

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION SIX**

POINT PARK UNIVERSITY

Employer

and

**Case 6-RC-12276**

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

Petitioner

**REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

NATIONAL LABOR RELATIONS BOARD  
Region 6  
Room 1501, 1000 Liberty Avenue  
Pittsburgh, PA 15222-4173

Dated at Pittsburgh, Pennsylvania

this 27th day of April 2004.

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The Employer, Point Park University, operates a private, liberal arts university in Pittsburgh, Pennsylvania, where it employs a total of approximately 560 employees in professional and nonprofessional capacities. The Petitioner, Newspaper Guild of Pittsburgh/Communications Workers of America, Local 38061, AFL-CIO, CLC, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit, as amended at the hearing, of all full-time faculty, Conservatory of Performing Arts teaching artists, and Natural Sciences and Engineering Technology laboratory associates; excluding the president, vice presidents, associate and assistant vice presidents, deans, department chairs,<sup>3</sup> and all office clerical employees, part-time faculty,<sup>4</sup> other

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<sup>1</sup> The name of the Employer appears as amended at the hearing.

<sup>2</sup> The name of the Petitioner appears as amended at the hearing.

<sup>3</sup> During the hearing, the parties stipulated, and I find, that the president, vice presidents, associate vice presidents and assistant vice presidents, deans and department chairs are supervisors within the meaning of Section 2(11) of the Act, and are managerial employees based on their formulation and effectuation of management policies.

<sup>4</sup> Part-time faculty, also referred to in the record as adjuncts, are not included in the petitioned-for unit.

professional employees, non-professional employees and managerial employees and guards and supervisors<sup>5</sup> as defined in the Act, consisting of approximately 77 employees. A hearing officer of the Board held a hearing and the parties filed timely briefs with me which have been duly considered.

As evidenced at the hearing and in the briefs, the parties disagree on the status of the full-time faculty members. The Employer contends that the full-time faculty must be excluded from the unit on the basis that they are managerial employees, while the Petitioner contends that these employees have no managerial authority. The Employer agrees that if the full-time faculty are found to be nonmanagerial employees, they are properly included in the unit with Conservatory of Performing Arts (“COPA”) teaching artists and Natural Science and Engineering Technology (“NSET”) laboratory associates. The parties also disagree as to the eligibility of five program directors. Specifically, the Employer contends that Program Director, Applied Corporate Communications Robert O’Gara; Program Director, Cinema and Digital Arts Frederick Johnson; Program Director, Master of Science in Engineering Management (“MSEM”) Walter Zalot; Program Director, MS Criminal Justice Administration Dr. Martin Greenberg and the Program Director, Masters of Business Administration (“MBA”)<sup>6</sup> must be excluded from the unit found appropriate herein on the basis that they are managerial employees and/or supervisors within the meaning of the Act. In addition, the Employer, contrary to the Petitioner, contends that the Executive Director of the Innocence Institute, William Moushey, and the Head

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<sup>5</sup> During the hearing, the parties stipulated, and I find, that Director of the Writing Program Dr. Robert Alexander, Program Director of Criminal Justice Dr. John Gobble, Director of Honors Program Dr. Portia K. Weston, Program Director M.A. in Journalism and Mass Communications, Dr. Dane Claussen, Academic Grant Manager Dr. Vincenne Revilla-Beltran and Director of Publication Projects/Newsroom Supervisor Heather Starr-Fiedler are managerial employees and/or supervisory employees within the meaning of Section 2(11) of the Act. The parties further stipulated that Director-Off Campus Facilities Development George Bromall and Information Technologies Director Margaret Gilfillan, both of whom are full-time faculty members, are properly included in the petitioned-for unit as neither of these individuals possess any supervisory or managerial authority.

<sup>6</sup> The position of Program Director MBA was not filled as of the close of the hearing. Dr. William Breslove held this position from September 2000 until December 31, 2003, at which time he resigned from the position. Dr. Breslove remains employed as a full-time faculty member and the parties stipulated that as such he is properly included in the petitioned-for unit.

of Graduate Studies, Robin Walsh, must be excluded from the unit found appropriate herein on the basis that they are managerial and/or supervisory employees. Finally, the Employer, contrary to the Petitioner, contends that the Director of the Point Park Library, Joan Hamby, must be excluded from the unit on the basis that she is a managerial employee. The Petitioner contends that none of the above-listed individuals is a supervisory or managerial employee and thus, they must be included in the unit found appropriate herein. As noted above, the unit sought by the Petitioner has approximately 77 employees.

I have considered the evidence and the arguments presented by the parties on each of the issues. As discussed below, I have concluded that the full-time faculty members are not managerial employees. With respect to the specific eligibility issues, I have concluded the positions of Program Director, Applied Corporate Communications; Program Director, Cinema and Digital Arts; Program Director, MSEM; and Program Director, MBA are supervisory positions and thus must be excluded from the unit found appropriate herein. Inasmuch as I am unable to determine the status of the Program Director, MS Criminal Justice Administration, I will permit him to vote subject to challenge. I further conclude that the Employer has not met its burden of establishing that the Head of Graduate Studies and the Executive Director of the Innocence Institute are supervisory or managerial employees. Finally, I have concluded that the Director of the Point Park Library is not a managerial employee. Accordingly, I have directed an election in a unit that consists of approximately 73 employees.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that supports each of my conclusions on the issues.

## **I. OVERVIEW OF OPERATIONS**

The Employer operates a non-profit liberal arts university offering undergraduate and graduate studies to approximately 3,200 full-time and part-time students. In these operations, the Employer employs a total of about 560 full-time and part-time employees. The Employer obtained university status as of October 24, 2003, after a lengthy planning and application

process, which included the creation of new programs and the reorganization of the Employer's academic structure from one consisting of departments headed by department chairs to one comprised of four separate academic schools,<sup>7</sup> each headed by a dean.

The overall operations of the Employer are the responsibility of its Board of Trustees which is comprised of 35 community leaders. Reporting directly to the Board of Trustees is the Employer's President Katherine Henderson.<sup>8</sup> Reporting to Henderson are four vice presidents and a dean of community outreach.<sup>9</sup> The Vice President for Academic Affairs ("VPAA") heads the Employer's academic organization of which the full-time faculty and all of the other positions in dispute are a part. As of the time of the hearing, the Employer's VPAA was Dr. Rex Stevens.<sup>10</sup> Reporting to Stevens is Associate Vice President for Academic Affairs Cynthia Liefeld, the four academic deans, and Director of the Library<sup>11</sup> Joan Hamby. Within each school, there are department chairs and/or program directors that report to the dean. Faculty members report to the department chair.<sup>12</sup> The record establishes that the Employer's academic organization includes at least 20 administrators.<sup>13</sup>

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<sup>7</sup> The four schools are: School of Arts and Sciences, School of Business, Conservatory of Performing Arts and School of Adult and Professional Studies.

<sup>8</sup> Henderson began her employment with the Employer as President in January 1997.

<sup>9</sup> The four vice presidents are: Vice President for Finance and Operation, Vice President for Institutional Advancement, Vice President for Student Development and the Vice President of Academic Affairs.

<sup>10</sup> Stevens left the Employer's employ as of about January 15, 2004. As VPAA, Stevens also had the title of Dean of the Faculty.

<sup>11</sup> Hamby is referred to in the record by the various titles of Director of the Library, Division Head of the Library and Academic Services Librarian. For consistency, I will refer to her as the Director of the Library.

<sup>12</sup> The record shows, and the Employer acknowledged, that a substantial number of administrative employees are employed in the operation of this institution.

<sup>13</sup> These administrators include VPAA Stevens, Associate VPAA Liefeld, Assistant to the VPAA L. Lebovitz, the four deans, Assistants to Dean J. Chayni and C. Drake, three administrators within COPA, and the department chairs and program directors who have been stipulated and/or found to be supervisory employees. These administrators do not include administrators, other than Dean Bolsinger, working in the School of APS.

Dean Stephen Fritz oversees the School of Arts and Sciences. There are four departments within this school. They are: Education and Community Services chaired by Paula Calabrese; Humanities and Human Sciences chaired by Kim Bell; Journalism and Mass Communications chaired by Helen Fallon and Natural Sciences and Engineering Technology (“NSET”) chaired by Mark Farrell.

The Dean of the School of Business is Bruce Murphy. Within the School of Business there are two programs. The Information Technology Program, headed by Margaret Gilfillan, and the MBA Program, a graduate program, which had no program director as of the close of the hearing in this matter.

Dean Ronald Lindbloom heads COPA. COPA has two departments and two programs. The dance department and the theatre department are chaired by Susan Stowe and John Shepard, respectively. The Cinema and Digital Arts Program is directed by Frederick Johnson. Robin Walsh heads the Masters of Fine Arts Program, COPA’s one graduate program.

Judith Bolsinger is the Dean of the School of Adult and Professional Studies (“APS”). The School of APS offers a Bachelor of Science in law enforcement and an associate of science in professional studies. The School of Adult and Professional Studies also houses a non-degree-granting program called Pathways, which prepares prospective students to return to school. Dean Bolsinger’s duties, which will be discussed herein, include admissions and curriculum decisions for part-time and evening students and for students in accelerated programs<sup>14</sup> and graduate programs.

## **II. BACKGROUND**

There was a change in the Employer’s Administration with the hiring of President Katherine Henderson in 1997. The record indicates that faculty came to view Henderson’s administration as systematically expanding the Administration’s governance authority. Contrary to the view of her predecessors, Henderson viewed faculty as having no involvement in certain

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<sup>14</sup> An accelerated program involves attending classes on Saturdays. On this schedule, a student can complete a program in one-half of the time normally required.

areas. The faculty felt that the Administration made several decisions, including the decision to seek university status with all of its consequences, which relegated the faculty to the role of a reactive body as opposed to a pro-active body. In addition, Henderson's Administration decided to implement various changes in the faculty's terms and conditions of employment. For example, the Administration implemented a merit pay system which the faculty had twice rejected. Ultimately, the faculty sought union representation, which led to the filing of the petition in this matter.<sup>15</sup>

### **III. GOVERNANCE STRUCTURE**

#### **A. Board of Trustees**

The Point Park College Bylaws vest the Employer's Board of Trustees with ultimate authority to manage and govern. The Board currently has 35 voting members, one of whom is President Henderson.<sup>16</sup> The President of the Faculty Assembly is an ex officio, nonvoting member of the Board.<sup>17</sup> Otherwise there are no faculty representatives on the Board of

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<sup>15</sup> On March 11, 2003, William Breslove, representing the faculty group known as the Faculty Assembly, announced at a committee meeting of the Board of Trustees that faculty felt alienated and some were fearful for their positions if they spoke out on concerns. At this meeting Breslove also reported that the vote held in the Faculty Assembly was overwhelmingly against the merit pay system.

<sup>16</sup> The Board of Trustees must vote to amend its bylaws. The Board did so on October 25, 2000, at which time the President became a voting member of the Board and the faculty lost the right to have a voting faculty member on the Board. The record reveals that a consultant hired by the Administration recommended the discontinuance of having a faculty member with voting rights on the Board of Trustees. In addition, the record establishes that the last faculty Board member, Professor Corrado, resigned his Board position on June 15, 1999. President Henderson characterized Corrado as resigning after "he behaved in a way which did not reflect credit on faculty in the view of any Board members". However, Corrado's resignation letter notes his objection that the new Criminal Justice major, an academic matter, was being presented for review to the Community Needs and Academic Affairs Committee, a committee with six representatives of the Administration and the Board of Trustees and only one faculty representative. Corrado's resignation letter notes that he "objected to this on the basis that this was an academic program and the domain of the faculty of the college". Corrado's letter continues, "However, the president of the college rejected my objections stating that the bylaws of the college give the Board the power to rule on academic as well as the financial matters of the College." Finally, Corrado's resignation letter notes that his presumption that he would be placed on a Board committee that was concerned with faculty and academic matters never materialized.

<sup>17</sup> Breslove became the President of the faculty group known as the Faculty Assembly in the fall 2000. Before he attended his first Board meeting, Henderson told Breslove that he was attending as an employee of the school, and he was not to speak unless he was spoken to.

Trustees. The Bylaws set forth the Board's powers and functions which include, but are not limited to, 15 separate areas. Among the enumerated authorities are several which relate to academic matters, including the power to establish, review and approve changes, including discontinuances, in the Employer's educational programs;<sup>18</sup> to review and approve annually the terms and conditions of employment, salary policies and increments for staff, faculty, administrators, and other employees; to approve and authorize all earned degrees upon the recommendation of the faculty and in concurrence with the President; to approve and authorize all honorary degrees after consultation with a representative faculty body and in concurrence with the President; to establish and change from time to time the tuition and fees to be charged for full-time, part-time, undergraduate and graduate students; and to confer with the President and other officers in matters that affect the Employer's mission.

The Board of Trustees has seven standing committees and several ad hoc committees.<sup>19</sup> The Board's Executive Committee, a standing committee, is comprised of at least six Trustees and the President. This committee exercises most Board powers between meetings.

The only standing committee on which faculty are nominally represented is the Academic and Student Affairs Committee (formerly called the Academic Affairs and Community Relations Committee), which is comprised of at least four trustees appointed by the chair of the Board of Trustees and two faculty members.<sup>20</sup> In addition to these voting members, the Board's

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<sup>18</sup> The Bylaws provide that, "For decisions that affect programs, curricula or faculty, the Trustees should seek responsible and timely input from the academic departments and faculty affected. The process should begin with a meeting of the President, the Vice President for Academic Affairs and the chairs of the affected departments. It is the responsibility of these parties to determine the process upon which these decisions will be made. In case of program discontinuances, consideration will be given to the procedures described in the Faculty Handbook (27.2)."

<sup>19</sup> The Executive Committee is one of seven standing committees of the Board. The others are the Finance Committee, Compensation Committee, Development Committee, Nominating Committee, Planning and Facilities Committee and the Academic and Student Affairs Committee.

<sup>20</sup> The Bylaws provide that, ordinarily, the two faculty members will be the President of the faculty group known as the Faculty Assembly and the chair of the Faculty Assembly's Curriculum Committee. The two faculty members on this committee are Faculty Assembly President William Breslove and Chair of the Curriculum Committee Mark Farrell. As noted above, Farrell is the NSET department chair and as such is

Chair and the Employer's President serve as ex officio nonvoting members of the committee. The Academic and Student Affairs Committee is charged with reviewing and approving all substantive changes in academic programs, including new programs and program discontinuances; substantive changes to the Faculty Handbook, especially those procedures regarding appointments, promotions, tenure and dismissal of faculty members; and community partnerships which involve substantive changes in academic programs or significant financial obligations.

## **B. Administration**

It is undisputed that the Administration sets the tuition and fee revenues, enrollment goals and levels and engages in fundraising initiatives. The Employer's Vice President of Finance and Operations Paul Hennigan presents an operating budget, including tuition and fee revenues to the Finance Committee of the Board of Trustees, which is then submitted to the full Board for a vote. Full-time faculty do not participate in this process and do not vote on budgetary issues.

President Henderson and Vice President Hennigan ultimately determine the level of funding for each school. Department chairs can present requests for funds from faculty to VPAA Stevens, who then determines which requests can be funded. Stevens will present Henderson with those requests he is unable to fund. Ultimately, Henderson and Hennigan decide whether the Employer can fund any additional requests.

The Employer's Dean of Enrollment Management Ron Sheincoff<sup>21</sup> and the Employer's Enrollment Office establish the Employer's enrollment goals without faculty input. The record

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a supervisory and managerial employee. Until December 31, 2003, Breslove was the program director of the MBA program, a position which I have found to be supervisory and thus excluded from the unit found appropriate herein.

<sup>21</sup> Sheincoff, a non-academic Dean, handles undergraduate enrollment. The Dean of the School of APS, Judith Bolsinger, handles enrollment for part-time, evening and graduate students and students enrolled in accelerated programs.

indicates that the faculty would like to reduce enrollment if able to and feels that more students are accepted than the facilities can handle, but they have no authority to do so.

The record reflects that like the Board of Trustees, the Administration has several administrative committees. One of these is the Strategic Leaders Committee, a policymaking body of the Administration. This committee consists of President Henderson and her five direct reports.<sup>22</sup> There is no faculty representation on this committee. The Strategic Leaders Committee participates in the budgetary process and makes policies in such areas as facilities and finance.

The Executive Cabinet is another administrative committee which consists of about 20 members,<sup>23</sup> including the vice presidents and their direct reports, the president of the Faculty Assembly and the student president of the United Student Government. Henderson delegated the oversight of this committee to Stevens, who now chairs the Cabinet's bimonthly meetings. Under Henderson's oversight this group was occasionally policy-making and partly informational. However, since VPAA Stevens assumed leadership of the Executive Cabinet, its role has changed solely to an information-dispersing role.

In the academic arena there are the Deans Council and the Graduate Council, both of which make recommendations to VPAA Stevens. The Deans Council is comprised of the four academic deans and the "dean level" positions of the Director of Library and the Director of Honors Program.<sup>24</sup> The Deans Council is described as making collective recommendations, which carry more authority than an individual recommendation by a dean, on issues affecting the four schools within the University. For example, after the Faculty Assembly rejected a

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<sup>22</sup> Henderson's five direct reports are the four vice presidents and an assistant to the president for community outreach.

<sup>23</sup> Prior to President Henderson's employment, two full-time faculty members and the librarian were members of the Executive Cabinet. Henderson reduced faculty membership from these three members to solely include the President of the Faculty Assembly.

<sup>24</sup> Director of Library Hamby and Director of Honors Program Weston are full voting members of the Deans Council. However, Hamby and Weston are excluded from executive sessions of the Deans Council when certain issues, including faculty personnel and curricular matters are discussed.

plus/minus grading policy favored by the Administration, the Deans Council decided that COPA, the one school in favor of the plus/minus grading policy, would be a pilot program for the new system.<sup>25</sup> In addition, the Deans Council has also participated with Stevens in determining various academic policies relating to independent study, study abroad and syllabi requirements. Finally, the Deans Council also established a new schedule of stipends to be paid to faculty members for internship supervision, independent study, thesis supervision and committee assignment to ensure that the faculty in the different schools are compensated equally for these responsibilities.

The Graduate Council is comprised of the directors of each graduate program and the department chairs to whom each program director reports. These members have voting rights. The Deans and the Director of the Library are nonvoting members of the Graduate Council.

There is evidence in the record that since 2002 there has been a movement toward school-based governance. The idea to add this layer to the governance structure was discussed by the Deans Council and was decided upon by VPAA Stevens and the deans. Both Stevens and Henderson authorized the establishment of school governance structures. Stevens testified that the School of Business, COPA and the School of APS have adopted school-based governance rules.<sup>26</sup> Moreover, in the School of Arts and Sciences, governance rules were, as of the time of the hearing, being developed by Dean Fritz and the department chairs.<sup>27</sup>

Neither these governance documents nor the idea for this structure was voted on by the Faculty Assembly or any of its committees. Of the four schools, the record contains specific

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<sup>25</sup> The faculty of COPA voted among themselves in favor of the plus/minus grading system. The system was not yet implemented at the time of the hearing because, after deciding to implement, the Employer learned that its computer system could not handle the plus/minus system.

<sup>26</sup> Questioned on this matter, VPAA Stevens did not know whether adjunct faculty members teaching in the School of Business or in COPA voted on the governance rules in effect in those schools.

<sup>27</sup> When the School of Arts and Sciences completes its governance documents, the VPAA and the Deans Council will examine the structures of the four schools for uniformity.

information as to the governance structure in the School of Business. In that school, the faculty proposed having various committees comprised of full-time faculty, including an executive committee which would work directly with the dean and have the power to somewhat restrain the dean's authority. Dean Murphy did not adopt his faculty's suggestion to have an executive committee. The School of Business does have faculty committees on curriculum, information technology, faculty development, resource and faculty admissions. All of these committees make recommendations to Dean Murphy.<sup>28</sup>

### **C. Faculty**

According to Henderson, as President she has the ultimate decision-making authority below the Board of Trustees on virtually every decision, and she can investigate issues independently or delegate authority as she sees fit. At times, faculty views are at odds with the Administration's views. At such times, Henderson determines whether to exercise her power to implement her view rather than that of the faculty. Notwithstanding this, the Employer asserted at the hearing and in its brief that the faculty members are managerial employees because they control curricula, admissions and retention criteria, teaching methods and the nonacademic areas of conferring tenure, promotions, sabbaticals, and the hiring of additional faculty.

The Faculty Handbook dated September 1, 2000 provides that the faculty, as a governing body, conducts its business through the Faculty Assembly and that the President of the Faculty Assembly is authorized to speak officially for the faculty.

The Faculty Assembly Bylaws provide that the full-time faculty<sup>29</sup> and the Director of the Library are members of the Faculty Assembly, which is defined as an organized body subject to the Employer's general policies as established by the Board of Trustees. The Assembly meets

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<sup>28</sup> Murphy also has an administrative staff that is part of the school-based governance. Murphy's administrative employees are an executive assistant, associate dean, director of marketing, director of business career development and assistant to the dean.

<sup>29</sup> Full-time faculty have a ranking hierarchy that begins at the level of instructor and proceeds to assistant professor, then associate professor and finally professor. Full-time faculty are hired as either tenure track or non-tenure track.

monthly in the fall and spring semesters. As needed during the summer months or in case of emergency, a smaller body known as the Faculty Council will be called to meet.<sup>30</sup> Pursuant to its Bylaws, the Faculty Assembly can recommend policy to the Employer regarding the conduct of courses of instruction and the maintenance of academic standards; revisions to curricula; and the granting of degrees in courses.

The Faculty Assembly has nine standing committees which make recommendations to the Faculty Assembly.<sup>31</sup> These committees are comprised of full-time faculty members. The Employer's President or the VPAA, and the President of the Faculty Assembly, are nonvoting, ex officio members of all standing committees.<sup>32</sup>

### **1. Curriculum Committee**

The stated purpose of the Curriculum Committee of the Faculty Assembly is to recommend to the Faculty Assembly the option of new courses, programs and majors and to review and recommend to the Faculty Assembly action concerning structural changes in existing degree programs, and all other changes in course offerings which may have effects beyond the department. The membership of the Curriculum Committee consists of one representative from each academic department, nine faculty members at large, and two voting students.<sup>33</sup> The additional ex officio members of the Curriculum Committee are the VPAA, who

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<sup>30</sup> The Faculty Council is comprised of one representative of each academic department and the library.

<sup>31</sup> The Faculty Assembly Bylaws also state that within the academic departments, there are Evaluation Committees, which are responsible for determining the composition, qualification and requirements of the department faculty. It appears that no evaluation committees are functioning within the departments. In any event, the Bylaws provide that the departmental evaluation committee neither abrogates nor replaces the evaluations of the department chairperson.

<sup>32</sup> The eight standing committees listed in the Bylaws are: Academic Personnel Policies Committee ("APPC"); Admissions, Retention and Financial Aid Committee; Curriculum Committee; Formal Hearing Committee; Library Committee; Organizational Review Committee; Student Development Committee and Budget and Finance Committee. Certain committees have additional administrators as committee members. In all such cases they are nonvoting ex officio members. In 2002, the Faculty Assembly voted to make an ad hoc committee, the Faculty Development Committee, its ninth standing committee.

<sup>33</sup> Less than half of the members of this committee may be department chairpersons.

serves as the executive secretary of the committee, the Director of the Library and two nonvoting students. The chairman of the Curriculum Committee is Dr. Mark Farrell.

**a. Programs**

The normal process by which an undergraduate program becomes part of the curriculum begins with a proposal from a particular school.<sup>34</sup> If approved there, the program proposal, which includes the course syllabi and course descriptions, is then submitted to the Curriculum Committee which can recommend, reject or defer its decision on the proposal. If recommended by the Curriculum Committee, the Faculty Assembly must vote on the proposal. If approved by the Faculty Assembly, the program proposal is submitted to the VPAA. The VPAA has the authority to recommend to the President that the program be disapproved.<sup>35</sup> As noted previously, the bylaws governing the Employer state that the Board of Trustees has the ultimate authority to establish programs and review and approve any changes to programs. The Bylaws further state, "For decisions that affect programs, curricula or faculty, the Trustees should seek responsible and timely input from the academic departments and faculty affected. The process should begin with a meeting of the President, the Vice President of Academic Affairs and the Chairs of the affected departments. It is the responsibility of these parties to determine the process by which these decisions will be made...." If approved, a program guide<sup>36</sup> is created, forwarded to the registrar's office and will then be published in the Employer's course catalog for the following year.

VPAA Stevens testified that he has never recommended that the President disapprove a program approved by the Faculty Assembly. However, the record establishes that the Administration has utilized the tool of having a market study performed in order to assess

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<sup>34</sup> Prior to 2002, a proposal originated at the department level.

<sup>35</sup> Contrary to the assertion in the Employer's brief that approval by the Faculty Assembly represents the final step in new program development and implementation, the record establishes that the VPAA has the authority to recommend to the President that a program be disapproved.

<sup>36</sup> A program guide contains a list of required courses.

whether there is a demand for the program. The Administration's determination to have market studies conducted and its assessment of the results of such studies are not subject to either faculty input or a vote of the Faculty Assembly.

Graduate programs begin when the Employer submits a statement of design to the Pennsylvania Department of Education ("PDE"). When the Employer is notified of its receipt, the department and an administrative assistant complete a program proposal for submission to the Graduate Council.<sup>37</sup> Upon approval of the Graduate Council, the proposal is sent to the Curriculum Committee. If the Curriculum Committee recommends the proposal, the Faculty Assembly must vote to accept, reject or table the graduate program. If accepted, the VPAA and then the President decide whether to approve the program. If the President approves the program, it is resubmitted to the PDE for approval. If the graduate program is ultimately approved by the PDE, the Employer begins to market it and the program will go into effect. If the program is rejected by the PDE, the identified weaknesses will be addressed.

Since 1998, the Employer has offered ten new undergraduate programs. Nine of these programs went through the above-described procedure and were recommended by the Curriculum Committee and accepted by the Faculty Assembly. At least two of the undergraduate programs, Cinema and Digital Arts and Sport, Arts and Entertainment Management, were proposed by the Administration. No information was provided as to the origin of the other program proposals.

The Employer has proposed six new graduate programs since 2000. It appears that all of these were recommended by the Curriculum Committee and voted on by the Faculty Assembly or the Faculty Council. The Employer implemented five of the six graduate programs. The program which was not implemented was a graduate program in Sport, Arts and Entertainment Management ("SAEM"). The record reflects that three of the graduate programs, MS Engineering Management, MS Criminal Justice Administration and MBA, were initially

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<sup>37</sup> The majority of the members of the Graduate Council are supervisory and/or managerial employees.

developed by the Administration. The development of the remaining three programs is not set forth in the record.

The record reveals that not all of the undergraduate programs approved by the Curriculum Committee and subsequently by the Faculty Assembly have been implemented by the Administration. For example, a program in Construction Management was approved by the Curriculum Committee and the Faculty Assembly but was not implemented because, based on a market study, the Employer determined that there was no consumer base for the program. In addition, two proposed new programs, entitled Vocal Performance and Counseling, were abandoned or discontinued<sup>38</sup> based on the results of a market and feasibility study.<sup>39</sup>

In addition, as noted, one of the ten undergraduate programs offered since 1998 is the SAEM. This undergraduate program did not undergo the required approval process. Nevertheless, the Employer began offering the SAEM Program in the fall of 2003.

Discussions regarding both undergraduate and graduate programs in SAEM began prior to April 2002. The Employer then engaged an outside company, 141 Communicator, Inc.,<sup>40</sup> to conduct a market study to determine potential enrollment. In October 2002, Henderson reported to the Board of Trustees that, in accordance with the Employer's strategic plan, one Center of Excellence<sup>41</sup> had been established at PNC Park.<sup>42</sup> The record establishes that the primary participants in establishing this Center for Excellence were Deans Murphy and Lindbloom. It appears that neither the creation of the Center for Excellence nor the partnership with 141 Communicator were matters subject to faculty input.

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<sup>38</sup> The record does not reveal at what point in the process this occurred.

<sup>39</sup> The market and feasibility firms are engaged by the Administration without input from the faculty.

<sup>40</sup> 141 Communicator is referred to in the record as the Employer's "partner" in this program.

<sup>41</sup> A Center of Excellence is a project, program or institute that combines academic events with nonacademic and community outreach activities. The SAEM program is described as a Center of Excellence involving the School of Business, COPA, the Administration and 141 Communicator, Inc.

<sup>42</sup> The Administration envisioned that the facility at the PNC Park Stadium would serve the purpose of providing programs and events for people in the sports and entertainment professions.

During the summer of 2002, Dr. Stevens requested that Faculty Assembly President William Breslove convene a Faculty Council to vote on new programs. Based on previous discussions, Breslove assumed he was calling the meeting to consider both an undergraduate and graduate SAEM program.<sup>43</sup> As it turned out, Breslove was asked to present a motion to the council concerning only two graduate programs, one of which was SAEM.

At the meeting, Associate VPAA Cynthia Liefeld advised the Council that as required by the PDE in connection with proposed graduate programs, a statement of design was being submitted to the PDE, and the Council need not vote its acceptance or rejection of the program at that time as there was no formal proposal with course descriptions and degree requirements. The Council then passed the proposal for an SAEM graduate program<sup>44</sup> in principle by acclamation. The record reveals since then that specific courses for this program have never been submitted to the Curriculum Committee.<sup>45</sup>

At the hearing, VPAA Stevens acknowledged noncompliance with the formal process in that the additional required step of approval by the Faculty Assembly as a whole never occurred with the SAEM program.<sup>46</sup>

The record also reflects the Employer's opening of the Innocence Institute of Western Pennsylvania in 2001, a project created to examine allegations of wrongful convictions. The

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<sup>43</sup> The SAEM program was designed by VPAA Stevens and Associate VPAA Liefeld. Dean Murphy designed the academic component. Henderson testified that Murphy did so working with his faculty. No information as to faculty involvement was provided, and it appears that only Murphy and one of the 141 Communicator employees teach in the SAEM program.

<sup>44</sup> This was not a formal program proposal.

<sup>45</sup> The record establishes that on December 3, 2002, VPAA Stevens reported to the Academic and Student Affairs Committee of the Board of Trustees that the statement of design for the MS in Criminal Justice had been approved by the PDE, and that the MS in SAEM had been put "on hold". Stevens further reported at that meeting that SAEM was to be one of three undergraduate programs scheduled to begin in the fall of 2003.

<sup>46</sup> Stevens initially testified, on December 3, 2003, that the undergraduate program in SAEM was approved by the Faculty Council. However, Stevens later admitted on January 15, 2004, that it was the graduate program that was approved by the Faculty Council and further that the undergraduate program was not discussed.

faculty did not vote on the establishment of the Institute. Henderson's view is that because the Innocence Institute is part of the Journalism and Mass Communications department it need not be considered by the Faculty Assembly, even though the Innocence Institute resulted in new curriculum and independent study opportunities in investigative journalism.<sup>47</sup>

The record further establishes that the Administration has implemented changes in course offerings and structural changes in existing programs without faculty approval. Prior to 2002, the Employer had a program called the English as a Second Language ("ESL") Program,<sup>48</sup> which was part of the Humanities and Human Sciences Department. In late 2002, Henderson decided<sup>49</sup> to contract with Berlitz/ELS Educational Services, Inc., a company that has an instructional program called ELS, which also teaches English as a second language. According to Henderson, the Berlitz/ELS program brings "thousands of international students to this country to study English." Henderson felt that the Berlitz/ELS program was "far more expansive" and had "infinitely more resources" than the Employer's ESL Program. The record indicates that the Employer also created an International Student Services and Enrollment position to consolidate services related to international students. The Employer's enrollment of international students did increase from about 100 students to approximately 200 students.<sup>50</sup>

Department Chair Bell voiced numerous objections orally and in writing to the Administration about changing the ESL Program and contracting with Berlitz/ELS. Bell predicted that a contract with Berlitz/ELS would cause the ESL Program to cease to exist.

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<sup>47</sup> There is no indication in the record that prior to President Henderson's tenure the Employer ever created Centers of Excellence or any other Institutes.

<sup>48</sup> President Henderson referred to the ESL Program as a "very tiny" program.

<sup>49</sup> Henderson testified that she made the decision but did so after "consultation" with department chair Bell and VPAA Stevens. It is undisputed that Bell objected to the decision.

<sup>50</sup> Stevens testified that the international student population had grown, and a current figure of 200 was his best "educated guess".

At the hearing, Henderson admitted that there were fewer ESL courses offered, but maintained that the program had not been discontinued.<sup>51</sup> Even assuming that the ESL Program has not been formally discontinued, Henderson's stated view is that the issue of ceasing to offer certain courses need not go before the Faculty Assembly if the courses, like the ESL courses, do not carry academic credit. However, the Bylaws of the Faculty Assembly make no distinction between courses and programs which carry or do not carry academic credit.

With respect to structural changes implemented by the Administration without approval of the Curriculum Committee or the Faculty Assembly, Associate Professor of History Edward Meena testified that in 2001 the Administration dismantled the department to which he had been assigned. From 1986, when he became employed by the Employer, until the spring of 2001, Meena was a member of the Government and International Studies ("GIS") Department. In the spring of 2001, concurrent with the retirement of then-department chair Dr. Panzella, the GIS Department was dismantled. Like the creation of the four schools in the preparation for university status in 2002, this reorganization was effectuated without the participation of the faculty. At that time, the courses in public administration and economics were shifted to the Business Department, and political science and history were reassigned to the Humanities Department.

Although this reorganization by the Administration may not have involved the adding or disbanding of any courses, it was a change that had effects beyond the GIS Department in that both the Business Department and the Humanities Department had additional offerings. Moreover, the Administration's authority to unilaterally restructure departments is noteworthy because, according to the testimony of Henderson and Stevens, it is the academic departments that are at the core of developing new programs in that departments determine whether to

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<sup>51</sup> No other information was provided by the Employer as to the number of ESL courses remaining or the enrollment in those classes. There was testimony, however, by faculty member Edward Meena, a witness called by the Petitioner, that the program was "discontinued".

propose programs and/or courses. However, it appears that the Administration can alter the configuration of academic departments without any faculty input.

The record contains an additional example of a change in two existing degree programs that apparently occurred without a recommendation of the Curriculum Committee or a vote of the Faculty Assembly. Dr. Darlene Marnich, a tenured professor of education, testified that prior to the fall of 2002, students seeking a bachelor's degree in the programs of early childhood education and elementary education were required to take either EDU325, Multi Cultural Diversity Issues, or EDU326, Special Education Inclusion. According to Marnich, when the faculty returned in the fall of 2002, the program guide had been changed such that students were required to complete both courses to complete each of these programs. Marnich stated that she and other full-time education faculty were unaware that this change was planned. Marnich requested that then-department chair Dr. Revilla-Beltran provide minutes or other documentation regarding the change. Revilla-Beltran responded that having moved offices, she could not find any of the documentation.

Marnich, a member of the Curriculum Committee, recalled no proposal for such a change ever being submitted to the Curriculum Committee, and her search did not reveal any minutes to show that the Curriculum Committee reviewed this proposed change. The requirements that EDU 325 and EDU 326 be completed in both the Early Childhood Education Program and the Elementary Education Program continue to date.

In addition, in 2002, the Employer decided to revamp its Honors Program. The National Collegiate Honors Council was invited to Point Park to review the Honors Program. After the October 2002 visit, the Honors Council recommended a ten-course core curriculum that is separate from the college's core curriculum. The Administration decided not to adopt the ten-course curriculum. However, the recommendation made by the National Collegiate Honors Council was not submitted to or shared with the Curriculum Committee or the Faculty Assembly for consideration.

## **b. Courses**

The record establishes that between 8 and 20 new courses are developed each year. The formal process for establishing a regular course begins with a faculty member's development of an idea for a class. The faculty member then makes a proposal to his or her department chair. Upon approval by the department chair,<sup>52</sup> the proposal is submitted to the Curriculum Committee. If the Curriculum Committee approves the course, it is then submitted to a vote by the Faculty Assembly. If approved by the Faculty Assembly, it is recommended to the Administration. If approved, the course becomes part of the particular degree program as an elective or to replace an existing course. It appears that the Administration generally accepts new courses which have been recommended by the Faculty Assembly.

The Employer also has a process known as Special Topics, which allows new courses to be taught up to three times without going through the formal process. All Special Topic courses must be approved by the department chair at the undergraduate level or by the program director at the graduate level. The course number identifies Special Topic courses in that the three-digit number of all Special Topics courses ends with the numerals 95.

It appears from the record that the Administration has prematurely designated a special topics course entitled "Freshman Seminar" as part of its required degree programs. The Freshman Seminar course was designed by Associate VPAA Liefeld. About six sections of this course were offered in the fall of 2001. The course was again offered in the fall of 2002. By the fall of 2003, about 26 sections of the course were offered. Professor Edward Meena testified that during the registration process in the fall of 2003, he noticed that the paperwork for all of the freshmen whom he was assisting indicated that they were to take EDUC195 Freshman Seminar. Meena questioned Department Chair Kim Bell<sup>53</sup> about this phenomenon and was told

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<sup>52</sup> No information was provided as to the number of course proposals which have been disapproved by the department chairs.

<sup>53</sup> As noted above, the parties stipulated that the department chairs are supervisory and managerial employees.

that Freshman Seminar was a required class for freshmen. Meena asked Bell how this became a required course, and Bell responded that the directive came from Admissions.

The Employer's Application for University Status to the PDE dated May 2003 indicates that the Freshman Seminar course will continue to be offered. In the application, the Employer states, "The Freshman Seminar experience will be extended to include all first-time students (including transfer students with more than 30 credits). The course has been well received and seems to be making an impact on our retention efforts." The Employer also noted under the Student Development addendum "Collaborative work with Academic Affairs in relation to the Freshman Seminar centers on the areas of the community service where Student Activities assists faculty with resources, and in the projected use of student assistants for the Freshman Seminar as Orientation Leaders. Planning to enhance collaborative work in this area is ongoing and is projected to expand." It is undisputed that a special topics course such as Freshman Seminar can be taught three times without being submitted to a Faculty Assembly vote. Thus, the offering of the course in the fall 2003 did not violate the procedure. Although the Freshman Seminar course may be presented to the Curriculum Committee before it is offered a fourth time, the record indicates that the Employer has begun, prematurely, to designate it as a required course.

**c. Program Discontinuance**

In October 2001, after the Middle States Accreditation team suggested that the Employer reduce its offerings, VPAA Stevens made a recommendation to the Curriculum Committee that 43 programs be discontinued as they had been under-enrolled since 1996. The Curriculum Committee recommended to the Faculty Assembly that 13 of those programs be discontinued and the Faculty Assembly approved this recommendation. The Administration then deleted those 13 programs from the catalog. The other 30 programs remained in the Employer's catalog.

**d. Academic Policies**

The record contains evidence that the Administration regularly makes changes to academic policies without consulting the Curriculum Committee or any other committee of the Faculty Assembly. As noted previously, the Bylaws provide that the Curriculum Committee “shall recommend to the Faculty Assembly the adoption of the new courses, programs and majors . . . and shall make other recommendations that may be appropriate.” The Curriculum Committee also “shall review and recommend to the Faculty Assembly action concerning structural changes in existing degree programs, and all other changes in course offerings which may have effects beyond the department.” (Emphasis added)

The record reveals that the Administration has unilaterally developed policies relating to on-line courses, special delivery courses, independent study and faculty led trips abroad. On April 16, 2003, VPAA Stevens sent a memorandum to the faculty concerning the Employer’s plan to offer on-line courses for the fall of 2003. The memorandum indicates that a stipend of \$1500 would be paid to faculty members for developing full on-line courses. Admittedly, the proposal for on-line courses was not submitted to the Curriculum Committee or to the Faculty Assembly. Although the Employer implemented the on-line courses, there were no enrollments. At the hearing, the Employer offered testimony that these courses merely changed the method of delivery, but not the content.

With respect to special delivery courses,<sup>54</sup> the Employer added a requirement that faculty add 14 hours of alternate activities outside of the classroom so that these three credit courses would meet the PDE requirement of meeting for 42 hours.<sup>55</sup> It appears from the record that the supplemental activities were determined by Associate VPAA Liefeld and the deans. This matter was not presented to the Faculty Assembly for a vote.

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<sup>54</sup> Special delivery or special format courses are those which are offered on a time schedule which allows the student to take two courses in one time slot by selecting courses which meet on alternate weeks.

<sup>55</sup> Previously, these courses met for 28 hours a term.

In the fall of 2003, the Deans Council decided to change the policy for independent study courses by requiring that the deans approve all student requests for independent study and that such requests be accompanied by a course syllabus and a work and meeting schedule. Moreover, pursuant to the new policy, faculty could no longer offer independent study options for courses already existing in the schedule to students whose schedules permitted them to enroll in the course at its existing time. These changes in the policy for independent study courses were not presented to the Faculty Assembly prior to implementation.

Similarly, in 2003, VPAA Stevens suspended all faculty-led trips abroad due to problems caused by faculty members planning and booking trips without proper authorization.<sup>56</sup> The Deans Council subsequently developed guidelines to be incorporated into a process being designed by the International Assessment Project (“IAP”) Group. This group was convened by Vice President for Institutional Advancement Susan White. The record indicates that the Deans Council decided that it would not reconsider its decision not to support faculty-led trips abroad until the IAP Group’s process was implemented. The guidelines promulgated by the Deans Council required prior approval by the dean of the appropriate school of the intent to develop a study abroad program, as well as the submission of substantial curricular materials, including a syllabus, for review and final approval by the VPAA prior to any marketing or student recruitment. The Deans Council guidelines also included its preference of having approval for summer programs made no later than October of the previous calendar year. The suspension of the faculty-led trips abroad and the guidelines for a new process were not submitted to the Faculty Assembly.

Finally, the record establishes that, in February 2002, VPAA Stevens and the deans unilaterally determined “Dean’s limits” for enrollment in classes. Stevens directed the registrar and an administrator for student services “that no one, not even the instructors themselves, may

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<sup>56</sup> In 2003, Stevens decided to cancel a trip abroad due to the war in Iraq. Stevens discovered that the trip had been booked without proper insurance. Consequently, the Employer ended up having to reimburse approximately \$9,000 of its own funds to the students.

exceed these limits.” The determined class limit for all courses, except English Composition for which a lower limit was established, was 25 students with a reserve of five extra spaces to be filled at the discretion of the faculty member. If the enrollment in a given class is less than seven students, the dean and the department chair determine whether to cancel the class. The record indicates that prior to 2002, informal class limits were ignored by faculty every semester. The record indicates that deans also planned to establish limits for on-line courses, but this became unnecessary as there were no enrollments in the on-line courses.

**e. Structural Changes**

A structural change in an existing degree program is required to be presented to the Curriculum Committee for a vote. According to Stevens, the process for revising an existing program is initiated at the department level. The structural change must be approved by the Curriculum Committee and then the Faculty Assembly. This process was not followed when the Administration merged its two MBA programs.

The International MBA (“IMBA”) program began in 1984,<sup>57</sup> and remained a distinct graduate program until September 2001. The Employer also began an accelerated MBA (“AMBA”) program in about 1996. The Administration’s objective in creating the AMBA was student growth, and the enrollment in the AMBA program did increase quickly. Indeed, Breslove was told at the beginning of his tenure as program director that the Administration saw the AMBA program as a large growth opportunity area. Around this period, former IMBA Program Director Kraniou stated that the \$3,000 per year advertising/marketing budget for the IMBA was transferred from his control and given to Judith Bolsinger, then Dean of Part-Time and Accelerated programs. Kraniou further testified that the Employer’s decision to cease marketing and recruitment for the IMBA eventually led to declining enrollment, which ultimately led to the Employer’s decision to discontinue the program.

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<sup>57</sup> The original name of this program, Masters in International Business Management, was changed sometime after 1985.

In about April 2001, the PDE notified the Employer that its prior certification for the IMBA did not cover two separate MBA programs. Consequently, the Administration determined that it would offer one MBA program. Because the majority of the students were enrolled in the AMBA program, the Administration decided to merge the IMBA into that program. The Administration also determined that it would offer three tracks, or concentrations, one being a concentration in international business.<sup>58</sup> This change was effectuated. The IMBA program ceased being offered, and a new MBA degree program listing required core courses and the courses offered in each of the three concentrations was published in the 2002-2003 graduate catalog.

Dr. Dimitris Kraniou, former director of IMBA,<sup>59</sup> testified that he objected to the discontinuance of the program and the implementation of an international business track, but was forced, by necessity, to discuss the courses which would be selected as the international business track of the revised MBA program. Now the international business track contains only four of the courses that had been part of the IMBA program. Prior to the discontinuance of the IMBA there were 26 course offerings (7 core courses, 13 electives and 6 international studies component courses) from which a student could obtain the 39 credits required to complete the IMBA degree program. All but the four remaining courses were eliminated by the Administration.

The discontinuance of the IMBA program was not presented to the Curriculum Committee, Faculty Assembly, or the Faculty Council.<sup>60</sup>

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<sup>58</sup> The other two tracks are the management information systems track and the management track.

<sup>59</sup> Kraniou was director of the IMBA program from 1997 to August 2001.

<sup>60</sup> Stevens did, however, write a memo to full and part-time faculty in the Business Department from MBA Program Director William Breslove explaining the merger of the AMBA and IMBA programs and the changes resulting from it. Stevens explained that he wrote the memo on Breslove's behalf because Breslove "does not write memos."

**f. Academic Calendar**

The Curriculum Committee proposes an academic calendar, which is submitted to the Faculty Assembly. If approved, the Faculty Assembly forwards the academic calendar to the VPAA and the President. They review the calendar with the Executive Cabinet. If necessary, the Executive Cabinet proposes modifications to reconcile any conflicts due to religious holidays or other dates of particular interest to one constituency or another at the institution. Any modifications are then considered by the Curriculum Committee. The academic calendar is ultimately approved by the VPAA and the President. The record indicates that in January 2003, the Curriculum Committee proposed the academic calendar to the Faculty Assembly. On August 4, 2003, VPAA Stevens notified the faculty by letter that adjustments to the academic calendar were required to ensure that each regular semester included a minimum of 14 weeks, not including final exams. Apparently, this change was mandated by the PDE.

**2. Academic Personnel Policies Committee**

The Academic Personnel Policies Committee ("APPC") is a nine-member committee composed entirely of faculty, a minimum of five of whom should be tenured. This committee is charged with making recommendations on personnel policy to the Faculty Assembly and to the Employer's President for transmission to the Board, including receiving applications for faculty leaves (referred to in the record as sabbaticals) and forwarding these with appropriate recommendations for action to the VPAA and the President. The APPC is also charged with making recommendations in areas of academic policy.<sup>61</sup> According to the Faculty Assembly Bylaws, this committee also informally hears and attempts to settle complaints and decides whether a formal hearing is warranted.

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<sup>61</sup> I noted the Administration's implementation of various academic policies relating to curriculum above in my discussion of the Curriculum Committee. None of those matters were submitted to the APPC.

**a. Sabbaticals**

The Faculty Handbook provides that sabbatical leaves to full-time faculty members are “granted by the President on the advice and recommendation of the Dean of the Faculty and the APPC.” Sabbatical leaves typically are taken every seven years, either for a semester or for a full year.<sup>62</sup>

Full-time faculty members make application for sabbatical leaves to the APPC after the department chair approves the sabbatical proposal submitted by the faculty member. The APPC makes a recommendation to the VPAA. The VPAA then forwards the recommendation, together with his own recommendation, to the President. The Administration considers budgetary constraints in connection with its decision to reject or defer a sabbatical.<sup>63</sup>

The record establishes that between 1998 and 2003, the Employer granted 13 sabbatical leaves, all of which were recommended by the APPC. For the 2001-2002 academic year, the APPC approved three sabbatical requests. Stevens initially decided to delay the sabbaticals based on financial reasons, which were not fully explained to the APPC. The APPC notified Stevens of its objection to his decision by memo dated December 12, 2000. It appears from the record that Stevens reversed himself and the sabbaticals took place at the requested times.

**b. Personnel Policies**

As to the APPC’s role in recommending personnel policies, the record reflects that the Administration acts independently of the faculty when implementing personnel policies and certain areas of academic policy. During the spring of 2002, VPAA Stevens, in consultation with President Henderson, decided that a comprehensive policy manual for the entire university was

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<sup>62</sup> The faculty member receives one-half pay for a full-year sabbatical or full pay for a one-semester sabbatical.

<sup>63</sup> Stevens testified that he notifies the APPC in advance of the budgetary situation.

warranted, both to address a multitude of issues for which the Employer had no established policies and to eliminate inconsistencies between various documents. Henderson and Stevens engaged an outside consultant to provide drafts of policies that cover the whole range of issues in higher education. The result was six draft volumes, two to three of which relate to faculty. One such volume, entitled Faculty Personnel Policies, will replace the Faculty Handbook.<sup>64</sup> The drafts of all six volumes are largely the work of the consultant.

Initially, I note that replacing the Faculty Handbook also affects each faculty member's annual contract with the Employer.<sup>65</sup> The current Faculty Handbook contains a faculty handbook revision process, which states that the Secretary of the Faculty Assembly will keep a separate record of all Faculty Assembly actions that affect changes in the Faculty Handbook and will produce the records for revision of the document. Notwithstanding this provision, neither the APPC nor the Faculty Assembly were involved in the drafting of the proposed replacement of the Faculty Handbook. They did not participate in the drafting of proposed academic policies and they had no role in deciding to engage the outside consultant.

Not only was the faculty excluded from the decision to redraft/replace the Faculty Handbook, but the Administration has set a deadline after which it can adopt the new policy manuals, if the faculty fails to timely request revisions. Stevens provided drafts of the policy manuals to the APPC in early September 2003. Stevens further informed the Faculty Assembly, by memo, that the manuals will be approved, after revisions, by the Board of Trustees in April 2004.<sup>66</sup>

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<sup>64</sup> It appears that those policies relating to faculty are contained in Volume I - Governance and Administrative Organization; Volume 3 - All College Employment Policies; and Volume 4 – Faculty Personnel Policies.

<sup>65</sup> Section 6.3 of the Faculty Handbook provides that the handbook is, by reference, included as part of the annual contract between faculty members and the Employer.

<sup>66</sup> The record also contains the July 23, 2003, minutes of the Board of Trustees meeting. These minutes reflect President Henderson's explanation of Resolution 14/2003 regarding "decision-making authority". The minutes establish that the Employer expected a lot of discussion, especially among the faculty, and the possibility that the redraft might never be passed despite a spirit of compromise. The resolution proposed by Henderson would not allow discussion to go on endlessly, but would bring the manuals to the Board at the April 2004 meeting. This motion was carried unanimously.

At the hearing in this matter, Henderson explained that the consultant who drafted the policy manuals recommended having a deadline after which the Board of Trustees could approve policy manuals. Henderson also testified that if the Faculty Assembly objects, she will decide whether she and the Board will implement the revised policy manuals. According to Henderson, the resolution passed by the Trustees giving them authority to approve the policy manuals was caused by the “faculty history of inertia”.

As to specific personnel policy recommendations, the record establishes that the APPC has attempted to have input on the issues of salary administration, shared governance in the decision to seek university status, faculty appointment types, school deans and overload policies. The Employer’s response to these attempts is set forth in a memo from VPAA Stevens to the APPC dated February 15, 2002.

With respect to salary administration, Stevens summarily stated that the Faculty Handbook does not contain any policies or procedures for faculty salary administration. The Employer has implemented many policies affecting faculty salary without submitting those policies to the vote of the Faculty Assembly. For example, the Employer implemented a Salary Parity Plan<sup>67</sup> in 2000. Likewise, the Administration made decisions with respect to stipends paid to department chairs, program directors and non-program directors,<sup>68</sup> about which the Faculty Assembly had no input.

The record establishes that the Administration has favored a merit pay system for faculty since 2001. The faculty voted on and rejected merit pay twice and let it be known that its position was to have across the board wage increases. Henderson felt the faculty’s opposition was not reasonable. Ultimately, on the recommendation of President Henderson and VPAA

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<sup>67</sup> The Salary Parity Plan is a five-year plan involving the Employer’s selection of two comparison groups of local colleges and universities to determine an appropriate level of salary for faculty. The plan includes three compensation components, consisting of cost of living increases, parity increases and merit increases.

<sup>68</sup> A stipend is a salary supplement paid to those who also perform administrative duties.

Stevens, the Board of Trustees approved the implementation of the merit pay policy. The implementation has not ended faculty complaints on this issue. At the February 3, 2003, meeting of the Faculty Assembly, the subject of merit pay was raised in VPAA Stevens' address to the faculty. Stevens deferred to Henderson when a faculty member asserted that the Administration's actions in seeking university status and implementing merit pay belied Dr. Henderson's previous statement that the Employer engaged in participatory management. Henderson responded that participatory management meant that she had to listen to what the faculty said, but did not have to do it. When the faculty member opined that this was not democratic, Henderson emphatically responded that, "This is not a democracy."<sup>69</sup>

In 2002, the Administration also unilaterally devised a 200 point rating system whereby Stevens assigned a maximum point value to ten areas, included the areas of college service, advising, professional development and scholarship. Stevens determined that faculty members with ratings of 190 and above would receive a merit increase.<sup>70</sup>

Like the Employer's response to the APPC regarding the request to have input on salary administration issues, Stevens informed the APPC that a decision, such as the one involving application for university status, was uniquely within the responsibility of the Board of Trustees. Stevens also interpreted the Faculty Handbook as meaning that those areas that are "specifically academic" are the areas where shared governance exists. Thus, the Administration's interpretation in this regard excluded the faculty from any input into the many academic consequences of the decision to seek university status, such as the restructuring of the academic organization of the institution.

A brief description of the events leading up to the application for university status is warranted. The record reflects that shortly after her hiring in 1997, President Henderson and

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<sup>69</sup> This testimony was not rebutted by any of the Employer's witnesses, including VPAA Stevens, who acted as the Employer's representative during the hearing and who was called as the Employer's rebuttal witness on the day the Petitioner offered this testimony.

<sup>70</sup> Even after the Administration promulgated this rule, it ignored the rule in a few instances.

the Board of Trustees initiated a strategic planning process. An initial strategic planning retreat was held in the fall of 1997. In attendance were 17 Board members, 4 Vice Presidents, 2 deans and one faculty representative from each of the seven departments.<sup>71</sup> Out of the retreat, 10 to 15 task forces were created to examine such matters as new programs, assessment, fundraising, advancement, public relations, technology and financial issues. The result of this process was a five-year strategic plan dated July 21, 1998. This plan indicated that at its conclusion consideration would be given to seeking university status. After the goals of this plan were accomplished, President Henderson initiated a second strategic plan.<sup>72</sup> A second retreat was held in July 2002. At this time, department chairpersons, rather than a faculty representative of each department, were invited to the retreat. President of the Faculty Assembly William Breslove was also invited.<sup>73</sup> At the retreat for the second strategic plan, the Employer decided to adopt a university structure in preparation for an application for university status. Thereafter, Henderson and Stevens went to Harrisburg to discuss attaining university status with education experts. Henderson testified that the Administration worked with “faculty members” Robert Alexander and Vincenne Revilla-Beltran as well as Associate VPAA Cynthia Liefeld, to produce the application for university status and prepare for a site visit by the PDE.<sup>74</sup> The record establishes, however, that at the time of their involvement in this application process, Alexander’s and Revilla-Beltran’s positions were Director of the Honors Program and

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<sup>71</sup> At this time, Breslove’s academic position was Program Director of the MBA Program.

<sup>72</sup> The Point Park College Bylaws, which reflect the authority of the Board of Trustees, now provide that the Planning and Facilities Committee, a standing-committee, will ensure that the institution has, at all times, a strategic plan.

<sup>73</sup> Three weeks before the strategic retreat, Breslove attended a retreat meeting at a golf club which was attended by the Employer’s Vice Presidents, the Dean of Community Outreach and the Assistant of Community Outreach. According to Henderson, Breslove proposed moving the main location of the college out of the downtown area. However, three weeks later, at the strategic plan retreat, the Board of Trustees rejected this idea as “not consonant” with the Employer’s mission, and decided to recommit to the urban location.

<sup>74</sup> The Employer submitted two applications for university status. The first application was submitted in late 2001. Henderson discontinued the first application because she felt that one of the representatives involved in the university site visit was biased. The Employer reapplied for university status in May 2003.

Department Chair of the Education and Community Services Department, respectively. Thus, they, like Liefeld, were part of the Administration.

Henderson also contended at the hearing that she invited faculty participation in this process at a Faculty Assembly meeting. However, the record indicates that Henderson met with the Faculty Assembly in the spring of 2002 and informed them that the Employer's application for university status had been completed.<sup>75</sup> When one of the faculty members questioned the Employer's taking those actions without discussions with the faculty, Henderson effectively dismissed the question citing time constraints and the fact that another local college had also applied for university status.

With respect to types of faculty appointments, the record indicates that the faculty objected to non-tenure track continuing appointments. Stevens' response to this concern was similarly dismissive and is further indicative of the Administration's narrow view of the faculty's role. Stevens told the APPC that because certain types of appointments (tenure track appointments) were listed in the Faculty Handbook, this did not mean that other types (non-tenure truck appointments) were excluded.

As to the process of appointing school deans, Stevens told the APPC that while the Faculty Handbook did not define a process for school-based deanships (as there had never been schools within the organization prior to 2002), the Administration's intent was to adopt practices that would involve faculty members elected by their colleagues in search procedures. As described *infra*, at Section III.C.10.e, Hiring of Deans, the involvement of the faculty members in the appointment of deans has been quite limited.

### **c. Teaching Load**

The standard teaching load for full-time faculty is 12 semester hours consisting of four three-credit courses. The record indicates that this has been the standard for many years and

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<sup>75</sup> The announcement as described in the record as a "proclamation".

there is no information as to how the teaching load was originally determined. In the fall of 2003, the Administration, in response to a recommendation following a visit of a PDE site team, increased the load factor for graduate courses such that a three-credit graduate course counts for four credits of load.<sup>76</sup>

On June 30, 2003, VPAA Stevens issued a memo to the full-time faculty advising them that the Employer would award four units of work for a three-credit graduate course only if the course syllabus met the PDE standards. Apparently, the PDE university status site visitors were concerned that the syllabi for graduate courses did not introduce sufficient rigor, research, library assignments and bibliography. Stevens noted that the syllabi for accelerated courses (MBA courses, especially) did not fully, or in some cases even minimally, meet the hourly requirements for out of class work to satisfy the PDE standard of 42 total in-class hours for a three-credit course. Stevens further advised the faculty that the Administration was implementing the syllabus requirement as of the fall of 2003. The memorandum also advised the faculty that syllabus workshops were to be conducted during the summer for full-time faculty and adjuncts. These workshops were, in fact, held.

The Employer advised faculty of the requirements to be met in order to receive four credits of teaching load, without first presenting the issue to the Faculty Assembly or any of its committees.

Teaching additional courses over the normal teaching load of 12 credits per semester is referred to as an overload. Faculty members teaching an overload course receive additional compensation for each course taught. Henderson testified that when she arrived at the institution, faculty were teaching an “unconscionable” number<sup>77</sup> of overload courses which was severely impacting the quality of teaching.<sup>78</sup> The Administration limited the number of overload

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<sup>76</sup> In this way, the faculty who teach only graduate courses have a teaching load of three courses but are still paid for four courses.

<sup>77</sup> According to Henderson, faculty were teaching three to five overloads a semester.

<sup>78</sup> The student surveys indicated dissatisfaction with the quality of teaching.

courses faculty could teach two to three years ago, such that faculty was limited to one overload course in each of the fall and spring semesters and a maximum of four courses during the combined summer semesters, subject to the approval of the VPAA. This limitation was then included in each faculty member's annual employment agreement.

Stevens confirmed that faculty members cannot teach a second overload course in the fall or spring unless he approves it. Although the Faculty Assembly objected to any limitation on overloads, Stevens felt that the policy he implemented was a compromise.<sup>79</sup>

#### **d. Syllabi**

By letter dated August 4, 2003, faculty members were provided with a detailed model syllabus developed by the Administration for the redesign of syllabi for fall classes. Stevens also set the deadline for submission to the school dean of all syllabi for fall courses. Prior to this directive, the faculty was required to prepare a syllabus for each course, but no requirement of a particularized format existed. The letter further advised faculty that, based on the PDE's university status report, the "most immediate requirement for faculty is a syllabus format required for all courses offered in an accelerated or other special format."

#### **e. Evaluations**

Another area of contention arose when the Administration began requiring that faculty submit student evaluations of teaching and their faculty dossiers for annual performance reviews. The faculty felt that student evaluations were to be utilized only by the faculty member teaching the course. The Administration's view was that the faculty handbook's statement that

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<sup>79</sup> As noted by the Employer in its brief, Professor Edward Meena taught four overload courses in the fall 2003 semester and two overload courses in the spring 2003 semester. The Employer cites this for the proposition that faculty members continue to be permitted to teach overloads above the policy limit without adverse repercussions. This argument does not address the fact that faculty members must receive approval to teach overloads above the policy limit. In addition, the record reveals that department chair Kim Bell asked Meena to teach at least one of the overload courses a few days before the start of the fall semester because additional classes had been added to the schedule at the last minute. The record does not reveal under what circumstances the other overload courses above the policy limits were approved.

the result of student evaluations “will be sent to faculty members only” in no way precluded deans, department chairs or the President from reviewing the student evaluations for annual review purposes.

**f. Copyright Policy**

The Faculty Handbook contains a policy on faculty publications, which generally provides that the results of original research are the full property of the faculty member, unless an agreement stating otherwise has been entered into with the Employer. In July 2002, the Board of Trustees adopted a new Copyright Policy providing that the Employer maintains the copyright of “works for hire” unless there is an agreement to the contrary.<sup>80</sup> VPAA Stevens presented this policy to the faculty in August 2002 as an accomplished act, even though there was no prior notice that the Administration was considering revisions. The faculty viewed this policy as in direct opposition to the existing policy. The faculty was outraged and questioned the legality of the policy passed by the Board.

Stevens later agreed that the APPC could submit a proposal to revise this policy. Thereafter, in the spring of 2003, the APPC presented its revised Copyright Policy to the Faculty Assembly. The Assembly voted to adopt the policy as revised by the APPC. The Faculty Assembly’s secretary was to submit the proposed revised policy to the Administration.

In August 2003, when the faculty was presented with the comprehensive policy manuals prepared by the Employer’s consultant, the Copyright Policy contained therein was very similar to the Copyright Policy passed by the Board in July 2002.<sup>81</sup>

Notwithstanding that the status of the copyright policy appears to be less than final, I nevertheless find that the Administration did not comply with the Faculty Handbook Revision

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<sup>80</sup> This policy was described in the record as allowing the Employer to own “the rights to publications by the faculty member in many different situations.”

<sup>81</sup> The record reveals that the revised Copyright Policy approved by the Faculty Assembly was not submitted to the Administration until October 2003, when it was discovered that the Faculty Assembly’s secretary failed to submit the policy during the prior spring. VPAA Stevens testified that the faculty version of the Copyright Policy was thus received by the Administration long after the Board’s policy was “put into force and effect.”

Process when it initially adopted the new Copyright Policy in July 2002. The Handbook states that, "Recommendations for revision are submitted to the Vice President for Academic Affairs, the Faculty Assembly, and appropriate committees thereof for review. Changes in any policies or provisions of the Handbook are subject to the approval of the President and the Board of Trustees." The Administration chose to disregard the recommendation step. Rather, it passed a new policy and then allowed the faculty to react to an accomplished revision rather than a recommendation for a revision. That the Administration may yet choose to revise the copyright policy because of the level of the faculty's opposition does not change the fact that the Administration did not follow the express procedure for handbook revisions set forth in the current Faculty Handbook.

### **3. Library Committee**

The record indicates that from 1997 to about November 1999, the Employer had a Library Oversight Committee<sup>82</sup> comprised of then-VPAA Robert Alexander, then-Librarian Mary Jane Sunder and then-President of the Faculty Assembly Dimitris Kraniou. During this period, the committee discussed various budgetary issues on behalf of the Employer with The Carnegie Library relating to the joint use of the library center. In November 1999, the Faculty Assembly voted to merge the Library Oversight Committee with the Faculty Assembly's standing Library Committee,<sup>83</sup> and to change the name of the Library Committee to the Library Oversight Committee. Since the Faculty Assembly took this action, no committee member of the Library Oversight Committee, including the current Director of the Library, has been involved in the budgetary negotiations for the library. Moreover, the faculty is given no data on the annual budgetary negotiations with The Carnegie Library.<sup>84</sup> Kraniou testified that the budget of the

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<sup>82</sup> It appears that this committee was initially created pursuant to the joint operating agreement between the Employer and The Carnegie Library of Pittsburgh.

<sup>83</sup> The composition of the Library Committee is one faculty representative from each department. The charge of this committee is to recommend policies, rules and regulations for the operation of the library.

<sup>84</sup> Kraniou prepared a document for submission to the Middle States Review Board, an accrediting body, in which he proposed that members of the Library Oversight Committee participate in budgetary

library has an extensive impact on academic programs in that the budget controls the acquisition of academic resources.<sup>85</sup> Even so, faculty have neither input nor information about the library's budget.

#### **4. Budget and Finance Committee**

There are five faculty members on the Faculty Assembly's Budget and Finance Committee.<sup>86</sup> The Bylaws provide that this committee should be kept informed of all fiscal matters, facts and figures. This committee's role is to submit its recommendations and/or resolutions directly to the Faculty Assembly.

The record contains evidence of one issue that the Budget and Finance Committee attempted to address. At its meeting in early 2002, the Budget and Finance Committee requested that the Employer contribute additional monies to the faculty pension fund, based on faculty overload pay, instead of limiting the contribution to the base salaries. VPAA Stevens and Vice President Hennigan were present at the committee meeting. Hennigan told the committee that the Human Resources Director would look into the matter. After hearing nothing for several months, Kraniou called Hennigan's office to inquire about the status of the request and was informed that President Henderson denied the request because the Administration had proceeded with its annual salary adjustment and could not afford to fulfill this additional request.

The Administration's decision in this regard is not subject to appeal inasmuch as the faculty does not have the authority to participate in budgetary matters. However, the Vice President of Finance and Operations does meet with the Budget Committee regarding the Employer's budget once per year.

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discussions. His report was one of those not submitted by the Administration in the final report to the Middle States Review Board.

<sup>85</sup> VPAA Stevens testified that the Library Oversight Committee had made decisions about the library's business collection several years ago when Kraniou was the chair of that committee, but acknowledged that the committee has been dormant in the last few years.

<sup>86</sup> The Employer's Treasurer, now called the Vice President of Finance and Operations, and the Secretary of the Faculty Assembly are nonvoting ex officio members of this committee.

The record indicates that sometime between January 2003 and January 2004, the committee requested information from the office of the Vice President of Finance and Operations concerning the procedure followed in preparing the Employer's budget, inasmuch as the committee cannot participate in budgetary matters. The office of the Vice President of Finance and Operations gave the committee a copy of its budget development schedule and a listing of priorities, both of which are produced by the Administration.

It appears that the budgetary process begins on December 31, when the Office of the Vice President of Finance and Operations approves both the budget development format and the schedule. On this date, instructions and budget information are sent to the deans, vice presidents and department directors. The next occurrence on the schedule is the February meeting of the Strategic Leaders<sup>87</sup> for budget preparation. On February 28, the tuition, salaries and financial levels and new expenditures pool is approved using a budget model. Also on this date, all departmental budget requests from department chairs are submitted to the deans and then to the vice presidents for approval. On March 31, all departmental budget requests are presented to the Associate Vice President of Finance. Apparently, this office collates all budgetary requests and presents the entire group of requests at a budget retreat attended by the members of the Strategic Leaders and other invitees.<sup>88</sup> At the budget retreat, each vice president speaks of his or her proposals. On April 30, the budget requests are submitted to the President in summary format. The President makes the final determination on the funding of the proposals and issues a document within a month of the budget retreat identifying the level of funding for each proposal. If the finance committee of the Board of Trustees approves the budget, it is submitted to the full Board by summer for implementation the following fall.<sup>89</sup>

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<sup>87</sup> As noted herein, the Strategic Leaders Committee consists of President Henderson and her five direct reports.

<sup>88</sup> The other invitees are all non-faculty.

<sup>89</sup> As noted, the setting of tuition is part of the budgetary process. After the retreat at which a budget model is agreed upon, the Vice President of Finance drafts a proposal which he recommends to the Finance Committee of the Board. The full Board can approve or reject the proposal.

It is clear that faculty members' involvement in the budgetary process is limited to requesting funds from department chairs for certain projects within their own department. Department chairs then provide any input or make budgetary requests for the department through the chain of hierarchy. Although Stevens testified that the Vice President of Finance meets with the Budget and Finance Committee of the Faculty Assembly on an annual basis to discuss the budget, it is clear that the discussion does not involve any budgetary input or budgetary decisions.

#### **5. Admissions, Retention and Financial Aid Committee**

This committee has 11 (nine faculty and two students) voting members, and two nonvoting student members. The ex officio members include the Dean of Admissions and Financial Aid. The Faculty Assembly Bylaws state that this committee recommends to the Faculty Assembly an admissions policy and reviews "the standards of the established policy and their enforcement." No information was provided with regard to whether or how often this committee meets. Moreover, the record contains no evidence of any specific matters considered by this committee.

The record establishes that the Employer's admissions policy for full-time undergraduate students is published in its catalog.<sup>90</sup> The genesis of these standards is unknown, according to VPAA Stevens. George Bromall, a 33-year faculty member, testified that he was unaware of any faculty input into the promulgation of these standards.

It appears that the structure of the Employer's Admissions Office has changed since Henderson assumed the presidency. Formerly, there was a position called Dean of Admissions. As noted previously, Henderson split this position such that currently the Employer has two enrollment deans. In 2002, Henderson decided that instead of having the enrollment deans report directly to her, the enrollment functions should be overseen by the Vice President of Finance and Operations.

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<sup>90</sup> The minimum admission standard is a 2.5 GPA and an 860 SAT/18 ACT score. Transfer students must have maintained at least a 2.0 college GPA.

In addition to the general undergraduate admissions standards, there are other standards for graduate programs and accelerated programs.<sup>91</sup> There is conflicting evidence in the record as to the development of admissions standards for graduate and accelerated programs. Henderson testified generally that faculty establish admissions standards for their programs. Bolsinger also testified generally that admissions criteria for the accelerated programs are established by the department. However, John P. Gobble, Sr., a witness called by the Employer, has been the director of the undergraduate Criminal Justice Program<sup>92</sup> since its inception in 2002. This program is offered on both an accelerated and non-accelerated basis. Unlike the non-accelerated program, which is part of the Humanities and Human Services Department, the accelerated program is housed in the School of APS under Bolsinger's direction. Gobble testified that he believed Bolsinger determined the admission standard for presumptive admission<sup>93</sup> for the accelerated program.

In the MBA Program, which now has both a non-accelerated and an accelerated program, the initial standard for being presumptively admitted or automatically denied in the AMBA program was a GPA of 2.75 or 2.0, respectively. Within his first month as the program director, Breslove met with Dean Bolsinger and then-department chair Bromall. During the meeting, it was determined that a student with a GPA of 2.5 to 2.75 should be automatically admitted on a probational basis, and that any applicant with a 2.0 to 2.4 should be denied admission, but would be given the option of contacting the program director to explain why their GPA was not indicative of their likelihood of success. All of those students who opted to speak to Breslove were given the opportunity to take one to two undergraduate classes. If the student

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<sup>91</sup> Accelerated programs are also referred to in the record as Saturday Fast Programs.

<sup>92</sup> Stevens appointed Gobble to this position.

<sup>93</sup> In this program, those with a GPA of 2.5 are presumptively admitted. The presumptive admission means that having attained the specified grade point average, the applicant is admitted without the program director reviewing the application and supporting documents.

demonstrated proficiency in the two undergraduate classes by earning a grade of B or above, the student would then be admitted to the MBA Program.

Breslove denied that this system was arrived at as a collective decision. Breslove felt that the process resulted from enrollment quotas given to Bolsinger by Henderson. According to Breslove, Bolsinger described these enrollment quotas to the business department faculty in a department meeting.

Admittance into COPA requires that a student meet the general admission requirements of the university and that he/she audition before a group of full-time and adjunct faculty members.<sup>94</sup> Each faculty member of the group completes an audition form to evaluate each auditioning student. Based on the results of these forms, the most proficient students will be accepted into the program. The faculty members' evaluation of applicants is based on their individual expertise and training in the art form being evaluated. No information was provided as to the method by which auditions became part of the admission requirements for COPA.<sup>95</sup>

Faculty members also use the audition form to recommend students in COPA for apprenticeship and scholarship monies. Dean Lindbloom reviews these recommendations. The department chair or the dean can reject the level of apprenticeship funds, but there is no evidence that the faculty recommendations have been rejected. The record establishes that apprenticeship funds range from \$500 to \$3000 per year, and are paid for work performed for the University. The record also establishes that the tuition charged to attend COPA is \$2000 to \$3000 per year higher than in the other schools. Lindbloom determines the amount of apprenticeship money to be allocated to each department in COPA. Students must apply for such funds to COPA's Director of Academic Administration. Scholarships are determined by the Employer's Financial Aid Office.

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<sup>94</sup> There are 23 full-time and 95 adjunct faculty teaching in COPA.

<sup>95</sup> It also appears that the Administration has set enrollment goals for COPA.

The faculty in COPA are involved in grading and evaluating COPA students each semester. During the evaluation session, students can be put on probation, continued or dismissed.

## **6. Formal Hearing Committee**

According to the Faculty Assembly bylaws, the Formal Hearing Committee hears all cases of dismissal for cause or of non-reappointment. Upon request, the committee may hear cases not successfully resolved through the informal grievance procedure involving the APPC. This committee is to consist of 11 faculty members, none of whom are members of the APPC, and no more than three of whom are departmental chairs.

The President can reject a decision of the Formal Hearing Committee. At that point, the faculty member can request that the record of the case be transmitted to the Board of Trustees, which will provide an opportunity for argument. The Board may return the matter to the committee with specific objections to be considered by the committee. The committee will then reconsider the matter, and the Board will make a final decision after study of the committee's reconsideration. It appears that the Formal Hearing Committee has not been utilized to date.<sup>96</sup>

## **7. Student Development Committee**

This committee has nine voting faculty members, two voting student members and two non-voting student members. The Dean of Student Development<sup>97</sup> is an ex officio nonvoting member. This committee makes recommendations to the Faculty Assembly concerning professional personnel in areas of athletics and student affairs. The committee is also responsible for appointing search committees for the hiring and supervising of such personnel, providing faculty advisors or sponsors for clubs or organizations when requested, establishing a

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<sup>96</sup> The record reflects that the Employer instituted termination proceedings against a tenured faculty member during the fall of 2003. Apparently, this is the first time the Employer has instituted such an action.

<sup>97</sup> It appears that this title has recently been changed to Vice President for Student Development and Dean of Students.

pool of current students for orientation programs, and acting as a consulting body concerning student affairs and related activities.

It appears from the record that this committee is inactive. Moreover, the record reflects that the Administration directly handles student affairs and issues through the office of Vice President for Student Development and Dean of Students Sue Oatie.<sup>98</sup>

The record further indicates that VPAA Stevens chaired the search committee which resulted in the hiring of Oatie. Two members of this committee were department chairs, but none were non-chair faculty.

Shortly after Oatie became employed, the position of Director of International Student Services and Enrollment was created by the Administration to handle all areas relating to international students. Aamir Anwar was hired to fill that position by Henderson and Stevens. There is likewise no evidence that faculty was involved in these matters.

Oatie's direct reports and the student government develop and issue a student handbook each year. If necessary, Oatie or her staff recommends modifications to the student handbook to the President and the Strategic Leaders Committee. The student handbook contains the student code of conduct and a process for disciplinary action for non-academic discipline. Such discipline is handled through Oatie's office.

During the fall of 2002, Oatie and Stevens promulgated a change in the student disciplinary process by creating a new ad hoc committee called the Academic Integrity Committee to deal with complaints from the faculty or others about student behavior as it relates to academic performance. The impetus for creating this committee was the discovery that an employee in the registrar's office offered to change the grades of 8 to 12 students in exchange for social and/or financial benefits.<sup>99</sup>

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<sup>98</sup> Reporting to Oatie are seven directors who are in charge of career development, international student services and enrollment, resident life, student activities, program for academic success, recreation center, and athletics.

<sup>99</sup> This incident is referred to in the record as the "grade scandal".

The record indicates that the Administration appointed three members of the Academic Integrity Committee to meet with each of the students involved in the grade scandal and recommend discipline to be imposed. The composition of these committees (i.e. whether Administration or faculty) is largely unknown. Associate VPAA Liefeld reviewed the recommendation of each committee, and Stevens ultimately imposed the discipline on the students.

Although not entirely clear from the record, it appears that different individuals served on each Academic Integrity Committee which was convened for each student involved in the grade scandal. William Breslove, then-Director of the MBA Program, served on one such committee with department chair Helen Fallon and the student government president. Breslove's committee heard Associate VPAA Liefeld explain to the accused student the grounds for the Administration's suspicion that she participated in the grade scandal. The committee also listened to the student's response. The committee then recommended disciplinary action to Liefeld, and Stevens imposed this discipline.

The Faculty Assembly did not vote on the creation of the ad hoc Academic Integrity Committees or have any role in the composition of the committees that dealt with the accused students. No information was provided as to whether any such committee was comprised of full-time faculty members who were not department chairs or program directors.

Questions as to the status of the grade scandal were raised at the Faculty Assembly meetings, but the Administration refused to share any information with the faculty. The Administration also directly handled the matter with respect to the employee in the registrar's office, the results of which were also not shared with the Faculty Assembly.<sup>100</sup>

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<sup>100</sup> The grade scandal was widely discussed at the Faculty Assembly meetings in October and November of 2002. According to Professor Marnich, the faculty objected both that the Administration hired outside auditors to investigate the scope of the scandal and that faculty had no role in imposing sanctions. President Henderson told the faculty that they could "e-mail suggestions". At one of the meetings, a faculty member suggested that all of those involved should be expelled. Henderson explained that such action would cost too much money. Henderson also dismissed the notion that this matter should be addressed openly and could not be hidden. Faculty Assembly President Breslove also questioned VPAA Stevens regarding how many students were involved and what discipline was issued. Stevens told Breslove that it was none of his business and that Breslove did not want to know. Stevens added that the

## **8. Organizational Review Committee**

The organizational review committee has five faculty members, including the Faculty Assembly secretary. Its responsibility is to offer to the Faculty Assembly a slate of committee members for election during the Faculty Assembly meeting in April of each year. When circumstances warrant, the committee also recommends to the Faculty Assembly the reconstitution of faculty committees. In addition, the record shows that, in 1999, this committee recommended to the Faculty Assembly that its meetings be scheduled at times during which classes were not to be scheduled. The Faculty Assembly approved this recommendation.

## **9. Faculty Development Committee**

In January 2001, VPAA Stevens advised President Henderson of the “critical need”<sup>101</sup> for faculty development in the form of training faculty in the use of new technology, funding their attendance at conferences and other activities for enhancing professional development. Stevens suggested that a Faculty Development Committee be created to plan and implement those activities which Stevens felt needed to be supported.<sup>102</sup> Faculty Development workshops were held to further the formation of such a committee, and in the fall of 2002 the Administration initiated the creation of an ad hoc Faculty Development Committee of the Faculty Assembly.<sup>103</sup> The Administration then budgeted approximately \$35,000 for faculty development needs. It appears that the committee was initially composed of about eight members.<sup>104</sup>

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haphazard fashion in which the records were kept made it difficult to know which grades had been changed illegally.

<sup>101</sup> After a university site visit in preparation for the application for university status, the PDE noted the Employer’s deficiency in the area of faculty development.

<sup>102</sup> Stevens envisioned that he would be the chair of the Faculty Development Committee.

<sup>103</sup> The Faculty Assembly was not involved initially in the decision to enhance faculty development or in the idea to create a Faculty Development Committee. The Faculty Assembly later voted to make the Faculty Development Committee a standing committee.

<sup>104</sup> The record indicates that the members of the Faculty Development Committee were Committee Chairman Robert O’Gara, Rich Kietell, Edward Meena, Mark Marnich, Mohammed Sidky and a retired faculty member, Dr. Emmett Panzella. In addition, the committee included Director of the Library Hamby and the Head of Information Technology Karen Hall, a non-faculty administrative employee of the Employer. VPAA Stevens was an ex officio member of the Faculty Development Committee.

In January 2003, Stevens drafted a Faculty Development plan for discussion with the Committee. In February 2003, the Faculty Development Committee sent a draft announcement to Stevens' office. The purpose of the announcement was to solicit applications from all full and part-time faculty for a Director of Faculty Development position to oversee the Faculty Development program.<sup>105</sup> The draft announcement also set forth the process for requesting Faculty Development funds. The process outlined involved the preparation of a "simple memo" with a description of the activity, cost breakdown and a description of the value added to both the faculty member and the institution. The announcement stated that the committee wanted to fund every idea that made sense with a view to launching an even greater effort in the future.

Thereafter, the Faculty Development Committee developed general guidelines for funding requests, and created a form for requesting funds which required the signature of the department chair or dean.

The applications for the position of Director of Faculty Development were reviewed by the committee and two co-directors were selected.<sup>106</sup> The record indicates that the committee processed and approved requests for faculty development funds until June 2003.

On May 16, 2003, Stevens advised committee chair O'Gara<sup>107</sup> of his concerns regarding the absence of clear guidelines as to the use and distribution of faculty development funds. Stevens particularly objected that the committee established unrealistic expectations that money would be given for general and vague notions of faculty development and that no one would be turned down. Stevens further objected to the suggestion of the co-directors that each faculty

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<sup>105</sup> The Director of Faculty Development was to carry an annual stipend of \$10,000 (combination of pay and/or released time).

<sup>106</sup> The co-directors were Professor Edward Meena and Dr. Panzella.

<sup>107</sup> The Associate VPAA, the four academic deans and the information technology support employee Karen Hall were all copied on the message. Other than Hall, none of these individuals were members of the Faculty Development Committee.

member be allocated a sum of money to use as they chose.<sup>108</sup> Finally, Stevens requested that the committee establish both specific criteria for the disbursement of faculty development funds and procedures with deadlines. According to Stevens, the Faculty Development Committee failed to implement any criteria.

By memo dated August 21, 2003, Stevens informed the committee that the Administration would no longer fund the position of Director of Faculty Development. Instead, the Administration added the \$10,000 planned for that position to faculty travel and research funds to support research requirements of graduate faculty. Stevens' memo further advised that "Budgeted funds for Faculty Development will be released when new standards reflecting the concerns of PDE are developed and distributed."

At the Deans Council meeting on September 3, 2003, a proposal that faculty development become the obligation of the individual schools was discussed. Under this proposal, the funds would be kept in the VPAA's office for the deans to draw on. The Administration then imposed, without Faculty Assembly input, an "interim measure" of having faculty members make their funding requests for faculty development support directly to the deans.

As of the hearing, the Faculty Development Committee was no longer a functioning committee. According to Stevens, the Administration decided to transfer the function of the Faculty Development Committee to the academic schools because of the disagreement as to the committee's role. The Administration felt that the Faculty Development Committee should establish policy and various dollar limits for different types of faculty development grants. In addition, the Administration felt that the deans and department chairs should be involved in determining the acceptability of the faculty members' proposals. Apparently, the committee disagreed with the Administration. Instead, the committee felt there should be no such dollar

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<sup>108</sup> Co-Director Meena testified that there was no such "proposal"; rather, he and Panzella raised the idea once during a conversation at one of the committee meetings.

limits and that the Faculty Development Committee should make the decisions as to whether a particular proposal was acceptable.

## **10. Other Considerations**

### **a. Schedules**

It appears from the record that full-time faculty submit the courses they wish to teach and their preference as to teaching times to the deans of their respective schools. The dean makes the final determination as to the courses to be offered and the times of the offerings. A schedule grid is prepared and the full-time faculty select courses to teach. To the extent needed, the grid will be completed with the names of adjunct faculty members. All department course schedules must then be approved by the VPAA each year.

In 1999, VPAA Stevens informed the full-time faculty that they were required to teach at least three days per week, and that he would not approve departmental course schedules for the 1999-2000 school year which included any two-day schedules for full-time faculty. This directive was not submitted to the Faculty Assembly or any of its committees. At the hearing, Stevens explained that such a measure was necessary in order to meet the needs of the students and to distribute class times throughout the day and week. The implementation of this policy by the department chairs and program directors was almost complete as of the fall of 1999.<sup>109</sup> At the hearing, Stevens testified that he no longer approves a schedule which includes any two-day schedules for faculty.

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<sup>109</sup> Professor Marnich testified that then-department chair Dr. Revilla-Beltran advised faculty members that, due to PDE requirements, the faculty in the Education Department were no longer allowed to use blocked time or stacked courses. Blocked time refers to the approach of meeting once per week for two and a half hours instead of meeting twice per week for one and one quarter hours. Marnich testified that Education Department faculty preferred the use of blocked time as it emulated the larger block of time utilized in many schools and it was an easier time slot during which to have guest speakers or to participate in field trips. Thereafter, Marnich called PDE and was informed that PDE did not mandate the cessation of blocked time and stacked courses. Marnich reported this to Associate VPAA Liefeld. Liefeld told Marnich that she was not to call the PDE and that Marnich had angered her department chair.

Even after this directive, certain department chairs were scheduling classes at non-standard times in certain courses that spanned two of the established course periods.<sup>110</sup> On January 24, 2001, Stevens again notified all department chairs that they were not to schedule courses at times other than the established times.

**b. Grade Changes**

The Faculty Handbook contains a procedure for student grade appeals, which initially involves the student's effort to discuss the problem with the faculty member, followed by the department chair<sup>111</sup> who is to appoint a committee of three faculty members. If the appointment of the committee does not result in a settlement of the issue, the VPAA will convene a grievance committee, which will render a decision. It appears that this procedure is ignored by the Administration.

The record contains evidence that the Administration has changed grades issued by full-time faculty members without following the student grade appeal procedure. In one case, without convening a committee, Stevens directed the registrar to change a student's grade in a graduate MBA course from B- to A. In another case, Stevens directed the registrar to recompute a student's average<sup>112</sup> in order for the student to have a 4.0 GPA. Stevens told the registrar that if one class could have been entered as an A+ the student's overall average would have been a 4.0. Although Stevens stated that this incident did not result in a grade change, but only in a GPA change, he acknowledged that his decision had been a bad one. Notably, then as now, the plus/minus grading system had not been accepted by the Faculty Assembly when Stevens ordered this recomputation.

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<sup>110</sup> The standard course times are: Period 1 – 8 to 9:15; Period 2 – 9:30 to 10:45; Period Three – 11 to 12:15; Period Four – 12:30 to 1:45; Period 5 – 2:00 to 3:15 and Period Six – 3:30 to 4:45.

<sup>111</sup> If the department chairperson is the instructor whose grade is being appealed, the student may appeal to the VPAA.

<sup>112</sup> The registrar did not agree with changing the GPA. At Stevens' insistence the registrar relented.

Stevens changed the grades of about 18 students in a class taught by a member of the Business Department faculty. In this instance, a committee chaired by the program director recommended the grade changes. Stevens reviewed the matter, agreed with the committee and ordered the grade changes. This did not comport with the Faculty Handbook, which provides that after the department committee deliberations, the department chair has the authority to either sustain the grade or ask the instructor to change it within 30 days. Apparently the instructor involved in this incident did not accede to the request because the matter went to Stevens. According to the handbook, when such a matter reaches Stevens' level, a grievance committee with the VPAA as the chair is to be convened. Stevens did not convene a grievance committee in accordance with the procedure set forth in the handbook. Instead, he determined that the grades should be changed. In another case, Stevens changed a student's grade but he could not recall the specifics of the incident.

Finally, the record reflects that prior to 2004, the VPAA had warned faculty members on two occasions that they should not issue too many A's. In January 2004, President Henderson informed the faculty that the grades they issued had been reviewed. The Administration then decreased the merit pay bonus by \$1,000 of those faculty members who issued more A's than the Administration felt was appropriate. The Faculty Assembly had no input regarding this decision.

### **c. Promotion and Tenure**

The Faculty Handbook contains procedures for promotion and tenure. These procedures involve the participation of committees which are comprised of tenured faculty members.

The process of attaining permanent academic tenure is open to faculty members with the rank of Associate Professor or Professor. Generally, there is a six-year probationary period after which a full-time faculty member is eligible for tenure.

Each department forms a departmental committee composed of all tenured full-time faculty members for the evaluation of faculty who are eligible for promotion and tenure.<sup>113</sup> This committee reviews the candidate's qualifications. The committee votes on each candidate and forwards its recommendation to the VPAA.

The department chair is excluded from this committee, but will submit an independent evaluation and recommendation to the VPAA. With the creation of the four schools, the deans now independently evaluate and recommend candidates for tenure. Thus, another layer of evaluation has been added to the process.

The VPAA reviews the committee's recommendations, the chair's evaluation and recommendations, the dean's evaluation and recommendations, and formulates his own independent evaluation and recommendation. All of these are forwarded to the President for a final determination and announcement of the award of tenure.

The Employer asserts that from 1998 to 2003, all 14 full-time faculty recommendations for tenure were accepted by President Henderson. The record contains, however, several deviations from the tenure requirements and process described in the Faculty Handbook.

In the case of Vincenne Revilla-Beltran, the record establishes that in 1999 the Administration appointed Revilla-Beltran to the position of department chair in the Education and Community Services Department. Revilla-Beltran told the faculty in her department that she was given professor status upon her appointment to the department. Before 1999, Revilla-Beltran was not a full-time faculty member; rather, she held the administrative position of the Director of the Program for Academic Success. Two years later, in 2001, Revilla-Beltran was awarded tenure. No departmental committee was formed to review Revilla-Beltran's tenure request. Rather, VPAA Stevens recommended Revilla-Beltran for tenure.

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<sup>113</sup> If there are less than three full-time faculty members within a department to form a committee, the VPAA will appoint an additional tenured full-time faculty member, who has expertise in the academic discipline, to the committee.

The Administration also directed the tenure of Raymond Laine, in December 1999, shortly before Laine's death. Laine was a full-time faculty member in the Theatre Department. Laine did not have a bachelor's degree, but obtained his position based on his acting experience. In any event, when Laine was hospitalized with an incurable disease, Stevens recommended to Henderson that tenure be directed. Henderson approved this recommendation.

Finally, the record establishes that Portia Weston was hired in 2003 as a faculty member with the highest rank of professor and with a four-year credit toward tenure. In addition, Weston's offer of employment included a commitment that her tenure review will be conducted by the VPAA in October 2006.<sup>114</sup> Weston's hiring under these circumstances circumvents the requirement that tenure be attained after a six-year probationary period. In addition, it appears that her review will be conducted without the recommendation of a tenure committee.

The composition of the committee to consider promotions is nearly the same as the departmental committee called to review tenure.<sup>115</sup> Again, separate recommendations come from the committee, the department chair, the dean for those promotions occurring after the year 2002, and the VPAA. The President makes the final determination on all promotions. From 1998 until 2003, 21 individuals recommended by departmental promotion committees have been promoted. The record reflects that there were at least 25 recommendations during this time period.

The record further reflects that the Administration does not consistently follow the recommendation of the promotion committees. For example, in 2001, VPAA Stevens did not agree with the recommendation of the Education and Community Services departmental promotion committee to promote Darlene Marnich from Associate Professor to Professor and to

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<sup>114</sup> Stevens acknowledged that Weston's hiring did not comport with the Faculty Handbook. Stevens characterized this hiring as a "directed appointment".

<sup>115</sup> The promotion committee is comprised of a minimum of three tenured faculty and one tenured faculty member from another department.

promote Suzanne Miller from Associate Professor to Professor. Based on Stevens' recommendation, Henderson deferred their promotions for a period of one year, after which both reapplied for promotion. In addition, in 2001, the departmental committee, the department chair and the Dean of the School of Business all recommended the promotion of Fred Kitner. Notwithstanding this, the President rejected their recommendations on the recommendation of Stevens. Henderson informed Kitner that she was deferring his promotion to Professor for at least one year. Kitner did not reapply for promotion. Finally, in April 2003, the VPAA rejected the recommendation of the Promotion Committee and the department chair and the Interim Dean of the School of Arts and Sciences that Christal Chaney be promoted from Associate Professor to Professor. Henderson agreed with Stevens, and Chaney was not promoted. Finally, as noted previously, there was no faculty input when Henderson promoted Revilla-Beltran to the highest academic rank of Professor.<sup>116</sup>

#### **d. Faculty Hiring**

The Faculty Handbook provides that the authority to appoint faculty is delegated to the President by the Board. Moreover, appointments to the faculty are made with the recommendations of the appropriate faculty search committees and administrative principals. Normally, a search committee involved in the hiring of a tenure track faculty member must consist of three faculty members<sup>117</sup> from the appropriate discipline or department and one additional faculty member, preferably in a related discipline, from another department. Normally, the department chair or program director will chair a faculty search committee.

The first step in the process of hiring full-time tenure track faculty members is that a budget line is established by the Administration for the funding of the position.<sup>118</sup> The search

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<sup>116</sup> The promotion of Revilla-Beltran is not one of the 21 promotions in which a promotion committee with faculty membership was involved.

<sup>117</sup> Whenever possible, the committee will consist of tenured faculty members.

<sup>118</sup> In the course of preparing for the university site visit by the PDE as part of its application for university status, the Employer had to address the full-time to part-time faculty ratio inasmuch as the state requires that full-time faculty teach the majority of classes according to a set formula. The Employer had more than the allowed number of part-time faculty. Consequently, Stevens devised a faculty staffing plan

committee and the department chair develop an advertisement for the position which is placed in a chronicle of higher education or other professional journals. The search committee then screens the applications and supporting documents and decides how many candidates will be brought to campus for interviews.<sup>119</sup> The dean of the school develops an agenda for the visit and publishes a schedule. Occasionally, Stevens and/or Henderson will meet with the candidates.<sup>120</sup> Once the interview process is completed, the search committee completes an evaluation. The committee then makes its recommendation to the dean.<sup>121</sup> The dean submits a recommendation to the VPAA who, in turn, makes a recommendation to the President.

Stevens testified that the 18 full-time tenure track hirings since the September 1, 2000, effective date of the current handbook have followed the above-described procedure, which is set forth in the Handbook. The hirings in 2000 became effective on September 1, 2001. Stevens testified that the procedures under the handbook in effect before September 1, 2000 were quite similar to the current procedure, the only difference being that, at times, an entire department was involved as a search committee.

The record indicates that the current Administration does not consistently follow the agreed upon procedures for the hiring of tenure track faculty members. For example, VPAA Stevens admitted that the hiring of Margaret Gilfillan did not comply with the procedures in the handbook. Gilfillan was formerly the Employer's Vice President of Finance. In 2000, Gilfillan decided she wanted to step down from that position, and expressed an interest in teaching

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which would bring the Employer into compliance with PDE requirements for the full-time to part-time faculty ratio within five years. Stevens showed the plan to the Faculty Assembly when it was completed, but did not solicit faculty input in preparing the plan.

<sup>119</sup> Due to budgetary constraints, at times Stevens is involved in deciding how many candidates will be brought to the campus or whether conference calls should be arranged.

<sup>120</sup> All department members and often faculty from outside departments have the opportunity to meet with the candidates.

<sup>121</sup> Prior to 2002, the department chair involved in the search committee made the committee's recommendation directly to the VPAA. If the search committee was chaired by someone other than the department chair, then the department chair made a separate recommendation.

accounting. Then-chair of the Business Department George Bromall recommended that Gilfillan be hired as a full-time tenure track faculty member. Stevens recommended to Henderson that Gilfillan be appointed and further recommended the terms of her appointment. According to Stevens, Henderson “reluctantly” approved Gilfillan’s appointment to Associate Professor with an abbreviated probationary period.

Bromall also testified as to the events leading up to the hiring of Gilfillan as an accounting professor. Initially, both a search committee and Bromall, as department chair, recommended the hiring of an accounting professor. VPAA Stevens rejected the recommendations and the search committee’s choice was not hired. After this rejection, then-Vice President of Finance Gilfillan approached Bromall. Gilfillan knew that there had been a failed search and expressed her interest in becoming an accounting professor. Bromall testified that he recommended her hiring to both the faculty and to Stevens. Stevens agreed with the recommendation, and Henderson hired Gilfillan. No search committee was convened.

The record also contains evidence that the Administration recently decided to postpone filling a full-time faculty position. Thus, a faculty position was approved for a full-time faculty member to teach in the SAEM Program. VPAA Stevens and Dean Murphy decided to postpone the filling of that full-time position.<sup>122</sup>

The record also contains examples of faculty hirings prior to 1998 that were not in conformance with the procedures. Shortly before 1998, Bromall hired Elaine Luther without a search committee. Luther had been teaching as an adjunct professor in the Business Department. After a full-time faculty member left, Bromall prevailed on the Administration to let him hire Luther. When the Administration agreed, Bromall “cajoled” the Business Department faculty to accept her because the opportunity to hire did not come along very often.

Although not an example of a faculty member being newly hired, the record contains one instance of a tenured faculty member being reassigned to the Business Department over the

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<sup>122</sup> VPAA Stevens informed President Henderson that there was not time to hire a good candidate and that they would try again in January.

objection of the faculty in that department. When the Employer's library operations merged with the Carnegie Library in 1996, then-librarian Mary Jane Sunder was displaced as the librarian. Because Sunder was tenured, the VPAA at the time assigned her to the Business Department. The faculty of that department twice voted unanimously to reject Sunder, but she was assigned to the department anyway.

Henderson testified that the Employer formed a "faculty" search committee in the search for a director of the honors program.<sup>123</sup> An advertisement was placed in the chronicle of higher education. Admittedly, the ad did not reference an appointment to the faculty of the Education Department. Contrary to the testimony of Henderson, Stevens admitted that the hiring of Director of the Honors Program Portia Weston did not follow the hiring procedure for full-time tenure track faculty. Stevens characterized Weston's hiring as a "directed appointment".

Likewise, it appears that when Revilla-Beltran went from an administrative position to a full-time tenure track position, her "hiring" did not follow the handbook procedures and was similarly a directed appointment. Furthermore, the appointment of Revilla-Beltran to department chair was also effectuated without the participation or input of the faculty in the Education Department or any other full-time faculty members.

The appointment of Revilla-Beltran's successor as department chair is another example of the Administration's failure to follow the Faculty Handbook procedures. The record indicates that in January 2003 Revilla-Beltran announced that she was stepping down from the position of Education Department chair.<sup>124</sup> At a Faculty Assembly meeting after Revilla-Beltran's announcement, Stevens was questioned concerning how the Administration planned to fill her position. Shortly thereafter, Interim Dean Fessler met with the department faculty and asked those present to consider taking the job. Following this meeting, the faculty of the department

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<sup>123</sup> Henderson could not recall the identity of the faculty members on the search committee.

<sup>124</sup> Revilla-Beltran currently holds the position of the Employer's Academic Grant Manager, an administrative position.

sent a letter to Henderson, to Stevens and to the President of the Faculty Assembly requesting that, in filling this position, the procedures in the Faculty Handbook be followed.

Initially, Stevens told the group that there would be no chair. Instead, the new interim Dean, Fritz, would be in charge of running the department. However, the position was finally posted and the Education Department faculty received nine to eleven resumes. Interviews of four candidates were conducted by the department faculty and Dean Fritz. After the interviews, the faculty members submitted a report describing the criteria on which each candidate was rated and the results of those ratings. The Administration notified the faculty to submit three unranked names instead of the report. Accordingly, the faculty resubmitted the list to Dean Fritz omitting the name of Paula Calabrese. Thereafter, Dean Fritz notified the faculty that Calabrese had been selected as department chair. According to Professor Marnich, the faculty members were completely dismayed at the fact that Calabrese was selected even though her name was not included on the list of nominees presented by the members of the department.

According to Stevens, the process of hiring full-time non-tenure track faculty is generally the same as for tenure track faculty, unless there is a need to abbreviate the process. Stevens stated that in many cases there was not time or any particular reason to have search committees. Stevens said that where positions were available, department chairs recommended the hiring of the full-time non-tenure track faculty on one-year contracts directly to the VPAA. Since the hiring of the deans, the recommendations have been submitted to Stevens after review and recommendation by the dean. The VPAA then recommends the hiring to the President.<sup>125</sup>

The record establishes, however, that for the 13 non-tenure track appointments since 1998, none has involved a search committee convened by the department. The Employer further acknowledges that the hiring of Rocio Martinez did not follow the process for hiring non-tenure track faculty. In that case, the Employer received a grant to hire a multi-disciplinary

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<sup>125</sup> The Faculty Handbook contains no process for hiring full-time non-tenure track faculty.

faculty member, and three department chairs recommended the hire of Martinez. Stevens also acknowledged some irregularity in the hiring of Mohammed Sidky and William Moushey.

With respect to Sidky, the record establishes that, in 2000, then-department chair George Bromall hired Sidky to teach full time in the MBA Program. At that time, the Employer was undergoing three review/accreditation processes.<sup>126</sup> All three of the accrediting bodies informed the Employer that it was “woefully low” on full-time faculty, especially in the accelerated MBA Program. Stevens informed Bromall and the then-MBA Program Director Breslove that the department should move quickly. Inasmuch as Sidky had been an adjunct in the MBA program for two semesters, and the three felt that he would be a good faculty member, Sidky was hired. Stevens determined that Sidky would be hired on a non-tenure track basis.

Moushey was hired in 2001 as a non-tenure track faculty member in the Journalism and Mass Communications Department. Moushey was hired after discussions between Department Chair Helen Fallon, Stevens and Henderson.

Each semester the Employer issues between 150 and 250 adjunct faculty contracts.<sup>127</sup> Normally, applications for adjunct positions are submitted to the Employer’s Human Resources office. It appears that occasionally an adjunct will be recommended by a faculty member, another adjunct or by the Administration. These applications are then forwarded to the appropriate department. Thereafter, the department chair or program director will interview selected candidates. The department chair or program director then decides to assign the candidate to teach a class on the department schedule. This information is then submitted to the Dean’s office for transmittal to the VPAA’s office. Contracts are issued within a month or two prior to the beginning of the semester and must be executed and returned by the adjunct.

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<sup>126</sup> The three processes were the Middle States accreditation visit, the International Assembly of Collegiate Business Education accreditation and the preparation for the PDE application for university status.

<sup>127</sup> The contract with adjunct faculty is for one course, which may be a seven or fourteen week course. Adjuncts are appointed at the rank of instructor, assistant professor, associate professor and professor. The rank of the appointment determines the adjunct’s compensation.

Thus, adjunct faculty members are hired on the basis of the recommendation of the program director, department chair or, occasionally, a dean.

In addition, in the fall 2003, Vice President of Finance Hennigan issued a policy allowing non-faculty staff members to teach a maximum of one course per semester with the permission of their supervisor.

**e. Hiring of Deans**

There is no procedure in the Faculty Handbook for hiring school deans inasmuch as the handbook was approved in 2000, and the creation of the four schools did not occur until 2002. According to Stevens, the Employer followed a process “adapted from” the process set forth in the handbook for the hiring of a VPAA. The process used by the Employer to hire a school dean consisted of the creation of the search committee comprised of faculty members from that school and at least one other school. The search committees also included individuals such as those who sit on an advisory board of the school for which the dean is being sought, as well as members of the Administration. An advertisement is developed and published. The Administration may engage a consultant to screen applicants or to generate applicants in certain cases. The search committee selects applicants for airport interviews and conducts those interviews. After this round of interviews, the search committee determines which candidates should be brought to the campus for interviews and open sessions with faculty, staff and students. During this process, certain candidates also meet with members of the Strategic Leaders and then meet separately with the VPAA and the President.<sup>128</sup> At times, the candidates for dean positions meet with members of the Board of Trustees. After the campus interviews are completed, the search committee makes recommendations to the President through the VPAA. The record shows that Henderson prefers unranked recommendations.

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<sup>128</sup> Survey forms are distributed to those who meet with the candidate and these forms are a vehicle for input.

There have been six dean hirings since the conversion to university structure.<sup>129</sup> Stevens testified that the hirings of Bruce Murphy and Ronald Lindbloom followed the Employer's process as described above. However, with respect to the search for Dean Murphy, Henderson decided that Dr. Jeffery Zoffer, an outside consultant,<sup>130</sup> would chair the search committee, contrary to the normal protocol described by Stevens. In addition, there were at least eight voting members of this search committee, only three of whom were non-department chair full-time faculty members.<sup>131</sup> Thus, the faculty members were in the minority in the decision to hire Murphy. In the end, two unranked candidates were presented and Henderson chose Murphy.

In the case of Interim Dean of Arts and Sciences Fessler, the record establishes that Fessler was appointed to the position in the summer 2002 by Henderson, based on the recommendation of Stevens. Stevens explained that he conferred with the department chairs because there was insufficient time to conduct a search. Stevens was interested in having Fessler<sup>132</sup> as the Dean of Arts and Sciences for one year to work with the department chairs and faculty in redesigning the core curriculum. Therefore, Fessler was appointed with the understanding that he would step down after one year, at which time Fessler would assume the directorship of the core curriculum.<sup>133</sup> No Search committee was formed for this appointment.

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<sup>129</sup> The six dean hirings have been the hiring of Bruce Murphy for the School of Business, Robert Fessler as interim dean for the School of Arts and Sciences, Steven Fritz as second interim dean of Arts and Sciences, Dean of COPA Ronald Lindbloom, Interim Dean of the School of APS Judith Bolsinger and Dean of the School of APS Judith Bolsinger.

<sup>130</sup> Zoffer is a retired dean from the University of Pittsburgh.

<sup>131</sup> The three faculty members were Elaine Luther, Jeffrey Carper and Dimitris Kraniou. The other voting committee members included then-department chair George Bromall, Dean Lindbloom, Dr. Zoffer and Board members Jacqui Lazo and Thomas Golonski.

<sup>132</sup> Fessler was previously a professor of psychology in the Department of Humanities and Human Sciences.

<sup>133</sup> The record contains no other information on the position of the directorship of the core curriculum.

A search for a permanent dean of the School of Arts and Sciences began in the fall of 2002. At that time, a Search committee was formed.<sup>134</sup> After the search procedures were completed, the committee recommended three candidates. The record reflects that Henderson offered the position to one of the candidates, who declined the position. Henderson felt the other two were unworthy, and thus she aborted the search. At that point there was insufficient time to begin a new search to have a permanent dean in place by the summer of 2003.

Consequently, the Administration brought to campus four candidates recommended to Henderson by the Registry for Interim Presidents, a corporation that works with former college presidents and institutions in need of interim administrators. Fritz was hired using this process in about January 2003, after the department chairs who were on the search committee,<sup>135</sup> submitted written evaluations to the VPAA and to the President.

As to the selection and appointment of Dean Judith Bolsinger, the record indicates that, in the summer of 2002, Henderson appointed Bolsinger to the position of Interim Dean of the School of APS. Stevens characterized this as a “change in title”, as Bolsinger’s previous position had been the Dean of Part-Time and Accelerated Programs. On Stevens’ recommendation, Henderson appointed Bolsinger to be the permanent dean of the School of APS. No Search committee was convened for either the interim or permanent dean position. Despite Stevens’ characterization, the record establishes that the School of APS now offers two academic programs, whereas Bolsinger had no responsibility for academic programs in her previous position.

#### **f. Graduation**

Students are certified for graduation by the registrar after the registrar performs a degree audit to make sure all course requirements established for the particular degree have been met.

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<sup>134</sup> The record does not reflect the members of the search committee except that Department Chair Mark Farrell was one of the members.

<sup>135</sup> The record is unclear as to whether any non-chair full-time faculty members were on the search committee. However, the record establishes that only the department chairs submitted written evaluations to the VPAA.

The registrar then creates a commencement list and the President confers the degree at commencement. The degree requirements must comport with PDE requirements and accreditation standards, but departments can and do require credit hours in excess of the minimum credits required.

#### **IV. ANALYSIS**

##### **A. Legal Standard**

In NLRB v. Yeshiva University, 444 U.S. 672 (1980), the Supreme Court found that faculty members were managerial employees excluded from the coverage of the Act.<sup>136</sup> It defined managerial employees to be those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer”. *Id.* at 682. The Court refined this definition by holding that managerial employees “must exercise discretion within or even independently of established employer policy and must be aligned with management” and normally must represent management interests by “taking or recommending discretionary actions that effectively control or implement employer policy.” The Court held that the purpose of excluding managerial employees, like the purpose of excluding supervisors from the Act’s coverage, was to assure employers the undivided loyalty of their representatives. The Court found that the problem of divided loyalty was particularly acute for a university like Yeshiva that depended on the professional judgment of its faculty to formulate and apply crucial policies, constrained only by necessary general institutional goals.

The Court found that the faculty at Yeshiva, through participation in faculty meetings and on faculty committees, determined each school’s curriculum, academic calendar, course schedules, admissions and matriculation standards, teaching methods, grading policies and sometimes determined tuition, the size of the student body, and in one case, the location of a school. The Court concluded that the faculty’s control over academic matters was absolute.

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<sup>136</sup> In that case, the union sought certification as the bargaining agent for the full-time faculty members at ten of the university’s 13 schools.

In non-academic matters, the Court found that the faculty played a predominant role in decisions on faculty hiring, tenure, sabbaticals, termination and promotion. The Court noted that although the final decisions on such personnel matters were made by the Administration, the faculty made recommendations in all cases and “the overwhelming majority of faculty recommendations [were] implemented”. Id. at 677. The Court also noted that, at least in some of the schools, budget requests were made by faculty, and that in the case of one school, such requests had never been rejected. The Court found unpersuasive the fact that many faculty decisions were subject to the rarely exercised veto power of the Administration.

The Court noted that at other institutions, unlike Yeshiva, faculty members may be non-managerial, depending on the extent of their authority, commenting, “It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research”. Id. at 690-691, fn. 31.

In Yeshiva, Justice Brennan argued in a dissenting opinion that “[e]ducation has become ‘big business’ and the task of operating the university enterprise has been transferred from the faculty to an autonomous administration, which faces the same pressures to cut costs and increase efficiencies that confront any large industrial organization.” The majority, noting this argument, stated, “The shift, if it exists, is neither universal nor complete.” Moreover, the Court was constrained to decide the case on the record before it.

Since the Supreme Court decided Yeshiva, the Board has determined the status of faculty members in various settings. In Bradford College, 261 NLRB 565 (1982), the Board found that the faculty were non-managerial where the written governing document, namely the Faculty Manual, indicated that the faculty had substantial authority, but in practice it had little. The Board found that the faculty did not effectively determine teaching loads, salaries, budget, the filling of administrative positions, faculty evaluations or certain faculty personnel actions. The Board also found that the administration had cancelled an academic position without faculty approval, had sometimes altered grades given by faculty members, and at least in some cases had failed to follow faculty recommendations for the hiring of new faculty members. In the

instant case, the Administration decided not to fill a full-time position in the SAEM program, has altered grades given by faculty members on several occasions and has failed to follow search committee recommendations. For example, the Administration refused to hire a full-time faculty member to teach accounting in the Business department who was recommended by the search committee.<sup>137</sup> Conversely, the Administration also hired department chair Paula Calabrese who was not recommended by the search committee.

In determining that the faculty lacked effective authority, the Board in Bradford College noted a memorandum of the president of the college which contained a statement to the effect that it was the administration, and not the faculty, which set academic and administrative policies. The Board said that this view was reinforced by the vice president for college relations, who told the faculty “that governance of [the] college was not a democratic government--it was a government from higher levels.” Id. at 566. This comment is strikingly similar to President Henderson’s statements to the faculty at the February 3, 2003 Faculty Assembly meeting that participatory management meant only that she had to listen to the faculty, not that she had to do what they said, and that the Employer was not a democracy.

It has become clear that in determining whether faculty are managerial employees, the Board accords less weight to faculty authority in nonacademic matters, especially where there is substantial indicia of the faculty’s managerial status in academic areas. See University of Dubuque, 289 NLRB 349 (1988); Thiel College, 261 NLRB 580, 586 at fn. 34 (1982), overruled on another issue in St. Joseph’s College, 282 NLRB 65, 67-68 (1986). Moreover, in Lewis & Clark College, 300 NLRB 155, 163 at fn. 41 (1990), the Board emphasized, in discussing Yeshiva, 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’.” Effective recommendation is found where nearly all recommendations are routinely approved by the administrative hierarchy, often without

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<sup>137</sup> This opening was subsequently filled when the Administration appointed Margaret Gilfillan.

independent review. The Board has also determined that the party seeking to exclude either a whole class of employees or particular individuals as managerial has the burden of presenting sufficient evidence to establish this exclusion. University of Great Falls, 325 NLRB 83, 93 (1997).<sup>138</sup>

The presence of a large administrative staff has been a factor relied on by the Board in finding faculty members to be nonmanagerial. See Loretto Heights College, 264 NLRB 1107 (1982), enfd. 742 F.2d 1245 (10<sup>th</sup> Cir. 1984). In that case, the Board found that such a large administrative staff created an effective buffer between top management and the lowest echelon, eliminating the need found in Yeshiva for the institution's administration to rely on the faculty for advice, recommendations, and the establishment and implementation of policies. In Loretto Heights, it was the program directors who provided the buffer. Those individuals largely controlled the budget, served in key positions on committees and task forces, and were administrators rather than instructors, even though they carried teaching loads. In this case, the Employer admittedly has a substantial administrative complement. In fact, there are at least 20 administrators in the Employer's academic organization, including the deans, department chairs, certain program directors and other administrators.

In St. Thomas University, 298 NLRB 280 (1990), the Board reversed a Regional Director's finding that the Employer's faculty were managerial employees. In that case, the chain of command, in ascending order, consisted of faculty, division chairpersons, the dean of the faculty, the vice president of academic affairs, the university president, and the Board of Trustees. The parties there agreed that all levels above the faculty should be excluded from the bargaining unit. Here, the chain of command, in ascending order, consists of faculty,

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<sup>138</sup> In University of Great Falls, the Regional Director's reasoning was adopted by the Board. In support of his conclusion as to what constitutes effective recommendations, the Regional Director cited Lewis & Clark, 300 NLRB 155, 163 at fn. 41 (1990) in which the Board said, "Here, the faculty effectively controls academic matters, as its recommendations are virtually always approved and the faculty directly decides some academic matters without making recommendations to higher management. That the faculty in Livingstone had almost plenary authority, and in Yeshiva absolute authority, does not preclude finding managerial authority where, as here, the faculty effectively recommends and controls academic policy."

department chairs or program directors, deans, the VPAA, the university president and the Board of Trustees. As in St. Thomas University, the parties here have agreed that all levels above the faculty should be excluded from the bargaining unit. In addition, in St. Thomas University, the employer decided, without faculty vote or approval, to restructure the university. There was evidence in that case, as here, that faculty opposed the changes effected by the reorganization plan.

In the instant case, the curriculum is not within the faculty's absolute control, as all proposed courses must be approved by the department chair before being examined by the Curriculum Committee and voted on by the Faculty Assembly. Then, the VPAA can recommend disapproval of the proposal to the President. Like courses, programs are reviewed by the Curriculum Committee and, if recommended, are voted on by the Faculty Assembly. They are then subject to approval by the Administration. Generally, the Administration agrees with the programs passed by the Faculty Assembly, in part because many of these programs are initiated by the Administration. However, even then, the Administration can, and does, choose to have market studies performed on certain programs. If the result of the market study does not meet the Employer's economic agenda, the Administration determines, without faculty input, to abandon the program. For example, in this case, the Administration did not implement a Construction Management program approved by the Faculty Assembly, and the Administration also abandoned faculty proposals for a Counseling program and a Vocal Performance program.

Even without market studies, this Administration has effectuated large-scale changes in certain programs. For instance, the Administration merged the MBA programs, which resulted in the discontinuance of the International MBA program. The Employer also contracted with Berlitz/ELS, thereby severely diminishing, if not discontinuing, the need for its own ESL Program. Finally, the Administration dismantled the GIS Department and reassigned the various disciplines housed there to different departments. This action had far reaching effects on the disciplines formerly within the GIS Department in that those disciplines are now part of

departments with a different focus. All of these actions were taken without the recommendation of the Curriculum Committee or the vote of the Faculty Assembly.<sup>139</sup>

In addition, the record indicates that academic policy is made primarily by the VPAA, and is increasingly made by the Deans. The Deans Council has set policy on such issues as independent study courses, special delivery courses, faculty-led trips abroad, the plus/minus grading system and faculty development. In addition, faculty are now expected to conform to the Administration's rules when preparing their course syllabi. The Administration has set class size limits and has determined the schedules to which faculty must adhere. The Administration also unilaterally established the four schools of the university and determined that schools can each adopt their own governance rules. Finally, the Administration adopted a merit pay policy for faculty, even though the faculty twice rejected it. The Administration has adopted these and other policies affecting the faculty's terms and conditions of employment without faculty input.

The standing committees of the Faculty Assembly and the Faculty Assembly do have the authority to recommend certain actions, and it must be determined whether these committees "effectively recommend" policy or action. With respect to the Library Oversight Committee; Formal Hearing Committee; Admissions, Retention and Financial Aid Committee; Budget and Finance Committee and Student Development Committee, the record contains insufficient evidence to establish that these committees effectively recommend or otherwise exercise control over any academic or nonacademic matters. Moreover, the Organizational Review Committee appears to be an internal committee of the Faculty Assembly and does not advise or recommend policy to the Employer. As to the Faculty Development Committee, the evidence establishes that this committee initially attempted to independently create policy in a manner which did not comport with the desires of the Administration. In response, the Administration revoked the committee's budget, thus rendering this committee defunct. The

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<sup>139</sup> The one faculty member teaching in the ESL program, albeit a department chair, strenuously objected to contracting with Berlitz/ELS. Nevertheless, the Administration implemented the new program.

function previously performed by this committee has now been assigned by the Administration to the deans.

**B. Academic Areas**

In the area of academic curriculum, the Curriculum Committee is a committee that recommends new courses and programs. While nine of the ten undergraduate programs implemented by the Administration were recommended by the Curriculum Committee, there is evidence that three others (Construction Management, Counseling and Vocal Performance) were abandoned based on the results of market studies conducted by outside consultants retained by the Administration. In addition, the Administration implemented the Berlitz/ELS Program without allowing the Curriculum Committee or the Faculty Assembly to pass on it. The utilization of market studies shows that the Administration has the last word in the implementation of programs. The Employer's actions with respect to the Berlitz/ELS program, in contracting for a new program while not formally discontinuing the existing ESL program, is another avenue utilized to circumvent the Faculty Assembly, in apparent disregard of the Faculty Handbook, which provides that faculty members are responsible, inter alia, to define, add, subtract and evaluate courses within academic areas.

As to the five new graduate programs implemented since 2000, most were initiated by the Graduate Council, which is made up of department chairs, all of whom are stipulated to be managerial and supervisory employees, and program directors, the majority of whom are also managerial and/or supervisory employees, and thus, are part of the University's Administration. The Curriculum Committee and the Faculty Assembly did approve the five new graduate programs, which were implemented by the Administration. However, the Curriculum Committee also approved a graduate SAEM Program, which was unilaterally put on hold by VPAA Stevens. In addition, the Administration merged the IMBA into the accelerated MBA Program, with the result that the IMBA is no longer a distinct graduate program, without involving the Curriculum

Committee or the Faculty Assembly, again in apparent disregard of the written governing document.<sup>140</sup>

As to the approval process for new courses, it appears that the vast majority of courses which are submitted to the Curriculum Committee and then to the Faculty Assembly are offered as courses in the following year. Information was lacking, however, as to the number of courses that are not submitted to the Curriculum Committee, having been disapproved by the department chair. Moreover, in University of Great Falls, supra, at 96, it was noted that the managerial status of faculty members cannot be determined solely on their participation in recommending curricula matters.

With respect to other key academic matters, there is evidence that the Administration has unilaterally established rules regarding independent study courses, faculty-led study abroad, on-line courses, class enrollment limits, special delivery courses, teaching overloads, stipends, syllabi requirements and the teaching schedules of each faculty member. The Administration also handled the student grade scandal without facultywide input. In the area of student grades, the Administration has, on several occasions, changed grades given by a faculty member, and has withheld merit pay bonuses based on its assessment that certain faculty members issued too many A's. The academic calendar recommended by the Curriculum Committee is subject to review and generally minor modifications by the Executive Cabinet, and is ultimately approved by the Administration.

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<sup>140</sup> The Point Park College Bylaws provide, at Article 1, that the Board of Trustees “[e]stablish, review and approve changes, including discontinuances, in the educational programs of the College....In the case of program discontinuances, consideration will be given to procedures described in the Faculty Handbook (27.2).” Section 27.2 of the Faculty Handbook provides, inter alia, that “The decision to discontinue formally a program or department of instruction will be based essentially upon educational considerations, as determined primarily by the faculty as a whole or an appropriate committee thereof.” The handbook further provides that educational considerations do not include cyclical or temporary variations in enrollment. They must reflect long-range judgments that the educational mission of the institution as a whole will be enhanced by the discontinuance. Manifestly, eliminating 23 courses and the availability of obtaining the International MBA degree constitutes a program discontinuance.

The record shows that, on one occasion, VPAA Stevens proposed the discontinuance of 43 programs based on under-enrollment. The Curriculum Committee and the Faculty Assembly agreed with his recommendation on 13 of these programs, which were the only ones discontinued at that time.

The input and recommendation by the Academic Personnel Policies Committee (APPC) must also be considered. In this regard, the record establishes that the Administration largely ignores the APPC's attempts to impact certain areas. For instance, VPAA Stevens advised the APPC that the decision to seek university status was uniquely within the responsibility of the Board of Trustees. Subsequently, Stevens and the deans decided upon a school-based governance system without faculty input. The Administration also decided to redraft the Faculty Handbook without APPC or any other faculty input,<sup>141</sup> and has threatened to implement these revisions if the faculty does not act quickly enough in proposing revisions.<sup>142</sup>

With respect to the graduation of students, the registrar ensures that degree requirements, which comport with PDE standards and with any additional requirements set by the academic department, are met.

### **C. Nonacademic Areas**

With respect to sabbaticals, the APPC's recommendations have ultimately been followed in all cases. However, the APPC must make recommendations subject to the guidelines of the college, which permit about ten percent of the faculty to take sabbaticals in any academic year. In addition, the number of sabbatical leaves actually granted depends upon budgetary considerations and department needs, as determined by the VPAA.

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<sup>141</sup> The Employer asserts in its brief that the APPC agreed with the VPAA's recommendation that changes to the handbook be proposed and discussed, and that a consultant, Dr. Tom Emmett, was retained by Point Park in 2003 to assist with this project. The record does not support the notion that the APPC envisioned having the Employer, on its own, draft revised policy manuals to which the faculty could react. Rather, the record contains minutes of the October 7, 2002 Faculty Assembly meeting, during which Stevens reported that he and the APPC agreed that significant modifications to the Faculty Handbook would be needed as the college restructured itself, and that Stevens "offered to submit some basic proposals to the APPC 'to begin working on them as a starting point'."

<sup>142</sup> In its brief, the Employer attempts to minimize the fact that the Board of Trustees adopted a resolution proposed by Henderson permitting the unilateral adoption of a new faculty handbook. However, the reality of the situation is that the Administration has arrogated to itself the final authority to implement a new faculty handbook, which is the written governing document defining the relationship between the Administration and the faculty.

The faculty participate on search committees when the committees are convened by the Administration for the purpose of hiring new faculty members.<sup>143</sup> However, the department chair, dean, and VPAA, all make independent recommendations. Thus, the record does not establish that the faculty effectively recommend faculty hiring. I also note that the Administration does not consistently follow the hiring procedures set forth in the handbook for the hiring of tenure track faculty members. In addition, the majority of nontenure track faculty hirings did not comport with the process to be followed by the Employer as testified to by Stevens. With respect to the appointment of department chairs, the record indicates that faculty recommendations have been ignored on occasion by the Administration. Finally, in selecting deans, it appears that faculty input was not considered in four of the six instances described in the record.

The record also establishes that the Administration rejected four recommendations made by the departmental promotions committees, and promoted one faculty member to the rank of professor without the involvement of a promotion committee. The record shows that the Administration has circumvented the tenure process of the Faculty Handbook by unilaterally granting credit toward tenure, as it did when Vincenne Revilla-Beltran was appointed to department chair, and when Portia Weston was hired to direct the Honors Program.

The terms and conditions of the full-time faculty are determined by the Administration. For instance, despite opposition from the faculty, the Administration decided that in evaluating faculty members for their annual review the Faculty Handbook does not preclude the review of student evaluations. The Administration has also imposed a merit pay system, a salary parity plan and has utilized a 200-point rating system to determine which faculty members deserve merit pay.

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<sup>143</sup> As noted herein, the Administration has not consistently complied with the procedure set forth in the Faculty Handbook when hiring full-time tenure track faculty members. For example, the hiring of Portia Weston, Vincenne Revilla-Beltran, Margaret Gilfillan and Elaine Luther were each effectuated without a search committee. In addition, no search committees have been convened for the hiring of the 13 non-tenure track faculty members in the last five years.

#### **D. Employer's Argument**

In its brief, the Employer relies on several primary cases in support of its contention that the full-time faculty should be found to be managerial employees based on their decision-making authority in a majority of critical areas relied on in Yeshiva and its progeny. In each of those cases, the faculty exercised greater authority in a wider range of areas than the faculty involved in the instant case. For instance, in Lewis & Clark College, 300 NLRB 155 (1990), the Board, contrary to the Regional Director, said that the faculty possessed managerial authority because they effectively recommended and controlled academic policy as nearly all recommendations on academic matters were routinely approved by the administrative hierarchy. Moreover, the Board noted that the faculty recommendations that were independently reviewed as they progressed up the administrative hierarchy predominantly involved nonacademic decisions. It was this authority that the Board described as the exercise of "substantial, independent authority over academic matters in the majority of the academic areas" identified in Yeshiva and its progeny as important to a determination of managerial authority.

The Board noted that it appeared the faculty's recommendations in many areas, including grades, degree requirements, curriculum and course content, admissions standards, departments of instruction, honors programs and class enrollments, had not been overturned at higher administrative levels. Here, the Administration has determined such issues, without faculty input or recommendation, on a number of occasions. For instance, the Administration disbanded the Government and International Studies (GIS) Department without faculty input. In addition, the Administration determined that the International MBA Program should be merged into the Accelerated MBA Program and that the new Berlitz/ELS program should be offered without recommendation of the faculty. As to the Honors Program, the Administration chose not to share the recommendation of the National Collegiate Honors Council regarding the program's core curriculum. The Administration has also independently engaged marketing consultants and been guided by the results of market studies when deciding whether to agree with faculty

proposals involving new programs. In addition, unlike the situation in Lewis & Clark College, the Administration here has changed grades given by faculty members on several occasions, has issued a directive regarding the number of A's to be issued and has set class enrollment limits.

In Elmira College, 309 NLRB 842 (1992), the Board denied a request for review of a Regional Director's Decision and Order wherein the Regional Director found that the faculty exercised considerable managerial authority concerning significant personnel matters. In University of Great Falls, supra at 83, the Board found that the faculty in Elmira College "had final authority for establishing standards for developing and approving new courses, approving changes in course levels and changes in majors and minors, adding courses, setting credit hours, course content, size of classes, curriculum, grading of students, degree requirements, admission and graduation standards, major and minor requirements, and approving applications for waiving academic requirements." The faculty there also effectively recommended changes in significant benefit terms such as medical insurance and pensions.

The record in this matter does not establish that the faculty has final authority in these areas. Specifically, here the faculty do not have final authority to implement new courses and programs. There is also evidence that the Administration has changed certain program requirements without consulting the Curriculum Committee as in the cases of the requirements to complete an early childhood education program and the elementary education program. The requirements changed such that students are required to take both EDU 325, Multi-Cultural Diversity Issues and EDU 326, Special Education Inclusion, rather than taking one of the two courses. In the non-credit area, the Administration unilaterally implemented the Berlitz/ELS Program for teaching English as a second language, which resulted in reduced offerings in the existing ESL program. The Administration has also determined credit hours and class enrollments, and has changed students' grades. In addition, the faculty in the instant case has unsuccessfully attempted to influence policy on wage increases and on additional contributions to the faculty pension fund based on faculty overload pay.

In University of Dubuque, 289 NLRB 349 (1988), a unit clarification proceeding, the Board found the faculty members were managerial employees because they played a major role in the formulation of academic policy, noting that the collective-bargaining agreement in effect provided that the faculty had the exclusive right to set student grading and classroom conduct standards, set degree requirements, recommend earned degree recipients, initially receive and consider new degree programs, and develop, recommend and approve curricular content and course offerings. The faculty involved in this case does not have similar “exclusive rights”. In Dubuque, the faculty also participated on various committees with administrators and management. Here, the only committee where two faculty members are appointed by the Administration to serve with “at least” four Trustees is the Academic Affairs and Student Relations Committee of the Board of Trustees.<sup>144</sup> In Dubuque, the faculty made effective recommendations concerning such matters as course schedules, admissions standards, student retention and the distribution of financial aid to students, and the modification of programs and departments. It is the Administration in this case that primarily determines course schedules and admissions standards. The record indicates that faculty in COPA do make recommendations in the areas of student retention and distribution of financial aid. The record indicates, with respect to financial aid, that faculty recommend apprenticeships within a defined range and that each department’s allocation of funds for this use is determined by Dean Lindbloom. As to retention, the Faculty Handbook states that students are required to understand and follow the academic policies related to grades, probation, dismissal, and attendance in the Point Park College Catalog. The record does not reflect how such policies came to be included in the catalog. Moreover, the record indicates that the Administration has changed grades issued by faculty on several occasions and that in the case of the grade

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<sup>144</sup> Again, this committee reviews and approves all substantive changes in academic programs, including new programs and program discontinuances, substantive changes to the Faculty Handbook, and community partnerships which involve substantive changes in academic programs or significant financial obligations. It is clear from the composition of the committee that the faculty members would not have exclusive control over its actions.

scandal, the Administration opted to retain the students rather than expel them based on cost considerations.

Finally, in Livingstone College, 286 NLRB 1308 (1987), faculty members participated in academic governance in two ways. First, faculty participated through membership on standing committees composed of varying members representing the administration, faculty and student body. Second, the faculty participated in faculty-wide votes on recommendations proposed by the various committees. In Livingstone College, the curriculum committee's recommendations were voted on by the entire faculty and were almost always implemented without prior approval of the president or Board of Trustees. The Board found that the faculty exercised almost plenary control over curriculum and academic policy, particularly by virtue of faculty-wide votes on proposals and recommendations made by the various standing committees. Neither the dean nor the president of the college could make changes in academic policy without presenting the changes to the curriculum catalog committee. In that case, the faculty had established major fields of study, modified course requirements, added and deleted course offerings and set degree requirements, without opposition from the administration. Also, the faculty at the department level determined course content, course descriptions and course scheduling. Faculty set standards for expulsion and retention, attendance for upperclassmen, matriculation and graduation requirements. In addition, grades could not be changed without the approval of the faculty member from whom the student received the grade. There was no evidence that the administration at Livingstone College ever countermanded faculty decisions in these areas, except that in one instance the administration required prior approval before a bachelor's degree in social welfare work could be implemented due to the financial resources involved.

Unlike Livingstone College, here the Administration sets academic policy without presenting changes to the Curriculum Committee or the APPC in such cases as independent study, syllabi requirements, faculty-led trips abroad, on-line courses, course scheduling, class limits, grade changes and teaching overloads. As noted previously, the Administration has also

changed grades given by faculty members, deleted course offerings in the ESL program and the IMBA program and has established course offerings in the undergraduate SAEM program.

#### **F. Conclusion**

The faculty here undoubtedly has an important consultative role, but based on the record developed, it cannot be concluded that they exercise such plenary, absolute or effective authority or control to warrant their exclusion from the protection of the Act as managerial employees.

President Henderson came to the institution in 1997 and immediately implemented a strategic plan, the result of which was that many beneficial goals were met. Ultimately, the college became a university with all of the attendant changes, including the restructuring of the institution into four schools each headed by a dean. The department chairs now report to the deans, thus adding another layer of administration. As noted, the deans' authority in academic and nonacademic matters is increasing as the faculty's authority in these areas is becoming more circumscribed.

In terms of curricular matters, the record shows that, as in University of Great Falls, the Administration here often agrees with faculty recommendations which are in harmony with its own views. In cases where the faculty desires are not in harmony with those of the Administration, the Administration decides whether to impose its will. It did so in contracting with Berlitz/ELS, merging the MBA programs, implementing a merit pay system and even in attaining university status. When questioned about certain of these unilateral actions, Henderson's statement to the faculty was that participatory management meant only that she had to listen to what the faculty said but not that she had to do what they said. She further stated that, "This is not a democracy." Based on the entire record developed in this matter, these statements reflect the reality of the relationship between the Administration and the faculty.

Further reflecting the relationship between the Administration and the faculty herein is the record evidence that the Administration ignores the Faculty Handbook, the very document

which governs the faculty “in performing its professional duties”, when the Administration chooses to do so. For instance, the Administration does not uniformly follow the procedures set forth in the Faculty Handbook when hiring faculty, granting tenure, appointing department chairs or when handling grade appeals. All of these actions by the Administration establish the faculty’s lack of effective control.

Finally, the Administration has undertaken an extensive redraft of the Faculty Handbook, by an outside consultant. This consultant also redrafted the copyright policy. These actions, too, were in contravention of the Faculty Handbook Revision Process which is set forth in the Faculty Handbook. Moreover, if the faculty fails to respond to the Administration’s actions in a timely enough fashion, the Board of Trustees, in accordance with President Henderson’s proposal, has given itself the authority to implement the revised policy manuals.

Accordingly, based on the above and the record as a whole, I find insufficient evidence to warrant a finding that the full-time faculty are managerial employees excluded from the coverage of the Act.

#### **V. SUPERVISORY AND/OR MANAGERIAL STATUS**

There remains for consideration the eligibility issues involving certain program directors and other individuals with administrative duties. The Employer, contrary to the Petitioner, asserts that program directors Robert O’Gara, Frederick Johnson, Martin Greenberg, Walter Zalot, and the Director of the MBA program, as well as the Head of Graduate Studies in COPA Robin Walsh and the Executive Director of the Innocence Institute William Moushey should be excluded from any unit found appropriate herein because they are managerial employees and/or supervisors within the meaning of the Act.

## **A. Program Directors**

### **1. Robert O’Gara**

Robert John O’Gara became employed as a full-time faculty member ten years ago. His current rank is that of associate professor. In addition, since the 1998 creation of the Applied Corporate Communications (“ACC”) program,<sup>145</sup> O’Gara has been the program director. O’Gara reports to department chair Helen Fallon. For his duties as program director, O’Gara receives a \$3,000 annual stipend and released time of one three-credit course each semester.

As program director, O’Gara recommends course substitutions, determines capstone project partners, participates in the hiring and ranking of adjunct faculty, and monitors their performance. O’Gara also oversees work study students assigned to the ACC program.

Regarding admission to the program, the record establishes that O’Gara is consulted when a prospective student has less than 60 credits. In that case, he and an admissions officer recommend courses to the student so that the student can achieve the number of credits required in the most efficient manner. After students are admitted to the program, O’Gara also reviews courses taken at other institutions to determine whether they can substitute for required courses in the ACC program. In this regard, O’Gara signs course substitution forms recommending to the registrar that a course be accepted as a substitute for one of the required courses. If the registrar agrees, he or she countersigns the form and the course substitution is finalized. O’Gara recommends course substitutions two to three times per semester. None of his recommendations have been rejected by the registrar.

Part of the curriculum of the ACC program is a final capstone project<sup>146</sup> in which students complete a public relations and marketing program for a local non-profit agency in need of

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<sup>145</sup> The program is a Saturday accelerated program in the Journalism and Mass Communications department within the School of Arts and Sciences. Students with 60 credits are admitted to the program and graduate within two years with a Bachelor of Science degree.

<sup>146</sup> The project is described as a group practicum.

communications expertise. The record indicates that O’Gara’s responsibilities include finding organizations willing to work with the students on Saturdays. Department Chair Fallon works closely with O’Gara in selecting capstone project participants. Although Fallon has the authority to overrule O’Gara’s decisions, she has not done so.

O’Gara attends meetings with Fallon, Bolsinger, and Martin Paonessa<sup>147</sup> at which admissions to and marketing of the ACC program are discussed. The record indicates that Bolsinger and Paonessa have primary responsibility for marketing the ACC program.

O’Gara interviews and hires adjunct professors for the ACC program. Over the five years of the program’s existence, O’Gara has hired approximately 10 individuals as adjunct faculty members.<sup>148</sup> Fallon often participates in the interview process, but O’Gara has the final decision on the hiring of adjuncts for the program.<sup>149</sup> Adjuncts are hired at a rank of instructor, assistant professor, associate professor and professor.<sup>150</sup> O’Gara recommends the initial rank of the adjunct to Fallon, and any subsequent changes in the adjunct’s rank based on performance. Fallon has never disagreed with any of O’Gara’s recommendations in this regard.

In one instance, O’Gara determined that a faculty member should not return after the course he was teaching was completed. O’Gara based his determination on student reviews and a face-to-face interview with the adjunct. O’Gara advised Fallon of his decision not to

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<sup>147</sup> Martin Paonessa is the admissions representative from the School of APS for the ACC program. Paonessa is an administrative employee.

<sup>148</sup> Some of the 10 adjuncts have taught in the program more than once. O’Gara has renewed the contracts of many of these 10 individuals. The record indicates that as many as a total of 40 separate contracts have been issued in O’Gara’s five years as the program director.

<sup>149</sup> In its brief, the Petitioner asserts that Fallon has the final say as to O’Gara’s role in the hiring and retention of adjuncts, that some of O’Gara’s recommendations are not followed, and that only Fallon can extend an adjunct contract. However, the testimony on which the Petitioner relies for these assertions was O’Gara’s testimony as to his responsibility for adjuncts who teach on days other than Saturdays in programs other than the ACC program. Thus, O’Gara gave testimony as to his responsibility for adjuncts who teach in the areas of his expertise, namely, advertising, public relations and marketing communications.

<sup>150</sup> The pay the adjunct receives per course taught varies based on the rank assigned to them.

renew the contract, and Fallon agreed. The record establishes that O’Gara evaluates the adjuncts in the program one to two times per year. O’Gara meets with the adjuncts teaching in the ACC program either individually or as a group to discuss performance issues, curriculum changes or new teaching methods.

One work-study student is assigned to work in the ACC program and such students are compensated for their work. O’Gara assigns tasks to the work-study student. O’Gara reports any performance issues to Fallon or to the admissions assistant assigned to his department. Normally, Fallon handles issues relating to the work-study students.<sup>151</sup>

## **2. Frederick Johnson**

Frederick Johnson has been the program director of the Cinema and Digital Arts Program in COPA since September 1, 2003, when the program began. Johnson began his employment in August 2003. Johnson reports directly to Dean Lindbloom.

The Employer asserts that Johnson has the same authority as a department chair in COPA. Johnson’s job description is the same as that of the two department chairs in COPA. Johnson was hired as a program director because he is presently the only full-time faculty member in the program. The Employer expects the program to grow significantly at which time more full-time faculty will be added to the staff, and the program may become a department.

Johnson’s duties include teaching in the program, hiring adjuncts and scheduling classes. Johnson has also redesigned some of the program curriculum which was originally designed by Lindbloom. Johnson also developed a summer program for high school students on the topic of digital film. As of the time of the hearing, the Employer was in the process of hiring a second full-time faculty member for the Cinema and Digital Arts Program. Johnson was involved with the search committee to find this faculty member, and the process had progressed

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<sup>151</sup> Two to three other work-study students are assigned to the Journalism and Mass Communications department.

to the point that the search committee forwarded its recommendation to Lindbloom, who supported the committee's recommendation and passed it on to VPAA Stevens.

The record indicates that Johnson was involved in the hiring of one adjunct professor as of the time of the hearing. The record reflects that Lindbloom provided Johnson with a collection of resumes to review for the possible hiring of a full-time employee.<sup>152</sup> Johnson reviewed the resumes and presented the resume of one candidate to Lindbloom. Both Johnson and Lindbloom interviewed the individual. Both felt that he should be hired as an adjunct, rather than as a full-time employee, so that he could complete a doctoral program at a nearby university. The candidate was hired and continues to work as an adjunct in the program.

The Employer asserts that Johnson has the authority to evaluate this adjunct faculty member, to independently determine whether to renew his contract and to issue discipline. This authority has not been exercised in that Johnson had been employed for less than six months as of the time of the hearing.

Johnson has already been involved in the budget process to the extent that he submitted a proposed budget for his program for the academic year 2004-2005. Johnson submitted this budget to Lindbloom. Johnson attends department chair meetings within COPA.

As program director, Johnson receives a course load reduction of six credits, which is identical to that received by the COPA department chairs.

The Employer asserts that Johnson's direction and control of the program is a managerial function. Moreover, the Employer contends that Johnson's hiring of the adjunct faculty member and his authority to discipline, discharge, evaluate and renew, or decline to renew, the contract of the adjunct faculty member, although not yet exercised, establishes his supervisory authority.<sup>153</sup>

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<sup>152</sup> It appears that Lindbloom gave Johnson between 30 and 60 resumes.

<sup>153</sup> The Petitioner did not address the eligibility of Johnson in its brief.

### 3. Martin Greenberg

Martin Greenberg became employed by the Employer in August 2003 as an associate professor. Greenberg is the program director of the newly created graduate program in Criminal Justice Administration ("CJA").<sup>154</sup> Greenberg reports to department chair Kim Bell.

The Employer asserts that Greenberg should be excluded based on his managerial responsibilities in heading the CJA Program. Specifically, the Employer argues that Greenberg effectively recommends admission of students in the program, and is part of the committee which determines whether students must take preparatory courses. The record shows that the School of APS recruits all graduate students. Selected applications are sent to Greenberg for an admission decision.<sup>155</sup> The record indicates that Greenberg discusses every admissions packet with Department Chair Bell and Professor John Gobble, the program director of the undergraduate CJA program.<sup>156</sup> An applicant can then be rejected or provisionally admitted. According to Greenberg, the three make joint decisions which he then communicates to admissions representative Lynn Ribar. Greenberg is unaware of any specific admissions policy for his program. There are currently 17 students in the program and Greenberg anticipated that an additional four to five students will be part of the program in the spring semester 2004.

As to Greenberg's role in determining whether students must take preparatory courses, the record shows that if a student lacks or did poorly in an undergraduate statistics or criminology course, he/she may be required to take an eight-hour refresher course. In such

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<sup>154</sup> This program is part of the Humanities and Human Sciences department in the School of Arts and Sciences.

<sup>155</sup> Greenberg reviews only those applications of applicants who do not meet the criteria of a 2.75 GPA. Those applicants with a 2.75 GPA or above are admitted to the program without Greenberg's input as they meet the Employer's requirements. As with the Applied Corporate Communications program, an admissions representative from the School of APS, Lynn Ribar, is assigned to the CJA Program.

<sup>156</sup> As noted previously, the parties stipulated that all department chairs are supervisory and managerial employees. In addition, the parties stipulated that John Gobble is a supervisory and managerial employee.

cases, the School of APS notifies Greenberg of the apparent deficiency in these areas and requests his opinion. Greenberg takes such matters up with Bell and Gobble.

Greenberg attends meetings of the Criminal Justice Advisory Board<sup>157</sup> and the Graduate Council. The Criminal Justice Advisory Board is chaired by Gobble, and Gobble controls the agenda.<sup>158</sup> With respect to the Graduate Council, Greenberg attends these meetings, as do all other graduate program directors.

Greenberg has not been involved in the actual hiring of any adjunct faculty members. The record indicates that it was possible one adjunct faculty member might teach a course in the graduate CJA Program; however, she was initially hired by Gobble and Bell to teach an undergraduate course. Greenberg was also provided by Dean Fritz with the resume of one applicant for an adjunct faculty position. Greenberg solicited the input of Bell and Gobble. After they advised that the applicant should be interviewed, Greenberg arranged to interview her. Bell interviewed the applicant with Greenberg.<sup>159</sup> As of the hearing, this individual had not been offered an adjunct contract because a decision as to whether a full-time faculty member would teach this course in the graduate program was pending. Greenberg is unaware of the number of students needed to warrant the hiring of an adjunct faculty member. Although Gobble teaches in the graduate program, it appears that Greenberg was not involved in the decision to have Gobble teach a course.

Greenberg did not establish the program or design the curriculum, as he was hired after the program was approved.<sup>160</sup>

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<sup>157</sup> The advisory board is comprised of Bell, Gobble and Greenberg, as well as other faculty members and community leaders. The advisory board exists so that the Criminal Justice program can receive input from community leaders regarding programs and activities.

<sup>158</sup> While Greenberg can suggest items for the agenda, he has not done so.

<sup>159</sup> Gobble was unavailable at the time of the interview.

<sup>160</sup> Associate VPAA Cynthia Liefeld submitted the proposal for the program to PDE. Bell and Gobble determined the specific content of the program.

Greenberg has suggested that a placement exam be given to applicants but the Administration has not responded to this suggestion. Greenberg testified that he does not have the authority to implement a placement exam without higher approval.

The Employer asserts that Greenberg is a managerial employee<sup>161</sup> based on his managerial responsibilities in heading the CJA graduate program. The Employer further contends that Greenberg's decisions as a part of the selection committee as to both the admission of applicants to the program and the determination of whether applicants must take additional preparatory courses after being admitted further establishes his managerial authority.

#### **4. Walter Zalot**

Walter Zalot, an associate professor of electrical engineering technology, became employed by the Employer in 1980. Since the fall of 2001, the Employer has offered a Master of Science in Engineering Management ("MSEM") Program.<sup>162</sup> Department Chair Mark Farrell, to whom Zalot reports, asked Zalot to assume the position as director of the program. The MSEM Program is a 30-credit program geared for adult learners with undergraduate degrees in scientific, engineering and technical fields who desire management expertise in those fields.<sup>163</sup> Completion of the program requires students to take six credits per semester for five semesters. The courses in this program are taught primarily in the evenings, and one course is taught on Saturday morning.

The record reveals that the idea for the creation of the program was Farrell's. The faculty of the NSET Department created the initial framework for the program.<sup>164</sup> The program

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<sup>161</sup> Although the Employer contended during the hearing that Greenberg is a statutory supervisor, as well as a managerial employee, the Employer's Brief is unclear concerning this supervisory contention.

<sup>162</sup> This graduate program was part of the Natural Sciences and Engineering Technology ("NSET") Department in the School of Arts and Sciences.

<sup>163</sup> Due to PDE regulations, the Employer must limit each incoming class to 12 students.

<sup>164</sup> The five faculty members in the department, including Farrell and Zalot, each created the syllabi for two courses.

was initially designed to be an accelerated master's program; however, the design did not come to fruition because the PDE evaluators<sup>165</sup> changed the entire program and effectively discarded all of the courses prepared by the faculty members. According to Zalot, the program imposed by the PDE severely limits his discretion by prohibiting any change in the number of courses required or in course content. Apparently, the only latitude the Employer has with respect to the program is in the offering of two electives. Adjunct faculty members have made recommendations to Zalot regarding electives which he has in turn recommended to Farrell. Recently, Zalot approved the elimination of one elective and its replacement with a new elective in technical writing. As required, the PDE was notified of this change. As of the hearing, the Employer had not heard whether the change would be acceptable. If the PDE does not approve of the course, the Employer will cease offering it.

Zalot receives the budget for the MSEM Program from Farrell, which covers adjunct faculty salaries, travel, supplies and funds for faculty development and guest lecturers. Zalot does not participate in the budget process.

Zalot did not participate in setting the admission standards for the program.<sup>166</sup> Of the 13 initial applicants to the program,<sup>167</sup> twelve were admitted to the program. Zalot advised the thirteenth applicant to provide an adequate letter of recommendation.

Zalot's role as to admissions is to review the files of each applicant for approval or disapproval. In questionable cases, Zalot consults Farrell. The two have not disagreed with respect to any admissions determination. Zalot then informs Debbie Bateman, the admissions representative from the School of APS assigned to MSEM, of the decision. Zalot also determines whether credits from other graduate schools should be accepted as an elective for

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<sup>165</sup> Evaluators were chosen by VPAA Stevens and Department Chair Farrell.

<sup>166</sup> Applicants must have an undergraduate degree in technical, engineering or another scientific discipline with a GPA of 2.75.

<sup>167</sup> Students began applying in the spring of 2001 for fall 2001 admittance.

the program. The record shows Zalot is limited to accepting six credits. In such situations, Zalot notifies the registrar of his recommendation to accept transfer credits or not and the registrar makes the final determination. Zalot has twice been involved in assessing transfer credits. One time Zalot recommended approving the transfer of credits and the other time he recommended denying the transfer of credits. Zalot believes that his recommendations were accepted in this regard.

Zalot's recruitment efforts<sup>168</sup> appear to be limited to making a presentation at a meeting of the Engineers Society of Pittsburgh. The record also indicates that Director of International Students Services and Enrollment Dr. Anwar is attempting to recruit students to the program.

The MSEM has an Advisory Board consisting of the faculty who teach in the program and certain members of the community. Farrell is responsible for offering positions on this board to individuals outside the school.<sup>169</sup> The record indicates that the Advisory Board meetings are held once per semester. Zalot generally sets the agenda for and runs the Advisory Board meetings.

The MSEM Program is currently staffed by two full-time faculty members and six adjunct faculty members.<sup>170</sup> With respect to the hiring of adjunct faculty members and decisions as to their retention, the record establishes that Zalot receives selected resumes from Farrell. Zalot then determines whether to interview the candidates. Farrell is invited to the interviews. Zalot recommends the hiring of certain candidates and, if Farrell concurs,<sup>171</sup> they request that VPAA Stevens issue a contract. The record indicates that Stevens has done so in all but one case. In

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<sup>168</sup> Zalot has not been consulted as to the amount of resources allocated to recruitment.

<sup>169</sup> Zalot has asked Advisory Board members to serve as guest lecturers.

<sup>170</sup> Zalot has never held a faculty meeting.

<sup>171</sup> The record does not reflect how often, if ever, Farrell disagrees with Zalot's recommendations.

that case, Stevens rejected the candidate recommended by Zalot and Farrell because the candidate did not have an advanced degree.

The record also reveals that Stevens determined that full-time faculty member Dan Reed should not continue to teach in the MSEM Program. In that instance, Stevens did not request a recommendation from Zalot and did not explain the reason for Reed's removal from the program. Zalot was aware that one student had "issues" with Reed from an e-mail sent by the student to him and to various members of the Administration. Although Zalot attended a meeting with VPAA Stevens, Farrell and Reed, Zalot had no input into the decision that Reed would no longer teach in the MSEM Program. In fact, Zalot testified that he disagreed with Stevens' decision.

As to scheduling, Zalot writes down the course names and meeting times. Zalot then fills in the name of the faculty member teaching the course. The full-time faculty have first preference as to the courses they wish to teach. Zalot then attempts to accommodate the requests of the various adjunct faculty members. Finally, if he cannot do so, an adjunct is assigned to an open slot. Zalot then submits the schedule to Farrell for approval.

Zalot was responsible for compiling a questionnaire for completion by recent graduates, the purpose of which was to gather information the Employer is required to submit to PDE. The record reflects that Farrell reviewed and approved the questionnaire, without changes, before it was distributed.

## **5. Director of the MBA Program**

The position of Director of the MBA Program was unfilled as of the close of the hearing in this matter. From September 1999 to December 2003, William Breslove was the Director of the MBA Program, in addition to his teaching duties in the School of Business. Breslove did not apply for the Director position; he was asked to assume the position by VPAA Stevens and then-Director of IMBA Kraniou. Breslove resigned his position as Director of the MBA Program during the hearing.

Since the merger of the accelerated MBA Program and the IMBA, the position of Director of the MBA Program encompasses all aspects of the program. Breslove initially reported to Department Chair George Bromall. After the creation of the four schools in 2002, Breslove reported to Dean Bruce Murphy.<sup>172</sup> Breslove received a \$3,000 stipend and three credits of released time for his duties as Director of the MBA Program.

The duties of the Program Director, as described by Breslove, involve facilitating entry of as many students as possible into the program; approaching various full-time faculty as to their preference in teaching the courses on each semester's schedule;<sup>173</sup> supplying adjunct faculty members to teach the courses not filled by full-time faculty members;<sup>174</sup> reviewing applicants' files; handling students' complaints; and reviewing requests for transfer credits, course substitution and experiential learning credits.

As to the scheduling of classes and the assignment of faculty, the record indicates that inasmuch as the MBA is an accelerated Saturday program, a cohort, or grouping, of students proceed through the program together and graduate as a class. Thus, the schedule setting forth the courses to be offered and their meeting times is prepared a year in advance by Dean Bolsinger's office without input from the MBA Program Director. Although Breslove was told that he could change the scheduling process, he testified that he had been unable to do so.<sup>175</sup>

In assigning faculty to teach, Breslove filled in the schedule grid by first asking full-time faculty if they wished to teach a particular course, followed by asking adjunct faculty who previously taught a course if they would like to teach the course again. Historically, at least five or six classes were without instructors at the end of this process. To cover these courses,

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<sup>172</sup> The position of Chair of the Business Department was eliminated by the Administration upon the creation of the School of Business.

<sup>173</sup> Breslove received the course schedule each semester from the School of APS.

<sup>174</sup> Approximately 60 percent of the courses in the MBA Program are taught by adjunct faculty members.

<sup>175</sup> Breslove had discussed his desire to gain control of the scheduling process with Dean Murphy.

Breslove did recommend the hiring of new adjunct faculty members. Breslove received the resumes for adjunct positions from various sources, including from the offices of VPAA Stevens, President Henderson, Dean Bolsinger, Dean Murphy and from other adjunct faculty members. Based on a review of those resumes, or through a telephone interview, Breslove hired adjuncts for various courses.

When he first assumed the position of the Director of the MBA, Breslove sought approval from then-Department Chair Bromall for every adjunct faculty member recommended for hire. Since Murphy became dean, Breslove has not sought approval to renew any of the existing adjuncts' contracts, but has advised Murphy when a new adjunct is being recommended for hire. Breslove did not recommend or assign a rank to adjunct faculty, as VPAA Stevens advised Breslove that Stevens would make that determination.

Breslove interviewed the two graduate assistants working in the MBA Program and recommended them for hire. Breslove testified that he believed that Dean Murphy also interviewed the two graduate assistants before they were hired. Although Breslove initially assigned the two their work, he asked Murphy to take over this responsibility about one year ago. The record indicates that two full-time faculty members, Dr. Mohammad Sidky and Dr. Michael Haley, were hired solely to teach in the MBA Program. Breslove was not asked about the extent of his participation in their hiring, if any.

With respect to handling student complaints, Breslove testified that, as director, he was responsible for "customer satisfaction". To investigate student complaints, on occasion, Breslove visited classrooms unannounced to observe faculty members. Breslove acknowledged that in doing so he acted on behalf of the Administration.

There is no evidence that Breslove disciplined any full-time or adjunct faculty member or recommended the nonrenewal of any adjunct contract. In one instance, Breslove asked VPAA

Stevens to speak to an adjunct faculty member who was coming to class late.<sup>176</sup> Breslove did not know whether Stevens spoke to the individual in question, but in any event, the conduct was not modified. In some cases, Breslove has spoken to instructors to try to “cajole” a response that would correct the problem. On occasion, this tactic was successful.

Assessments of transfer credits pertinent to the MBA Program are primarily handled by an administrative employee working in the registrar’s office. However, Breslove has been consulted in questionable cases. Within the last few years, Breslove has reviewed and given his recommendation on 15 to 20 requests for transfer credits. Although Breslove stated that he did not know if his recommendations were followed, the documentary evidence established that in at least two cases, the students received transfer credits based on Breslove’s recommendation.

Breslove also recommended that students receive credit for experiential learning. These recommendations were followed.<sup>177</sup> There is also evidence that Breslove approved course substitutions for students.

Finally, Breslove did not hold faculty meetings with the faculty teaching in the MBA Program because the schedules of the large number of adjuncts teaching in the program made it difficult to schedule meeting times. Breslove did participate in the Graduate Council along with the other directors of graduate programs. With respect to the budget for the MBA Program, Breslove had no input into the preparation of the budget.

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<sup>176</sup> The adjunct faculty member involved was a member of the Board of Trustees.

<sup>177</sup> One or two such recommendations involved CPAs who were given experiential credit so that they would not have to take the accounting for managers course. Another case involved a student who had 20 years of work experience and several certificates in data processing. This student was given six credits for two computer classes which Breslove felt the student did not need to take.

## **B. Other Positions with Administrative Duties**

### **1. Robin Walsh**

Robin Walsh began her employment as an adjunct faculty member in COPA's Theatre Department in 1998. Walsh was promoted to a full-time teaching artist position in about 1999 or 2000. In about April 2003, Dean Lindbloom recommended that Walsh become an assistant professor when he recommended that she be the new head of the graduate program.<sup>178</sup> The only graduate program in COPA is the Master of Fine Arts ("MFA") Program. Her current rank of assistant professor is the entry-level rank for a tenure track faculty member. Walsh assumed the position of the Head of Graduate Studies in COPA as of September 1, 2003. The MFA Program had been in existence for three years when Walsh became the Head of Graduate Studies. Walsh's promotion coincided with a new group of incoming students entering the program. Walsh reports to Theatre Department Chair John Shepard and to Dean Lindbloom. For the administrative duties associated with the position of Head of Graduate Studies, Walsh receives a \$1,000 stipend. As of the fall of 2003, Walsh did not receive any released time because she was needed to teach full time in the undergraduate and graduate programs.<sup>179</sup>

The record indicates that the administrative duties in Walsh's position account for approximately 20 percent of her time. Walsh meets with faculty members who teach in the graduate program. She also meets regularly with graduate students in the program and makes recommendations to Lindbloom about developing the curriculum of this new program. No specific examples in this regard are contained in the record.

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<sup>178</sup> There was no search committee or advertisement for this full-time tenure track position.

<sup>179</sup> Stipends and/or released time compensate faculty members who have responsibilities in addition to their normal teaching load. The record indicates that Walsh was expected to receive two units of released time in the spring 2004. The determination of the exact amount of released time is a subject that would be negotiated between the department chair and Lindbloom.

Lindbloom testified that he anticipates Walsh will be involved in the selection of graduate students for admission into the MFA Program.<sup>180</sup> As to her involvement with the teaching assignments for faculty in the program, the record indicates that, to date, the extent of her duties in this regard has been to consult with and make recommendations to Department Chair Shepard. Shepard makes the decision as to which faculty members are assigned to each specific class. The record is devoid of any specific recommendations made by Walsh in this regard.

Walsh's involvement in recruiting/hiring faculty appears to be limited to collecting resumes and making recommendations to Shepard and Lindbloom as to adjunct faculty and full-time faculty members to teach in the program. The record contains no examples of recommendations made by Walsh. Walsh does not participate in the interview process at this time.<sup>181</sup>

It is anticipated that Walsh will make budgetary proposals with respect to the needs of the graduate program. She will be expected to direct those proposals to Dean Lindbloom and/or Department Chair Shepard. As of the time of the hearing, Walsh had made two requests involving budgeted funds. One was for the training of four of the seven graduate students in a specialized vocal technique which would require the Employer to engage an outside instructor for a period of about five weeks, and the other involved special instruction for a dance technique.<sup>182</sup> According to Lindbloom, Walsh had started planning recruiting trips<sup>183</sup> and

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<sup>180</sup> Walsh was not involved in the selection of students in the classes of 2003 and 2004 because she only recently assumed her position.

<sup>181</sup> Professor Richard Kietel was Walsh's predecessor in the position of Head of Graduate Studies. Kietel did not interview prospective faculty. His duties primarily involved recruiting graduate students for the program. Lindbloom testified, however, that he anticipates Walsh will have duties beyond those of Kietel.

<sup>182</sup> The funds for this request were allocated from the pre-existing budget which had been prepared by Lindbloom.

<sup>183</sup> As of the hearing, Walsh had not participated in any out of town recruiting trips, as the graduate students had been coming to the Employer's facility to audition.

investigating the profile of graduate students. The nature of such investigation is not described in the record.

As noted, Walsh holds meetings with both graduate faculty and undergraduate students. The record indicates that Walsh sets the agenda for her meetings with the graduate students. These meetings involve discussions of the graduate students' teaching assignments in the undergraduate program and assessing their performance in the graduate program. Walsh acts in both a mentoring and a monitoring capacity with respect to the graduate students teaching of undergraduates. The graduate students receive a partial tuition remission for teaching at the undergraduate level. Although it had not yet occurred as of the time of the hearing, the Employer expects that Walsh will evaluate the graduate students' performance in their teaching duties with Department Chair Shepard at the end of each semester.

With respect to the meetings Walsh holds with graduate faculty, the record indicates that Shepard also attends these meetings. No other information was presented about Walsh's role in these meetings.

## **2. William Moushey**

William Moushey has been employed as an assistant professor since August 2001.<sup>184</sup> He currently teaches three journalism courses in the Journalism and Mass Communications Department in the School of Arts and Sciences. In addition to teaching these courses, Moushey oversees various independent study courses,<sup>185</sup> independent internships and publication projects.

When Moushey was hired by the Employer, it was envisioned that the Innocence Institute would be established to examine allegations of wrongful convictions. Initially, Moushey

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<sup>184</sup> Moushey is also employed part-time as an investigative reporter for the Pittsburgh Post-Gazette, and he is a graduate student in the CJA program.

<sup>185</sup> Juniors and seniors as well as graduate students are eligible for an independent study type class called Innocence Institute Investigations.

submitted his proposal for the Innocence Institute to Department Chair Fallon. The project was initially considered by Stevens and ultimately approved by Henderson. As of the fall of 2001, the Innocence Institute was incorporated into the Employer's curricula and students began participating in the Innocence Institute for independent study credits and internships in investigative journalism.

In both his duties as an assistant professor and the Executive Director of the Innocence Institute, Moushey reports to Department Chair Helen Fallon. Moushey is the only full-time faculty member associated with the Innocence Institute.

As the Executive Director of the Innocence Institute, Moushey receives and responds to letters from incarcerated individuals. Moushey reviews the letters of those individuals who are located within a 100-mile radius of downtown Pittsburgh. If the complaints set forth in a particular letter warrant further review, Moushey sends a detailed 20-page questionnaire to the prisoner.<sup>186</sup> Once the completed questionnaire is received and reviewed, Moushey may initiate a full-fledged investigation.<sup>187</sup> The investigations are actually performed by Moushey, independent study students and the graduate assistant assigned to the program. Articles about certain cases are submitted for publication to the Pittsburgh Post-Gazette pursuant to an arrangement between Moushey and the newspaper.<sup>188</sup>

Moushey receives three credits of released time for his duties as the Executive Director of the Innocence Institute. The record indicates that Moushey spends 60 percent of his time teaching the three courses in the Journalism Department and 40 percent of his time on responsibilities relating to the Innocence Institute. About one-quarter of his time working on

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<sup>186</sup> Moushey developed the 20-page questionnaire.

<sup>187</sup> Moushey initiates a full investigation on about one-quarter of the questionnaires he receives. This investigation includes reading transcripts of proceedings and police reports, visiting crime scenes and interviewing witnesses and attorneys.

<sup>188</sup> The newspaper has the right of first refusal of any story regarding Innocence Institute cases.

Innocence Institute matters (or 10 percent of his time overall) is spent with students who are receiving credit for independent study courses involving the Innocence Institute. The remaining 30 percent of Moushey's time is spent performing administrative duties related to the Innocence Institute. The record establishes that Moushey spends time on a daily basis reading incoming mail and that he personally performs various investigative duties each day.

Moushey is responsible for all public relations activity related to the Innocence Institute. Moushey gives speeches regarding the Institute, and contacts reporters to publicize stories on Innocence Institute cases. Moushey provides interviews to those newspaper reporters who respond to his contacts. Moushey participated with students and the Employer's "public relations machine" in preparing the Institute's public relations brochures. Moushey has developed fundraising proposals and he participated in the creation of the Innocence Institute's website.

Moushey's duties with respect to hiring have been limited to hiring an assistant, work study students and COPA apprentices who perform duties at the Innocence Institute.<sup>189</sup> For approximately the first 16 months of the Innocence Institute's existence, Moushey had no assistance in running the program. Moushey then "begged" for assistance and was permitted to hire the first of three staff assistants around December 2002.<sup>190</sup> Moushey approached one of the graduate students in a course he was teaching, Madeline Izzo, to offer her employment with the Institute.<sup>191</sup> Izzo's duties included reading the backlog of mail from prisoners and setting up a database for the Innocence Institute. Izzo also assisted with setting up a filing system and with the development of the 20-page questionnaire. When Izzo left her employment for an

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<sup>189</sup> COPA's budget includes apprenticeship money by which COPA pays students for services to the University. Students' applications for such funds are not decided by faculty.

<sup>190</sup> Since then, the budget for the Innocence Institute has been about \$10,000 per year. Fallon prepares and submits the Innocence Institute budget.

<sup>191</sup> Moushey and Fallon jointly determined Izzo's pay rate of \$7.00 an hour. Izzo was offered 20 hours of work per week.

internship, Moushey hired a second assistant, Jill Raynor, another student, whose primary work involved developing the Innocence Institute's website. When Raynor left, Moushey hired Abby Helbing to replace her.

As of the time of the hearing, the Innocence Institute had recently been assigned graduate assistant Nathan Crabbe. The record indicates that Crabbe was interviewed and hired by Program Director, MA Journalism and Mass Communications, Dane Claussen. As a graduate assistant, Crabbe receives total tuition remission and he is also paid by the Employer.<sup>192</sup>

The record indicates that work-study students are also assigned to the Innocence Institute. The record also shows that the work-study students are admitted to the work-study program and their pay is set through one of the Employer's administrative offices that handles the work-study program.

Moushey does not consult Fallon before hiring work-study students. Students who are approved for the federal work-study program go to various departments in need of help and ask to be hired. It appears from the record that Moushey has hired four work-study students and has hired two COPA apprentices. Although Moushey prefers to limit work-study opportunities to journalism students or those with an interest in criminal justice, the work-study program has not been administered in this manner to date.

The record indicates that Moushey does not set the number of hours to be worked or the actual schedules of either the work-study students or the COPA apprentices. These individuals are permitted to work an allotted number of hours. They schedule themselves at the Innocence Institute by writing the dates and the number of hours they plan to work on a bulletin board. Although they should call Moushey if they cannot work as scheduled, apparently this does not happen. The staff assistants also record their schedules on the board at the Innocence

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<sup>192</sup> Moushey did not know the amount of Crabbe's payment.

Institute. Moushey directs the work of the work-study students and the COPA apprentices such that he primarily assigns them to perform filing work. These students generally check with the staff assistant to determine what should be filed on a given day.

With respect to any authority to discipline individuals working at the Innocence Institute, the record reflects that Moushey has never been advised that he has the authority to discipline employees. There are two examples in the record which the Employer contends constitute discipline. In one case, Moushey came upon a work-study student who was asleep at a computer in the Innocence Institute office. Moushey advised the work-study student that the arrangement was not working out, and the student did not return to the Innocence Institute.<sup>193</sup> In another case, Moushey questioned the hours turned in by a work-study student. After being given a detailed explanation of the hours worked on each day in question, Moushey concluded that the entries were warranted, and therefore signed off on her time sheet.

It appears that the Pittsburgh Post-Gazette initially paid Moushey's salary for his work at the Innocence Institute.<sup>194</sup> Subsequently, the Employer provided a \$10,000 budget for the operation of the Innocence Institute and gave Moushey three credits of released time. However, the record indicates that Moushey's salary from the Employer is paid to him as a faculty member based on the journalism courses he teaches.

### **C. Analysis**

Section 2(11) of the Act defines the term supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

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<sup>193</sup> The record indicates that this individual went to the work-study office to be reassigned elsewhere in the University.

<sup>194</sup> Moushey is paid for 17-1/2 hours of work per week for the newspaper.

To meet the definition of supervisor in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. Ohio Power Co. v. NLRB, 176 F.2d 385 (6<sup>th</sup> Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. Harborside Healthcare, Inc., 330 NLRB 1334 (2000).

The burden of proving supervisory status lies with the party asserting that such status exists. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 711-712 (2001); Michigan Masonic Home, 332 NLRB 1409 (2000). The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., Vencor Hospital – Los Angeles, 328 NLRB 1136, 1138 (1999); Bozeman Deaconess Hospital, 322 NLRB 1107, 1114 (1997). Lack of evidence is construed against the party asserting supervisory status. Michigan Masonic Home, supra, at 1409. Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., Fred Meyer Alaska, 334 NLRB 646, 649 at fn. 8 (2001); Pepsi-Cola Co., 327 NLRB 1062, 1064 (1999). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See Michigan Masonic Home, supra, at 1410; Chevron U.S.A., 309 NLRB 59, 61 (1992). The Board and the Courts have recognized that an employee does not become a supervisor merely because he has greater skills and job responsibilities than fellow employees or because he gives some instructions or minor orders. Byers Engineering Corp., 324 NLRB 740 (1997); Chicago Metallic Corp., 273 NLRB 1677 (1985).

In Detroit College of Business, 296 NLRB 318 (1989), the Board concluded that department coordinators were supervisors because they had the authority to hire or make effective

recommendations to hire part-time instructors. In that case, the coordinators spent the majority of their work time teaching classes and performing other activities related to their instructional duties. At one of the school's campuses, the coordinators participated with the associate dean in the interview of all prospective candidates for the position of part-time instructor and in the hiring decisions. At another of the Employer's campuses, the coordinators alone interviewed and determined which candidate to hire.

At the campus where the authority of the coordinators with respect to the hiring of part-time instructors was somewhat less broad, in that hiring was a joint effort between the coordinators and the associate dean, the Board noted that nearly all of the hiring recommendations of the coordinators had been followed and that no instructors had ever been hired without the consent of a coordinator. Thus, the Board found that these coordinators effectively recommended the hiring of part-time instructors and, like their counterparts at the other campus who alone performed the hiring function, were supervisors within the meaning of the Act. In Detroit College, the Board rejected the approach utilized after Adelphi University, 195 NLRB 639 (1972), that an individual who supervises nonunit employees less than 50 percent of his time is not a supervisor, regardless of the nature of his supervisory duties or any other factors which might indicate the nature of the individual's alliance with management.

The Board noted that the supervision of the part-time instructors at Detroit College was an integral part of the coordinators' primary work product and, as the employer's mission involved the education of men and women, the faculty hiring function furthered the employer's goal of obtaining the most qualified instructors. Once hired, the coordinators evaluated and, if necessary, recommended the nonretention of the part-time instructors. The Board reasoned that the coordinators were hired both to perform professional teaching services and to hire and evaluate part-time instructors. In these circumstances, the Board concluded that the coordinators were so allied with management as to establish a differentiation between them and other employees in the unit even though such duties consumed less than 50 percent of their work time.

In this case, the record establishes that the positions of Program Director, Applied Corporate Communications; Program Director, Cinema and Digital Arts; Program Director, MBA; and the Program Director, MSEM all involve, at a minimum, effective recommendation as to the hiring and retention of adjunct faculty members.

Accordingly, based on the above and the record as a whole, I find that Robert O’Gara, Frederick Johnson, Walter Zalot and the Director of the MBA program are supervisors within the meaning of the Act, and, accordingly, I shall exclude them in the unit found appropriate herein.<sup>195</sup> As to Program Director Martin Greenberg, I have considered the Board’s decision in Pepsi-Cola Co., 327 NLRB 1062 (1999), in which the Board refused to draw a distinction between those account representatives who had exercised the authority to discharge merchandisers assigned to them and those who had not, as all of the account representatives possessed the same authority to discharge merchandisers. However, I am unable to determine on the record before me whether Greenberg, a recently hired program director, actually possesses the same hiring authorities as the other program directors, or whether he possesses any managerial authority. It is unclear whether undergraduate CJA program director Gobble will continue to participate in the decisions relating to the graduate CJA program, including the decisions involving interviewing and/or hiring of adjuncts. Accordingly, I will permit Program Director Greenberg to vote subject to challenge in the election directed herein.

As to Robin Walsh, Head of Graduate Studies in COPA, I find that the Employer has failed to meet its burden of proving that Walsh is either a statutory supervisor or a managerial employee. The record does not contain any specific evidence that she participated in the hiring process or made effective recommendations as to hiring. Walsh has not as yet evaluated graduate students in connection with their teaching duties. Similarly, she has not been involved in the selection of graduate students for admission to the MFA program. Likewise, Walsh has not made any recommendations for developing the curriculum of the program. Finally, to date, Walsh’s involvement

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<sup>195</sup> In light of my decision as to the supervisory status of these individuals, I need not, and do not decide, whether they are also managerial employees.

in the budgetary process has been limited to making requests for allocations from the preexisting budget prepared by Lindbloom.

As to Moushey, Executive Director of the Innocence Institute, I cannot conclude that his duties with respect to work-study students, COPA apprentices and staff assistants so align him with management as to warrant his exclusion as a supervisor or as a managerial employee from the unit found appropriate herein.

As to Moushey's alleged supervisory duties, it appears from the record that Moushey's assignment of work to the work-study students and the COPA assistants is a general direction to perform filing and other clerical duties. They check with the staff assistants to determine their daily duties. In addition, the staff assistants have some latitude in deciding their own duties. For instance, based on their interests and expertise, one assistant helped to create the Innocence Institute website, while another created a computerized database.

As noted, the Board in Detroit College of Business, supra, rejected the shorthand approach followed after Adelphi University, but stated that in order to ascertain whether an individual's exercise of supervisory authority over employees outside the unit warrants his exclusion as a supervisor, a complete examination of all of the factors present to determine the nature of the individual's alliance with management must be made. The relevant factors to be considered include the business of the employer, the duties of the individuals exercising supervisory authority, the particular supervisory functions being exercised, the degree of control being exercised over the nonunit employees, and the relative amount of interest the individuals at issue have in furthering the policies of the employer as opposed to those of the bargaining unit in which they would be included. The Board also stated that it would continue to view time spent in the performance of supervisory duties as relevant, but not controlling.

In this case, Moushey's primary duties are those of a faculty member. Moushey's supervisory duties with respect to the nonunit employees appear to consist of allowing them to work at the Innocence Institute and assigning them various clerical and office tasks. The record

indicates that Moushey does not exercise a great deal of control over the work-study students, COPA apprentices and staff assistants, in that he allows them to schedule themselves and provides only general direction as to their assignments. Thus, the hiring and direction of staff assistants, COPA apprentices and work-study students is not part and parcel of Moushey's work product. Moreover, inasmuch as only 30 per cent of Moushey's time is spent on the overall administrative duties relating to the Innocence Institute, it is clear that the time spent in the hiring, assignment and direction of the students constitutes an insignificant portion of Moushey's duties.<sup>196</sup>

As to the contention that Moushey is a managerial employee, the record establishes that the determination to create the Innocence Institute was made by Henderson, Stevens and Fallon. The record reflects that Moushey does not formulate or effectuate management policies. In essence, the Innocence Institute appears to be a clinical course experience in investigative journalism structured so that incoming requests for assistance are reviewed by students and Moushey to identify situations which warrant further investigation, thus enabling the students to utilize and further develop their investigatory journalism skills. Moushey's position as Executive Director of the Innocence Institute appears to be an extension of his role as a journalism professor in a clinical area which involves certain related administrative duties. This does not meet the burden of establishing that Moushey represents management's interests by taking or recommending discretionary actions that effectively control or implement employer policy.

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<sup>196</sup> As to Moushey's duties with respect to graduate assistant Crabbe, the record indicates that their relationship is essentially a teacher-student relationship, and the record does not establish that Moushey exercises statutory supervisory authority with respect to Crabbe.

#### **D. Director of the Library**

Joan Hamby is the Director of the Library. Hamby is also a tenured associate professor. Unlike the nine-month contracts issued to the full-time faculty, Hamby's contract has a duration of 11 months. Hamby teaches two to four classes per semester.<sup>197</sup>

Since 1996, the Employer and the Carnegie Library have been parties to a joint operating agreement for the operation of the library.<sup>198</sup> The Employer owns the facility where the library is located, but the Carnegie Library supplies all of the library staff, except Hamby, and most of the library resources. Hamby is responsible for the Employer's library collection, which accounts for only about 20 percent of the total library resources. The Employer also owns 25 to 35 new computer terminals in the library.

According to the Employer, the Director of the Library is a dean level position. Since about June 2003, Hamby has attended meetings of the Deans Council, and has reported directly to VPAA Stevens. Henderson, Stevens and the deans decided that Hamby should attend meetings of the Deans Council because she serves all of the schools. Hamby does not participate in discussions or decisions on faculty personnel and curricular matters, and does not attend executive sessions of the Deans Council, which are limited exclusively to deans. Hamby does not earn a dean level salary and, as noted, she has no subordinates.

Hamby conducts orientation sessions for new faculty members. She also attends orientation sessions for adjunct faculty members. Hamby leads library tours for new students and faculty. She serves on the advisory board to the School of APS to advise staff on making library materials available to adult students. Hamby also serves as the Employer's representative on the Pittsburgh Council of Higher Education, a consortium of colleges in Pittsburgh that shares information and resources.

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<sup>197</sup> Two classes is her regular teaching load, but at times Hamby will teach two overload courses.

<sup>198</sup> The relationship between the two entities will likely end in May 2004.

Henderson, Stevens, Hennigan and Associate Vice President of Finance Mancosh have been the Employer's representatives in negotiations with the Carnegie Library.<sup>199</sup> In preparation for these negotiations, Hamby was involved in internal discussions regarding the hours of the library. The record reveals that although Hamby opposed having the library open on Sunday, the Employer ultimately agreed that the library would be open on Sundays, except during breaks.

The annual budget of the library is between \$150,000 and \$250,000. Hamby is responsible for the portion of the budget dealing with books and materials. She is responsible for all purchasing and expenditures and will make decisions on purchasing various databases on the basis of input from department chairs and faculty. Hamby assesses the needs of the four schools in determining how to expend the funds in the library's budget. The record indicates that Hamby does not allocate funds until she consults with deans, department chairs and possibly faculty and students. Before expending a large amount of resources, Hamby will consult with Associate Vice President Mancosh or one of the Employer's purchasing agents.

The record reveals that Hamby was not involved in the decision to purchase the 25 to 35 new computer terminals in the library. Apparently, this expenditure was necessary so that the Employer's computers would be compatible with those of the Carnegie Library.

The Employer contends that the managerial functions associated with directing the Library justify Hamby's exclusion from the petitioned-for unit. The record does not establish that Hamby formulates and effectuates management policies or has discretion in the performance of her job independent of the Employer's established policies. Specifically, I note that Hamby does not approve large expenditures without consulting with higher authority. Hamby is the Employer's only employee in the library and she therefore has no responsibilities for

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<sup>199</sup> As noted previously, the Library Oversight Committee, on which the former Director of the Library served, has not participated in budgetary negotiations with the Carnegie Library since it became a standing committee of the Faculty Assembly in 1998.

establishing salaries, schedules, procedures or other actions. Moreover, the Administration negotiated even the hours of the library with the Carnegie Library representatives without Hamby's presence, and contrary to her internal recommendation. Hamby's primary responsibilities are to provide assistance, tours and instruction in the use of the library and to oversee the library resources owned by the Employer. Based on the above and the record as a whole, I find that Hamby is not a managerial employee. See, e.g., Marymount College, 280 NLRB 486, 488-489 (1986); Bradford College, 261 NLRB 565, 567 (1982).

## **VI. FINDINGS AND CONCLUSIONS**

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.
3. The Petitioner claims to represent certain employees of the Employer.
4. 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.
5. The following employees of the Employer<sup>200</sup> constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time faculty, Conservatory of Performing Arts teaching artists, Natural Sciences and Engineering Technology laboratory associates, Director of the Library, Head of Graduate Studies in COPA, and Executive Director of the Innocence Institute; excluding the President, Vice Presidents, Associate and Assistant Vice Presidents, Deans, Department Chairs, Program Director, Applied Corporate Communications; Program Director, Cinema and Digital Arts; Program Director, Master of Science in

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<sup>200</sup> As noted previously, full-time faculty member Martin Greenberg is permitted to vote subject to challenge in the election directed herein.

Engineering Management; Program Director, Master of Business Administration, and all office clerical employees, part-time faculty, non-professional employees, managerial employees and guards, other professional employees and supervisors as defined in the Act.

## **VII. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Newspaper Guild of Pittsburgh/Communications Workers of America, Local 38061, AFL-CIO, CLC. The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

### **B. Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

## **B. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Room 1501, 1000 Liberty Avenue, Pittsburgh, PA 15222, on or before **May 4, 2004**. No extension of time to file this list will be granted, except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 412/395-5986. Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

## **E. Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) full working days prior to 12:01 a.m. of the day of the election. Failure to

follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so precludes employers from filing objections based on non-posting of the election notice.

#### **VIII. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST (EDT), on **May 11, 2004**. The request may **not** be filed by facsimile.

Dated: April 27, 2004

/s/ Gerald Kobell

Gerald Kobell, Regional Director

NATIONAL LABOR RELATIONS BOARD  
Region Six  
Room 1501, 1000 Liberty Avenue  
Pittsburgh, PA 15222

#### **Classification Index**

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