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The Yeshiva Case: One Year Later

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2. THE YESHIVA CASE: ONE YEAR LATER

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When United States Supreme Court Justice Powell wrote in Footnote No. 31 to National Labor Relations Board v. Yeshiva University, 444 U.S. 672 (1980), that this ruling was applicable only to the case at hand and that "there thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominately nonmanagerial," he never realized the number of 'Yeshiva Universities' he had instantly created. In the time that has elapsed since this landmark 5-4 decision, which held that the entire faculty at Yeshiva University was managerial and, thus, not entitled to bargain collectively under the protection of the National Labor Relations Act, the halls of academe have been filled with speculation, litigation, research and confusion over the meaning and application of the case. Clearly, the end of a decade had come. For the first time since it began exercising jurisdiction over faculty collective bargaining in the early 1970s, the NLRB had been reversed on an issue of faculty unionism.

In order to appreciate the events that have occurred during the past eighteen months with respect to faculty collective bargaining and governance, one must be familiar with the principles of labor law that were instrumental in the development and the construction of the respective positions set forth in the case. Post-Yeshiva events in both faculty governance and other employment relationships within higher education will be examined with a look towards what may lie ahead. It is for that reason we must begin with a review of the appropriate case law that led to Yeshiva.

Legal Framework

With its ruling in Cornell University, 183 NLRB 329 (1970), the NLRB set aside its previous position, which had held that private universities and colleges were not covered by the National Labor Relations Act as they did not sufficiently impact on interstate commerce. Cornell placed the Board in the position of applying well-established labor relations principles, founded in and for industrial work places to university settings in which collegial forms of governance had evolved. The Board delineated its "collective authority" concept in C.W. Post Center of Long Island University, 189 NLRB 904 (1971), and established in Fordham University, 193 NLRB 134 (1971), additional standards for dealing with issues of faculty inclusion and coverage under the Act. By rejecting additional university arguments in Northeastern University, 218 NLRB 904 (1971), and Miami University, 213 NLRB 634 (1974), the Board continued to stand by its ruling in C.W. Post Center.

The position that faculty are both managerial and supervisory and exempt from coverage under the Act was rejected in NLRB vs. Wentworth Institute, 515 F. 2d 550 (1st Cir. 1975). This ruling was upheld by the United States Court of Appeals for the First Circuit, which held that, "there was no evidence of an instance of significant faculty impact collectively or individually on policy or managerial matters" (515 F. 2d 550, 557). Furthermore, the allegation raised by the employer that all faculty at all institutions of higher learning are not entitled to coverage under the act was expressly repudiated. Thus, with this legal framework clearly established most observers were somewhat surprised when these arguments surfaced once again in NLRB vs. Yeshiva University, 582 F. 2d 686 (2nd Cir. 1978).

The case of Yeshiva University appeared to be similar to dozens of others that had been appealed unsuccessfully to the NLRB by colleges and universities who either refused to bargain collectively with duly certified unions or sought to challenge the coverage and scope of the Act as it applied to faculty inclusion. Yeshiva University took the position that the faculty were supervisors or managers or both and, thus, were not entitled to coverage under the Act; however, the Board found the faculty to be professional employees under the meaning of the Act and, thus, in the protected category. The Faculty Association was successful in a representation election and emerged as the duly certified exclusive bargaining agent for a unit consisting of all full-time faculty. The university refused to comply with the Board's subsequent order to bargain and in a case argued before the United States Court of Appeals for the Second Circuit was upheld in its original contentions that the faculty were indeed managers and not entitled to bargain under the protections of the Act. It was this case that led the NLRB to seek and obtain a writ of certiorari appealing the decision of the circuit court.

The United States Supreme Court, in a 5-4 decision, upheld the findings of the appellate court:

> The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They 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. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.

The ruling was received with degrees of apprehension and perplexity. Groups opposed to faculty unionization saw an immediate end to collective bargaining (indeed the story that appeared in the New York Times initially predicted an end to negotiations), whereas faculty unionists saw a return to recognition strikes, economic pressure, censure, and employment sanctions as the only recourse open to them. As is often the case, neither extreme proved to be correct. For the majority of the over 400 colleges and universities that bargain collectively, business continued as usual with little, if any, reference being made to Yeshiva. The number of reported strikes at the outset of the fall 1980 semester was less than ten (NCSCBHEP Newsletter, Vol. 8, No. 4).

A notable exception to this was the recent two week strike at Wagner College where the issue of unit recognition was a major impasse item. The strike was finally settled when both parties agreed to refer this problem to a three member panel consisting of lawyers chosen by each side with the Regional Director of FMCS selecting the neutral lawyer. The panel will be charged with the responsibility of writing a new recognition clause that will protect the interest of the College in its pending litigation before the NLRB while at the same time providing for the continuation of the the new contract through August 31, 1982. The faculty have agreed not to introduce the newly executed CBA before the Board in any matters of litigation. This settlement is somewhat indicative of how Yeshiva-related issues are being resolved on a campus by campus basis.

Impact of Yeshiva

The question of what has happened on the campus since Yeshiva cannot be answered without taking into account the fourteen month delay by the NLRB in issuing any Yeshiva-like standards and the absence of any federal court ruling on the subject except to remand or deny certiorari. Thus the fact that the immediate impact of the decision has been somewhat minimal does not in any way diminish its significance. Several factors explain the minimal impact. Perhaps most significant, over 70 percent of the colleges and universities that bargain collectively are in the public sector, where bargaining is governed by statewide enabling legislation or individual trustee policy. These institutions have been protected from a Yeshiva spillover by the existence of statutory public sector labor laws.

Research conducted by the National Center for the Study of Collective Bargaining in Higher Education and the Professions at Baruch College, CUNY, indicates that as of May 1, 1981, nearly 40 private institutions have exercised some type of Yeshiva-like claim. For the purpose of research design and statistical grouping, these institutions have been classified into the following categories: a) those that have refused to bargain a successor agreement with a certified bargaining agent; b) those that have refused to bargain an initial agreement with a certified agent; and c) those that have raised a challenge to a bargaining unit representational claim or status issue.

Table 1 identifies those institutions that have exercised a Yeshiva-like claim, either before the NLRB, a court, or directly to a faculty group during the course of either union certification hearings or negotiations. The table is designed to be all-encompassing, citing those institutions that have litigated the matter to the Supreme Court as well as those that have been asked to file memoranda with the board outlining their individual claim. A majority of these institutions are small liberal arts colleges with reported financial problems. Observers have commented that in these institutions financial pressures might be so overwhelming that the cost of doing continued business with the union raises the issue of their future existence.

Management Approaches Post-Yeshiva

It is an old adage in labor relations that the employer acts, causing the union to react. This maxim has been proved true during this post-Yeshiva year. In those institutions where management has not sought faculty exclusion from coverage under the Act, business has continued to operate as usual with both parties continuing to enjoy whatever rights they have had under the collective bargaining agreement. Some attribute

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TABLE 1. - INSTITUTIONS EXERCISING YESHIVA-LIKE CLAIMS

Institution	State	Agent
Adrian College	Michigan	NEA
American International College	Massachusetts	AAUP
American University	Washington, D.C.	AAUP
Ashland College	Ohio	AAUP
Boston University	Massachusetts	AAUP
Catholic University of America Law School	Washington, D.C.	Indep.
College of Osteopathic Medicine	Iowa	AFT
Cooper Union	New York	AFT
C.W. Post Center of Long Island Univ.	New York	AFT
Cottey College	Missouri	AFT
Curry College	Massachusetts	AAUP
Daemen College	New York	AAUP
Drury College	Missouri	AFT
Duquesne University School of Law	Pennsylvania	Faculty Assn.
Florida Memorial	Florida	UFF/AFT
Ithaca College	New York	NYSUT/AFT
Lewis University	Illinois	AFT
Livingston College	North Carolina	AFT
Long Island Univ. - Brooklyn Center	New York	AFT
Loretto Heights College	Colorado	NEA
Mount Vernon College	Washington, D.C.	AAUP
Nasson College	Maine	AFT
Ohio Northern University	Ohio	NEA
Polytechnic Institute of New York	New York	AAUP
Saint Theresa College	Minnesota	AAUP
Salem College	West Virginia	NEA
Seattle University	Washington	AAUP
Stephens College	Missouri	AFT
Stephens Institute/Academy of Art College	California	Indep.
Stevens Institute of Technology	New Jersey	AAUP
Southampton College of Long Island Univ.	New York	AFT
Thiel College	Pennsylvania	AAUP
University of Albuquerque	New Mexico	AFT
University of New Haven	Connecticut	AFT
Villanova University	Pennsylvania	AAUP
Wagner College	New York	NYSUT/AFT
Yeshiva University	New York	Indep.

Source: NCSCBHEP research.

enlightened college administrators. In these institutions, others argue that the issue is still too new and that these institutions are waiting to see which way the post-Yeshiva cases are decided before making their decisions.

The majority of the private institutions that engage in collective bargaining have continued to do so. There is no record of any college under a collective bargaining agreement at the time of the decision that has refused to honor a contract for its remaining duration although the situation at Lewis University might fall into this category. At Lewis three faculty contracts with expiration dates of June 30, 1980 were voided in March of 1980. The substance of the agreements, less any references to collective bargaining and union security, were converted into faculty handbooks. The validity of the university's actions, which were clearly based on Yeshiva, is now before the regional NLRB in Chicago with a decision expected shortly.

Although thirty-seven institutions have exercised some type of Yeshiva claim, there is no reason to believe that most private colleges are planning to refuse to negotiate successor agreements.

The post-Yeshiva managerial responses thus far have taken the following forms:

- outright refusal to bargain successor agreements (see Table 2)
- refusal to bargain initial agreements, raising Yeshiva-like issues with either the NLRB or the courts (see Table 3)
- movement to have union certification proceedings halted pending resolution of Yeshiva claims (see Table 4)
- use of threat of Yeshiva at the bargaining table as leverage to win concessions
- movement to have union voluntarily declare itself a unit of managerial employees and continue to bargain without protection of the Act
- threat to union of prolonged and expensive litigation if it does not withdraw election or certification petitions pending before the NLRB

Table 2 lists those institutions that, according to most reports, have refused to negotiate successor agreements, citing Yeshiva as the authority. This action is considered the most serious, for management has clearly sought to end a collective bargaining relationship in a unilateral manner. This claim was first exercised by the University of New Haven, which broke off negotiations for a successor agreement with the local AFT affiliate.

Cooper Union exercised its claims at the time of the selection of a new president. Unionists at the campus level were partially successful in staging a boycott of his inauguration after he reportedly supported the decision by the college to refuse to bargain a successor collective agreement. It is interesting to note that the boycott was supported, in part, by labor and political leaders, including a U.S. senator from New York who refused to cross the faculty picket line.

At Ashland, Loretto Heights, and Polytechnic Institute, collective bargaining relationships, established in the early 1970s, were among the first to be broken off. Speculation arose that those institutions, which heretofore had been party to long-standing labor agreements, had found unionization so untenable that they were eager to find legal precedent to buttress their decision to end bargaining.

Ohio Northern University is perhaps the most dramatic case to occur thus far. In his decision to revoke the certification of the faculty bargaining agreement, the regional director of the NLRB held that the faculty .... "possess indicia of managerial authority within the meaning of the Supreme Court's decision in NLRB vs. Yeshiva .... and are excluded from the coverage of the Act." The contract contained a liquidation clause which provided that either party may terminate the collective agreement if any part of the bargaining unit were declared to be inappropriate. Thus, while it appears that the existing contract is no longer valid, the University has reaffirmed its commitment ... "to continue to implement the substance of the faculty personnel policies and procedures included in the agreement except for those features involving the Association." While the situation remains somewhat fluid at this time, it appears that the regional National Labor Relations Boards may in essence be setting the posture that the full board may choose to adopt in subsequent cases. An appeal has been filed by the Ohio Northern Faculty Association.

Those institutions that have refused to negotiate initial contracts with duly certified faculty unions are identified in Table 3. These schools have exercised their Yeshiva claim at a time subsequent to their faculty organization being certified although, in certain instances, arguments similar to those used in Yeshiva may have been brought forth at a time of the original NLRB certification hearings. Of this group, two were thought to be especially significant to potential post-Yeshiva litigation: Ithaca

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TABLE 2. - INSTITUTIONS THAT HAVE REFUSED TO BARGAIN SUCCESSOR AGREEMENTS

Institution	Certification Date	Contract Expiration Date	Size of Bargaining Unit[a]
Adrian College	1975	8/31/79	56
Ashland College	1972	8/14/77 (extended & Supplemented)	82
College of Osteopathic Medicine	1975	6/30/81	60
Cooper Union	1976	8/31/80	55
Cottey College[b]	1976	8/31/81	32
Florida Memorial	1979	(reached tentative agreement spring 1980; contract never put into effect)	35
Lewis University	1975	6/30/80	97
Loretto Heights	1972	5/31/80	100
Nasson College	1977	8/31/81	40
Polytechnic Institute of New York	1971	5/31/80	214
Stevens Institute of Technology, New Jersey	1976	1/15/80	109
University of New Haven	1979	8/31/79	130

Source: NCSCBHEP research.

a Unit size at time of certification or otherwise amended. Numbers subject to fluctuation dependent upon growth of institution. Source: NCSCBHEP Directory of Faculty Contracts and Bargaining Agents.

b Reportedly broke off negotiations for successor agreement; however, have since stated will honor their current agreement.

TABLE 3. - INSTITUTIONS THAT HAVE REFUSED TO BARGAIN INITIAL CONTRACTS WITH CERTIFIED UNIONS

Institution	Certification Date
Catholic University of America Law School	1977
Curry College	1979
Daemen College	1979
Drury College	1979
Ithaca College	1978
Mount Vernon College	1977
Salem College	1979
Stephens College (Missouri)	1979

Source: NCSCBHEP research.

College, where the union fell one vote short of the required four needed to obtain certiorari by the Supreme Court, and Salem College where the faculty association unexpectedly withdrew its petition challenging the administration's refusal to bargain.

Union Responses

The response of the faculty unions to Yeshiva has been, at best, a mixed one. The initial reaction, that Yeshiva was limited to one particular institution, quickly gave way to a concerted legal drive designed to litigate and distinguish each issue with the hope of building a record of lead cases that will eventually erode and restrict the decision to a handful of isolated colleges. An interesting sidelight arising out of this case is the degree of cooperation demonstrated by the legal staffs of the AAUP, AFT, and NEA who now find themselves in a coalition for the purpose of minimizing and, perhaps, overturning this decision.

The legal position of the unions in the post-Yeshiva period appear to be concentrated on the following:

- place the burden of proof on the employer to show the applicability of Yeshiva
- build a record on appeal showing the inapplicability of the so-called ninety percent Yeshiva rule (This rule refers to the fact that in over ninety percent of the instances cited, at Yeshiva University, the administration acted on faculty recommendations.)
- continue to file unfair labor practice charges before the NLRB in those cases where institutions refuse to negotiate successor agreements
- request that NLRB move in federal court for compliance with board-issued orders to bargain
- request that courts defer to the expertise long established by the NLRB in issues such as unit determination and coverage under the Act
- seek certiorari by the Supreme Court in bringing forth cases in which they believe that the record produced will warrant exceptions to Yeshiva
- consider the option of negotiating new recognition clauses admitting that they now represent units of managerial employees, and thereby lose the protection of the Act, but gain the benefits of a continued labor agreement
- withdraw petitions for NLRB certification hearings after institution has raised Yeshiva-like questions or the union becomes aware that its governance pattern closely resembles the record described in Yeshiva

Challenges that have been voiced about the appropriateness of the bargaining unit and other representational issues associated with Yeshiva are identified in Table 4.

The approach reportedly taken at C.W. Post and Southampton is somewhat unique inasmuch as the parties may have circumvented the problems raised by Yeshiva by redefining the recognition clause from that of a faculty unit to one of a managerial unit and continuing to bargain without the protection of the NLRB. The Boston University decision will be significant, not only for the ruling on the issue of chairperson inclusion in the unit, but for the importance that the entire higher education labor relations community appears to have attached to this case.

Two recent rulings in the matter of the University of Albuquerque, one by the regional director and the second by the Board itself may have served to crystallize and focus in on the totality of governance issue. In Albuquerque, the union's brief appealing the decision of the regional director, which reduced the faculty bargaining unit from ninety-five to eight argued that in "attributing the putative authority of a minority of the faculty to the faculty as a whole, the Regional Director extended the Yeshiva decision far beyond its reach and plainly misapplied Board law as well." In the subsequent action, the NLRB affirmed the ruling of the regional director and revoked the bargaining agent's certification for the entire faculty, once again, citing Yeshiva. The Albuquerque case is believed to be the first which the full Board has acted upon since the U.S.S.C. ruling in Yeshiva.

The unions have also tried some legislative and political approaches in responding to the Yeshiva decision. The major legislative approach has been to seek an amendment to the Act that would extend NLRA coverage to faculty members and create a new definition of higher education managers and supervisors. Faculty would no longer be excluded from bargaining under the protection of the Act for the types of activities that the court found on the record in Yeshiva. Such a bill was proposed by the AAUP and introduced by Rep. Frank Thompson, Jr., Chairman of the House Subcommittee on Labor Management Relations in the 96th Congress. The bill provided that: "No faculty member or group of faculty members shall be deemed to be managerial or supervisory employees soley because the faculty member or groups of faculty members participate in decisions with respect to courses, curriculum, personnel, or other matters of educational policy."

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Observers of the 97th Congress are offering little hope of labor law reform legislation with respect to the issue of increased unit inclusion and coverage under the protection of the Act.

Other examples of legislative or political action by faculty unions have included:

- lobbying in those states that are considering passage of public sector collective bargaining bills to minimize the impact of Yeshiva
- reaching memoranda of understanding with college administrations in lieu of collective bargaining agreements as alternative means of establishing employment relationships
- using local political forces along with economic pressure to ensure continued bargaining relationships

Though the success of these legislative and political approaches appears uncertain, predictions are that faculty groups will continue along these lines and at the same time try to obtain relief through the Board and the courts.

Public Sector Impact

The potential impact of Yeshiva on public sector collective bargaining is somewhat analogous to the relationship that exists between private and public sector labor laws. Most public employment relations boards and commissions have modeled their statutes and decisions on the NLRA, so it is reasonable to assume that if Yeshiva stands in its present form, then the public institutions could be significantly affected. If this were the case, one might expect to see a gradual erosion of faculty bargaining units that contain teaching faculty deemed to be managerial or supervisory. Most states will exclude deans and administrators and impose stricter standards for chairperson inclusion.

On the other hand, the comparative sector argument, used so long and effectively by public employees seeking the same rights as their private sector counterparts, may be reversed. It has been submitted that for the first time in the labor history of the United States greater collective bargaining rights are being enjoyed by those who work for the government than by private sector employees, and, although it seems unlikely to occur, the private sector may be asked to model itself after the public in granting collective bargaining rights. While no answers are yet in place, a wait-and-see attitude has emerged with the following questions being asked as a means of structuring the expected discussion:

- Will state public employment relations boards follow NLRB standards and erode bargaining rights for faculty supervisors and managers?
- Will the department chairpersons question result in fewer chairs being included in the unit?
- Will a new labor relations definition of academic supervisors emerge in the public sector?
- Will states contemplating legislation now take the position that Yeshiva does not warrant faculty collective bargaining and refuse to pass enabling legislation?
- Will those states that do not specifically mention college faculty in their legislation but include them in an overall employee classification now move to seek their exclusion?
- Will the situation of allowing greater bargaining rights to public employees instead of private sector faculty mark a new shift in American labor relations?
- Will Yeshiva spill over into other areas of public sector professional employment such as health care, as employers refuse to recognize or negotiate with "managerial employees"?

Future: The Yeshiva Guidelines

Much of the course of this debate in the future will depend on what stand the NLRB pursues with respect to the managerial and supervisory issues raised by the Supreme Court. If it seeks to regain and assert its acknowledged expertise in this area, it will have to respond to the message of the court. The Supreme Court chastised the NLRB in its decision:

> The Board contends that the deference due its expertise in these matters requires us to reverse the decision of the Court of Appeals. The question we decide today is a mixed one of fact and law. But the Board's decision may be searched in vain for relevant findings of fact. The absence of factual analysis apparently reflects the Board's view that the managerial status of particular faculties may be decided on the basis of conclusionary rationales rather than examination of the facts in each case. The Court of Appeals took a different view, and determined

> that the faculty at Yeshiva University "in effect, substantially and pervasively operate the enterprise" 582 F.2d 698 We find no reason to reject this conclusion. As our decisions consistently show, we accord great respect to the expertise of the Board when its conclusions are rationally based on articulated facts and consistent with the Act.... In this case, we hold that the Board's decisions satisfied neither criterion.

On April 10, the Board issued a Memorandum entitled, "Guidelines for Cases Arising Under NLRB v. Yeshiva University." (see NLRB Memo 81-19, Office of General Counsel). The sixteen page document by General Counsel William A. Lubbers, sets forth a detailed analysis of the Yeshiva decision and the relevant case law that preceded it. The seminal issue of faculty status after Yeshiva, with specific reference to the 'alignment with management issue,' was the first question to be examined:

> ... As the court pointed out in its analysis, a finding that faculty members are managerial turns on the extent to which they can be said to be aligned with management.[15] In resolving this issue, the inquiry must focus initially on whether faculty members formulate, determine, or effectuate decisions of a managerial character.[16] However, even if faculty members do exercise this authority, the issue remains as to whether they do so in their own interest, rather than in the interest of the employer. Further, even if faculty members exercise such authority, the extent to which they are held "accountable" for departures from institutional policy is another factor bearing on the issue of status.[17] Finally, the percentage of time spent on exercising such authority,[18] as well as whether or not the exercise of that authority is "incidental to" or "in addition to" their primary functions of teaching, research, and writing,[19] are additional factors to be considered ...

15 Id. at 683, citing N.L.R.B. v. Bell Aerospace Co., 416 U.S. at 286-87.

16 See N.L.R.B. v. Bell Aerospace Co., 416 U.S. at 288; Alco-Gravure, Inc., 249 NLRB 1019 (1980)

17 See Northeastern University, 218 NLRB 247, 257 (1975)(concurring opinion); Fairleigh Dickinson University, 227 NLRB 239, 241 (1976).

18 The percentage of time faculty members devote to the performance of allegedly managerial duties is a relevant consideration, since incidental or sporadic performance of such duties normally would militate against their exclusion from the Act's coverage. See Oregon State Employees Association, 242 NLRB No. 150 (1979); C. Markus Hardware, Inc., 243 NLRB No. 158 (1979); N.L.R.B. v. Dunkirk Motor Inn, Inc., 524 F.2d 663, 666 (2nd Cir. 1975); N.L.R.B. v. Doctors Hospital of Modesto, 489 F. 2d 772, 776 (9th Cir., 1973); Westinghouse Electric Corp. v. N.L.R.B., 424 F. 2d 1151, 1157-58 (7th Cir. 1970).

19 The Court noted in Yeshiva that Congress expressly approved a test in the health care context of "whether the decisions alleged to be managerial or supervisory are 'incidental to' or 'in addition to' the treatment of patients." 444 U.S. at 690, n. 30.

Four subsequent questions, which constitute the foundation of the dual governance model, were then reviewed.

- Faculty participation in decision making...
- Do faculty members act in the interest of the employer...
- Accountability to managerial policies...
- Supervisory status of faculties...

The analysis of the aforementioned questions and issues established the foundation for the concluding portion of the Memo which sets forth those statements identified as the "Yeshiva Guidelines."

- First, it is apparent from the Court's criticism of the Board's factual analysis in Yeshiva that as complete as record as possible should be made in cases arising under Yeshiva.
- Second, although the Court in Yeshiva found the entire faculty to be managerial, decisions at Yeshiva are made primarily by the various faculties voting as committees of the whole, and the Court recognized that even at Yeshiva, and universities structured like it, there might be faculty members "who properly could be included in a bargaining unit." Thus, evidence should be adduced not only as to the faculty as a whole, but also as to the status of individual faculty members.

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- Third, a determination under the above analysis that individual faculty members or groups of faculty members or chairpersons are managerial or supervisory would not necessarily result in a conclusion that the entire faculty is, for that reason, outside the Act.
- Finally, in Section 8 (a)(5) cases, if it is concluded that a handful of faculty members or chairpersons are managerial or supervisory and thus should be excluded from the unit, their inclusion would not necessarily privilege a withdrawal of recognition or refusal to bargain by the university.
- In unfair labor practice cases which are ultimately litigated, Counsel for the General Counsel should assume the burden of going forward with sufficient evidence to make out a prima facie showing that the case is distinguishable from Yeshiva University and that the faculty members are neither managerial nor supervisory.

What impact the guidelines will have on the thirty-seven "Yeshivas" that are presently litigating the matter is somewhat uncertain at this time. They are a compilation of previous Board Memos, briefs and advice and, if nothing else, should aid in the development of a consistent approach to be used by the thirty-three regional directors in adjudicating Yeshiva questions. Many observers believe that the Board merely reaffirmed its earlier position in Boston University however, in its present format the guidelines may have more significance.

Two vacancies currently exist on the Board, however, regardless of the Board's makeup, it is in the judicial arena that the next round of post-Yeshiva will be fought. The unions, in a cooperative effort and in hopes of eroding the decision are trying to establish a series of lead cases where the record indicates that the Yeshiva ninety percent rule is not applicable. As more cases are adjudicated, they will try to distinguish the issue in the hopes of narrowing Yeshiva to, if possible, that institution itself.

The cost of litigating these issues will be significant and might account, in part, for the predicted slowdown in organizing drives at previously targeted private institutions. While it is difficult to connect these points directly, it is expected that unionization at institutions such as New York University and Syracuse University will be placed on the back burner until the issues are more clearly resolved. Much will depend on the Boston University case, as it may develop into a landmark decision.

Legislation, either in the form of an amendment to the NLRA that will permit the inclusion of faculty or a new definition of academic managers compatible with the Act seems unlikely at this time. The 97th Congress does not appear to be one in which significant labor legislation supportive of the unions' position will be enacted. It also appears doubtful that organized labor will risk an entire examination of NLRA scope and coverage in order to gain support from higher education faculty unions.

Public sector legislation will be closely watched to see if the decision causes any state to either exclude faculty where coverage has not been granted or to defeat potential enabling legislation. The next such test may come in Wisconsin where a collective bargaining bill, which has been defeated in each of the past three sessions, will probably, once again, be put up for a vote in 1981. The newly enacted California law, granting bargaining to faculty in both the university and state college systems, is currently at the unit hearing and representation election stage. It is still too early to ascertain what, if any, impact Yeshiva will have. Speculation lingers about which way the California legislature might have gone if Yeshiva had come down prior to the passage of its bill.

The post-Yeshiva confusion that existed during the past year shows no signs of ending, especially if the suggestion of Supreme Court Justice Powell, that junior faculty have bargaining units separate from those of senior faculty, is enacted. No such design currently exists and observers predict that if any is created, long-established governance relationships will certainly be weakened. One other suggestion that would surely add to the confusion is the adoption of the so-called "flexible unit" whereby an individual faculty member's status will be determined by the nature of the committee(s) that he or she belongs to in any given semester. Thus, when the faculty member is on the personnel and budget committee, the exclusion rule would come into play and would remain in effect as long as the committee assignment does. No such restrictions would be placed on committee memberships that were construed to be nonmanagerial. Neither the junior faculty bargaining model nor "flexible unit" is being widely suggested; however, both remain on the list of available options.

While Yeshiva has been litigated in a labor relations environment, the central theme of the case remains the nature of faculty governance. The governance machinery at Yeshiva University was such that in over ninety percent of the deliberations, the decision of faculty committees was upheld. The perceived success of this system by the Court resulted in the faculty effectively governing themselves out of a collective bargaining relationship, one that they voluntarily sought. Is the Yeshiva message to be construed as one in which faculty organizations may lose collective bargaining rights if they are successful in having ninety percent of their decisions implemented? Surely, that cannot be the meaning of this case. On the other hand, will colleges that do not choose to bargain and implement the decisions of their faculty bodies to the degree done at Yeshiva University lay the groundwork for a managerial and supervisory claim? It seems unusual that the more successful you are in self governance, the less rights you are able to enjoy in pursuing collective bargaining employment relationships.

The "dual-loyalty" issue that colleges are raising with respect to unionization must be further studied to ascertain if models can be developed to ensure effective means of shared governance within the traditional academic setting. The fact that many institutions have both academic senates, in some cases contractually protected, and bargaining agents lends support to those who believe that not only was Yeshiva bad law, it was also poor labor relations policy. Will faculty be forced to choose between exercising their choice of engaging in collective bargaining at the expense of participating in institutional governance or will compromise solutions be reached that will preclude the necessity of this option?

Is there a new and different legal approach to Yeshiva that has yet to be developed? The briefs filed by various parties thus far appear to concentrate largely on the managerial and supervisory issues. The unions have been trying to distinguish the cases, whereas colleges have been making umbrella-like claims. One such new legal theory, though still in the embryonic stage, concerns the prohibition in the NLRA of employer interference in union activities. If faculty members have been restrained, coerced, or otherwise interfered with in exercising their statutory rights under the act, then we may see the development of a new legal hypothesis. Should the employer act in such a manner as to encourage collective bargaining and yet as a result of that action, the union is denied the right to bargain, that consequence may be subject to challenge under the NLRA. Thus, Yeshiva might in actuality mean that you do not lose the right to collective bargaining under the law. If, however, you control access to managerial and supervisory rights, then statutory protection will not be afforded. It is inconceivable to think that the Supreme Court intended to deny coverage to all faculty under the NLRA and their major concern must have been those faculty in supervisory and managerial positions.

The Yeshiva debate will rage within academe for years to come. Unions will argue that the decision, more than anything else, shows faculties that they must organize and bargain collectively, with or without the protection of the Act. Small private colleges that have either exercised or are planning to initiate Yeshiva-like claims will submit that in these times of declining enrollment and overall contraction, they cannot be burdened with collective bargaining costs and must, for their own financial survival, refuse to recognize the union.

Considering the history of managerial and supervisory employees in labor relations, it is somewhat ironic that the arena of higher education collective bargaining might be the forum in which it will be resolved. Whether the Burger Court willfully selected this case to demonstrate its new majority in labor relations or it is just a chance happening, no other case in the law of higher education employment relationships has caused such furor, confusion, and uncertainty over the future.

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TABLE 4. - CHALLENGES TO BARGAINING UNIT AND REPRESENTATIONAL ISSUE DISPUTES

Institution	Issue
American International College	College exercised Yeshiva-like claim halting NLRB certification hearings.
American International	Election petition withdrawn by AAUP after university inquired into making Yeshiva-like claim.
Boston University	United States Court of Appeals for the First Circuit remanded issue of Department Chair inclusion and overall faculty coverage under the NLRA to regional NLRB for reconsideration in light of Yeshiva.
C.W. Post Center of Long Island Univ.	University agrees to withdraw Yeshiva-like claim if union admits to being unit of managerial employees.
Duquesne University School of Law	University exercised Yeshiva-like claim thereby halting NLRB certification hearings.
Livingston College	NLRB, Raleigh, N.C. rejects college's position and declares faculty not to be managerial. Election ordered to determine if faculty desire to partake in collective bargaining. Votes have since been impounded while unit determination ruling is reviewed.
Long Island University Brooklyn Center	University raised Yeshiva issue during the course of negotiations for a successor agreement. New collective bargaining agreement reached after strike. Yeshiva issue still pending before NLRB.
Ohio Northern University	Regional Director of the NLRB revokes certification of ONUFA as bargaining agent. University subsequently terminates existing collective bargaining agreement pursuant to terms of said agreement.
Saint Theresa College	Regional NLRB requests position papers from parties after Yeshiva decision although neither party has raised Yeshiva during the course of unit hearings. Decisions pending on reopening original case, which excluded certain faculty from unit.
Seattle University	AAUP withdrew representational petition after university raised issue of Yeshiva applicability.
Southampton College of Long Island Univ.	University agrees to withdraw Yeshiva-like claim if union admits to being unit of managerial employees.
Stephens Institute/Academy of Art College	College asking USSC to overturn 9th circuit court rule which held that "school did not meet definition of mature university where faculty have managerial status."
Thiel College	College exercised Yeshiva-like claim thereby halting NLRB certification proceedings.
University of Albuquerque	Regional director of NLRB supports university claim that most faculty are managerial thereby reducing an original bargaining unit of ninety-five to eight.

TABLE 4. - CHALLENGES TO BARGAINING UNIT AND REPRESENTATIONAL ISSUE DISPUTES (cont'd)

Institution	Issue
Villanova University	University raised Yeshiva-like claim thereby causing NLRB to cancel previously agreed upon bargaining agent election.
Wagner College	College exercised a Yeshiva-like claim pertaining to a unit certification proceedings while at the same time continuing to negotiate a successor agreement.
Yeshiva University	USSC affirms Second Circuit Court of Appeals which held that entire faculty at Yeshiva University were managerial and thus exempted the university from bargaining under the NLRA.

Source: NCSCBHEP research.

3. IMPACT OF RETRENCHMENT I

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If the impact of retrenchment were confined to those directly affected by it, those whose positions are terminated, it would be bad enough. The separation of a professional from an institution for reasons unrelated to the individual's worth is traumatic. The stigma attached to the separation, regardless of the wording of the letter of notification, is always negative. The pall it casts over a person's career is as dark as it is unfair. The effect on the victim's psyche is well documented. One's capacity to earn a living in a chosen profession in these days of academic contraction, which gave rise to the retrenchment in the first place, is severely limited. A career, founded on extensive educational preparation, professional commitment and some experience, is jeopardized if not ruined. Each and every case is a personal tragedy.

But it is important to remember that the impact of retrenchment extends beyond the lives of the affected individuals. The institution itself is hurt by severing from its midst members of the faculty in whom it has made substantial investments. These are faculty who have grown and developed by virtue of their service to the institution and their disciplines, whose credentials have been established by the painstaking process of peer review and administrative reappointment, and whose value to the institution and its students is thus certified. Retrenchment negates all of that, and in that degree, in each individual case, the institution is negated and becomes poorer in quality.

The impact of retrenchment on institutional policy and development is frequently overlooked or underestimated. Every retrenchment decision has a direct bearing on student access, student retention, the availability of instruction, and ultimately the breadth of the curriculum. The effect is partially quantitative--fewer students can be accomodated and a smaller choice of programs can be offered--and it is also qualitative: one program is reduced or eliminated while another is not. Retrenchment

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