

Fairleigh Dickinson University and Fairleigh Dickinson University Council of American Association of University Professors Chapters, Union-Petitioner.

Fairleigh Dickinson University Council of American Association of University Professors Chapters and Fairleigh Dickinson University, Employer-Petitioner. Cases 22-UC-44 and 22-UC-46

December 13, 1976

**DECISION ON REVIEW AND ORDER
CLARIFYING CERTIFICATION**

BY MEMBERS FANNING, PENELLO, AND
WALTHER

On April 9, 1976, the Regional Director for Region 20 issued a Decision and Order in which he dismissed the UC petition (Case 22-UC-44) filed by the Fairleigh Dickinson University Council of American Association of University Professors Chapters (herein called AAUP). Thereafter, pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the AAUP filed a timely request for review of the Regional Director's decision, contending, *inter alia*, that the Regional Director's decision finding department chairmen to be supervisors is clearly erroneous and that the certified unit should be clarified to include the Employer's department chairmen.¹

By telegraphic order dated May 26, 1976, the Board granted the request for review, remanded the case to the Regional Director for the purpose of conducting a hearing with respect to the present status of the department chairmen, and directed that, after said hearing, the case be transferred to the Board for decision.

On May 28, 1976, the Employer filed a UC petition (Case 22-UC-46) in which it contends that the department chairmen's duties are the same as when the Board in 1973 found them to be supervisors and excluded them from the unit. The Employer also contends that as a result of the collective-bargaining agreement² faculty members as a group exercise authority in determining the terms and conditions of their employment. Therefore, the Employer asserts that, because the bargaining agreement creates such a high degree of "collegiality" at the University, the

faculty members are managerial and are not "employees" under the Act.

The Regional Director, on June 4, 1976, issued an order consolidating cases and notice of hearing. Following the hearing held before Hearing Officer Albert G. Kroll, and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, and by direction of the Regional Director for Region 22, this proceeding was transferred to the Board for decision. Thereafter, the Employer and the AAUP filed briefs in support of their 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 Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.³

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

1. Fairleigh Dickinson University is an independent nonprofit university operating under a charter from the State of New Jersey. It operates three major campuses at Rutherford, Madison, and Teaneck, New Jersey, with additional locations at Wayne and Fort Monmouth, New Jersey. The University has a gross annual revenue in excess of \$33 million. Annual purchases across state lines exceed \$50,000. Accordingly, we find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

2. We find that the labor organization involved claims to represent certain employees of the Employer.

3. In Case 22-UC-44, the Union-Petitioner contends that, under the terms and conditions of the parties' collective-bargaining agreement, the role of the department chairperson with respect to the hiring of new faculty members and the change of status of faculty members has changed to such an extent that department chairpersons are no longer supervisors within the meaning of the Act. Contrary to the Union's position, the Employer-Petitioner, in Case 22-UC-46, argues that the terms and conditions under the agreement as to the department chairper-

Junior College located at the Teaneck Campus, all officers and officials primarily engaged in administrative functions, librarians, laboratory work, all supervisors as defined in the Act including department chairmen, guards, and all other employees.

² The Fairleigh Dickinson University and the AAUP entered into a collective-bargaining agreement for the term September 1, 1974, to August 31, 1976.

³ The Employer's request for oral argument is hereby denied as the record and briefs adequately set forth the issues and the contentions of the parties

¹ In *Fairleigh Dickinson University*, 205 NLRB 673, 675 (1973), the Board found that the department chairmen were supervisors within the meaning of Sec. 2(11) of the Act. This determination was based on the facts that, at that time, department chairmen exercised the authority to make effective recommendations as to the hiring and change of status of faculty members, and they directed and assigned work to departmental support personnel.

The unit found appropriate consisted of: All full-time faculty members employed by the Employer at its New Jersey campuses, including the extension schools located at Wayne and Fort Monmouth, New Jersey, excluding part-time faculty members, the faculty of the Edward Williams

son's duties have not changed from that which existed when the Board in 1973 found them to be supervisors. We find merit in the Union's contentions.

The facts relating to the supervisory responsibilities of the department chairmen, prior to the parties' entering into their collective-bargaining agreement, are set forth in the Board's decision in *Fairleigh Dickinson University*, 205 NLRB 673, 675 (1973). There the Board concluded that the department chairmen were supervisors within the meaning of the Act inasmuch as they exercised authority to make effective recommendations with respect to the hiring and change of status of faculty members and directed and assigned departmental support personnel. In so concluding, the Board specifically noted that the department chairman conducted hiring interviews and that, although other faculty members also may have interviewed applicants, it was the chairman's recommendation which was forwarded to the college dean. In contrast, the record now indicates that the collective-bargaining agreement has substantially altered the duties and responsibilities of the department chairmen.

Under the contract, the various colleges of the University are subdivided into departments, with each department under the direction of a department chairperson. Department chairpersons are elected to a 3-year term based upon obtaining at least two-thirds of the votes of the full-time departmental faculty and the approval of the college dean, which is given except for reasonable cause. If the election of a chairperson is by a lesser margin than a two-thirds majority, then at least two names are presented to the college dean for his selection of a chairperson for the department. A chairperson may be recalled at the end of any academic year by a two-thirds vote of the departmental faculty and the concurrence of the dean. Department chairpersons do not receive extra compensation for their duties during the academic year, but they do receive a one-quarter teaching load reduction.

When the University administration authorizes the filling of a departmental vacancy or when a new position has been authorized, the Departmental Policy Committee (DPC),⁴ not the department chairperson, screens the applicants and recommends an individual to fill the position.

The parties' collective-bargaining agreement provides that no later than October of each academic

year the department chairperson shall forward to the DPC the names of all members of the department who, under the terms of the agreement and university regulations, must be reviewed for renewal or nonrenewal of their contracts, promotions, tenure, emeritus status, or sabbatical leaves.⁵ In cases to be reviewed, the department chairperson provides the DPC with a personal "preliminary recommendation" on the personnel matter and with a copy of the individual's personnel file. The DPC makes its own independent recommendation based on peer evaluations which include classroom observation, analysis of course outlines, etc., student evaluations, and in some cases recommendations from faculty members in the department.

The recommendations of both the department chairperson and the DPC are sent to the college dean who also makes a preliminary recommendation as to the personnel matter at issue. The bargaining agreement provides that the dean's recommendation shall be based upon "considerations of individual merit and, where appropriate, his analysis of such college-wide concerns as enrollment patterns, class size statistics, staffing patterns, and budgetary considerations." The dean's recommendation, along with all relevant information, is forwarded to the College Faculty Status Committee (CFSC)⁶ for it to make a recommendation.

In the event that the CFSC and the college dean concur, the vice president for academic affairs shall approve their recommendations, except in unusual circumstances. If the CFSC fails to make an effective recommendation owing, for example, to a tie vote or abstentions by a majority of the CFSC, the recommendation of the college dean is regarded as the effective recommendation of the college. However, if the CFSC and the college dean do not agree in a faculty status matter, the vice president for academic affairs, after reviewing the judgments made at each level, gives substantial weight to the recommendation of the CFSC. The vice president for academic affairs has final authority on personnel matters.

With respect to the hiring of part-time faculty, the record discloses that the DPC submits to the department chairperson a list of individuals recommended by them for part-time employment in the department. Except for emergency situations, the department chairperson's discretion in filling vacancies for part-

⁴ The DPC is elected by the faculty members in each department and consists of one-third of the departmental faculty, exclusive of the department chairperson. When the DPC functions as a personnel committee, there are also one student representative and a student alternate on the committee. The department chairperson is an *ex officio* member of the DPC, except when the DPC functions as a personnel committee at which time the department chairperson does not serve as a member of the DPC. Inasmuch as the chairperson issues his own separate recommendation as to personnel matters, he does not vote again on such matters on the committee.

⁵ The procedures for handling personnel matters are contained in arts. 10 and 11 of the collective-bargaining agreement.

⁶ The CFSC is an elected body composed of five tenured associate professors or professors, two other faculty members who are either tenured assistant professors or untenured faculty members without regard to rank, and two students. The recommendation of the CFSC as to personnel matters constitutes the recommendation of the college faculty.

time faculty is limited to selecting from among those individuals whose names appear on the DPC list.

Thus, under the terms of the parties' collective-bargaining agreement entered into and implemented after the election in which department chairpersons were excluded as supervisors, the recommendation of each chairperson as to personnel matters involving full-time faculty can no longer be said to be given "great weight." The department chairperson's recommendation is now only one of four recommendations on the same personnel matter and the college dean is specifically directed by the contract to concur with the recommendations of the DPC, "except for substantial reasons stated in writing." Further, the chairpersons now generally have only limited authority with respect to filling vacancies for part-time faculty positions. Additionally, the record reveals that the chairpersons spend only a minimal portion of their time directing nonunit departmental support personnel.⁷ We therefore find that the authority and responsibilities of the chairpersons have been so significantly changed under the parties' contract that the chairpersons are no longer supervisors within the meaning of the Act.

In its brief, the Employer, *inter alia*, contends in support of its petition in Case 22-UC-46 that a "true system of collegiality" exists at the University pursuant to which all faculty members have effective participation in formulating managerial policies. On this basis, the Employer maintains that faculty members are managerial employees and should be excluded from the unit. In support of its contentions, it cites *Adelphi University*, 195 NLRB 639, 648 (1972), wherein the Board stated:

Because authority vested in one's peers, acting as a group, simply would not conform to the pattern for which the supervisory exclusion of our Act was designed, a genuine system of collegiality would tend to confound us.

The Employer submits that the above quote indicates that the Board will apply the supervisory exclusion when, as in the instant case, a "genuine system of collegiality" exists. The Employer notes that not even the University's president can hire a faculty member without following the detailed contractual provision providing for effective faculty participation. Further, the Employer notes that department chairpersons are subject to review by their faculty peers, resulting in a situation in which those supposedly being supervised are collectively supervising their supervisor.

We find no record evidence to support the Employer's contention that all faculty members have enough participation in formulating labor relations policies to make them managerial employees. We note that the Employer's argument, if sustained, would effectively abolish the faculty unit found appropriate in 1973. As stated in *Adelphi University*, *supra*, "the concept of collegiality, wherein power and authority is vested in a body composed of all of one's peers or colleagues, does not square with the traditional authority structures with which this Act was designated to cope in the typical organizations of the commercial world."

We recognize and give some effect to the faculty participation or collegiality at the University. However, the record clearly indicates that, although faculty representatives on the DPC and CFSC make recommendations, the final authority as to personnel matters rests with the vice president for academic affairs. Committee representatives are not advised to advocate management's interests in making their recommendations, nor are they considered management's representatives while functioning on the committee. As in *Adelphi University* and in *C. W. Post Center of Long Island University*, 189 NLRB 904, 905 (1971), we will not disenfranchise faculty members merely because they have "some measure of quasicollegial authority." Accordingly, we shall dismiss the Employer's petition for unit clarification in Case 22-UC-46.

In view of the foregoing, we find that the collective-bargaining agreement between the parties has so changed the authority and responsibilities of the department chairpersons that they are no longer supervisors under the Act. We therefore conclude that, as the department chairpersons spend the great majority of their time performing teaching functions with minimal time spent directing secretarial nonunit employees, they should be accreted to the faculty unit found appropriate by the Board in 1973.⁸

Member Walther would not accrete these department chairmen or chairpersons to the certified faculty inasmuch as their positions were in existence at the time of the 1973 election and they were not eligible to vote. Those considerations are among recognized Board criteria for determining whether accretion has occurred. However, in each case the total circumstances are necessarily considered, and the cases cited in the dissent notably demonstrate that approach. For example, in *Hyatt House Motel*,⁹ emphasis was placed upon the separate community of interest of the office clericals and front desk personnel sought

⁷ See, e.g., *New York University*, 221 NLRB 1148 (1975).

⁸ See *Fordham University*, 193 NLRB 134, 138 (1971), where the Board included department chairmen in the professional unit, noting that decisions as to hiring, promotions, and tenure were not made by the chairmen alone but by the faculty of the department acting as a group, *Northeastern*

University, 218 NLRB 247 (1975); and *Rosary Hill College*, 202 NLRB 1137, 1139 (1973), where concentration chairmen were found not to be supervisors.

⁹ *San Jose Motel d/b/a Hyatt House Motel; Hyatt Corporation d/b/a Rucky's Hyatt House; Holiday Inn; May West Corporation d/b/a Holiday Inn of Sunnyvale*, 174 NLRB 1009 (1969).

after "a number of years" to be accreted to the existing unit covered by an industry contract. *Gould-National Batteries* and *General Electric Company*,¹⁰ decisions that also declined to clarify, were premised in substantial part on the passage of time since unit certification without the union making any claim in the meantime to represent the employees sought. The case presently before the Board is distinguishable. Its facts are unusual. The Union sought to include these chairpersons in the unit before the election, and afterward in bargaining for its first contract, for a 2-year term ending mid-1976, it secured substantial change in the duties of these professors. The record here reflects implementation of those changes and has convinced this panel that these chairpersons, who are elected for a 3-year term, are no longer supervisors within the meaning of Board precedent. Thus, due to the efforts of the bargaining agent who has continuously sought to represent this classification, it is now an employee classification rather than supervisory. In these circumstances we find the issue to be one of accretion rather than selection of a representative, and in this unit clarification proceeding shall accrete to the certified unit employees classified as department chairpersons.¹¹

ORDER

It is hereby ordered that the certification heretofore issued to the Fairleigh Dickinson University Council

¹⁰ *Gould-National Batteries, Inc.*, 157 NLRB 679 (1966), *General Electric Company*, 144 NLRB 88 (1963).

¹¹ Compare *Union Electric Company*, 217 NLRB 666 (1975)

of American Association of University Professors Chapters, be, and it hereby is, clarified by specifically including therein the employees designated department chairpersons.

IT IS FURTHER ORDERED that the petition in Case 22-UC-46 be, and it hereby is, dismissed.

MEMBER WALTHER, dissenting:

Assuming that department chairmen are no longer supervisors, it is error on the part of the majority to blanket them into the certified unit by means of a motion for clarification. The position of department chairman existed at the time of the election, albeit it was then supervisory, the individuals occupying that position did not vote because of their supervisory status, and they were not included in the coverage of the subsequently executed collective-bargaining agreement. Under these circumstances, department chairmen cannot be considered accretions to the existing unit and cannot be added to the certified unit by a motion for clarification.¹² The Union's desire to include them in the certified unit gives rise to a question concerning representation and requires the filing of a representation petition and the holding of an election to ascertain the desires of the employees involved. I would, therefore, dismiss the petitions for clarification.

¹² *San Jose Motel d/b/a Hyatt House Motel, et al.*, 174 NLRB 1009 (1969); *Gould-National Batteries, Inc.*, 157 NLRB 679 (1966); *General Electric Company*, 144 NLRB 88 (1963).