

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

POINT PARK UNIVERSITY
Employer,

and

6-RC-12276

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

BRIEF OF *AMICUS CURIAE*
LOUIS BENEDICT, MBA, J.D., Ph.D. (Higher Education Administration)

Louis Benedict
153 Troup Ave.
Bowling Green, OH 43402
lbenedi@aol.com
(419) 575-0097 or (419) 353-6003

This brief is filed in response to the May 22, 2012, notice and request of the National Labor Relations Board to file briefs that specifically address some or all of the eight questions posed by the Board. As a faculty member and attorney advising on labor law, a decision on these issues affects me directly and in the future. I have advised faculty and worked in the general counsel's office of a university, so I understand the implications for a university employer and faculty and faculty unions. The answers to these questions will have far-reaching applications to faculty at higher education institutions. These answers also have implications for university administration and university legal counsel who desire to fight unionizing attempts by faculty in that it may reduce the ability to game the system by arguing that faculty are managers even when the university does not consider them managers. Consequently, the Board's guidance on the determination of the managerial status of faculty can benefit all parties.

All of the issues are important and deserve serious consideration. Due to time constraints, I will address an issue that relates to the type of evidence that should be obtained that has not been discussed in decisions and briefs. Indeed, without the personal experience from a faculty and internal general counsel's viewpoint, this evidence can be easily ignored. My argument overlaps some of the other issues. I welcome and hope to be invited to submit on this entire subject in the future.

Introduction

Although different factors may provide important evidence in considering whether some faculty are actually managers at each school, the overriding determinant is whether the faculty exercise authority that is unquestionably managerial. In *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980), the Supreme Court stated that "[t]he controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably

would be managerial.” *Id.* at 686. Although the facts of each case must be examined (*id.* at 691), the Court provided overall guidance in concluding that faculty were managers based on the similar analysis that would be applied to industry. “To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.” *Id.* at 686. This guidance should be applied to the university setting to determine whether specific faculty are managers.

Many of the decisions by the Regional Directors and Board have gone into an examination of various factors to determine whether faculty are managerial. However, it is also the way that those factors are interpreted that is important. The interpretation can be problematic because of two issues: (1) “participation” by faculty committee or organization is not examined for actual (managerial) decision-making and discretionary authority by the faculty, and (2) the deferment of certain decisions (or aspects of decisions) to faculty may be because of the professional expertise of faculty coupled with the lack of knowledge or expertise on academic issues by the administration.

Faculty committees or faculty organizations are a long tradition at universities. They represent the traditional concept of shared governance. However, the existence of a faculty committee or organization does not automatically mean that the faculty have any significant authority in the issues that the committee takes up. Faculty committees and organizations are traditional, but the level and division of authority is not the same at all universities and for all committees. Some faculty committees wield little power and are more likely to exist out of tradition. (They do serve a purpose in that they allow faculty to feel that they are part of the decision and that their concerns are heard by management.)

The second point is that some decisions are allowed to be made by faculty simply because of their professional knowledge and expertise, especially those relating to academic issues. Administrators not only defer some decisions to faculty because of faculty expertise, but also because of the administrators' lack of knowledge and expertise. Delegating discretionary authority is much different than seeking and usually approving decisions made by employees where an administrator does not have the expertise to make the decision or does not have the time to acquire the knowledge to make the decision. This does not have to be professional knowledge, but any occupational knowledge that a manager does not have, which may be left to an employee to decide within managerial parameters and control. Additionally, where a manager does not care about the details of specific assignments, the decision may be delegated to the employee. For example, a janitor may be left to decide which office rooms to clean and in what order. This does not make the janitor a manager. In the case of a faculty member, it is possible that the decisions relating to curriculum or grading policies could not be decided by the administration because of the lack of knowledge and expertise as well as the amount of time to perform these tasks. It may also be those are decisions that the administrator does not care to make. This is similar to the building manager who does not care nor know enough to decide the order of offices to be cleaned in a building. Management gets involved when there is a problem.

Issue

(2) In the areas identified as “significant,” what evidence should be required to establish that faculty make or “effectively control” decisions?

One of the major problems in determining whether faculty are managers is the evidence that is utilized to establish that faculty make or “effectively control” decisions. The evidence is the existence of some faculty (often a majority) on a committee(s) that recommends decisions in

an area identified as “significant” by the ALJ or Board to the college president or provost (also called the vice president of academic affairs) or dean (collectively referred to as “administrator”), followed with the testimony of the administrator that to the best of the administrator’s knowledge or recollection, the administrator has never overruled the committee(s) recommendation. The Regional Director or Board then examines the number of committees where the faculty comprise a majority and then decides if the number of “significant” areas where the committees’ recommendations are followed is comparable to areas where the committees’ recommendations were not followed or where a decision was made without input from a committee that had faculty members on it.

There are several problems with this evidentiary methodology. First, it is assumed that because faculty make up all or a majority or a large part of a committee, that the decisions of the committee are made with complete discretion by every faculty member and is not heavily influenced by the administration. However, the mere presence of a single administrator on a committee can result in that administrator’s input being followed. If someone who has the power to set one’s salary, raises, and promotion, as well as has the power to approve or deny tenure, is on a committee, a faculty member might risk disfavor by not following the recommendation or “suggestion” of that administrator. Faculty, especially those academics without a union, rely on administrators to set their salary, raises, and approve sabbaticals, tenure, and other assignments. These decisions can be somewhat arbitrary and interpretation is discretionary. This power over faculty salary and issues would put pressure on faculty to follow the administrator’s decision recommendations. Even if some of the faculty on the committee had different views, a dissenting faculty member would be pressured to accept or go along with the administrator’s recommendation unless all faculty speak out in opposition. The Board has recognized the

problems associated with employer influence, control, or domination of committees of workers that made managerial decisions. *See, e.g., Electromation, Inc.*, 309 NLRB 990 (1992).

A committee that includes the employees' manager or supervisor or their representative results in undue influence and domination through indirect coercion and control. Thus, evidence needs to be obtained that demonstrates that faculty are making the decision with their discretionary authority alone and without administrative influence. If faculty are truly managers that make discretionary decisions and the administration routinely approves their decisions, then why would there be a need for administrators to be on faculty committees? If the decision is truly the faculty's, who are given discretion, then the administrator should not be involved until receiving the faculty decision. Thus, evidence should be required by the ALJ that demonstrates that the faculty organization or committee is solely making the decision in a process that is uninfluenced by the administration.

Additionally, an administrator does not have to be present on a committee or faculty organization that makes a decision in order to control that decision. An administrator can frame the decision outcomes that a faculty organization or committee can decide. An administrator can set the parameters of what the faculty organization or committee can consider. For example, the administration may "suggest" a new (specific) program to a faculty curriculum committee, who in turn may rubber stamp the change with an affirmative vote. The decision may appear as though it is coming from the faculty, but really it originates from the administration. The faculty may not have wanted a new program, for example a program that may take students from other established programs, or they may desire a different program, but the committee follows the suggestion by the administration because of fear of retaliation or due to future rewards.

The selection process for the faculty organization or committee making significant decision-making should also be determined. The composition and membership in a committee may be selected by the administration. Many committees have their members appointed by the administration, especially if the committee is appointed for a special purpose. The faculty may even be allowed to propose members, with the administration approving the members or making “suggestions” as to who should be on the committee; but, evidence should be obtained as to how the committee members were actually selected.

In addition, a so-called faculty committee decision cannot be attributed to faculty if non-faculty are also on the committee. The problems with undue influence and the dilution of faculty decision-making power and discretion occur when any other non-faculty members are on the committee. This not only applies when administrators or staff are on the committee, but this is especially the case where students are on the committee. Students or other staff should not be involved in the decision if faculty members are actually managers. Managers in a non-academic context would rarely have any customers or clients on their committees to make decisions. While customer feedback and satisfaction is important to consider, and customer surveys could be helpful, managers must make decisions for the benefit of the employer and these decisions may not be in the interest of the customer. For example, customers would prefer a return policy that allowed them to return merchandise without a receipt and without a time limit. However, managers must balance customer input with good management policy, which may involve limits on returns. The same is true for faculty as managers. Input and concerns from others may be helpful, but if faculty are truly managers, they must evaluate the information and make the decision under their discretion. Are students to be considered managers if they take part in and are on the committee making decisions?

What is needed is a more in-depth examination and analysis of evidence of how a “faculty” organization or committee actually made the decisions that are considered significant. This examination begins by first examining whether it was a truly a faculty committee, how the committee was selected, what level of discretion the committee had, and how the decisions were actually made. The inquiry must ascertain whether the authority of the faculty in an area is absolute. *See Loretto Heights College*, 264 NLRB 1107, 1120 (1982).

Even if the faculty committee or faculty organization is found to make the actual decision with only a rare veto from the administration, that information should not end the inquiry. It must be determined if the administration allows the faculty to make the decision because of the faculty expertise in the area (especially where the administration would be unable or does not have the expertise to make the decision) so that the faculty is utilizing its professional expertise and not managerial authority. Deans and provosts have little expertise in the diverse and specialized curriculum and courses of modern universities and must rely on faculty as professional employees. As the Supreme Court stated in *Yeshiva*: “Only if an employee’s activities fall outside the scope of duties performed by similarly situated professionals will he be found aligned with management.” *Yeshiva*, 444 U.S. at 690. Therefore, the inquiry must determine whether the faculty are making the decision because they are professionals and/or the administration does not have the knowledge and expertise to make the decision. Because a manager delegates the recommendation of a decision (even if the manager almost always follows that recommendation) to an employee, it does not then make that employee a manager.

The more the administration does not have the expertise or knowledge to make a decision in an area, the more likely that the decision will be left to the faculty. Thus, an examination of the number of administrators and the academic qualifications of the administrators is vital. The

greater the number of administrators, the less that faculty can be considered as managers, effectively running the university. *See Loretto Heights College*, 264 NLRB 1107 (1982) (finding faculty were not managers, where there was an effective buffer between top management and faculty, program managers largely controlled the budget, served on key positions of committees and task forces, and were administrators rather than faculty). The existence of a number of professional administrators who are not faculty support the determination that faculty are not managers.

The academic qualifications of the Dean and other administrators also must be examined. The more these administrators lack the academic qualifications of the faculty, the more that the expertise of the faculty as professionals will be relied upon for certain academic (especially curriculum and course related) decisions. Where administrators do not have a Ph.D., teaching experience, and research experience at the level of faculty, then faculty recommendations for academic decisions are a necessity. Faculty are being utilized as professionals and not as managers. Even if an administrator has a Ph.D. and teaching and research experience, the administrator's expertise is limited to one academic specialty; further, the administrator's duties do not usually include teaching or performing research. Thus, professional only status versus managerial status can be determined by the academic qualifications of those involved. The faculty's recommendations on academic decisions are effectively followed based on their professional status, whereas the administrators are involved in decisions because of their managerial status. The fact that faculty are limited to involvement in purely academic decisions as opposed to managerial decisions (such as determining budget decisions and structural changes) are indicia of the professional status of faculty. Where faculty are involved in areas

that do not utilize their academic expertise, then the indicia of managerial status of those faculty are evidenced.

Additional evidence arises from the hiring process for faculty and the required qualifications for faculty. Faculty as professionals are generally hired based on their qualifications for teaching and research (with different universities weighting each differently). However, administrators are hired based on their managerial ability. If faculty are to be considered managers, then there should be evidence that they are hired based (at least somewhat) on their managerial skills and ability. To the extent Deans and other administrators (like program directors) are hired based on their managerial skills and experience and not on their academic qualifications, this information provides support that they are managers and faculty are not managers.

Although university administrations (and sometimes even faculty) like to tout the existence of shared governance, as the Board decisions indicate, despite the statements and documents that tout the existence of shared governance, the actual level of shared governance differs can vary greatly.

CERTIFICATE OF SERVICE

The undersigned (/s/) certifies that copies of the foregoing brief of Louis Benedict have been served electronically this 6th day of July, 2012, upon the following counsel of record and email addresses as obtained from the NLRB, Region 6 Office on June 29, 2012 (Note: I contacted and spoke by phone on June 29, 2012, with Attorney Richard Markowitz of Markowitz & Richards, who was listed under participants, and he stated that he was counsel for CWA, but has nothing to do with the case and has never filed anything, and he does not want to be copied on any filings.):

Arnold Perl, Attorney
Glankler Brown, PLLC
6000 Poplar Ave.
Ste. 400
Memphis, TN 38119-3955
aperl@glankler.com

Point Park University
Pittsburgh, Pa 15222
Presidentsoffice@pointpark.edu

Ernie Orsatti, Attorney
Jubelirer, Pass and Intrieri PC
219 Ft. Pitt Blvd.
Pittsburgh, PA 15219-1500
ebo@jpilaw.com

Robert Chester, Regional Director
NLRB Region 6
Pittsburgh, PA
Robert.Chester@nlrb.gov

/s/ Louis Benedict