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Labor and Collective Bargaining Updates

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Introduction

Like many areas of law, labor law can change at a fast pace, particularly in the context of a change in presidential leadership with a new agenda likely to favor organized labor. Moreover, the lingering effects of a Republican administration are still being felt. As a result, while little controversial agency activity at the federal level is occurring as of the writing of these materials due to the current National Labor Relations Board ("Board" or the "NLRB") having only two members[3], much has occurred in recent years and more is expected in the coming years once the Board is fully staffed. These materials reflect an effort to lead the reader through a series of recent developments, including pending issues which may come to fruition in the coming months or years.

The last several years have seen a number of labor cases and legislative developments that either arose in the higher education context or could affect higher education management and employees (both faculty members and staff). Among the most significant are a decision governing use of employer email systems, the Employee Free Choice Act and its implications for organizing, a series of decisions re-defining the meaning of "supervisory" employees and the possibility of legislative change in this area, and a pending proposed rule allowing for joint petitions and an expedited election process. Further, the bargaining implications of intellectual property rights continue to be an issue of importance to higher education. Each of these issues are reviewed in separate sections below, followed by an update on a variety of relevant opinions from the National Labor Relations Board, state public employee relations boards, and other federal and state courts.

Access to Employer Email Networks for Organizing Purposes[4]

Background

As of June 30, 2008, over 70% of North Americans had access to the Internet.[5] As of 2004, more than 81% of U.S. employees used email at work, a percentage that can only have increased in the past five years.[6] As email communication has come to the fore, the use of

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[3] Chairman Peter Schaumber (R) and Member Wilma Liebman (D) are still issuing decisions under delegated authority of persons who have since departed.

[4] A number of issues related to email are not within the scope of this paper, including email privacy, broader matters of academic freedom, and FOIA issues at public institutions. For one discussion of recent email-related cases, see William A. Herbert, *The Electronic Workplace: To Live Outside the Law You Must Be Honest*, 12 EMPL. RTS. & EMPLOY. POL'Y J. 49 (2008). For an article focusing on email privacy issues, see Robert M. O'Neil, *Free Expression and Electronic Communications: Campus and Cyberspace*, in FREE SPEECH IN HIGHER EDUCATION: IMPORTANT PROTECTIONS AND PERMISSIBLE REGULATIONS (Langhauser, O'Neil, Thro eds., NACUA 2008).

[5] Internet Usage Statistics for the Americas, http://www.internetworldstats.com/stats2.htm (last visited Jan. 6, 2009).

[6] American Management Association, *2004 Workplace E-Mail and Instant Messaging Survey* (2004) (www.amanet.org/research/pdfs/IM_2004_summary.pdf) (cited in *The Guard Publishing Company d/b/a The Register-Guard and Eugene Newspaper Guild, CWA Local 37194* ("*Register-Guard*"), 351 NLRB No. 70 at p. 16, n.7 (Dec. 16, 2007)). *See also* "*BLS Finds 55 Percent of Employees Used Computers at Work in October 2003*," Daily Lab. Rep. (BNA) No. 148, at D-24 (Aug. 3, 2005) (noting that as of October 2003, 55% of employees used computers at work).

employer email for protected organizing activity has become an increasingly contested issue. In 2007, the National Labor Relations Board issued a decision, *Register-Guard*,[7] that decided the issue strongly in favor of employers. This section will begin by reviewing the National Labor Relations Act's (NLRA's) definitions of protected activity, prior NLRB and Supreme Court precedent on employee communication regarding labor matters, and early guidance from the NLRB General Counsel's office on email activity, before turning to *Register-Guard* and its progeny, as well as some predictions.

National Labor Relations Act Protection

Section 7 of the National Labor Relations Act affords employees the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C § 157. Section 8(a)(1) of the NLRA, perhaps the most frequently-cited subsection of the Section 8 prohibitions on illegal employer activity, provides that "it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1).

Pre-*Register Guard* Caselaw

In 1945, the Supreme Court considered two NLRB cases governing employee communication on work property and during work time. In *Republic Aviation Corp*.,[8] the employer had prohibited organizing activity on employer property outside of work time. The Board concluded, and the Supreme Court affirmed, that a "rule prohibiting union activity on company property outside of working time constitute[s] an unreasonable impediment to self-organization" and violates the NLRA in the absence of either special circumstances or a "cogent reason, warranting extension of the prohibition to non-working time, when production and efficiency could not normally be affected by union activity."

In *Le Tourneau*,[9] the employer imposed a blanket prohibition on distribution of union literature and suspended two employees for distributing such literature in its parking lot. The NLRB concluded, and the Supreme Court upheld (in a decision combining this case and *Republic Aviation*), that the rule was an unreasonable impediment to organizing because, given the layout of the plant, it was "virtually impossible" to distribute literature outside of the employer's property.

Under *Republic Aviation*, therefore, while employers can generally limit employees' ability to solicit co-workers during *working* time, *Peyton Packing Co.*, 49 N.L.R.B. 828, 12 LRRM 183 (1943), prohibiting solicitation by employees during *non-work* time – even in work areas – is presumptively unlawful.[10] Employers can, however, overcome the presumption of

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[7] *The Guard Publishing Company d/b/a The Register-Guard and Eugene Newspaper Guild, CWA Local 37194* ("*Register-Guard*"), 351 NLRB 70 (Dec. 16, 2007) (on appeal to U.S. Court of Appeals for the District of Columbia).
[8] 51 NLRB 1186 (1943), *enf'd*. 142 F.2d 193 (2d Cir. 1944), *aff'd*. 324 U.S. 793 (1945).
[9] 54 NLRB 1253 (1944), *enf. denied* 143 F.2d 67 (5th Cir. 1944), *reversed* 324 U.S. 793 (1945).
[10] "Working time" is, however, different from "working hours." The Board has held that prohibitions on solicitation during "working hours" are unlawful because, while "working time" describes the time during

unlawfulness by showing that the restrictions on solicitation are necessary to maintain discipline or productivity.

In the late 1990's and early 2000's, as email was becoming widely used by employees in a variety of professions, the NLRB's Office of the General Counsel was asked to provide advice on various restrictions on employees' use of employer email and computer systems.

In 1998, the Division of Advice considered an email policy promulgated by aerospace company Pratt & Whitney and enforced against unionizing employees.[11] In the advice memo, the Associate General Counsel concluded that an employer policy prohibiting *all* non-business use of email violated Section 8(a)(1) of the NLRA because it prohibited employees from sending messages via email that would otherwise be protected by Section 7 of the Act. The decision rested in part on the fact that Pratt & Whitney employees spent the majority of their time on their computers, had remote access to the computer network, and used email as their primary method of communication.

In reaching its conclusion, the General Counsel's office looked at both *Republic Aviation* and *Stoddard-Quirk Manufacturing Co.*[12], in which, as the advice memo noted, the Board "established a distinction between employer policies limiting employees' *solicitation* of fellow employees and those that limit the *distribution* of written materials." (emphases added) The advice memo characterized *Stoddard-Quirk* as standing for several propositions. First, because employees can read written literature at their convenience, employers may limit the avenues for distribution of literature; as long as employees can get the literature into their co-workers' hands, their Section 7-protected rights are satisfied, even if that distribution may occur only in non-work areas (assuming sufficient non-work areas exist).

The advice memo further observed:

> [A]fter *Stoddard-Quirk*, the distinction between solicitation and distribution must be defined based on the nature of the employees' interests and purpose in addition to interests of the employer. Where the communication can reasonably be expected to occasion a spontaneous response or initiate reciprocal conversation, it is solicitation; where the communication is one-sided and the purpose of the communication is achieved so long as it is received, it is distribution. If it is *solicitation*, it must be permitted in all areas in the absence of an overriding employer interest; if it is *distribution*, it may be prohibited in work areas unless the employees have no available non-work areas. [emphases added]

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which an employee is actually doing his or her job, "working hours" describes the employee's entire day, including paid breaks. *Our Way Inc.*, 268 NLRB 394, 115 LRRM 1009 (1983); *see also St. George Warehouse Inc.*, 331 NLRB 454, 171 LRRM 1398 (2000).

[11] Cases 12-CA-18446, 12-CA 18722, 12-CA-18745, 12-CA-18863. To obtain advice memos, go to http://www.nlrb.gov/Research/Memos/Advice_Memos/, choose the relevant year, and search for the case name.

[12] 138 NLRB 615 (1962).

The General Counsel reasoned that because of the extensive use made of the email system by engineers at Pratt & Whitney, the employer's computers and the computer network constituted "work areas" under *Republic Aviation* and *Stoddard-Quirk*:

> Given this conclusion, the application of *Republic Aviation* and *Stoddard-Quirk* to E-mail communication is straightforward – the balance of interests has already been struck in those cases. Thus, in the instant cases, the Employer may not prohibit messages that constitute solicitation as there is no evidence of special circumstances that make such a prohibition necessary in order to maintain production or discipline. Moreover, it is clear that at least some E-mail messages sufficiently carry the indicia of oral solicitation to warrant similar treatment. For example, if two of the Employer's employees have an interactive E-mail "conversation" in real time regarding the Union's organizing campaign, or some collective grievance, when both employees are not on work time, this cannot be meaningfully distinguished from any other verbal solicitation.

The General Counsel acknowledged that there could be legitimate employer concerns about email, including its use of the employer computer network and the possibility that it would arrive in the recipient's mailbox during work time, but concluded that "at least some E-mail nevertheless warrants treatment as oral solicitation." Because the *Republic Aviation* presumption in favor of oral solicitation was not mitigated by the availability of other means of communication among employees, Pratt & Whitney's blanket prohibition on non-work-related email was overbroad and unlawful.[13]

The General Counsel reached the same conclusion in a case posing nearly identical issues, *Bureau of National Affairs*.[14] BNA maintained an Electronic Communications Policy prohibiting employees from using email and the Internet for non-business purposes, but enforced it only against a union member circulating a "Bargaining Update." Based on its reasoning in *Pratt & Whitney*, the General Counsel's office concluded in an Advice Memorandum that the computer use policy was facially overbroad and unlawful under Section 8(a)(1). In addition, the General Counsel found that the "Bargaining Updates" email – several pages of text setting forth the union's proposal, its opposition to the employer's proposal, and a schedule for upcoming meetings, "in order to facilitate communications regarding contract negotiations" – constituted solicitation rather than distribution. The General Counsel reasoned that the employee who sent it "could reasonably have expected unit members' immediate responses . . . . [A]s with the circulation of authorization cards or decertification petitions, the Union asserted its positions and implicitly invited the Emails' recipients to consider and respond. The 'Bargaining Update' attempted to rally support and counter objections – such attempts at interchange exhibit solicitation."

[13] The General Counsel observed that this case was not the opportunity to address employees' use of employer computer resources or electronic "bulletin boards," non-employee access to employee e-mail addresses, or rules imposing more minor limitations on email use, such as a rule requiring that non-work-related email be sent as "lowest priority."

[14] General Counsel Advice Memorandum Case 5-CA-28860 (2000).

The General Counsel further advised that even if the Bargaining Update were to be considered distribution rather than solicitation, the BNA's order prohibiting employees from forwarding the Bargaining Updates would still be unlawful.

> [T]he unique nature of E-mail supports an argument that the balance of employer and employee interests discussed in *Stoddard-Quirk* should be struck differently here than in the case of distribution of printed literature in a facility with available non-work areas. . . . The ease of reply inherent in E-mail, as well as the incomparable abilities to forward an E-mail message to another recipient effortlessly and to incorporate its text into another message quickly and conveniently, may make a printed version of a message inferior and less effective than the version sent by E-mail. If employees are not permitted to send these "Bargaining Updates" via E-mail, but are instead required to rely exclusively on the distribution of printed copies thereof, an essential component of the employee communication would be lost. Therefore, unlike the distribution of printed literature discussed in *Stoddard-Quirk*, there are no non-work-areas where the same kind of distribution could take place and, under the *Stoddard-Quirk* framework, the E-mail "distribution" must be allowed even in a work area.

Finally, the General Counsel concluded that because BNA had permitted a variety of other non-business email messages, including solicitations for non-labor-related matters (i.e., fitness clubs), the order prohibiting further distribution of the Bargaining Updates by email constituted disparate application of BNA's email policy, a further violation of Section 8(a)(1).

The same year, the Board had an opportunity to consider the legality of an email policy under Section 8(a)(1). In *Adtranz*,[15] an AFL-CIO unit representing employees at a vehicle refurbishing plant filed an unfair labor practices charge, based in part on the employer's promulgation of an email and computer use policy. The policy stated in part: "Employees may use hardware/software and electronic corporate mail systems provided by the company *for business use only*." Various employees at the facility used company computers during the day and had access to the company email system, which they used to send and receive personal messages despite the policy.

The three-member Board observed that while the email policy raised a novel legal issue, cases involving the use of employer bulletin boards and telephones offered an appropriate analogy. As the Board noted, while neither employees nor unions have the statutory right to use employer bulletin boards or telephones, employers permitting their use cannot then discriminatorily restrict union postings or use. The Board continued: "Analogously, Respondent could bar its computers and E-mail system to any personal use by employees. In this case, Respondent did permit E-mails of a personal nature, notwithstanding its rule. Therefore, Respondent could not exclude the union as a topic of discussion."[16]

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[15] *Adtranz, ABB Daimler-Benz Transportation, N.A., Inc. and International Association of Machinists and Aerospace Workers*, 331 NLRB 291 (2000).

[16] The Board concluded that because there was no evidence demonstrating that the employer treated union discussions on its email system differently from other personal discussions (that is, tolerance notwithstanding the policy), the rule was valid and had not been discriminatorily applied.

The following year, the Office of the General Counsel considered *Computer Associates International*, Case 1-CA-38933 (2001). Computer Associates' 18,000 employees all had desktop computers; many had laptop computers and access to the employer's network from home; and they all used their computers for "virtually all work-related activities." Computer Associates (CA) had several policies governing email and computer network use. One prohibited employees from using the computer network for anything other than business-related purposes, and stated that by signing on, they consented to monitoring of their use of the network. The policy specifically prohibited use of the network for, among other things, "personal solicitation or personal business purposes." The policy concluded with an admonition that any personal use of CA's email system by employees with laptops should be limited to "non-business hours" and occur off work property.

The General Counsel's office concluded that CA's policy prohibiting employee use of its computer network for personal or non-business purposes constituted an overly broad ban on solicitation and therefore violated Section 8(a)(1). The General Counsel analogized the employees' use of CA's computer network to that of the employees in *Pratt & Whitney*, making the system a "work area" under *Republic Aviation* and *Stoddard-Quirk*. Because *Republic Aviation* grants employees the presumptive right to use employer property for Section 7-protected activities during non-working time, CA's outright ban on the use of its computer systems at all times for all personal uses, as well as an additional requirement that employees obtain permission before sending personal emails (including protected Section 7 solicitation), violated Section 8(a)(1).

In addition, the policy's prohibition on sending personal emails during "non-business hours" was unlawful, because that time was presumed to include paid breaks. In reaching its conclusion, the General Counsel rejected CA's argument that because the computer network was private property, it could fully regulate employee use of its system. The memo distinguished between lawful restrictions on use of an employer's bulletin board, copier, or television set and the restrictions on the use of the email system, observing that none of the former constituted "work areas."

Finally, in 2005, the Board squarely addressed union email use in the context of Sections 7 and 8(a)(1) of the Act.[17]

The Richmond Times-Dispatch newspaper had a computer policy stating: "The computers throughout Media General (the Company) are business equipment and they have been acquired to support Company operations. The use of this equipment for personal, or any other purpose other than the Company's business, must be approved by the Department Head. . . . The e-mail system is provided to employees at Company expense to assist them in carrying out the Company's business." The evidence showed, however, that the union (RNPA) and the Times-Dispatch had used the newspaper's computer equipment and e-mail system to co-sponsor charitable campaigns, and newspaper management had used e-mail to advertise a variety of professional journalism events. In addition, both employees and management had used e-mail

[17] *Media General Operations, Inc., d/b/a Richmond Times-Dispatch and Richmond Newspapers Professional Association*, 346 NLRB No. 11 (2005).

for “a wide variety of personal messages,” including birth announcements, Girl Scout cookie solicitations, and concert ticket sales. And at several points, union officials and management officials collaborated on employment-related emails.

In 1998, 1999, and again in 2000, Times-Dispatch management informed the RNPA – which represented all news employees at the Times-Dispatch newspaper – that it had to stop using the newspaper’s computers and email system for union business. The union filed an unfair labor practice charge alleging a violation of Section 8(a)(1) based on disparate enforcement of the newspaper’s computer and email use policy.

The Board began by rejecting the Times-Dispatch’s argument that the complaint was time-barred because of management’s 1998 and 1999 communications with the union regarding the policy, observing that 2000 was the first time that the union’s entire bargaining committee, not just its president, was told of the Times-Dispatch’s policy.

The Board then concluded that the Times-Dispatch had in fact discriminatorily enforced its computer and email use policy against the RNPA. The administrative law judge considering the case in the first instance had observed that while the newspaper could have closed its computer equipment and email system to any personal use by employees, it did not; once it permitted employees to use the system to “distribute a wide variety of material that has little or any relevance to the Employer’s business,” it could not deny access to the union. The Board upheld the ALJ’s finding, emphasizing that its decision was influenced by “the breadth of the e-mail usage permitted by the [Times-Dispatch], which included a large variety of e-mail messages unrelated to the [Times-Dispatch’s] business.”

Finally, the Oregon Court of Appeals considered an email solicitation case in 2006; while the case involved a public entity and therefore was not governed by NLRB precedent, the court relied in part on NLRB caselaw.[18] In reaching its decision, which anticipated the Board’s reasoning in *Register-Guard*, the court rejected *Adtranz* (described above) and embraced *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995), on which the *Register-Guard* majority heavily relied; the court described *Guardian Industries* as “not just provocative” but “compelling,” and dismissed *Adtranz*’s methodology (in which the Board concluded that an employer allowing personal emails must permit union-related emails) as “in for a penny, in for a pound.”

In *SEIU Local 503*, a county court employee used the court’s email system to invite a co-worker to attend a meeting regarding SEIU’s organizing efforts at the court. The employee was admonished not to use the court email system to communicate about union organizing, and the SEIU filed an unfair labor practice complaint. The court’s computer equipment use policy allowed personal use under certain circumstances – basically, either minimal use during nonwork time, or minimal use during work time if urgent, and only for proper uses. “Personal use” was defined as use of equipment “for purpose other than authorized [court] work”; improper uses included “soliciting . . . for or against commercial ventures, products, religions, or political causes or organizations.”

[18] *SEIU Local 503 v. State of Oregon*, 149 P.3d 235 (Or. Ct. App. 2006).

While the charge was pending before the Employment Review Board, the policy was amended to exempt authorized charity drives from the improper use provision. Evidence also emerged that court employees often used the court email system for a variety of personal purposes, including personal solicitation for products like Avon makeup and sports tickets. Court management did not appear explicitly to condone the personal use, however, and had admonished employees not to use the court system to solicit for outside charities.

The Employment Review Board (ERB) concluded that the court's policy did not prohibit only union messages and that the court did not discriminate against union-related messages; while the court permitted messages about government-sponsored charity drives and team-building activities, it rationally treated those as work-related emails. The Oregon Court of Appeals affirmed, holding that (1) as long as the court prohibited non-work-related uses of the email system that were analogous to union solicitation and enforced those prohibitions "in a consistent and rational manner," there was no "impermissible discrimination" against union speech; (2) SEIU had the burden of proving that the court had enforced its policy in a discriminatory manner; and (3) SEIU failed to satisfy that burden, particularly in light of evidence demonstrating that court managers in fact frequently enforced the anti-solicitation provision.

The *Register-Guard* Decision

The *Republic Aviation* line of cases, along with the advice memos from the General Counsel's office, suggested that when the Board finally did rule squarely on employee email communication, such communication would be protected at least to the same extent as in-person communication, if not more. In 2007, however, the NLRB issued a decision giving employers enormous latitude to restrict employee use of employer email systems in the service of Section 7-protected rights.[19]

Summary

In *The Guard Publishing Company d/b/a The Register-Guard and Eugene Newspaper Guild, CWA Local 37194* ("*Register-Guard*"), 351 NLRB 70 (Dec. 16, 2007), the Board majority – against a vigorous dissent – turned on its head decades of Board precedent protecting Section 7 communication rights.

Register-Guard raised several questions: first, is it a violation of Section 8(a)(1) of the National Labor Relations Act to maintain a policy prohibiting the use of email for "all non-job-related solicitations"? Second, does it violate Section 8(a)(1) to enforce that policy against union-related emails while allowing some personal emails, and does it violate Sections 8(a)(1)

[19] While *Register-Guard* is technically binding only on private sector labor matters, it is likely to influence courts' opinions on these issues in the public sector as well. *See, e.g., AFSCME, Local 575 v. L.A. County Superior Court*, 2008 PERC (LRP) LEXIS 129 (California PERB Oct. 7, 2008) (citing to *Register-Guard*); *SEIU Local 503 v. State of Oregon*, *supra* n.17 (citing extensively to NLRB precedent).

and 8(a)(3)[20] to discipline an employee for sending union-related emails? And third, is it a violation of Sections 8(a)(1) and 8(a)(5)[21] to insist on a proposal that would prohibit the use of email for “union business”?

In answering these questions, the Board concluded that Register Guard’s employees had “no statutory right to use [the company’s] e-mail system for Section 7 purposes.” The Board also modified its precedent to hold that “discrimination under the Act means drawing a distinction *along* Section 7 lines” (emphasis added).

Background & Facts

Register-Guard is a newspaper publisher; the Eugene Newspaper Guild is a union representing about 150 Register-Guard employees. The parties had a collective bargaining contract that expired in April 1999, and at the time of the incidents below were negotiating a successor contract. In 1996, Register-Guard began installing a new computer system; the system gave all newsroom employees, plus many (but not all) of the other unit employees, access to e-mail. Around the same time, Register-Guard also implemented a “Communications System Policy” (“CSP”), which stated in part: “Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.”

In 2000, Suzi Prozanski, a Register-Guard employee and the president of the union, sent three email messages to unit member employees at their Register-Guard email addresses. The first email was in response to several previous emails about a union rally and was sent to clarify certain facts. Prozanski had spoken to a managing editor about the email she wanted to send; after delaying it for several days at his request, she told him that she could no longer wait to send it, and he told her he understood. She wrote the email on her break but sent it from her work computer; the next day, the managing editor issued her a written warning for violating the CSP by using email to “conduct[] Guild business.”

Several months later, Prozanski sent two emails to unit employees at their Register-Guard email addresses, this time using a computer at the union office, which was not located on Register-Guard’s premises. The first email asked employees to show support for the union by wearing green; the second asked employees to be involved in the union’s entry in a town parade. After she sent those two emails, she was informed that she had violated the CSP by using Register-Guard’s communications system to conduct union activities, in violation of the CSP’s prohibition on “non-job-related solicitations.”

[20] Section 8(a)(3) states that “[i]t shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3).
[21] Section 8(a)(5) makes it an unfair labor practice for an employer to “to refuse to bargain collectively with the representatives of [an employer’s] employees.” 29 U.S.C. § 158(a)(5).

Furthermore, during the course of negotiating the successor contract, Register-Guard proposed a provision to supplement the CSP, which read: "The electronic communications systems are the property of the Employer and are provided for business use only. They may not be used for union business." The union filed an unfair labor practice charge, which was dismissed; after further information and bargaining, the union filed a new charge, alleging that Register-Guard had proposed and "refus[ed] to withdraw" the allegedly illegal proposal.

General Counsel's Argument

The NLRB's General Counsel argued that the Board should follow the *Republic Aviation* balancing analysis and contended that email had become the most common "gathering place" for communications on both work and non-work issues. The General Counsel distinguished between email systems and communication mechanisms like bulletin boards and telephones, citing to the interactive and simultaneous nature of email and computer networks, but acknowledged that some restrictions on email could be appropriate to protect the system itself and maintain productivity. The General Counsel also argued that the proposed supplement to the CSP would violate Section 8(a)(1).

Legality of the Communications System Policy

With respect to the legality of the CSP, the Board majority concluded that "the employees here had no statutory right to use [Register-Guard's] e-mail system for Section 7 matters," and that maintaining the CSP therefore did not violate Section 8(a)(1). Noting that "an employer has a basic property right to regulate and restrict employee use of company property," the majority reasoned that Register-Guard's e-mail system was Register-Guard's "property" and "was purchased by [Register-Guard] for use in operating its business." (Citations and internal quotation marks omitted.) The majority also asserted that Register-Guard had "a legitimate business interest in maintaining the efficient operation of its e-mail system."

Having characterized the e-mail system as "property," and determined that e-mail use would be governed by equipment decisions rather than oral solicitation and distribution decisions, the majority observed that the NLRB had "consistently held that there is no statutory right to use an employer's equipment or media, as long as the restrictions are nondiscriminatory." (Citations and internal quotation marks omitted.) The members in the majority rejected the argument (proffered by both their dissenting colleagues and the General Counsel) that the *Republic Aviation* balancing inquiry should govern, focusing instead on the fact that in *Republic Aviation*, the employees had been prohibited from engaging in solicitation at any time on the premises. Register-Guard's CSP, by contrast, did not regulate "traditional, face-to-face solicitation." The majority observed that Register-Guard employees had "the full panoply of rights to engage in oral solicitation on nonworking time and also to distribute literature on nonworking time in nonwork areas, pursuant to *Republic Aviation* and *Stoddard-Quirk*." The opinion continued: "What employees seek here is use of [Register-Guard's] communications equipment to engage in additional forms of communication beyond those that *Republic Aviation* found must be permitted." The majority therefore concluded that *Republic Aviation* required only that employees not be "entirely deprived" of their ability to engage in Section 7 communications in the workplace – not that employees have access to "the most convenient or most effective means of conducting those communications" or to the employer's communications system.

The majority also rejected the dissent's argument that because the employees were already rightfully on the work premises, only Register-Guard's managerial interests, rather than its property interests, were at stake. "That would be true if the issue here concerned customary, face-to-face solicitation and distribution, activities that involve only the employees' own conduct during nonwork time and do not involve use of the employer's equipment. Being rightfully on the premises, however, confers no additional right on employees to use the employer's equipment for Section 7 purposes regardless of whether the employees are authorized to use that equipment for work purposes." The majority dismissed the arguments that email has revolutionized communication, noting that "the widespread use of telephone systems has greatly impacted business communications, [but] the Board has never found that employees have a general right to use their employer's telephone system for Section 7 communications."

The most important factor for the majority, however, was the availability of face-to-face communication for the Register-Guard employees:

> [U]nlike our dissenting colleagues, we find that use of e-mail has not changed the pattern of industrial life at the Respondent's facility to the extent that the forms of workplace communication sanctioned in *Republic Aviation* have been rendered useless and that employee use of the Respondent's e-mail system for Section 7 purposes must therefore be mandated. Consequently, we find no basis in this case to refrain from applying the settled principle that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications. Accordingly, we hold that the Respondent may lawfully bar employees' nonwork-related use of its e-mail system, unless the Respondent acts in a manner that discriminates against Section 7 activity. As the CSP on its face does not discriminate against Section 7 activity, we find that the Respondent did not violate Section 8(a)(1) by maintaining the CSP. [footnotes omitted]

Discriminatory Enforcement of the CSP

In considering Register-Guard's punishment of Prozanski for her union-related emails, the Board agreed that the employer had discriminatorily enforced the CSP against Prozanski's first email, but not against the latter two. The majority rejected the administrative law judge's decision that Register-Guard discriminated against Prozanski by disciplining her while allowing employees to use e-mail for various personal messages. Instead, the majority looked at whether employees had used the email system to *solicit* for other purposes, and concluded that they had not (with the exception of a United Way campaign).

In reaching that decision, the majority explicitly overruled prior Board precedent – specifically, *Fleming Co.*,[22] and *Guardian Industries*[23]. In each of those cases, the Board had

[22] 336 NLRB 192 (2001), *enf. denied* 349 F.3d 968 (7th Cir. 2003).
[23] 313 NLRB 1275 (1994), *enf. denied* 49 F.3d 317 (7th Cir. 1995).

held while prohibiting union notices. In each, however, the U.S. Court of Appeals for the Seventh Circuit rejected the Board's reasoning on appeal, concluding (in *Guardian*) that "[a] rule banning all organizational notices (those of the Red Cross along with meetings pro and con unions) is impossible to understand as disparate treatment of unions." 49 F.3d at 320.

The *Register-Guard* majority adopted the Seventh Circuit's reasoning and overruled its own decisions in *Fleming* and *Guardian*, opining that "unlawful discrimination consists of disparate treatment of activities or communications of a similar nature because of their union or other Section 7-protected status." Under the majority's analysis, almost any speech-related distinctions would be permitted as long as the distinctions did not explicitly discriminate against union-related communications, unless "the employer's motive for the line-drawing was antiunion." (The majority also observed that "an employer may [still] use its own equipment to send antiunion messages, and still deny employees the opportunity to use that equipment for prounion messages.")

Based on its new standard, the majority concluded that Prozanski's second and third messages were unprotected because they "called for employees to take action in support of the Union." While the employer had "tolerated" personal e-mail messages about social occasions, jokes, baby announcements, and sports tickets, "there is no evidence that [Register-Guard] permitted employees to use e-mail to *solicit* other employees to support any group or organization" (emphasis added). Register-Guard's enforcement of the CSP with respect to those messages therefore did not discriminate along Section 7 lines and did not violate Sections 8(a)(1) or 8(a)(3).

The majority conceded, however, that Prozanski's first email was not a solicitation but simply a clarification of certain facts. Because the only difference between that email and the many personal email messages that Register-Guard permitted was its union-related nature, the management's enforcement of the CSP as to that message discriminated along Section 7 lines and therefore violated Sections 8(a)(1) and 8(a)(3).

Register-Guard's Computer System Counterproposal

Finally, the majority ruled that Register-Guard had not violated Sections 8(a)(1) or 8(a)(5) by offering a counterproposal amending the CSP, because the evidence was insufficient to show that it had insisted on the counterproposal.

Dissent

Members Liebman and Walsh issued a blistering dissent, excoriating the NLRB for having become the "Rip Van Winkle of administrative agencies." (Quoting *NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992).) The dissent snapped that "only a Board that has been asleep for the past 20 years could fail to recognize that e-mail has revolutionized communication both within and outside the workplace. . . . Where, as here, an employer has given employees access to e-mail for regular, routine use in their work, we would find that banning all nonwork-related 'solicitations' is presumptively unlawful absent special circumstances." Liebman and

Walsh also dissented "in the strongest possible terms" from the majority's re-crafting of the meaning of Section 8(a)(1) discrimination.

With respect to the CSP's prohibition on "non-job-related solicitations," the dissent re-asserted that "[t]he issue in an 8(a)(1) case is whether the employer's conduct interferes with Section 7 rights. If so, the employer must demonstrate a legitimate business reason that outweighs the interference." The dissent cited approvingly to the *Republic Aviation* presumption that a rule banning solicitation on employer premises during nonworking time is an unlawful "impediment to self-organization" in the absence of "special circumstances."

Applying that presumption to these circumstances, the dissent challenged the majority's approach "on several levels."

> First, it fails to recognize that e-mail has revolutionized business and personal communications, and that cases involving static pieces of "equipment" such as telephones and bulletin boards are easily distinguishable. Second, the majority's approach is based on an erroneous assumption that the Respondent's ownership of the computers gives it a "property" interest that is sufficient on its own to exclude Section 7 e-mails. Third, the majority's assertion that *Republic Aviation* created a "reasonable alternative means" test, even regarding employees who are already rightfully on the employer's property, is untenable.

The dissent also characterized as "absurd" the majority's conclusion that an email system is analogous to "a telephone, a television set, a bulletin board, or a slip of scrap paper," noting that an email system is a "sophisticated network[] designed to accommodate thousands of multiple, simultaneous, interactive exchanges." Because Register-Guard already permitted employees to be on its computer network, Liebman and Walsh asserted, it needed to "demonstrate[] how allowing employee emails on Section 7 matters interferes with its alleged property interest" above and beyond simply making use of the computer system.

Finally, the dissent excoriated the majority for its reliance on the availability of alternative methods of communication: "[T]hat train has already left the station: that is not how the courts and the Board have applied *Republic Aviation*, and the availability of alternative means is not relevant when dealing with employee-to-employee communications."

The dissent therefore "reject[ed] the majority's conclusion that e-mail is just another piece of employer 'equipment,'" and concluded that where employers provide regular access to email in the workplace, banning all non-work-related "solicitations" should be unlawful in the absence of "special circumstances."

In addition, the dissent criticized the majority's reliance on the Seventh Circuit's decisions in *Fleming* and *Guardian*, in which the circuit court analogized to "discrimination" in other contexts. As the dissent observed, "the [National Labor Relations] Act does not merely give employees the right to be free from discrimination based on union activity. It gives them the *affirmative* right to engage in concerted *group* action for mutual benefit and protection." If an employer's conduct tends to interfere with affirmative Section 7 rights, "the burden is on the employer to demonstrate a legitimate and substantial business justification." As the dissent noted:

> [T]he majority's holding that an employer need only avoid 'drawing a line on a Section 7 basis' is a license to permit almost anything but union communications, so long as the employer does not expressly say so. It is no answer to say that a rule prohibiting all noncharitable solicitations or all solicitations for a group or organizations is not discriminatory because it would also prohibit selling Avon or Amway products. The Act does not protect against interference with those activities; it does protect against interference with Section 7 activity.

The dissent also contended that even using the majority's analysis, Register-Guard's enforcement of the CSP with respect to Prozanski's emails was discriminatory; the CSP prohibited all "non-job-related solicitations," whether they were personal or organizational, and yet Register-Guard management permitted a number of personal solicitations while prohibiting Prozanski's union-related solicitation.

Finally, the dissent disputed the majority's conclusion about the computer system counterproposal, reasoning that it was an "illegal codification of [Register-Guard's] discriminatory practice of allowing e-mail use for a broad range of nonwork-related messages, but not for union-related messages."

The Board's decision was appealed to the U.S. Court of Appeals for the District of Columbia, and oral argument was held on December 8, 2008. The appeals court has not yet issued its opinion.

Post-*Register-Guard* Decisions

In the wake of *Register-Guard*, the General Counsel of the NLRB, Ronald Meisburg, asked all NLRB Regional Offices to submit discrimination cases implicating *Register-Guard* to the NLRB's Division of Advice "in order to assure a consistent approach to the interpretation of that decision."[24] On May 15, 2008, his office issued a report on the five cases[25] that had been submitted for advice regarding the proper application of *Register-Guard*.[26]

In the first case, the employer had permitted the union to use the company's email system for various union matters, including communications with the employer about labor issues. The employer then sent a letter informing the union that it could not use the system to send emails to company managers outside the particular facility. The Division of Advice concluded that the rule was lawful "because it concerned how the union was permitted to use the employer's e-mail system and did not otherwise prohibit the union from engaging in protected communications

[24] Office of the General Counsel Memorandum GC 08-07 (May 15, 2008) (available at http://www.nlrb.gov/Research/Memos/general_counsel_memos.aspx (last visited January 12, 2009)).
[25] The fourth case was *Texas Dental*, described below, and the fifth case did not deal with email; accordingly, only three of the cases are described here.
[26] All of the case and advice summaries were stripped of identifying information, so significant descriptive details are lacking.

outside the plant or to broad groups of managers. Since the rule solely involved company equipment, and did not discriminate against union or Section 7 activity, it was considered lawful."

In the second case, an employer maintained a no-solicitation rule that prohibited solicitation for any purpose during working time and in patient care areas. The evidence demonstrated, however, that the employer enforced the policy inconsistently; employees engaged in union solicitation were disciplined, while employees were allowed to solicit for Avon and Mary Kay cosmetics, sales of holiday crafts, school fund-raising, and money for individual families. This situation was unlike *Register-Guard*, in which the Board explicitly noted that the employer had allowed personal emails but not analogous solicitation emails. The Division of Advice accordingly found that the employer here had acted discriminatorily by prohibiting union-related solicitations while allowing solicitations "for a variety of groups and organizations other than the union."

In the third case, an employee sent emails over the employer's email system to 20 other employees, informing them about an off-site union meeting. Before sending the message, the employee asked the IT Director about appropriate use of the email system; the IT Director advised that some personal use of the system was permitted. After the employee sent the message, he received a written warning for violating the employee handbook by using the email system for solicitation. The handbook stated that the email system was not intended for personal use permitted, and that employees could not solicit during working time for any purpose. The evidence showed, however, that employees had sent a variety of other non-business emails and not been disciplined, and also that the employer's reason for imposing discipline was to prevent other employees from engaging in union activity.

The case settled, but several months later, the employer disciplined the same employee for sending another union-related email. The Division of Advice concluded that a complaint should issue "since the evidence showed that the employer re-promulgated its e-mail rule for anti-union reasons, and discriminatorily enforced the rule against Section 7 activity." The General Counsel reasoned that such an outcome was appropriate under *Register-Guard* because the Board majority in that case had held that "'if the evidence showed that the employer's motive for the line-drawing was antiunion, then the action would be unlawful.' Further, the Board made it clear that it was not altering well-established principles prohibiting employer rules that discriminate against Section 7 activity."

The General Counsel closed the report by noting that it was continuing to bring *Register-Guard* cases to the Division of Advice "to ensure a consistent approach to our casehandling."

Several other decisions since *Register-Guard* similarly reflect both the tremendous impact of the Board's opinion and the continued difficulty of analogizing email communication to traditional solicitation and distribution.

In *Henkel Corporation*[27], an AFL-CIO local sought a rerun of an election, alleging, among other things, that the employer had maintained an unlawful internet policy that was

[27] 2008 NLRB LEXIS 247 (August 8, 2008).

discriminatorily written and applied. The email use policy stated that while employees might use the network occasionally for personal use, it was intended for "business-related transactions" and should not be used for a variety of other purposes, including "non-job-related solicitations." During the union campaign, several supervisors informed an employee that he was not permitted to access union-related information on company computers, although he continued to use company computers to check personal email.

The Administrative Law Judge observed that if the rule entirely prohibiting "non-job-related solicitations" were applied to oral solicitation rather than to e-solicitation, it would be overbroad under *Republic Aviation*. Under *Register-Guard*, however, the restriction on the use of the employer's computers was facially lawful. Because there was no evidence that the employer allowed other "organizational" postings, the ALJ also declined to find that the specific prohibition on using the system for union-related emails constituted disparate treatment of the union.

Texas Dental Association[28], on the other hand, demonstrates (as also indicated by the second and third cases in the General Counsel's memo) that *Register-Guard* does not give employers total impunity to act against employees who use electronic communications to engage in concerted activity. An Administrative Law Judge concluded in this case that the firing of two employees of the Texas Dental Association (TDA) for their involvement in various concerted activities, including using the TDA's computer system to circulate a petition asserting various complaints, violated Section 8(a)(1) of the NLRA.

In February 2006, TDA's Director of Ethics was discharged after breaking off a relationship with a supervisor. Soon after, a number of staff members, along with two supervisors, met in person to discuss grievances. One of the employees present, Nathan Clark, subsequently drafted a petition on his personal computer, and 11 employees signed it at a second meeting that included a supervisor, Barbara Lockerman. Before going to that meeting, Lockerman advised a company official about the upcoming meeting; the official informed her that if the employees held the meeting, "they'll be fired." After the second meeting, Clark drafted a resolution calling for an independent investigation of TDA's management, and sent it anonymously to the chairman of TDA's Ethics and Judicial Committee along with the petition. The chairman unsuccessfully attempted to bring up the petition at an annual meeting, after which Clark sent the petition anonymously to the Board of Directors.

Shortly afterwards, TDA's executive director ordered all employees who had been involved in the anonymous communications to report to her as a requirement of their employment. When no one came forward, the executive director hired a forensic scientist to examine certain employees' computers; after the examination revealed a fragment of the petition on Clark's work computer, the executive director fired Clark for "participating in this anonymous e-mail scheme" and ignoring her request to meet with her. She also alleged that Clark had inappropriately used "the Association's computer and e-mail system" in violation of TDA's Electronic Communications Policy. Finally, she asserted that Clark had inappropriately asked TDA's auditor for information, but admitted that she had not raised the issue before firing

[28] 2008 NLRB LEXIS 98 (April 10, 2008).

him. The executive director also fired Lockerman for failing to come to her with her knowledge of the facts underlying the petition.

TDA had two somewhat contradictory policies relating to use of the Association's equipment by employees. The Personnel Policy Manual allowed employees to use computer equipment for personal reasons "at their own risk," including "loss of privacy." TDA's Electronic Communications Policy (ECP), on the other hand, entirely prohibited non-business use of the Association's equipment, including for non-job-related solicitations. The evidence showed, however, that the business-use-only aspect of the ECP was not enforced, as the Association's system was used for personal emails, jokes, and solicitations for the sale of Girl Scout cookies.

The administrative law judge first observed that although Clark's communications were anonymous, "anonymous submissions do not lose the protection of the Act."[29] The judge also found that the petition constituted concerted activity because it included allegations about "poor management, negligence, and unfair treatment." Moreover, the executive director believed that the petition came from "disgruntled employees who have some issues"; because she understood that it related to "issues" and came from "employees," the judge determined that she believed the activity to be protected as well.

With respect to the specific justifications for terminating Clark, the judge first concluded that because the executive director failed to conduct further investigation to corroborate her belief that Clark had made inappropriate inquiries of TDA's auditor, and in fact the inquiries were proper, that basis for Clark's discharge was a pretext. In addition, Clark's failure to voluntarily come forward to confess to his involvement in the petition was not a reasonable basis for discharge: "employees are excused from failing to tell the truth when interrogated regarding their protected activities insofar as their responses constitute 'a continuation of . . . [their] protected, concerted activities.'"[30]

Moreover, TDA failed to present any evidence that it would have fired Clark even in the absence of his protected activity – particularly as the allegations regarding communications with the auditor were pretextual, and the executive director conceded that Clark would not have been fired for using the electronic communications system for emails about Girl Scout cookies. The judge concluded by noting that *Register-Guard* did not immunize TDA because Clark "would not have been discharged absent his protected activity."

Email and the First Amendment

In several recent public-sector higher education cases, employees have invoked a First Amendment right to use their employer's email system rather than relying (or relying entirely) on a collective bargaining-based right.

In *Bowers v. Rector & Visitors of the University of Virginia*, 478 F. Supp. 2d 874 (D. Va. 2007), Dena Bowers worked in the human resources department for the University of Virginia.

[29] Citing *Chrysler Credit Corp*., 241 NLRB 1079 (1979).
[30] Quoting *Earle Industries*, 315 NLRB 310, 315 (1994).

After she attended an NAACP meeting about pay increases, one of her co-workers asked her to send an email with the information from the meeting. The co-worker then forwarded the email to dozens of other people, one of whom sent the email – still bearing Bowers' signature – to "hundreds" of people. Bowers was fired for using her university email account to send out the email. The court held that because Bowers had used her university email account to send the information, and because the email appeared to be from Bowers as a university employee rather than as a private citizen, her email was not protected by the First Amendment.

In *Bowen v. Goldstein,* 2007 U.S. Dist. LEXIS 92140 (S.D.N.Y. Dec. 13, 2007), the U.S. District Court for the Southern District of New York concluded that the Professional Staff Congress (PSC), the union representing 20,000 employees at the City University of New York (CUNY), did not have a First Amendment right to use CUNY's email system to communicate with its members.

CUNY's Policy on Acceptable Use of Computer Resources read in part: "CUNY's computer resources are dedicated to the support of the [U]niversity's mission of education, research and public service. . . . Use of CUNY computer resources is limited to activities relating to the performance by CUNY employees of their duties and responsibilities" and use of CUNY computer resources for "not-for-profit business purposes . . . is prohibited" except with respect to "incidental personal use." The collective bargaining agreement between PSC and CUNY did not explicitly give PSC a right to use CUNY's computer or email system.

According to the chair of the PSC chapter at LaGuardia Community College (LCC), the chapter had had LCC email accounts since 2002, and had used those accounts to communicate with chapter members about various union matters. In addition, prior to October 2007, the university had never prohibited the chapter's executive board from using LCC's email system. At the end of October of that year, however, LCC's president sent the chapter's chairperson a letter stating: "This fall you have sent several notices relating to PSC meetings via the email system of [LCC]. . . . [S]uch use of the University's computer resources violates the [Acceptable Use] Policy. . . . I am writing to request that you cease using [LCC's] email system, or other computer resources, to send notices of PSC meetings or to carry out other union business." The PSC president and LCC chairperson sued the university, alleging that the policy violated the First and Fourteenth Amendments to the U.S. Constitution, as well as a provision of the New York State Constitution; the university argued that the union had no right to use the email system because the system was not available to the general public and the union had other means at its disposal to communicate with its members. In this decision, the court considered whether to grant an injunction that would prohibit the university from enforcing its email use policy against the union.

The court concluded that despite the university's previous lax enforcement of its policy, the status quo was that the union had no right to use the system pursuant to either the university's policy or the collective bargaining agreement. To preemptively gain access to the system, the union had to show both that it would suffer an "irreparable harm" and that its lawsuit had a "likelihood of success."

The court reasoned that the union did not face irreparable harm through the email ban because it had no present right to use the LCC email system for internal union communication. In addition, PSC could communicate with its members in other ways, including by telephone, face-to-face, in college meeting rooms, through the college mailroom, and by postings on bulletin boards.

Second, the union did not have a likelihood of succeeding on the merits of its First Amendment or New York State Constitution claims because the LCC email system was not available for use by members of the public; the email policy did not discriminate on the basis of content or viewpoint of the email messages; and the PSC acknowledged that it had violated the policy.

The court concluded by directing the parties to bargain over the union's claim of right to use the LCC's email system.

AAUP Policy

In 2004, the American Association of University Professors approved a policy titled Academic Freedom and Electronic Communications. The policy – while not explicitly focusing on the use of email for labor-related purposes – recommends that institutional acceptable-use policies be limited in their scope. As the policy advises in part:

> No conditions should be imposed upon access to and use of [a university's computer] network more stringent than limits that have been found acceptable for the use of traditional campus channels, unless and to the extent that electronic systems warrant special constraints. . . .
>
> More problematic are restrictions such as those that deny the use of the system for 'personal matters' or for other than 'official university business.' . . . [S]ome limits may be justified to prevent abuse of the system for extraneous purposes . . . . The difficulty with language such as 'only official university business,' apart from a distressing lack of precision, is the inherent invitation to selective use of such a standard by an administration anxious to impose substantive constraints on faculty activity. Any restrictions that an institution feels it must impose on 'acceptable use' must therefore be clearly and precisely stated, must be content-neutral and narrowly defined, and should address only systemic abuses by users, such as the posting or sending of material that would cause the system to malfunction or would severely inhibit the access of other users.

AAUP POLICY DOCUMENTS AND REPORTS, 45-50 (10th ed.).

What's Next? A Few Post-*Register-Guard* Predictions

It is not yet clear what direction labor law will take in the wake of *Register-Guard*. As an initial matter, the decision leaves open a number of unanswered questions. Perhaps the most obvious is what will happen in the next *Pratt & Whitney* or *Computer Associates*-type situation;

given the majority's emphasis on the Register-Guard employees' ample opportunities for face-to-face communication, it is certainly possible that the Board would be far more hesitant to uphold a CSP-type policy in a largely virtual workplace.

As one commentator has observed:

> On the administrative level, there remain a number of additional unanswered legal issues stemming from *Register-Guard* that will have to be resolved by the Board and the courts in future cases:
>
> 1) whether an employer can apply a computer use anti-solicitation policy to employee owned electronic communication devices while on break inside an employer's premises or vehicle;
> 2) whether an employer can prohibit union solicitations when employees receive other organization solicitations on personal hotmail or yahoo accounts accessed at the workplace during breaks;
> 3) whether the use of monitoring software targeted at non-work related email can constitute unlawful surveillance under the NLRA;
> 4) whether an employer can prohibit employees from reading union-related email or accessing union-related websites while permitting such activities relating to other organizations;
> 5) whether an employer can lawfully require employees to take affirmative steps to be removed from a union listserv while permitting employees to receive emails from other listservs; and
> 6) the impact of potential future state laws regulating employer computer use policies.[31]

In addition, of course, after *Register-Guard*, employees are likely to receive less protection for engaging in concerted activity via email (as they are receiving less protection in a variety of other areas in decisions from the most recent Board and the current Supreme Court).

One commentator, however, predicts what might be an even more dramatic result: "[T]he Internet is poised to either revive the NLRA or finish it off."[32] Hirsch observes that "unions have already shown a willingness to organize workers outside of the NLRA process; the Internet accelerates this trend by providing an inexpensive and effective means to communicate with employees that is less dependent on the Board's slower and more traditional organizing rules."

Hirsch also asserts that the *Republic Aviation* analysis makes an uneasy fit for email communication.

> The balance struck under *Republic Aviation* was based in large part on the environment in manufacturing and other similar industries where employees work

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[31] William A. Herbert, *The Electronic Workplace: To Live Outside the Law You Must Be Honest*, 12 EMPL. RTS. & EMPLOY. POL'Y J. 49, 98-99 (2008) (footnotes omitted).
[32] Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262 (Feb. 2008).

> in one area and take breaks in another. . . . This model . . . is no longer dominant in the United States, particularly in workplaces where employee interactions rely heavily on the Internet. . . . A rule permitting union-related Internet use only in nonwork areas or on nonwork time is virtually meaningless in such environments. . . . For these workers, a broad prohibition against nonwork time or nonwork area Internet use would severely infringe their right to communicate freely with one another about unionization.

Hirsch suggests that the Board create a rebuttable presumption that all restrictions on Internet use are unlawful, unless the employer can justify the restriction through a reasonable, nondiscriminatory business justification.

Finally, Hirsch contends that the *Stoddard-Quirk* solicitation/distribution distinction makes little sense in the email context and recommends that the Board either abandon the distinction for Internet communications or, at the least, treat such communications as oral solicitation because they create no litter and cannot practicably be segregated to a parking lot or similar remote area.

Indeed, NLRB member Wilma Liebman herself has criticized the Board for making "little sustained effort to adjust its legal doctrines to preserve worker protections in a ruthlessly competitive economy. . . . [L]abor law policymakers and enforcers have done too little, too late." Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. LAW 569, 589 (2007).

With the inauguration of a new administration and, presumably, a more union-friendly NLRB, it is possible that the Board will wake from what the *Register-Guard* dissent termed its Rip Van Winkle-esque snooze and adapt its approach to the new wired workplace. The Board's and other courts' decisions will be worth watching closely in the coming years to ascertain the eventual place of email exchanges in the pantheon of protected communication.

Employee Free Choice Act of 2007

The Employee Free Choice Act ("EFCA") (H.R. 800, S. 1041)[33] has been identified as a top priority for organized labor. In summary, the bill would amend the National Labor Relations Act (the "Act") as follows:

- require the Board to certify a bargaining representative without directing an election if a majority of the bargaining unit employees have authorized designation of the representative (card-check) and no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit[34];

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[33] Available on THOMAS, the Library of Congress portal for legislative information, at http://thomas.loc.gov/

[34] Section 2 of H.R. 800 would amend Section 9(c) of the NLRA to accomplish this, and also require that the Board develop guidelines and procedures for the designation by employees of a bargaining representative, including specifically model collective bargaining authorization language that may be used

- establish special procedural requirements for reaching an initial collective bargaining agreement following certification or recognition, including the time period during which bargaining must commence[35] and optional mediation[36] and mandatory arbitration of initial contract disputes[37];
- revise enforcement requirements with respect to unfair labor practices during union organizing drives, particularly a preliminary investigation of an alleged unfair labor practice which may lead to proceedings for injunctive relief; and require that priority be given to a preliminary investigation of any charge that, while employees were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative until the first collective bargaining contract is entered into, an employer: (1) discharged or otherwise discriminated against an employee to encourage or discourage membership in the labor organization; (2) threatened to discharge or to otherwise discriminate against an employee in order to interfere with, restrain, or coerce employees in the exercise of guaranteed self-organization or collective bargaining rights; or (3) engaged in any other related unfair labor practice that significantly interferes with, restrains, or coerces employees in the exercise of such guaranteed rights; and
- add to remedies for such violations including back pay plus liquidated damages; and additional civil penalties for certain willful repeat violations.[38]

By its terms, it seems simple, but the implications are significant. To say labor and management are polarized on this issue is to put it mildly. The AFL-CIO characterizes the EFCA as enabling "working people to bargain for better wages, benefits and working conditions

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for purposes of making the designations, and procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives.

[35] Under Section 3 of H.R. 800, Section 8 of the National Labor Relations Act would be amended by adding at the end language requiring that whenever bargaining is for the purpose of establishing an initial agreement following certification or recognition, bargaining must start "[n]ot later than 10 days (or within such further period as the parties agree upon) after receiving a written request for bargaining from the newly organized or certified representative, the parties must "meet and commence to bargain collectively" and "make every reasonable effort to conclude and sign a collective bargaining agreement."

[36] Section 8 of the National Labor Relations Act would be amended to provide that "[i]f after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement."

[37] Also under Section 3, if after the expiration of the 30-day period beginning when mediation is requested, or such additional period as the parties may agree upon, FMCS is not able to bring the parties to agreement by conciliation, FMCS will refer the dispute to an arbitration board (detailed to be determined by regulations). The arbitration panel shall render a decision settling the dispute, and that decision will be binding upon the parties for a period of 2 years, unless amended during that two-year period by written consent of the parties."

[38] *See* Section 4 of H.R. 800, available on THOMAS, the Library of Congress portal for legislative information, at http://thomas.loc.gov/

by restoring workers' freedom to choose for themselves whether to join a union."[39] In the view of the AFL-CIO, "[a]lthough U.S. and international laws are supposed to protect workers' freedom to belong to unions, employers routinely harass, intimidate, coerce and even fire workers struggling to gain a union so they can bargain for better lives. And U.S. labor law is powerless to stop them. Employees are on an uneven playing field from the first moment they begin exploring whether they want to form a union, and the will of the majority often is crushed by brutal management tactics."[40]

In contrast, the U.S Chamber of Commerce maintains a web page titled *Responding to Union Rhetoric: The Reality of the American Workplace*, and has published its own white paper defending the current system.[41] Associated Builders and Contractors is also promoting opposition to the EFCA.[42] Numerous other groups are also in the fray, both in support and in opposition.[43] For example, in a letter to Congress on January 7, 2009, the Coalition for a Democratic Workplace, a group of more than 500 organizations, stated it was "united in opposition to the *Employee Free Choice Act* because we believe this bill severely undermines long standing principles of balance and fairness in federal labor law. Make no mistake; the purpose of EFCA is not labor law reform. The legislation is a dramatic assault on the rights of employees and employers that threatens to severely undermine any chance at a constructive dialogue on labor law reform."[44]

In summary[45], those supporting the bill do so because, among other things, they believe the current system does not effectuate a national policy of encouraging unionization[46],

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[39] *See* http://www.aflcio.org/joinaunion/voiceatwork/efca/whatis.cfm For a more detailed look at the perceived failings of the current process and why the EFCA would effectuate the NLRA, see *The Facts—Union Representation and the NLRA*, available at http://www.aflcio.org/joinaunion/voiceatwork/efca/upload/efcareport_1208.pdf

[40] *See* http://www.aflcio.org/joinaunion/voiceatwork/efca/brokensystem.cfm

[41] *See The Union Representation Process Under the National Labor Relations Act: Maintaining Employee Free Choice for over 70 Years*, available at http://www.uschamber.com/assets/labor/unionrhetoric_nlra.pdf

[42] *See* http://www.abc.org/Government_Affairs/Issues/Card_Check.aspx

[43] *See, e.g.*, Coalition for Democratic Workforce (http://www.myprivateballot.com/), which characterizes the EFCA as being "[m]ore aptly titled the Employee "Forced" Choice Act" and stating "the legislation will effectively remove secret ballots for workers in union organizing elections and bind employers to contracts that inhibit their ability to create much-needed new jobs." The Alliance for Worker Freedom (http://www.workerfreedom.org/index.php?content=issues#cc) phrases its opposition as follows: "AWF opposes H.R. 800 and supports a working environment free of intimidation and bribery of the worker where similar to our national election, workers can vote to join a union or not using private ballots." *See also*, http://www.aflcio.org/joinaunion/voiceatwork/efca/allies.cfm for an AFL-CIO listing or organizational supporters and http://www.aflcio.org/joinaunion/voiceatwork/efca/against.cfm for those the AFL-CIO has identified as opposed to the EFCA.

[44] *See* Letter dated 1/7/09, available at http://www.myprivateballot.com/fs/resource:id/x1wr5np68dwc8g/xofommjcpv9gn1?_adctlid=v%7Cx1nebahdn7kdhz%7Cxog60m0l2b1hqz

[45] For more detail on the competing views related the EFCA, *compare* Jonathan Kane and Christopher P. Zubowicz, *Consequences of the Employee Free Choice Act: What's Left of Section 7?* with Brent Garren and Zachary Henige, *The Employee Free Choice Act: Salvaging Section 7 Rights*, ABA Section of Labor

management tactics effectively deny many workers the union representation they desire,[47] and the EFCA would permit unions to educate employees gradually regarding unionization rather than relying on an election that might take place during a period in which the union has limited or no access to employees. Those that oppose do so for a variety of reasons, including but not limited to the lack of reliability of a card check as compared to the secret ballot process, the denial of a voting opportunity for almost half of the employees at a given location subject to a card-check recognition, the inherent limitations placed on management's ability to campaign in opposition, and the violation of free-market principles by virtue of potential contract term imposition for initial contracts through arbitration.[48] Moreover, as noted by one commentator, many open questions remain, such as how the unit will be determined, whether union conduct in obtaining cards will be policed, will the employer have notice of organizing activity, how decertification will work, and arbitrator controls on first contracts.[49] The fact that President-elect Obama has pledged his support for the EFCA during the election would seem to make some version of this bill seem likely, but it is not over. Recent speculation on wavering support made its way around a few blogs.[50] Moreover, one must not underestimate strong sentiment in favor of the secret ballot process as the most effective means by which to gauge the true desires of employees regarding representation.[51]

Supervisory/Managerial Developments and the RESPECT Act

Case Law Developments

A series of Board developments in 2006 after the Supreme Court voided the Board's view of supervisory status in *NLRB v. Kentucky River Community Care, Inc.*[52], has caused the issue of supervisory status to move to the forefront. In *Kentucky River*, the Supreme Court, while agreeing with the Board that the burden of proof on supervisory status falls on the party asserting it, nonetheless criticized the Board view of the element of "independent judgment" under the Act. The Supreme Court directed the Board to redefine its test for determining

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and Employment Law 2007 Annual Conference, available at http://www.abanet.org/labor/annualconference/2007/materials/start.htm

[46] *See The Facts—Union Representation and the NLRA*, available at http://www.aflcio.org/joinaunion/voiceatwork/efca/upload/efcareport_1208.pdf

[47] *See* http://www.aflcio.org/joinaunion/voiceatwork/efca/brokensystem.cfm

[48] *See, e.g.*, Richard B. Hankins and Seth H. Borden, Kilpatrick Stockton LLP, *The Employee Free Choice Act*, available at http://efcaupdate.squarespace.com/home/?currentPage=4

[49] *See Union Representation Without An Election? A Reality That Could Be Closer Than You Think*, EFCA Newswire (Baker Hostetler (10/29/08), available at http://efcanewswire.com/news-archives/10-union-representation-without-an-election-a-reality-that-could-be-closer-than-you-think; *see also*, *Far From Free: Q&A with Ford & Harrison's Gerald Coker on the Pitfalls of the Employee Free Choice Act* (9/8/08), available at http://findarticles.com/p/articles/mi_m0EIN/is_2008_Sept_8/ai_n28072407

[50] *See, e.g., EFCA Support May be Faltering Under Pressure* (12/19/08), available at http://www.dcemploymentlawupdate.com/2008/12/articles/efca-1/efca-support-may-be-faltering-under-pressure/ and *Obama Still Supports EFCA* (12/3/08), available at http://www.washingtonmonthly.com/archives/individual/2008_12/015900.php

[51] *See, e.g., Dana Corp.*, 351 NLRB No. 28 (2007).

[52] 532 U.S. 706 (2001).

supervisory status for nurses and other workers who use professional or technical judgment in directing less-skilled workers.[53]

This set the stage for what followed in 2006, when the Board then issued a trilogy of cases in which the Board modified its approach on supervisory status to conform to *Kentucky River*.[54] The first and most significant of these, *Oakwood Healthcare, Inc.*[55], involved charge nurses claimed as supervisors under the Act. Although *Oakwood* arose in the context of a hospital rather than an institution of higher education, it is well worth considering because of the change it wrought in the definition of "supervisory" employees. In *Oakwood*, the NLRB reviewed the classification of charge nurses at the Oakwood Heritage Hospital; as part of that review, the Board took the opportunity to define "assign," "responsibly to direct," and "independent judgment," terms used in the section of the National Labor Relations Act that defines "supervisor."

Supervisors are excluded from the protection of the National Labor Relations Act because they are not considered "employees." Section 2(11) of the NLRA defines "supervisor" as:

> any individual having the 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.

The NLRB therefore looks at three broad categories to determine whether employees are supervisors under the statute: (1) whether the employees in question hold the authority to engage in any of those 12 supervisory functions (hiring, transferring, suspending, etc.); (2) whether their exercise of authority requires the use of "independent judgment"; and (3) whether their authority is held "in the interest of the employer." As the Board noted in this case, "supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same."

In *Oakwood Healthcare*, the Board looked first at the meaning of "assign" (in the context of nursing) and concluded that the term refers to "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." The three-member majority rejected the dissenting Board members' argument that an assignment must affect "basic" terms and conditions of employment or an employee's "overall status or situation." In response to the dissenting members' concern that this interpretation of "assign" could "sweep almost all staff nurses outside of the Act's protection," the majority declared: "we decline to start

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[53] *Id*. at p. 720-722.

[54] *See Oakwood Healthcare, Inc.*, 348 NLRB 686, 2006 WL 2842124 (2006), *Croft Metals, Inc.*, 348 NLRB 717, 2006 WL 2842125 (2006), and *Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Healthcare Center*, 348 NLRB 727, 2006 WL 2842126 (2006).

[55] *Oakwood Healthcare, Inc.*, 348 NLRB 686, 2006 WL 2842124 (2006)

with an objective – for example, keeping all staff nurses within the Act's protection – and fashioning definitions from there to meet that targeted objective. We have given 'assign the meaning we believe Congress intended. We are not swayed to abandon that interpretation by predictions of the results it will entail."

The Board next addressed the meaning of "responsibly to direct" and found that "for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." The Board emphasized that this definition would also distinguish between employees whose interests align with management and those whose interests align with other employees, such that employees who are carrying out the interests of management – "disregarding, if necessary, employees' contrary interests" – would be excluded from the Act's protection.

Finally, the Board observed that in *Kentucky River*, the U.S. Supreme Court had rejected the NLRB's interpretation of "independent judgment" as excluding the exercise of "ordinary professional or technical judgment in directing less skilled employees to deliver services." The Supreme Court held that the *degree* of discretion involved in making a decision, rather than the *kind* of discretion exercised, established the existence of "independent judgment" under the NLRA. The Board ruled here that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." So, for instance, a staffing decision determined by a seniority policy would not be a supervisory decision. However, weighing various factors – even predetermined factors specified in a company policy – could involve independent judgment.

Turning to the charge nurse context, the Board distinguished between supervisory duties and duties exercised by professional employees, who are covered by the NLRA, by holding (somewhat opaquely) that "even if the charge nurse makes the professional judgment that a particular patient requires a certain degree of monitoring, the charge nurse is not a supervisor unless and until he or she assigns an employee to that patient or responsibly directs that employee in carrying out the monitoring at issue. Thus, a charge nurse is not automatically a 'supervisor' because of his or her exercise of professional, technical, or experienced judgment as a professional employee."

The Board added that where an employee spends part of his or her time as a supervisor and the rest as a unit employee, the legal standard for determining whether that employee counts as a "supervisor" under the Act is "whether the individual spends a regular and substantial portion of his/her work time performing supervisory functions." Although the Board does not have a strict numerical definition of substantiality, the majority here noted that it has found supervisory status "where the individuals have served in a supervisory role for at least 10–15 percent of their total work time."

The Board went on to apply *Oakwood* in *Croft Metals*[56], refusing to designate certain lead workers in a manufacturing plant as supervisors. The Board found that the lead workers did not "assign" other employees where the employees' duties were governed by their work schedules and job classifications, neither of which were determined by lead workers. While the Board did find that the lead workers responsibly directed employees because "lead persons are held accountable for the level and quality of production on their lines, and are expected to monitor production, correct problems as they occur, and insure that employees remain busy," the authority was deemed routine and did not involve the exercise of independent judgment.

Charge nurses were again the issue in *Golden Crest*[57], with the Board deciding whether charge nurses in a nursing home were supervisors because they allegedly had the authority to "assign" and "responsibly direct" nursing assistants. Using the *Oakwood* standards, the Board rejected supervisory status, concluding that the charge nurses in *Golden Crest* performed neither of those supervisory functions. There was no authority to assign nursing assistants to particular shifts or to work beyond their regular shifts because nursing assistants suffered little or no adverse consequences for disregarding a charge nurse's instruction. In effect, the charge nurses could merely request that nursing assistants work particular hours, and the NLRB distinguished such authority from the statutory function of assigning employees to work particular times. The NLRB also found that the charge nurses did not responsibly direct the work of the nursing assistants because they were not held accountable for the nursing assistants' work. Although charge nurses were evaluated on their direction of nursing assistants, there was no evidence that "any adverse consequences could or would befall the charge nurses as a result of the rating" they received on that factor. Because the charge nurses did not perform any supervisory functions within the meaning of the NLRA, they could not be classified as supervisors.[58]

While the Board's decision in *Oakwood Healthcare* focused primarily on the exercise of authority by charge nurses, its decision could have wide ramifications in all collective bargaining contexts, including higher education – as illustrated by the case below.

The case of *Carroll College*[59] gave the Board an opportunity to consider the definition of faculty supervisory employees in the wake of *Oakwood* (as well as in the wake of *Point Park University v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006) (discussed later in this section), in which the United States Court of Appeals for the District of Columbia roundly criticized the Board for failing to specify the factors leading to a decision that faculty members were not supervisory employees). In *Carroll College*, a three-member panel of the Board upheld a decision by the NLRB Acting Regional Director, as well as previous decisions by the Board, holding that the unit employees were not managerial employees, and also that the application of the NLRA did not violate the Presbyterian college's free exercise of religion.

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[56] *Croft Metals, Inc.*, 348 NLRB 717, 2006 WL 2842125 (2006).

[57] *Golden Crest Healthcare Center*, 348 NLRB 727, 2006 WL 2842126 (2006).

[58] Following *Oakwood*, the General Counsel issued a guidance memo to provide case-handling instructions on supervisory status. *See* MEMORANDUM GC 07-05 (4/10/07), 2007 WL 1108896 (NLRBGC).

[59] *Carroll College, Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America-UAW*, 2007 NLRB LEXIS 273 (July 20, 2007).

In the decision on review by the Board, the Acting Regional Director stated that in determining whether faculty members exercise managerial authority, “the controlling issue . . . is whether [faculty-dominated] committees effectively recommend or determine academic policy or action.”

As found by the Acting Regional Director, faculty members at Carroll College did have some significant participation in the management of the college: they effectively determined the admission of students who fell below the college’s traditional standards of admission; determined the content of their courses; set office hours; designed syllabi; created attendance policies; and had some role in recommending employer policy in non-academic areas.

Those activities were not sufficient, however, to remove the faculty from the NLRA’s protections, because of the degree of control that the administration retained. For instance, the administration exercised “substantial independent control” over the content of curriculum and the addition and deletion of courses and majors, and retained unfettered authority to adjust the student and admissions formula and to set enrollment limits and determine the overall size of the student body. The faculty did not determine or effectively recommend class sizes, course scheduling, or the academic year, and the administration had recently expanded the college despite faculty opposition and restructured the administration system without faculty input.

The Board distinguished this case from *LeMoyne-Owen College*[60], in which the Board concluded that the college’s faculty members were managerial employees. In *LeMoyne*, the evidence showed that faculty proposals related to course, curriculum, and degree requirements were always approved and implemented by the administration and the Board of Trustees without independent review or modification.

Finally, the Board agreed that the application of the NLRA to the college did not burden the college’s free exercise of religion.

Also of interest is *Point Park University*[61], a case in which the NLRB Regional Director concluded that full-time faculty at Point Park University were not managerial employees under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), and that they therefore had the right to unionize. The case was on remand from the U.S. Court of Appeals for the District of Columbia, which had ruled that the NLRB – which originally found the faculty members to be non-managerial – had failed to articulate the factors underlying its decision.

In the Regional Director’s words, the court of appeals observed that “the proper analysis turns on the type of control faculty exercise over academic affairs at the institution.” *See also LeMoyne-Owen College v. NLRB*, 357 F.3d 55 (D.C. Cir. 2004) (“*LeMoyne-Owen II*”). The appeals court also directed the Regional Director to determine “whether the faculty in question so controls the academic affairs of the school that their interests are aligned with those of the university or whether they occupy a role more like that of a professional employee in the ‘pyramidal hierarchies of private industries.’” *Point Park University*, 457 F.3d at 48 (quoting

[60] 345 NLRB No. 93 (2005).
[61] NLRB Regional Director, No. 6-RC-12276 (July 10, 2007).

NLRB v. Yeshiva University, 444 U.S. 672 (1980)). And finally, as the Regional Director noted, the appropriate elements to consider in assessing managerial status under *Yeshiva University* would be the degree of faculty control over "curriculum, course schedules, teaching methods, grading policies, matriculation standards, admission standards, size of the student body, tuition to be charged, and location of the school."

In analyzing faculty status, the Regional Director explained his method of analysis:

> In considering whether the full-time faculty are managerial employees I have considered the evidence as to the faculty's authority over curriculum and academic policies, including the extent of their ability to determine what undergraduate and graduate programs are offered, as well as changes to degree programs, including structural changes and all other changes in course offerings having effects beyond the academic department, grading, teaching methods, and admissions, retention and graduation of students to be the most significant factors relating to the determination. I have also considered the faculty's authority relating to other academic-related matters such as enrollment levels, the setting of tuition, course scheduling, and academic calendars. Finally, I have reviewed the faculty's authority with respect to nonacademic matters, such as the granting of tenure and sabbaticals, faculty hiring and promotion and input on personnel policies. While authority in these nonacademic areas has some bearing on the managerial determination, it is the least significant factor in determining managerial status. Thus, without effective recommendation and control over academic matters, faculty will not be found to be managerial based on their authority in nonacademic matters.

The Regional Director observed that the Point Park faculty lacked input into structural aspects of the university, including a change from department- to school-based governance and the decision to seek university status. The university relied on administrators to operate the institution, and created "buffers" between the administration and the faculty. Moreover, the administration often made curricular and programmatic decisions either without consulting the faculty or in opposition to faculty recommendations, in areas including on-line courses, independent study and faculty-led trips abroad, grading, curriculum changes, student admissions, syllabi, attendance policies, student enrollment goals, overload schedules, hiring of faculty members, and program offerings.

Based upon the factual record, the Regional Director concluded that the faculty members were not managerial employees and upheld the union's certification.

Since *Oakwood*, at least one Court of Appeals has upheld the Board's determination that certain individuals (dispatchers) were not supervisors within the meaning of the Act based on the application of *Oakwood* standards.[62]

[62] *See NLRB v. Atlantic Paratrans of N.Y.C.*, 2008 WL 4876827, 185 LRRM (BNA) 2328 (2nd Cir. 2008).

RESPECT Act

So what are the implications of this development? In the view of organized labor, and notwithstanding the fact that the Board found that nearly all of the workers whose supervisory status was at issue in the *Oakwood* trilogy were not supervisors, the reaction has been that the Board expanded the concept of "supervisors", making it easier to prove supervisory status.[63] This brings us to an additional piece of proposed legislation that failed in 2007 but may gain traction under an Obama administration, namely the Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers (H.R. 1644[64], S. 969[65]), or RESPECT Act Introduced in the Senate on March 23, 2007 by Senator Chris Dodd (D-CT), along with Senators Richard Durbin (D-IL) and Edward Kennedy (D-MA), the legislation would amend the National Labor Relations Act to revise the definition of "supervisor" by requiring the individual to have authority over employees for a majority of the individual's work time and by removing the requirement of authority to assign other employees and the requirement of authority to responsibly direct the employees.

Currently, Section 2 (11) of the Act[66] defines a "supervisor" as an employee with the authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, or to adjust their grievances, or effectively to recommend such action" so long as this authority requires the use of "independent judgment."[67] The proposed text wording changes at first glance seem minimal, as shown below:

> (11) The term "supervisor" means any individual having authority, in the interest of the employer <u>and for a majority of the individual's worktime</u>, 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.

As with the EFCA, both labor and management have strong views on the issue and the significance of these changes. On the AFL-CIO's blog, the *Oakwood* trilogy is described as having "reinterpreted the definition of 'supervisor' in a way that greatly expanded the number and types of workers that can be classified as supervisors"[68] (and thus be excluded from the Act). In contrast, the U.S. Chamber of Commerce, in its opposition letter to House members, stated that "the dire consequences predicted by critics of the decision have not come to pass" and that

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[63] *See, e.g.*, Silverman, Scott, *The Impact of Recent NLRB Decisions on Supervisory Status*, 23 The Labor Lawyer 11 (2007).
[64] Available at on THOMAS, the Library of Congress portal for legislative information, at http://thomas.loc.gov/
[65] Available on THOMAS, the Library of Congress portal for legislative information, at http://thomas.loc.gov/
[66] *See* 29 USC §152(11).
[67] *See* 29 USC §152(11).
[68] *See* James Parks, *Breaking: Legislation Introduced to Reverse Anti-Worker Labor Board Decisions*, available at http://blog.aflcio.org/2007/03/22/breaking-bill-introduced-to-reverse-anti-worker-labor-board-decisions/ (March 22, 2007).

"[a]s the Board continues to issue more decisions in this area, it is only becoming clearer that the Board will not permit workers to be classified as supervisors if they do not truly function in such a capacity."[69] To the extent that *Oakwood* does not have dire consequences in higher education, it may be only because *Yeshiva* already so sharply restricted the category of faculty members who are eligible to unionize.

Moreover, while in the months leading up to *Oakwood*, the Economic Policy Institute claimed some 8 million workers' rights would be affected[70], another group, The Heritage Foundation, disputed this figure, claiming it has no factual basis because the underlying BLS data used is based on a "classification of supervisor that is far broader than the NLRA definition."[71] Associated Builders & Contractors has also been vocal in its opposition to the RESPECT Act, claiming among other concerns, that the change would cause issues of divided loyalties among front-line supervisors who assign work to employees, change the current dual functions of the national labor policy to protect rank-and-file worker rights while insuring supervisors act as agents in the employers' interests in matters of labor-management relations, and create significant related challenges under other laws, such as Fair Labor Standards Act, Occupational Safety and Health Act, anti-discrimination laws, and regulations and rules in which a determination of supervisory or exempt status could be used to hold an employer liable for the acts of its supervisory agents.[72] This will continue to be a focus for organized labor, and could have significant implications in higher education if the legislation is enacted.

Withdrawal of Recognition and Related Developments

One hallmark of the Bush Board in 2007 is its issuance of decisions seemingly adverse to organized labor's interests. Within this section, two such issues will be addressed. The first is a series of decisions issued over the past several years that arguably narrowed the *Levitz* standard for recognition withdrawal. The second is *Dana Corp.*[73], a case viewed as effectively overruling the recognition bar rule established some four decades earlier in *Keller Plastics Eastern, Inc.*[74]

***Levitz Furniture* Aftermath**

In March 2001, the Board issued *Levitz Furniture Co. of the Pacific*,[75] adopting an "actual loss" of majority support standard for withdrawal of union recognition. To understand

[69] *See* Letter Opposing H.R. 1644, the "Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers (RESPECT) Act", available at http://www.uschamber.com/issues/letters/2007/070913respectact.htm (9/13/07)

[70] *See* Ross Eisenbrey and Lawrence Mishel, *Supervisor in name only — Union rights of eight million workers at stake in Labor Board ruling***,** EPI Issue Brief #225 (7/12/06), available at http://www.epi.org/content.cfm/ib225

[71] *See* James Sherk, *The RESPECT Act: Congress Should Preserve Balance Between Management and Employees* (Web Memo #1667, 10/17/07), available at http://www.heritage.org/research/labor/wm1667.cfm

[72] *See RESPECT ACT*, available at http://www.abc.org/Government_Affairs/Issues/Workplace_Policy/RESPECT_Act.aspx

[73] 351 NLRB No. 28 (2007).

[74] 157 NLRB 583 (1966).

[75] 333 NLRB 717 (2001).

the recent developments in the area of withdrawal of recognition, one must first examine the backdrop of law against which *Levitz* was issued. With the 1951 *Celanese Corp.* decision, employers were permitted to withdraw recognition by either (1) showing the union actually lost majority unit support, or (2) showing the employer had a good-faith doubt, based on objective considerations, about the union's majority status.[76]

In 1998, however, the NLRB's good-faith doubt standard came under scrutiny with the Supreme Court in *Allentown Mack*,[77] a case in which the Court took issue with the Board's application of the "good faith doubt" standard, finding that the Board was applying a stricter good-faith disbelief standard.[78] Against this backdrop, the Board issued *Levitz Furniture* in 2001, overruling *Celanese* and abandoning the good-faith doubt standard in favor of proof of actual loss of majority support as a defense to alleged unlawful unilateral employer withdrawal. *Levitz* was hotly contested, with the competing arguments summarized as follows:

- Opposing the good-faith doubt standard: Board elections are the preferred method to establish loss of majority; unilateral withdrawal on good-faith doubt is contrary to NLRA's purposes because it permits refusal to bargain even if support not actually lost;[79]

- In support of good-faith doubt standard: good-faith standard furthers employee choice; Board election not always viable due to union blocking tactics; continued recognition in absence of majority support would risk a Section 8(a)(2) violation.[80]

The Board favored the *Celanese* opposition, and overruled *Celanese*, holding in *Levitz Furniture* that absent actual loss of majority status, an employer could not legally withdraw recognition. Of course, the loss of majority status must be untainted by improper employer activity.[81] So what happened? In 2007, a series of decisions generated a flurry of speculation that *Levitz Furniture* was being narrowed, if not ignored. The first of these, *American Golf Corp. d/b/a Badlands Golf Course and Laborers' International Union of North America, Local 872*[82] involved a span of activity from the 1999 certification of the union, a period of bargaining, a withdrawal of recognition in 2002 that was determined to be in violation of Section 8(a)(5), and a subsequent period of bargaining. After the employer received a handwritten petition signed by a majority of employees stating they no longer wished to be represented, the employer withdrew recognition. A decertification petition was pending at the time of withdrawal.

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[76] *Celanese Corp. of Am.*, 95 NLRB 664 (1951).
[77] *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998),
[78] *Id*. at 373-373.
[79] *See* Patrick E. Deady, *Levitz Furniture: On its Last Legs or Already Knee-Capped*, ABA 2008 Midwinter Meeting of the Committee on the Development of the Law Under the NLRA (1/24/08), at p. 3-4, available at http://www.hmltd.com/labor_news_articles/Levitz%20Furniture%20Article%2010-08.pdf.
[80] *See* Stephen C. Mitchell and Steven M. Bernstein, *Is Levitz Furniture on its Last Legs or Holding Steady*, ABA 2008 Midwinter Meeting of the Committee on the Development of the Law under the NLRA (1/24/08), at p. 5, available at http://www.abanet.org/labor/dlcomm/mw/papers/2008/home.shtml.
[81] *See,e.g., Broadway Volkswagen*, 342 NLRB 1244, enf. *and pet. for review den. sub nom. East Bay Automotive Council v. NLRB*, 483 F.3rd 628 (9th Cir. 2007).
[82] 350 NLRB No. 28 (2007).

After this second withdrawal in 2003, further litigation ensued, with the ALJ initially finding the employer violated Sections 8(a)(1) and (5) by its withdrawal action because under *Lee Lumber*[83], a reasonable period of negotiations had yet to elapse following resumption of negotiations. The Board disagreed, focusing its analysis on the *Lee Lumber* factors that would mandate an extension of the insulated period of good-faith bargaining, and finding that no extension was warranted. *Levitz* itself was only briefly discussed, with the majority stating in a footnote:

> We reject as lacking in merit the Charging Party's contention that *Levitz Furniture* … should be interpreted to prohibit an employer from withdrawing recognition when a petition for a representation is pending. Indeed, the *Levitz* Board itself considered and rejected a similar contention.

The second decision, *B.A. Mullican Lumber & Manufacturing Co.*[84], proved to be an opportunity for a more clear expression of discontent with *Levitz*. In *Mullican*, the ALJ's decision was largely adopted by the Board, with a finding that the employer violated the Act by withdrawing recognition. Within that case, it became clear that at least one Board member had serious concerns over the validity of *Levitz* though he lacked the ability to overrule or modify it.[85]

The Board's decision did not stand, however, because the Fourth Circuit denied enforcement, holding instead that the employer met the *Levitz* burden for withdrawing recognition. In so holding, the Court explained that they had concluded "that Mullican Lumber advanced substantial objective evidence, consistent with the standard articulated in *Levitz Furniture Co. of the Pacific*, 333 N.L.R.B. 717, 725 (2001), and sufficient to demonstrate that, more likely than not, the production employees no longer supported the Union."[86] Two factors appeared significant to the Court's holding. First was the absence of any effort by the General Counsel of the Board to challenge or contradict the Mullican evidence. Addressing the NLRB's argument that Mullican had not presented sufficient evidence that the union had lost majority support, the Fourth Circuit pointed out that the union and the General Counsel never disputed Mullican's evidence at the hearing. Moreover, the fact that some of the employer's evidence was hearsay did not eliminate it from consideration particularly where it was admitted without objection. Moreover, as the Court explained, "objective" evidence means simply "evidence external to the employer's own (subjective) impressions." In this case, Mullican had presented evidence of its employees' own petition to decertify, the filing of a majority of decertification

[83] Under *Lee Lumber & Bldg. Material Corp.*, 334 NLRB 399, 402 (2001), five factors, if found to exist, would extend the 6-month period of mandatory bargaining. Those factors are (1) whether the parties are bargaining for an initial contact; (2) the complexity of the issues being negotiated and the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse.
[84] 350 NLRB No. 45, *enf. denied*, 535 F.3d 271(4th Cir. 2008)
[85] See 350 NLRB No. 45. Specifically, then-Chairman Battista expressed concern over current blocking-charge rules that can halt the election process.
[86] 535 F.3d 271, 273 (4th Cir. 2008).

cards with the NLRB, and a number of statements from employees that the union no longer enjoyed majority support.

In addition, the Court seemed troubled that the Board sought enforcement even though the General Counsel apparently had in its possession but declined to disclose the decertification slips indicating a loss of majority support. In addressing this issue, the Court first re-stated the Levitz standard:

> Prior to *Levitz*, an employer could withdraw recognition of a union if it had a "good-faith doubt" about the union's majority support. *See* Celanese Corp. of Am., 95 N.L.R.B. 664, 672 (1951). But under *Levitz*, the Board moved to an objective test to discover whether the union *actually* lost majority support; it thus became irrelevant to inquire into the employer's state of mind. The *Levitz* standard focuses on the Act's policy of promoting employee choice by determining *actual* employee desires, rather than employers' *beliefs* about employee desires, by asking whether there was *in fact* majority support for the union at the time the employer withdrew recognition, *regardless of what the employer believed.* The *Levitz* standard therefore introduced a truth-seeking test.
>
> Thus, "[i]f a majority of the unit employees present evidence that they no longer support their union, their employer may lawfully withdraw recognition," and this is so regardless of what the employer knew at the time. Levitz, 333 N.L.R.B. at 724. Accordingly, the General Counsel's argument in this case-that the evidence contained in the decertification slips he possessed was irrelevant to what the employer knew when it withdrew recognition-is simply obsolete in light of *Levitz*. *Levitz* stated the principles on an objective basis, focusing on the *actual* choice of employees. Thus the Board in *Levitz* stated, "if a union actually has lost majority support, the employer must cease recognizing it, both to give effect to the employees' free choice and to avoid violating Section 8(a)(2) by continuing to recognize a minority union." *Id.* at 724.

In such a circumstance, the Court explained as follows:

> While the new standard of *Levitz* does not relieve the employer of presenting objective evidence as to the actual loss of majority support, it does impose on the General Counsel additional duties, ethical and statutory, when the issue is presented to the Board and the courts. It would be improper for the General Counsel, if he had in his possession evidence that a union no longer had majority support, to urge a court of appeals to enforce a bargaining order against the employer requiring the employer to bargain with a union representing only a minority of the employees. In doing so, he would be seeking unlawful relief that would not only erode the fundamental policies of the Act but would also violate his duties under the Act.

Therefore, while noting that the General Counsel was not obligated to produce the information, it nonetheless explained that the General Counsel, when in possession of such evidence, "must either disclose the information to the employer or limit its conduct in seeking enforcement from the courts"[87] Therefore, "if the Board chooses not to disclose the information, regardless of the quality of the employer's case, it may not seek orders from courts of appeals that it knows would violate the Act."[88] As the Court explained, "under the objective standard for determining the free choice of employees, the Board is not free to rely on deficiencies in the employer's evidence to enter a bargaining order when it has the evidence exclusively within its possession that a majority of the employees, in fact, have chosen *not* to be represented by the Union. On the other hand, if the employer fails in its burden of proof and the Board does not know the will of a majority of the employees, the Board may seek enforcement of an order against the employer based simply on the employer's failure to overcome the presumption of majority status." [89]

The third case, following *Mullican* at the Board level but issued before the Fourth Circuit's *Mullican* decision, was *Shaw Supermarkets.*[90] In *Shaw*, the union and employer were parties to a five year agreement spanning January 1999 to January 2004. In February 2002, the employee filed a decertification petition with the Board, and in the days that followed furnished the employer with slips supporting the petition. The employer, through an accounting firm it hired to tally the slips, determined that the union had lost majority support and withdrew recognition. Over dissent, the Board upheld the withdrawal, finding the employer may withdraw recognition based on evidence of actual loss of support after the third year of a contract of longer duration. In so holding, the majority reasoned that the parameters governing the employer's actions should be fixed at the point where the policy goals of stable labor relations and employee free choice are "satisfied and reconciled".

Since these three cases, the General Counsel's Office has issued a guidance memo[91] setting forth the agency's perspective on *Levitz*' current status and its applicability by the Regional Directors in the face of the Fourth Circuit's denial of enforcement and approval of recognition withdrawal by Mullican. The General Counsel's Memorandum, an update of prior *Levitz* guidance[92], begins by reaffirming that an employer may lawfully withdraw recognition from an incumbent union only if it can prove that the union has actually lost majority support. The analytical framework used in withdrawal cases was also re-stated, with the General Counsel stating that:

> An employer that withdraws recognition bears the initial burden of proving that the incumbent union suffered a valid, untainted numerical loss of its majority status. The employer can establish this loss by a variety of objective means,

[87] *Id*. at 283.
[88] *Id*. at p.283.
[89] *Id*. at 283-284.
[90] 350 NLRB No. 55 (2007).
[91] MEMORANDUM GC 09-04 (11/26/08), available at http://www.nlrb.gov/shared_files/GC%20Memo/2009/GC%2009-04%20Guidelines%20memo%20concerning%20Withdrawal%20of%20Recognition%20based%20on%20loss%20of%20majority%20support.pdf
[92] See MEMORANDUM GC 02-01 (10/22/01), available at http://www.nlrb.gov/shared_files/GC%20Memo/2002/gc02-01.html

> including an antiunion petition signed by a majority of the unit employees. In appropriate cases, the General Counsel may then present rebuttal evidence to show that the union in fact enjoyed majority support at the time of the withdrawal or that the employer's evidence is unreliable. The burden then shifts back to the employer to establish actual loss of majority status by a preponderance of all objective evidence.[93]

The General Counsel then addressed the Fourth Circuit's *Mullican* decision, suggesting it was not inconsistent with existing policy because "the General Counsel's longstanding policy has been to decline to issue complaint when the General Counsel has sufficient objective evidence that the Union has lost majority support, even if the employer has no such evidence.[94]"[95] (footnote in original).

The remainder of the memo, in an effort to "maintain a consistent policy regarding the sufficiency of 'objective evidence' under *Levitz*,"[96] goes on to detail what would be sufficient to constitute objective evidence of loss of majority support sufficient to warrant dismissal of Section 8(a)(5) charges.[97] In closing, the General Counsel directed as follows:

> In sum, Regional Offices should dismiss Section 8(a)(5) allegations where there is direct evidence of an actual numerical loss of majority support in the form of firsthand statements from a majority of the unit employees or an untainted and unambiguous antiunion petition. The Regions need not submit to the Division of Advice cases where the employer's evidence would have been insufficient under the pre-*Levitz* good-faith doubt standard and may continue to issue complaints in those cases if otherwise appropriate. On the other hand, the Regional Offices should submit cases to Advice if the alleged loss of majority status is based on an ambiguously-worded petition; disputed unit composition; possibly stale evidence of disaffection; or hearsay evidence, such as hearsay evidence of employee sentiments or polling, as in *Pacific Eco Solutions* and *B.A. Mullican Lumber*.[98]

MEMORANDUM GC 09-04 (11/26/08) at p. 9 (footnote in original).

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[93] MEMORANDUM GC 09-04 (11/26/08)(additional citation omitted).
[94] Famsa, Inc., Case 21-CA-37667, Advice Memorandum dated September 21, 2007 at 2-3; Christy Webber Landscapes, Inc., Case 13-CA-41300, Advice Memorandum dated December 29, 2003 at p.3.
[95] MEMORANDUM GC 09-04 (11/26/08) at p. 2.
[96] During their processing of these charges, the Regional Offices may consult the Division of Advice as to any investigative issues.
[97] *See* MEMORANDUM GC 09-04 (11/26/08) at p. 3-8. More specifically, the memo addresses in more detail what constitutes the type of "objective evidence" the Board views as satisfying the *Levitz* standard.
[98] *See* GC Memorandum 02-01 at 4. As the Fourth Circuit noted in B.A. Mullican Lumber, hearsay evidence, while inherently less reliable, can be probative, particularly when it is admitted without objection. 535 F.3d at 278.

Moreover, notwithstanding the dire predictions, the Board has continued to find withdrawal unlawful in appropriate circumstances.[99]

***Dana Corp*. and the Recognition Bar**

For some 40 years, the Board followed the principles established in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), barring for a "reasonable time" any attempt to decertify a union that had been voluntarily recognized by an employer. In *Keller*, the unfair labor practice complaint alleged that the employer unlawfully executed a collective-bargaining agreement with a minority union. The employer's initial lawful recognition was not disputed nor was the fact that the union no longer retained majority support when the parties executed a contract a month later. The Board dismissed the complaint, reasoning that "like situations involving certifications, Board orders, and settlement agreements, the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining" and that "such negotiations can succeed, however, and the policies of the Act can thereby be effectuated, only if the parties can normally rely on the continuing representative status of the lawfully recognized union for a reasonable period of time." *Keller* was extended over the years, encompassing application to voluntary withdrawals shortly after recognition[100], in representation cases to bar the filing of election petitions for a reasonable time after voluntary recognition[101], and even when issues of majority status and free choice seemed to be present[102].

Then, in September 2007, the Board released *Dana Corp.*[103] In *Dana,* the Board modified its longstanding recognition bar doctrine and gave employees and rival unions the opportunity to challenge the majority status of a union that has been voluntarily recognized by an employer. In summary, and with clear preference for resolving questions concerning representation through a Board secret-ballot election, the Board modified the recognition-bar doctrine to provide that no election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of the notice without the filing of a valid petition.[104] If a valid petition (supported by the requisite 30 percent showing of interest) is filed within 45 days of the notice, the petition will be processed. The showing of interest in support of a petition may include employee signatures obtained before as well as after the recognition.

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[99] *See, e.g., SFO Good-Nite Inn, LLC,* 352 NLRB No. 42 (2008); *but see, Diversicare Leasing d/b/a/ Wurtland Nuring & Rehabilitation Center,* 351 NLRB No. 50 (2007) (allowing withdrawal based on employee petition for "a vote to remove the union").

[100] *Universal Gear Services Corp.*, 157 NLRB 1169 (1966), *enfd.*, 394 F.2d 396 (6th Cir. 1968).

[101] *Sound Contractors Association*, 162 NLRB 364 (1966).

[102] *Dale's Super Valu, Inc.*, 181 NLRB 698 (1970) and *Baseball Club of Seattle Mariners*, 335 NLRB 563 (2001).

[103] 351 NLRB No. 28 (2007).

[104] These principles govern regardless of whether a card-check and/or neutrality agreement preceded the union's recognition. Moreover, similar changes were made to the current contract-bar rules, providing that a collective-bargaining agreement executed on or after the date of voluntary recognition would not bar a decertification or rival union petition unless notice of recognition has been given and 45 days have passed without a valid petition being filed. Under the prior rule, a collective bargaining agreement entered into on the date of recognition would bar an election for up to three years.

Dana's full implications are yet to be determined. While *Dana* did not address the issues surrounding neutrality agreements, this issue has been flagged by the General Counsel as one of a number of issues to be submitted to the Division of Advice.[105] Moreover, one commentator has characterized that *Dana Corp*., with its underlying focus on employee choice over labor relations stability, "illustrates a fundamental shift in the framing of American labor relations" and that [t]he emphasis on safeguarding the rights of employees to collectively bargain over their conditions of employment has increasingly given way to a new concern with safeguarding the ability of employers to choose whether to engage in collective bargaining at all."[106] Some speculation is ongoing regarding its implications and whether the EFCA is actually helped by this development.[107]

NLRB Proposed Rule Making on Joint Petitions

On February 26, 2008, the Board published in the Federal Register its proposal for a new rule on joint petitions for certifications consenting to an election (hereinafter referred to as an "RJ Petition").[108] This notice of proposed rule-making provides in relevant part that as part of the NLRB's on-going efforts to address the needs of its constituents, the Board is proposing to adopt a rule that would, in essence, authorize a petition for a prompt NLRB election to be jointly filed by a labor organization and an employer.[109] The Supplementary Information published with the proposal notes that "Section 102.62 of the Board's Rules and Regulations currently provides three kinds of "consent" election procedures."[110] More specifically, "[u]nder Sec[tion] 102.62(a) and (b), the parties must stipulate with respect to jurisdictional facts, labor organization status, appropriate unit description, and classifications of employees included and excluded. The parties must also agree to the time, place, and other election details."[111] In addition, "[u]nder Sec[tion] 102.62(a), the parties agree that post-election disputes will be resolved with finality by the Regional Director."[112] Further, "[u]nder Sec[tion] 102.62(b), post-election disputes are resolved pursuant to Sec[tion] 102.69 of the Board's Rules and Regulations,

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[105] See MEMORANDUM GC 07 11 (9/25/07), available at http://www.nlrb.gov/shared_files/GC%20Memo/2007/GC%2007-11%20Mandatory%20Submission%20to%20Advice.pdf

[106] Raja Raghunath, *Stacking The Deck: Privileging "Employer Free Choice" Over Industrial Democracy in the Card-Check Debate*, 87 Neb. L. Rev. 329 (2008).

[107] *See* Amy Moor Gaylord and Jennifer A. Niemiec, *Hot Topic: Neutrality Agreements, Card Checks and Voluntary Recognition After Dana*, ABA Section of Labor and Employment Law 2nd Annual CLE Conference (September 2008), available at http://www.abanet.org/labor/lel-annualcle/08/materials/start.htm

[108] Published at Vol. 73 Fed. Reg. 10199 (2/26/08), available at http://edocket.access.gpo.gov/2008/E8-2767.htm.

[109] *Id*. at p. 10199. Interestingly, while the Board used the Federal Register process for the notice of proposed rulemaking, it disclaimed any obligation to do so, stating that in its view, "the changes involve rules of agency organization, procedure, or practice and therefore no notice of proposed rulemaking is required under section 553 of the Administrative Procedure Act (5 U.S.C. 553)" and that "the Regulatory Flexibility Act (5 U.S.C. 601) does not apply to these rule changes." Vol. 73 Fed. Reg. at p. 10200.

[110] *Id*.

[111] *Id*.

[112] *Id*.

with the parties retaining the right to file exceptions or requests for review with the Board."[113] Finally, [u]nder Sec[tion] 102.62(c), the parties can agree to the conduct of an election with disputed pre-election and post-election matters to be resolved with finality by the Regional Director."[114]

The Board then goes on to describe its proposed change as follows:

> The current proposal for revision of the Board's Rules and Regulations would create a new, voluntary procedure whereby a labor organization and an employer could file jointly a petition for certification consenting to an election. The petition will provide the date on which the parties have agreed for an election, not to exceed 28 days from the date of the filing of the petition, and the place and hours on which the parties have agreed for an election. In addition, the petition will provide a description of the bargaining unit that the parties claim to be appropriate, the payroll period for eligibility to vote in the election, and the full names and addresses of employees eligible to vote in the election. If the petition lacks any necessary information, the Regional Director will so advise the parties and request that the petition be corrected.

Of particular interest is the fact that <u>no showing of interest</u> will be required to be filed with the RJ petition. Rather, the Supplementary Information explains as follows:

> No showing of interest is required to be filed with the petition. If it appears to the Regional Director that the information provided on the petition is accurate and sufficient and that the bargaining unit description is appropriate on its face and not contrary to any statutory provision, the petition will be docketed. Within 3 days of the docketing of the petition, the Regional Director will advise the parties of his/her approval of their request for an election. The parties' agreement as to the date, place, and hours of the election will be approved by the Regional Director, absent extraordinary circumstances.[115]

The Supplementary Information then explains the processes to be used for the posting of notices, and how intervention motions would be handled. The notice requirements simply provide that "within 3 days of the docketing of the petition, the Regional Director will send to the employer official NLRB notices, informing employees that the joint petition for certification has been filed and specifying the date, place, and hours of the election."[116] While "[t]hese notices must be posted by the employer in conspicuous places where notices to employees are customarily posted and must remain posted through the election", the failure to do so is grounds for setting aside the election only "whenever proper and timely objections are filed under the provisions of Sec[tion] 102.69(a)."[117] The proposed rule also states that in "addition to these notices, the employer must also post copies of the Board's official Notice of Election in

[113] *Id*.
[114] *Id*.
[115] *Id*. at p. 10199.
[116] *Id*.
[117] *Id*.

conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election, as required under Sec. 103.20 of the Board's Rules and Regulations."[118]

On the issue of intervention by rival unions, the Supplementary Information to the proposed rule state only that "[a]ny motions to intervene may be filed with the Regional Director in accordance with Sec. 102.65 of the Board's Rules and Regulations, except that any such motion must be filed within 14 days from the docketing of the petition."[119] Moreover, "[t]he Board's traditional intervention policies regarding levels of intervention and the intervenor's corresponding rights to appear on the ballot, seek a different unit either in scope or composition, or insist on a hearing, will be applicable."[120]

Finally, on the issue of unfair labor practices, including Section 8(a)(2) and 8(a)(5), the Board Supplementary Information states:

> Unfair labor practice charges, including those alleging Section 8(a)(2) or Section 8(a)(5) violations of the National Labor Relations Act, will not serve to block the election or cause the ballots cast in the election to be impounded, but will be handled in conjunction with any post-election proceedings. All election and post-election matters will be resolved with finality by the Regional Director. Except as outlined above, the Board's traditional election rules and policies will apply, including those relating to withdrawal or dismissal of the petition.[121]

Thus far, nine sets of comments have been posted to the Board website.[122] These include comments from Bruce Buchanan, an attorney with King & Ballow Law Firm[123], the California Nurses Association[124], Catholic Healthcare Partners[125], the Center on National Labor Policy[126], Chamber of Commerce of the United States[127], the HR Policy Association[128], the Jackson Lewis

[118] *Id*.
[119] *Id*.
[120] *Id*. at p. 10199-10200.
[121] *Id*. at 10200.
[122] *See* http://www.nlrb.gov/research/frequently_requested_documents.aspx
[123] Available at http://www.nlrb.gov/nlrb/about/foia/Proposed_Rule_Joint_Petitions/Bruce%20Buchanan%20Letter%20to%20Heltzer%203-26-08.pdf
[124] Available at http://www.nlrb.gov/nlrb/about/foia/Proposed_Rule_Joint_Petitions/California%20Nurses%20Assn%20Comments%20on%20JP%20Rule.pdf
[125] Available at http://www.nlrb.gov/nlrb/about/foia/Proposed_Rule_Joint_Petitions/Catholic%20Healthcare%20Partners.pdf
[126] Available at http://www.nlrb.gov/nlrb/about/foia/Proposed_Rule_Joint_Petitions/Center%20on%20National%20Labor%20Policy.PDF
[127] Available at http://www.nlrb.gov/nlrb/about/foia/Proposed_Rule_Joint_Petitions/Chamber%20of%20Commerce.pdf
[128] Available at http://www.nlrb.gov/nlrb/about/foia/Proposed_Rule_Joint_Petitions/HR%20Policy%20Assn.pdf

Law Firm[129], Massachusetts Nurses Association[130], and the National Right to Work Legal Defense Foundation, Inc.[131] The reaction to the proposed rule has been mixed. One group, the Catholic Healthcare Partners[132], supports the proposal based on its own recent experience with a similar process. Jackson Lewis also supports the rule although with suggested revisions. As Jackson Lewis explains, the proposed rule "expands opportunities for employees to make a free and informed choice consistent with the protections afforded by" the Act. Even Jackson Lewis, however, does not support the elimination of the showing of interest requirement, and also advocates other changes, such a standard form of authorization card to be used for RJ Petitions that could not be used for any other purpose, and a requirement that the union prevail by a majority of unit employees rather than majority of those voting.

The U.S. Chamber of Commerce largely supports the proposal, but with reservations over two aspects, namely the possibility of rights waiver without adequate notice, and the need for clarification as to the resolution process for unfair labor practice charges. On the first issue, the Chamber is concerned that "many employers or smaller or newer labor organizations may not fully comprehend the manner in which this new type of consent election differs from standard representation election procedures." Therefore, the Chamber advocates use of a notice form which details the specified rights and procedural safeguards which are waived. On the issue of unfair labor practice processing, the Chamber expressed concern over clarity, explaining that while the Chamber "understands and supports the concept of parties voluntarily agreeing that unfair labor practice charges will not serve to block a scheduled election", it was concerned that the proposal could create an inference that parties have waived their right to have unfair labor practices heard and determined by an Administrative Law Judge ("ALJ") and thereafter have that determination reviewed by the Board, something the Chamber would oppose.

The National Right to Work Legal Defense Foundation (NRTW)[133] expressed significant criticism of the proposed rule, arguing that it gives control over the election process to union officials and employers and then applies a rubber stamp of Government approval.[134] Of particular concern is that the system would in essence allow employers and their preferred unions

[129] Available at http://www.nlrb.gov/nlrb/about/foia/Proposed_Rule_Joint_Petitions/Jackson_Lewis_LLP_Comments_03_26_08.pdf

[130] Available at http://www.nlrb.gov/nlrb/about/foia/Proposed_Rule_Joint_Petitions/Massachusetts%20Nurses%20Assn.pdf

[131] Available at http://www.nlrb.gov/nlrb/about/foia/Proposed_Rule_Joint_Petitions/National%20Right%20To%20Work.pdf

[132] Available at http://www.nlrb.gov/nlrb/about/foia/Proposed_Rule_Joint_Petitions/Catholic%20Healthcare%20Partners.pdf

[133] The National Right to Work Legal Defense Foundation, Inc., is described in its comments as "a non-profit charitable organization providing free legal aid to employees whose human or civil rights have been violated by abuses of compulsory unionism." See http://www.nlrb.gov/nlrb/about/foia/Proposed_Rule_Joint_Petitions/National%20Right%20To%20Work.pdf

[134] *Id*.

to schedule rapid-fire elections at will, with no showing of interest that even a single employee desires the union's representation[135]; gerrymander the bargaining unit in a way that would not be permitted in a traditional representation process; refrain from giving advance notice to employees that the election will be conducted, since the notice requirement as proposed is, in the NRTW's view, inherently unenforceable; and finally, engage in wrongful conduct to coerce employees to support the union as blocking charges are inapplicable and employees are not parties to post-election proceedings.[136] In addition, the NRTW objects because the proposal removes the Board from effectively policing the election process, instead delegating almost all authority to what NRTW considers to be colluding union officials and employers.[137]

The Center on National Labor Policy[138] focused its comments not on perceived shortcomings in the rule, but rather in support of an alternative proposal that would amend the NLRB's Rules and Regulations to make clear that employers can file RM Petitions[139] upon a union demand for a recognition agreement. Called the "RM Petition Alternative" by the Center, this alternative would, in the Center's view, solve the problems associated with "prolific union use of private 'recognition agreements' to organize employees outside of the Board's processes." Rather than pursuing the proposed RJ process, which the Center views as ineffective in combating "the Board's slide into irrelevancy", the Center is far more concerned that action be taken to eliminate "circumvention of the NLRA's election procedures in favor of private recognition agreements", a development the Center claims "should be deeply troubling for the Board because it places employee rights in the self-interested hands of employers and unions." As the Center asserts:

> Under a recognition agreement, union organizers can pressure employees one at time to "vote" for a union by signing a union card. By contrast, in a secret ballot election, employees are free to vote their conscience in the privacy of voting booth. Under most recognition agreements, employers are gagged from speaking about unionization and forced to assist the union's organizing campaign against

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[135] *Id*. Similarly, Bruce Buchanan, an attorney with King & Ballow Law Firm, also opposes the rule asserting it is both contrary to the Act's purpose and its statutory language. In Buchanan's view the proposal furthers the interests of employers and unions without regard to employee rights, permitting an election even in the absence of any showing of interest.
[136] *Id*
[137] *Id*.
[138] The Center on National Labor Policy, Inc. ("Center") described itself as "a national non-profit legal foundation concerned with protecting the individual rights of employers, employees, and consumers. Founded in 1975, the Center has a long and significant history of experience under the National Labor Relations Act, from defending employees in litigation, upholding employee Section 7 rights, enforcing Section 7 rights, protecting employer rights, and presenting the public interest." It also describes itself as "a non-profit organization providing free legal assistance to employees whose rights have been violated by excesses of union and government power." http://cnlplaw.org/.
[139] An RM Petition is a petition is filed by an employer for an election when one or more unions claim to represent the employer's employees or when the employer has reasonable grounds for believing that the union, which is the current collective bargaining representative, no longer represents a majority of employees. In the latter case, the petition must be supported by the evidence or ''objective considerations'' relied on by the employer for believing that the union no longer represents a majority of its employees.

their employees. By contrast, Board procedures favor a robust debate in which employees hear both the pros and cons of unionization.[140]

Finally, the Human Resources Policy Association, a group of H.R. professionals comprised of the top twenty companies in the United States, described a "divided reaction to the proposals", with some members asserting "that the proposed rule is an abandonment of the principal of employee free choice which is at the heart of the National Labor Relations Act." In particular, this group is concerned over the lack of showing of interest even though the employees will ultimately get to decide the secret ballot election process. In contrast, other members of the H.R. Policy Association view the proposal "as a potentially useful mechanism available to employers and unions that mutually agree that an expeditious resolution of the representation question through a mechanism that preserves the confidentiality of its secret ballot election is desirable." H.R. Policy Association members falling into this category cannot believe that it is preferable to other informal mechanisms for recognition, such as card check, which lack confidentiality and cause concerns over issues of coercion.

In the end, the H.R. Policy Association as a group neither supports nor opposes the proposal. It does, however, urge a change that would make the RJ Petition available to an employer that is being subjected to pressure by a union to agree to a card check recognition procedure, even though the union has not made a present demand for recognition. In the Association's view, and citing to *New Otani Hotel & Garden*[141], the Association disagrees with what it characterizes as the Board's constrained view of what represents a "claim to be recognized." As explained by the Association, "[t]he Board refuses to include within such claims instances where a union insists that an employer agree to a card check certification but fails to 'make a present demand for recognition,' even when the union exerts substantial external pressure upon the employer to agree to a card check. Thus, the association advocated that this process end the differentiation between a demand for recognition and a demand for agreement on the card check recognition process."

Organized labor also has concerns over the RJ petition proposal. For example, in comments submitted by the Massachusetts' Nurses Association (MNA)[142] over the proposed rule, the MNA described it as antithetical to the rights of employees protected under Section 7 of the Act to designate "representatives of their own choosing," and antithetical to the unfair labor practice provisions contained in Sections 8(a)(2) and 8(b)(1)(A), and thus in excess of the Board's authority. MNA also objects on due process and equal protection grounds. The California Nurses Association (CNA) is similarly opposed to the new rule, asserting it is unlawful because (1) it denies fundamental statutory rights of collective self-determination under Section 7, (2) it exceeds the Board's authority because it purports to eliminate the statutory

[140] *See Linn v. United Plant Guard Workers*, 383 U.S. 53,62 (1966); *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir.1971); *NLRB v. Pratt & Whitney Air Craft Div., 789* F.2d 121, 134 (2d Cir. 1986); *Excelsior Underwear*, 156 NLRB 1236, 1240 (1966)(footnote in original).
[141] 331 NLRB 1078 (2000).
[142] The Massachusetts Nurses Association (MNA) described itself as "the certified bargaining agent for over twenty thousand registered nurses under the National Labor Relations Act, as amended. It is easily the largest labor organization representing registered nurses within Massachusetts, and is currently engaged in multiple organizational drives in Massachusetts and other New England states."

prerequisite of a "question concerning representation" necessary for processing a petition for certification to election, and (3) it creates an exception and employer safe harbor from the prohibitions of Section 8(a)(2) of the NLRA.

The rule is pending comment for the NLRB and as of this writing has not been finalized. In the face of the above-described opposition, it seems unlikely to proceed without substantial revision. Moreover, the change in administration and the opposition of organized labor makes the likelihood of adoption seem even more remote.

Intellectual Property Update

Intellectual property rights for union members in higher education are generally determined by contract, as governed by state and federal law. This section reviews recent cases – largely in the public sector – analyzing the allocation of intellectual property rights in collective bargaining agreements, and closes by canvassing some recommended policy language and provisions.

Cases

Professional Staff Congress-City University of New York and CUNY, 40 NYPER (LRP) P4604 (N.Y. PERB ALJ Dec. 18, 2007)

In this case, the Professional Staff Congress (PSC), which represents approximately twenty thousand instructional staff at the City University of New York (CUNY), including professors, assistant professors, associate professors, and instructors, filed an improper practice charge against CUNY. The charge alleged that CUNY violated New York's Public Employees' Fair Employment Act by negotiating directly with represented instructors to develop and teach online courses for the Communication and Culture online degree program and failing to inform PSC of the negotiations.

From 2000-2003, CUNY received grant funding to develop online courses. Eighteen faculty members signed agreements with CUNY in May 2006 to develop materials for the online courses; those materials, which include syllabi, handouts, readings lists, individual and group exercises, and instructor guides, would be created prior to the start of the course. The agreements between CUNY and the faculty members indicated that the agreement was intended to be a contract for services "outside the scope of the Author's employment" and that it was a "commissioned work for hire" pursuant to CUNY's intellectual property policy. The agreement also provided that CUNY was the "sole and exclusive owner of the Course and all rights therein, including, without limitation, copyright." In case the online course was not construed as a work for hire, the faculty members signing the agreement also agreed to assign CUNY "the entire right, title and interest in and to the copyright in the course." In exchange for developing the course materials and transferring the copyright, the faculty member would be paid $3000 upon delivery, $500 per term for the first two academic terms in which another person taught the course, and $3000 for a course revision. The faculty members who developed the courses had no guarantee that they would actually teach those courses; if they were hired to teach them, they would be paid separately for those teaching duties.

In November 2006, CUNY sent a memorandum and new agreement to the faculty members who had developed course materials for the Communication and Culture program. The memorandum stated that the payments to faculty members who taught the courses for which they developed materials were not intended to be compensation for development of those materials, because faculty hired to teach a course were already obligated to develop the materials for that course. Instead, the payments were intended to be in exchange for the author's copyright interests in the materials. As the memorandum said, "the principal purposes of the revised agreement is to make clear that the payments being made under the agreement are to purchase your copyright interest, not to provide further compensation to you for the performance of your contractual duties." Ultimately, pursuant to the agreement, the faculty member received payment for both the course material and the copyright.

After PSC filed a charge alleging that CUNY unfairly engaged in direct dealing by entering into these agreements, CUNY asserted that the development of the course material constituted copyrightable materials, and that the agreement was therefore covered by CUNY's intellectual property policy, about which it was not obligated to bargain with PSC pursuant to *PSC-CUNY v. New York State PERB*, 7 NY3d 458, 39 PERB 7010 (2006) (see below). The intellectual property policy states that the creator of copyrightable materials shall own all rights, and that CUNY shall own all rights to other intellectual property.

In dismissing PSC's charge, the Administrative Law Judge focused on whether the payments to the faculty members were for the copyright interests in courses that were already developed or for courses not yet developed. "If the payment were made for courses not yet developed, which is traditional unit work, PSC would indeed be correct in its assertion that CUNY dealt directly with PSC unit members in violation of the Act. However, if the courses already had been developed, the intellectual property rights attached to them would be governed by CUNY's intellectual property policy, or by copyright law."

Based upon CUNY's testimony, and in the absence of any countervailing testimony from PSC, the ALJ concluded that "what was intended, and what in fact occurred, was for CUNY to acquire the right to use existing course materials. As a result . . . CUNY cannot be found to have dealt directly with unit members for paying them for courses to be developed." The ALJ reasoned that because CUNY's intellectual property policy assigned copyright to the faculty member creating the material, because PSC had been interpreted to have waived its rights to negotiate regarding the IP policy while the collective bargaining agreement was in effect, and because the right of copyright included the right to assign the copyright, the assignment of the copyright to CUNY in exchange for payment was encompassed within the IP policy and PSC "does not have any right to bargain about the assignment of the copyright interests by faculty members." The ALJ therefore dismissed the charges.

Pittsburg State University/Kansas NEA v. Kansas Board of Regents, PSU and PERB, PERB Case No. 75-CAE-23-1998 (Kansas Public Employee Relations Board Aug. 16, 2007)

This case involved a challenge by the Kansas National Education Association (KNEA) to the Kansas Board of Regents' proposed policy giving ownership of faculty intellectual property to the universities at which they work. In 2004, a Kansas appellate court ruled against the KNEA, stating that the Regents were not required to engage in bargaining with the union on copyright ownership issues because such a practice would conflict with federal law's provision that an author may negotiate away his or her intellectual property rights but cannot be required to do so. The appellate judge reached this decision by assuming that the faculty members' intellectual property was work-for-hire, and thus the property of the University.

The KNEA appealed the case to the Kansas Supreme Court, and in 2005, the Kansas Supreme Court ruled that intellectual property rights are not simply assumed to be work-for-hire belonging to the university and can be a subject of collective bargaining. Finding the appellate court's reasoning to be an "incorrect application of federal copyright law," the Kansas Supreme Court concluded that to assume universities' blanket ownership of faculty intellectual property was "too big a leap." Instead, the court recognized that the question of ownership of faculty work is a complex one, depending on a careful analysis of the employment relationship and the reason for and method of creation of the work itself. The court, citing the AAUP Statement on Copyright, recognized that faculty intellectual property ownership cannot be treated simply as the work of an employee belonging to an employer, but rather "will necessarily involve not just a case-by-case evaluation, but potentially a task-by-task evaluation."

The court returned the case to the district court, which returned it to the Public Employee Relations Board (PERB) "for additional findings regarding whether ownership of intellectual property is a condition of employment" and therefore mandatorily negotiable under the Public Employer-Employee Relations Act (PEERA), and whether ownership of intellectual property is an "inherent management prerogative" and therefore not mandatorily negotiable under an exception in the state law. The PERB concluded in February 2007 that ownership of intellectual property was a mandatory subject of bargaining; the PERB therefore found that the university and Regents had engaged in various prohibited bargaining practices and ordered that the Board of Regents and university withdraw its unilateral implementation of the intellectual property policy and meet and confer in good faith with the KNEA on intellectual property rights.

The PERB noted that under Kansas law, an employer is prohibited from willfully refusing to meet and confer with the exclusive representative of employees in a bargaining unit over "conditions of employment," which include (but are not limited to) such matters as salaries, wages, hours of work, leave, benefits, and grievance procedures. To determine whether intellectual property rights, which are not expressly included in the list of conditions of employment, are mandatorily negotiable, the PERB weighed the interests of the employer and employees "by considering the extent to which the meet and confer process will impair the determination of governmental policy." To appropriately balance those interests, the PERB looked to three criteria, two of which were relevant here: whether the intellectual property policy "intimately and directly affects the work and welfare of public employees;" and, if so, whether the policy "is a matter on which a negotiated agreement would not significantly interfere with the exercise of inherent managerial prerogatives." As the PERB noted, the basic inquiry "must be whether the dominant concern involves an employer's managerial prerogative or the work and welfare of the public employee."

The PERB concluded that "the topic of intellectual property 'intimately and directly affects the work and welfare of' the public employees" of Pittsburg State. The PERB also ruled that there was no "inherent managerial prerogative" that would "suffer significant interference by negotiating in regard to intellectual property rights." The PERB dismissed the Regents' and university's argument that a meet and confer requirement with respect to intellectual property rights would interfere with the university's right "to direct the work of its employees," reasoning that the issue was not the university's right to direct its employees' work but the union members' rights "regarding intellectual property after it has been created." Finally, after a long analysis of the meaning of the word "willfully," the PERB concluded that the Regents and university "intentionally, voluntarily, or deliberately" unilaterally adopted the policy and refused to meet and confer about the policy with the union, and therefore engaged in prohibited practices under Kansas law.

The decision, which was an "initial order," became a final order after consideration by the full PERB on August 16, 2007.

SERB v. Kent State University, 23 OPER 73, 2006 OPER (LRP) LEXIS 74 (Ohio SERB Feb. 21, 2006)

The AAUP chapter at Kent State University represented the university's full-time tenure-track faculty; the chapter and KSU had a collective bargaining agreement (CBA) covering the period from September 2001 through September 2004, and were negotiating a successor agreement during the time covered by this complaint. The section of the agreement on intellectual property rights noted that it included copyrights. Kent State faculty are paid a regular salary for performing their regular duties and responsibilities, not conditioned on research resulting in patents. The regular duties and responsibilities of a full-time tenure-track faculty member do, however, include engaging in research. Under Ohio law, Kent State – a public institution – has exclusive ownership of any invention by a faculty member, any patent resulting from the invention, and any income resulting from the patent, including all license income, if the faculty member develops the invention in the course of his or her work or while using university facilities.

Kent State has an Office of Technology Transfer and Economic Development (OTT), which oversees the patenting of all employee and student inventions. Once a faculty member has created an invention, the faculty member must submit a disclosure form to OTT, after which a University Patent and Copyright Board decides whether to apply for a patent for the invention. If the university receives a patent, it may market or license the patent; the licensing agreement, negotiated by the university, specifies the compensation that the university receives, which could include an upfront fee, a yearly minimum fee, and ongoing royalties if the company produces a commercial product from the patent. Neither the AAUP chapter (the exclusive collective bargaining representative) nor the faculty member is involved in negotiating the license agreement or signs the agreement.

In 1988, the university developed Patent Income Guidelines, which specify the amount of patent income that is distributed to the faculty inventor (40%), the inventor's research unit (15%), the university's general fund (15%), and the Research and Graduate Studies Department

(30%). Faculty inventors receive license income only when the university receives it from a third party, and the income is dependent upon factors like the licensee's financial well-being and the commercial viability of the product. When the Guidelines were created, the AAUP and KSU had a collective bargaining agreement that expired in 1990; at the time, the AAUP did not request that the university bargain over the guidelines and did not file a grievance over the creation or implementation of the guidelines.

In 2003, KSU notified the chapter that it intended to revise and codify the procedures governing the distribution of licensing income; the revisions would be subject to review by the faculty senate and approval by the Board of Regents. The AAUP demanded that the parties bargain over the proposed revisions, but after an informal meeting, the university rejected the AAUP's demand. In late 2003, the AAUP filed a grievance based on the university's refusal to bargain, and in mid-2004 filed a Notice to Negotiate with SERB, seeking to negotiate a successor CBA. During those negotiations, the AAUP made a formal request to Kent State to bargain over the distribution of patent license income, as well as the terms of the guidelines, but the university refused. The AAUP filed an unfair labor practice charge soon after.

Kent State asserted that a requirement to collectively bargain regarding the distribution of patent income would violate the federal Bayh-Dole Act and Ohio state law. The Bayh-Dole Act[143] requires universities receiving federal funding for research projects to share patent royalties with inventors, while the state statute[144] provides that public universities in Ohio own all patents resulting from inventions developed by university employees acting within the scope of their employment. The state statute also permits a public university's board of trustees to direct how the university licenses any income from inventions or patents.

The State Employment Relations Board rejected both arguments. With respect to the Bayh-Dole Act, the Board observed that the statute does not restrict or stipulate *how* royalties must be shared with inventors. With respect to state law, the SERB noted that the statute "contemplates that a university board of trustees may enter into various contractual relationships, each having as their subject matter the university-owned inventions and patents. The licensing agreements the University enters into with third parties are examples of such contracts." The section of the statute stating that patent rights "may be licensed 'upon such terms as the board of trustees may direct' does not preclude contract negotiations from occurring among the University and potential third-party licensees. . . . Similarly, under [a different state statute,] a university board of trustees acts to accept or reject a proposed collective bargaining agreement after its designated representative has completed the collective bargaining negotiations process."

Because the statute vesting the university board of trustees with authority to accept or reject a proposed collective bargaining agreement prevailed by its terms over all other state statutes, the SERB turned to the question of whether the university was required to bargain in good faith about the distribution of patent income.

Under Ohio law, public employers may determine matters of inherent managerial policy, but are required to bargain on matters relating to wages, hours, and other terms and conditions of

[143] 35 U.S.C. §§ 200, *et seq*.
[144] Ohio Revised Code §§ 4117.11(A)(1), (A)(5).

employment. “Thus, if a given subject involves the exercise of inherent managerial discretion and also materially affects any of these factors, a balancing test must be applied to determine whether the subject is a mandatory or permissive subject of bargaining.” The balancing test – developed in a 1995 SERB decision, *In re SERB v. Youngstown City School Dist. Bd. of Ed.*, SERB 95-010 (June 30, 1995) – weighs the following factors: (1) the extent to which the subject is logically and reasonably related to wages, hours, and terms and conditions of employment; (2) the extent to which the employer’s obligation to negotiate may significantly abridge its freedom to exercise various managerial prerogatives; and (3) the extent to which the mediatory influence of collective bargaining mechanisms are the appropriate means of resolving conflicts over the disputed subject matter.

With respect to the first prong, the Board reviewed a Kent State policy characterizing license and royalty income as “compensation,” and concluded that because both the NLRB and the U.S. Supreme Court have found that analogous types of “additional” compensation constitute employee wages, the distribution of patent income is a “term or condition of employment.” The Bard also found it significant that inventors are eligible to receive patent income only because of their employment with the university, and that the university perceives the availability of patent income as an incentive to work at the university. The Board rejected the assertion that patent income is not a term and condition of employment because relatively few bargaining-unit members receive distributions, focusing instead on the impact on the affected faculty members.

With respect to the second prong, SERB opined that the university has a strong interest in the distribution of patent income one of the university’s three key missions is research; such income funds 100 of the OTT’s budget; and patent income supports research in a variety of other ways. “The Guidelines, therefore, involve management rights to determine the functions and programs of the University, to utilize technology, and to take actions to carry out the University’s mission. . . . The University has a strong interest in this prong.”

With respect to the final prong, the Board observed that a variety of other mechanisms in place, including the University Patent and Copyright Board and the Faculty Senate, already allow the parties to discuss and revise the Guidelines, while allowing the University to exercise managerial discretion. In addition, the university already informs faculty inventors about licenses and income distributions.

Reasoning that the AAUP’s interest in the first prong was moderate while Kent State’s interests under the second and third prongs were strong, the Board concluded that patent income distribution is a permissive, rather than mandatory, subject of collective bargaining. The university was therefore free to reject the chapter’s demand to bargain over patent income distribution during the successor CBA negotiations.

Professional Staff Congress-CUNY v. PERB, et al, 857 N.E.2d 1108 (N.Y. App. Ct. 2006)

The Professional Staff Congress (PSC), which has had a series of collective bargaining agreements with the City University of New York (CUNY) since 1973, represents approximately 17,000 instructional and administrative employees at CUNY. Until November 2002, CUNY had an intellectual property policy in place that addressed ownership of copyrights and patents, payment of other royalties, and other issues related to intellectual property developed by CUNY employees. The PSC and CUNY never negotiated over the intellectual property policy and it was never incorporated into any of the CBAs. After the 1996-2000 CBA expired, and while the PSC and CUNY were negotiating a new agreement, CUNY began amending the intellectual property policy; in response, PSC demanded to negotiate over the policy. CUNY rejected the demand, asserting that the PSC had waived the right to negotiate the policy.

CUNY's contention was based on Article 2 of the parties' agreement, which authorizes the CUNY Board of Trustees to alter policies relating to a "term or condition of employment" after giving PSC "notice and an opportunity to consult," but without obtaining PSC's consent, as long as the Board's action is not inconsistent with any terms of the CBA. CUNY argued that even though the prior CBA had expired, and the parties were negotiating over a new one, the Article 2 waiver remained in effect during negotiations.

PSC filed an improper practice charge with the Public Employment Relations Board regarding CUNY's refusal to bargain, but before the charge was resolved, the parties reached agreement on a 2000-2002 CBA. Before signing the new agreement, which retained the Article 2 language, PSC withdrew its request to bargain over the intellectual property policy. PSC again demanded to bargain over the intellectual property policy prior just before the 2000-2002 CBA expired, and CUNY again refused, citing Article 2. In November 2002, CUNY adopted a new intellectual property policy, and PSC re-filed its improper practice charge. The PERB ruled that PSC had, through Article 2, clearly and unambiguously waived its rights to negotiate the intellectual property policy and concluded that the waiver survived the expiration of the CBA. PERB's decision was appealed to New York's Appellate Division and then to the New York Court of Appeals, which issued this decision upholding the PERB's opinion.

The Court of Appeals concluded that the intellectual property policy fell within the purview of Article 2 because the policy was never made part of the parties' collective bargaining agreements and its alteration did not conflict with any term of the CBA. Given that, CUNY was not required either to obtain PSC's consent to a change in the intellectual property policy or to negotiate modification of the policy.

The issue, then, was whether the Article 2 remained in effect *after* the CBA expired. Under the "*Triborough* doctrine," articulated in a 1972 PERB case (5 PERB 3037 (1972)), terms and conditions of employment are carried forward while a new agreement is being negotiated, regardless of whether they were actually embodied in a CBA. According to PERB, "the duty to maintain the status quo devolves not only upon the public employer, but also upon the public employee." In addition, in 1982, the New York state legislature codified the *Triborough* doctrine by making it "an improper practice for a public employer . . . deliberately . . . to refuse to continue *all* the terms of an expired agreement" – not just mandatory subjects of negotiation – "until a new agreement is negotiated." Civil Service Law § 209-a(1)(e) (emphasis added).

Here, PSC and CUNY could have included a "sunset" provision in the CBA indicating that Article 2 would expire at the expiration of the agreement, which they did for other elements of the CBA, and PSC could have demanded collective bargaining on the intellectual property policy or objected to amendments to the policy under Article 2 at some point during the previous twenty-five years. Because they did neither, the Court of Appeals upheld PERB's determination that CUNY's continuation of the Article 2 waiver was not an improper practice. The Court of Appeals also rejected PSC's claim that maintaining Article 2 after the expiration of the CBA would entitle CUNY to a waiver "in perpetuity": "The Article 2 waiver is itself a mandatory subject of negotiation and the union is free to seek alteration or elimination of that language through the collective bargaining process."

In closing, the Court of Appeals advised that if PSC wished to bargain over the intellectual property policy in the future, PSC could "propose that Article 2 be amended to exempt the intellectual property policy from its scope or to include a sunset clause that would allow negotiation of the topic during the status quo period. Since it is subject to the give and take of collective bargaining, the Article 2 waiver is no more likely than any other term of the parties' CBA to continue in perpetuity."

University of Rutgers v. Rutgers Council of AAUP Chapters, 30 NJPER 44 (N.J. PERC March 26, 2004)

The AAUP chapter at Rutgers represents teaching and graduate assistants and certain faculty members; the most recent collective bargaining agreement as of the time of this case was effective from July 1999 through June 2003. Rutgers also has a patent policy, which has been in place since 1962, and was amended in 1974, 1986, and 1996. A majority of Rutgers' research is subject to the Bayh-Dole Act (see above), and Rutgers has an Office of Corporate Liaison and Technology Transfer (OCLTT) to handle licensing and patenting activity.

In 1994, Rutgers formed a Patent Policy Advisory Committee, composed of twelve faculty members and administrators, which recommended revisions to the 1986 patent policy. Both the original 1986 policy and the 1996 amendments required Rutgers employees to assign to Rutgers any patent rights resulting from inventions made during the course of their employment with the university.

Rutgers' Board of Governors adopted the amendments in 1996, and the AAUP alleged that the amendments changed elements of the 1986 policy, including the distribution of royalty income to faculty inventors. In 1996 and in 2003, the AAUP sought to negotiate over the patent policy; when Rutgers refused, AAUP filed an unfair practice charge. In this decision, the Public Employment Relations Commission (PERC) assessed whether the policy was mandatorily negotiable via a scope of negotiations process.

Under New Jersey state law, an issue is mandatorily negotiable in the public sector when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. The last element depends upon a balancing of the employees' and employers' interests; according to the PERC, "when the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions."

In general, the PERC observed that in the context of non-federally-funded invention, New Jersey law imposes no obstacle to requiring employees to assign their patent rights to their employers, and that employers and employees (or employee representatives) may negotiate over issues like the terms of assignments and distribution of royalty income. With respect to federally-funded inventions, the Bayh-Dole Act assigns patent rights to the university, but various aspects of that assignment could still be subject to negotiation.

Analyzing each provision independently, the PERC reached the following conclusions:

(1) Royalty income is a form of compensation; negotiating over such income would not interfere with Rutgers' policy objectives; and the Bayh-Dole Act, while requiring that the university share some percentage of the royalties with the faculty inventor, does not mandate a particular percentage. The percentage of royalties to be received by faculty member inventors is therefore mandatorily negotiable with respect to all research.

(2) The distribution of Rutgers' share of royalty income to individual university departments and research units is not mandatorily negotiable. The income to departments is not shared with inventors or necessarily used to support inventors' research, and it therefore does not directly and intimately affect the terms and conditions of employment. In addition, the decision about how to reward departments and units is a policy determination to be made by Rutgers.

(3) Once a patent assignment has been made from a faculty inventor to the university, Rutgers has the right to enter into a no-fee license agreement, even though that will deprive the inventor of income. "[T]he purpose of an assignment of patent rights is to grant the assignee the right to license the invention. Any direct restriction on the employer's ability to set the terms of a license agreement would unduly undermine the purposes of the patent assignment." AAUP is not, however, precluded from negotiating alternative compensation for marketable inventions.

(4) The timing of when a faculty member discloses a potentially patentable invention is mandatorily negotiable. Although both state law and Bayh-Dole require that there be prompt disclosure, neither defines "promptly," and negotiations over the definition of "prompt" would not significantly interfere with Rutgers' patent program.

(5) With respect to a dispute over ownership of research materials and notebooks: "Beyond the employer's need to have access to notebooks in connection with patent applications and prosecutions, we find that the employees' interest In owning research materials unrelated to patent applications so that they can pursue publication outweighs any demonstrated managerial interest in owning that material. Any negotiated provisions concerning employee notebooks must allow Rutgers to comply with grant requirements governing review of

research documents and must also allow it to apply for and protect patents for faculty inventions to which it has been assigned the rights or to which it has taken title."

(6) Under both state law and Bayh-Dole, rights of reversion – that is, reversion of the patent rights to the faculty inventor – are mandatorily negotiable, despite the fact that the initial patent right is assigned to the university.

(7) The university has a non-negotiable right to review faculty members' agreements regarding outside consulting, where those agreements concern intellectual property, to ensure that university rights are not inappropriately assigned to other parties. Although the PERC recognized employees' interests in their own earning capacities, it also observed that the review clause was triggered only where the consulting activity was related to university research or use of university facilities. "The employer's interest in determining any improper use of public facilities and property is greater than where the outside employment is independent of the primary employment."

(8) The amount of notice that is given to inventors regarding whether or not to commercialize inventions is mandatorily negotiable.

(9) The effective dates of mandatorily negotiable provisions are mandatorily negotiable as well.

AAUP Policy

In June 1999, the AAUP adopted a Statement on Distance Education and a Statement on Copyright.

The Statement on Distance Education advises that "[a]s with all other curricular matters, the faculty should have primary responsibility for determining the policies and practices of the institution in regard to distance education. The rules governing distance education and its technologies should be approved by vote of the faculty concerned or of a representative body, officially adopted by the appropriate authorities, and published and distributed to all concerned."

> With respect to ownership rights, the Statement suggests that the institution should: establish policies and procedures to protect its educational objectives and the interests of both those who create new material and those who adapt material from traditional courses for use in distance education. . . . The policies should include provisions for compensating those who create new course materials or who adapt course materials originally prepared for traditional classroom usage, including any use or reuse of recorded material. Provision should also be made for the original teacher-creator, teacher-adapter, or an appropriate faculty body to exercise control over the future use and distribution of recorded instructional material and to determine whether the material should be revised or withdrawn from use.

AAUP POLICY DOCUMENTS & REPORTS, 211-13 (10th ed.).

The Statement on Copyright observes that "it has been the prevailing academic practice to treat the faculty member as the copyright owner of works that are created independently and at the faculty member's own initiative for traditional academic purposes." In addition, while faculty handbooks sometimes declare that faculty members are understood to have assigned their copyrights to the university, the Copyright Act "explicitly requires that a transfer of copyright, or of any exclusive right (such as the exclusive right to publish), must be evidenced in writing and signed by the author-transferor." With respect to "works made for hire," the Statement notes:

> The pertinent definition of "work made for hire" is a work prepared by an "employee within the scope of his or her employment." In the typical work-for-hire situation, the content and purpose of the employee-prepared works are under the control and direction of the employer; the employee is accountable to the employer for the content and design of the work. In the case of traditional academic works, however, the faculty member rather than the institution determines the subject matter, the intellectual approach and direction, and the conclusions. This is the very essence of academic freedom. Were the institution to own the copyright in such works, under a work-made-for-hire theory, it would have the power, for example, to decide where the work is to be published, to edit and otherwise revise it, to prepare derivative works based on it (such as translations, abridgments, and literary, musical, or artistic variations), and indeed to censor and forbid dissemination of the work altogether. Such powers, so deeply inconsistent with fundamental principles of academic freedom, cannot rest with the institution.

The statement also reviews the three types of situations in which a college or university may reasonably claim ownership of, or interest in, copyright to works created by faculty members or other university employees: genuine "made for hire" circumstances, as when, for instance, a work is created as a specific requirement of employment or as an assigned institutional duty; negotiated contractual transfers, for instance in "sponsored research" programs; and "joint works" as described in the Copyright Act, in which either two academic colleagues or, in rare circumstances, a faculty member and the institution would share joint ownership. AAUP POLICY DOCUMENTS & REPORTS, 214-16 (10th ed.).

For further background on intellectual property generally, see http://www.aaup.org/NR/exeres/517C85B6-CC13-4A47-AE3E-5C1763713B02.htm, and for additional information on copyright, see http://www.aaup.org/AAUP/protect/legal/topics/copy.htm. A primer on faculty rights and responsibilities in distance education is available at http://www.aaup.org/AAUP/protect/legal/topics/dl-ip-ownership.htm.

For additional information on legal issues in academic research – for instance, corporate funding, confidentiality provisions in research agreements, and institutional review boards – see: http://www.aaup.org/AAUP/protect/legal/topics/researchissues.htm (Donna Euben, 2003).

For one perspective on the patenting of academic research, see http://www.aaup.org/AAUP/pubsres/academe/2001/SO/Feat/Lieb.htm.

Model policy language

The AAUP has developed model policy and contract language, available at http://www.aaup.org/AAUP/issues/DE/sampleIP.htm. The AAUP suggests that an intellectual property policy contain sections addressing the definition of intellectual property, the ownership of the intellectual property, who may use the intellectual property, how any funds are to be distributed, and how emerging issues and disputes are to be resolved.

A recent paper on higher education intellectual property policies also sets out several recommendations. Beth Cate, David Drooz, Pierre Hohenberg, & Kathy Schulz, *Creating Intellectual Property Policies and Current Issues in Administering Online Courses* (NACUA CLE, Nov. 7-9, 2007). Similar to the AAUP recommendation, the authors – all of whom are institutional counsel – advise that an intellectual property policy should cover ownership and use of materials.

The ownership provision should take account of faculty members, visitors, non-faculty employees, and students. Cate, et al. observe that “universities have traditionally declined to assert ownership of their employed faculty’s independent scholarly works such as course materials (e.g. syllabi), scholarly articles and books, artwork, software, etc.” As an exception to that rule, however, it is typical for a college or university to assert ownership of intellectual property where the intellectual property “was created with substantial use of university resources, created under institutional auspices or as part of a larger research team, or created in the course of a sponsored research project.” Even when intellectual property is assigned to the university, “the faculty involved with the work should retain a right to publish scholarly articles or books about the work.”

With respect to use of materials, the authors articulate the presumption that “faculty-owned materials may be used [by faculty members] without restriction by, or accounting to, the university. The university may retain a license to certain materials created and owned by faculty such as material created for classroom use.” As for use of materials by the university itself, the authors suggest that the institution “will affirmatively seek to license materials which it owns in furtherance of its charitable mission . . . and the widest possible use of the results of research for the public good.” They also note specific issues that institutions might consider addressing in an intellectual property policy, including distance education, reproductions of lectures, faculty consulting, use of university resources, and open source code.

General Organizing Issues – Higher Education Update

Finally, this section reviews several categories of recent cases that may have significant consequences for organizing in higher education.

Unit definition

Pace University v. National Labor Relations Board, 514 F.3d 19 (D.C. Cir. 2008)

In *Pace University*, the U.S. Court of Appeals for the D.C Circuit agreed with the NLRB's ruling that a bargaining unit consisting of adjuncts who taught at least three credits should be permitted. This case dealt with the question of whether the Board's Election Order defining the *eligibility of voters* in a manner different from its definition of the *bargaining unit itself* could allow an employer to contend that the unit should be limited only to those who were eligible to vote.

In 2003, the New York State United Teachers (NYSUT) requested certification as the representative of adjunct and part-time faculty members at Pace University. After a hearing, the Board ordered an election and decreed that the unit would include all non-supervisory adjunct faculty members and part-time instructors. The faculty members and instructors who had taught at least three credits and/or 45 hours in any two recent semesters would be eligible to vote.

NYSUT won and was certified as the unit representative, but a question soon arose about whether only those contingent faculty members eligible to vote were included in the unit. The university argued that all other contingent faculty – i.e., those that did not meet the teaching requirements – were "casual" employees who were ineligible not just to vote but also to be represented. The Regional Director ruled that all adjuncts who taught at least three credits and/or 45 hours in one semester, *regardless of whether they had been eligible to vote*, were included in the unit. The University appealed to the NLRB, which issued a refusal to bargain determination (*Pace University*, 349 NLRB No. 10 (2007)). The D.C. Circuit Court of Appeals affirmed, ruling that the university could have challenged the unit determination previously but failed to do so, instead articulating only general objections to the unit.

The appeals court also rejected the university's argument that it reasonably relied on a typographical error in reaching the conclusion that contingent faculty who were not eligible to vote would not be included in the unit. The error appeared once in the election order but not in the part of the order defining the actual bargaining unit. As the court admonished the university: "Any confusion arising from the added text [to the amended election order] should have prompted experienced counsel to seek clarification or to state Pace's understanding on the record, not wait to raise the issue long after the election had occurred and the Board had certified the Union."

Research Foundation of the SUNY Office of Sponsored Programs and Local 1104, Communication Workers of America, 350 NLRB No. 18 (2007)

In *Research Foundation*, the Board ruled that research project assistants (RPAs) at SUNY's Albany, Buffalo and Syracuse locations were employees within the meaning of the Act, distinguishing the case from *Brown University,* 342 NLRB 483 (2004). While the Research Foundation was a not-for-profit educational corporation, it did not issue academic degrees, did not admit students, and was not an academic institution. In addition, the RPAs in question were employed solely by the Foundation, not by SUNY.

The Board observed:

> [T]he undisputed evidence demonstrates the existence of an economic relationship between the RPAs and the employer rather than an educational relationship, as in *Brown*. . . . [P]ursuant to an agreement with SUNY, the Employer receives, administers and manages government and private donor awards for SUNY's sponsored research programs. Under that agreement, the Employer employs research and other personnel, including the RPAs, "who shall be deemed to be employees of the [Research Foundation] and not the University." The RPAs are employed and received compensation, including benefits, under awards administered by the Employer; their compensation is subject to the Employer's compensation benchmarks; and they are placed on the Employer's payroll by the Employer's Human Resources office. In addition, the parties stipulated that the employer's labor and employment policies apply to the RPAs. The RPAs therefore clearly have an economic relationship with the employer.

The Board acknowledged that the RPAs were in an educational relationship, as evidenced by the facts that "RPAs must be enrolled at SUNY to work for the Employer, that their work assignments bear a substantial relationship to their SUNY dissertations, that they end their RPA careers once they graduate from SUNY, and that the Principal Investigators on their funded research projects often simultaneously serve as their advisers on the dissertations they must complete to be awarded a graduate degree from SUNY." Contrary to the Acting Regional Director's decision and the dissent's argument, however, the Board characterized that educational relationship as being with SUNY, not with the Research Foundation: "[T]he evidence cited by the Acting Regional Director . . . demonstrates the RPAs' primarily educational relationship with SUNY, not with the Employer. In sum, the petitioned-for RPAs have an educational relationship with SUNY, but an economic relationship with the Employer."

Columbia College and Illinois Education Association (IEA), 346 NLRB No. 69 (2006)

The Illinois Education Association (IEA) represented a unit of part-time faculty at Columbia College, a private institution, and sought to represent a unit of full-time and regular part-time staff employees working in a variety of academic and administrative departments at Columbia. After a vote against union representation, there was a dispute over whether part-time math, science, and writing center tutors could be included in the unit (and therefore whether their ballots were properly counted). Most of the tutors also held part-time faculty positions, and they were all hired to tutor on a per-semester basis, though they were generally rehired for each semester if they wished. Tutors received separate paychecks for teaching and for tutoring, and they were paid less for their tutoring than for their teaching.

The hearing officer determined, and the NLRB agreed, that the tutors were statutory employees of the college and had a community of interest with the other staff employees based on similar job functions, wage rates, and lack of benefits. In addition, the hearing officer found, and the Board agreed, that despite also holding part-time faculty positions, the tutors were not dual-function employees because they had separate and distinct employment relationships for each position. He concluded that in their capacity as tutors, they had a community of interest only with the part-time staff employees.

The Board further found that although the election agreement covering the election excluded "faculty," the tutors/faculty members could nevertheless be included in the unit due to their community of interest with other staff employees: when working in their non-faculty positions, they were paid hourly wages comparable to other staff employees, received no benefits, worked specific and limited schedules, worked under separate supervision from faculty, and performed non-classroom teaching functions. Instead of holding a single, integrated job with responsibilities spanning multiple classifications and potentially multiple collective-bargaining agreements, these employees' duties as faculty and as tutors were contained within their separate and independent positions. Accordingly, part-time faculty employees holding part-time tutoring positions could be included within the unit.

Topics of bargaining

California Faculty Association v. PERB, 2008 Cal. App. LEXIS 291 (Cal. Ct. App. Feb. 28, 2008)

In this case, the California Court of Appeals concluded that the terms and conditions on which an employer makes parking available to its employees "involve the employment relationship," and ordered the state Public Employment Relations Board (PERB) to determine whether the California State University (CSU) had engaged in an unfair labor practice in excluding members of the bargaining unit from parking in new parking structures and refusing to bargain over the decision.

The California Faculty Association (CFA) is the exclusive bargaining representative for faculty coaches, librarians, and academic counselors at CSU. CFA and CSU did not traditionally bargain over parking location, but they did traditionally bargain over parking fees, and the "Benefits" section of the 2002-04 collective bargaining agreement (CBA) contained a provision governing parking fees. In 2000-01, the university decided to build new parking structures at the Northridge and Sacramento campuses, and requested that CFA reopen the CBA to negotiate increased parking fees, which CFA refused to do. Subsequently, the university prohibited members of the bargaining unit from parking in the new structure at Northridge, while the university designated the new parking structure at the Sacramento campus as student parking only. The CFA filed unfair practice charges with respect to both campuses, alleging that the university violated California Government Code § 3571(c), which makes it illegal for the university to "refuse or fail to engage in meeting and conferring with an exclusive representative."

The administrative law judge (ALJ) considering the case issued a proposed decision in 2004 concluding that the university had violated that statute by unilaterally prohibiting employees from parking in the new parking structures, reasoning that parking location was an issue within the CFA's scope of representation. In 2006, however, the PERB decided that parking location was not within the scope of representation, and that the university therefore had no duty to bargain.

The Higher Education Employer-Employee Relations Act (HEERA) requires the university to "engage in meeting and conferring with the employee organization selected as exclusive representative of an appropriate unit on all matters within the scope of representation." "Scope of representation" generally means "wages, hours of employment, and other terms and conditions of employment." Cal. Gov. Code § 3562(r)(1). As the court here noted, "an employer's unilateral change in the terms and conditions of employment within the scope of representation is . . . a per se refusal to negotiate and a violation of HEERA." (Quoting *California State Employees' Ass'n v. PERB* ("*CSEA*"), 51 Cal.App.4th 923, 934 (Cal. Ct. App. 1996)). To show an illegal unilateral change, an aggrieved employee organization must establish that the employer altered a written agreement or past practice without giving notice or an opportunity to bargain, that the change is not isolated but amounts to a change of policy, and that the "change in policy concerns a matter within the scope of representation." 2008 Cal. App. LEXIS 291 at *7-8 (quoting *CSEA* at 935).

The PERB determined that the university's unilateral parking decision did not involve the employment relationship because "parking at both locations is not a condition of employment. Employees are not required to drive to work. However, in the event they choose to drive . . . [t]hey may, like student[s] and members of the public, park in 'daily use' spaces . . . or, alternatively, park off campus." The court of appeals concluded that the PERB's analysis was clearly erroneous.

In reaching its conclusion, the court relied on two cases. First, in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), the U.S. Supreme Court ruled that the prices for an in-plant cafeteria and vending machines were "terms and conditions of employment" subject to mandatory collective bargaining. The Court based its decision in part on the difficulty to employees in leaving the plant to eat lunch because of the location of the plant.

Subsequently, in *Statewide University Police Association v. Regents of the University of California*, Cal. PERB Dec. No. 356-H (1983), the state PERB concluded that the University of California had violated HEERA "by refusing to negotiate and by unilaterally raising the fees paid by its police officer employees for parking in lots operated by" the university. The state board analogized between the increases in in-plant food prices in *Ford* and the increases in parking fees, concluding that parking fees were within the scope of representation under HEERA because "[t]he availability of parking and its costs are matters of concern to employees" and the "[t]erms and conditions under which parking is available [are] plainly germane to working conditions."

The *Statewide University* decision also rejected the University of California's argument that parking fees were not a term or condition of employment because "alternative modes of transportation exist for employees." The PERB reasoned that although the Supreme Court in *Ford* invoked the absence of reasonable lunch alternatives, it did not indicate that the obligation to bargain "would *only* be affirmed in those cases in which it was shown that there existed no reasonable alternative to in-house culinary services, and in which employees were thus 'captive consumers' of such services." The *Statewide University* PERB therefore found that "the amount of fees charged to employees for employer-provided parking is a subject within the scope of representation under HEERA, *whether or not alternative methods of commuting are available to employees*." (emphasis added)

In this case, the PERB tried to embrace the same argument – known as the "captive consumer-no reasonable alternative" rationale – that it rejected in *Statewide University*. The state appeals court repudiated that effort, however, noting that in *Ford*, the Supreme Court relied not on the fact that the employees were "captive consumers," but on the fact that the lunch issue was a "matter[] of deep concern to workers" and was "plainly germane to the working environment."

Instead, the first question for determining if a subject is within the scope of representation with respect to the terms and conditions of employment is whether the subject "*involves* the employment relationship," not whether it is "*integral* to the employment relationship." The court continued: "The fact that driving (unlike eating) is not a necessity of life – and that employees are not required to drive to work, not required to park on campus if they do drive, and not required to park in permitted spaces if they do park on campus – makes no difference to whether the terms and conditions on which the university provides parking to its employees 'involves the employment relationship.'" (Quoting *Board of Trustees v. ILRB*, 224 Ill. 2d 88 (Ill. 2007).)

The court also emphasized that the employees' parking fees were included as a benefit of employment in the collective bargaining agreement.

Because there were still a number of issues to be resolved before concluding that the university violated the California Government Code, the court remanded the case back to the PERB for additional fact-finding. The PERB was charged with determining whether the terms and conditions of university-provided parking were "of such concern" to both the CFA and the university that "conflict is likely to occur" and collective bargaining would be appropriate; whether the university's obligation to negotiate would encroach on its managerial freedom; whether the university breached or altered the collective bargaining agreement or its own past practices; whether the CFA received notice or an opportunity to bargain over the change; and whether the change amounted to a change of policy.

Diablo Valley College Faculty Senate v. Contra Costa Community College District, 148 Cal. App. 4th 1023 (Cal. App. Ct. 2007)

In *Diablo Valley*, the California Court of Appeals determined that a decision by Diablo Valley College (DVC) to hire professional deans instead of filling managerial positions on a part-time basis with faculty members did not relate to "academic and professional matters" and therefore did not require "collegial consultation" with DVC's academic senate.

Diablo Valley College is one of three community colleges managed by the Contra Costa Community College District. Beginning in about 1968, faculty "division chairs" managed academic divisions within the college; division chairs were nominated by faculty and appointed by the university president. Division chairs, who continued to teach part-time, acted as "first-line managers for their divisions." In 1977, this system was put into the District's administrative procedures manual, but it was unclear whether this action, or the subsequent movement of the procedures into other manuals, was accompanied by collegial consultation or was formally adopted by the District's governing board. A description of the division chair selection procedure was subsequently added to the collective bargaining agreement between the District and United Faculty, the faculty union; the CBA identified division chairs as "management positions."

In 2001, however, the Community College District Chancellor decided to have all three colleges in the District managed by full-time professional administrators. The DVC Faculty Senate objected, arguing that the reorganization was an "academic or professional matter" that required collegial consultation under California regulations because it would alter faculty roles in governance. After an interim review, the Chancellor concluded that the regulations required collegial consultation only for "matters that go to the heart of faculty expertise," based on "their expertise as teachers and subject matter specialists and their professional status;" because the Chancellor's office had already developed a rule that management reorganizations did not require collegial consultation, the Chancellor decided to continue to adhere to that rule, and also found that collegial consultation on division chairs was precluded because the issue was included in the CBA.

The state trial court rejected several of the Chancellor's arguments, finding that collegial consultation regulations applied to both practices and policies and that the CBA did not preclude collegial consultation on the issue because neither side had intended the CBA to be binding on this subject. The trial court upheld the Chancellor's final decision, however, because the change did not implicated only faculty members' roles in management, not their unique "faculty roles."

The appeals court here – ultimately upholding the trial court's decision – observed that the state regulations requiring local community colleges to consult collegially on academic and professional matters defined those exclusively as curriculum matters, degree and certificate requirements, grading policies, student preparation standards, district and college governance structures as related to faculty roles, accreditation, professional development, program review, and institutional planning and budget development. The District's Board had therefore adopted a policy stating that the Board would consult collegially with the District's Academic Senate "when adopting policies and procedures on academic and professional matters" as defined in the regulations. The policy specifically provided that the Board would "rely primarily upon the advice and judgment" of the academic senate with respect to curriculum, degree requirements and grading, and would "reach mutual agreement" with the Academic Senate on other matters. The issue for the court, therefore, was whether the reorganization constituted a "district and college governance structure[], as related to faculty roles," which would require collegial consultation.

The court reasoned that the management system was not "related to faculty roles," observing that "all . . . 'academic and professional matters' defined in [the law] concern subjects that are within the unique expertise of faculty members, as opposed to administrators or any other specialists." The court construed "faculty roles" as used in the statute to refer to the "traditionally understood roles faculty members play in a college. Faculty members are uniquely qualified to instruct students and assess their work, to design and implement curriculum, to develop the college's educational offerings, and to address broader institutional issues such as accreditation and budgeting to the extent these issues depend upon or impact student instruction. No evidence in the record, however, suggests faculty members at DVC are uniquely qualified to manage their peers, or to decide which management structure the college should use."

The court also rejected the faculty senate's argument that past practice regarding the division chair policy mandated collegial consultation, reasoning that that would make the definition of "faculty roles" "entirely contextual, dependent in any given case on the faculty's history of involvement in a particular area." "In short," the court ruled, "the faculty's past participation does not convert the District's reorganization of purely managerial positions into an 'academic or professional matter' requiring collegial consultation." Accordingly, the court upheld the trial court's decision holding that the Chancellor was not required to engage in collegial consultation over the change in the division chair system.

Tenure grievances

Luzerne County Community College Association of Higher Education v. Luzerne County Community College, 916 A.2d 731 (Pa. Cmwlth. Ct. 2007)

A Pennsylvania commonwealth court found that when a community college failed to respond in a timely manner to a professor's grievance over the denial of a promotion from Assistant to Associate Professor, the arbitrator did not exceed his authority in awarding the promotion to the faculty member. The CBA read: "If a grievance is not responded to by the President or his/her designee within the time frame prescribed in this Section, then said grievance will be deemed resolved in favor of the grievance and/or the [union]."

The court also rejected the university's argument that promotions are a core function of the university and can be granted only by the Board of Trustees, noting that (1) the CBA specifically contemplated a resolution in favor of the grievant when there is no response from the university; (2) the Board of Trustees was bound by the consequences of the university's lack of response to the grievance; and (though the court found this to be the least important element) (3) there were other provisions in the CBA allowing for promotion to be granted automatically rather than by decision of the Board of Trustees.

Slippery Rock University v. Ass'n of Penn. State College and University Faculties, 916 A.2d 736 (Pa. Commw. Ct. 2007)

The Association of Pennsylvania State College and University Faculties ("APSCUF") had a collective bargaining agreement with the State System of Higher Education ("SSHE"), of which Slippery Rock University was a part. Under the CBA, tenure decisions were based on performance in three areas: teaching effectiveness; scholarly growth; and service to the university and community. In addition, the university's local agreement with the Slippery Rock APSCUF chapter indicated that if the local agreement and the CBA conflicted, the CBA would govern. Under the local agreement, the tenure candidate had the burden of proving that she was eligible for tenure and the university president had ultimate responsibility for the tenure process. The president was obligated to rely on the criteria used by the departmental and University-wide tenure committees.

Beverly Gocal started as an Assistant Professor of Computer Science at the University in 1999. When she applied for tenure, her departmental chairperson and the departmental committee both recommended approval, but the university's Tenure and Sabbatical Committee (UTSC) recommended denial based on her inadequate scholarly growth. After meeting with Gocal, another computer science professor, and the dean of the college, the provost recommended that her tenure application be denied, and the president concurred.

APSCUF filed a grievance on Gocal's behalf under the CBA. After the grievance was denied at all levels, an arbitrator ruled that the president had violated the terms of the CBA and ordered that Gocal be reinstated and reconsidered for tenure.

On appeal, the state court vacated the award and remanded the case to the arbitrator, ruling that the candidate for tenure bore the burden of proving that the departmental review categories had been satisfied. The court observed that the CBA was silent on the burden of proof, while the local agreement placed the burden on the faculty candidate; in the absence of any relevant provision in the CBA, there was no conflict between it and the local agreement, and the arbitrator therefore should have looked to the local agreement to supplement the terms of the CBA. The court directed the arbitrator to revisit the case consistent with its ruling.

Definition of labor organization

Syracuse University and Teamsters Local 317 and Staff Complaint Process, 350 NLRB No. 63 (2007)

In this case, the NLRB was faced with the question of whether Syracuse University's Staff Complaint Process (SCP) was a labor organization within the meaning of Section 8(a)(2) of the NLRA. That section makes it an "unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(a)(2). The Board concluded that the SCP was not a labor organization.

The SCP was a complaint resolution procedure that the university developed to help resolve employee relations issues between non-bargaining unit employees and their supervisors. The SCP operated during working time, using facilities, supplies, and employees of the university. The university's Human Resources department coordinated the SCP, including training volunteers and serving as a resource for questions. Managers and supervisors could serve in a variety of capacities for the SCP, as advocates, mediators, or panel members. When an employee filed a complaint through the SCP, the SCP would supply a mediator and an advocate to help the employee and supervisor reach an informal settlement. If that stage failed, the complaint would be heard before a panel; that panel's decision was appealable to a three-member review panel, whose decision was non-appealable and binding.

When the Teamsters filed a petition to represent the university's parking services employees, they asserted that the SCP was an employer-dominated labor organization in violation of Section 8(a)(2). The NLRB rejected the Teamster's charge, noting that under *Electromation, Inc*., 309 NLRB 990 (1992), enf'd 35 F. 3d 1148 (7th Cir. 1994):

> The Board will find a committee is a labor organization under Section 2(5) [of the NLRA] if (1) employees participate; (2) the organization exists, at least in part, for the purpose of "dealing with" employers; (3) these dealings concern conditions of employment or other statutory objects, such as grievances, labor disputes, etc.; and (4) if an employee representation committee or plan is involved, there is evidence that the committee is in some way representing the employees." Second, if the organization satisfies these criteria, the Board considers whether the employer has engaged in any of the forms of conduct proscribed by Section 8 (a)(2), i.e. domination or interference with the organization's formation or administration, or unlawful support.

In this case, the Board concluded that the SCP was not a labor organization because "its purpose is not to 'deal with' the employer on terms and conditions of employment. Rather, its purpose is limited to an adjudicative function; specifically, to finally resolve the propriety of employer actions against an employee. It does not make proposals to management, and thus there are no management counterproposals. The panel simply renders a decision as to the propriety of the Employer's action." While a management official was generally the third member of a three-member panel, there was no evidence that management representative "dealt with" the two employee members as if they were on opposing sides; instead, they made a group decision. Instead of *dealing* with management, the panel effectively acted *for* management, and therefore did not constitute a labor organization under the meaning of the Act.[145]

Political advocacy

Finally, although not necessarily higher-ed related (or even precisely organizing-related), a July 2008 memorandum from the General Counsel of the NLRB bears mentioning.[146] The memorandum provides guidance on the intersection of Section 7-protected rights and political activity. In it, the General Counsel advises that where there is a "direct nexus" between the subject of political advocacy and a "specifically identified employment concern of the participating employees," the political advocacy is protected.

The memo uses *Kaiser Engineers*, 213 NLRB 752, 755 (1974), *enf'd*. 538 F.2d 1379 (9th Cir. 1976) as an example. In *Kaiser*, a Kaiser Engineers employee wrote to Congress to oppose a competitor's efforts to obtain visas for foreign engineers; the Board held (and the U.S. Court of

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[145] Member Liebman dissented, opining that the SCP was "an integrated dispute resolution mechanism" and that viewed "in [its] entirety . . . the process fulfills the four characteristics of a Section 2(5) labor organization."

[146] Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy (Memorandum GC 08-10, July 22, 2008). See http://www.nlrb.gov/Research/Memos/general_counsel_memos.aspx; click on the first memorandum listed under year 2008.

Appeals for the Ninth Circuit agreed) that the employee was engaged in protected activity because the letter was, in the General Counsel's words, "motivated by a concern that an influx of foreign engineers would threaten U.S. engineers' job security" and was therefore for the "mutual aid or protection" of Kaiser's and other engineers. As the General Counsel put it, the Board has often found that "employee appeals to legislators or governmental agencies were protected, so long as the substance of those appeals was directly related to employee working conditions." As a corollary, even literature distribution on a political issue may be protected by the Act; in *Motorola Inc*., 305 NLRB 580, n.1 (1991), *enf. denied in pert. part* 991 F.2d 278 (5th Cir. 1993), the Board held that an employer's ban on distribution of literature suggesting messages to the city council regarding mandatory drug testing violated Section 8(a)(1).[147]

By contrast, however, complaints to governmental bodies that involve, for instance, safety of persons who are not employees are not protected by Section 7. *See Five Star Transportation, Inc*., 349 NLRB No. 8, slip op. at 3 (2007), *enfd*. 522 F.3d 46 (1st Cir. 2008); *Waters of Orchard Park*, 341 NLRB 642, 643-44 (2004). Similarly, distribution of literature that is "purely political," with no reference to employment-related issues, do not constitute activity for "mutual aid or protection." *See, e.g*., *Ford Motor Co.*, 221 NLRB 663, 666 (1975) *enfd. mem*. 546 F.2d 418 (3d Cir. 1976).

The General Counsel closed by observing that even when political advocacy constitutes "mutual aid or protection" under Section 7, it still may not be protected because of the means used to carry it out. Thus, when employees leave the workplace during work time to engage in a political demonstration, the activity is not protected because, unlike strikes (which are protected), the subject of the demonstration is outside of the employer's control.

The General Counsel distilled several principles from the Board cases surveyed:

- "non-disruptive political advocacy for or against a specific issue related to a specifically identified employment concern, that takes place during the employees' own time and in nonwork areas, is protected;

- on-duty political advocacy for or against a specific issue related to a specifically identified employment concern is subject to restrictions imposed by lawful and neutrally-applied work rules; and

- leaving or stopping work to engage in political advocacy for or against a specific issue related to a specifically identified employment concern may also be subject to restrictions imposed by lawful and neutrally-applied work rules."

The General Counsel therefore directed that in matters involving political advocacy that might be protected under Section 7, the NLRB Regional Director:

[147] The Fifth Circuit denied enforcement of the Board's decision on the grounds that employees involved were acting as members of an outside political organization. 991 F.2d at 285. The General Counsel opined, however, that "[t]his approach is questionable, as the Court focused on the status of the groups involved rather than the substance of the advocacy."

should first determine the purpose and subject matter of the advocacy. With respect to advocacy directed to legislators, the Region should investigate whether there is a specific legislative proposal or enacted provision at issue or whether the advocacy is more diffuse in its scope. With respect to complaints or testimony to administrative and regulatory agencies, the Region should determine the subject matter of those appeals and the specific employee concerns underlying those appeals. In the case of political campaigning, the Region should determine if the advocacy relates to specific issues or more generally to the election of a particular candidate or slate of candidates.

After determining the subject matter of the advocacy, the Region should investigate any asserted nexus between that subject matter and a specific employment-related interest, working condition, or ongoing labor-management dispute. Advocacy that is more diffuse in scope tends to be more attenuated from employment-related concerns.

The Region should then investigate the means employed. Political activity related to employment concerns that occurs during nonwork time and in nonwork areas is generally protected. On the other hand, on-duty political advocacy is subject to restrictions imposed by lawful, neutrally-applied work rules. As in any case, the Region should also investigate whether any discipline imposed was consistent with or a departure from a neutral, nondiscriminatory policy and the employer's past practice.
