aaup
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

1133 19th Street, NW, Suite 200, Washington, DC 20036
PHONE: 202.737.5900 • **FAX:** 202.737.5526 • **www.aaup.org**

June 29, 2012

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

RE: ***Point Park University and Newspaper Guild of Pittsburgh/ Communications Workers of America Local 38061, AFL-CIO, CLC***
Case No.: 06-RC-012276

Dear Executive Secretary Heltzer,

Enclosed, please find the *Brief of Amicus Curiae, American Association of University Professors, in support of Petitioner, Newspaper Guild of Pittsburgh/ Communication Workers of America Local 38061, AFL-CIO, CLC,* which we are submitting pursuant to the *Notice and Invitation to File Briefs*, dated May 22, 2012, in the above referenced matter. Per our telephone conversation with Associate Executive Secretary, Hank Breiteneicher, we understand that we are only required to electronically file our brief. Further, we are not required to serve it on the parties or their counsel as they may obtain a copy from the public filings on the NLRB website.

We appreciate the opportunity to file an amicus brief in this case and look forward to seeing its resolution.

Thank you for your time and attention to this matter, and please do not hesitate to contact us if you have any questions.

Respectfully,

/s/ Kathi S. Westcott

Kathi S. Westcott, Esq.
Senior Counsel

KSW/emj
enclosure

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION SIX

POINT PARK UNIVERSITY

Employer,

and Case 06-RC-012276

NEWSPAPER GUILD OF PITTSBURGH/
COMMUNICATIONS WORKERS OF AMERICA
LOCAL 38061, AFL-CIO, CLC

Petitioner.

_____

BRIEF OF AMICUS CURIAE, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, IN SUPPORT OF PETITIONER, NEWSPAPER GUILD OF PITTSBURGH/COMMUNICATION WORKERS OF AMERICA LOCAL 38061, AFL-CIO, CLC

Of Counsel

Kathi S. Westcott, Esq.
Senior Counsel
American Association
of University Professors
1133 19th Street, NW, Ste. 200
Washington, DC 20036
202-737-5900
legal.dept@aaup.org

Risa L. Lieberwitz
Professor
School of Industrial
and Labor Relations
Cornell University
361 Ives Hall
Ithaca, NY 14853
607-225-3289

TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Association of University Professors ("AAUP"), founded in 1915, is a non-profit organization of over 48,000 faculty, librarians, graduate students, and academic professionals, a significant number of whom are private sector employees. Its purpose is to advance academic freedom and shared university governance, define fundamental professional values and standards for higher education, and ensure higher education's contribution to the common good. AAUP's policies have been recognized by the Supreme Court and are widely respected and followed in American colleges and universities. *See, e.g., Bd. of Regents v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971). In cases that implicate AAUP policies or otherwise raise legal issues important to higher education or faculty members, AAUP frequently submits amicus briefs in the Supreme Court, the federal circuits, and the National Labor Relations Board. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985); *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000), *cert. denied* 531 U.S. 1070 (2001); *Columbia Union Coll. v. Oliver*, 254 F.3d 496 (4th Cir. 1999); *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672 (4th Cir. 1995); *Brown University*, 342 NLRB 483 (2004); and *New York University*, 332 NLRB 1205 (2000). By participating as an amicus in this case, AAUP seeks to assist the National Labor Relations Board in developing the legal definition of employee status in a manner that accurately reflects employment relationships in universities and colleges and that respects the rights of college and university employees to exercise their rights to organize and engage in collective bargaining.

STATEMENT OF FACTS

This case is before the National Labor Relations Board for decision following remand by the United States Court of Appeals for the District of Columbia Circuit for clarification of the reasons for the Board's conclusion that the Point Park University faculty members are not managerial employees. *Point Park University v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006). Following the court's remand, the Regional Director issued a Supplemental Decision on Remand finding that the Point Park University faculty members are not excluded managerial employees. On November 28, 2007, the NLRB granted the Employer's request for review of the Regional Director's Supplemental Decision.

On May 22, 2012, the NLRB issued a Notice and Invitation to File Briefs, inviting the parties and amici to "address the court's instruction that the Board explain the weight of the various factors identified by the Supreme Court in *Yeshiva* and their application to this case." *Point Park University*, 2012 NLRB LEXIS 292 (May 22, 2012). In its Notice, the Board instructed that the briefs should address some or all of eight listed questions.

ARGUMENT

I. Introduction

This amicus brief responds to Questions 3, 4, and 7 listed in the NLRB's Notice and Invitation to File Briefs. These questions were chosen as being particularly relevant to addressing the changes in the university context since the Supreme Court's decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). Section II of the brief, responding to Questions 3 and 4, enumerates additional factors relevant to determining whether a party has met its burden of proving that faculty are managerial employees. Section III of the brief, responding to Question 7, provides a detailed analysis of the reasons for adding the factors enumerated in the response to Questions 3 and 4.

II. Response to Questions 3 and 4:

> **Question 3:** Are the factors identified in the Board case law to date sufficient to correctly determine whether faculty are managerial?
>
> **Question 4:** If the factors are not sufficient, what additional factors would aid the Board in making a determination of managerial status for faculty?

The determination of whether faculty members are managerial employees should be considered in the current context of universities in the United States, which includes major changes in university structure and authority.[1] During the three decades since *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), was decided, the context in universities has changed in

[1] The term "university" is used in this brief to refer to colleges and universities. At certain points in the brief, the term "college" refers to colleges or schools, such as the college of arts and sciences, within a university.

fundamental ways. Rather than relying on faculty expertise and recommendations, universities have increasingly relied on expanded administrations to make unilateral decisions, often influenced by considerations of revenue generation. Administrators have become more top-down in managing the university, which undermines faculty effective recommendation and control over academic matters. Increasingly, university administrations ignore or override written university policies and faculty handbooks that set forth a shared governance model recognizing faculty authority on matters of academic concern. A pattern has emerged of university administrators making unilateral decisions, without approval of faculty governance bodies, on matters central to academic work, including: developing curriculum; creating, restructuring, or discontinuing academic programs; changing academic degree requirements; changing grades and grading systems; subcontracting out the work of existing academic programs; and procedures for faculty hiring and retention.

These significant changes should be considered as factors relevant to determining whether faculty are Section 2(12) professional employees with Section 7 rights or whether they are managerial employees excluded from the protections of the NLRA. Taking account of the changed context calls for consideration of the following additional factors in determining whether a party has met its burden of proving that faculty are managerial employees:

- the extent of university administration hierarchy;
- the extent to which the administration makes academic decisions based on revenue generation or other market-based considerations;
- the degree of consultation by the administration with faculty committees or other faculty governance bodies over academic and nonacademic matters;

- whether the administration treats faculty recommendations as advisory rather than as effective recommendations;
- whether the administration routinely approves nearly all faculty recommendations without independent administrative review;
- whether conflict between the administration and the faculty reflects a lack of alignment of administration and faculty interests.

The response to Question 7, below, provides support for the addition of these factors in the managerial employee determination. This discussion includes a description and analysis of changes in management structures that have expanded university administrations, increased top-down decision-making by the administration, and encouraged choices about academic matters based on external market forces. As discussed below, these changes in the distribution and exercise of authority in the university reveal a changed relationship between the administration and the faculty, one in which their interests are not aligned.

III. Response to Question 7:

> **Question 7:** Have there been developments in models of decision making in private universities since the issuance of *Yeshiva* that are relevant to the factors the Board should consider in making a determination of faculty managerial status? If so, what are those developments and how should they influence the Board's analysis?

A. Overview of nationwide trends that have changed the context of the university.

In *Yeshiva*, the Supreme Court applied the *Bell Aerospace* definition of managerial employees as those who "formulated and effectuated management policies by expressing and making operative the decisions of their employer." *Yeshiva University*, 444 U.S. at 682, quoting

NLRB v. Bell Aerospace Co., 416 U.S. 267, 288 (1974). The *Yeshiva* Court further developed this standard by explaining that managerial employees "exercise discretion within, or even independently of, established employer policy and [are] aligned with management…by taking or recommending discretionary actions that effectively control or implement employer policy." 444 U.S. at 683.

The *Yeshiva* Court recognized that this analysis of faculty employment status is a dynamic process, stating that the factors the Court relied on provide "a starting point only, and that other factors not present here may enter into the analysis in other contexts." 444 U.S. at 690, n. 31. During the three decades since *Yeshiva* was decided, the context of the university has changed in fundamental ways, with major alterations in the structure and practices of universities across the United States. As the context changes, so should the evaluation of faculty employment status under the NLRA.[2] The significant changes in the university structure and management model should be considered as factors relevant to determining whether faculty are Section 2(12) professional employees with Section 7 rights or whether they are managerial employees excluded from the protections of the NLRA. As the D.C. Circuit Court of Appeals stated in *Point Park University v. NLRB*, 457 F.3d 42, 48 (D.C. Cir. 2006), in determining whether faculty are managerial employees:

> [C]ontext is everything. Every academic institution is different, and…the Board must perform an exacting analysis of the particular institution and faculty at issue. That analysis must look beyond self-serving descriptions of the role of the faculty or the

[2] The AAUP continues to adhere to its long-standing position that faculty engage in shared governance as part of their non-managerial responsibilities as professional employees under Section 2(12) of the NLRA. As argued in this amicus brief, however, under the standards developed by the Supreme Court in *Yeshiva*, within the changed context of current universities most faculty should be determined to be non-managerial professional employees covered by the NLRA.

> administration of a university. In *Yeshiva*, the Court looked repeatedly to the actual role of faculty in the academic affairs of the university…. The key inquiry is "how a faculty is structured and operates."

Nationwide patterns since 1980 show that the context has transformed through universities' increasing use of a corporate business model that goes well beyond Justice Brennan's observation in *Yeshiva* that universities have become "big business." 444 U.S. at 703. As Andrew Meyer, the chairman of Suffolk University's Board of Trustees has stated, "Suffolk has gone through a transition. This is a new chapter in the history of the university. We need people who understand that running an institution of higher education today means running a business."[3]

While the extent to which particular universities embrace a corporate business model will vary, the influence of the model has increased the likelihood that university administrations adopt and implement corporate management practices. Various reasons have been identified to explain the influence of the corporate business model, including "competition for students and research dollars and resulting pressures on universities to 'market' themselves; increasing costs, overall, of operating the university; rising costs of research in the sciences and engineering; the growing media use of competitive rankings in *U.S. News & World Report* and other outlets as indicators of presumed educational quality; and the privatization of public functions, with a

[3] Mary Carmichael, "New guiding hands at Suffolk: School set to add 12 trustees with business focus," Boston.com (Oct. 4, 2011), available at http://articles.boston.com/2011-10-04/news/30243289_1_board-members-higher-education-pappas-consulting-group

decrease in public funding to universities."[4] It is striking how widespread and similar the structural changes are in universities nationwide.[5]

The application of a corporate model of management has resulted in significant changes in university institutional structure and distribution of authority. There has been a major expansion of the administrative hierarchy, which exercises greater unilateral authority over academic affairs. This organizational structure stands in stark contrast to the *Yeshiva* majority's description of the university as a collegial institution primarily driven by the internal decision-making authority of its faculty. Further, university administrators increasingly are making decisions in response to external market concerns, rather than consulting with, relying on, or following faculty recommendations. Thus, university decision-making is increasingly made unilaterally by high-level administrators who are driven by external market factors in setting and implementing policy on such issues as program development or discontinuance, student admissions, tuition hikes, and university-industry relationships. As a result, the faculty have experienced a continually shrinking scope of influence over academic matters.

---

[4] Faculty Senate Committee to Review Faculty Governance: Final Report and Recommendations 6 (March 7, 2007), available at http://theuniversityfaculty.cornell.edu/pdfs/GOVERNANCE372007.pdf

[5] These national trends have been described and analyzed by many commentators in articles, books, and studies of the current university structure. See, e.g., Ellen Schrecker, THE LOST SOUL OF HIGHER EDUCATION: CORPORATIZATION, THE ASSAULT ON ACADEMIC FREEDOM, AND THE END OF THE AMERICAN UNIVERSITY (New York: New Press 2010); Gaye Tuchman, WANNABE U: INSIDE THE CORPORATE UNIVERSITY (University of Chicago Press 2009); Jennifer Washburn, UNIVERSITY INC.: THE CORRUPTION OF HIGHER EDUCATION (New York: Basic Books 2005); Sheila Slaughter and Larry L. Leslie, ACADEMIC CAPITALISM: POLITICS, POLICIES, AND THE ENTREPRENEURIAL UNIVERSITY (Baltimore: Johns Hopkins University Press 1998); Risa L. Lieberwitz, *Faculty in the Corporate University: Professional Identity, Law and Collective Action*,16 CORNELL J. L. & PUB. POL'Y 263 (2007); Joan Wallach Scott, *The Critical State of Shared Governance*, available at http://www.aaup.org/AAUP/pubsres/academe/2002/JA/Feat/Scot.htm

The *Yeshiva* Court limited the scope of the managerial exception, stating, "It is plain…that professors may not be excluded [as managerial employees] merely because they determine the content of their own courses, evaluate their own students, and supervise their own research." 444 U.S. at 690 n. 31. In today's universities, while faculty may have effective control over their own courses and research, their sphere of influence on other academic matters has been eroded through the administration's application of the goals and managerial practices of the corporate business model. Moreover, faculty loss of influence over programmatic and other academic matters reduces faculty influence even in their individual academic course content and research. The scope of the managerial exception as applied in universities should be narrowed to reflect the scope of actual authority in practice. As the Sixth Circuit, interpreting *Yeshiva*, stated, "[T]he [managerial] exception must be narrowly construed to avoid conflict with the broad language of the Act, which covers 'any employee,' including professional employees." *Kendall Memorial School v. NLRB*, 866 F.2d 157, 160 (6th Cir. 1989). The party asserting managerial status must carry the burden of proving that faculty fall within this narrow managerial exception. This is essential to protect the rights of faculty in universities, as overly broad application of the managerial exception will result in the exclusion of an entire class of professional employees from the NLRA. *University of Great Falls*, 325 NLRB 83, 93 (1997), *affd*. 331 NLRB 1663 (2000), *reversed on other grounds* 278 F.3d 1335 (D.C. Cir. 2002).

Faculty in public and private universities have experienced the impact of the corporate business model and its erosion of shared governance. Public university faculty, however, have an effective means to respond to these changes by exercising their statutory rights to unionize

and collectively bargain.[6] Faculty unionization in public universities has led to successful collective bargaining to address terms and conditions of employment across a range of academic and economic issues. This experience teaches that collective bargaining by faculty unions has not resulted in problems of conflicted loyalties. Rather faculty unions and administrations have engaged in collective bargaining as a constructive means to address their different positions about terms and conditions of employment.[7] Within the current context of private universities, the interpretation of faculty employee status should be informed by the long-term experience of successful collective bargaining relationships in public universities. This is consistent with the *Yeshiva* majority's clarification that "[w]e certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them." 444 U.S. at 690. Protecting faculty rights as professional employees requires a full consideration of social and institutional changes since *Yeshiva* was decided.

Most importantly, the influence of the corporate business model has resulted in fundamental changes in power and authority in the university that are not fleeting or ephemeral. They are embedded structural changes that favor top-down decision-making authority by

---

[6] See, Richard Hurd & Amy Foerster, 23 Directory of Faculty Contracts and Bargaining Agents In Institutions of Higher Education 135 (1997) (listing thirty-four states with public sector collective bargaining legislation covering higher education faculty, including one state without legislation but with collective bargaining permitted by State Governing Board policy.

[7] See the following chapters in ACADEMIC COLLECTIVE BARGAINING (Ernst Benjamin and Michael Mauer, eds. 2006): Ernst Benjamin, *Introduction* (pp. 9-20); Ernst Benjamin, *Faculty Bargaining* (pp. 23-51); Martin J. Morand and Ramelle C. Macoy, *Keys to the Development of the Association of Pennsylvania State College and University Faculties (APSCUF)* (pp. 275-283); Brad Art, *A Worst-Case Scenario* (pp. 284-291); Richard Katz and Dean Casale, *Professionalism, Inclusiveness, and Accountability in Collective Bargaining* (pp. 292-300); Roger Hatch and John Pfeiffer, *After the Contract: Vigilance* (pp. 301-307).

university administrators responding to market concerns, rather than a collegial process of consultation and consensus-building over academic affairs. One outcome of this institutional shift is a growing conflict between university administrations and faculty over unilateral actions taken by administrators either without consultation with faculty or overriding faculty governance bodies' recommendations. Thus, contrary to the circumstances informing the Court's conclusion in *Yeshiva,* the faculty's interests in many universities today are not aligned with the interests of the administration. These changed circumstances should be assessed as factors relevant to the fact-based inquiry in evaluating whether the employer has met its burden of proving that faculty are managerial employees.

The consequences and outcomes of the use of the corporate business model in the university are detailed below, revealing the specific patterns of the changes, the widespread impact on universities nationwide, and the corrosive effect on faculty influence in the university.

B. Universities' increasing use of a corporate business model and the significant expansion of university administration have eroded faculty effective control and effective recommendations over academic affairs.

1. In the three decades since the *Yeshiva* decision, the university context has changed through the expanded the size and power of university administration.

The influence of the corporate business model on universities has led to a major expansion of university administration, accompanied by the increased top-down authority exercised by high-level administrators. Between the years of 1976 and 2009, the number of full-

time executives and managers grew by 129 percent, while full-time faculty grew by 68 percent.[8] Breaking this down by sector is even more revealing. From 1976 to 2009, the number of full-time executives and managers at private colleges and universities increased by 200 percent, more than double the 83 percent rate of growth at public colleges and universities.[9] These positions include a proliferation of executive-level administrators in university administration. In addition to the Provost, academic affairs are governed by Vice Provosts, Associate Provosts, and Vice Presidents. It is important to emphasize that this expansion of administration has occurred not simply in public university systems featuring multiple campuses throughout the state, but also, as noted above, in private universities with a single campus location. For example, at Stanford University, in addition to the President and Provost, there are three Vice Provosts, eight Vice Presidents, and eight Deans.[10] At Cornell University, in addition to the President and Provost, there are three Senior Vice Provosts (one who is also a Vice President and another who is also a Dean), four Vice Provosts (one who is also a Dean), two Vice Presidents, the Head of the University Library, and twelve Deans.[11] At MIT, there is a President, Chancellor, Provost, four Associate Provosts, an Executive Vice-President and Treasurer, six Vice Presidents, and eight

[8] Data compiled by John W. Curtis, Director of Research and Public Policy, AAUP, Washington, D.C. (June 6, 2012) (Source: US Department of Education, Integrated Postsecondary Education Data System (1993 and 2009) and Higher Education General Information System (1976)). Data for 1976 is from Digest of Education Statistics 2001, table 224. Data for 2009 is from Digest of Education Statistics 2011, table 257.). See also, "Specialization" and "Shifts in Staffing", in AAUP 2007-2008 Report on the Economic Status of the Profession, available at http://www.aaup.org/AAUP/comm/rep/Z/ecstatreport2007-08/survey2007-08.htm

[9] *Id*. Data for 2009 is from Digest of Education Statistics 2011, table 259.

[10] Stanford University, Stanford Facts 2012, University Governance and Administration, available at http://facts.stanford.edu/governance.html

[11] The Vice Provost who is also a Dean and one of the Vice Presidents are administrators for the forthcoming Cornell University New York City Tech Campus. The individuals filling these positions had been Dean of the Cornell Faculty of Computing and Information Science and Associate Dean in the Cornell School of Engineering. Provost Organizational Chart (as of February 1, 2012), available at http://dpb.cornell.edu/documents/1000006.pdf

Deans.[12] At the college level of universities, the administration has expanded through the addition of associate deans, assistant deans, and directors.

Along with the increase of high-level administrators, the administrative apparatus has expanded. From 1976 to 2009, the number of full-time non-faculty professional positions increased by 345 percent overall, with growth of 499 percent in that category at private institutions.[13] Between the years of 1947 to 1995, while overall university spending increased by 148 percent, administrative spending increased by 235 percent, as compared with instructional spending increases at only 128 percent.[14] A 2010 study reported that in the period 1998 to 2008, U.S. private colleges increased spending on administration and staff support by 36 percent, but increased spending on instruction by only 22 percent.[15] It is noteworthy that during these years, as expenditure on instruction has gone down, the percentage of lower-wage nontenure-track faculty has increased significantly. Between 1976 and 2009, the number of part-time faculty positions has grown by more than 256 percent overall, with the rate of growth in private colleges and universities at 331 percent.[16] Currently, nearly 40 percent of full-time faculty positions and 70 percent of all faculty positions in post-secondary institutions are nontenure-track.[17] The

---

[12] MIT Organization Chart, available at http://orgchart.mit.edu/
[13] Curtis, *supra* notes 8 and 9.
[14] Benjamin Ginsberg, THE FALL OF THE FACULTY: THE RISE OF THE ALL-ADMINISTRATIVE UNIVERSITY AND WHY IT MATTERS 33 (Oxford University Press 2011) (citing as the source for the data: Calculated from National Center for Education Statistics (NCES), Digest of Education Statistics, 2006, Table 346).
[15] *Id*. at 27, *citing*, Sam Dillon, "Share of College Budgets for Recreation is Rising," *New York Times*, July 10, 2010, A13 (describing the Delta Cost Project).
[16] Curtis, *supra* notes 8 and 9.
[17] Ernst Benjamin, *The Eroding Foundations of Academic Freedom and Professional Integrity: Implications of the Diminishing Proportion of Tenured Faculty for Organizational Effectiveness in Higher Education*, 1 AAUP JOURNAL OF ACADEMIC FREEDOM, at 4 (2010), available at http://www.academicfreedomjournal.org/Previous/VolumeOne/Benjamin.pdf; The Coalition for the Academic Workforce (CAW) reports that as of 2009, "when graduate student teaching assistants are

Continued

reduction of tenure-track positions along with the expansion of nontenure-track positions further dilutes the effectiveness of faculty governance. The vast majority of nontenure-track faculty are not included as full participants in faculty governance bodies.[18] Further, nontenure-track faculty are in precarious positions without the job security of tenure, making it difficult for them to meaningfully assert rights of academic freedom.[19]

The proliferation of high-level administrators and their professional staff has multiple effects. First, the growth of administration expands the hierarchical nature of decision-making, concentrating power at the top level of the central university administration and the college administrations. This upward movement of power to the administrative hierarchy, in turn, undermines the "shared governance" model of collegial decision-making by funneling authority away from the faculty influence over academic matters.[20] Shared governance is also eroded by administrators taking unilateral actions without consultation with faculty governance bodies such

---

included, [contingent employees constitute] more than three-quarters of the instructional workforce." Coalition for the Academic Workforce, *A Portrait of Part-Time Faculty Members: A Summary of Findings on Part-Time Faculty Respondents to the Coalition on the Academic Workforce Survey of Contingent Faculty Members and Instructors* (2012), at 5, citing, Laura G. Knapp, Janice E. Kelly-Reid, and Scott A. Ginder, *Employees in Postsecondary Institutions, Fall 2009, and Salaries of Full-Time Instructional Staff, 2009–10*. NCES 2011-150. *National Center for Education Statistics*. Natl. Center for Educ. Statistics, Dept. of Educ., Nov. 2010. Web. 24 Apr. 2012. The CAW report is available at http://www.academicworkforce.org/survey.html

[18] Coalition for the Academic Workforce, *supra* note 17, at 2; Joe Berry and Elizabeth Hoffman, *Including Contingent Faculty in Governance,* Academe Vol. 94, No. 6 (Nov. – Dec. 2008), available at http://www.aaup.org/AAUP/pubsres/academe/2008/ND/Feat/berr.htm

[19] John C. Duncan, Jr., *The Indentured Servants of Academia: The Adjunct Faculty Dilemma and Their Limited Legal Remedies*, 74 IND. L.J. 513, 524-528 (1999); Berry and Hoffman, *supra* note 18.

[20] For AAUP policy statements on academic freedom and shared governance, see, AAUP 1915 Declaration of Principles on Academic Freedom and Tenure, available at http://www.aaup.org/AAUP/pubsres/policydocs/contents/1915.htm ; 1940 Statement of Principles on Academic Freedom and Tenure, available at http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm
1966 Statement on Government of Colleges and Universities, available at http://www.aaup.org/AAUP/pubsres/policydocs/contents/governancestatement.htm

as faculty senates. As the Regional Director observed in *Point Park University*, the restructuring involved in making the transition from College to University expanded the administration and created a "buffer" between academic policy decision-making and the faculty. Case 6-RC-12276, Regional Director's Supplemental Decision on Remand (July 10, 2007), at 10. The administration made unilateral decisions about academic matters, including creating and discontinuing academic programs. As a result, faculty influence over decisions about academic policy and programs has been diminished, often placing the faculty in the position of merely being notified of decisions unilaterally reached by the administration. Further, these unilateral decisions about academic programs have a direct impact on faculty control over their courses and curriculum, as top-down administrative changes in academic programs force faculty to alter their course offerings to fit the new shape of academic programs.

The growth in university administration, which creates a "buffer", can also be described as an increased stratification in the university employment structure. The proliferation of administrators at high levels of the university hierarchy has solidified a class of long-term university administrators who could be called "managerial professionals," in contrast to the rest of the faculty, who remain "practicing professionals." David M. Rabban, *Distinguishing Excluded Managers From Covered Professionals Under the NLRA*, 89 Colum. L. Rev. 1775, 1834 (1989). These "managerial professionals" in the administration "have positions of bureaucratic power within [the university's] formal hierarchy," while the faculty as "practicing professionals" do not. *Id.* Although many of the individuals holding these bureaucratic managerial positions were originally in faculty positions, their entry into the central administration removes them from the normal professional faculty activities of teaching and

research. This separation from the classroom and research may be for a period of years or even as a permanent shift into the university administration and an upwardly mobile career path in administration at other universities.[21]

Most importantly in this increased stratification, the growing number of "managerial professionals" in the administration have been given enhanced authority and power over academic matters in a way that erodes effective recommendations or control by the "practicing professionals" in the faculty. While "managerial professionals" would be excluded from the NLRA as managerial employees, faculty "practicing professionals" should be protected as professional employees under Section 2(12). Further, "[e]xcluding [only the] managerial professionals would reflect the key concern about divided loyalties that generated the unwillingness to allow protected bargaining by managers and supervisors." Rabban, *supra*, at 1855. As the Tenth Circuit explained, "The availability of this expertise within the ranks of the administration obviates the College's need to rely extensively on the professional judgment of its faculty in determining and implementing academic policy. Under these circumstances while significant faculty input undoubtedly remains beneficial to the College, it is not necessary that the faculty be 'aligned with management'… [and] presents no problem of divided loyalty equivalent to that found in *Yeshiva.*" *Loretto Heights College v. NLRB,* 742 F.2d 1245, 1254 (10th Cir. 1984); *St. Thomas University*, 298 NLRB 280, 287 (1990).

This growing separation of power and functions of administrators and faculty has important implications for faculty employee status under the NLRA. As university restructuring shifts power and authority, the legal principles of employee status, defined in *Yeshiva*, must be

[21] Tuchman, *supra* note 5, at 69-82.

applied to the evidence that accurately demonstrates "authority in practice." *University of Great Falls*, 325 NLRB at 93; *St. Thomas University*, 298 NLRB 280 (1990); *Bradford College*, 261 NLRB 565 (1982). While the extent of changes may differ from one university to another, the nationwide patterns show that the context has changed as universities have expanded the size of administrations and their unilateral authority over academic affairs. These circumstances should be assessed as part of the fact-based evaluation of whether the employer has met its burden of proving that faculty are managerial employees.

2. The expanded size and authority of university administration has decreased faculty authority to effectively control or make effective recommendations about academic affairs.

In applying *Yeshiva*, the NLRB has emphasized that "neither the Board nor the Court requires that a faculty possess absolute or plenary authority in order to be found to be managerial; the standard set forth in the Court's decision is '*effective* recommendation or control.'" *Lewis and Clark College*, 300 NLRB 155, 163 n. 41 (1990). "Effective recommendation authority is found where nearly all recommendations are routinely approved by the administrative hierarchy, without independent review." *University of Great Falls*, 325 NLRB at 93. Further, "the presence of a large administrative staff…create[s] an effective buffer between the top management and the lowest echelon, eliminating the need for the institution's administration to rely on the faculty for advice, recommendations, and the establishment and implementation of policies." *University of Great Falls*, 325 NLRB at 94; *Loretto Heights College v. NLRB*, 742 F.2d 1245, 1254 (10th Cir. 1984). As the statistics show, university administrations have continued to expand and provide a multi-layered buffer between the top managerial administrators and the faculty. In this context, it is crucial to require the university to go beyond

conclusory assertions that the faculty are managerial because they may make recommendations to the administration on academic affairs. Rather the university must demonstrate that "nearly all [faculty] recommendations are routinely approved by the administrative hierarchy, without independent review." *University of Great Falls*, 325 NLRB at 93.

In today's universities, the expanded scope and authority of bureaucratic "managerial professionals" in university administrations have reduced faculty participation to an advisory capacity in many instances. In *Manhattan College*, Case 2-RC-21735, 1999 NLRB LEXIS 903, n.21 (Nov. 9, 1999), the Regional Director observed that "the *Yeshiva* Court specifically noted that the Board failed to advance the argument that the role of the faculty was merely advisory, and thus not managerial." Further, the *Yeshiva* Court "distinguished between situations where faculty authority is advisory and where faculty effectively recommends action, notwithstanding the administration's rarely exercised veto power." *Manhattan College*, at n.21, discussing *Yeshiva University*, 444 U.S. at 684, n. 17. In *Manhattan College*, the Regional Director relied on this distinction to find that the faculty was not managerial, based on the evidence that although "the Manhattan College faculty have a substantial role in the development of policy in academic and other spheres…this role is fundamentally advisory in nature." 1999 NLRB LEXIS 903, at 130-131.[22]

[22] A three-member panel of the NLRB denied Manhattan College's appeal of the Regional Director's decision, finding that the appeal "raises no substantial issues warranting review." Courtney Leatherman, *NLRB Lets Stand a Decision Allowing Professors at a Private College to Unionize*, CHRON. HIGHER EDUC., Jul. 7, 2000, at A14.

(a) Increasing university administrative authority over academic matters.

University administrations increasingly make unilateral decisions about academic matters, either by excluding faculty from the decision-making process or by treating faculty recommendations as merely advisory, particularly when they disagree with the administration's position. As the Regional Director stated in *Point Park University*, based on *Yeshiva* and its progeny, he "considered authority over academic matters to be the most critical to the determination of managerial status." Case 6-RC-12276, Regional Director's Supplemental Decision on Remand (July 10, 2007), at 57. Faculty authority over academic matters, as *Yeshiva* recognized, refers to far more than the course content and research of a particular faculty member. Rather, the scope of academic matters includes the creation, alteration, and discontinuance of academic programs, given the impact of such decisions on the curricular and course content that make up the academic program.

The Board has held that faculty were non-managerial based on the administration's actions of unilaterally creating and discontinuing academic programs without faculty approval or over faculty opposition. In *Cooper Union*, the Board detailed the academic areas where faculty authority "has been made ineffective by the administration," including "the administration's creation and elimination of entire degree programs without faculty input or over faculty opposition" and "the creation of a special admissions program without faculty-approval…." *The Cooper Union for the Advancement of Science and Art*, 273 NLRB 1768, 1775 (1985). In *St. Thomas University*, the Board found that faculty were not managerial based in part on the administration's practice of submitting faculty proposals on curriculum or academic policy for

independent approval by a committee of the dean and five division chairpersons, which often ignored or overrode the faculty. 298 NLRB at 287.

In *Point Park University*, the administration's conduct established a pattern of making unilateral decisions concerning academic programs, including: discontinuing some undergraduate programs; approving a new undergraduate program; dismantling an academic department; restructuring a graduate program; creating a new institute with an existing academic department; subcontracting out the work of an existing academic program; changing requirements for two academic programs in the Education department; designing and designating a new required course for university freshmen; developing policies for on-line courses; and developing new requirements for special delivery courses, independent studies, and faculty-led trips abroad. Regional Director's Supplemental Decision on Remand, at 57-58. The Regional Director described the administration's failure to respect the Point Park University faculty's recommendation authority: "Abandoning the program obviously includes abandoning the courses which made up that program, all of which courses should have been previously reviewed and recommended by the Curriculum Committee and the Faculty Assembly in accordance with the process by which an undergraduate program becomes a part of the curriculum." Regional Director's Supplemental Decision on Remand, at 57.[23]

[23] Other examples of unilateral decisions on academic matters include actions by the administrations at Yale University, George Mason University, Bennington College, and University of Dubuque:

At Yale University, "[s]ince January [2012], faculty dissatisfaction over a number of issues has coalesced into a semi-organized movement calling for a larger role for faculty in the governance of the university." The issues concern faculty reservations about the Yale-National University of Singapore new joint venture; the university's shared-services plan, which centralizes some business and financial functions; and a Graduate School dean's report, which encouraged "best practices" that many faculty

Continued

In addition to administrators' unilateral actions concerning the creation, content, and discontinuance of academic programs, administrators have made unilateral changes in other types of academic affairs. In *Point Park University*, the Regional Director found that the administration unilaterally changed student admission standards in two academic programs; created a new grading system to be used as a pilot program; changed grades the faculty had assigned; imposed syllabus requirements; and decreased bonuses to faculty who, in the administration's view, gave too many grades of "A". Regional Director's Supplemental Decision on Remand, at 58-59. Such actions evidence further erosion of the faculty's effective control or effective recommendations in matters that relate directly to course development and

---

viewed as an imposition of sciences practices on the humanities. Mark Alden Branch, *Delayed reaction*, Yale Alumni Magazine, Vol. 75, No. 5 (May/June 2012), available at http://www.yalealumnimagazine.com/issues/2012_05/lv_faculty.html

The George Mason University Governing Board engaged in unilateral actions in derogation of the faculty handbook provision giving the faculty the "primary role" in "the university's academic offerings." The Governing Board rejected a faculty committee's proposal for a required undergraduate course, substituting two of the Board's own courses; rejected a faculty governance body recommendation concerning credit for courses; and rejected another faculty governance body's recommendation of whether to relocate a degree program to the College of Arts and Sciences. Nota Bene, *Board Overrides Faculty Recommendation on Curriculum at George Mason University*, Academe Online (Sept.-Oct. 2000), available at http://www.aaup.org/AAUP/pubsres/academe/2000/SO/NB/mason.htm

The Bennington College administration reorganized teaching programs and divisions as part of its unilateral actions of dismissing one-third of its faculty, eliminating many of its faculty governance bodies, and changing standards for hiring and retention. William Celis 3d, *Radical Answer to a Small College's Woes*, NEW YORK TIMES, Jun. 23, 1994, at A12.

In 1999, the University of Dubuque terminated the tenured appointments of two professors based on the administration's assertion of a financial exigency. However, the board of trustees and administration did not consult with faculty governance bodies prior to developing a plan that determined that there was a financial exigency and that academic programs would be discontinued and faculty terminated; did not provide a meaningful faculty role in the decisions to discharge the two professors; and did not provide the professors with academic due process hearings. AAUP Report, *Academic Freedom and Tenure: University of Dubuque* (September – October 2001).

student evaluation. As *Yeshiva* recognized, "It is plain…that professors may not be excluded [as managerial employees] merely because they determine the content of their own courses, evaluate their own students, and supervise their own research." 444 U.S. at 690 n. 31. Yet, at Point Park and other universities, administrators' unilateral actions have eroded faculty authority even in realms that the *Yeshiva* Court considered non-managerial professional work.

In some cases, a university administration's unilateral actions have violated the university's own policies or regulations providing for faculty governance rights. At Adelphi University, university governance documents provide faculty with broad rights to participate in university matters. Yet, during the 1990s, the president and board of trustees ceased communicating with the faculty through the governance process. For example, the board of trustees created a confidential academic plan, excluding faculty from participation in developing or commenting on it.[24] Similarly, in *Bradford College,* the NLRB concluded the faculty were not managerial where the administration failed to follow college documents giving faculty substantial governance authority. Faculty recommendations "were often ignored or reversed by the president, by the academic dean, or by both" on academic matters that included "curriculum, admission policies, graduation of students, course loads, course scheduling, [and] grading of students… ." 261 NLRB at 566-567. These examples reinforce that the employer has the burden of proving managerial status based on authority in practice, rather than simply pointing to general descriptions of university policies.

[24] Larry G. Gerber, *College and University Government: Adelphi University (New York): A Special Report from Committee T,* Academe, Vol. 83, No. 3 (May - Jun., 1997), pp. 69-71.

The Board's observation in *University of Great Falls* captures the problem of the administration's exercise of its authority to override or ignore the recommendations of faculty governance bodies: "[M]any of the recommendations of [the faculty status committee] are not routinely accepted but rather are independently reviewed and evaluated, particularly by the provost, as they travel up the administrative hierarchy. Where the provost strongly has opposed a faculty status committee recommendation, higher administrators have approved the provost's recommendation over that of the committee." 325 NLRB at 96.

(b) Increasing university administrative authority over nonacademic matters.

Further examples reveal the increasing use of top-down administrative authority in areas that the Board has described as "nonacademic," including faculty hiring, tenure and promotion. *University of Great Falls*, 325 NLRB at 93; *Lewis and Clark College*, 300 NLRB 155, 161 (1990). Although the *Yeshiva* Court did not "rely primarily" on such nonacademic factors in determining managerial status, 444 U.S. at 686, n.23, the Board has considered them relevant, while according them "less weight." *University of Great Falls*, 325 NLRB at 93. As the Board has noted, "while curriculum is a key academic matter, in no case have faculty been held managerial solely because of their participation in recommending curricular matters." *University of Great Falls*, 325 NLRB at 96. In finding the Bradford College faculty to be non-managerial, the Board relied, in part, on the administration's responses ignoring or reversing faculty recommendations on nonacademic matters of "faculty hiring or retention, tuition, and faculty salaries." *Bradford College*, 261 NLRB at 566-567. At Adelphi University, despite university governance provisions giving faculty the right to participate in the selection of academic

administrative officers, the university president excluded faculty from giving any input in many of his major appointments, including provosts and deans.[25] At Bennington College, in 1994, the board of trustees and the president unilaterally decided on and implemented a plan to abolish its "presumptive tenure" system under which faculty had been reviewed every five years, substituting one to five year individual contracts.[26] The administration instituted this change by dismissing one-third of its faculty, eliminated many of the faculty governing bodies, and changed standards for hiring and retention.[27] At Clark Atlanta University, the administration unilaterally discharged one-fourth of its faculty, stating that it was on the basis of an "enrollment emergency." The administration took this action, however, without consulting with the faculty, without substantiating the asserted "emergency," and without following due process provisions of the university's own regulations.[28]

In *Point Park University*, the Regional Director concluded that "just as with academic matters, the faculty herein do not effectively recommend or control nonacademic matters," finding that the administration failed to follow the procedures outlined in the Faculty Handbook, including hiring some faculty members without a search committee. Regional Director's Supplemental Decision on Remand, at 60-61. Further evidencing its lack of consideration for faculty recommendations, the administration hired an outside consultant to redraft policies, including the Faculty Handbook, in derogation of the Faculty Handbook Revision Process. Regional Director's Supplemental Decision on Remand, at 59. As the Regional Director

[25] Gerber, *supra* note 24.
[26] William Celis 3d, *Radical Answer to a Small College's Woes*, N.Y TIMES, Jun. 23, 1994, at A12.
[27] *Id.*
[28] AAUP: New AAUP Investigation Report (Jan. 13, 2010), available at http://www.aaup.org/AAUP/newsroom/prarchives/2010/clark.htm?PF=1

explained, this unilateral action by the administration is significant, as it constitutes the administration's "assertion of the unilateral right to alter the document most fundamental to establishing the status of the faculty vis-à- vis the Administration…." Regional Director's Supplemental Decision on Remand, at 59-60.

Other university administrations have also emphasized that their managerial authority supersedes the Faculty Handbook. For example, although the preface to the Cornell University Faculty Handbook states that the Handbook is issued by the Office of the University Faculty, the following caveat is also included: "STATEMENT FROM UNIVERSITY COUNSEL: This handbook describes various Cornell University policies and procedures of interest to the University Faculty. The handbook, however, is not intended to create a contract between the university and its employees or to set forth terms or conditions of employment."[29]

(c) Increasing conflict between administration and faculty.

The use of a corporate business model of top-down management and the corresponding erosion of the shared governance model has led to increased conflict between university administrations and faculty. Faculty governance bodies, including committees, senates, and councils, have protested administrative failures to consult with them or administrative decisions overriding faculty governance recommendations. For example, a Cornell University faculty senate committee report in 2007 recounts a series of administration decisions made without adequate consultation with the faculty senate, including the creation of a new faculty of computing and information science, the reorganization of the division of biological sciences, and

[29] Faculty Handbook 2010 (Eighth Edition), available at http://theuniversityfaculty.cornell.edu/handbook/handbook_main.html

the creation of a for-profit distance learning corporation.[30] At Bennington College, the Bennington Academic Freedom Committee and the AAUP engaged in activities to protest the administration's unilateral actions in 1994 to abolish its "presumptive tenure" system.[31] At Rensselaer Polytechnic Institute, in 2006, the Board of Trustees ordered the Faculty Senate to revoke its amendment to expand Senate membership to include clinical faculty. Following the Rensselaer President's rejection of the Senate's request to convene a joint committee to resolve the issue, the Provost unilaterally suspended the Faculty Senate for failing to comply with the Board of Trustees' order. This action led to an extended period of conflict, during which the administration took control from the Senate of the election process for faculty committees (including the curriculum committee) and for the responsibility over the contents of the Faculty Handbook.[32]

In *NLRB v. The Cooper Union for the Advancement of Science and Art,*783 F.2d 29, 32 (2d Cir. 1986), the Second Circuit considered "faculty-administration conflict arising out of the [administration's] unilateral changes" in concluding that the faculty was not "aligned with management" and thus, not managerial. As the court stated, "[W]e would have to ignore the extensive evidence of conflict and of broad administrative authority to implement changes over

[30] Faculty Senate Committee to Review Faculty Governance: Final Report and Recommendations 18-42 (March 7, 2007), available at http://theuniversityfaculty.cornell.edu/pdfs/GOVERNANCE372007.pdf
[31] Joan Wallach Scott, *The Critical State of Shared Governance*, http://www.aaup.org/AAUP/pubsres/academe/2002/JA/Feat/Scot.htm; Jane Buck, *The President's Report: Successes, Setbacks, and Contingent Labor*, Academe, Vol. 87, No. 5, Sept.-Oct. 2001, at 18, 20.
[32] Nancy D. Campbell and Jane F. Koretz, *The Demise of Shared Governance at Rensselaer Polytechnic Institute,* 1 AAUP Journal of Academic Freedom (2010), available at http://www.academicfreedomjournal.org/Previous/VolumeOne/Campbell-Koretz.pdf ; Paula Wasely, "Rensselaer Professors Challenge Provost's Decision to Suspend Faculty Senate," Chronicle of Higher Education (Nov. 1, 2009).

faculty opposition in core academic areas such as curriculum to find that the Cooper Union faculty is 'aligned with management.'" 783 F.2d at 32.

Faculty perceptions reflect the conflict between the corporate business model and the shared governance model. The results from a 2007 international survey reveal that most U.S. faculty perceive that they have little influence over key academic policies at the level of their college and in the central university administration. Seventy-three percent of faculty responded that they are very or somewhat influential in helping to shape key academic policies at their departmental level.[33] That percentage drops at the school/college-level to 37 percent and even further at the university level, where 21 percent responded that they are very or somewhat influential in shaping key academic policies.[34] Sixty-four percent of faculty agreed that "there is a top-down management style" in their university, while only 31 percent agreed that "there is collegiality in decision-making processes" and only 30 percent agreed that "there is good communication between management and academics."[35] Faculty sense of affiliation with their university is also dropping. In a comparable survey in 1992, 90 percent of faculty responded that their affiliation with their university was important or very important, while in 2007, only 61 percent responded positively to this question.[36] This contrasts with a continued high degree of a sense of affiliation of faculty with their discipline, at 96 percent in 1992 and 92 percent in 2007.[37] These data support a conclusion that the shifts toward top-down management and away

[33] William K. Cummings and Martin Finkelstein, *Global Trends in Academic Governance*, Academe Online (Nov.-Dec. 2009) (Table 3), available at http://www.aaup.org/AAUP/pubsres/academe/2009/ND/Feat/Cumm.htm
[34] *Id.*
[35] *Id.* at Table 4.
[36] *Id.* at Table 5.
[37] *Id.*

from shared governance contribute to faculty perceptions that faculty and administrative interests are not aligned.[38] Rather faculty interests lie with their professional discipline, but diverge from their institutions.

3. Summary: Factors relating to expanded administration size and authority.

As this discussion has demonstrated, the growing influence of the corporate business model on universities has led to a major expansion of university administration, accompanied by increased top-down authority exercised by high-level administrators. This has resulted in institutional changes in the relationship between administration and faculty. The proliferation of administrators at high levels of the university hierarchy has solidified a class of long-term university administrators – "managerial professionals" – who have been given enhanced authority and power over academic matters in a way that erodes effective recommendations or control by the "practicing professionals" in the faculty. As the administration expands, its decisions rely more heavily on the expertise of the "managerial professional" administrators. Although the "practicing professionals" in the faculty may continue to have a substantial role in the development of academic policy and practice, this role has become more advisory in nature. Unilateral decision-making by the administration and the corresponding erosion of the shared governance model has led to conflict between administration and faculty.

These institutional shifts in power and authority should be considered in the fact-based evaluation of whether the employer has met its burden of proving that faculty are managerial

[38] Cummings and Finkelstein state: "Academics both in the United States and around the world believe that they do not have a sufficient role in decision making, though American faculty feel less powerful in a number of respects than their colleagues in other mature systems of higher education. Additionally, in most countries, faculty do not believe that the current decision-making processes have led to much improvement in their working conditions." *Id.* at 2.

employees. Additional factors relating to the growth of administration size and authority are: the extent of university administration hierarchy; the degree of consultation by the administration with faculty committees or other faculty governance bodies over academic and nonacademic matters; whether the administration treats faculty recommendations as advisory rather than as effective recommendations; whether the administration routinely approves nearly all faculty recommendations without independent administrative review; and whether conflict between the administration and the faculty reflects a lack of alignment of administration and faculty interests.

4. University administrations increasingly respond to external market forces rather than faculty views and recommendations.

In applying the corporate business model, university administrators have relied increasingly on external market forces to make decisions based on revenue generating potential of academic programs. This has eroded the shared governance model by shifting control and influence over academic policy and programs from the faculty to the administration. In the competition for market position, university administrators have turned to public relations firms to develop the university's "brand" in a way that will appeal to students as "customers" purchasing education as a product.[39] This commercial image of education has been one of the bases for expanding the administration, with a multiplicity of new "nonacademic" units to address administrative areas such as finance, student affairs, and housing.[40] Yet these "nonacademic" units have an impact on traditional "academic" concerns, including issues about budgetary

[39] See, Susan C. Aldridge, *Strategy Matters More Than Budget in Student Recruiting*, Chronicle of Higher Education (Oct. 31, 2010); Lloyd Thacker, *Confronting the Commercialization of Admissions*, Chronicle of Higher Education (Feb. 25, 2005).

[40] See, Ginsberg, *supra* note 14, at 27-36; Faculty Senate Committee to Review Faculty Governance: Final Report and Recommendations 6 (March 7, 2007), available at http://theuniversityfaculty.cornell.edu/pdfs/GOVERNANCE372007.pdf

priorities. As universities face continuing financial pressures, administrators control the management of finances and the budget, with a marked reduction of faculty consultation or participation in setting budget policies that affect academic matters.[41] Faculty influence decreases, as well, with the growth of the ranks of lower paid nontenure-track faculty.[42]

The erosion of faculty governance of academic programs has occurred, in part, through changes in the various budget models that universities have been adopting. The traditional model was incremental budgeting where only new revenue is allocated. However, more and more universities are moving to models like Responsibility Center Management, which "exemplifies the attempt to introduce business principles into higher education" by making each college within the university a profit center.[43] The central administration maintains control by imposing a tax on the colleges to carry out "strategic initiatives." At the same time, colleges receive most of the revenue but also have all expenses, including space, police and administrative costs allocated to them. Each college receives revenues based on student credit hours and research funding. Colleges receive higher revenue for their own majors, giving them an incentive to offer as many courses as they can within their own colleges. Thus, engineering schools have an incentive to teach English and mathematics as well as engineering; business

---

[41] Joan Wallach Scott, *The Critical State of Shared Governance*, available at http://www.aaup.org/AAUP/pubsres/academe/2002/JA/Feat/Scot.htm

[42] See, Benjamin, *supra* note 17 (nearly 40 percent of full-time faculty positions and 70 percent of all faculty positions are nontenure-track).

[43] David L. Kirp, *The Corporation of Learning: Nonprofit Higher Education Takes Lessons from Business*, Research & Occasional Paper Series: CSHE.5.03, Center for Studies in Higher Education, at 4-5 (May 2003), available at http://cshe.berkeley.edu/publications/docs/ROP.Kirp.5.03.pdf Universities have also changed their reporting in financial statements to make them much closer to financial statements used by for-profit businesses. See, Mary F. Foster and James E. Shiah, *FASB Changes Reporting Standards for Not-for-Profit Organizations*, JOURNAL OF CORPORATE ACCOUNTING AND FINANCE 381, 382 (Spring 1994).

schools have incentives to teach writing, philosophy, mathematics and statistics. This budgetary model encourages deans to make unilateral decisions to create, develop, or eliminate programs based on their revenue generating potential regardless of the faculty's academic concerns. This budgetary model also changes the communal academic culture of the university by discouraging collaboration between faculty across colleges for research and in formulating interdisciplinary programs.[44]

Other budgetary decisions by university administrations have also invaded faculty control over academic programs. The market potential in the sciences has led to budgetary priorities favoring expansion of the science disciplines as compared to the humanities. Since the enactment of the Bayh-Dole Act of 1980, which encourages commercialization of federally funded research, there has been an expansion of university technology transfer offices, directed and operated by non-faculty administrators to provide the infrastructure and personnel to "scour [university] labs"[45] for commercially profitable discoveries.[46] Between 1998 and 2003, U.S.

---

[44] See, John D. Hummell, *Financing Higher Education: Approaches to Funding at Four-Year Public Institutions*, Working Paper Series: CHEWP.1.2012, Center for Higher Education, at 2-4, 9-13 (March 2012), available at http://www.cehs.ohio.edu/centers-partnerships/centers/c4he/CHEWP_1_2012_JH.pdf Leroy W. Dubeck, *Beware Higher Ed's Newest Budget Twist*, THOUGHT & ACTION 81-91 (Spring 1997), available at http://www.nea.org/assets/img/PubThoughtAndAction/TAA_97Spr_07.pdf

[45] DEREK BOK, UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION 141 (2003).

[46] See, AAUP Recommended Principles & Practices to Guide Academic-Industry Relationships (draft report) 107 (June 2012), available at http://www.aaup.org/AAUP/comm/rep/industry.htm ; David Blumenthal, *Academic-Industrial Relationships in the Life Sciences*, 349 NEW ENGLAND JOURNAL OF MEDICINE 2452, 2454-55 (2003); Sheldon Krimsky, *The Profit of Scientific Discovery and Its Normative Implications*, 75 CHICAGO-KENT LAW REVIEW 15, 22 (1999); Arti K. Rai and Rebecca S. Eisenberg, *Bayh-Dole Reform and the Progress of Biomedicine*, 91 AMERICAN SCIENTIST 52, 53 (Jan.-Feb. 2003).

patents awarded to universities quadrupled, from about 800 to more than 3,200 per year.[47] From 1991 to 2000, licenses granted by universities increased by 158 percent.[48]

Faculty control has been reduced, as well, by the growth of university agreements giving corporate donors unprecedented access to university departments in exchange for large-scale corporate funding. Such access includes corporate representatives on panels making decisions about whether to fund faculty research proposals, a function which had traditionally been reserved for faculty peer review.[49] Corporate donors also influence the dissemination of research results through arrangements for non-exclusive or exclusive licensing of patented academic research results. Examples include the 1982 Washington University-Monsanto agreement for $23.5 million of corporate funds over five years in exchange for exclusive licensing rights to patents resulting from biomedical research; the 1994 MIT-Amgen agreement for $30 million of corporate funding to the Department of Biology and the Department of Brain and Cognitive Sciences over a ten-year period in exchange for resulting patents to be owned jointly by MIT and Amgen;[50] and a 2008 Harvard-GlaxoSmithKline five-year $25 million agreement for stem cell research, which will include joint projects, Glaxo first rights to non-exclusive licensing, and a

[47] Josephine Johnston, *Health Related Academic Technology Transfer: Rethinking Patenting and Licensing Practices,* 9 INTERNATIONAL J. BIOTECHNOLOGY 156, 162 (2007).
[48] Blumenthal, *supra* note 46, at 2455 (2003).
[49] AAUP Recommended Principles & Practices to Guide Academic-Industry Relationships, *supra* note 46, at 189-195.
[50] Risa L. Lieberwitz, *Confronting the Privatization and Commercialization of Academic Research: An Analysis of Social Implications at the Local, National, and Global Levels*, 12 IND. J. GLOBAL LEG. STUD. 109, 123-124 (2005).

research consortium to be "overseen by a steering committee made up of equal numbers of Harvard and GSK personnel."[51]

The university's growing identity as a business and market actor has altered the unique academic culture of the university. The extent to which the administration makes academic decisions based on market potential should be considered as a factor in the determination of whether faculty are managerial employees. In considering this factor, the fact-based inquiry should include the extent to which faculty governance bodies actually exercise the authority to make "effective recommendations" about university market ventures, including university-industry agreements. As discussed above, faculty do not make effective recommendations if they are relegated simply to an advisory capacity, where the administration will seek, accept, or reject faculty recommendations depending on whether they comport with the administration's or external industry partner's position

C. An accurate assessment of faculty status under Section 2(12) should take into account factors related to the university's use of the corporate business model of decision-making.

Erosion of faculty influence and faculty governance bodies means erosion of faculty academic freedom as a term and condition of employment. Faculty rely on academic freedom as the term and condition of employment central to their ability to have autonomy and independence in their teaching and research, and in their collective influence on academic matters through governance bodies. The fundamental structural changes in the distribution of authority in the university, however, have led to established patterns of administrators' unilateral

[51] AAUP Recommended Principles & Practices to Guide Academic-Industry Relationships, *supra* note 46, at 191.

actions on academic and nonacademic matters. These structural changes have weakened academic freedom and shared governance as terms and conditions of employment that faculty can rely on as a predictable and regular part of their professional work. Administrators have made it increasingly clear that they will consult with faculty when they please, fail to consult with faculty when they please, accept or reject faculty input and recommendations when they please, and even dissolve faculty governance bodies when they please. As a result, administrations increasingly make and implement unilateral decisions when they please. The faculty does not make "effective recommendations" or have "effective control" over many academic and nonacademic matters. These conditions show that administration and faculty interests are not aligned.

Thus, the determination of whether faculty members are managerial employees should consider the changed relationship between the faculty and the administration. As discussed above, this assessment is consistent with the emphasis on context in *Yeshiva* and in the D.C. Circuit's decision in *Point Park University*. The Regional Director will, of course, engage in fact-finding on a case by case basis to determine whether the employer has met its burden of proving that faculty at a specific university are managerial. But the current widespread conditions of universities make it necessary to expand the parameters of that determination to assess whether the faculty actually exercises managerial authority. Taking account of the changed context would include consideration of the following factors in the determination of whether faculty are managerial employees: the extent of university administration hierarchy; the extent to which the administration makes academic decisions based on revenue generation or other market-based considerations; the degree of consultation by the administration with faculty

committees or other faculty governance bodies over academic and nonacademic matters; whether the administration treats faculty recommendations as advisory rather than as effective recommendations; whether the administration routinely approves nearly all faculty recommendations without independent administrative review; and whether conflict between the administration and the faculty reflects a lack of alignment of administration and faculty interests.

In applying these factors, the conclusion that faculty are non-managerial professional employees should not depend on evidence of the most extreme loss of faculty authority over academic matters. The current context in universities reveals a range of situations where faculty governance has been eroded through administrative unilateral decision-making and disrespect for faculty recommendations. In enforcing the Board's decision finding Loretto Heights College faculty to be non-managerial, the court noted that the faculty did "play a substantial role in College governance, participating in decision making and implementation in a wide range of areas." 742 F.2d at 1252. At the same time, the court concluded that "while faculty members do take part in the formulation and implementation of management policy, their role does not…rise to the level of 'effective recommendation or control'…." 742 F.2d at 1252. The faculty did not, therefore, meet the *Yeshiva* standard of "in effect, substantially and pervasively operating the enterprise." 742 F.2d at 1255, quoting *Yeshiva*, 444 U.S. at 679. Nor was "their authority in academic matters…absolute." 742 F.2d at 1255, quoting *Yeshiva*, 444 U.S. at 686. Thus, in applying the relevant factors in the current university context, the Board can reasonably conclude that faculty are non-managerial professional employees across a range of cases where faculty participate actively in university affairs but do not "substantially and pervasively operate the enterprise."

Even with an expanded range of faculty determined to be non-managerial professional employees, there will still be a need to determine whether certain positions are managerial. In addition to high-level administrators, in some cases department chairs and program directors will be found to be managerial employees. Where the parties do not agree, this determination will be made, of course, through a fact-based inquiry by the Regional Director. Having made these employee status determinations, the most relevant issues will involve bargaining unit determinations, for example, whether tenure-track/tenured faculty members and nontenure-track faculty should be included in a single bargaining unit. These community of interest issues will be determined, as in all cases, through the labor organization's petition for election, followed by either agreement of the parties or a Regional Director's decision based on evidence gathered at a representation case hearing.

CONCLUSION

For the foregoing reasons, the AAUP respectfully urges the NLRB to expand the factors used in determining whether university faculty are managerial employees. These factors, as listed and analyzed above, would take into account the current context of universities, including the major institutional changes in university structure and authority since the *Yeshiva* case was decided.

Dated: June 29, 2012

Respectfully submitted,

AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS

/*s*/ Kathi S. Westcott, Esq.
Senior Counsel
1133 19th Street, NW, Ste. 200
Washington, DC 20036
202-737-5900 (Office)
202-737-5526 (Fax)
legal.dept@aaup.org

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the foregoing BRIEF OF AMICUS CURIAE, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, IN SUPPORT OF PETITIONER, NEWSPAPER GUILD OF PITTSBURGH/ COMMUNICATIONS WORKERS OF AMERICA LOCAL 38061, AFL-CIO, CLC, was served electronically on this 29th day of June 2012, to the parties and their counsel in this case by e-filing via the NLRB website: http://mynlrb.nlrb.gov/efile.

/*s*/ Kathi S. Westcott, Esq.