

Livingstone College and Livingstone College Federation of Teachers and Librarians, AFT, AFL-CIO, Local 4110, Petitioner. Case 11-RC-4957

30 November 1987

DECISION ON REVIEW AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
JOHANSEN, BABSON, STEPHENS, AND
CRACRAFT

On 26 February 1981 the Acting Regional Director for Region 11 issued a Decision and Direction of Election in the above-entitled proceeding in which he asserted jurisdiction over Livingstone College and found appropriate the petitioned-for unit of all full-time teaching faculty, including department and division chairpersons and professional librarians but excluding the Hood Theological Seminary faculty and two associate librarians. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer filed a timely request for review of the Acting Regional Director's decision. The Employer asserted that the Acting Regional Director should have dismissed the petition, arguing that the Board lacked jurisdiction over the College because it is a church-controlled and dominated institution within the meaning of the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*,¹ and that the College faculty is managerial as that term is defined by the Supreme Court in *NLRB v. Yeshiva University*.² The Employer also contended that the Acting Regional Director erred in not excluding the department and division chairpersons as statutory supervisors. The Employer also posited that in the event an election was considered to be appropriate by the Board, the Acting Regional Director erred in excluding the two associate librarians and the seminary faculty from the bargaining unit. The election was conducted on 26 March 1981 and the ballots were impounded. In an Order dated 10 December 1986 the Board granted the Employer's request for review. No party filed a brief on review.

The Board has considered the entire record in this case and finds that the assertion of jurisdiction over Livingstone College would not create the same significant risk of entanglement between church and state as that envisioned by the Court in *Catholic Bishop*. The Board further finds, however, that the College faculty members are managerial employees as defined by *Yeshiva University* and therefore the petition must be dismissed. In view of

this decision, it is unnecessary to reach the other issues raised in the Employer's request for review.

Jurisdiction

Livingstone College (the College) is a 4-year liberal arts college in Salisbury, North Carolina. It was founded in 1879 under the auspices of the African Methodist Episcopal (AME) Zion Church (the Church). The College is divided into the arts and sciences college and the Hood Theological Seminary. The Church remains the sponsoring body of the College. The Church contributes approximately \$845,000 annually to Livingstone: Hood Theological Seminary receives approximately \$145,000 out of an overall budget of \$250,000 and the arts and sciences college receives about \$700,000 out of an overall budget of approximately \$5 million. Livingstone College also receives approximately 30 to 40 percent of its budget from the Federal Government.

The College is headed by a 24-member board of trustees. The Church names 12 bishops of the Church to be members of the board. The remaining members are nominated by the board's nominating committee and confirmed by the general conference, the legislative body of the Church. These 12 board members need not be members of the Church; two of them are elected from the College's alumni association. Traditionally, the senior bishop of the Church serves as chairman of the board of trustees. There is also an elected faculty member who acts as faculty staff representative to the board of trustees.

All bylaws and all amendments to the bylaws of the College must be approved by the general conference. Under the bylaws, the board of trustees has the authority to operate the seminary and the arts and sciences college. The board of trustees elects the president of the College who may be, but is not required to be, a member of the board. The board of trustees holds title to the property of the College. To encumber or lease the property requires approval by two-thirds of the board of trustees, and to sell any property requires the approval of the general conference. The board has the authority to approve the appointment of faculty members, to remove faculty members, and, on the president's recommendation, to authorize an overall budget amount for faculty salaries. The board of trustees approves academic and honorary degrees. The board of trustees also is authorized to promulgate rules and regulations to ensure academic freedom. The president is delegated the responsibility for the administration of educational, fiscal, and physical aspects of the College and generally makes final decisions in these areas.

¹ 440 U.S. 490 (1979).

² 444 U.S. 672 (1980).

According to the faculty handbook, which was approved by the board of trustees in 1979, the College aims primarily to foster higher education in an atmosphere supportive of Christian values contributing to moral integrity and human dignity. According to its own definition of its goals, the College seeks to: broaden the students' knowledge and understanding; foster critical and constructive thinking; encourage an unfettered search for truth; develop the students' communication skills; engender self-awareness, acceptance, and self-reliance; prepare students for graduate study; and foster a sense of responsibility and creative participation in society.

Each student who attends Livingstone College is required to take 4 credits (i.e., 2 courses) of religious studies out of the approximately 124 credits needed to graduate. Applicants for admission to the College need not be members of the Church. In fact, the students enrolled at Livingstone are predominantly Baptist. Although the College celebrates a religious week during the month of January, attendance is not compulsory. Furthermore, the College hires faculty members who are not members of the AME Zion Church. F. George Shipman, president of the College, testified that neither the College nor the seminary sets requirements for the religious orientation of prospective faculty members. There is also no requirement that any of the faculty remit part of their compensation to the Church.

In *Catholic Bishop*, the Supreme Court found that assertion of jurisdiction over teachers in church-operated schools³ posed a serious risk of impermissibly infringing on rights guaranteed by the religion clauses of the first amendment and concluded, therefore, that the Board improperly asserted jurisdiction over lay faculty at several Roman Catholic high schools. Thereafter, the Board expressly interpreted the holding in *Catholic Bishop* as applying only to parochial elementary and secondary schools and not to institutions of higher learning.⁴ More recently, however, the Board held in *St. Joseph's College*, supra at footnote 4, that the Court's holding in *Catholic Bishop* is not limited to parochial elementary and secondary schools, but rather applies to all schools regardless of the level of education provided. The Board noted that it would con-

sider on a case-by-case basis whether the exercise of the Board's jurisdiction presents a significant risk of infringing on first amendment rights.

In *St. Joseph's College*, the Board found that the college exhibited many characteristics that raised a significant possibility of infringing on the first amendment. St. Joseph's College was financially dependent on the Sisters of Mercy of Maine (the Order). Further, all members of the board of trustees were required to be members of the Order and consequently the Order exercised administrative control over the college. The bylaws required the board of governors to establish policies consistent with the Roman Catholic religion and the college handbook prohibited the faculty from knowingly inculcating ideas contrary to the official position of the church on matters of faith and morals. In addition, the Bishop of Portland had the authority to remove faculty members for conduct contrary to Catholic beliefs and to determine the books used in the classroom. The Board particularly noted the college's requirement that faculty members conform to Catholic doctrine and sign a letter agreeing to promote the objectives and goals of the Order. Citing *Catholic Bishop*, the Board concluded that its assertion of jurisdiction in these circumstances would necessarily involve it in an "inquiry into the good faith of a position asserted by clergy-administrators" in the resolution of unfair labor practice allegations involving discipline or discharge, which presented a substantial likelihood of infringing on first amendment rights. Accordingly, the Board declined to assert jurisdiction.

In contrast, we find that here, unlike *St. Joseph's*, the AME Zion Church is not involved with the College in a manner that creates a significant risk of constitutional infringement. Livingstone College is not financially dependent on the Church. Only one-half of the board of trustees are required to be bishops of the Church; the remaining members of the board need not even belong to the Church.

Further, the College does not have a religious mission as did St. Joseph's College. The stated purpose of the College is to foster higher education; promote critical and constructive thinking; develop communication skills; and engender self-awareness, acceptance, and self-reliance. Of more significance is the fact that faculty members are not required to conform to AME doctrine or promote the ideals and objectives of the AME Church, nor are they prohibited from knowingly inculcating ideas that are contrary to the position of the AME Church on matters of faith and morals. In fact, the bylaws of the College authorize the board of trustees to promulgate rules promoting academic freedom. In addition, there is no evidence that the Church

³ The Board recently clarified the Court's use of the term "church-operated school" by finding that the Court simply used this phrase to describe schools whose purpose and function in substantial part are to propagate a religious faith, and did not intend to require that the school be owned or affiliated with a religious organization. See *Jewish Day School of Greater Washington*, 283 NLRB 757 (1987).

⁴ See, e.g., *Barber-Scottia College*, 245 NLRB 406 (1979), *College of Notre Dame*, 245 NLRB 386 (1979); *Thiel College*, 261 NLRB 580 (1982), and *Lewis University*, 265 NLRB 1239 (1982), which were all overruled on that issue by *St. Joseph's College*, 282 NLRB 65 (1986).

could require dismissal of faculty for engaging in conduct not in harmony with the teachings of the Church, or for advocating ideas contrary to Church beliefs. The absence of a religious mission, and the absence of a requirement that the faculty propagate or conform to a particular religious faith significantly diminishes any risk of impermissible constitutional infringement posed by asserting jurisdiction over the College.

The Church does not interfere with the day-to-day administration of the College. There is no evidence that the Church exercises any influence with respect to course content or the selection of books. There is no requirement that students belong to the AME Church. Neither faculty nor students are compelled to engage in worship. Participation in religion week in January is not compulsory. Students are required only to take 4 credits of religious courses as a prerequisite to graduation; these constitute a small percentage of the approximately 124 credits required for graduation.

Thus, although we recognize that the AME Zion Church owns the College's property, appoints one-half of the board of trustees, and provides financial support for the College, we find this insufficient to raise a serious constitutional question under *Catholic Bishop*. Consequently, we find that here, where the purpose of the College is primarily secular, where teachers are not required to submit to or support the bishops or the teachings of the Church, and where the Church is not involved in the day-to-day administration of the College, the assertion of jurisdiction does not pose a significant risk of infringement on the first amendment.⁵

Managerial Status of Faculty

Livingstone College is divided into four divisions: education and psychology, humanities, natural sciences, and social sciences. Each division is headed by a division chairperson, who reports directly to Olivia Spaulding, the dean of the liberal arts college. Within the 4 divisions are 11 departments, each headed by a department chairperson. Three of the department chairpersons are also division heads. Department and division heads are recommended by Dean Spaulding and approved by the president, and receive 9-1/2 months of compensation, unlike faculty members who receive 9

months of compensation. Faculty and staff attend monthly staff meetings chaired by the dean. Faculty members receive a faculty handbook, which President Shipman testified was binding on the faculty and the administration. The newest faculty handbook was approved by the board of trustees in 1979, without a vote by faculty members.

The faculty members participate in academic governance through membership on various standing committees and by virtue of a facultywide vote on recommendations proposed by the various committees. Committees are composed of varying numbers of representatives from the administration, faculty, and student body. Members of these committees are selected by the committee on committees in collaboration with the dean, or are appointed by the president. The committee on committees is composed of five persons—three elected by the faculty and two appointed by the dean.

The curriculum catalog committee formulates policies and procedures pertaining to academics and approves all of the College's instructional offerings and institutional policies. This committee is composed of the department chairpersons, the division heads, the registrar, the head librarian, and one or two faculty members and is responsible for all curriculum changes. The committee recommends the addition or deletion of courses, the addition of new degrees, and changes in admissions policies. In addition, it is responsible for setting graduation requirements, such as the number of hours, degree requirements, and retention and expulsion standards. Neither the dean nor the president is able to make curriculum changes unless the change is approved by this committee.

The entire faculty votes on the recommendations proposed by the curriculum committee. The record revealed only two instances in which curriculum recommendations were implemented prior to a faculty vote. Both occurred because of time constraints. Generally, recommendations approved by the faculty are implemented without prior approval from the president or the board of trustees.⁶ In the event the proposed change requires an inordinate amount of financial resources, prior approval must be obtained from the president and the board before implementation. However, Dean Spaulding recalled only one such instance, i.e., the recommendation to add a bachelor's degree in social welfare work.

The "ad hoc honors" committee presents names of candidates to be considered for honorary de-

⁵ In reaching our decision in this case we note the First Circuit's decision in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir 1986). Initially, by a 2-1 vote, the court enforced the Board's decision asserting jurisdiction and ordering the university to bargain with the union. Subsequently, however, the full court vacated the panel's decision and reheard the case en banc. Ultimately, an equally divided court, 3-3, denied enforcement. Accordingly, the First Circuit's decision lacks precedential value and we find it unnecessary to discuss the applicability of the First Circuit's denial of enforcement of our decision to assert jurisdiction in *Bayamon* to the instant case.

⁶ For example, the faculty implemented a dual degree program in the engineering department without prior approval from the president or the board of trustees.

grees. The entire faculty then votes on each candidate and the names of those approved are submitted to the honorary degree committee of the board of trustees, which makes the ultimate decision. Dean Spaulding testified that each recipient of an honorary degree from Livingstone had been approved by the faculty. The scholarship and honors committee makes recommendations regarding scholarships, awards, and academic honors and establishes the criteria for each category. This committee also administers the awards to ensure that they comport with the guidelines established by the award donor. The entire faculty then votes on each student nominated and the president ultimately names the recipients.

The student life committee, composed of both faculty and student members, recommends policies concerning student social life and campus activities. This committee is responsible for such areas as student dress, social functions, fraternities, and sororities. In one instance the student life committee determined that it would take no disciplinary action against a fraternity that had been involved in a campus disturbance.⁷

The faculty participate in determining which students graduate by voting to approve or disapprove awarding a degree to each candidate. The board of trustees also votes on each candidate; however, in no instance has a student been granted a degree without an affirmative vote by the faculty.

Department heads are responsible for organizing and leading the department, holding meetings, ensuring that departmental courses meet the sequence for the majors, submitting reports, book orders, and requisitions, assigning student advisors, and identifying staffing and space needs. Department heads fill out a course form for each course to be taught in their respective department, showing the course number; course description; approximate enrollment; and time, place, and faculty member to teach the course, which is then signed by their respective division head. Course content is the responsibility of the faculty member teaching the course in concert with the department chairperson, and faculty members prepare the syllabus for their own courses. The dean's office's role in course selection is limited to coordinating the course schedules to

⁷ According to the handbook, other standing committees include the conduct and standards committee, which ensures due process to students, the financial aid and admissions and retention committees, which deal exclusively with special cases, the religious life committee, which addresses improvement of the students' religious and moral life, the faculty welfare committee, which encourages moral and professional growth; and the advancement committee. There is no testimony, however, regarding the actual functioning of these committees or the actual extent of faculty participation.

eliminate conflicts and issuing a final schedule.⁸ The dean's office also makes room assignments for classes.

Each faculty member has the ability to determine his or her own grading schedule, although institutional policy requires that the grading schedule be included in the syllabus. Grades cannot be changed without the approval of the faculty member from whom the student received the grade. Attendance policies for freshman and sophomore students are set by the College. The College does not have an attendance policy for junior and senior students and consequently the effect of their lack of attendance is determined by individual faculty members. With respect to the role of the faculty in the student grievance procedure, a dissatisfied student meets first with a faculty member, then in succession with the department head, division head, and the president.

Faculty members play no role in the selection of students for admission. Admission policies are implemented by the admissions office and registrar's office.

The department heads have significant input into decisions regarding the promotion, retention, and salary increases of faculty members. Department heads evaluate faculty members on a scale of 1-5 in such areas as teaching effectiveness, community involvement, and research. They then make a recommendation regarding retention, promotion, and salary increases at the end of the evaluation form. The faculty member reviews and signs the evaluation, adding comments or indicating areas where his or her view of the rating differs from that given by the department head. The evaluation is then forwarded to the dean's office. When promotions are recommended, the dean verifies whether the faculty member has taught at the College the requisite number of years, whether his or her file contains the necessary supportive documentation, and whether the department is able to absorb another promotion. A committee of division heads reviews the files of faculty members recommended for promotions. Dean Spaulding testified that she has never taken any action with respect to promotions contrary to a recommendation from the reviewing committee.

Department chairpersons effectively recommended 7 out of the last 10 promotions at the College.⁹

⁸ The record shows, however, that on one occasion, the dean, after issuing the final schedule, rescheduled Dr. Munavalli's chemistry lab from Tuesday to Thursday without his knowledge. There is also testimony in the record that a biology course was taught despite Dr. Shannon's recommendation that no such course be taught that particular semester.

⁹ Faculty members had no input into the other three promotions. Two of these promotions involved faculty members who reported directly to

Approximately six or seven faculty members recommended for promotions were not promoted because of reasons unrelated to the areas covered by their evaluation, such as questionable credentials, incomplete files, missing transcripts, insufficient time at the recommended rank, and departmental inability to support another professor. Thus, according to the testimony of Dean Spaulding, although Dr. Shannon, chair of the division of natural sciences, and Dr. Munavalli, chair of the chemistry department, recommended that faculty member Dr. Boyd be promoted, he did not receive his promotion because the department could not accommodate another professor.

With regard to the hiring of faculty members, the department chairperson initiates the search, solicits applications, and participates in the interview process. When department chairpersons are unavailable, the division heads may participate in the search and hiring process. After interviewing potential hires, the department chairpersons recommend candidates to the dean. Either the dean or the president then interviews the prospective candidate. The president makes the ultimate hiring decisions. Faculty members are not consulted in the hiring or appointment of the College's administrators.¹⁰

Dean Spaulding testified that all of the 96 people hired since 1976 had been recommended by the appropriate division or department head. However, there are a number of instances set forth in the record in which potential candidates were not hired despite having been recommended by the department or division chairperson. For example, Dr. Halfond, chair of the history and political science department and chair of the social sciences division, testified that although he effectively recommended five people for positions in the social sciences division, two candidates were not hired despite his recommendation. These candidates were rejected on the basis of Dean Spaulding's investigation into why one candidate was then unemployed and why the other had been released from his former institution. As a result of the investigation, Dean Spaulding was advised that one candidate had been ineffective in class and the other had an alcohol problem.

Other recommendations were only partially successful. Thus, Dr. Munavalli testified that although he recommended one candidate for a full-time position in the chemistry department, that person was

hired only for a part-time position. In addition, Dr. Munavalli testified that two candidates were hired without his knowledge.¹¹

With respect to the termination of faculty members,¹² department chairpersons effectively recommended termination in all eight instances in which a faculty member's contract was not renewed. Moreover, in no instance has the dean terminated a faculty member contrary to the department head's recommendation that he or she be retained. One professor, however, was terminated in 1975 without the knowledge of his department head. Dr. Shannon testified that although she recommended terminating two faculty members, one was retained until the documentation necessary to terminate the faculty member was compiled, and the second was conditionally retained pending the faculty member's correction of deficiencies in necessary background courses.

The budget is determined by the administration. Faculty members exercise no role in the financial affairs of the College. Although department and division heads submit budget sheets, there is no evidence that the business office or the administration relies on this input when formulating the budget for the College. Department chairpersons receive computer printouts delineating the budget for each department. Dr. Munavalli and Dr. Halfond testified that the faculty members are not authorized to spend the funds allegedly allocated in the budget because it is merely a "paper budget." Department chairpersons submit requisitions for supplies and materials, travel funds, or funds for speakers, which must be approved by the administration. Faculty members also have no role in setting the tuition for the College.

The College had not established clear guidelines regarding the award of tenure until the 1980 edition of the faculty handbook. The record reveals evidence of only three tenured faculty members. Faculty members have no direct input into tenure decisions and, although the tenure process has undergone review, there is no evidence that faculty

¹¹ Dr. Shannon also testified that three professors were hired without her knowledge. The record established, however, that these faculty members were hired after being interviewed and recommended by either the department head or the acting division head because Dr. Shannon was on leave or unavailable for the summer. Thus, although these candidates may have been hired without Dr. Shannon's knowledge, they nevertheless were hired on the basis of recommendations from other faculty members. Dr. Shannon also testified that she did not participate in the selection of her replacement.

¹² The faculty handbook sets forth notice requirements regarding termination of faculty. According to the handbook, a faculty member who has been at the College 1 year is entitled to be notified by March 15 regarding retention for the coming year; 2 years of faculty experience entitles the individual to notification by December 15, and 3 or more years of faculty experience at the College entitles the individual to 1 year's notification.

the dean and therefore were not evaluated by the faculty, the third was promoted because of a contractual requirement agreed to by the prior administration.

¹⁰ Hence, the faculty played no role in the appointment of Dr. Robert Sheppard to the position of associate dean or in the appointment of Dean Spaulding to the position of dean of the arts and sciences college.

members exercised any role in the development of guidelines for granting tenure.

The College has no formal sabbatical policy. The department chairperson recommends that a faculty member be granted a leave of absence; however, the evidence establishes that these recommendations are not necessarily followed. The dean and the president must approve all study leaves. Faculty members must seek prior permission to be out if they know in advance they will be absent and must submit teacher absence forms documenting these absences.

In *NLRB v. Yeshiva University*, supra, the Supreme Court acknowledged that managerial employees are defined as those employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer."¹³ The Court further noted 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."¹⁴

The Court found that through participation on faculty committees, the faculty at Yeshiva University effectively determined curriculum, grading systems, admission, matriculation standards, academic calendars, and course schedules. In addition, faculty at some schools made decisions regarding expulsion and graduation of students, teaching loads, student absence policies, tuition, and enrollment. The Court concluded that the faculty members were managerial employees and therefore excluded from the coverage of the Act.

In *Boston University*,¹⁵ the Board adopted the administrative law judge's conclusion that the department chairpersons and full-time faculty were managerial employees as defined in *Yeshiva*. The faculty at Boston University exercised effective control over matriculation requirements, curriculum, academic calendars, and course schedules and had absolute authority over grading, teaching methods, graduation requirements, and student discipline. The Board also noted that the faculty played an effective role in recommending faculty hiring, tenure, promotions, and reappointments. Similarly, in *American International College*,¹⁶ the Board found the faculty to be managerial because the faculty effectively controlled academic standards and

curriculum through their participation in committees and through their vote on recommendations and proposals made by the committees. The Board also relied on the faculty's influence in hiring, promotion, and tenure decisions.

The faculty members at Livingstone College effectively make decisions in a majority of the critical areas relied on in *Yeshiva*, *Boston University*, and *American International College*. Like the faculty at the above institutions, the faculty here exercise almost plenary control over curriculum and academic policy, particularly by virtue of the facultywide vote over proposals and recommendations made by the various standing committees. Significantly, all curriculum changes must be approved by the curriculum catalog committee. Neither the dean nor the president can make changes in academic policy without presenting the changes to this committee. Faculty proposals regarding the establishment of degree programs have been implemented. The faculty has established major fields of study, modified course requirements, added and deleted course offerings, and set degree requirements, without opposition from the administration. At the departmental level, course content, course descriptions, and course scheduling are determined by the faculty and the department chairpersons, with the academic dean serving primarily to coordinate the schedules. The faculty effectively controls and sets standards for expulsion and retention, attendance for upperclassmen, matriculation, and graduation requirements. Furthermore, the faculty has significant input into the awarding of scholarships and honors. The majority of recommendations made by the committees and approved by the faculty are implemented without prior approval from the administration. Although implementation of a bachelor's degree in social welfare work required prior approval from the administration because of the financial resources involved, there is no evidence that the administration has ever countermanded faculty decisions in the above-mentioned areas.

As detailed above, the record shows that faculty members exercise substantial authority with respect to curriculum, degree requirements, course content and selection, graduation requirements, matriculation standards, and scholarship recipients. In view of this authority we find that the full-time faculty members sought by the Union are managerial employees as we find that they play a major and effective role in formulating and effectuating policies affecting primary areas identified by the Supreme

¹³ 444 U.S. at 682, quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974)

¹⁴ *Id.* at 683.

¹⁵ 281 NLRB 798 (1986).

¹⁶ 282 NLRB 189 (1986)

Court as characteristic of managerial employees in *Yeshiva*.¹⁷

We note, however, that the faculty has virtually no input into the budget process, tenure decisions, and setting of tuition and that only the division and department heads have authority in nonacademic matters such as hiring, firing, promotion, and salary increases. Nevertheless, we do not believe that lack of participation in these matters precludes a finding that the faculty are managerial employees.

This case is distinguishable from recent cases where the Board has found the faculty not to be managerial as the faculty in those cases exercised substantially less control in academic areas. In *Lorretto Heights College v. NLRB*,¹⁸ the court found that the infrequent or insignificant nature of committee work, the mixed membership of many committees, the faculty's limited decision-making authority, and the layers of administrative approval required for many decisions resulted in the faculty's participation in the academic area falling far short of the effective recommendation or control contemplated by *Yeshiva*.¹⁹

Further, as noted by the Supreme Court in *Yeshiva*, an individual's role in hiring, firing, or similar decisions has both managerial and supervisory characteristics. See *Yeshiva*, supra at 686 fn. 23. Under Board precedent, moreover, it is an individual's authority to hire, fire, or make effective recommendations regarding these matters that generally operate as a determining factor in finding that an employee has supervisory status. By comparison, however, an individual need not possess this authority to be deemed a managerial employee, where the purpose of the Board's examination with respect to this issue is to determine the degree of the employee's alignment with management. See, e.g., *Sutter Community Hospitals of Sacramento*, 227 NLRB 181, 193 (1976).

Finally, as noted above, the Supreme Court did not rely primarily on faculty authority in matters of hiring and firing and related areas in finding *Yeshiva* faculty to be managerial employees. As stated by the Supreme Court in *Yeshiva*, "the 'business' of a university is education" and the vitality of a university ultimately depends on its academic policies. *Yeshiva*, supra at 627. We have found that faculty

members at Livingstone College have substantial authority in formulating and effectuating policies in academic areas. Given that the business of a university is education, it is the faculty members' participation in formulating academic policy that aligns their interest with that of management and warrants our finding them to be managerial employees. Thus, we accord lack of authority in nonacademic matters limited significance in determining that these faculty members are managerial employees.²⁰ Accordingly, we shall dismiss the instant petition.

ORDER

The petition is dismissed.

MEMBER JOHANSEN, concurring in part and dissenting in part.

I concur with my colleagues that the Board correctly asserted jurisdiction in this case. I also concur in the finding that the department and division chairpersons are not statutory employees as defined in Section 2(3) of the Act.

I dissent from my colleagues' finding that the faculty members are managerial employees. I would affirm the Acting Regional Director's determination that the faculty members are statutory employees.

My colleagues have based their finding that the faculty members are managerial employees on the faculty's authority in academic areas. As noted in the decision, Livingstone's faculty has virtually no input into the budget process, tenure decisions, or the setting of tuition; and no authority in nonacademic matters such as hiring, firing, promotion, and salary increases. My colleagues accord only "limited significance" to these nonacademic areas. I cannot agree with this contraction of the two-part analysis that the Board most recently used in *American International College*, 282 NLRB 189 (1986).

In *American International* the Board reached its finding of managerial status after utilizing the two-part analysis. Under the academic part of the analysis, the Board found that the faculty exercised control over the college's curriculum and academic policies. Under the nonacademic part, the Board found that the faculty: (1) effectively recommended renovations and construction to the physical facilities; (2) exercised effective authority in the area of

¹⁷ In *Yeshiva*, although the Court found that faculty members at the university played a predominant role in faculty hiring, tenure, sabbaticals, termination, and promotion, the Court did not rely primarily on these features of faculty authority as it did not reach the question of supervisory status. *Id.* at 686 fn. 23.

¹⁸ 742 F.2d 1245 (10th Cir. 1984).

¹⁹ See also *Bradford College*, 261 NLRB 565 (1982). In *Bradford College*, the Board found that the faculty were nonmanagerial because although the "faculty manual" indicated that the faculty had input in many areas of decision making, the administration often ignored or reversed faculty recommendations.

²⁰ Contrary to Member Johansen's dissent we do not read our decision in *American International College*, supra, as either prescribing a two-part test for determining if employees are managerial or as requiring that both parts of such a test be satisfied. Rather in that case, consistent with the Supreme Court's decision in *Yeshiva* and with Board precedent, we relied on the managerial and supervisory authority of faculty members in both academic and nonacademic matters, but we did not deem faculty participation in any one of these areas controlling.

tenure; (3) exercised considerable influence in the area of hiring; (4) was instrumental in developing a merit evaluation system, but only exercised a limited role in terminations and budget matters. With the complete picture in front of it, the Board decided that the faculty played a "major and effective role in the formulation and effectuation of policies affecting the critical areas identified by the Supreme Court in *Yeshiva*."¹

Here my colleagues are looking only at one-half of the total picture; and they are justifying their actions by labeling the nonacademic sphere as being of "limited significance." After examining the total picture, I find that the fact that the faculty has virtually no input into hiring, firing, promotions, tenure, and salary increases persuasively reflects lack of managerial status.

It may of course be said, as the majority does, quoting the Supreme Court, that "the 'business' of a university is education." But that "business" also is the "profession" of the faculty. It does not follow, as the majority would have it, that the mere exercise by a faculty of its "profession" "aligns" that faculty's "interests" with management in a way that clashes with employee interests and somehow converts them to management.

Under the facts of this case, I find that the faculty's lack of participation in nonacademic matters and its less than absolute control in academic matters precludes a finding of managerial status.

CHAIRMAN DOTSON, dissenting.

Applying the Supreme Court's holding in *Catholic Bishop of Chicago*¹ to the facts of this case, I would decline to assert jurisdiction.

Livingstone College was founded under the auspices of the African Methodist Episcopal (AME) Zion Church (the Church). The College is divided into an arts and sciences college and Hood Theological Seminary. Both schools operate under the same charter. The Church continues to be the College's sponsoring body. The College is dependent on the Church for about 7 percent of its total budget, which exceeds \$6 million.

The general conference of the Church must approve all of the College's bylaws and amendments

to the bylaws. Pursuant to the bylaws, the College has a 24-member board of trustees. Twelve of the trustees must be bishops of the Church. The Church names the bishops who will serve on the board. The remaining 12 trustees are selected by the Church's general conference from nominations made by a board committee. The senior bishop of the Church serves as chairman of the board.

The board receives its authority from the general conference of the Church and is charged with operating the College. The board holds title to the property of the College. Two-thirds of the board must agree to encumber and lease property; thus, the bishops on the board have the potential to control such votes. The general conference of the Church must approve the sale of any property.

The board elects the College's president to whom it delegates the responsibility for the administration of educational, fiscal, and physical aspects of the College. The arts and sciences school and Hood Theological Seminary each have a dean who reports to the president. The board has the power to appoint and remove faculty and to set salaries. It also awards degrees and is empowered to promulgate rules regarding academic freedom.

The aim of the College is to foster higher education in an atmosphere supportive of Christian values contributing to moral integrity and human dignity. Each year the College celebrates a religious week. Further, to graduate from the school of arts and sciences, students are required to take two courses in religious studies.

I find that the substantial administrative control that the Church maintains over the College through the board of trustees, combined with the fact that the College is church-sponsored, is annually dependent on the Church for significant amounts of money, and encourages the development of Christian values among students through mandatory religious study and the overall general atmosphere, requires a finding that the College is church controlled. Accordingly, I would decline jurisdiction for the reasons discussed in *St. Joseph's College*,² and would dismiss the petition without reaching any additional issues raised by the parties.

¹ 282 NLRB 189.

² 440 U.S. 490 (1979).

² 282 NLRB 65 (1986); see also *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1986).