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**University of Southern California and Service Employees International Union, Local 721, Petitioner. Case 31–RC–164868**

December 30, 2016

ORDER DENYING REVIEW

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

The National Labor Relations Board has carefully considered the Employer’s Request for Review of the Regional Director’s Decision and Direction of Election (pertinent portions of which are attached as an appendix), as well as the Petitioner’s opposition brief. The request for review is denied as it raises no substantial issues warranting review.<sup>1</sup>

<sup>1</sup> We agree with the Regional Director that the Employer has not met its burden of demonstrating that the petitioned-for Roski School faculty possess managerial authority in any of the primary or secondary areas under *Pacific Lutheran University*, 361 NLRB No. 157 (2014). The Regional Director’s decision properly applied that precedent. We are not persuaded by the position of our dissenting colleague, who dissented as well in *Pacific Lutheran*.

Our colleague argues that the nature of the petitioned-for faculty’s employment relationship is irrelevant to the determination of their managerial status. We disagree. The Regional Director properly considered “the nature of the faculty’s employment” *id.* slip op. at 17, consistent with *Pacific Lutheran*. See *id.* slip op. at 19 fn. 40 (“[T]he structure of the university administration and the nature of the faculty’s employment relationship may well bear on whether the faculty in issue control or make effective recommendations for specific areas of university decision-making. To that extent, both the structure of the university administration and the nature of the faculty’s employment relationship will be relevant to our analysis.”).

Next, our colleague challenges the Regional Director’s analysis of how the university committees operate and the standard for assessing the petitioned-for faculty’s role in decision making. Here, too, the Regional Director correctly applied *Pacific Lutheran*, which reaffirmed the longstanding requirements that “the party asserting managerial status must demonstrate that faculty actually exercise control or make effective recommendations” and that “to be ‘effective,’ recommendations must almost always be followed by the administration.” *Id.* at 18.

Finally, our colleague questions the Regional Director’s focus on the role of nontenure track faculty, as opposed to faculty members generally, on university committees. This focus was consistent with *Pacific Lutheran*. See *id.* at 18 fn. 36, 24–25.

We also deny the Employer’s Request for Review of [the Regional Director’s] Order Denying Employer’s Motion to Reopen the Record and for Reconsideration of the Decision and Direction of Election (pertinent portions of which are attached to the appendix) as it raises no substantial issue warranting review. Contrary to our dissenting colleague, even assuming the Employer’s motion was timely and that the postelection testimony constitutes newly discovered evidence, the proffered evidence would not warrant a different result as to our determination that the Regional Director did not err in finding that the Roski

Dated, Washington, D.C. December 30, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

The Regional Director determined that the Employer’s nontenure track faculty are not managerial employees. In making this determination, the Regional Director questioned whether any USC faculty members exercise managerial control over any area of university governance, even when their recommendations are adopted regarding core academic matters such as USC’s curriculum. The Regional Director also found that if faculty members as a whole exercise managerial authority, such authority is not exercised by nontenure track faculty even though they participate on “the committees that comprise USC’s shared governance system.” In reaching these conclusions, the Regional Director relied in part on the testimony of Professor Kate Levin that she had no effective say on academic matters, but assigned no significance to Professor Levin’s contrary testimony during a postelection objections hearing. I believe that the request for review has raised substantial issues warranting review regarding each of these findings. Accordingly, I respectfully dissent.

Discussion

In *NLRB v. Yeshiva University*, 444 U.S. 672, 676 (1980), the Supreme Court held that university faculty who collectively determined the university’s “curriculum, grading system, admission and matriculation stand-

School faculty are not managerial employees under *Pacific Lutheran University*.

Finally, in agreeing with the Regional Director’s rejection of the Employer’s challenge to the facial validity of the Final Rule, citing *Pulau Corp.*, 363 NLRB No. 8 (2015), we note that in *Chamber of Commerce v. NLRB*, 118 F.Supp.3d 171 (D.D.C. 2015), the district court, granting summary judgment for the Board, found that the Rule did not violate the Act, the First Amendment, or due process under the Fifth Amendment. We further note that in *Associated Builders & Contractors of Texas v. NLRB*, No. 1-15-CV-026 RP, 2015 WL 3609116 (W.D. Tex. June 1, 2015), the district court found that the Rule did not violate the Act and was not arbitrary and capricious under the Administrative Procedures Act. That decision was affirmed by the U.S. Court of Appeals for the Fifth Circuit, 826 F.3d 215 (5th Cir. 2016).

ards, academic calendars, and course schedules” were managerial employees exempt from the Act. The Court rejected the view that faculty authority could not be managerial because it was exercised collectively, and the equally untenable view that faculty could not have managerial authority unless it was final. *Id.* at 685 fn. 21. The Court made clear that managerial status exists not only “in the pyramidal hierarchies of private industry,” but also in the typical “mature” private university, where authority is divided between a central administration and one or more collegial bodies. *Id.* at 680.

More recently, the Board addressed the managerial status of university faculty in *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 20 (2014). There, the majority stated:

In sum, where a party asserts that university faculty are managerial employees, we will examine the faculty’s participation in the following areas of decisionmaking: academic programs, enrollment management, finances, academic policy, and personnel policies and decisions, giving greater weight to the first three areas than the last two areas. We will then determine, in the context of the university’s decision making structure and the nature of the faculty’s employment relationship with the university, whether the faculty actually control or make effective recommendation over those areas. If they do, we will find that they are managerial employees and, therefore, excluded from the Act’s protections.

I generally agreed with the *Pacific Lutheran* framework regarding managerial status, but I stated that the Board should not impose unrealistic burdens on parties to demonstrate the existence of control or the effectiveness of recommendations made by faculty members, which might “improperly confer ‘employee’ status on some faculty members who should be considered ‘managerial’ employees under *Yeshiva* and its progeny.”<sup>1</sup> For example, I indicated that the Board could not appropriately reject uncontroverted documentary evidence about faculty authority by dismissing such evidence as “mere paper authority.”<sup>2</sup> Similarly, I said that “it is unrealistic and inconsistent with the Act to regard faculty members as ‘managerial’ employees only if their recommendations are ‘almost always’ followed.”<sup>3</sup>

In the instant case, I believe the Board should grant review because substantial issues exist regarding these and other aspects of the Regional Director’s application of

*Pacific Lutheran*, and I believe the Regional Director’s analysis may depart from *Yeshiva*. The following considerations, in particular, are relevant to my belief that the Board should grant review.

First, the Board defines managerial employees as those who “‘formulate and effectuate management policies by expressing and making operative the decisions of their employer.’” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974) (quoting *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320, 323 fn. 4 (1947)). Matters such as length of appointment, tenure rights, and benefits—though they may be important to faculty members—are irrelevant to a determination of managerial status. Accordingly, the Regional Director’s reliance on the limited duration of nontenure track faculty appointments, the fact that nontenure track faculty lack the job security tenured faculty enjoy, and the fact that faculty who work less than 50 percent of full time do not receive benefits as evidence that nontenure track faculty are not managerial employees alone warrants granting review.

Second, several all-faculty USC committees exercise effective decision-making powers in exactly the same areas that the Court found determinative in *Yeshiva*. For example, the USC University Committee on Curriculum (UCOC) is an all-faculty body that must approve every course offered for credit, every proposed new or modified program consisting of those courses, and every major or minor or new degree offered by USC, with the exception of the MD program. A course cannot be included in the curriculum handbook without UCOC’s authorization. While UCOC’s decisions are considered recommendations to the provost, they are not independently investigated, and once accepted by the provost or vice provost, they are implemented in the USC course catalog. The Regional Director dismissed this evidence on the basis that “it is not clear what kind of review is conducted.” In addition, UCOC “worked back and forth” with USC’s Price School of Public Policy on the School’s proposal for a new global master’s degree in public policy to reach an agreement on the degree program, but the Regional Director dismissed this fact as well because the relevant “testimony does not indicate whether UCOC rejected certain aspects of the proposal or simply asked clarifying questions.” Indeed, the Regional Director went so far as to question whether any of USC’s faculty committees exercise actual or effective control over USC’s academic programs.

I believe the Regional Director’s analysis is based on an incorrect premise: that faculty members cannot be considered “managerial” under our statute unless they have unreviewable authority. Our cases do not limit managerial status to the single person in an organiza-

<sup>1</sup> *Id.* slip op. at 27 (Member Miscimarra, concurring in part and dissenting in part).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

tion—for example, the president or chief executive officer (CEO)—who reports to nobody else.<sup>4</sup> In this respect, the request for review raises substantial questions regarding the burden of proof required by the Regional Director and her determination that USC’s faculty have no collective authority over its academic programs. As I have previously explained, the Board should not disregard un rebutted evidence “merely because it could have been stronger, more detailed, or supported by more specific examples.” *Buchanan Marine*, 363 NLRB No. 58, slip op. at 9 (2015) (Member Miscimarra, dissenting) (citations omitted). Yet it appears that the Regional Director attached no weight to uncontroverted evidence of the UCOC’s authority based on an assumption that stronger evidence was needed. Again, the mere fact that UCOC’s recommendations are reviewed by the provost does not negate un rebutted record evidence of the faculty’s managerial authority. If the preponderance of record evidence supports a finding of managerial status, the Board cannot properly find that faculty members are nonmanagerial based exclusively on evidence that is *not* in the record.

In addition to the authority exercised by UCOC, the USC University Committee on Academic Review (UCAR) reviews all academic programs on a predetermined schedule. This body considers the views of faculty from peer institutions and makes recommendations to the provost on changes to improve a program’s academic content, and the provost’s office then implements UCAR’s recommendations, working with the program in question. The Regional Director dismissed this fact because “the actual actions taken pursuant to those recommendations are devised and decided upon at the school level.” I believe this analysis fails to recognize that managerial employees are those who “formulate and effectuate management policies” regardless of whether others may be involved in implementing those policies. *NLRB v. Bell Aerospace Co.*, above, 416 U.S. at 288.

Along similar lines, the University Committee on Finance and Enrollment (COFE) makes recommendations about university-level finances, such as net tuition, income and expenditure, and enrollment management. USC describes those recommendations as “at least as effective as those of deans, on analogy with the faculty’s role in the tenure process.” COFE has made recommendations regarding how much USC should draw on its endowment, the cost of tuition, whether to increase the size of the student body, whether to increase the use of

test scores for admissions, and whether to implement a pilot program to broaden need-based financial aid; and all of these recommendations were quickly approved. The Regional Director discounted this evidence because COFE was newly formed and the review of its recommendations was not “sufficiently” described. In this regard, the Regional Director expressed skepticism that the Board of Trustees would “sign off without second thought on a tuition amount or enrollment payout based solely on the recommendation of a newly-formed committee that had never before considered such issues.” Faculty authority is managerial regardless of whether it is exercised hierarchically or collegially, and it does not require evidence that faculty recommendations are approved “without a second thought.” See *NLRB v. Yeshiva University*, above, 444 U.S. at 680, 685 fn. 21.<sup>5</sup> Additionally, the Regional Director’s reasoning here is speculative. The question we are addressing is whether faculty members are managerial, and this depends in part on whether the record shows that recommendations on management policies are implemented. *NLRB v. Bell Aerospace Co.*, 416 U.S. at 288. It is inappropriate to resolve this question based on an assumption—without record support—that the board of trustees would not “sign off” on faculty recommendations regarding management policies.

Third, the Regional Director concluded that even if managerial authority was exercised by the faculty committees referenced above, the non-tenure track faculty members cannot be deemed managerial because “they do not constitute a majority” of the committees. I believe this analysis raises a substantial issue that warrants review based on its inconsistency with the principle of collegial managerial authority that the Supreme Court recognized in *Yeshiva*.<sup>6</sup> There, the Court held that a faculty

<sup>5</sup> Similar considerations warrant review of the Regional Director’s determination that faculty managerial authority is not demonstrated by faculty participation in other university committees and faculty councils identified in the Decision and Direction of Election.

<sup>6</sup> The Regional Director cited two cases in support of this startling proposition, but both are distinguishable. In *Pacific Lutheran University*, above, 361 NLRB No. 157, slip op. at 18 fn. 36, the Board stated that “[i]n those instances where a committee controls or effectively recommends action in a particular decision-making area, the party asserting that the faculty are managers must prove that a majority of the committee or assembly is faculty.” Applying this principle, the Board held in that case that the contingent faculty at issue there were not managerial where “the membership of each current university committees [sic] include[s] a mix of faculty, administrators and students, but the faculty are not a majority on any committee.” *Id.*, slip op. at 21. In *Cooper Union of Science & Art*, 273 NLRB 1768 (1985), the Board found no managerial status on similar facts, where students, alumni, and administrators served on the relevant governance committees and both the faculty as a whole and bargaining unit faculty were apparently in the minority on many of those committees. Here, in contrast, the

<sup>4</sup> Even actions by a president or CEO are subject to potential review and approval by a board of trustees or board of directors. One cannot credibly contend that this type of review renders the president or CEO nonmanagerial.

member may possess managerial authority even though he or she cannot individually establish policy separate from the committees on which he or she serves. Similarly, faculty members in an individual department or program may be managerial, even if as a group they are a minority of the total faculty and are outnumbered and outvoted on every issue.<sup>7</sup> The Regional Director's newly fashioned "majority status" requirement contradicts these principles and cannot be reconciled with the Court's holding in *Yeshiva*.

Fourth, I believe that the Board also should grant review of the Regional Director's order denying the Employer's motion to reopen the record and for reconsideration. The Employer's motion demonstrates that union witness Kate Levin gave inconsistent testimony regarding the role and authority of UCOC. During the preelection hearing, she minimized its authority in support of the Union's position that nontenure track faculty are not managerial employees. During a postelection hearing on union objections, in contrast, she testified to UCOC's importance in support of the Union's argument that the Employer interfered with the election by telling employees "that if they voted to form a union they would lose the opportunity to participate in faculty governance." The Regional Director denied the Employer's motion on the grounds that the evidence was not newly discovered because the Employer could have adduced it at the preelection hearing, that the Employer did not file its motion "promptly" after Levin's postelection testimony, and that in any event the testimony would not require a different result on managerial status. I disagree with this reasoning in several respects:

- I believe there is no merit to the Regional Director's finding that the evidence was not newly discovered, as Section 102.65(e)(1) requires.<sup>8</sup> In finding that the Employer could have adduced the evidence at the pre-election hearing, the Regional Director faulted the Employer for not eliciting it on cross-examination. I believe this fundamentally misperceives the issue presented here, which is

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faculty is not only the majority but the sole members of UCOC and UCAR, and a clear majority on COFE as well.

<sup>7</sup> Otherwise, even faculty who indisputably exercise managerial authority on a university-wide basis could be treated as nonmanagerial if organized in separate departmental units, each of which was a minority on any given governance body.

<sup>8</sup> I disagree with any implication in the Regional Director's decision that a motion to reopen the record must relate to evidence that could have been presented at the original hearing. To the contrary, Sec. 102.65(e)(1) in the Board's Rules and Regulations permits a motion to reopen the record based on "evidence which has become available only since the close of the hearing," which may include evidence regarding posthearing events.

whether Levin testified one way at the pre-election hearing—favoring the interests of the party that called her—and then changed her testimony regarding a material issue at the post-election hearing.<sup>9</sup> Clearly, Levin's *post*-hearing change in testimony could not have been brought out in cross examination *during* the pre-election hearing, since Levin had not yet changed her testimony. Nor is there any merit to the view that the motion, which was filed one month after Levin testified at the post-election hearing, was untimely. See *YWCA of Metropolitan Chicago*, 235 NLRB 788 (1978) (motion to reopen record timely filed one month after close of hearing in unrelated case, where evidence adduced in unrelated case indicated record in first case was inaccurate and incomplete).<sup>10</sup>

- The Regional Director included a lengthy summary of Levin's pre-election testimony in her decision,<sup>11</sup> and she clearly relied on that testimony as support for her finding that UCOC did not "exercise actual control or effective recommendation over the university's academic program." But Levin's testimony that UCOC's role was "technical and clerical" is irreconcilable with her later claim that UCOC's work was important and gave her a "say" in what courses are offered to students.<sup>12</sup> In these circumstances, I believe that the

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<sup>9</sup> Indeed, the Regional Director went so far as to find it "irrelevant" that Levin's testimony at the postelection hearing was more favorable to the Employer's position on managerial status than her prior testimony, on which the Regional Director relied.

<sup>10</sup> Further demonstrating the timeliness of the motion, the Employer notes that the transcript of the postelection hearing became available on February 26, 2016, its posthearing brief on the objections was due March 7, it filed a motion to strike portions of the Union's brief on March 15, and it filed its motion to reopen the record on March 31.

<sup>11</sup> See Decision and Direction of Election at 12–13:

A part-time, non-tenure track Professor in the Dornsife College [Levin], who is currently appointed to the UCOC, testified that her experience with UCOC is that the committee members largely review proposals for "technical and clerical" matters, such as assuring that the prerequisites for a course match the specifications in the curriculum handbook, and making sure the number of credits for a course correspond with the number of contact hours between professors and students. She testified that the three assignments she has been given on the committee—reviewing a graduate-level political science research methods course, reviewing a change to a certificate offered by the law school, and reviewing a change to a master's program in the business school—have each taken about forty-five minutes of her time. Her understanding is that once she approves something she has been asked to look at, she submits it to her subcommittee chair, who then sends it to "the administration for their final approval."

<sup>12</sup> Levin testified that her work on UCOC was "important" (Tr. 246) and that by serving on UCOC she had "a say in—you know, in what courses are offered to students. I enjoy chiming in on discussions that my fellow committee members are having about any given course or

relevant issue is not whether Levin's post-election testimony alone warrants a different result with regard to faculty managerial status, but whether the determination that the petitioned-for faculty are not managerial can stand without Levin's pre-election testimony. At a minimum, these circumstances warrant reopening the record and admitting Levin's contrary testimony regarding this material issue. I believe this constitutes an additional substantial issue that warrants granting review.

#### Conclusion

The Board is required to give due consideration to the policy, embedded in the Act, that "an employer is entitled to the undivided loyalty of its representatives." *Yeshiva*, above, 444 U.S. at 682; see *NLRB v. Bell Aerospace*, above; *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 719 (2001) (rejecting Board's holding that exercise of professional judgment does not constitute independent judgment within the meaning of Sec. 2(11)); *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994) (rejecting the Board's holding that professional employees exercising professional judgment do not act "in the interest of the employer" within the meaning of Sec. 2(11)). See generally *Buchanan Marine*, above, slip op. at 3-5 (Member Miscimarra, dissenting). I believe substantial issues warrant review in this case based on the Regional Director's failure to give appropriate consideration to this policy in determining whether the faculty members at issue here were managerial employees. Accordingly, I respectfully dissent.

Dated, Washington, D.C. December 30, 2016

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Philip A. Miscimarra Member

#### NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

#### DECISION AND DIRECTION OF ELECTIONS

Petitioner Service Employees International Union, Local 721 (Petitioner) filed two petitions under Section 9(c) of the National Labor Relations Act (the Act), seeking to represent employees in the following units:

31-RC-164864

Included: All full-time and part-time non-tenure track faculty who are employed by the University of Southern

California, including those who also hold a position as a Program Director or Coordinator, and who teach at least one credit-earning class, section, lesson, or lab within the academic unit known as the USC Dana and David Dornsife College of Letters, Arts and Sciences at the Employer's instructional facilities at the University Park Campus.

Excluded: All tenure or tenure-track faculty; all visiting faculty; all faculty teaching at an academic unit other than the USC Dana and David Dornsife College of Letters, Arts and Sciences; all faculty regularly employed by the Employer at any location other than the University Park Campus; all faculty teaching online courses exclusively (regardless of location); all emeritus faculty; all registrars and librarians; all Athletic Department coaches; all graduate students; all post-doctoral scholars; all lab assistants, graduate assistants, clinical fellows, teaching assistants, and research assistants; all mentors who do not have teaching responsibilities; all department chairs, regardless of their faculty status; the President of the University; the Provost; all Associate Provosts, Vice Provosts, and Vice Presidents; all Deans, Vice Deans, Associate Deans and Assistant Deans, regardless of their faculty status; all non-faculty employees; all volunteers; all other represented employees; and all managers, supervisors, and guards as defined in the Act.

31-RC-164868:

Included: All full-time and part-time non-tenure track faculty who are employed by the University of Southern California and who teach at least one credit-earning class, section, lesson, or lab within the academic unit known as the USC Roski School of Art and Design at the Employer's instructional facilities at the University Park Campus or at the Graduate Fine Arts Building, located at 3001 South Flower Street, Los Angeles, California 90007.

Excluded: All tenured or tenure-track faculty; all faculty whose primary teaching responsibilities are within an academic unit other than the USC Roski School of Art and Design; all faculty whose primary area of practice and/or scholarship is outside the following areas: ceramics, critical studies, design, intermedia, painting and drawing, photography, printmaking, or sculpture; all faculty regularly employed by the Employer at any location other than the University Park Campus or the Graduate Fine Arts Building; all faculty teaching online courses exclusively (regardless of location); all emeritus faculty; all registrars and librarians; all Athletic Department coaches; all graduate students; all post-doctoral scholars; all lab assistants, graduate assistants, clinical fellows, teaching assistants, and research assistants; all mentors who do not have teaching responsibilities; all department chairs, regardless of their faculty status; all administrators, including those who have teaching responsibilities; the President of the University; the Provost; all Associate Provosts, Vice Provosts, and Vice Presidents; all Deans, Associate Deans and Assistant Deans, regardless of their faculty status; all non-faculty employees;

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any given modification because it's often the case that a number of people will comment on a proposal, and I enjoy seeing how other professors organized their materials, design their classes" (Tr. 194).

all volunteers; all other represented employees; and all managers, supervisors, and guards and defined in the Act.

Pursuant to Section 102.82 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, I ordered Case 31–RC–164864 and 31–RC–164868 be consolidated<sup>1</sup> and a hearing be conducted. A hearing was held before a hearing officer of the National Labor Relations Board. In its timely filed Statements of Position and at the hearing, the Employer, University of Southern California, raised the following issues:

1. Employees in the petitioned-for bargaining units in Case 31–RC–164864 and 31–RC–164868 are managerial employees and/or supervisors under Section 2(11) of the Act.
2. *Pacific Lutheran University*, 361 NLRB No. 157 (2014) is contrary to the law established in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), and the proposed units are comprised entirely of faculty who are managerial under *Yeshiva*.<sup>2</sup>
3. The Board’s new election rules violate the Act, are impermissibly arbitrary, and deny employers free speech and due process, both on their face and as applied to the Employer.<sup>3</sup>

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. As explained below, based on the record, the parties’ posthearing briefs,<sup>4</sup> and relevant Board law, I find that the petitioned-for bargaining unit employees in Case 31–RC–164864 and in Case 31–RC–164868 are not managerial employees, and are not supervisors-within the meaning of Section 2(11) of the Act.

#### I. THE PARTIES’ POSITIONS

##### A. Employer’s Position

The Employer submits that the nontenure track faculty at the University of Southern California’s Dornsife College and

<sup>1</sup> The Petitioner also filed a petition in Case 31–RC–164871, which also was consolidated with the instant cases for hearing. During the course of the hearing, the parties reached a stipulated election agreement with respect to Case 31–RC–164871, and I granted the parties’ joint motion to sever that case from the proceedings.

<sup>2</sup> Pursuant to Sec. 102.66(c) of the Board’s Rules and Regulations, the hearing officer required the Employer to present an offer of proof on this issue. After considering the Employer’s offer of proof, I declined to permit litigation at the hearing of the issue of whether *Pacific Lutheran* was wrongly decided.

<sup>3</sup> After considering the Employer’s offer of proof at the hearing, I declined to permit litigation at the hearing of this issue because the Board has already considered and rejected such arguments concerning the facial validity of the amendments to its representation case procedures in adopting the final rule, and the issue was again considered and decided in *Pulau Corp.*, 363 NLRB No. 8 (2015). Furthermore, the Employer failed to establish in its offer of proof how its due process and/or free speech rights were violated in the specific application of the Rules to the Employer.

<sup>4</sup> Although I exercised my discretion to permit the filing of posthearing briefs, I denied the Employer’s request to file reply briefs.

Roski School are all managerial employees under *NLRB v. Yeshiva University*, and under the Board’s current analysis under *Yeshiva* as set forth in *Pacific Lutheran University*. The Employer argues that its history of shared faculty governance is evidenced by widespread faculty participation in various committees, many of which handle matters that go to the heart of the areas of faculty decision making identified in *Pacific Lutheran*. The Employer further contends that the record evidence shows that by participating in these committees, the USC faculty exercise effective control over central policies of the University, such that they are aligned with management. The Employer distinguishes between its nontenure track faculty and the contingent faculty at issue in *Pacific Lutheran*, arguing that the employment relationship at USC supports the nontenure track faculty’s role in shared governance. The Employer notes that many of the nontenure track faculty have job security in the form of 1 year or multi-year appointments. The Employer argues that in some respects, nontenure track faculty at USC actually have more job security than their tenure-track counterparts who are probationary and will not receive tenure unless they are extraordinary. The Employer also notes that all nontenure track faculty-including part-time faculty who have at least a 50 percent appointment-are eligible for most of the same benefits as are offered to tenured and tenure-track faculty.

Finally, the Employer argues that all faculty at the Dornsife College and Roski School, including those who do not directly serve on committees and those who are part-time, are managerial employees. The Employer asserts that it does not matter whether nontenure track faculty, nor any other subcategory of faculty, constitute a majority on USC’s governance committees. The Employer argues that the Board’s analysis in *Pacific Lutheran* suggests that it is sufficient to base a finding of managerial status for nontenure track faculty on the fact that faculty members in general have majority control of such committees. Furthermore, the Employer reasons, the fact that committee compositions change on a yearly basis suggests that it would be illogical to require that any one category of faculty, e.g. nontenure track, or part-time faculty, constitute a majority in order for that category to be found managerial.

Although the Employer did not raise this issue in its brief, it contended at the hearing that the petitioned-for employees are also, or alternatively, supervisory employees under Section 2(11) of the Act.

##### B. Petitioner’s Position

The Petitioner contends that the Employer has failed to meet its burden to establish that the employees in the petitioned-for units should be excluded as managerial employees. The Petitioner argues that the Employer has failed to establish that the petitioned-for employees exercise actual control over decision-making in the primary areas identified in *Pacific Lutheran*, namely academic programs, enrollment management, and finances. The Petitioner characterizes much of the evidence introduced by the Employer on this subject as conclusory and self-serving, and argues that it is not sufficient to carry the Employer’s burden. The Petitioner

further argues that its own witnesses' testimony illustrates that nontenure track faculty in the Dornsife College and Roski School have little to no input into those primary areas and in some cases faculty input is outright disregarded by the administration. Similarly, the Petitioner argues that nontenure track employees do not exercise actual control in the secondary areas of decision-making identified by the Board in *Pacific Lutheran*. Finally, the Petitioner analogizes these cases to cases involving employee-shareholders, and concludes that nontenure track faculty lack sufficient collective power to influence management policy. Specifically, Petitioner contends that nontenure track faculty cannot be managerial employees because they do not constitute a majority of any of the shared governance committees.

## II. FACTS

### A. Overview

University of Southern California (USC) is a private, not-for-profit university in Los Angeles, California. USC is governed by a self-selected board of trustees. The board of trustees elects and delegates academic powers to the University's president. Reporting directly to the president are approximately six vice presidents of various subject areas such as finance, administration, and academic affairs, as well as the provost, who is the chief academic officer of the University. There are several vice provosts who operate within of the provost's office and who are delegated by the provost to act on his or her behalf on certain issues.

The University is divided into several schools, each offering degree programs and courses. The two schools most relevant to this matter are the Dornsife College of Letters, Arts and Sciences and the Roski School of Art and Design. Dornsife College, essentially a liberal arts school, is the largest school at USC and offers a wide range of undergraduate and graduate degrees. The Roski School is an art school that offers undergraduate and graduate degrees in areas such as fine arts and critical studies. Each school is further subdivided into departments and/or programs. Both Dornsife and Roski are headed by a dean, as are the other schools of the University. Deans are appointed by the University president and report to the provost. Under each school's dean are additional administrative positions, such as vice deans, associate deans, assistant deans, and department chairs. Many of the individuals in such positions, and indeed in higher positions such as dean, vice provost and provost, also teach or conduct research within the various schools and departments of USC and consider themselves faculty as well as administration. However, it should be noted that the petitioned-for units specifically exclude, "all Associate Provosts, Vice Provosts, and Vice Presidents; all Deans, Vice Deans, Associate Deans and Assistant Deans, regardless of their faculty status."

### B. USC Faculty

University faculty are typically appointed to a particular school within USC, although some have joint appointments and may teach and/or conduct research in more than one school. Faculty are classified as tenured, tenure-track, or nontenure track. Tenured faculty are those who have

achieved tenure, meaning they can only be removed or demoted from their faculty appointment for cause. They are essentially guaranteed employment until retirement. Tenure-track faculty are those who are being considered for tenure. The tenure track is seven years long, and during that time, the faculty are probationary unless they are offered tenure. At any time while on the tenure track, a faculty member can be non-reappointed, meaning that they can be dismissed from their tenure-track appointment. If a tenure-track faculty member has not achieved tenure by the 6th year, they will receive a terminal year appointment, which means they will be dismissed after the 7th year of their appointment. Finally, and most relevant here, nontenure track faculty<sup>5</sup> are those full-time and part-time faculty who have short-term appointments and are not being considered for tenure. Of approximately 6,600 faculty at USC, approximately 5000 are nontenure track faculty. Of those nontenure track faculty, a little over half are part-time faculty.<sup>6</sup>

The lengths of nontenure track faculty appointments vary. Some appointments are for a single semester or single academic year. Other nontenure track faculty receive 3, 5, or even 10-year appointments. There is evidence that some of these appointment contracts are "evergreen" or continuing contracts, meaning that they may renew after a certain length of time, or they will renew absent some specific action being taken. About 60 percent of full-time nontenure track faculty in the Dornsife College and Roski School have 3- to 5-year contracts; the rest have 1-year contracts. Most part-time nontenure track faculty in those schools have semester-long appointments. The Petitioner presented witnesses who testified that they often learn that they have been reappointed for the following semester only a matter of weeks or months before the semester begins.

In terms of benefits, full-time nontenure track faculty at USC receive most of the same benefits that tenured and tenure-track faculty receive. The notable exception appears to be tuition assistance. Part-time, nontenure track faculty receive benefits only if they work at least a 50 percent full-time equivalent. In terms of professional development of nontenure track faculty, there is little to no evidence that USC provides nontenure track faculty with support for their development, research, or art. USC does not provide nontenure track faculty with support for travel to professional meetings and conferences, or for their publishing,

<sup>5</sup> The petition in Case 31-RC-164864 seeks to include all nontenure track faculty, including those in the position of Program Director or Coordinator. The record is not clear as to who currently fills these positions or what they do. As the parties did not distinguish between Program Directors and Coordinators and the rest of the nontenure track faculty in Dornsife College, and as there was no specific evidence presented with regard to their managerial and/or supervisory status, the term "non-tenure track faculty" as used in this decision includes Program Directors and Coordinators in Dornsife College.

<sup>6</sup> The record does not reveal what percentage of faculty in Dornsife College and Roski School are tenured or tenure-track versus nontenure track faculty.

research, or exhibitions. Nontenure track faculty in both Dornsife and Roski do not receive regular performance evaluations, other than end-of-term student evaluations. In fact, witnesses testified that administrators in their departments or schools have never met with them to discuss expectations about their teaching, their scholarship or artistic work, or their service to the University.

### *C. Faculty Governance*

#### 1. Faculty assembly

At the University level and within each school, there are dozens of committees comprised in whole or in part of faculty, which are part of USC's system of shared governance. At the broadest level, the Faculty Assembly consists of all full-time faculty. The Faculty Assembly usually acts through representative bodies, such as the Academic Senate and Faculty Councils, but may convene in a general meeting or act through referenda. The Faculty Handbook states that the Faculty Assembly "is the ultimate body for determining faculty positions on academic and University issues."

#### 2. Academic senate

As described in its Constitution and in the Faculty Handbook, the Academic Senate "is the representative body of faculty at large for university-wide issues." Its bylaws, as quoted in the Faculty Handbook, state that the Academic Senate is "from time to time elected or designated by the faculty," and possesses the power "to make studies, reports, and recommendations to the president of the University in any and all matters pertinent to the well-being of the faculty." The Academic Senate includes an executive board comprised of the president of the faculty, the academic vice president, the administrative vice president, the secretary general, the immediate past president, and four at-large positions. The terms for members of the senate executive board range from 1 year for the members at-large, 2 years for the secretary and administrative vice president, and 3 years for faculty in the other positions, who rotate from academic vice president to president elect, to past president in a 3-year cycle.

The voting members of the Academic Senate are the president of each school's faculty council, additional delegates from the faculty councils, the executive board, and the members-at-large of the executive board. There are approximately 43 voting members of the academic senate, about 19 of whom the Employer identified as being nontenure track faculty. Five of the nine members of the current senate executive board, including the president of the faculty, are identified as nontenure track faculty. The Academic Senate includes three nontenure track professors from Dornsife College and one nontenure track professor from the Roski School.

Some of the primary functions of the Academic Senate are to appoint faculty to university-wide committees; study, debate, and adopt resolutions with regard to issues affecting faculty; and generally serve as a liaison between the faculty and the University. Additionally, the Academic Senate,

through its handbook committee,<sup>7</sup> proposes amendments to the faculty handbook. Those proposals then go to the president of the University for approval. The record indicates that the President has always approved the Academic Senate's handbook proposals, except in one instance where the President sent the proposal back for rewording before approving it. The Faculty Handbook, however, states:

To be sure, any amendments that are endorsed by the Academic Senate and approved by the President will be incorporated into the Faculty Handbook. However, the University Bylaws make it clear that the Academic Senate is strictly advisory with respect to the President. Thus, the policy of the Board of Trustees has been and continues to be that the President bears the final authority and responsibility for amending the Faculty Handbook.

Moreover, the handbook goes on to state that where the language of the handbook conflicts with the University bylaws or the policies of the board of trustees, the latter two will prevail.

Some of the revisions to the 2015 Faculty Handbook, at least some of which would have originated in the Academic Senate or other faculty committee, include: a new option for nontenure track appointments to include a roll-over provision; a new mandate to develop guidelines for the review of nontenure track faculty, including approval of the principle that teaching should be evaluated through methods other than student surveys; a provision for sick leave for all faculty, including part-time faculty, consistent with California State Law; a new affirmative consent standard for charges of sexual assault on campus; and changes to the research policy consistent with laws on export-controlled or classified data.

#### 3. Senate and university committees

There are dozens of committees at the University level, some of which are Academic Senate subcommittees. These committees conduct studies and make reports to the Academic Senate or to the provost or one of the vice provosts, and some also "take action." Almost all of these committees are comprised of faculty only, although it is unclear whether that includes faculty who have administrative appointments, such as deans or vice provosts. The University uses what is at least nominally a "self-nomination" process for filling these committees. Through this process, an email jointly issues every spring semester from the senate president and the provost, inviting all faculty members to nominate themselves to serve on any university-wide committee. Additionally, the Faculty Council of each school is asked to make additional nominations or to comment on the nominations. The list of nominations goes to the Academic Senate executive board, which then identifies "suitable faculty for each committee." If the executive board determines there are not

<sup>7</sup> The record does not indicate how many members comprise the handbook committee, but at least four of them are nontenure track faculty, two of whom are from Dornsife College.



enough suitable candidates, it will suggest candidates or “call broadly for people to make suggestions for further candidates.” The record is not developed as to how the Senate executive board determines the suitability of each candidate or what criteria candidates must meet for particular committee appointments. There is some evidence that individual faculty members have been sought out to work on certain committees and that others have been appointed to committees without volunteering. Ultimately, the final determination about which faculty will serve on a particular committee is made by the senate president, the vice provost, or the university president, depending on the committee.

The most significant of the senate or university-wide committees are discussed below.

#### University Committee on Curriculum

The University Committee on Curriculum (UCOC) is responsible for approving, modifying or disapproving every credit-earning course in the University, every proposed new or modified program consisting of those courses, and every major or minor or new degree offered by the University, with the exception of the MD program. The UCOC is organized into five subcommittees that are divided by discipline, e.g., social sciences, humanities, etc. The majority of the work of the UCOC is done at the subcommittee level. The UCOC Curriculum Handbook states, “UCOC Minutes and any related documents are sent from UCOC to the Provost (or his, or her, designee). All decisions are considered recommendations to the Provost, and are not official until approved via email by the Provost.” When the UCOC’s minutes come to the vice provost, she either accepts the minutes or goes back to the committee with questions. There is record testimony that the vice provost does not do any independent investigation of the committee’s recommendations, and once she accepts them, they go into the USC course catalog.

The record includes two recent examples of the UCOC’s work. In the first, UCOC considered the Price School of Public Policy’s proposal for a new global master’s degree in public policy, which is a joint degree with another university in Asia. There is testimony that UCOC and the Price School would have worked back and forth to reach an agreement on the degree program, which is now being offered. Similarly, UCOC recently approved a new nursing program in the School of Social Work, which has been accepted and has gone into the catalog.

A part-time, nontenure track professor in the Dornsife College, who is currently appointed to the UCOC, testified that her experience with UCOC is that the committee members largely review proposals for “technical and clerical” matters, such as assuring that the prerequisites for a course match the specifications in the curriculum handbook, and making sure the number of credits for a course correspond with the number of contact hours between professors and students. She testified that the three assignments she has been given on the committee—reviewing a graduate-level political science research methods course, reviewing a change to a certificate offered by the law school, and review-

ing a change to a master’s program in the business school—have each taken about 45 minutes of her time. Her understanding is that once she approves something she has been asked to look at, she submits it to her subcommittee chair, who then sends it to “the administration for their final approval.”

There are currently about nineteen members in the UCOC, eight of whom the Employer identified as nontenure track faculty. Three of those are from Dornsife College; none are from Roski School. There is only one part-time nontenure track faculty member on the committee.

#### University Committee on Academic Review

The University Committee on Academic Review (UCAR) conducts in-depth studies of academic programs within the University on a prescheduled multiyear cycle. When a particular program comes up for review, UCAR creates a task force comprised of one USC faculty member as well as professors from peer institutions who work in the relevant field of study. The UCAR task force obtains a large, detailed document from the program being reviewed and spends two days interviewing faculty, administrators, and students in the program. After deliberating over its findings, it makes a report to UCAR, which further deliberates and formulates recommended actions that should be taken to improve the program academically, with no regard given to financial considerations. These recommendations go to the provost’s office, which then interacts with the subject program’s school to discuss how best to implement the recommendations.

Vice Provost Martin Levine provided an example of UCAR recommending that the law school offer an advanced LLM degree to foreign lawyers who wanted advanced training in American law. After the provost brought the suggestion to the law school, the school created a curriculum proposal and course proposals that went to the University Committee on Curriculum, which would have then considered the proposals pursuant to its normal procedures, described above. A Roski School tenured professor, who also had experience with UCAR, testified that after the UCAR recommended changes to the Master of Fine Arts (MFA) program, the dean of the Roski School ultimately rejected proposals made by the faculty and implemented other changes over the faculty’s objections. It is not clear whether the Dean rejected recommendations of the Roski School Faculty Council, the UCAR, a Roski School curriculum committee, or some combination thereof. It is also not clear exactly when this occurred, but it seems to have been around 2013 or 2014, based on the witness’s testimony. Although the Employer argues that minutes from the Roski curriculum committee indicate that witness who testified had himself proposed the changes that the Dean ultimately adopted, the witness testified that subsequently, the Dean refused to act on the changes as recommended by the faculty. Instead, the new MFA curriculum was developed and written by an administrator and a staff member, with no faculty input.

UCAR is comprised of about seventeen voting members, all of whom are faculty, and two of whom are nontenure track faculty. One of the nontenure track faculty members is from

Dornsife College; none are currently from Roski School. None of the members of UCAR are part-time faculty.

#### University Committee on Finance and Enrollment

The University Committee on Finance and Enrollment (COFE) was created in April 2015. The committee was formed, in part, because Provost Michael Quick read the Board's *Pacific Lutheran University* decision and decided that it was important to have faculty involvement in the areas of finances and enrollment, which had previously been under the sole purview of the Board of Trustees. In the memo issued from Provost Quick to Academic Senate President John Sylvester, which described the formation of the committee, Quick wrote,

The committee will play a crucial role in shaping the central policies of the university as a whole about university-level finances (net tuition, income and expenditure) and university-level enrollment management (size, scope and make-up of the university's student body. While, of course, the final decisions on such matters are made by the Board of Trustees or the President, the committee's recommendations will be at least as effective as those of deans, on analogy with the faculty's role in the tenure process leading to a Provost's decision.

The COFE has considered and made recommendations on multiple issues since its recent inception. One such issue was how much money the University should withdraw from its endowment for the year. The committee members requested the University's financial information, studied and debated it, and ultimately decided on a recommendation that was made to the provost's office. The provost sent the recommendation on to the board of trustees for approval, and it was approved. The committee has also made a recommendation on the tuition price for the upcoming year. This recommendation was also accepted by the provost, and approved by the Board of Trustees. The COFE also considered whether additional housing made available by the construction of a new residential complex should be used to increase the size of the student body by admitting more students per year, or be used to provide the existing student body with a more residential college experience, i.e. allow more students to live on campus for a longer period of time. The committee recommended to the provost that the new facilities should not be used to increase enrollment. The provost accepted that recommendation. It is not clear if the recommendation then went to the Board of Trustees or University President for further consideration. In another instance, the COFE considered whether undergraduate enrollment decisions should focus on standardized test scores that would bring more students in to the business and engineering schools, rather than on a "holistic" approach that promoted diversity across departments and schools. The committee recommended there not be additional emphasis placed on test scores, and that recommendation was also accepted by the provost. In this same vein, the committee recommended that the University develop a master plan with regard to graduate student enrollment. This did not involve a specific plan of action, but simply recommended that the

administration and the faculty work together to create such a plan of action. The provost approved this recommendation. Finally, the COFE recommended implementation of a pilot program to broaden the need-based financial aid program, which would affect net tuition. In that case, the provost wrote back to the committee explaining that he would need to send that recommendation to the president. Ultimately, the president accepted the recommendation for the pilot program. In all of these examples, the record is not developed as to the actions taken by the provost, board of trustees, or the president in response to these recommendations. In other words, although they were almost all ultimately approved, there is no evidence as to how much independent investigation or consideration the recommendations were given, or whether they were revised or modified before being adopted. Moreover, I note that all of these recommendations received approval within the last 4 months, with the recommendations on the endowment, the tuition amount, and the financial aid pilot program being approved on about December 2, 2015, less than a week before the hearing in this matter opened.

COPE consists of ten voting faculty members, four of whom are nontenure track faculty; one of those nontenure track faculty is a part-time professor from the Roski School. Faculty appointed to COPE are asked to serve three-year terms. There are at least three administrators who sit on the committee in an ex-officio capacity: the president of finance, the vice president of admissions, and a vice provost.

#### Committee on Teaching and Academic Programs

The committee on teaching and academic programs (CTAP) is tasked with delving into in-depth studies of issues that affect the University at large. For example, for the current academic year, CTAP is focusing on the subject of academic integrity and what kinds of guidelines and policies the University needs. In the previous year, the committee produced a report on residential colleges and how to incorporate the undergraduate residential college experience into the existing resources. The provost liked their findings and created another committee, the University Committee for residential design, to look into the issue further.

CTAP has 12 members, 7 of whom are nontenure track faculty, three of whom are part time. Two of the nontenure track faculty on CTAP are from Dornsife College and one is from Roski School.

#### Research Committee

Each year, the Research Committee studies specific topics that have been identified by the Academic Senate or the provost as being of interest to the University as a research institution. In years past, the committee has looked into the University's mentoring practices and computing and software needs. With regard to computing and software, the committee identified common software platforms that were used across the University, for which the University could purchase site licenses and give the software to faculty, staff, and students for free. As a result of the Research Committee's recommendation, USC purchased and supplied Microsoft Word. However, the majority of the committee's recommendations on software and computing are pending before the

executive board of the Academic Senate, where they will either be voted on by the Senate or passed to the administration. Decisions that are voted on favorably by the Senate are passed up to the provost, who typically accepts the recommendations. This year, the committee is investigating options for high performance computing at USC and is meeting with the University chief information officer to ensure he understands the faculty's position on that subject.

It is unclear how large the research committee is, but it is estimated in the record as between 12 and 20 faculty members, some of whom may also be administrators or ex officio members. There are seven nontenure track faculty on the committee, one of whom is from Dornsife College. The chair of the committee is also a nontenure track faculty. None of the members of the Research Committee are part-time faculty.

#### University Committee on Academic Policies and Procedures

The University Committee on Academic Policies and Procedures (UCAPP) reviews and revises the University's academic rules and policies, such as the grading policy. The recommendations of the committee go to the vice provost of faculty and academic affairs. In the 6 months that she has been in that position, the current vice provost has always adopted the recommendations of UCAPP and she believes that her predecessor did the same. UCAPP also adjudicates petitions, which are filed by students when they wish to do something that is contrary to the academic catalog.

UCAPP consists of faculty, staff and students, but faculty constitute the majority of the voting members. Although the record reveals that seven of the UCAPP members are nontenure track faculty, the record does not indicate how many people serve on the committee. One of the UCAPP members is a part-time faculty from Dornsife College.

#### University Committee on Appointments, Promotions and Tenure

The University Committee on Appointments, Promotions and Tenure (UCAPT) reviews and makes recommendations on grants of tenure, continuing appointment, clinical scholar or other titles, and promotions—for tenure-track faculty. Although UCAPT includes nontenure track faculty, they are not involved in any decisions involving tenure. However, if the decision involves a nontenure matter, nontenure track faculty must take part in the deliberations and decision-making process. An example of this would be a nontenure track professor who was being considered for appointment to "clinical scholar or equivalent," which may mean that the professor will get a five-year "evergreen" contract. In such a case, the faculty in that professor's department would review a dossier of the professor's academic achievements and qualifications and vote on whether to recommend them as clinical scholar. The issue then goes before the dean of the department. If neither the dean nor the department faculty vote to promote the candidate, the candidate does not receive the appointment as clinical scholar. If either the dean or faculty recommend the appointment, the issue comes before UCAPT, for essentially the same deliberations at the University level. Once UCAPT makes its decision, it forwards its recommendation,

along with the candidate's dossier, to the provost. If both the department faculty and UCAPT recommend the appointment, the Provost will approve the candidate for appointment to clinical scholar. If the two bodies do not agree, the Provost will review the dossier his or herself, and decide which recommendation to follow. The UCAPT manual states that the Provost gives careful consideration to all tenure and promotion cases and UCAPT recommendations, but that "the final decision is made only by the provost on behalf of the president." This process is essentially identical to the process of granting tenure, except that in that case, no nontenure faculty would be involved in UCAPT's decision making.

UCAPT consists of about twenty-five faculty members. Seven of those members are identified as nontenure track faculty, though none of them are from Dornsife College or Roski School. There are no part-time faculty members currently serving on UCAPT. The members of the committee are appointed annually by the university president, and they typically serve 2- to 4-year terms.

#### Committee on Nontenure Track Promotions

The committee on nontenure Track Promotions is comprised of about 14 nontenure track faculty members, none of whom are part-time. About three of the members of the committee are from Dornsife College, including the committee chair; none are from Roski School. The record testimony describes this committee as paralleling UCAPT on the nontenured track. However, the committee on nontenure track promotions would only consider a case if a dean ever overruled or vetoed a promotion that had been recommended by the school's faculty committees. There is no evidence that this has actually occurred. There is also testimony that this committee "can make recommendations about the policies on nontenure track promotions." However, no evidence was presented that the committee has ever actually made such a recommendation.

#### Committee on Tenure and Privileges Appeals

The committee on tenure and privileges appeals hears and decides faculty grievances. For example, this committee conducts due process hearings where there has been a dismissal of a faculty member for cause. The committee makes a decision on the dismissal and makes a recommendation to the President. Although the committee has the word "tenure" in its title, it nevertheless handles matters pertaining to nontenure track faculty as well. If the grievance involves a nontenure track faculty member, the three-person panel chosen from the committee must include at least one nontenure track member. Vice Provost Levine testified that he had never heard of a case in which the President did not follow the committee's recommendation.

The Committee on Tenure and Privileges Appeals is comprised of about forty members, only eight of whom are nontenure track. Of those, only three are from Dornsife College, and none are from Rosh School. There are no part-time faculty members on the committee.

#### Committee on Nontenure Track Faculty Affairs

The Committee on Nontenure Track Faculty Affairs is an Academic Senate committee that deals with “anything whatsoever having to do with the nontenure track faculty or terms and conditions of employment.” In the past, the committee has compared USC’s practices and policies with regard to nontenure track faculty to those at other peer institutions. The committee then reported to the Academic Senate about the improvements it found to be necessary. There is reference in the record to the committee being pleased with the administration’s responses to its recommendations, but the record does not describe what those recommendations or responses were.

A new subcommittee of the Nontenure Track Faculty Affairs Committee, called the Part-Time Faculty Subcommittee, was created in the summer of 2015 and convened for the first time during the current semester. So far, the subcommittee has mostly engaged in discussions, although it has made several recommendations, which are currently pending before the Academic Senate. Some of the recommendations made by the subcommittee involve including part-time faculty in the Faculty Assembly and as voting members of University committees, paying part-time faculty for their hours spent on faculty governance service, and trying to move as many part-time faculty members to full-time status as possible.

The committee on nontenure track faculty affairs consists entirely of nontenure track faculty, except for possibly one tenured member. The committee includes about 25 members, 4 of whom are from the Dornsife College and one of whom is from Roski. Additionally, there are approximately 20 members of the part-time subcommittee, all of whom are part time. Two of those members are from Dornsife; none are from Roski School.

#### Committee on Deadlines and Leaves

The committee on deadlines and leaves deals with faculty requests for extensions of deadlines for reaching tenure, as well as requests for sabbaticals and other types of leave. The members of the committee are jointly selected by the Academic Senate and the provost. The recommendations of the committee go to the provost’s office. Vice Provost Levine recalled only one time that the provost did not adhere to the committee’s recommendation. The majority of the committee are faculty members without administrative appointments, although there are some administrators on the committee. The record reveals that there are three nontenure track faculty members on the committee, none of whom are from Dornsife College or Roski School and none of whom are part-time; the record does not disclose the total number of people on the committee.

#### Strategic Planning Committee

The strategic planning committee was convened “this year” (presumably, the 2015/2016 academic year) to devise a new strategic plan for USC. There is little record evidence about what this committee does or will do, but the purpose of the committee is to address the goals of the University at a “high level,” seek input from faculty through various media and methods, and ultimately draft a strategic plan that will

go to the Board of Trustees for ratification. The previous strategic plan, dated December 7, 2011, discusses broad goals of the University in general terms, without identifying specific actions that will be taken.

The record does not indicate the overall size of the strategic planning committee. There are six nontenure track faculty on the committee, including two who are part time and two who are from Dornsife College.

#### 4. Faculty councils

As noted above, there is another level of faculty governance that interacts with those described above, and that is the faculty councils. Each school has a faculty council, and each faculty council has voting delegates in the Academic Senate. The organization, size, and purpose of the faculty councils vary from school to school. The Dornsife College faculty council’s Constitution indicates that only tenured, tenure-track, and full-time nontenure track faculty are represented by the Dornsife College faculty council, and are eligible to attend its meetings or serve as representatives on the council. There are twenty faculty members on the Dornsife College faculty council, nine of whom are nontenure track faculty. There is no evidence that any of them are part-time. There is similarly no evidence as to what the Dornsife College faculty council does, or in what way faculty can participate in the governance of USC through that council. There is no record evidence of the Dornsife faculty council making any recommendations that were adopted by the administration.

The Roski School faculty council does not appear to have any governing documents, such as a constitution or bylaws. There are currently six faculty members on the Roski School faculty council, three of whom are nontenure track faculty. The terms for the Roski School faculty council last 2 years. The record is not clear as to whether part-time faculty are eligible to serve on the Roski School faculty council or to vote on who will serve. A professor, who recently became full-time, nontenure track member of the faculty at the Roski School, testified that although she had worked as a part-time professor for 4 years, she was not invited to vote for the faculty council until she became full time. In fact, she testified that prior to becoming full time, she did not even know what the faculty council was. Similarly, another Roski School part-time, nontenure track faculty member testified that she does not know what the Roski School faculty council is, despite the fact that she has worked in the school since the spring semester of 2013.

A tenured professor from the Roski School, who served on the faculty council at its inception, and served again for the previous two academic years, testified that the role of the faculty council is advisory, to hear issues the faculty bring to the council and to make recommendations to the appropriate administrative body. He spoke about a particular instance, in late spring of 2015, in which the faculty council advised Roski School Dean Erica Muhl about proposed changes to the way teaching assistant positions—which come with full tuition and a stipend—were awarded to MFA students. The council advised the Dean that the current group of MFA students from the class of 2016 had accepted offers to attend

Roski School on the understanding that if they completed their first year successfully they would receive a teaching assistantship in the second year. The administration was planning to implement a new application procedure for such positions, which the faculty council believed could result in students leaving the program and damage to the school's reputation. Although the faculty council submitted its strong objections to the new procedure in writing to the dean, the school nevertheless implemented the change, and "the 2016 class withdrew from the university and walked away from the program en masse." For its part, the Employer did not produce any evidence of actions taken by the Roski School faculty council or examples of recommendations it had made that were implemented.

#### 5. School and departmental committees

At the school and department level, there are myriad additional committees, some of which purportedly parallel the function of the significant committees at the University level, such as the curriculum committee. However, there is little record evidence about these committees, specifically those within Dornsife College and Roski School. There is no specific evidence about actions these committees have taken or recommendations they have made. In fact, most testimony about the school or departmental committees came from the Petitioner's witnesses, who generally spoke about faculty concerns being ignored by the schools' administrators or about a lack of input.

#### *D. Supervisory Indicia*

##### 1. Hire

There is little direct evidence of nontenure track faculty being actively involved in the hiring process for other faculty or staff. Vice Provost Levine testified generally that all faculty hiring must involve faculty committees at the school level, which review applications and may interview candidates. Ultimately, however, the decision is made in the name of the dean or the dean's delegate, or in cases involving hiring part-time faculty, by the program head. Levine testified that faculty recommendations on hiring are "generally approved," but when asked for specific examples of such approval he simply explained that he had heard no complaints from faculty committees. Levine admitted that in some cases even after a faculty committee chooses a candidate, a dean may decline to hire them for budgetary reasons. The Employer did not produce any specific evidence with regard to hiring in Dornsife College or Roski School.

The Petitioner's witnesses from the Roski School testified that they do not have any involvement in hiring or interviewing. The Petitioner also presented evidence of an incident, in which a faculty hiring committee in Dornsife College recommended a candidate to the dean, and the dean chose a different candidate. A Dornsife College part-time nontenure track faculty member testified that part-time faculty have no involvement in the hiring process, but she believes that full-time faculty do through a committee that reviews the applications. She also stated that her "di-

rect supervisor" Program Director John Holland<sup>8</sup> conducts interviews, but it was not clear how she knows this. Furthermore, she testified that the ultimate decision on hiring rests with the dean.

##### 2. Transfer

There was even less evidence presented with regard to the petitioned-for nontenure track faculty's authority to transfer employees. Vice Provost Levine explained that if a faculty member wishes to leave one department, they will not be stopped. The decision about whether they will be appointed in another department is made by that department. He mentioned that departmental committees would be involved in the decision to appoint faculty from another department, but there was no specific testimony or evidence about how that works. Presumably, however, it would be similar to hiring a new faculty member. There was no direct evidence produced about the faculty's involvement in transfers in either the Dornsife College or Roski School. The Petitioner's witnesses testified that they have no such involvement in transfers.

##### 3. Suspend/discipline

Vice Provost Levine testified that if a faculty member--either tenured, tenure-track, or nontenure track--has a research grant, they may have staff under them who they may discipline. No evidence was provided as to the identities of these faculty members with research grants, or how many of them are included in the petitioned-for bargaining units. Moreover, Levine testified that the University follows a disciplinary procedure called "one-step up," in which the individual seeking to discipline someone below them must submit the request for discipline to someone above them for approval. This would typically be the dean of the school. However, Levine testified that because the University takes due process and regulatory compliance so seriously with regard to discipline, there are times where he as vice provost and the University's counsel will also be involved in the decision. He also stated that in cases where someone is seeking to issue discipline outside of the typical procedure--such as a discharge for a first offense, rather than a warning--the one-step up reviewer will not follow the request and will issue some lesser discipline.

The Petitioner's witnesses testified that they do not issue discipline or suspensions.

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<sup>8</sup> The witness's almost off-handed references to her "supervisor," Program Director John Holland, did not serve to develop the record with regard to the program director position mentioned in the bargaining unit description in Case 31-RC-164864. The record does not reflect what Holland's duties or responsibilities are, or whether he in fact hired this witness or any other employees, or exercises any of the supervisory indicia himself. Accordingly, I do not rely on the characterization of Holland as either a "Program Director" or as her "direct supervisor" as dispositive of the issue of whether the petitioned-for program directors are supervisors or managerial employees.

#### 4. Layoff/recall

Vice Provost Levine testified that USC does not lay off staff. The Petitioner's witnesses testified that they have no role in layoffs.

#### 5. Promote/reward

Vice Provost Levine testified that without distinction between tenured, tenure-track, and nontenure track, faculty "universally" conduct evaluations of staff members (i.e. non-faculty and non-student personnel), including recommendations on merit increases. Those recommendations then go to a senior business officer or human relations representative who reviews the recommendations. He testified that the review does not involve independent investigation into whether the wage increase is merited but is simply a budgetary review to determine if there is money available for the raise. There was no specific evidence presented about whether this practice is followed in Dornsife College and Roski School. Similarly, there is no evidence as to how many of the nontenure faculty members in those schools have staff who report to them.

As discussed above, the University Committee on Appointments, Promotions and Tenure, as well as the Committee on Nontenure Track Promotions and various departmental committees facilitate faculty involvement in promotions.

The Petitioner's witnesses testified that they do not promote or evaluate other faculty or staff.

#### 6. Adjust grievances

As discussed above, the committee on tenure and privileges appeals hears and makes recommendations with regard to faculty grievances.

Once again, the Petitioner's witnesses testified that they are not involved in handling other employees' grievances.

#### 7. Discharge

Vice Provost Levine testified about different ways that nontenure track faculty could be involved in the decision to discharge a faculty member. For instance, if a faculty member's contract is being terminated for some reason other than for cause, a school or departmental committee will consider that decision, and make a recommendation that goes to the dean or the dean's designee. However, if the contract is terminated because a research grant has run out, that decision would not have faculty committee involvement. If a faculty member is discharged for cause, it involves multiple levels of committees, as well as a due process hearing, which is handled by CTAP, as discussed above. Recommendations resulting from this process are sent to the president, who, according to Levine, always approves the recommendation.

The Petitioner's witnesses testified that they are not involved in discharging employees.

#### 8. Assignment and responsible direction

When asked about the extent to which the petitioned-for employees assign and direct the work of other employees, Vice Provost Levine testified that "all faculty who are supported by staff supervise that staff," and assign and prioritize the work of that staff. The record is not developed with re-

gard to which nontenure track faculty are directly supported by staff; Levine's testimony is that faculty may share staff such as secretaries. When asked for specific examples of faculty assigning work, Levine described a faculty member asking someone to make copies of documents, or asking the IT department for an audio-visual set-up. He did not provide specific examples involving Roski School or Dornsife College nontenure track faculty.

Some of the Petitioner's witnesses testified that they do not assign work to other employees. One testified that when she needs something done she will ask the administrative coordinator, who then assigns a faculty assistant to the task.

#### 9. Secondary indicia

There is no record evidence that the nontenure track faculty in the petitioned-for bargaining units regularly attend supervisory meetings, receive any benefits not granted to other employees, are specifically designated as supervisors or other special titles, or are regarded as supervisors by other employees, faculty or administrators. The petitioned-for faculty represent a large proportion, if not a majority, of the faculty in the Dornsife College and Roski School. The record does not include the ratio of the petitioned-for employees to all University employees in the schools, including staff.

### III. DISCUSSION

#### A. Managerial Status of the Petitioned-for Employees

##### 1. The *Pacific Lutheran* framework

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court found the faculty of Yeshiva University to be managerial employees, excluding them from the coverage of the Act. In coming to its conclusion, the Court noted that a university is in the business of education, and thus, managerial employees in such a setting "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *Id.* at 682, citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). The Court explained that managerial employees are those who are "aligned with management" such that they "represent management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *Id.* at 683 (citations omitted).

Over the next three and a half decades, the Board issued dozens of decisions applying *Yeshiva*, examining "the many different combinations and permutations of influence that render each academic body unique." *University of Dubuque*, 289 NLRB 349, 353 (1988). Recently, the Board reevaluated and refined the analytical framework it applies to cases involving the managerial status of university faculty. In *Pacific Lutheran University*, 361 NLRB No. 157 (2014), the Board identified five areas of faculty decision-making that it will consider in deciding such cases. Three are primary and should be given more weight as they affect the university as a whole. *Id.*, slip op. at 17. These are: academic programs, "such as the university's curricular, research, major, minor, and certificate offerings and the requirements to complete successfully those offerings;" enrollment management, which includes "the size, scope, and make-up of the universi-

ty's student body;" and finances, or "the power to control or make effective recommendations regarding financial decisions-both income and expenditure[.]" Ibid. (citation omitted). There are two secondary areas of decision-making, which although less important, should still be considered. They are: academic policy, "such as teaching/research methods, grading policy, academic integrity policy, syllabus policy, research policy, and course content policy;" and personnel policy and decisions, "including hiring, promotion, tenure, leave, and dismissal." Id., slip op. at 17-18.

The party asserting managerial status has the burden of proof and must demonstrate not only that the faculty makes decisions in these policy areas, but that they actually exercise control or make effective recommendations in those areas. Ibid. (citations omitted). To that end, the *Pacific Lutheran* Board held that to carry its burden, "the party asserting managerial status must prove actual-rather than mere paper-authority." Ibid. The Board explained the need for "specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decision-making area, and the subsequent review of those decisions or recommendations, if any, by the university administration, prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed." Ibid. The Board also clarified that for faculty recommendations to be "effective," the administration must "almost always" adopt the recommendations, and do so "routinely" without independent review. Id. at 19. Finally, the Board emphasized the importance of evaluating faculty decision-making in the context of the structure of the university, and the employment relationship of the faculty with the university, in particular whether or not the faculty enjoy tenure. Ibid.

Applying this new framework with regard to the full-time contingent faculty (i.e. non tenured faculty hired on annual contracts) at Pacific Lutheran University, the Board found that they were not managerial employees. In examining the contingent faculty's decision-making in the primary areas of consideration, the Board found that they had limited participation in decisions affecting academic programs, in part because they were precluded at some levels from voting on such decisions, and were barred from serving on relevant committees at other levels. Id., slip op. at 24. The Board found no evidence that the contingent faculty voted on issues surrounding enrollment management or finances, and noted that while there were advisory committees that dealt with those matters, no contingent faculty sat on those committees. Ibid. The Board also found insufficient evidence that contingent faculty's influence in the secondary areas of decision-making rose to the level of actual or effective control, despite the fact that they could vote on some personnel policies that passed before the faculty assembly. Ibid.

As the Board said it would, it considered the facts of *Pacific Lutheran* in the context of the university's organization and structure, as well as the contingent faculty's position in that structure and their employment relationship. Noting that most of the university's policy in the primary areas of concern was developed at the level of divisions, schools and

departments, the Board observed that in some cases, contingent faculty were excluded from participating in committees at those levels, either by rule or by virtue of the fact that their year-long appointments were a deterrent to them serving multi-year terms on committees. Id., slip op. at 25. Moreover, the Board found that while contingent faculty were now eligible to vote on university-level committees, they had not yet done so, and "even if they did, they would be a minority on the university committee as their membership is currently structured." Ibid; see also, id., slip op. at 24, fn. 36 (the Board will not attribute committee control in decision making areas to faculty, unless it is proven that faculty exert majority control of the committee). Finally, the Board held that Pacific Lutheran University's contingent faculty had a limited voice in university governance because their employment was subject to annual review and renewal, and because many of them were not even made aware of their basic rights and responsibilities as faculty of Pacific Lutheran University.

## 2. The petitioned-for nontenure track faculty are not managerial employees

Applying the framework of *Pacific Lutheran* to the instant case,<sup>9</sup> find that the part-time and full-time nontenure track faculty in the petitioned-for units are not managerial employees.

### Academic Programs

At USC, faculty involvement in decision-making about academic programs at the University level happens primarily through the University Committee on Curriculum (UCOC) and the University Committee on Academic Review (UCAR). In the case of UCOC, the record shows that before the proposed curricula, course descriptions, and program offerings come before that body, they have actually been<sup>10</sup> formulated at the school level. The role of the UCOC subcommittees seems to be simply to verify that the proposals meet predetermined criteria, such as having a sufficient number of contact hours. UCAR, on the other hand, makes recommendations to the schools about the programs that it reviews, but the actual actions taken pursuant to those recommendations are devised and decided upon at the school level. If those actions include changes to the curriculum, the school then submits its proposals to UCOC. There is testimony that more complex matters that come before the UCOC are handled by the full committee, rather than subcommittees. However, the evidence about the actual work the committee does is vague. For instance, there is testimony that UCOC worked "back and forth" with the Price School of Public Policy on its proposal for a global master's degree in public policy. But that testimony does not indicate whether UCOC

<sup>9</sup> As described above, the Employer raised the issue of the validity of the *Pacific Lutheran* decision, arguing that it is contrary to the *Yeshiva* decision. However, as the Employer notes in its brief, *Pacific Lutheran* is the extant Board law on this issue, and I am bound to follow it.

<sup>10</sup> The processes by which curricula are formulated at the school level seem to vary from school to school. The record is not clear with respect to the process followed in Roski or the Dornsife College.

rejected certain aspects of the proposal or simply asked clarifying questions. Similarly, though there is record testimony that the vice provost does not conduct any independent investigation of UCOC's recommendations, it is not clear what kind of review is conducted. As emphasized by the Board in *Pacific Lutheran*, "specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decision-making area, and the subsequent review of those decisions or recommendations, if any, by the university administration, prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed" is necessary to establish actual control or effective recommendation sufficient to make faculty managerial employees. *Pacific Lutheran University*, slip op. at 24. Accordingly, the record evidence here is not sufficiently detailed or specific to find that these committees exercise actual control or effective recommendation over the university's academic programs.

Moreover, even if the faculty on the UCOC and UCAR could be said to actually or effectively control decision-making with regard to academic programs, I would not attribute that control to the nontenure track faculty at issue here, as they do not constitute a majority of either committee. See *id.*, slip op. at 24 fn. 36. In fact, nontenure track faculty in general do not exercise majority control of these committees, despite constituting a significant majority of the faculty at large. Nontenure track faculty from Dornsife College or Roski School are in the minority on these committees, where they are represented at all. The Employer argues that it is sufficient that committees be represented by a faculty majority, and that to require a majority of University of Southern California the members be nontenure track faculty is illogical. I disagree, particularly in a case such as this where nontenure track faculty constitute a majority of the University's faculty body.

The Board has considered this issue before. In *Cooper Union of Science & Art*, 273 NLRB 1768 (1985), a case alleging a withdrawal of recognition in violation of Section 8(a)(5) of the Act, the Board ruled that full-time faculty members who comprised the bargaining unit were not managerial employees. In making this ruling, the Board found that the bargaining unit faculty's role on administrative committees was not indicative of managerial authority, in part because *full-time* faculty constituted a minority on the committees, even though the committees were controlled by faculty majorities. *Id.* at 1775. It is also instructive to note this comment made by the *Pacific Lutheran* Board, when explaining its finding that contingent faculty did not exercise actual or effective control through university committees: "[T]he record reflects that no contingent faculty member has yet served on a university committee. *But even if they did, they would be a minority on the university committee as their membership is currently structured.*" *Pacific Lutheran University*, slip op. at 25 (emphasis added). Thus, the *Pacific Lutheran* Board implies that it would follow the line of reasoning in *Cooper Union* and look specifically at whether the petitioned-for faculty members constitute a majority on decision making bodies. Accordingly, I find that nontenure track

faculty do not have majority control of UCOC or UCAR, and therefore it would be inappropriate to confer any managerial control by those committees to the nontenure track faculty.

The record also fails to establish that nontenure track faculty in Dornsife College and Roski School have any involvement in decision-making about academic programs within their schools. To the extent that this work is done in the faculty councils, part-time nontenure track faculty in Dornsife are expressly barred from participation. Furthermore, even the full-time nontenure track faculty do not constitute a majority of the Dornsife faculty council. The same is true of the Roski School faculty council, although there the nontenure track faculty are evenly represented with other faculty. However, the only specific record evidence about the Roski faculty council's involvement in academic programs shows that the administration of that school ignored the proposals of the faculty and implemented changes to the MFA program over faculty objections. The Board has often found university administrators' unilateral actions without input from or over the objections of faculty to be indicative of a lack of faculty control. *Cooper Union*, *supra*, at 1775; *Bradford College*, 261 NLRB 565 (1982).

Thus, there is insufficient evidence that the faculty committees at the University, school, or departmental levels exercise actual or effective control over USC's academic programs. Moreover, even if there was evidence of such control, full-time and part-time nontenure track faculty do not comprise a majority on any of the relevant committees, and therefore do not possess managerial control over academic programs.

#### Enrollment Management

The record shows that within the 5 months or so prior to the hearing, the newly-created committee on finance and enrollment (COFE) made several specific recommendations about enrollment matters, all of which were approved by the University's administration. Specifically, the COFE recommended that USC maintain a "holistic" approach to undergraduate admissions rather than focusing on standardized test scores, and that the University formulate a "master plan" on graduate admissions. The committee's most concrete recommendation on enrollment was its rejection of the idea that newly constructed dormitories should result in increasing the size of entering undergraduate classes. While all of these recommendations were quickly approved by the provost, the record does not sufficiently describe the level or type of review or investigation the provost engaged in before approving the recommendations. Without such specific evidence, I cannot find that the COFE's recommendations on enrollment matters are routinely followed in such a way that they constitute effective recommendation. Furthermore, I find it noteworthy that the COFE was very recently created and has made only a handful of decisions affecting enrollment, all within the few months before the hearing in this matter. This brief history is insufficient to establish that the COFE makes recommendations on enrollment management that are routinely implemented by USC. Additionally, there is no evidence that COFE, or any other faculty body, has made effective



decisions about the specific size, scope, and make-up of the student body. Certainly, their recommendations as adopted will have an effect on those factors, but there is no evidence that the faculty is actually determining the size of the student body or the make-up of the student body.

Finally, even if the COFE can be found to exercise actual or effective control over enrollment management, here again, nontenure track faculty do not constitute a majority of the committee. Therefore, they cannot be found to possess any managerial control that the COFE might have.

#### Finances

In the area of University finances, COFE is again the main vehicle by which faculty may take part in decision-making. As with enrollment management issues, in the last few months, COFE has made multiple financial recommendations, all of which have ultimately been approved by the administration. Its proposal as to the amount of the University's endowment payout was accepted by the provost, and ultimately approved by the board of trustees, as was its proposal on next year's tuition rate. The COFE's proposal that the University begin a pilot program to expand its need-based financial aid was ultimately approved by the President. University of Southern California However, again, the record does not include specific evidence about the type of review or investigation these recommendations received prior to approval. I am not convinced by the conclusory evidence in the record that the Board of Trustees, for example, would sign off without second thought on a tuition amount or endowment payout based solely on the recommendation of a newly-formed faculty committee that had never before considered such issues. Furthermore, I again note the fact that these recommendations were all approved less than a week before the hearing in this matter. This is not a sufficient record to evidence that the faculty is aligned with management on these issues. Moreover, there is record evidence that in the Roski School, the administration made the unilateral decision to change the way teaching assistant positions were awarded-an issue that implicates financial expenditures, namely the wages paid to teaching assistants-over the protests of the Roski School faculty council. This fact also further cuts against finding that the nontenure track faculty, at least at the Roski School, are managerial employees.

Accordingly, I conclude that the Employer has not met its burden of proving that the COFE has managerial control over finances. Additionally, I find that any such control held by the COFE cannot be attributed to the petitioned-for nontenure track faculty members because nontenure track faculty do not constitute a majority of the committee.

#### Academic Policies

The faculty at USC has some involvement in decision making around academic policies, such as the academic integrity policy, the grading policy, and the research and mentoring policies. Faculty input into these areas is provided through various committees: the academic senate handbook Committee, the committee on teaching and academic programs (CTAP), the research committee, and the University Committee on Academic Policies and Procedures (UCAPP).

There was testimony that handbook amendments proposed by the handbook committee are approved by the University president 100 percent of the time. However, the record also contains a specific example in which the president sent the proposal back to the committee for revisions before approving it. There is almost no record evidence about the review of CTAP recommendations, such as the recommendation they will make this year on academic integrity. The only example of the committee's past work is a report on residential colleges, which led the provost to form yet another committee to focus on that particular subject. Similarly, although the record indicates that the research committee has studied such subjects as mentoring practices, computing and software needs of the University, and high performance computing capabilities at USC, the record describes only one concrete outcome of that work, which is the free provision of Microsoft Word to faculty and students. Testimony on UCAPP was vague as to the work that the committee does, with the exception of one example about revising the grading policy. In terms of the level of review of UCAPP's recommendations, the evidence indicates that the vice provost always adopts the recommendations, but does not state whether she conducts any independent investigation prior to doing so.

Considering these facts, although there is some evidence that faculty at USC play an active role in making decisions about academic policies, the record is too vague and undefined to conclude that the faculty's role on committees amounts to actual or effective control over this area. I note that even if some of these committees do exercise managerial control, there is record evidence of nontenure track faculty constituting a majority on only one, the Committee on Teaching and Academic Programs. Moreover, even if the petitioned-for faculty could be found to have managerial authority in the area of academic policies, such authority in a secondary area of consideration alone does not support a conclusion that the nontenure track faculty in Dornsife College and Roski School are managerial employees.

#### Personnel Policy and Decisions

There are several committees that deal with personnel matters at USC, such as the University Committee on Appointments, Promotions and Tenure (UCAPT), and the similarly functioning Committee on Nontenure Track Promotions. UCAPT primarily deals with issues involving tenure, which nontenure track faculty are prevented from handling. However, it is clear that when the issue involves a nontenure track faculty member being promoted to clinical scholar, UCAPT involves nontenure track faculty, who will decide on the appointment with the rest of the committee. It is likewise established that unless there is a disagreement between UCAPT and the candidate's school on whether to promote, the provost accepts UCAPT's recommendation. With regard to the committee on nontenure track promotions, however, there is no evidence that the committee has ever considered any cases or made any recommendations.

The committee on tenure and privileges appeals is another committee where faculty are involved in decision making about personnel decisions, in particular discharges for cause

for both tenure and nontenure track faculty. There is record testimony that the president has never failed to follow this committee's recommendations, although there was no evidence presented about the president's review of the recommendations.

Finally, with respect to the committee on nontenure track faculty affairs, and its subcommittee for part-time faculty, there is insufficient evidence to establish that they have in fact effectively controlled decision making about personnel matters. There is no specific evidence about the type of recommendations the full committee has made, or about the response from the administration, other than that the committee had been pleased by it. The newly-created Part-Time Subcommittee has made recommendations about various terms and conditions of employment of part-time faculty, but so far no action has been taken on those recommendations.

Therefore, I do not find that the Employer has met its burden to show that through these committees, the nontenure track faculty exercise actual or effective control over personnel policies and decisions. With rare exception, the evidence regarding these committees is vague or shows that the committee has not made any decisions or recommendations. Furthermore, non-tenure track faculty do not exert majority control over some of the committees, including UCAPT and the committee on tenure and privileges appeals. Finally, as noted above, without evidence that the nontenure track faculty in Dornsife College and Roski School exercise managerial authority in one of the primary areas of consideration, even if they do exercise that authority with regard to personnel policies and decisions, this would be insufficient to establish that they are managerial employees.

#### Actual Control and Effective Recommendation

In reaching my conclusion that the petitioned-for nontenure faculty members in Dornsife College and Roski School do not exercise actual control or effective recommendation in any of the primary or secondary areas of consideration, I have considered the organization of USC and the employment relationship of these faculty members. Despite the fact that nontenure track faculty constitute a majority of the faculty body, they are consistently in the minority on the dozens of faculty committees that comprise USC's shared governance system. Even more revealing is that although the majority of nontenure track faculty are part-time, part-time faculty have very little presence on those committees. In fact, the evidence shows that part-time faculty members in Dornsife College and Roski School sometimes are not even aware of the committees that are available to them. Furthermore, the committees, particularly the University and Academic Senate committees, are not filled by democratic elections, but rather by a combination of "self-nomination" and a subjective process of seeking out "suitable" candidates. Part-time faculty in Dornsife College are not only barred from serving on the school's faculty council, they are not even considered to be represented by it, per its Constitution. The University does not give nontenure track faculty feedback or guidance about their role or responsibilities, support for their other academic or artistic endeavors, or, in the case

of part-time faculty members who work less than 50 percent of full-time, benefits such as health insurance.

Furthermore, while the majority of full-time, nontenure track faculty in Dornsife College and the Roski School may have multiyear appointments, this is still materially—less than the job security of a tenured position. More importantly, part-time nontenure track faculty typically have only semester- or year-long appointments. Sometimes they do not find out they have been appointed for another semester until a few weeks before the previous semester ends. It is unclear how someone with a short-term appointment can serve on committees with year-long or multiyear terms, such as the COFE with its three-year long commitment. As the *Pacific Lutheran* Board stated, "[T]he ability of contingent faculty to control or make effective recommendations regarding university policy is inherently limited by the very nature of their employment relationship with PLU." *Pacific Lutheran*, slip op. at 25. Here too, the nontenure track faculty in Dornsife College and the Roski School are limited by their tenuous employment terms, as well as their status as nontenure track faculty.

I conclude that the Employer has failed to establish that the full-time and/or part-time nontenure track faculty at the Dornsife College and the Roski School actually or effectively exercise control over decision making pertaining to central policies of the university such that they are aligned with management. *Pacific Lutheran*, slip op. at 14. For all of the reasons discussed above, I find that the petitioned-for full-time and part-time nontenure track faculty in the Dornsife College and the Roski School are not managerial employees.

#### ORDER DENYING EMPLOYER'S MOTION TO REOPEN THE RECORD AND FOR RECONSIDERATION

On March 31, 2016, the Employer filed a motion pursuant to Section 102.65(e) of the Board's Rules and Regulations to reopen the preelection record in Case 31-RC-164864 and 31-RC-164868 to receive new evidence, and for reconsideration of my December 24, 2015 Decision and Direction of Election in light of that new evidence. Subsequently, the Petitioner filed its Opposition to the Employer's motion. The Employer argues that certain postelection testimony by Professor Kate Levin contradicts her testimony in the pre-election hearing, and that this new testimony would compel me to reach a different result with regard to the preelection matter. The Petitioner contends that the Employer's motion does not meet the standard for reopening the record or for reconsideration, and should be denied.

Section 102.65(e)(1) of the Board's Rules and Regulations states, in relevant part:

A party to a proceeding may, because of extraordinary circumstances, move after the decision or report for reconsideration, for rehearing, or to reopen the record. A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing de novo, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced,

why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing or evidence which the regional director or the Board believes should have been taken at the hearing will be taken at any further hearing.

Section 102.65(e)(2) requires that such motions be filed “promptly on discovery of the evidence sought to be adduced.”

The Employer argues that contrary to her testimony in the preelection hearing that her involvement on the university committee on curriculum (UCOC) was merely of a technical or clerical nature, Professor Levin now testifies in the post-election hearing that she enjoys having “a say in what courses are offered,” that she joined the committee to have a “window into how university curricula are shaped,” and that she views her work on the committee as “important.” The Employer also cites Professor Levin’s postelection testimony that the UCOC “makes recommendations about whether new courses or changes to existing courses should go through,” as contradicting her preelection testimony that her work on UCOC did not require her to use her judgment to make substantive decisions about courses. The Employer argues that this testimony was not known at the time of the preelection hearing, and that this new testimony necessarily requires a finding that USC’s nontenure track faculty in the relevant units exercise managerial authority, contrary to my previous decision. This, the Employer contends constitutes extraordinary circumstances such that the preelection record should be reopened and reconsidered in light of this new evidence.

I do not find that the Employer has established extraordinary circumstances exist that warrant the reopening of the record. First, I note that the Employer has not provided an explanation as to why this evidence was not adduced in the pre-election hearing. None of Professor Levin’s testimony relied upon by the Employer is directly contrary to her preelection testimony. That her specific testimony in the post-election hearing may be more favorable to the Employer’s

position on the issue of managerial authority is irrelevant. The Employer had the burden in the preelection hearing to prove the statutory exclusion. The Employer was given the opportunity to cross-examine Professor Levin about her experiences on UCOC and did so. The Employer could have questioned her further or asked the same specific questions asked of her in her post-election examination, but it did not do so when it had the opportunity. Thus, Professor Levin’s testimony does not constitute newly discovered evidence.

Even if Professor Levin’s post-election testimony did constitute new evidence, I do not find that it would require me to reach a different result on the question of these faculty members’ managerial authority. The testimony adduced from Professor Levin is unspecific as to the type of recommendations faculty make about University curricula, how they come to make those recommendations, and what happens to those recommendations once made. Furthermore, as the Employer correctly argued in the preelection hearing, Professor Levin’s subjective opinions or valuations of the work she does on UCOC are irrelevant to the question of managerial status. In other words, her enjoyment of, or the importance she places on her participation in the committee does not establish that nontenure track faculty exercise managerial decision making with regard to USC’s academic programs, as the Employer argues. This evidence is of little to no probative value and would not change the result I reached in my preelection decision.

Finally, I do not find that the Employer’s motion was filed “promptly on discovery of the evidence sought to be adduced.” Professor Levin concluded her postelection testimony on February 24, 2016. Transcripts were available to the parties by February 26, 2016. Yet, the Employer did not file its motion to reopen the record until March 31, 2016. The Employer provides no explanation for the month-long delay, and I see no basis for it. Therefore, I do not find that the motion was timely filed. Accordingly, based on all the foregoing reasons, I deny the Employer’s motion to reopen the record and for reconsideration.