

**Yeshiva University and Yeshiva University Faculty Association, Petitioner. Case 2-RC-16662**

December 5, 1975

**DECISION AND DIRECTION OF ELECTION**

**BY CHAIRMAN MURPHY AND MEMBERS JENKINS AND PENELLO**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Clifford P. Charet. Pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, and by direction of the Regional Director for Region 2, this case was transferred to the National Labor Relations Board for decision. Thereafter, the Employer and the Petitioner filed briefs in support of their respective positions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the Hearing Officer made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. Yeshiva University, also referred to herein as the Employer or the University, is a private institution of higher education chartered under the laws of the State of New York. Its offices and educational facilities are located on four campuses in New York, New York.<sup>1</sup> During the past year the University derived gross income in excess of \$1,000,000 from sources other than donations and restricted contributions. At least \$50,000 of this income was derived directly from sources located outside the State of New York. Based on the foregoing stipulated facts, we find that the Employer is engaged in commerce

<sup>1</sup> The University is composed of 12 schools and colleges and a number of programs. These are as follows: Yeshiva College, Bernard Revel Graduate School (whose summer session is known as the Harry Fischel School), James Striar School of General Jewish Studies, Wurzelweil School of Social Work, Stern College for Women, Erna Michael College for Hebraic Studies, Teachers Institute for Women, Ferkauf Graduate School of Humanities and Social Sciences, Belfer Graduate School of Science, Albert Einstein College of Medicine, Sue Golding Graduate School of Medical Sciences, Rabbi Isaac Elchanan Theological Seminary, Community Service Division, Cantorial Training Institute, Sephardic Studies Program, Yeshiva Program, and Sephardic Community Action Program.

<sup>2</sup> The Employer took the position that the Petitioner and its component bodies, the Faculty Associations of the Belfer Graduate School of Science, the Ferkauf Graduate School of Humanities and Social Sciences, and the Yeshiva College, were formed by supervisory employees of the University thereby taking the organization outside of the definition of a labor organization as stated in the Act. However, it is clear from the record that the Petitioner is an organization "in which employees participate" and which exists for the purpose of bargaining collectively with the Employer. The Petitioner thus meets the definition of "labor organization" set forth in

within the meaning of the Act, and it will effectuate the policies of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.<sup>2</sup>

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The Yeshiva University Faculty Association herein referred to as the Petitioner or YUFA seeks to represent a unit including all faculty appointed to the University in the titles of professor, associate professor, assistant professor, instructor with a full-time teaching load or the equivalent, excluding part-time faculty, lecturers, faculty of the Albert Einstein College of Medicine, the Sue Golding Graduate School of Medical Sciences, the Yeshiva High School, the Rabbi Isaac Elchanan Theological Seminary, the Cantorial Training Institute, the Community Service Division, the Sephardic Community Activities Program, the James Striar School, the Teachers Institute for Women, and the Sephardic Studies Program, librarians, research associates, research assistants, visiting faculty whose employment at the University is for a fixed 1-year period and who are faculty members at another academic institution, emeritus faculty who are not actively engaged in teaching at the University, faculty whose initial and subsequent appointment is subject to special funding derived in the main from nonuniversity funds, deans and acting deans, directors, the Registrar, and other officers of the University.<sup>3</sup>

The Employer initially takes the position that all faculty members of the University are managerial or supervisory personnel and are therefore not employees within the meaning of the Act. In the alternative, the Employer seeks a unit of all full-time and regular part-time faculty members.<sup>4</sup> The Employer would exclude from this unit as managerial and/or supervisory, department chairmen and their concomitants,

Sec 2(5) of the Act. Further, it is clear that the Petitioner was organized primarily by faculty found, *infra*, to be nonsupervisory employees. The participation in the organizational effort by three principal investigators, found to be supervisors, *infra*, does not remove Petitioner from the definition of a labor organization in light of substantial employee participation in the Petitioner *Directors Guild of America, Inc. (Association of Motion Picture & Television Producers, Inc.)*, 198 NLRB 707 (1972). We also note that questions relating to showing of interest are not litigable in representation proceedings *Tappan Division of Tappan Incorporated*, 193 NLRB 989 (1971).

<sup>3</sup> At the close of the hearing, the Petitioner indicated that it did not seek to represent faculty at the University's Teachers Institute for Women, herein referred to as Teachers, inasmuch as the professors at Teachers labeled "full-time" by the University do not hold faculty appointments but are actually part-time faculty.

<sup>4</sup> Under the University's definition, part-time (that is, half the normal full-time load of 12 hours) would include the faculty members teaching at least 6 hours in the semester in which the election is held and in both semesters of the preceding 3 academic years.

members of the University's committee on academic priorities and resource allocation and the faculty review committee, assistant deans, principal investigators of research and training grants, faculty who have as of date of the election, received notice that their appointment will be terminated or will not be renewed, have notified the University that they intend to resign, or have reached the University's mandatory retirement age. The Employer would not exclude, as would the Petitioner, full-time faculty whose appointments are subject to funding from research grants or from other nonuniversity sources, faculty with the rank of "lecturer," and faculty at Teachers. The Employer does not disagree with the other exclusions sought by the Petitioner.

In contending that no faculty bargaining unit can be appropriate because all faculty members—by virtue of their group participation in faculty governance—are supervisory or managerial and are, thereby, not employees within the meaning of the Act, the Employer requests that the Board reconsider its previous decisions on this issue.<sup>5</sup> The Employer urges, further, that, in any event, the Board reach a contrary result herein on the ground that this particular faculty has authority which is different from and more extensive than the authority vested in the faculties which were the subjects of the earlier cases.

We find from our examination of the record, however, that the role and authority of the faculty herein with respect to hiring, promotion, salary increases, the granting of tenure, and other areas of governance are not significantly different from what they were in the cited cases,<sup>6</sup> wherein the same arguments were rejected. At Yeshiva University, faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than "in the interest of the employer,"<sup>7</sup> and final authority rests with the board of trustees. As in the earlier decisions, we find that the faculty members are professional employees under the Act who are entitled to vote for or against collective-bargaining representation.

<sup>5</sup> *Northeastern University*, 218 NLRB No 40 (1975), *University of Miami*, 213 NLRB 634 (1974), *Adelphi University*, 195 NLRB 639 (1972), *Fordham University*, 193 NLRB 134 (1971), and *C W Post Center of Long Island University*, 189 NLRB 904 (1971)

<sup>6</sup> See fn 5, *supra*. See also *New York University*, 205 NLRB 4 (1973)

<sup>7</sup> Sec 2(11) of the Act

<sup>8</sup> The Employer argues that application of the factors relied on by the Board in *New York University* requires the inclusion of regular half-time faculty members here. However, while there is some involvement of part-time faculty in issues of curriculum and standards in the Jewish Studies Programs, for the most part the part-time faculty, by both regulation and practice, play a significantly lesser role in student and faculty affairs at the University than do full-time faculty. The record herein amply demonstrates a lack of mutuality of interest between the part-time and full-time faculty at Yeshiva University similar to that requiring exclusion of part-time faculty in

## Unit Composition

*Part-time faculty:* The Petitioner would exclude, while the Employer would include, part-time faculty members. For the reasons set forth in our decisions in *New York University*, *supra*,<sup>8</sup> and *University of San Francisco*, 207 NLRB 12 (1973), we shall exclude part-time faculty from the bargaining unit found appropriate herein.<sup>9</sup>

*Members of committee on academic priorities and resource allocation and faculty review committee.* The Employer contends that members of these committees have substantial managerial and supervisory powers and must, therefore, be excluded from the unit. The record, however, demonstrates that the faculty members on each of the two committees are *elected by the faculty* and serve as representatives of the faculty rather than of management. As we have found, *supra*, authority exercised by the faculty as a group on the basis of collective discussion and consensus is not sufficient to render the individual members of such group supervisors within the meaning of the Act.<sup>10</sup> We therefore find that the several members of the two above-named committees are not supervisory or managerial representatives of the University, and we shall include them in the bargaining unit.

*Department chairmen, division chairmen, and senior faculty:* The Employer contends that the department chairmen and their concomitants are managerial and/or supervisory employees and, as such, must be excluded from the bargaining unit. The Petitioner asserts that the department chairmen and senior faculty do not qualify as supervisory or managerial and seeks their inclusion in the unit.

As in the *University of Miami*, *supra*, department chairmen are generally appointed by the dean of their school or college, after consultation with the departmental faculty concerned—whose recommendation is usually, although not always, followed. Indeed, at Belfer, Revel, Ferkauf, and Yeshiva College, the department or division chairmen are actually *elected* by the faculty of their respective departments or divisions. Further, department chair-

*New York University* and *University of San Francisco*

<sup>9</sup> The record indicates that there are currently no faculty members at Teachers holding full-time appointments with the University, rather the faculty listed by Teachers as teaching a full 12-hour load are, in fact, part-time faculty without University appointment. Accordingly, such part-time faculty members are not eligible to vote in the election. However, as there is no basis for excluding from the unit any full-time faculty members at Teachers should any such University appointments be made in the future, faculty at Teachers holding full-time appointments with the University will be included in the unit. As the faculty in the title "lecturer" work part-time, employees in that classification are excluded from the unit as part-time employees.

<sup>10</sup> *Adelphi University*, 195 NLRB 639, 648 (1972), *C W Post Center of Long Island University*, *supra*

men have been subject to recall several times by their faculty membership.

The chairmen have regular faculty appointments and teach classes. It appears from the record that they do not receive any extra pay or stipend as chairmen, but they do have their teaching obligations somewhat reduced in many cases.

Belfer's Dean Komar testified that department chairmen at Belfer recommend faculty salaries to the dean but such salaries are subject to approval by the vice president of the University, and individual faculty members can and have gone directly to the president of the University to adjust the recommended figures. The recommendations, arrived at by a consensus of the department members, as to hiring, firing, or granting tenure are relayed through the chairmen.

The dean at Erna Michael testified that when a new faculty member is needed, he approaches the "senior professor," if there is one for the subject area involved, or a number of other faculty people if there is no senior professor, and asks if they know of anyone. Another source is letters or requests for positions received by the dean or "any other of the well-known members of the faculty." According to the dean's testimony, if a particular application looks good or if a faculty member has someone in mind, the dean asks the faculty member to interview the person in question; about 50 percent of the time the dean also participates in the initial paper screening and sometimes participates in the interviews.

Rabbi Besdin, Director of Striar, testified that the two department chairmen were chosen with the consensus of faculty and that other faculty, as well as department chairmen, may play a consultative role regarding hiring.

The testimony of Dean Gittler of Ferkauf indicates that recommendations on hiring come from the consensus of the department through the chairman.

Wurzweiler has no "chairmen" or "senior professors." The Employer argues that the convenors, the chairman of the admissions committee, the field instruction coordinator, and the chairman of the doctoral committee perform many of the supervisory and managerial duties of the school. The record indicates that the primary duties of these personnel involve, respectively, coordination of teaching approaches in each division, direction of students' admission, selection of social agencies for placement of students (a responsibility delegated by the faculty), and establishment of requirements for the doctorate degree.

Rabbi Landman of Revel testified that the department chairman's recommendations on the hiring of

full-time and part-time faculty members appear to be arrived at by consensus of the department faculty.

The testimony of Dean Mirsky of Stern indicates that he has consulted with Stern's chairmen and generally obtained the approval of the department chairmen before submitting recommendations to the president with regard to the hiring of new employees and the reappointment of faculty. Dean Mirsky has, however, acted contrary to a department chairman's recommendation, and the chairmen do not have the authority to effectuate a reappointment denied by the dean.

According to Dean Bacon of Yeshiva College, the division chairmen, who are elected by the faculty of the particular division, make up the advisory council to the dean. Collectively they deliberate and recommend, through the chairman of the division involved, action on such matters as promotions and sabbaticals. The senior faculty at Yeshiva College, faculty members with the most seniority in each subject area,<sup>11</sup> review applicants for faculty positions and recommend the most outstanding to Dean Bacon, who makes an independent review of the applicants' qualifications before referring such recommendations to the president.

As with the final authority to appoint and reappoint, exclusive authority for the granting of tenure is vested in the president. The record does not indicate that department chairmen play a significant role in this process. The departments at Belfer collectively make tenure recommendations which Dean Komar passes on to the president; the dean at Wurzweiler, individually, makes the recommendations to the president. At Ferkauf, a council of all tenured faculty considers award of tenure, but the dean chairs the council and retains, and has exercised, veto power over its recommendations.

The Board has considered many factors in determining whether department chairmen should be included in a unit of faculty. One of the crucial factors is the role of the chairmen in faculty personnel decisions such as hiring, firing, and other changes of status. In appropriate cases where the chairman's authority has been effectively diffused among the department faculty pursuant to the principle of collegiality, the Board has included the chairmen.<sup>12</sup> The record in the present case demonstrates that the department chairmen, division chairmen, and senior faculty at Yeshiva fall within this qualification.

On the record before us, it appears that, although they have certain formal responsibilities with respect to decisions on such matters as appointment, promotion, and tenure, the department chairmen and

<sup>11</sup> The subject areas at Yeshiva College are organized in broad "divisions."

<sup>12</sup> *Northeastern University, supra*

their concomitants act primarily as instruments of the faculty in these matters. The department chairmen, in these respects, therefore stand largely on the same footing as the faculty, from whom they receive their authority. All major recommendations, including hiring, appear to be done on a collegial basis. Further, as previously noted, the department chairmen at Yeshiva receive no additional remuneration for assuming the position of chairman.

Accordingly, we find that the department chairmen, division chairmen, and senior faculty are neither supervisors nor managerial employees and shall include them in the unit.<sup>13</sup>

*Assistant deans:* The Petitioner seeks to include in the unit the two assistant deans, Patt at Belfer and Wischnitzer at Yeshiva College. The Employer would exclude them as supervisory and/or managerial. It does not appear from the record that they are ever delegated the supervisory authority possessed by the deans under whom they serve.<sup>14</sup>

Both of the assistant deans hold faculty appointments, are paid in the faculty classifications, and fulfill teaching responsibilities within the academic departments with which they are affiliated. Further, the assistant dean at Belfer has been elected by the faculty to serve as faculty representative on several committees.

Based on the foregoing we find that the assistant deans are neither supervisors nor managerial employees.<sup>15</sup> Accordingly, we shall include them in the bargaining unit herein.<sup>16</sup>

*Terminal faculty members:* As noted, *supra*, the Employer seeks to exclude faculty resignees, termines, and retirees.<sup>17</sup> Petitioner seeks inclusion of these faculty members. The Employer, recognizing that in previous university cases the Board has uniformly included such employees in faculty bargaining units,<sup>18</sup> urges the Board to reconsider its holding on this issue. After due consideration, we have decided to adhere to our longstanding position with regard to terminal employees, since while their employment continues they have a substantial community of interest with their colleagues. Therefore, faculty members who have received notice that

their appointments will be terminated or will not be renewed, have notified the University that they intend to resign, or have reached the University's mandatory retirement age will be eligible to vote in the election herein provided that they are still employed as faculty members at the time of the election.

*Principal investigators:* The Petitioner seeks to include in the unit principal investigators. The Employer argues that they possess supervisory and managerial authority and must be excluded.

Principal investigators are faculty members who prepare grant proposals and administer the projects once funds have been awarded by government or private agencies.

The principal investigator is responsible, subject only to approval of the deans and University administration, for the hiring of full-time and part-time members of the Yeshiva faculty, research associates, research assistants, clerical and other support personnel for work on his project. The record shows that the principal investigator prepares the budget for a grant and sets salaries within broad University guidelines. The record also demonstrates that the principal investigators have the authority to reprimand and terminate the services of all grant employees. Day-to-day supervision of grant employees is also carried out solely by the principal investigator.<sup>19</sup> The principal investigator adjusts the complaints and grievances of the grant employees.

As in *Northeastern University, supra*, all of the employees who work on grants and contracts under the direction of a principal investigator are employees of the University and not of the granting agency. These employees are paid by Yeshiva and receive the fringe benefits available to other employees. Yeshiva makes payroll deductions for grant employees similar to the deductions made for other employees.

In the instant case, as in *Rensselaer Polytechnic Institute*,<sup>20</sup> the employees supervised by the principal investigators are employees of the University, and, therefore, the principal investigators herein are supervisors in their relationship to their Employer.<sup>21</sup> Therefore, we find them to be supervisors within the

member may continue beyond the retirement age on a year-to-year basis with the president's permission.

<sup>13</sup> *Northeastern University, supra*; *Fordham University*, 214 NLRB No 137 (1974); *University of Miami, supra*; *New York University, supra*

<sup>14</sup> Although Dean Komar testified that Assistant Dean Patt "replaces" him during Komar's absences, there is no testimony indicating that during such time Patt was empowered to make any determinations with regard to hiring, firing, promotions, tenure, or any other change in status or to exercise any other supervisory or managerial function.

<sup>15</sup> *University of Miami, supra*

<sup>16</sup> Chairman Murphy is of the view that the record in this case is insufficient to make a determination as to whether the assistant deans are supervisors within the meaning of the Act. Accordingly, the Chairman would vote the two assistant deans by challenged ballot.

<sup>17</sup> Upon notice of resignation or termination, the full-time faculty member is expected to continue his employment through and until the end of the academic year. Further, terminations may be appealed, and a faculty

member may continue beyond the retirement age on a year-to-year basis with the president's permission.

<sup>18</sup> See *Fordham University, supra*; *New York University, supra*; *Manhattan College*, 195 NLRB 65 (1972)

<sup>19</sup> While it is difficult to determine the amount of time actually spent by the principal investigators in grant supervision, the University allocates 50 percent of a principal investigator's time for administration of grants. Further, testimony indicates that "absolutely more than half of the time" has been spent by a principal investigator in the supervision of nonunit employees.

<sup>20</sup> 218 NLRB No. 220 (1975).

<sup>21</sup> In *Fordham, supra*, and *New York University, supra*, the principal investigators were found not to be supervisors in their relationship to their employers and were included in the unit. However, in both cases, the

meaning of the Act and exclude them from the unit found appropriate herein.

*Full-time faculty whose appointment is subject to special funding and derived from non-University funds:* Contrary to the Employer, the Petitioner would exclude the two faculty members who have been hired primarily to perform research activities under a research grant.

Although listed by the University as full-time faculty (one under the title "Research Assistant Professor") neither of the two faculty members in this category have appointment letters from the president, and they are ineligible for tenure, sabbatical leave, or other perquisites enjoyed by full-time faculty. Further, it appears that their salaries are determined under the grant proposals upon which their employment is dependent.

Under these circumstances, it appears that these two faculty members whose appointment is subject to special funding have a community of interest with the research associates and research assistants, stipulated out of the unit by the parties, rather than with the appointed full-time faculty herein. Accordingly, we shall exclude them from the unit.

In accordance with the above, we find that the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

employees hired by them were not and did not become employees of the university.

All full-time faculty members appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visting thereof, department chairmen, division chairmen, senior faculty and assistant deans, but excluding faculty at Albert Einstein College of Medicine, Sue Golding Graduate School of Medical Sciences, Yeshiva High School, Rabbi Isaac Elchanan Theological Seminary, Cantorial Training Institute, Community Service Division, and Sephardic Community Activities Program; part-time faculty; lecturers; principal investigators; deans, acting deans and directors; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-University funds or whose initial or subsequent appointment is in connection with special projects; the Registrar; visiting professors (with effective faculty appointments at other academic institutions); librarians; research assistants; research associates; emeritus faculty not actively engaged in teaching at the University; officers of the University; all other administrative and support personnel; guards, and supervisors as defined in the Act.

[Direction of Election and *Excelsior* footnote omitted from publication.]