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## **D.C. Circuit Enforces Most of The NLRB's Test for Determining Whether Faculty Members Are Managers**

In a decision that will directly impact how colleges and universities deal with faculty organizing drives, the United States Court of Appeals for the District of Columbia held today that the test developed by the National Labor Relations Board (the "NLRB" or the "Board") to determine whether faculty members are managers was – with one notable exception – enforceable. University of Southern California v. NLRB, Case No. 17-1149 (D.C. Cir. March 12, 2019).

### **Background on Faculty Managerial Status**

In 1980, the United States Supreme Court ruled that faculty members at Yeshiva University were managers under the National Labor Relations Act (the "NLRA" or "the Act") and therefore exempt from the Act's coverage. NLRB v. Yeshiva, 444 U.S. 672 (1980). Following the Yeshiva decision, the Board adopted a totality of circumstances approach to determine whether the faculty at a particular institution were managerial. This case-by-case approach was later criticized by the D.C. Circuit for lacking clarity and seemingly turning on the whim of the NLRB. LeMoyne-Owen College v. N.L.R.B., 357 F.3d 55 (D.C. Cir. 2004) and Point Park University, 457 F.3d 42 (D.C. Cir. 2006).

In late 2014, the NLRB announced a new test for determining the managerial status of faculty. Pacific Lutheran University, 361 NLRB No. 157 (2014). The NLRB announced it would look to three primary and two secondary areas to determine faculty managerial status.

## **Primary Areas**

1. **Academic Programs.** This area includes curriculum, research, offering of majors, minors and certificates and the requirements necessary to satisfy those offerings. These areas are akin to the school's "product" and the terms upon which that product is offered to students.
2. **Enrollment Management.** This area relates to the size, scope and make-up of the student body. These are essentially the school's customers who will be served by the university.
3. **Finances.** This area relates to the power to control or make effective recommendations as to expenditures. The NLRB cited in particular the determination of net tuition (tuition less financial assistance) because it sets the "price point" for the student-customers and plays a significant role in determining which university a student will attend.

## **Secondary Areas**

1. **Academic Policy.** This covers a broad area including teaching and research methods, grading policy, academic integrity policy, syllabus policy, research policy and course content policy.
2. **Personnel Policy and Decisions.** This area includes hiring, firing, promotion, tenure, leave and dismissal. The NLRB admits that this area "potentially implicates the divided loyalty concern that underlies the managerial exception," but this decision-making only indirectly implicates the product to be produced, the terms in which it is offered, and the customers sought.

## **Actual Control or Effective Recommendation**

The NLRB not only re-cast the Yeshiva factors but went on to require the party asserting managerial status to demonstrate that the faculty actually exercise control or make effective recommendations. That test itself – actual control or effective recommendation – was not new and was routinely used in determining managerial status in the commercial context. What was different however was that the NLRB had significantly narrowed the circumstances where it would find control or effective recommendation. Specifically, the Board found that where a committee controls or effectively recommends action in a particular area, it must be shown that the petitioned for faculty group constitutes a majority of the committee. The Board also held that it would require that faculty recommendations "must almost always" be followed by the administration and must become operative "without independent review by the administration."

While the NLRB's new test was clearly set out, its application was far from obvious and left many unanswered questions:

- Why, for example, were the issues of academic policy and of personnel policy relegated to secondary status? Questions of academic and personnel policy arguably directly impact all of the 'primary' factors. Using the commercial analogy adopted by the NLRB, one could argue that academic and personnel policies speak to the "quality" of the product produced by the University. The NLRB's analysis appears to relegate the quality of the institution's 'product' to secondary importance.
- How did the factors – both primary and secondary – interrelate? Is proof of all five factors required? At least one primary and two secondary? All primary and at least one secondary?
- How would the NLRB interpret and apply its requirement that the faculty exercise "actual control or effective recommendation" authority in the primary and secondary areas? What, for example, did the Board mean by "must almost always" be followed? What did the NLRB mean when it stated that faculty recommendations are effective if they become operative "without independent review by the administration"? What is 'independent review' and what level is required for the faculty's recommendation to be discounted?

## **The USC Decision**

The *USC* decision marks the first appellate court ruling addressing the enforceability of the *Pacific Lutheran* standards for determining faculty managerial status. Significantly, the appellate court enforced the vast majority of the *Pacific Lutheran* test. For example, the Court endorsed the primary/second criteria adopted by the Board and swept aside arguments that the test was unworkable because it relegated academic and personnel decisions to secondary status and because the Board did not answer how the criteria interrelate. "Although we can imagine different groupings of these factors, nothing in *Yeshiva* dictates the outcome one way or the other, and the Board's categorization falls well within its discretion under the NLRA."

The Court also rejected the school's argument that the Board's actual control or effective recommendation standard was inconsistent with *Yeshiva*. "We see nothing in the Board's two-part standard for "effective" control that runs afoul of *Yeshiva*." The Court noted that the terms "almost always" and "routine" left room for effective administrative review. In other words, a school could demonstrate that its faculty actually met these admittedly high standards for managerial status.

The D.C. Circuit rejected only one portion of the *Pacific Lutheran* test. Specifically, the Court rejected the Board's requirement that for the faculty to exercise effective control, the committee itself must be comprised not only of a faculty majority, but that the petitioned-for faculty subgroup must constitute a majority of that committee. The petitioned for unit at issue in the *USC* case was a unit of non-tenure track faculty. As the non-tenure track faculty did not constitute a majority of the committee in

question, the Regional Director and the Board itself discounted the committee's role as demonstrating effective control. This, according to the D.C. Circuit, was an error. "In our view, the Board's subgroup majority status rule rests on a fundamental misunderstanding of *Yeshiva*." The Board's interpretation failed to adequately consider faculty governance and collegiality both of which were mentioned prominently in *Yeshiva*. The Court also added a re-formulation of the standard for effective control and suggested that "[t]he Board should instead, as required by *Yeshiva*, think of this analysis as having two distinct inquiries: whether a faculty body exercises effective control and, if so, whether, based on the faculty's structure and operations, the petitioning subgroup is included in that managerial faculty body."

The Board also commented on the recent trend placing the running of the institutions in the hands of administrators rather than faculty. It noted, but side-stepped, the debate as to whether universities are in fact led by administrators or are based instead on shared governance. The Court ruled "the Board must not lose sight of the fact that the question before it in any case in which a faculty subgroup seeks recognition is whether that university has delegated managerial authority to a faculty body and, if so, whether the petitioning faculty subgroup is part of that body." (*emphasis in the original*)

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Only time will tell whether other appellate courts or ultimately the Supreme Court will share the D.C. Circuit's view of the Board's latest iteration of the test for managerial status in the faculty setting. In the meantime, colleges and universities are advised to fully consider Pacific Lutheran's primary/secondary areas of faculty involvement and to consider the extent of faculty involvement in committee assignments to determine whether the actions of those committees demonstrate "actual control or effective recommendation" of matters concerning academic programs, enrollment, finances, academic policy and personnel and policy decisions.

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