

**UNIVERSITY OF SOUTHERN CALIFORNIA  
CASES 31-CA-178831 AND 31-CA-192125**

**MOTION FOR SUMMARY JUDGMENT  
LISTS OF EXHIBITS**

<b>EXHIBIT</b>	<b>DESCRIPTION</b>
1	Petition Pursuant to Section 9(c) of the Act in Case 31-RC-164868
2	Order Consolidating Cases and Rescheduling Hearing
3	Regional Director's Decision and Direction of Election
4	Tally of Ballots in Case 31-RC-164868
5	Certification of Representative in Case 31-RC-164868
6	Respondent's Request for Review of the Regional Director's Decision and Direction of Election in Case 31-RC-164868
7	Respondent's Motion to Reopen the Record and for Reconsideration
8	Regional Director's Order Denying Respondent's Motion to Reopen the Record and for Reconsideration
9	Respondent's Request for Review of the Regional Director's Order Denying Respondent's Motion to Reopen the Record and for Reconsideration
10	Board's Order Denying both Respondent's Requests for Review in Case 31-RC-164868
11	Union's Demand to Bargain Letter dated April 7, 2016
12	Union's Demand to Bargain Letter dated January 6, 2017
13	Union's Charge in Case 31-CA-178831
14	Affidavit of Service of Union's Charge in Case 31-CA-178831
15	Union's First Amended Charge in Case 31-CA-178831
16	Affidavit of Service of First Amended Charge in Case 31-CA-178831
17	Union's Second Amended Charge in Case 31-CA-178831
18	Affidavit of Service of Second Amended Charge in Case 31-CA-178831
19	Union's Charge in Case 31-CA-192125
20	Affidavit of Service of Union's Charge in Case 31-CA-192125
21	Complaint and Notice of Hearing in Cases 31-CA-178831 and 31-CA-192125
22	Affidavit of Service of Complaint
23	Respondent's Answer to Complaint

UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
**RC PETITION**

DO NOT WRITE IN THIS SPACE	
Case No. 31-RC-164868	Date Filed 11/24/2015

**INSTRUCTIONS: Unless e-Filed using the Agency's website, [www.nlr.gov](http://www.nlr.gov), submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.**

**1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

**2a. Name of Employer**  
University of Southern California

**2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)**  
3551 Trousdale Parkway, Adm 352, Los Angeles, CA 90089

**3a. Employer Representative - Name and Title**  
Carol Mauch Amir, General Counsel

**3b. Address (If same as 2b - state same)**  
3551 Trousdale Parkway, Adm 352, Los Angeles, CA 90089

**3c. Tel. No.**  
(213) 740-7922

**3d. Cell No.**

**3e. Fax No.**  
(213) 740-3249

**3f. E-Mail Address**  
cmauch@usc.edu

**4a. Type of Establishment (Factory, mine, wholesaler, etc.)**  
University

**4b. Principal product or service**  
Higher education

**5a. City and State where unit is located:**  
Los Angeles, CA

**5b. Description of Unit Involved**

**Included:** See attached.

**Excluded:** See attached.

**6a. No. of Employees in Unit:**  
46

**6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes  No**

**Check One:**  7a. Request for recognition as Bargaining Representative was made on (Date) n/a and Employer declined recognition on or about n/a (Date) (If no reply received, so state).

7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

**8a. Name of Recognized or Certified Bargaining Agent (If none, so state).**  
None

**8b. Address**

**8c. Tel No.**

**8d. Cell No.**

**8e. Fax No.**

**8f. E-Mail Address**

**8g. Affiliation, if any**

**8h. Date of Recognition or Certification**

**8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)**

**9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? \_\_\_\_\_**  
(Name of labor organization) \_\_\_\_\_, has picketed the Employer since (Month, Day, Year) \_\_\_\_\_.

**10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)**  
none

**10a. Name**

**10b. Address**

**10c. Tel. No.**

**10d. Cell No.**

**10e. Fax No.**

**10f. E-Mail Address**

**11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.**

**11a. Election Type:**  Manual  Mail  Mixed Manual/Mail

**11b. Election Date(s):**  
December 28, 2015 - January 15, 2016

**11c. Election Time(s):**  
n/a - mail ballot

**11d. Election Location(s):**  
Mail ballot

**12a. Full Name of Petitioner (including local name and number)**  
Service Employees International Union, Local 721

**12b. Address (street and number, city, state, and ZIP code)**  
1545 Wilshire Boulevard, Los Angeles, CA 90017

**12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state)**  
Service Employees International Union, CTW/CLC

**12d. Tel No.**  
(213) 280-6138

**12e. Cell No.**

**12f. Fax No.**  
(213) 401-1791

**12g. E-Mail Address**

**13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.**

**13a. Name and Title** Maria Keegan Myers, Attorney

**13b. Address (street and number, city, state, and ZIP code)**  
Rothner, Segall & Greenstone 510 South Marengo Avenue, Pasadena, CA 91101-3115

**13c. Tel No.**  
(626) 796-7555

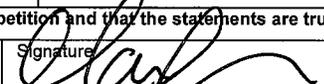
**13d. Cell No.**

**13e. Fax No.**  
(626) 577-0124

**13f. E-Mail Address**  
mmyers@rsglabor.com

**I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.**

**Name (Print)** Maria Keegan Myers

**Signature** 

**Title** Attorney

**Date** November 24, 2015

**WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)**

**PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

## **Attachment to RC Petition**

*University of Southern California and Service Employees International Union, Local 721 (Roski)*

### Box 5b. Description of Unit Involved

#### *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, Vice Deans, Associate Deans and Assistant Deans, regardless of their faculty status; all non-faculty employees; all

**Attachment to RC Petition**

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

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31

UNIVERSITY OF SOUTHERN CALIFORNIA

Employer

and

Case 31-RC-164864

SERVICE EMPLOYEES INTERNATIONAL UNION,  
LOCAL 721

Petitioner

AND

UNIVERSITY OF SOUTHERN CALIFORNIA

Employer

and

Case 31-RC-164868

SERVICE EMPLOYEES INTERNATIONAL UNION,  
LOCAL 721

Petitioner

AND

UNIVERSITY OF SOUTHERN CALIFORNIA

Employer

and

Case 31-RC-164871

SERVICE EMPLOYEES INTERNATIONAL UNION,  
LOCAL 721

Petitioner

**ORDER CONSOLIDATING CASES AND  
RESCHEDULING HEARING**

On November 24, 2015, a Notice of Representation Hearing issued with respect to Cases 31-RC-164864, 31-RC-164868, and 31-RC-164871. Under careful consideration and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary costs or delay,

**IT IS HEREBY ORDERED**, pursuant to Section 102.82 of the National Labor Relations Board Rules and Regulations, Series 8, as amended that Cases 31-RC-164864, 31-RC-164868, and 31-RC-164871 are consolidated.

**IT IS FURTHER ORDERED**, that a consolidated hearing be conducted with respect to the above-captioned matters at **9:00 a.m. on Monday, December 7, 2015** at 11500 West Olympic Boulevard, Suite 600, Los Angeles, CA 90064. The hearing will continue on consecutive days until concluded.

The Statement of Position in this matter must be filed with the Regional Director and served on the parties listed on the petitions by no later than **noon** Pacific time on **Thursday, December 3, 2015**. The Statement of Position may be e-Filed but, unlike other e-Filed documents, must be filed by noon Pacific time on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: November 30, 2015



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MORI RUBIN  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
REGION 31  
11500 W Olympic Blvd Ste 600  
Los Angeles, CA 90064-1753

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31**

**UNIVERSITY OF SOUTHERN CALIFORNIA**

**Employer**

**and**

**SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 721**

**Cases 31-RC-164864 and  
31-RC-164868**

**Petitioner**

**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; 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.

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<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.

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' post-hearing 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 non-tenure track faculty at the University of Southern California's Dornsife College and 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

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<sup>2</sup> Pursuant to Section 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 Corporation*, 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 post-hearing briefs, I denied the Employer's request to file reply briefs.

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 non-tenure track faculty and those contingent faculty at issue in *Pacific Lutheran*, arguing that the employment relationship at USC supports the non-tenure track faculty's role in shared governance. The Employer notes that many of the non-tenure track faculty have job security in the form of one-year or multi-year appointments. The Employer argues that in some respects, non-tenure 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 non-tenure track faculty—including part-time faculty who have at least a 50% 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 non-tenure 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 non-tenure 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. non-tenure 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 non-tenure 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 non-tenure 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 non-tenure track faculty lack sufficient collective power to influence management policy. Specifically, Petitioner contends that non-tenure 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 non-tenure 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 sixth year, they will receive a terminal year appointment, which means they will be dismissed after the seventh year of their appointment. Finally, and most relevant here, non-tenure track faculty<sup>6</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 5,000 are non-tenure track faculty. Of those non-tenure track faculty, a little over half are part-time faculty.<sup>7</sup>

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<sup>6</sup> The petition in case 31-RC-164864 seeks to include all non-tenure 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 non-tenure 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>7</sup> The record does not reveal what percentage of faculty in Dornsife College and Roski School are tenured or tenure-track versus non-tenure track faculty.

The lengths of non-tenure track faculty appointments vary. Some appointments are for a single semester or single academic year. Other non-tenure track faculty receive three, five, or even ten-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% of full-time non-tenure track faculty in the Dornsife College and Roski School have three- to five-year contracts; the rest have one-year contracts. Most part-time non-tenure 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 non-tenure 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, non-tenure track faculty receive benefits only if they work at least a 50% full-time equivalent. In terms of professional development of non-tenure track faculty, there is little to no evidence that USC provides non-tenure track faculty with support for their development, research, or art. USC does not provide non-tenure track faculty with support for travel to professional meetings and conferences, or for their publishing, research, or exhibitions. Non-tenure 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 By-Laws, 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 one year for the members at-large, two years for the Secretary and Administrative Vice President, and three years for faculty in the other positions, who rotate from Academic Vice President to President Elect, to Past President in a three-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 non-tenure track faculty. Five of the

nine members of the current Senate Executive Board, including the President of the Faculty, are identified as non-tenure track faculty. The Academic Senate includes three non-tenure track professors from Dornsife College and one non-tenure 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>8</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 re-wording 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 non-tenure track appointments to include a roll-over provision; a new mandate to develop guidelines for the review of non-tenure 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

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<sup>8</sup> The record does not indicate how many members comprise the handbook committee, but at least four of them are non-tenure track faculty, two of whom are from Dornsife College.

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 sub-committees. 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 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, non-tenure 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 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.”

There are currently about nineteen members in the UCOC, eight of whom the Employer identified as non-tenure track faculty. Three of those are from Dornsife College; none are from Roski School. There is only one part-time non-tenure 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 pre-scheduled multi-year 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 non-tenure track faculty. One of the non-tenure 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 four 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.

COFE consists of ten voting faculty members, four of whom are non-tenure track faculty; one of those non-tenure track faculty is a part-time professor from the Roski School. Faculty appointed to COFE 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 twelve members, seven of whom are non-tenure track faculty, three of whom are part-time. Two of the non-tenure 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 twelve and twenty faculty members, some of whom may also be administrators or ex officio members. There are seven non-tenure track faculty on the committee, one of whom is from Dornsife College. The chair of the committee is also a non-tenure 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 six 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 non-tenure

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 non-tenure track faculty, they are not involved in any decisions involving tenure. However, if the decision involves a non-tenure matter, non-tenure track faculty must take part in the deliberations and decision-making process. An example of this would be a non-tenure 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 non-tenure faculty would be involved in UCAPT’s decision-making.

UCAPT consists of about twenty-five faculty members. Seven of those members are identified as non-tenure 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 two- to four-year terms.

### **Committee on Non-Tenure Track Promotions**

The Committee on Non-Tenure Track Promotions is comprised of about fourteen non-tenure 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 non-tenured track. However, the Committee on Non-Tenure 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 non-tenure 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 non-tenure track faculty as well. If the grievance involves a non-tenure track faculty member, the three-person panel chosen from the committee must include at least one non-tenure 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 non-tenure track. Of those, only three are from Dornsife College, and none are from Roski School. There are no part-time faculty members on the committee.

### **Committee on Non-Tenure Track Faculty Affairs**

The Committee on Non-Tenure Track Faculty Affairs is an Academic Senate committee that deals with "anything whatsoever having to do with the non-tenure track faculty or terms and conditions of employment." In the past, the committee has compared USC's practices and policies with regard to non-tenure 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 Non-Tenure 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 Non-Tenure Track Faculty Affairs consists entirely of non-tenure track faculty, except for possibly one tenured member. The committee includes about twenty-five members; four 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 non-tenure 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 non-tenure 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 non-tenure 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 non-tenure 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 by-laws. There are currently six faculty members on the Roski School faculty council, three of whom are non-tenure track faculty. The terms for the Roski School faculty council last two 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, non-tenure track member of the faculty at the Roski School, testified that although she had worked as a part-time professor for four 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, non-tenure 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 non-tenure 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 non-tenure 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 "direct supervisor" Program Director John Holland<sup>9</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 non-tenure 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.

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<sup>9</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.

3. Suspend/Discipline

Vice Provost Levine testified that if a faculty member—either tenured, tenure-track, or non-tenure 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.

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 non-tenure 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 non-tenure 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 Non-Tenure 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 non-tenure 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 regard to which non-tenure 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 non-tenure 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 non-tenure 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 university’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 Non-Tenure Track Faculty are Not Managerial Employees*

Applying the framework of *Pacific Lutheran* to the instant case,<sup>10</sup> I find that the part-time and full-time non-tenure 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 formulated at the school level.<sup>11</sup> The role of the UCOC subcommittees seems to be simply to verify that the proposals meet pre-determined 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

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<sup>10</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>11</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.

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 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 non-tenure 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, non-tenure track faculty in general do not exercise majority control of these committees, despite constituting a significant majority of the faculty at large. Non-tenure 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

the members be non-tenure track faculty is illogical. I disagree, particularly in a case such as this where non-tenure 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 non-tenure 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 non-tenure track faculty.

The record also fails to establish that non-tenure 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 non-tenure track faculty in Dornsife are expressly barred from participation. Furthermore, even the full-time non-

tenure 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 non-tenure 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 non-tenure 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 five 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, non-tenure 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.

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 non-tenure 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 non-tenure track faculty members because non-tenure 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% 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 non-tenure 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 non-tenure 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 Non-Tenure Track Promotions. UCAPT primarily deals with issues involving tenure, which non-tenure track faculty are prevented from handling. However, it is clear that when the issue involves a non-tenure track faculty member being promoted to clinical scholar, UCAPT involves non-tenure 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 Non-Tenure 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 non-tenure 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 Non-Tenure 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 non-tenure 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 non-tenure 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 non-tenure 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 non-tenure 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 non-tenure 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 non-tenure 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% of full-time, benefits such as health insurance.

Furthermore, while the majority of full-time, non-tenure track faculty in Dornsife College and the Roski School may have multi-year appointments, this is still materially less than the job security of a tenured position. More importantly, part-time non-tenure 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 multi-year 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 non-tenure track faculty in Dornsife College and the Roski School are limited by their tenuous employment terms, as well as their status as non-tenure track faculty.

I conclude that the Employer has failed to establish that the full-time and/or part-time non-tenure 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 non-tenure track faculty in the Dornsife College and the Roski School are not managerial employees.

**B. Supervisory Status of Petitioned-for Employees**

Section 2(11) of the Act describes a supervisor as any individual who has authority, in the interest of the employer, to exercise any of twelve indicia, using independent judgment. Those indicia are: hiring, firing, transferring, suspending, laying off, recalling, promoting, discharging, assigning, rewarding or disciplining other employees, or effectively recommending such action. The burden of proving supervisory status rests with the party asserting it. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). Mere inferences or conclusory statements, absent detailed, specific evidence are insufficient to find supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

Here, the Employer has not met its burden of proving that the full-time and part-time non-tenure track faculty of Dornsife College and the Roski School have supervisory authority. The evidence on this issue, where there is any, is vague and conclusory. There is no specific record evidence of Dornsife or Roski non-tenure track faculty engaging in any of the Section 2(11) indicia. Accordingly, I do not find that the petitioned-for employees are supervisors within the meaning of the Act.

**IV. CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter I find as follows:

1. The Hearing Officer's rulings are free from prejudicial error and hereby are affirmed.

2. The parties stipulated, and I find, that the Employer, University of Southern California, is a California corporation with an office and place of business in Los Angeles, California, engaged in the business of providing higher education. During the preceding twelve months, a representative period, the Employer, in conducting its operations described above, derived gross revenues in excess of \$1,000,000. During the same period, the Employer purchased and received goods and materials valued in excess of \$5,000 directly from points located outside the State of California. Accordingly, I find that the Employer is engaged in commerce within the meaning of Section 2(6) and 2(7) of the Act.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. There is no collective bargaining agreement covering any of the employees in the units sought in the petitions herein and there is no contract bar or other bar to elections in these matters.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following unit in Case 31-RC-164864 is appropriate within the meaning of Section 9(b) of the Act<sup>12</sup>.

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.

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<sup>12</sup> The parties stipulated that aside from the purported managerial status of the non-tenure track faculty, the petitioned-for unit is an appropriate unit within the meaning of Section 9(b) of the Act.

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.

7. The following unit in Case 31-RC-164868 is appropriate within the meaning of Section 9(b) of the Act<sup>13</sup>.

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

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<sup>13</sup> The parties stipulated that aside from the purported managerial status of the non-tenure track faculty, the petitioned-for unit is an appropriate unit within the meaning of Section 9(b) of the Act.

**V. DIRECTION OF ELECTIONS IN CASES 31-RC-164864 and 31-RC-164868**

The National Labor Relations Board will conduct two separate secret ballot elections among the employees in the two units found appropriate above. Employees in each bargaining unit will vote separately as to whether or not they wish to be represented for purposes of collective bargaining by *Service Employees International Union, Local 721*.

**A. Elections Details**

The parties propose a mail ballot election be held in both Cases 31-RC-164864 and 31-RC-164868. I have determined that mail ballot elections are appropriate and therefore will be held.

The ballots will be mailed to employees employed in the appropriate collective-bargaining units. On **Wednesday, January 13, 2016**, different colored ballots will be mailed to voters in each of the two appropriate units from the National Labor Relations Board, Region 31, 11500 West Olympic Blvd., Suite 600, Los Angeles, CA 90064.<sup>14</sup> Voters in both Cases 31-RC-164864 and 31-RC-164868 must return their mail ballots so that they will be received in the Region 31 office by the close of business on **Friday, January 29, 2016**. All mail ballots from each bargaining unit will be commingled and counted at the Region 31 Office on **Tuesday, February 2, 2016 at 2:00 p.m.**

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Tuesday, January 19, 2016**, should contact the Region 31 Office at (310) 235-7123 to arrange for a mail ballot kit to be sent to them.

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<sup>14</sup> The employees in the petitioned-for unit will be on their winter break through January 10, 2016.

**B. Voting Eligibility**

Eligible to vote are those in the units who were employed during the **payroll period ending prior to December 24, 2015**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

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

**C. Employer to Submit Voter List**

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a separate list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters in each of the bargaining units.

To be timely filed and served, the lists must be *received* by the Regional Director and the parties by **Tuesday, December 29, 2016**. The lists must be accompanied by certificates of service showing service on all parties. **The Region will no longer serve the voter lists.**

Unless the Employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the lists must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the lists will be used during the election, the font size of the lists must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the lists shall be filed electronically with the Region and served electronically on the other parties named in this decision. The lists may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the elections whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the lists within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter lists for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

**D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election in each bargaining unit accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notices must be posted so all pages of the Notices are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the units found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice in each bargaining unit at least 3 full working days prior to 12:01 a.m. of the day of the elections and copies must remain posted until the end of the elections. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the elections if proper and timely objections are filed.

**RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a separate request for review in each of Cases 31-RC-164864 and 31-RC-164868 may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding in each of Cases 31-RC-164864 and 31-RC-164868 by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the elections on the grounds that it did not file a request for review of this Decision prior to the

elections. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the elections in these matters unless specifically ordered by the Board.

Dated: December 24, 2015

  
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MORI RUBIN  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
REGION 31  
11500 W Olympic Blvd Ste 600  
Los Angeles, CA 90064-1753

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

Date Filed  
Nov 24, 2015

Case No. 31-RC-164868

Date Issued 02/02/2016

City Los Angeles

State CA

Type of Election:  
(Check one:)

(If applicable check  
either or both:)

Stipitation

8(b) (7)

Board Direction

Mail Ballot

Consent Agreement

RD Direction  
Incumbent Union (Code)

University of Southern California

Employer

and

Service Employees International Union, Local 721

Petitioner

### TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of tabulation of ballots case in the election held in the above case, and concluded on the date indicated above, were as follows:

- 1. Approximate number of eligible voters 45
- 2. Number of Void ballots 0
- 3. Number of Votes cast for Petitioner 31
- 4. Number of Votes cast for \_\_\_\_\_
- 5. Number of Votes cast for \_\_\_\_\_
- 6. Number of Votes cast against participating labor organization(s) 6
- 7. Number of Valid votes counted (sum 3, 4, 5, and 6) 37
- 8. Number of challenged ballots 2
- 9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) 39
- 10. Challenges are not sufficient in number to affect the results of the election.
- 11. A majority of the valid votes counted plus challenged ballots (Item 9) has  been cast for Petitioner

For the Regional Director

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For Employer

For Petitioner

For

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31**

**University of Southern California**

**Employer**

**and**

**Case 31-RC-164868**

**Service Employees International Union, Local 721**

**Petitioner**

**TYPE OF ELECTION: RD DIRECTED**

**CERTIFICATION OF REPRESENTATIVE**

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots has been cast for

**SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721**

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

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



February 10, 2016

*Mori Rubin*

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MORI RUBIN  
Regional Director, Region 31  
National Labor Relations Board

## **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of the regional director's decision to direct an election, if not previously filed. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by **February 25, 2016**. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1099 14<sup>th</sup> Street, N.W., Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

## **NOTICE OF BARGAINING OBLIGATION**

In the recent representation election, a labor organization received a majority of the valid votes cast. Except in unusual circumstances, unless the results of the election are subsequently set aside in a post-election proceeding, the employer's legal obligation to refrain from unilaterally changing bargaining unit employees' terms and conditions of employment begins on the date of the election.

The employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, **as long as** the employer (a) gives sufficient notice to the labor organization concerning the proposed change(s); (b) negotiates in good faith with the labor organization, upon request; and (c) good faith bargaining between the employer and the labor organization leads to agreement or overall lawful impasse.

This is so even if the employer, or some other party, files objections to the election pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board). If the objections are later overruled and the labor organization is certified as the employees' collective-bargaining representative, the employer's obligation to refrain from making unilateral changes to bargaining unit employees' terms and conditions of employment begins on the date of the election, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances,<sup>1</sup> an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period while objections are pending and the final determination about certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective-bargaining representative, it violates Section 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of undermining the labor organization's status as the statutory representative of the employees. This is so even if the changes were motivated by sound business considerations and not for the purpose of undermining the labor organization.

As a remedy, the employer could be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees, with interest, for monetary losses resulting from the unilateral implementation of these changes, until the employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

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<sup>1</sup> Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.

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

**SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 721,**

CASE NO. 31-RC-164868

**Petitioner,**

**and**

**UNIVERSITY OF SOUTHERN  
CALIFORNIA,**

**Employer.**

**UNIVERSITY OF SOUTHERN CALIFORNIA'S  
REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION  
AND BRIEF IN SUPPORT THEREOF**

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## REQUEST FOR REVIEW

Pursuant to 29 CFR § 102.67, the University of Southern California (“USC”) hereby requests review of the Regional Director’s (“RD”) Decision in Case No. 31-RC-164868. The Region issued its Certification of Representative on February 10, 2016 and, therefore, this request for review is timely. There are compelling reasons for the Board to grant review, specifically: (1) substantial questions of law and policy are raised by this case because the RD’s Decision departed from officially reported Board precedent, (2) the RD’s Decision on substantial factual issues is clearly erroneous on the record, and such errors have prejudicially affected USC’s rights, and (3) there are compelling reasons for reconsideration of important Board rules and policies. For these reasons, and as described below, the Board should grant review of the Decision, determine that the USC faculty at issue are managerial employees under the Act, and dismiss the union’s petition.

### BRIEF IN SUPPORT OF REQUEST FOR REVIEW

#### **I. INTRODUCTION**

The petition involves the non-tenure-track faculty at the Roski School of Art and Design at the University of Southern California. USC is a private, non-profit, research-intensive university. The petitioned-for faculty, like all USC faculty, are all managerial employees under the Board’s decision in *Pacific Lutheran Univ. & SEIU, Local 925*, 2014 NLRB LEXIS 1002 (N.L.R.B. Dec. 16, 2014), and the Supreme Court’s decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

#### **A. For Each And Every Box On The *Pacific Lutheran* Checklist, The Evidence In This Case Checks The Box “Yes” For Managerial Status.**

In all five of the areas of decision-making that the Board identified in *Pacific Lutheran*, managerial authority is established. Much of the most important evidence of managerial authority was either not considered or was brushed aside by the RD, so that the RD’s factual

conclusions are clearly erroneous when the record is considered as a whole. Here are some of the more glaring examples:

***Primary Areas of Decision-Making***

- **Academic Programs (Curriculum).** The evidence showed that the University Committee on Curriculum, comprised 100% of faculty (including non-tenure-track), *decides* the University's curriculum. *Nothing* makes it into the University's catalogue unless approved by this Committee, and once the Committee approves, there is *no further review*. The catalog itself was admitted into evidence --- 673 single-spaced pages of decisions by faculty about the University's curriculum. Yet neither it, nor any testimony about it, is mentioned even once in the RD's Decision.

- **Academic Programs (Research).** The evidence also showed that the University Research Committee, comprised 100% of faculty (including and chaired by non-tenure-track faculty), analyzes and makes recommendations about major research policy questions that affect the types of research the University as a whole can support. When the Committee's recommendations are adopted by the elected Academic Senate (also 100% faculty), the Provost *invariably accepts* the Committee's recommendations. But the RD failed to consider the work of this committee as a "primary area" of decision-making, instead demoting it to "secondary" status and improperly discounting the undisputed evidence of managerial status.

- **Enrollment Management and Finances.** The University Committee on Finance and Enrollment, with a voting membership that is 100% faculty (including and co-chaired by non-tenure-track faculty), was created soon after *Pacific Lutheran*, partly in response to the Board's teachings in that case. The committee has made recommendations regarding the size, scope, and makeup of the student body, *all of which the Provost adopted without further review*. It has also analyzed and made recommendations regarding critical university-wide financial matters, such as the payout rate of the University's endowment (*i.e.*, investments) whether tuition should be raised, maintained, or reduced; and net tuition. *All of those recommendations were approved*. However, none of this mattered to the RD. She disregarded

this committee on the ground it has only a “brief history,” although that is irrelevant to whether faculty are managers now. She also disregarded the committee because the trustees might someday fail to “rubber stamp” the committee’s recommendation.

***Secondary Areas of Decision-Making***

The evidence showed that USC has multiple faculty committees that decide academic policy and personnel policy (secondary areas under *Pacific Lutheran*). Among them:

<b>Committee</b>	<b>Key Facts</b>
<b>The University Committee on Academic Policies and Procedures</b>	<ul style="list-style-type: none"> <li>• a <b>majority faculty</b> committee</li> <li>• includes <b>seven non-tenure-track</b> faculty members</li> <li>• the Provost has <b>never rejected</b> a single recommendation</li> </ul>
<b>The Academic Senate Handbook Committee</b>	<ul style="list-style-type: none"> <li>• a <b>100% faculty</b> committee</li> <li>• includes <b>four non-tenure-track faculty</b> members (one of whom is the committee co-chair)</li> <li>• the President has <b>approved every recommendation</b></li> </ul>
<b>The University Committee on Appointments, Promotions, and Tenure</b>	<ul style="list-style-type: none"> <li>• a <b>100% faculty</b> committee</li> <li>• includes <b>eight non-tenure-track</b> faculty members</li> <li>• the Provost has <b>never overruled</b> a single recommendation, except occasionally to agree with departmental faculty when the Committee’s views conflicted with those of the departmental faculty</li> </ul>
<b>The Tenure and Privileges Appeals Committee</b>	<ul style="list-style-type: none"> <li>• a <b>100% faculty</b> committee</li> <li>• includes <b>eight non-tenure-track</b> faculty members</li> <li>• the President conducts <b>no independent review</b>, and <b>always implements</b> the committee’s decisions</li> </ul>

Yet the RD disregarded all of these committees because the specific *category* of faculty who were petitioned-for in this case (non-tenure-track) are not currently the majority on each. This makes no sense. If non-tenure-track faculty must be the majority of every key decision-making committee for those faculty to be managerial, what about the tenure-track faculty, who are certainly managerial as well? Would tenure-track faculty lose their indisputable managerial status upon becoming the minority on these committees? There cannot be *two* majorities, after all. This is an obviously absurd result, and it cannot be what the Board intended in *Pacific Lutheran*. The RD's Decision is thus contrary to Board law, and it cannot stand.

**B. The Situation of USC's Non-Tenure-Track Faculty (Including Those at Roski) Contrasts in All Relevant Aspects to That of Pacific Lutheran's Contingent Faculty.**

The RD also failed to consider evidence showing USC is the *opposite* of the Pacific Lutheran University examined by the Board, both in its lack of corporatization and in its ever-increasing inclusion of non-tenure-track faculty in shared governance. Whereas Pacific Lutheran used "contingent faculty . . . [who were] appointed with no prospect of tenure and often no guarantee of employment beyond the academic year," USC's non-tenure-track faculty can be appointed to tenured positions and often receive multi-year contracts. Indeed, sixty percent of the full-time non-tenure-track faculty in USC's Roski School have three-to-five year contracts. Whereas Pacific Lutheran's "contingent faculty" did not serve on any university committee, USC's non-tenure-track faculty (including those from the Roski School) serve on many university-level committees, and in the Academic Senate. The list goes on as described below in Section III(E)(2). The RD's failure to consider these differences is critical, and that failure is part of why the RD reached the wrong result.

C. **If The Board Agrees That The RD Construed *Pacific Lutheran* Correctly, Then USC Respectfully Submits That *Pacific Lutheran* Itself Is Contrary To The Supreme Court's Decision In *NLRB v. Yeshiva University*.**

To the extent the Board agrees with the RD's interpretation of *Pacific Lutheran*, *Pacific Lutheran* should be overruled or substantially modified to comply with *Yeshiva*, and USC's non-tenure-track faculty should be found managerial under the new *Yeshiva*-compliant test, as discussed in Section IV below.

II. **USC'S SYSTEM OF SHARED FACULTY GOVERNANCE IS WELL-ESTABLISHED**

USC is a non-profit educational corporation governed by a Board of Trustees in accordance with state law. Tr. 43:15-23. The Board of Trustees has delegated all academic decisions to the President, who in turn has delegated most academic decisions to the Provost. Tr. 43:22-44:17. Six senior vice presidents report to the President. One is the Provost, who is also the Senior Vice-President for Academic Affairs. There are several schools within the University, which are essentially subdivisions of the University, each with faculty and each offering courses and degrees. An example is the school at issue here: the Roski School of Art and Design. Tr. 44:22-45:13. Each school has a Dean, and each Dean reports to the Provost. Tr. 43:22-44:17.

*All* of USC's faculty --- tenured, tenure-track, and non-tenure-track --- full-time and part-time alike --- are part of, and serve at every level, in USC's shared governance system, which has four pillars. *First*, USC's Academic Senate is a university-wide elected governance body made up entirely of faculty. It has the power to make recommendations on any and all matters pertaining to the well-being of the faculty. The Senate decides its own agenda based on its independent initiatives. It can --- and does --- pass any resolution, propose any Faculty Handbook amendment, and set up any committee it wants. Each year the Senate elects its officers and executive board members from among the faculty at large, tenure-track and non-tenure-track alike. The executive board meets almost every week, and continues to meet over

the summer. It takes up any topic it chooses. It summons any administrator it wants to question. It drafts any resolution, and debates any issue, it wishes. It also plays a key role in selecting faculty to serve on university-wide governance committees (the second “pillar”). Tr. 50:24-52:13.

It is important to note that the current president of the Senate (Ginger Clark) is a non-tenure-track professor. Tr. 61:14-21. Moreover, a majority of the Senate Executive Board *and* a majority of the Senate Nominating Committee are non-tenure-track faculty (and the Nominating Committee includes a part-time faculty member). Tr. 243:10-22; Employer’s Exhibit 13. Non-tenure-track faculty also hold almost as many voting seats in the Senate as tenured and tenure-track faculty. Employer’s Exhibit 13. One of those voting members is a non-tenure-track professor in the Roski School. Employer’s Exhibit 13.

*Second*, USC has numerous university-wide governance committees (meaning, committees that deal with programs, policies, and decisions affecting the university as a whole). The voting membership of all but one of these committees is 100% faculty. These committees conduct studies, make reports, and recommend actions to the Senate or Provost. Committee members are appointed annually.

Relevant here, each Spring, the Senate president and the Provost’s office invite every faculty member in the university --- full-time and part-time, tenured, tenure-track, non-tenure-track --- to nominate themselves to serve on any university-wide committee. *This includes all faculty who are in the Roski School*. Tr. 56:24-58:25; Employer’s Exhibit 4. USC has used this self-nomination system for decades. Tr. 60:7-11.

Non-tenure-track faculty (full-time and part-time) are eligible to --- and do --- sit on *all* of the roughly 24 university-wide committees. Tr. 60:12-20; Employer’s Exhibit 10. Non-tenure-track faculty participate heavily in each --- in some cases, serving as chairs and co-chairs of those committees.

*Third*, each school has its own faculty governance body, called a faculty council. Each school’s faculty decides the size, structure, and agenda of its council, and the faculty elect who

among them will serve on it. The voting members of the councils are all faculty. The types of issues the councils address vary by school based on the preference of the faculty. Tr. 62:8-63:8. Non-tenure-track faculty participate heavily in the faculty councils of all schools --- particularly Roski (which is led by a non-tenure-track chair, and in which non-tenure-track faculty outnumber tenure-track faculty). Employer's Exhibit 10.

*Last*, there are informal and formal committees and task forces at the departmental and school level throughout the University and in every school. As Vice Provost Martin Levine described at the hearing, this is yet another way in which faculty "participate in running the place," and the work done by these committees covers the whole panoply of decisions that are made at the department and school level. For example, faculty vote on every full-time appointment, decision not to reappoint, and decision to promote. Non-tenure-track faculty participate equally with tenure-track faculty when the decision involves a non-tenure-track faculty member. And it is unheard of for a Dean to veto the decision of the faculty unless the department or school lacks the resources to pay for what the faculty has decided. Tr. 73:21-74:14.

- A. **USC's Faculty (Including Non-Tenure-Track Faculty in Roski) Have Effective Control In All Five Areas Of Decision-Making Identified By The Board In *Pacific Lutheran*.**
1. **USC Faculty Effectively Control The University's Academic Programs (Including Curricular, Research, Minor, Major, And Certificate Offerings).**

**The University Committee on Curriculum (UCOC).** The UCOC is the most important of USC's committees on academic programs. It approves, modifies, or disapproves every course in the University that bears credit and will appear on a USC transcript, every proposed new or modified program consisting of such courses, every major or minor consisting of such courses, and every new degree in the University (except for the MD program, which is separate for regulatory reasons). Tr. 86:16-87:16.

One hundred percent of the voting members of the UCOC are faculty. Tr. 89:1-11. Eight non-tenure-track faculty currently serve on the UCOC, including one who is *part-time*. Employer's Exhibit 10. The UCOC has five subcommittees, three of which (a majority) are chaired by non-tenure-track faculty. Employer's Exhibit 10. Ordinary decisions are done at the subcommittee level. Any matters that are particularly complicated or controversial come before a main committee, consisting of the subcommittee chairs and the overall UCOC chair. In all, the UCOC and its subcommittees make over a thousand decisions a year. Tr. 87:2-15.

The UCOC's decisions on courses, programs, and offerings take effect with *no independent investigation or review*. As a practical matter, they go straight into the USC Course Catalog (the thick book listing all courses offered at USC). Tr. 87:8-16. Indeed, the Vice Provost for Academic and Faculty Affairs, Professor Elizabeth Graddy, testified that, although the minutes of the UCOC's meetings come to her for signing, she does not do any independent investigation or review of their recommendations, nor did the Vice Provost before her. As the RD acknowledged, "the Vice Provost does not do any independent investigation of the committee's recommendations." Decision at 12. The reason? "[A]cademic programs and the scope and content of academic programs are an inherently faculty function. And so faculty make those decisions. And [the] administrators administer those decisions." Tr. 304:16-305:14. Vice Provost Martin Levine testified that, in his 16 years in the Provost's office, he has "never heard of a single incident of any administrator even reviewing, independently, any decision of the Curriculum Committee, and certainly not vetoing or overturning one." Tr. 90:6-16.

The UCOC's effective decision-making was illustrated at the hearing through two specific examples. *First*, the UCOC recently examined a new global Master's degree in public policy that was proposed by USC's Price School of Public Policy. The UCOC examined the offering and debated it among the committee --- sending questions back to the school that had to be answered before the UCOC would recommend offering the new degree. The questions were

answered to the UCOC's satisfaction, and this new degree will now be offered in USC's Course Catalogue. Tr. 303:6-304:3. **Second**, a new nursing program was recently developed by the School of Social Work. The committee examined the program, and approved it. Here again, that means the program is going straight into the Course Catalog without further review.

Tr. 304:4-15.

**The University Research Committee.** The Research Committee analyzes a range of issues that are critical to a top-tier research university like USC, including scientific research, research policy, and research in the arts and humanities. The Research Committee's practice is to tackle one or two big questions a year that have broad application to many different schools and programs. Tr. 279:4-280:21.

The Research Committee is an all-faculty committee. Tr. 188:19-25. Non-tenure-track faculty participate heavily. The Chair of the Research Committee is a non-tenure-track professor. Employer's Exhibit 10.

At the hearing, Professor Paula Cannon, who is a faculty member serving on this Committee and also the incoming President of the Academic Senate (elected by the faculty), testified to two specific examples of work done, and decisions made, by the Research Committee. **First**, the Research Committee just finished an in-depth look at the computing and software needs of researchers across the University to decide which computer systems and types of computer software USC should support. The Committee summoned members of USC's IT staff and the University's administrators to answer questions about the system currently available to researchers and the University's capabilities. Tr. 279:4-16. As Professor Cannon explained, this particular project was "a good example of where the expertise of the faculty can influence and inform what staff or administration at the university do, because we have a . . . good sense of what the current needs of the faculty are." Tr. 279:17-20.

**Second**, the Research Committee's current focus is on high-performance computing capability at the University (using hardware and cloud computing to store and process large amounts of research data). The need for this capability spans many different disciplines --- from

the medical, where medical data is collected in huge archives, to the cinematic arts, which stores large amounts of digital media. In deciding what capabilities USC will invest in, the committee is analyzing issues related to access, real time analysis, cyber security, and storage sizes.

Tr. 279:23-280:24. When the Research Committee makes its recommendation, it will be reduced to a resolution that is voted on and approved by the whole Academic Senate and then sent to the Provost. Professor Cannon testified that the recommendation will surely be accepted. After all, that has been her consistent experience as a member of the Academic Senate for the last four years --- “anything the Senate votes on is sent to the Provost and he accepts our recommendations.” Tr. 282:12-21.

**The University Committee on Academic Review (“UCAR”).** The University Committee on Academic Review (“UCAR”) oversees in-depth academic program review for all academic units in the University over a multi-year schedule. For any given program that comes up for review, the committee works with the school or program to decide which are considered the leading outstanding departments in the country in that field. Then, the UCAR picks professors who are experts from those leading external departments to come in as a task force --- similar to an accreditation visit of one of the national accrediting bodies, except this review is conducted internally. For each review, the UCAR also designates one USC faculty member to be part of the task force with the outside professors. The faculty of the subject, or discipline, or department under review, presents its program in a very thick document depicting the program, its resources, its goals, its problems, and the like. The UCAR task force then spends days interviewing faculty, administrators, and students within the program. It then deliberates and makes a report to the full UCAR, which deliberates and decides the actions it recommends be taken to improve the program academically. Tr. 94:21-96:7. The Provost’s office then implements UCAR’s decisions without independent review, working with the program in question. Tr. 307:9-21.

UCAR is an all-faculty committee. Tr. 95:5. The UCAR has two non-tenure-track members. Employer’s Exhibit 10.

**2. USC Faculty Effectively Control Central Policies On Enrollment Management.**

The University Committee on Finance and Enrollment (“COFE”) is yet another committee for which 100% of the voting members are faculty. Tr. 253:13-17. **It includes a part-time non-tenure-track faculty member in the Roski School.** Employer’s Exhibit 10. Four of the ten members of the COFE are non-tenure-track faculty. Tr. 247:23-248:6. The co-chair of the COFE is a non-tenure-track professor. Employer’s Exhibit 10. This committee was created for the express purpose of bringing faculty into the decision-making process as to financial matters and student enrollment. In fact, the evidence at the hearing showed that Provost Michael Quick encouraged the formation of this faculty committee for two reasons: (1) he believes that faculty collaboration leads to better decision-making, and (2) the Board’s decision in *Pacific Lutheran* had been called to his attention, and it taught him that, although USC historically saw decisions on finance and enrollment as being within the purview of the Board of Trustees, the faculty should be asked to make effective recommendations on those crucial decisions. And so they do. Tr. 106:11-107:25; Employer’s Exhibit 14.

With regard to enrollment, the committee has already played a crucial role in determining the central policies of the University. Three specific examples were introduced into evidence at the hearing.

**First**, the COFE recently assessed and determined whether USC should implement university-wide graduate enrollment guidelines and policies, including a master plan for graduate enrollment. Graduate student enrollment has historically been controlled by the individual schools, and the number of graduate students at USC actually exceeds the number of undergraduate students. The COFE recommended the development of a master plan to address graduate student enrollment (including diversity and inclusiveness) on a university-wide level. Tr. 269:17- 270:12.

**Second**, the COFE also made recommendations about the scope and makeup of the undergraduate student body --- specifically, the standards used in (and approach taken toward)

applying admissions criteria. The COFE recommended that admissions be based on a holistic admissions process, in order to ensure academically-diverse students. In doing so, the COFE rejected an approach based on standardized test scores, and the COFE member from the Roski School (a part-time, non-tenure-track professor) played a significant role in this decision. As Professor Paula Cannon, who is a faculty member of the COFE, described it: “[I]t’s not just about the individual student but it’s about what the student and the mix of students brings to the experience of being at USC.” Tr. 270:13-21.

*Third*, the COFE assessed and determined whether and how to change current enrollment numbers in light of a new residential complex that USC is now building, called USC Village. The extra housing capacity creates the opportunity to increase the size of the student body or, alternatively, to increase the potential for students to live on campus. And so the committee examined whether to increase undergraduate enrollment by about an extra thousand students a year, or, alternatively, keep the number of students at USC the same and use this extra capacity to extend the period of time that students could have an on-campus residential experience. As Professor Cannon explained:

It’s an interesting question because *it really gets to the heart of what . . . should be the size of the student body and what should be the quality of the experience that students have. . . .*

We reflected on the fact that increased enrollment would bring increased need for more classrooms, more parking. *We really struggled with what does it mean to have the appropriate size of student body at USC, and at the end of those deliberations we made the recommendation that the extra capacity . . . that was afforded by the new development . . . should not be used to increase enrollment but instead should be used to enhance the period of time for which students could have an on-campus residential experience.* So we made that recommendation to the provost. That was I think one of our first recommendations.

Tr. 263:15-264:21 (emphasis added).

All these faculty recommendations were sent to the Provost (Employer’s Exhibit 15), and the Provost accepted them without further review (Employer’s Exhibit 16).

### 3. USC Faculty Effectively Control Central Policies Involving Finances.

The COFE --- with its nearly equal mix of non-tenure-track and tenure-track voting faculty, and chaired by a non-tenure-track faculty member --- also assesses and makes recommendations regarding crucial university-wide financial matters. For example, the COFE members analyzed and made *decisions regarding the payout rate of the University's endowment (investments)*. As part of that process, these faculty members considered the inherent tension between taking endowment earnings to spend on University priorities, and protecting the principal so that the endowment can continue to grow and meet the future requirements of the University. To make this decision, the COFE requested and received information about how well the endowment had performed over the past 12 quarters, comparisons to the stock market in general, and information about draws in previous quarters. The members also received and considered confidential University balance sheets and financial reports. With this information in hand, the members had robust discussions about what the draw should be. In particular, the members spent a lot of time considering how payout money can be used to offset the cost of tuition for students who have financial need and cannot afford the full price of a USC education. Tr. 255:13-257:14. The COFE reached a decision on the payout rate and made a written recommendation to the Provost, which was sent to the Board of Trustees and approved. Employer's Exhibit 17.

As another example, the COFE has analyzed and made recommendations on *whether tuition should be kept the same, decreased, or increased*. Those recommendations were sent to, and approved by, the Board of Trustees. Employer's Exhibit 17. As part of that process, COFE members also deliberated and made a recommendation concerning net tuition rate. Specifically, they *recommended an expenditure to change the net tuition rate* for students from middle-income families. This expenditure would create a new type of need-based financial aid as a pilot program to see if it would attract students whose families make too much money to qualify for current need-based aid, but not enough money to comfortably afford to send their child to USC.

This pilot program was so novel and significant that the Provost wrote to the COFE that it was discussed with the President of the USC, who approved it. Tr. 267:11-268:16; Employer's Exhibit 17.

#### **4. USC Faculty Effectively Control Academic Policies.**

The University Committee on Academic Policies and Procedures ("UCAPP") is a university-wide committee that revises USC's academic rules and policies, including the grading policy. Recently, the committee has been examining standards for assigned grades, so as to consider a recommendation regarding an established University grading policy. The recommendation will be sent to the Provost and approved as a matter of course --- after all, no recommendation of the Committee on Academic Policies and Procedures has ever been rejected. Tr. 310:13-312:20. The majority of voting members of the UCAPP are faculty. Tr. 310:13-311:8. Seven members of the UCAPP are non-tenure-track faculty. Employer's Exhibit 10.

The Committee on Teaching and Academic Programs ("CTAP") does in-depth studies of issues that involve large sections of the University. For example, this year the faculty-majority CTAP chose to focus on academic integrity --- determining whether USC should have university-wide guidelines for academic integrity. Last year, the CTAP chose to study the residential college system, and analyzed the best ways to integrate those colleges with existing academic resources, resulting in a detailed report with recommendations. The Provost approved the CTAP's report and created a majority-faculty committee called "the Committee on Residential College Redesign" to implement the CTAP's recommendations. Tr. 309:1-19.

#### **5. USC Faculty Effectively Control Central Personnel Policy.**

USC faculty have total control over university-wide personnel policies. The Academic Senate can propose any amendment to the Faculty Handbook that it wishes. All handbook amendments are developed by a handbook committee of the Academic Senate, which is an all-faculty committee (and one of the co-chairs is a non-tenure-track faculty member). The

committee will spend months deciding on and perfecting the amendments it chooses to propose. Proposed amendments then come forward to the Senate executive board, which may modify the proposal. The proposal then comes to the full Senate and by rule must be discussed and debated in at least two meetings. The Senate's final proposal is then sent to the President of the University. Every single one of these proposals, since the founding of the Academic Senate, has been approved by the President and promulgated as University policy. Tr. 52:18-53:19.

In addition, there are also three university-wide committees that address personnel issues. First, the **Non-Tenure-Track Promotions Committee** reviews and makes recommendations about university-wide policies on non-tenure-track promotions. In addition, if a Dean ever tries to overrule a faculty recommendation to promote on the non-tenure track (which has never happened), the case would be sent to this committee for review of the Dean's actions.

Tr. 130:21-131:2. The committee membership is 100% non-tenure-track faculty. Tr. 200:10-15. Thirteen members of the committee are non-tenure-track faculty. Employer's Exhibit 10. The chair of the committee is a non-tenure-track professor. Employer's Exhibit 10.

Second, the **Tenure and Privileges Appeals Committee** hears and decides grievances of faculty members. Most importantly, if there is a dismissal for cause under the chapter of the faculty handbook dealing with dismissal for cause, this is the committee that conducts the due process hearing, and receives witnesses and evidence, and makes the decision, which results in a recommendation to the President. The President conducts no independent review, and has never failed to implement the committee's decisions. Tr. 117:5-16. The committee membership is 100% faculty. Tr. 117:13-16. Eight members of the committee are non-tenure-track faculty. Employer's Exhibit 10.

Last, the **Appointments, Promotions, and Tenure Committee** reviews and makes recommendations on promotions of non-tenure-track faculty to the level of "clinical scholar or equivalent," which is regarded as equal in stature and dignity with tenure, and often is accompanied by a five-year contract, or a five-year evergreen contract (each year the person gets a new five-year contract). Tr. 112:13-24. The committee membership is 100% faculty.

Tr. 112:13-14. Seven members of the committee are non-tenure-track faculty. Employer's Exhibit 10.

**III. THE REGIONAL DIRECTOR'S CONCLUSION THAT NON-TENURE-TRACK FACULTY IN ROSKI ARE NOT MANAGERIAL IS CONTRARY TO THE LAW AND THE EVIDENCE**

**A. The RD Imposed New Substantive Requirements In This Case That Have No Basis In The Law.**

**1. The RD Was Wrong To Conclude That Faculty Governance Committees Only "Count" For Purposes Of Managerial Status If A Majority Of Seats Are Held By The Specific Category Of Faculty Described In The Proposed Bargaining Unit.**

The RD found that USC was required to show that non-tenure-track faculty constitute a majority on each of the faculty governance committees at issue if they are to be considered for purposes of managerial status. But *Pacific Lutheran* says nothing about requiring that any one *category* of faculty be the majority of a committee. And to read that requirement into *Pacific Lutheran* creates an absurd result. The evidence in this case shows that no distinction is made at USC between non-tenure-track, on the one hand, and tenured and tenure-track faculty, on the other hand, in their roles in faculty governance (except for tenure matters.) They *all* participate in the effective management of the University. Therefore, to arbitrarily say that one category must be in the majority in order to be managerial is necessarily to render the other category non-managerial – when in fact, *all* are managerial. Moreover, the make-up of a particular committee will necessarily change from year to year. If only the majority category is managerial, then from one year to the next, different categories of perfectly managerial faculty could be deemed non-managerial for no other reason than a one- or two-person swing on a committee roster.

The Board's analysis in *Pacific Lutheran* supports USC's point --- in that case, it was sufficient that *faculty* had majority control. *Pacific Lutheran*, at \*79, n. 36 ("the party asserting that the faculty are managers must prove that a majority of the committee or assembly is *faculty*") (emphasis added). Moreover, in applying its new criteria to the factual record, the

*Pacific Lutheran* Board nowhere suggested that the “nontenure-eligible contingent faculty members” sought by Petitioner had to make up a majority of any committee in order to be deemed managerial. Rather, noting that they lacked any role on key committees, the Board found “insufficient evidence that the full-time contingent faculty are *substantially involved* in decision-making affecting the key areas . . . .” *Id.*, at \*114 (emphasis added). At USC, by contrast, the evidence that non-tenure-track faculty are “substantially involved” is overwhelming.

The RD erroneously relies on *Cooper Union of Science & Art*, 273 NLRB 1768 (1985), for the proposition that faculty members who comprise the bargaining unit must constitute a majority on every governing committee if those faculty members are to be considered managerial. Decision at 35. But nowhere in *Pacific Lutheran* does the Board invoke *Cooper Union* for this point. Moreover, *Cooper Union* is factually distinct because that case involved committees that were not majority faculty at all (regardless of the bargaining unit). Indeed, the majority were deans, assistant deans, alumni, students, and part-time instructors who *Cooper Union* did not contend were managerial faculty. *Id.* at 1793-95, 1797, 1808. That, of course, is a radically different situation than at USC, where *all* of the committees and governing bodies at issue are majority *faculty* (tenure-track, tenured, and non-tenure-track faculty combined, who are *all* managers).<sup>1</sup>

2. **The RD Was Wrong To Conclude That Faculty Governance Committees Only “Count” For Purposes Of Managerial Status If The Committee Is Elected.**

The RD invented an additional rule not grounded in Board law, that university and Academic Senate committees must be elected, and that it is insufficient to have a system combining self-nomination and what the RD termed “a subjective process of seeking out

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<sup>1</sup> There are hints in the RD’s Decision that she may not regard committees as “faculty-majority” committees as “faculty-majority” committees unless they have a majority from the particular **petitioned-for unit**, in this case, the Roski School. If so, this only compounds the RD’s error. USC has 22 academic units. It is almost assured that the Faculty of any one school are going to be in the minority of any university-wide committee.

‘suitable’ candidates.” Decision at 42. She cited no authority for this novel proposition. In any other setting, managerial employees hold their positions by appointment, and it has never been suggested that a democratic selection process is required.

Moreover, the RD ignored the undisputed testimony about the leading role of the Academic Senate Executive Board in selecting University-level committees. The Academic Senate Executive Board, which is an elected body, has a non-tenure-track majority and is presided over by a non-tenure-track President. It has unfettered authority to elect additional members to the Committee on Finance and Enrollment (in addition to its own officers) and to appoint whomever it deems qualified to the Handbook Committee and every other Academic Senate committee. It could create a non-tenure-track majority on all those committees if it wished. (It has actually created substantial non-tenure-track representation on both committees, including the voting co-chair of Finance and Enrollment and the co-chair of the Handbook Committee.) Moreover, the Nominating Committee for next year’s Senate officers and Executive Board has a non-tenure-track majority.

3. **The RD Was Wrong To Find That USC Was Required To Prove Specifically How The Provost, President, And Board Of Trustees Reviewed Faculty Recommendations, Given That USC Clearly Established These Recommendations Were Routinely Approved.**

The RD found that USC was required to introduce evidence showing the “level” and “type” of review conducted by each of the various administrators before they approved the recommendations.” *See, e.g.*, Decision at 36-37. There are two problems with this theory.

*First*, as discussed in more detail in Section IV below, it is not clear from the Board’s decision whether the Board intended to require that recommendations “almost always be followed” *and* that there be no independent review. Certainly, the RD in the present case thought so. If the Board were to agree with the RD that *Pacific Lutheran* required both showings, then *Pacific Lutheran* is flatly contrary to *Yeshiva*.

*Second*, from a practical standpoint, imposing an additional requirement that the Employer submit evidence of the *mechanics* of the approver's review is illogical and impractical in a case like this. For example, with regard to USC's Committee on Finance and Enrollment (COFE), the testimony and the documentary evidence established that the various recommendations of the COFE faculty were swiftly approved --- by the Provost (in the case of faculty decisions about admissions standards and overall student body size), and the President and the Board of Trustees (in the case of faculty decisions about endowment payout rates and tuition). Employer's Exhibits 15-17. Indeed, USC even put the written approvals into evidence. Employer's Exhibits 16, 17. Given this, what additional evidence would this RD have had USC present? Was USC obligated to bring the Provost, President, and members of the Board of Trustees in to testify about how many minutes they took to read the faculty recommendations before approving them? Of course not. And, as discussed elsewhere in this brief, it would be absurd to require evidence that the Board reneged on its fiduciary responsibilities and "rubber stamped" the recommendations without any consideration.

**B. The RD Made Significant Factual Errors In Her Review Of The Record As To The Primary Areas Of Decision-Making.**

**1. Academic Programs.**

The RD was wrong to find that USC did not present "sufficiently detailed or specific" evidence of faculty control over academic programs. Decision at 34. USC certainly did. The problem is that the RD overlooked key evidence in the record, and imposed additional evidentiary burdens on USC that have no basis in the law.

**The University Committee on Curriculum (UCOC).** While the RD did acknowledge that complex decisions on curriculum are decided by the UCOC, the RD wrongly characterized the evidence about the actual work done by the committee as "vague." Decision at 34. But Vice Provost for Academic and Faculty Affairs, Elizabeth Graddy, testified to specific decisions made by the UCOC. For example, Professor Graddy described the Price School of Public Policy's

proposal for a new global Master's degree in public policy. She described the proposed program (that it was a joint degree with another university in Asia, and that it was a combination of study abroad and online courses). Tr. 303:6-22. She described that the committee took several months to approve this new degree --- asking many questions as part of an interactive process to decide whether the proposal was acceptable. Tr. 303:6-304:3. She testified that the UCOC ultimately approved the new Master's degree and, as a result, it is going into the course catalog.

Tr. 303:23-304:5. The RD wrongly disregarded this evidence on the ground that Professor Graddy did not state "whether UCOC rejected certain aspects of the proposal or simply asked clarifying questions." Decision at 34. This criticism suggests that USC was required to show that aspects of the proposal were, in fact, rejected. It was not. Under *Pacific Lutheran*, it is USC's burden to show that "faculty exercise actual or effective decision making authority" over University policies --- there is no requirement to present evidence that a university faculty committee reject policies and proposals presented to them by school faculty committees.

The RD also gave inappropriate weight to the testimony of one of the union's witnesses, Professor Kate Levin, who had served on a subcommittee of the UCOC for only three months as of the date she testified. Tr. 688:13-16. She had reviewed only three of the thousand or so matters that UCOC considers each year, and had no knowledge whatsoever about the main UCOC. Based on her limited experience, she testified that her decisions so far had been "technical and clerical" in nature, although she admitted that she had no idea what types of decisions are made by the main UCOC (which is comprised of the subcommittee *chairs*). Moreover, Levin acknowledged that the real workload of the committee begins later in the academic year. Tr. 657:18-659:2, 694:13-23. The RD relied on Ms. Levin's testimony that her work had been "technical and clerical" without any mention of the reasons why that testimony is unreliable. Decision at 12-13. In particular, Levin's testimony is irrelevant to the work of the main UCOC, as to which she was not a competent witness. Moreover, the RD appears to have given Ms. Levin's testimony greater weight than the detailed and first-hand experience of

Professors Levine and Graddy, who work regularly with the main UCOC, and the decade-and-a-half experience of Professor Levine.

Another of the RD's mistakes in this area was her failure to consider the largest exhibit in the entire hearing --- the *673-page course catalog* (Employer's Exhibit 6), which lists thousands of academic offerings that were approved by the UCOC. Tr. 86:16-87:22. Indeed, without UCOC approval, no course makes it into the catalog. *Id.* Yet the Decision does not mention the course catalog even once. Likewise, Professor Graddy also described the UCOC's review and approval of an entirely new nursing program that was developed by the School of Social Work (Tr. 304:4-15). The RD failed to consider this in her analysis of the UCOC as well. *See* Decision at 33-36 (failing to mention either fact). Furthermore, although the RD acknowledged that Professor Graddy "does not conduct any independent investigation of the UCOC's recommendations," the Decision states that "it is not clear what kind of review is conducted." Decision at 34. This conclusion is not supported by the record and indeed flatly contradicts the record. Professor Levine's undisputed testimony was, "[The] vice provosts who work with this committee, they do not 'review,' they do not 'investigate,' they do not do any independent study." Tr. 182:22-183:14.

As described above, USC was not required to present evidence of the mechanics of each administrator's review where all of the faculty's recommendations are approved. But in any event, USC *did* establish the kind of review that is conducted of a UCOC recommendation: a *pro forma* review that *always* results in approval of the UCOC's recommendations (and then the courses go directly into the course catalog). That was the undisputed testimony of Professor Levine:

Q. Yesterday during your testimony regarding the workings of the UCOC committee, you testified that the minutes of UCOC committee come to the Provost and that they are enacted immediately without independent review; is that accurate?

A. (Levine). It would go to the . . . Vice-Provost for Academic and Faculty Affairs. . . . **Recommendations from faculty committees**

such as UCOC as I testified are adopted. They're never vetoed. It's -- the official approval must come in the name of a Provost by a Vice-Provost, but that's the faculty committee that has done the work of examining and studying and they decide.

...  
[A]s to the UCOC[,] the actions of the faculty committee are . . . always followed . . . the so-called review is pro forma for the UCOC . . . [The] vice provosts who work with this committee, they do not "review," they do not "investigate," they do not do any independent study. They may look at the file or they may not read the file, and then they sign it. For example, the -- by analogy, when librarians order materials, or -- and propose contracts to purchase books, or nowadays electronic materials, whichever faculty in the library are in charge of that area makes the decision, it comes to me on behalf of the provost to sign the contract. And I do so. **It's pro forma.** I may not read it at all. If I glance at it, if I found any obvious error I'd send it back for reconsideration to fix a missed wording, or something. Or I may not read it at all. I must sign it for it to be official, but the actual decision is made by some faculty member somewhere.

...  
[B]y the letter of the law, the president or the provost must sign, or their delegate, must sign things -- lots and lots of things -- for it to be official. And what comes to them is called a recommendation. But **in many cases, such as every single UCOC recommendation, that review is pro forma,** but is required by our rules.

Tr. 182:1-184:18 (emphasis added).

That was also the undisputed testimony of Professor Graddy:

Q. To what degree does the provost approve or not approve the recommendations of the university committee on curriculum?

A. (Graddy). So what happens is that after the committee has deliberated, they make a recommendation. And in the context of the minutes of that deliberation, that comes to the person in my role, which is the provost delegate for all academic program processes. And then I acknowledge that. And then it goes into the -- and then it goes in the catalog. . . .

Q. **But do you do any independent investigation of a recommendation of this committee?**

A. **I do not. And my predecessor did not. . . . And that's because academic programs and the scope and content of academic programs are an inherently faculty function. And so faculty make**

**those decisions. . . . Administrators administer the decisions that the faculty have made on academic programs. . . .**

Q. Okay. So your job as an administrator is to administer what . . . the faculty decides is the curriculum of the university?

A. That is absolutely correct.

Tr. 304:16–306:2 (emphasis added).

**The University Committee on Academic Review (UCAR).** The RD also failed to give appropriate weight to the decision-making role of faculty who serve on the UCAR. The RD minimized the UCAR’s work, describing it as simply “mak[ing] recommendations to the schools about the programs it reviews, but the actual actions taken are devised and decided upon at the school level.” Decision at 33. That is incorrect. The evidence showed that the UCAR takes direct action through its own effective recommendations to change and improve the academic programs it reviews. Tr. 94:21-96:7. The Provost’s Office then becomes the champion of those recommendations, and works with the school to find the best way to implement them --- not *whether* they should be implemented, but *how*. Tr. 95:22-96:13. Even the union’s own witness, Jud Fine, remarked on the power of the UCAR to change programs and how its recommendations must be followed: “In a UCAR -- I mean, in a, you know, an external review [--] in 2006 . . . reviewers came and reviewed the program; they made a recommendation, and . . . it was used as a way of changing and altering the program. . . . [One recommendation] was that the program be expanded to a greater number of students, which was counter to our philosophy, but that’s what these outside people recommended.” Tr. 447:11-448:9.

**Faculty Decision-Making at the *School Level*.** The RD states that USC failed to show that non-tenure-track faculty in Roski make decisions on academic programs at the *school level* and that Professor Jud Fine’s testimony established that they, in fact, do not. Decision at 35. This conclusion is wrong.

As an initial matter, Board law does not require faculty decision-making at *every* level of an institution. *Pacific Lutheran* makes clear that decision-making at the university-wide level is

the key inquiry when determining managerial status. *Pacific Lutheran*, at \*72-73 (“[i]n examining the breadth of the faculty’s authority, we will give more weight to those areas of policy making that affect the university as a whole”). And that makes sense --- if faculty members are exercising authority at the *highest levels* of the university, they are plainly managerial under the Act.

Moreover, even if decision-making authority at the school level *were* required, Professor Fine’s testimony did not establish that Roski faculty lack it. In fact, he proved the opposite. On direct examination, he claimed that curricular changes to the MFA program were forced on the Roski faculty following a “positive” UCAR review. Tr. 447:13-24. But none of that was true. On cross-examination, he was impeached by the minutes of the meeting at which *he* proposed those exact curricular changes. Tr. 558:11-21; Employer’s Exhibit 20. Moreover, the UCAR review summary was introduced, and in fact it was very critical of the MFA program generally and its leadership (Professor Fine) specifically. Employer’s Exhibit 22. This reinforced the testimony that the curricular changes were based on the recommendations of UCAR, a faculty committee, not the brainchild of an administrator.

In light of the demonstrated falsity of Professor Fine’s testimony, the RD should have given no weight to Professor Fine’s other claim that a Roski School administrator once “re-wrote” a curriculum proposal he created for the MFA program. He was unable to identify when this happened, and provided no information about what exactly was rejected, and what actual changes were supposedly made. *See* Decision at 13 (observing that from the professor’s testimony, “[i]t 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[;] [i]t is also not clear exactly when this occurred, but it seems to have been around 2013 or 2014, based on the witness’s testimony”). Moreover, even if substantive changes were made on that occasion, one example of a dean’s involvement at the *school* level hardly diminishes USC’s strong showing of faculty decision-making at the university-wide level.

## 2. Enrollment Management.

The RD's errors continued in her review of the Committee on Finance and Enrollment (COFE).

*First*, although the RD acknowledged that “all of [the COFE] recommendations were quickly approved by the Provost,” she found that “the record does not sufficiently describe the level of type or review or investigation the Provost engaged in before approving the recommendations.” Decision at 36-37. As described above, this was not required given that the evidence established that all of the COFE's recommendations were swiftly approved.

*Second*, the RD observes that the COFE was formed in April 2015, and finds that “this brief history is insufficient to establish that the COFE makes recommendations on enrollment management that are routinely implemented by USC.” Decision at 37. But the Board only just announced its *new* requirement that faculty be involved in decisions about finance and enrollment on December 16, 2014, when it issued the *Pacific Lutheran* decision. USC responded to that guidance by forming the COFE in Spring 2015. Employer's Exhibit 14. Is the RD saying that USC had to establish the COFE before the Board even announced the need for employers to do so? That is nonsensical. Moreover, no case (including *Pacific Lutheran*) holds that a committee must have been in existence for a minimum amount of time in order for the faculty on them to qualify as managerial. This is a new rule that has been created by this RD for this case, without any basis in Board law. The issue in this matter is whether the faculty are managerial now, not whether they have been managerial for a past period. (By analogy, individuals can be promoted to be managers, and they become managers upon that promotion and cannot thereafter be included in a bargaining unit.)

*Third*, the RD concluded that USC needed to show its faculty make admissions decisions at the “micro” level (the exact number of students admitted to USC and/or which students are chosen), instead of the “macro” level (university-wide admissions policies and standards, and student body size overall). This is yet another new requirement created by this RD. It not only

has no basis in Board law, it contradicts the Board’s prior holding. Per *Pacific Lutheran*, “Enrollment Management: [is] decision-making [that] dictates the size, scope, and make-up of the university’s student body.” *Pacific Lutheran*, at \*75-76. That is precisely what USC’s evidence showed:

- The COFE faculty decided on the standards used for undergraduate admissions criteria and how they would be applied, which directly affects the scope and makeup of the undergraduate student body. The COFE prioritized admitting academically-diverse students, and rejected an approach that would have relied more heavily on standardized test scores. Tr. 270:13-21.
- The COFE faculty decided to hold steady current enrollment numbers despite a new residential complex at USC that would have allowed it to increase enrollment by an extra thousand students. Instead, the COFE faculty decided that the extra capacity will be used to extend the period of time that students can have an on-campus residential experience. Tr. 263:15-264:21
- The COFE faculty decided that USC should implement a master plan for graduate student enrollment that includes standards for diversity and inclusiveness on a university-wide level. Tr. 269:17- 270:12.

These are the high-level decisions that “dictates the size, scope, and make-up of the university’s student body” (*Pacific Lutheran*, at \*76). They are what show managerial authority.

The RD discounted the role of the Committee on Finance and Enrollment, on the grounds that “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.” Decision at 37. But the RD’s own summary of the evidence shows otherwise.

As to size of the student body, the RD found that the committee “reject[ed] the idea that newly constructed dormitories should result in increasing the size of entering undergraduate classes.” As to scope and make-up of the student body, the RD noted the committee’s

determination that USC should “maintain a ‘holistic’ approach to undergraduate admissions rather than focusing on standardized test scores.” A switch to a focus on test scores would have the result of changing the scope and make-up of the admitted class by focusing on those disciplines whose applicants have high test scores, at the expense of the disciplines with lower test scores but other abilities. That would risk the result of a student body largely consisting of engineering and business students, for example, with fewer artists and musicians. Tr. 265:21-266:13. In the deliberations leading to rejecting that switch, it was particularly important that a member of the Roski faculty (who happened to be part-time non-tenure-track) was a committee member, to represent the arts disciplines. *Id.*

The RD concluded, “Certainly, [COFE’s] 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.” Decision at 37. The RD’s conclusion is unsupported, and indeed flatly contradicted, by her own summary of the evidence. Translated into concrete language, COFE’s decisions were to keep the admitted class about 3000 rather than 4000 and to maintain USC’s academic diversity rather than focus on admitting more students in typically high-scoring disciplines.

*Last*, the RD faults the COFE for not having a majority of non-tenure-track faculty as voting members. The committee has 4 non-tenure-track members including the voting co-chair, and 6 tenured/tenure-track faculty. (The Academic Senate Executive Board, which has a non-tenure-track majority, had and still has the authority to elect whatever additional committee members it wishes.) As discussed above, there is no basis in Board law to require that a specific *category* of faculty in a proposed bargaining unit be the majority of this or any governance committee. Moreover, as discussed above, the new rule that the RD invented defies logic because it would mean that either tenure-track or non-tenure-track faculty, *but not both*, could be managers.

### 3. Finance.

The RD's criticisms of faculty decision-making on financial matters are similarly flawed. Most glaring is the RD's conclusion that USC was required to show that its Board of Trustees "would sign off, without a second thought" on financial decisions such as tuition amount and endowment payout rates. Decision at 38. What the RD requires would be unlawful for the Board of Trustees to do. USC is a public benefit educational corporation that must be governed by a Board of Trustees as a matter of law. Tr. 43:15-21; Cal. Corp. Code Section 5210. The Trustees may delegate some of their authority, but the Trustees are legally required to provide oversight of various types of decisions, including those relating to finances and investments. Cal. Corp. Code Section 5110, *et seq.*; *Kennerson v. Burbank Amusement Co.*, 120 Cal. App. 2d 157, 173 (1953) ("California has recognized the rule that the board cannot delegate its function to govern. As long as the corporation exists, its affairs must be managed by the duly elected board. The board may grant authority to act, but it cannot delegate its function to govern."); *Stern v. Lucy Webb Hayes National Training School for Deaconesses*, 381 F. Supp. 1003, 1014 (D.D.C. 1974) ("A director who fails to acquire the information necessary to supervise investment policy . . . has violated his fiduciary duty to the corporation. . . . A director whose failure to supervise permits negligent mismanagement by others to go unchecked has committed an independent wrong against the corporation."). It is inconceivable that the Board in *Pacific Lutheran* created a test for a faculty managerial role that no board of trustees in the country could meet without violating the law. Moreover, under the RD's analysis, even the President of the University is not managerial, for the trustees must supervise his decisions also.

The RD was also incorrect in stating as fact and drawing a negative inference from the supposition that the COFE's recommendations were "all approved less than one week" before the December 2015 hearing in this case. Decision at 38. Only the *most recent* set of COFE recommendations was approved then. The COFE faculty's first set of recommendations was made and approved back in August 2015. Employer's Exhibit 16. Moreover, there is absolutely

no basis for reading something nefarious into the timing of the December 2015 approval. After all, the evidence unequivocally showed that the COFE's second set of recommendations, which was made on November 15, 2015 (before the union's petition), had to be approved by the Board of Trustees at its *regularly-scheduled, quarterly meeting* on December 2, 2015. Employer Exhibit 14.

In addition, the RD relied on evidence that the Roski School dean changed the *process* for graduate students to apply to be teaching assistants as a basis for finding that non-tenure-track faculty in the Roski School lack control over *finances*. How did the RD reach that conclusion? She *speculates* that changing a student application process "implicates financial expenditures." Decision at 38. But there is absolutely *no evidence* of that --- it is pure conjecture. Moreover, even if that *were* true, the effect would be on a relatively small item of school-level finances, not university-wide finances.

#### 4. Research.

Another of the RD's errors is her treatment of USC's Research Committee. The RD failed to consider the Research Committee in the "primary areas of decision making" under *Pacific Lutheran*, relegating it instead to the "secondary area of decision making" within "academic policies." Decision at 38. But the only research-related decisions that belong in the "secondary" category are those that address research *methods*. *Pacific Lutheran*, at \*77 and \*110. That is not what USC's all-faculty Research Committee does. It makes university-wide decisions regarding USC's research programs (across all of its schools), including decisions about how to meet researchers' needs and requirements in order to maintain USC's status as a top tier research institution. The evidence showed that USC is one of the nation's major research-intensive universities where research is a major part of the university's academic program. As explained in USC's post-hearing brief, this committee is part of USC's showing of faculty decision-making in the primary areas established in *Pacific Lutheran*. *See id.* ("Primary areas of decision making . . . Academic programs: This decision making area covers topics such

as the university's . . . research . . . and the requirements to complete [research] successfully. . . . These topic areas affect the very nature of an academic institution, reflect its goals and aspirations, and clearly fall outside the routine discharge of a professor's duties."'). The RD had no basis for demoting USC's Research Committee and failing to follow *Pacific Lutheran* on this issue.

With regard to the evidence of Research Committee decisions, the RD wrongly criticized the committee for having "only one concrete outcome" of its work. But the record showed that the Research Committee takes on such large-scale issues that they can only handle one or two projects per year. In fact, the Research Committee's project to decide on new systems for university-wide high-speed supercomputing will take at least all of this year to complete. And last year's in-depth review of research software took all of last year and required additional time to create the lengthy document describing the committee members' recommendations. Tr. 281:19-282:21. If the RD is suggesting that USC's Research Committee needs to generate recommendations faster, that is absurd. Getting the big decisions right takes time. Top universities do not make rushed decisions on such major issues, and that is certainly not what the Board would require USC to do here.

**C. The RD Made Significant Factual Errors In Her Review Of The Record As To The Secondary Areas Of Decision-Making.**

**1. Academic Policies.**

The RD's mistakes continued in her review of faculty decision-making on matters of academic policy. For example, the RD brushed aside USC's evidence about the work of the **University Committee on Academic Policies and Procedures (UCAPP)** as "vague," but it was anything but. Professor Graddy testified to two specific categories of decisions that the UCAPP makes. First, UCAPP adjudicates petitions (student oppositions to requirements in the academic catalog). Second, the UCAPP sets University policy on academic standards, such as grading. In fact, Professor Graddy testified that the UCAPP just recently put out a policy on grading ---

specifically, what each of the grades (A through F) means. Tr. 310:13-312:20. The RD also criticized USC for not presenting evidence about what *type* of review this committee’s recommendations receive, even though (as the RD herself put it) “the Vice Provost *always* adopts the recommendations,” and for not showing that the committee has a majority of non-tenure-track faculty. These criticisms fail for all of the reasons already described above.

Likewise, the RD dismissed USC’s evidence about the important work of its **Committee on Teaching and Academic Programs (CTAP)**, on the ground that there was supposedly no evidence of the type of review the Provost performs. But here again, the record showed this committee’s recommendations are always approved, so evidence about the mechanics of the review process is not required. Moreover, the RD also mischaracterized the facts about this committee by claiming that the only result was the creation of another committee. Not so. The record shows that this committee produced a report of its recommendations summarizing a year of review and analysis, and that the report was so embraced by the Provost that he created a task force to implement the committee’s recommendations. Tr. 309:13-19. And while the RD did acknowledge that this committee is majority non-tenure-track faculty (Decision at 39), the RD failed to consider (or even mention in the Decision) that the membership of this committee includes a non-tenure-track faculty member from Roski (Employer’s Exhibit 10).

The RD’s failure to appreciate the weight of USC’s evidence was particularly striking with regard to the **Academic Senate’s Handbook Committee**. Indeed, the RD dismissed all of the evidence about this all-faculty committee (co-chaired, in fact, by a non-tenure-track faculty member), including that it can and does propose any amendment to the policies in the faculty handbook that it wishes. Tr. 52:18-53:6; Employer’s Exhibit 3. For example, in a series of faculty handbook editions, this committee not only crafted numerous policies governing faculty, it also chose to create rules governing staff and students, specifically regarding harassment and retaliation complaints brought against staff by students or others. The Academic Senate adopted these rules and the President approved them, which is the same way that *hundreds* of

recommendations by this committee have been approved since the founding of the Academic Senate. Tr. 55:23-56:5.

Nevertheless, the RD disregarded this committee on the ground that the President *once* sent a single proposed handbook provision back for revision before approving it. Decision at 39. Yet --- in that one instance --- the President returned the proposal for the sole reason that it was worded badly, not because he had any substantive changes to it. The President then approved it unchanged in the very next Handbook edition. Tr. 53:7-14. Given the routine presidential approval of hundreds of Handbook amendments to faculty policy over decades, by a series of USC presidents, with no vetoes and only one delay, over the entire history of the Academic Senate, the RD's refusal to count this as effective policymaking flies in the face of *Pacific Lutheran's* express language. It must be noted that the RD also disregarded this committee because the record does not show whether, in addition to its non-tenure-track members and co-chair, it has a majority of non-tenure-track faculty *this year*.

## 2. Personnel Policies And Decisions.

The RD disposed of faculty involvement in personnel matters in a similar fashion.

As to USC's **Non-Tenure-Track Promotions Committee**, the record shows that this committee makes recommendations on which non-tenure-track faculty to promote, if a dean disagrees with a lower-level faculty committee. The RD's sole criticism here is that USC did not present evidence of specific cases of faculty who were considered for promotion by this committee and what recommendations were made. Decision at 40. But given the obvious confidentiality of such cases, there is no way for *any* University to present the evidence the RD demands here. Promotion recommendations have certainly been made and approved by faculty committees. That fact is clearly the basis for Vice Provost Levine's testimony that no dean has ever tried to overrule a faculty recommendation to promote on the non-tenure track. Tr. 130:21-131:2.

With regard to the **University Committee on Appointments, Promotions, and Tenure**, the RD acknowledged that non-tenure-track faculty participate in decisions regarding non-tenure-track appointments and promotions at the highest rank. Despite this, the RD fails to make any finding regarding the undisputed decision-making power of non-tenure-track faculty on this committee.

With regard to the **Tenure and Privileges Appeals Committee**, the RD acknowledges the evidence that the President has never failed to follow one of this committee's recommendation. Decision at 40. Yet the RD again criticizes USC for not proving *unnecessary* details of the President's review.

Last, with regard to the **Non-Tenure-Track Faculty Affairs Committee**, the RD states that there is no specific evidence in the record of that committee's recommendations or the response to them. Decision at 40-41. Not true. The record reflects that this committee has been operating for over 15 years, and its work includes creating the guiding university-wide policies for all non-tenure-track faculty, which the Provost approved and promulgated. (Tr. 199:24-200:8.) Its work has also included an in-depth comparative study of how non-tenure-track faculty are treated at peer universities and their policies. The findings were reduced to a report that went to the Academic Senate, and all of the recommended improvements were adopted. (Tr. 126:3-12.) Moreover, although the RD failed to consider it, one of this committee's current members is a non-tenure-track faculty member from the Roski School. Employer's Exhibit 10.

**D. The RD Wrongly Ignored A Key Area Of The Non-Tenure-Track Faculty's Power And Decision-Making Authority: The Academic Senate.**

In addition to USC's robust showing of non-tenure-track involvement in committees, it also presented significant evidence of faculty decision-making through the all-faculty Academic Senate and the Senate Executive Board. Through these bodies, the faculty mold --- and, in some cases, radically change --- the practices and policies of the University.

As to the Academic Senate, Vice Provost Levine testified to specific examples of its power. A striking example was the Academic Senate's power in regard to plans for campus development. The Academic Senate demanded a change in the planned relocation of the health clinic for faculty and staff to a new building off campus. As a result, the new health center that was recently built on campus includes suites for faculty and staff medical and dental care. Tr. 82:18-83:2. Similarly, the Academic Senate decided to take action to ensure more convenient parking for faculty, and so it demanded that the administrator in charge of parking appear for questioning. He did appear, and he was sharply criticized by the Academic Senate for failing to create enough convenient faculty parking. As a result, the new parking structure that is now being built will have an entire floor reserved for faculty parking. Tr. 82:1-9.

Non-tenure-track faculty specifically have a strong voice on the Academic Senate. Though it should not matter what percentage of the faculty serving on the Academic Senate are non-tenure-track versus tenure-track, they are practically equal: 19 non-tenure-track, 20 tenure-track, with a non-tenure-track President, who is also the President of the Faculty. Employer's Exhibit 13. Despite all of this, the RD did not analyze the Academic Senate at all in her discussion of whether non-tenure-track faculty are managerial. Decision at 33-41.

The RD similarly ignored the Academic Senate Executive Board, which Vice Provost Levine identified as one of the most significant and powerful faculty bodies at USC. Tr. 185:17-186:8. It is majority non-tenure-track, chaired by a non-tenure-track faculty member, although again that should not matter. Tr. 78:13-79:2; Employer's Exhibit 13. And it has the power to make decisions on behalf of the Senate on anything within the University that it wishes. Tr. 185:17-186:8. Yet the RD never mentioned the Academic Senate Executive Board even once in her discussion of whether non-tenure-track faculty are managerial. Decision at 33-41.<sup>2</sup>

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<sup>2</sup> As previously discussed, the RD also wrongly discounted the sweeping authority of the Academic Senate's Handbook Committee.

**E. USC’s Non-Tenure-Track Faculty Do Not Have “Tenuous” Employment; The Nature Of Their Employment At USC Supports Their Role In Shared Governance.**

The RD also erred in finding that the employment relationship between non-tenure-track faculty and USC is so “tenuous” as to limit their ability to actually control and effectively recommend in the key decision-making areas. Decision at 42. On this issue, the RD discussed the participation of both part-time and full-time faculty on committees, but got the facts wrong as to both.

**1. Part-Time Faculty Meaningfully Participate In Shared Governance.**

The RD states that part-time faculty have “little presence” on the committees, but that is not true. It is undisputed that part-time non-tenure-track faculty sit on many powerful governance committees, including the Committee on Finance and Enrollment, Committee on Curriculum (UCOC), Nominating Committee, Committee on Non-Tenure-Track Faculty Affairs, Committee on Teaching and Academic Programs (CTAP), Committee on Academic Policy and Procedures (CAPP), and the Strategic Planning Committee. Employer’s Exhibit 10.

The RD’s statement that part-time faculty “sometimes are not even aware of the committees available to them” is also demonstrably false. One union witness (Noura Wedell) initially claimed she was never told of USC’s committee structure and claimed that she did not think committee participation was “available” to her. But, on cross-examination, she admitted that she had received the Provost’s annual letter (sent to *all* faculty – including part-time) that every year asks faculty to volunteer for USC’s governance committees. She also admitted she had reviewed the Academic Senate’s website which lists the committees. She admitted it was her choice not to volunteer for committee service. When asked why she did not volunteer, Professor Wedell attributed it to “ignorance” and described herself as “misinform[ed].” Tr. 417:5-418: 25. Notably, none of these later admissions appears in the RD’s Decision. Only Ms. Wedell’s initial testimony is referenced.

Last, the RD also relies on a line in the Senate Constitution that implies part-time faculty may not serve on the *school*-level faculty councils. Decision at 42. But it was undisputed at the hearing that this line in the Constitution is ignored in practice. Professor Levine testified that it is the right of each school to elect any faculty they choose to its faculty council --- including part-time faculty. Indeed, the School of Dance has a part-time faculty member on its faculty council right now, who is its Senate representative. Tr. 160:20-161:17; Employer’s Exhibits 10, 13. To the extent the RD is relying on a written policy instead of USC’s actual practice, that is flatly contrary to *Pacific Lutheran*. As the Board stated: “[F]or purposes of determining managerial status, the actual practice of the faculty is much more probative.” *Pacific Lutheran*, at \*80, n. 37.

**2. The Majority Of Roski’s Full-Time Non-Tenure-Track Faculty Have Long-Term Contracts.**

In the Decision, the RD defined non-tenure-track faculty as “those full-time and part-time faculty who have *short-term appointments* and are not being considered for tenure.” Decision at 7 (emphasis added). The RD is mistaken. It is undisputed that the clear majority (60%) of USC’s full-time non-tenure-track faculty in Roski have multi-year contracts that are three-to-five *years* long. Decision at 8; Tr. 699:15-17, 703:14-20. That is a long-term employment contract by any measure. Moreover, the practice is that these multi-year contracts automatically renew unless there is action taken, including a faculty committee recommendation, to prevent the renewal. Tr. 121:9-123:6. The RD’s conclusion that non-tenure-track faculty have *short-term* contracts is wrong.

Moreover, the evidence established that USC’s non-tenure-track faculty will continue to be re-appointed indefinitely as long as there is a need for them and they continue to perform satisfactorily. Tr. 75:2-21; 123:7-13; 135:24-136:18. By way of comparison, it is obvious that the managers of corporations throughout the nation do not have lifelong tenure, and often serve at will – like USC’s vice presidents – and nevertheless they are managers.

The evidence also showed that USC's so-called "non-tenure-track" faculty have the ability to *become tenured faculty*. Indeed, two of the witnesses who testified at the hearing (Professors Cannon and Fine) started in non-tenure-track appointments and later became tenured. Tr. 239:14-20; 434:17-23. Professor Fine (a witness for the union) even received credit for all of his "non-tenure-track" time when he received tenure. Tr. 555:11-13. The RD failed to consider this evidence.

Having mistakenly found that all non-tenure-track faculty have "short-term" contracts, the RD wrongly concludes that these faculty are therefore limited from serving on committees that have year-long or multi-year terms, such as the Committee on Finance and Enrollment (COFE). Decision at 42. This is wrong not only because many non-tenure-track faculty have multi-year contracts, but also because the committee members are not required to commit to an entire committee term in order to participate. After all, the Provost and Senate President ask faculty to volunteer for appointments to *all* of these committees *every year*. Employer's Exhibit 4. With regard to the COFE in particular, which is unusual in having multi-year membership terms, the Senate is empowered to fill positions that open on that committee at any time, including mid-cycle. Employer's Exhibit 14.

### **3. A Comparison Of The Environments At USC And Pacific Lutheran Shows How Different They Truly Are.**

USC's non-tenure-track faculty are exactly the opposite of the contingent faculty at issue in *Pacific Lutheran*. Indeed, the contrast between the environments at USC and Pacific Lutheran is striking. The Pacific Lutheran faculty who were found to be non-managerial were on short contracts. *Pacific Lutheran*, at \*90. Sixty percent of the full-time non-tenure-track faculty in the Roski School have three-to-five year contracts. Tr. 699:15-17; 703:14-20. The Roski part-time faculty are eligible for promotion and multi-year contracts. The Roski so-called "non-tenure-track" faculty are eligible for "evergreen" contracts that automatically renew unless there is a non-reappointment process involving a faculty committee. Tr. 168:17-169:3. Moreover, they

are able to be appointed to tenure. That was confirmed by witnesses, both of whom started at USC in non-tenure-track appointments. Tr. 239:14-20; 434:17-23; 555:11-13. And all of these faculty with loads of 50% or higher are benefits-eligible. Tr. 138:15-22; Employer's Exhibits 7-8.

For contingent faculty at Pacific Lutheran and elsewhere, "reappointment often depend[ed] on the discretion of a single administrator, 'producing the kind of hesitancy regarding controversy or offense in teaching and research that limits academic freedom'." *Pacific Lutheran*, at \*88. At USC, by contrast, the evidence shows non-reappointment of full-time non-tenure-track faculty requires recommendation by a faculty committee. Tr. 119:20-120:21.

At Pacific Lutheran, "[t]here [wa]s no evidence . . . of fulltime contingent faculty currently serving on a university committee," (*Pacific Lutheran*, at \*95.) Also at Pacific Lutheran, "[m]embership on faculty standing committees is limited to regular faculty; contingent faculty are expressly barred from serving." *Id.* at \*97. To the contrary, USC full-time and part-time teaching faculty serve on many university-level committees, and in the Academic Senate. Roski School non-tenure-track faculty are active members of many university-level committees. To take just one committee as an example, non-tenure-track faculty, including a Roski part-timer, have almost half the seats and the voting co-chairmanship, of USC's Committee on Finance and Enrollment.

At Pacific Lutheran, however, the evidence showed no faculty involvement in "decisions affecting PLU's finances." *Id.* at \*110. At Pacific Lutheran University, "the faculty are not a majority on any committee," (*Id.* at \*94) and "[T]he record contains no evidence . . . that full-time contingent faculty have actually ever voted or spoken in the faculty assembly." (*Id.* at \*101.) In contrast, at USC, faculty are a majority on all relevant committees, and have 100% of the voting membership on almost all of them. Non-tenure-track faculty make up almost half of the Academic Senate, and non-tenure-track faculty hold a majority on the Senate Executive Board, including the President of the Faculty. In addition, non-tenure-track faculty have a majority on the Academic Senate Nominating Committee. At the Roski School, a two-thirds

majority on the Roski Faculty Council are non-tenure-track, including its chairmanship, and part-time faculty have the right to a seat on the Roski Faculty Council.

**F. USC's Non-Tenure-Track Faculty Have A Role In Faculty Governance Equal To That Of Tenured Faculty, And The Tenured Faculty Are Managerial. All USC Faculty Are Managerial.**

USC has consistently argued, and produced evidence, that all its faculty are managerial. USC non-tenure-track faculty have a role in faculty governance equal to that of tenured faculty (except in tenure matters) and in some ways greater than that of tenured faculty, given the predominance of non-tenure-track faculty in the Academic Senate's elected leadership and the Roski School's elected leadership. Since USC's tenured faculty have as much or greater role in running the university as the faculty of Yeshiva University did, USC's tenured faculty are managerial, and so are its non-tenure-track faculty.

**IV. IN THE ALTERNATIVE, PACIFIC LUTHERAN SHOULD BE OVERRULED OR SUBSTANTIALLY MODIFIED TO COMPLY WITH THE SUPREME COURT'S DECISION IN YESHIVA**

For the reasons set forth above, USC contends that its faculty are managerial employees under the *Pacific Lutheran* standards, and that the RD erred in finding otherwise. Should the Board conclude, however, that the RD correctly interpreted and applied *Pacific Lutheran*, then USC respectfully submits that *Pacific Lutheran* itself is contrary to the Supreme Court's decision in *Yeshiva*. As such, *Pacific Lutheran* should be overruled or substantially modified to comply with *Yeshiva*, and USC's faculty found to be managerial employees under the new, *Yeshiva*-compliant test.<sup>3</sup>

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<sup>3</sup> The University preserved this issue in its Statement of Position: "*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 unit is comprised entirely of faculty who are managerial under *Yeshiva*." The Regional Director, bound by Board precedent, declined to allow the University to litigate this issue. Tr. 20:25-21:22:2; 25:6-22.

A. **The *Pacific Lutheran* Test For “Effective Recommendation” Is Inconsistent With *Yeshiva*.**

*Pacific Lutheran* states that, in order to be deemed “effective,” faculty recommendations must “almost always be followed by the administration.” It also states that faculty recommendations must “routinely become operative without independent review.” *Pacific Lutheran*, at \*82 (citing *Lewis and Clark College*, 300 NLRB 155, 163 (1990)).

It is not clear from the Board’s decision whether the Board intended to require *both* that recommendations “almost always be followed” *and* that there be no independent review. Certainly, the RD in the present case thought so. As detailed above, the RD treated *any* rejection or delay in adoption of a faculty recommendation as failing the “almost always” test. And in the many key areas where it is undisputed that faculty recommendations had never been rejected by USC’s administrators, the RD faulted the University for failing to prove the absence of independent review. The RD also faulted University administrators for engaging in dialogue with faculty committees --- for example, working ““back and forth”” with the Curriculum Committee on a proposed new Master’s degree program (Decision at 34) rather than simply rubber-stamping every proposal from faculty.

If the Board were to agree with the RD, then former Member Johnson’s prediction will have been borne out: *Pacific Lutheran* “raise[s] the bar for establishing managerial status of faculty to an unattainable height.” *Pacific Lutheran*, at \*183 (Member Johnson, dissenting). And as such, *Pacific Lutheran* is flatly contrary to *Yeshiva*.

In *Yeshiva*, the Supreme Court stressed that “authority in the typical ‘mature’ private university is divided between a central administration and one or more collegial bodies.” This is a “system of ‘shared authority.’” “Although faculties have been subject to external control in the United States since colonial times, . . . *traditions of collegiality* continue to play a significant role at many universities, including *Yeshiva*.” *NLRB v. Yeshiva University*, 444 U.S. 672, 680 (1980) (emphasis added).

In emphasizing the “divided” or “shared” authority and “traditions of collegiality” that prevail at mature universities such as Yeshiva (and USC), the *Yeshiva* Court did not envision that faculty recommendations must “almost always” be adopted.<sup>4</sup> Both Member Miscimarra and former Member Johnson contended --- correctly, in USC’s view --- that the “almost always” standard is inconsistent with the Act. *Pacific Lutheran*, at \*81 and \*122 (Member Miscimarra, concurring in part, dissenting in part) (Member Johnson, dissenting). And the *Yeshiva* Court most certainly did not contemplate that faculty recommendations, even if ultimately adopted, must be rubber-stamped without meaningful review.

If faculty recommendations must “almost always” be followed, *and* if the recommendations must “routinely” go into effect without independent review, then *Pacific Lutheran* necessarily requires that faculty be accorded *ultimate authority* in the decision-making areas confided to them. In her reading of *Pacific Lutheran*, the RD recognized ultimate authority for faculty as the logical endpoint of the decision. She entirely discounted USC’s recently formed Committee on Finance and Enrollment because she was not convinced that USC’s Board of Trustees “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.” Decision at 38. In the RD’s interpretation of *Pacific Lutheran*, to establish the faculty’s managerial authority, that is what the Trustees would be required to do: “*sign off without second thought.*”

This is flatly contrary to *Yeshiva*, in which the Supreme Court explicitly rejected the Board’s view that ultimate authority must rest with faculty.

In *Yeshiva University’s* underlying representation case, as in other college and university cases of the time, the Board reasoned that faculty could not be managers because “*final authority*

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<sup>4</sup> “[I]nfrequent administrative reversals [of faculty action] in no way detract from the institution’s primary concern with the academic responsibilities entrusted to the faculty.” *Yeshiva*, 444 U.S. at 689 n. 27. “[T]he fact that the administration holds a rarely exercised veto power does not diminish the faculty’s effective power in policy-making and implementation.” *Id.* at 683 n. 17.

rests with the board of trustees.” *Yeshiva University*, 221 NLRB 1053, 1054 (1975) (emphasis added). Upon review, the Second Circuit skewered the Board’s reasoning:

“[T]he concept that the faculty has neither managerial nor supervisory status because it is subject to the ultimate authority of the Board of Trustees is particularly unconvincing. Normally, every corporation is ultimately operated by its Board of Directors, . . . and yet that fact obviously has never precluded a finding that there are managerial or supervisory employees in the corporation. Certainly the President and Vice-Presidents of Yeshiva as well as its Deans are subject to the ultimate authority of the Board of Trustees and yet this does not prevent them from holding managerial or supervisory status.”

*NLRB v. Yeshiva University*, 582 F.2d 686, 701 (2d Cir. 1978) (citation omitted).

By the time the Supreme Court affirmed the Second Circuit’s decision, the Board had dropped its “ultimate authority” argument --- and rightly so, said the Supreme Court. The Board’s theory was “insupportable,” said the Court. “*Ultimate authority . . . has never been thought to be a prerequisite to supervisory or managerial status.* Indeed, it could not be since every corporation vests that power in its board of directors.” 444 U.S. at 685 nn. 21 & 22 (emphasis added).

Under *Pacific Lutheran*, however, the requirement that faculty have “ultimate authority” returns as the *de facto* prerequisite to managerial status.

There is nothing in *Yeshiva* that countenances the Board’s adopting a strict “almost always” requirement, nor is there anything in *Yeshiva* that supports melding that requirement with a demand that administrators and trustees forgo any meaningful review of faculty recommendations. To the contrary, these *Pacific Lutheran* requirements are inconsistent with the principles of “shared” or “collegial” university governance that the *Yeshiva* Court embraced. And as shown by the RD’s decision in the present case, these two requirements lead to the very thing the *Yeshiva* Court explicitly rejected: insistence that faculty be accorded *ultimate authority* as a condition of finding them to be managers.

**B. Pacific Lutheran's Designation Of "Primary" And "Secondary" Areas Of Decision-Making Is Inconsistent With Yeshiva.**

In *Pacific Lutheran*, the Board cited the criticism leveled at the Board in two D.C. Circuit cases, *LeMoyne-Owen College v. NLRB*, 357 F.3d 55 (D.C. Cir. 2004), and *Point Park University v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006), as reasons for adopting a new approach to *Yeshiva*. See *Pacific Lutheran*, at \*177. Yet, for several reasons, *Pacific Lutheran* fails to apply the Supreme Court's teachings in *Yeshiva*, while it also fails to comply with the D.C. Circuit's instructions to explain which of the many factors considered would satisfy it.

First, as the D.C. Circuit observed in *Point Park University*, "the heart of the Court's decision in *Yeshiva*" is "faculty control over *academic* matters." 457 F.3d at 49 (emphasis added). The court in *Point Park University* quoted the *Yeshiva* Court's listing of academic matters, which specifically included the determination of "teaching methods [and] grading policies." *Id.*, quoting 444 U.S. at 686. As the *Yeshiva* Court held, "The 'business' of a university is education, and its vitality ultimately must depend on *academic policies* that largely are formulated and generally are implemented by faculty governance decisions." 444 U.S. at 688 (emphasis added). "The university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of *academic policy*." *Id.* at 689 (emphasis added). Yet, contrary to the teaching of *Yeshiva*, the Board in *Pacific Lutheran* arbitrarily relegated "academic policy," which encompasses a whole range of academic decision-making, to "secondary" status." *Pacific Lutheran*, at \*77 and \*110.<sup>5</sup>

Second, the *Pacific Lutheran* Board relegates to "secondary" status the faculty's traditional role in personnel decisions, including promotions and tenure. *Pacific Lutheran*, at \*77. In so doing, the Board misunderstands and misapplies the Supreme Court's treatment of this topic. The *Yeshiva* Court stated, "The record shows that faculty members at *Yeshiva* also play a *predominant role* in faculty hiring, tenure, sabbaticals, termination and promotion. These

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<sup>5</sup> Former Member Johnson specifically addressed this failing in his dissent. *Pacific Lutheran*, at \*125 (Member Johnson, dissenting).

decisions *clearly have both managerial and supervisory characteristics.*” 444 U.S. at 686 n. 23 (emphasis added). The Court then went on to state, “*Since we do not reach the question of supervisory status, we need not* rely primarily on these features of faculty authority.” *Id.* (emphasis added). The Supreme Court did not hold, as *Pacific Lutheran* seems to suppose, that this well-established function of faculty self-government is of secondary importance. Rather, the Court merely found it unnecessary to tease apart the “managerial and supervisory characteristics” in this area where faculty “play a predominant role.”<sup>6</sup>

Third, while splitting off and demoting core academic and personnel functions that are customarily within the faculty’s purview at “mature” universities, including USC, the *Pacific Lutheran* Board elevated to “primary” status an area that has almost always been the domain of trustees and administrators: finances. There is no warrant for this in *Yeshiva*. “The budget for each school is drafted by its Dean or Director,” the Supreme Court observed, “subject to approval by the President after consultation with a committee of administrators.” 444 U.S. at 675. “Even when financial problems . . . restricted *Yeshiva*’s budget, faculty recommendations still largely controlled personnel decisions *made within the constraints imposed by the administration.*” *Id.* at 677 (emphasis added). Only “[o]n occasion” did the *Yeshiva* faculty’s views determine “the size of the student body [and] the tuition to be charged.” *Id.* at 686. There is no indication that other decisions with significant financial impact were confided to *Yeshiva*’s faculty, even occasionally.

In *LeMoyne-Owen College v. NLRB*, *supra*, D.C. Circuit Judge (now Chief Justice) Roberts cited and quoted numerous cases in which the Board, applying *Yeshiva*, recognized that leaving finances in the hands of trustees and administrators in no way diminishes the faculty’s role in academic matters, or bars them from managerial status. For example, quoting *Lewis and Clark College*, 300 NLRB 155, 162 (1990), Judge Roberts stated:

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<sup>6</sup> Former Member Johnson also addressed the importance of personnel decisions in his dissent. *Id.*

“As the Board found, ‘there is . . . nothing inconsistent with the faculty members’ having authority over one level of policy (e.g., academics), and the administration (including the board of trustees), having control over another (e.g., financial viability and long term planning).’ The Board further explained: ‘The board of trustees and others in the administration are entrusted with the ultimate policy-making and fiduciary responsibility for the College, *not the faculty.*’”

357 F.3d at 57 (emphasis added). Upon remand from the D.C. Circuit, the Board in *LeMoyne-Owen College* concluded that the faculty were managerial employees. Citing *Lewis and Clark College, supra*, as well as other authorities, the Board stated, “[F]aculty can be managerial even though a college’s administration is responsible for financial and budgetary decisions, and the faculty does not participate in such decisions.” *LeMoyne-Owen College*, 345 NLRB 1123, 1128 (2005).

In elevating finances to “primary” status, the *Pacific Lutheran* Board says financial decision-making is “one of the hallmarks of managerial control *across all industries.*” *Pacific Lutheran*, at \*76 (emphasis added). But as *Yeshiva* teaches, “[T]he analogy of the university to industry need not, and indeed cannot, be complete.” 444 U.S. at 689. Particularly considering the historic role of faculty in shared governance in United States universities, the identification of finances as a “primary” area is an unreasonable interpretation of the Act. Furthermore, it just is not true that all managers across industry control finances. Different industrial managers have different spheres: one may write policies, another control training, a third promotions, while someone else may control finances for the others.

Finally, having identified a goal of bringing clarity to its *Yeshiva* jurisprudence, the Board’s *Pacific Lutheran* test ultimately fails to do so. That’s because “the actual weighting of its factors, including what showing is sufficient to meet the . . . test” is left unresolved. *Pacific Lutheran*, at \*182 (Member Johnson, dissenting). Thus *Pacific Lutheran* fails to meet the requirements of *LeMoyne-Owen College v. NLRB*, 357 F.3d 55 (D.C. Cir. 2004), and *Point Park University v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006).

Once again, however, *Yeshiva* provides guidance. The *Yeshiva* Court cited a number of Board cases in which managerial status was established by decision-making in a *single* area “of far less significance to the employer” than any of the academic areas identified in *Yeshiva*. 444 U.S. at 683 n.16.

Member Miscimarra picked up on this point in his separate opinion in *Pacific Lutheran*, observing, “[T]here are many non-university contexts in which individuals who undisputedly qualify as ‘managerial’ have specialized responsibility in only one area, and not others. I believe the Board must allow for the same possibility in the university context . . . .” *Pacific Lutheran*, at \*123 (Member Miscimarra, concurring). Moreover, within universities, and specifically at USC, vice presidents who are indisputably managers have authority solely in one specialized area.

Accordingly, USC submits that, while it meets the criteria of all five areas of decision-making, any one of them suffices as a matter of law. See *LeMoyne-Owen College v. NLRB*, 357 F.3d at 57, quoting *Elmira College*, 309 NLRB 842 (1992) (“[W]ithout more, the nature of faculty involvement with respect to academic matters *conclusively* establishes their status as managerial employees.’”) (emphasis added).<sup>7</sup>

## V. THE BOARD’S NEW ELECTION RULES ARE UNLAWFUL ON THEIR FACE

The new election rules, on their face, deny employers due process under the Fifth Amendment and free speech under the First Amendment. The rushed process that the new rules require is particularly inappropriate in a faculty case such as this one, which the Board has acknowledged presents complicated issues that are likely to require more time. USC raised this issue in its Position Statement and at the start of the hearing, but the RD declined to allow it to be litigated. Throughout this representation case, including in this Request for Review, USC has

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<sup>7</sup> As previously discussed, *Pacific Lutheran*, does not support the RD’s view that faculty committees do not “count” unless the majority consists of non-tenure-track faculty. Should the Board adopt this interpretation of *Pacific Lutheran*, however, it would be an arbitrary, unreachable interpretation of the Act.

preserved its right to argue on appeal that the rules, and the tight time frames they impose, are unlawful for all of the reasons discussed in the dissents of Member Miscimarra and now-former Member Johnson.

**VI. CONCLUSION**

The RD's Decision in this case is riddled with factual and legal errors. Key factual conclusions are unsupported by the record and indeed contradicted by the evidence, and new legal requirements are invented out of whole cloth. In light of the strong showing that USC has made regarding how its non-tenure-track faculty (including those in the Roski School) participate in university-wide shared governance, it is clear that those faculty are managerial employees under the Act. Review should be granted, the Board should determine that the non-tenure-track faculty at issue are managerial under the Act, and the petition should be dismissed.

DATED: February 23, 2016

PAUL HASTINGS LLP  
J. AL LATHAM, JR.  
CAMERON W. FOX

By:   
CAMERON W. FOX

Attorneys for Respondent  
UNIVERSITY OF SOUTHERN CALIFORNIA

**CERTIFICATE OF SERVICE**

I am a citizen of the United States and employed in Los Angeles, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 515 South Flower Street, 25th Floor, Los Angeles, California 90071.

On February 23, 2016, I served the foregoing document described as:

**UNIVERSITY OF SOUTHERN CALIFORNIA'S REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION AND BRIEF IN SUPPORT THEREOF** on the interested parties by electronic service and United States mail as follows:

Mori Rubin  
Regional Director  
National Labor Relations Board  
Region 31  
11500 W. Olympic Blvd., Suite 600  
Los Angeles, CA 90064-1753  
[Mori.Rubin@nlrb.gov](mailto:Mori.Rubin@nlrb.gov)

Maria Keegan Myers  
Rothner, Segall & Greenstone  
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[mmyers@rsglabor.com](mailto:mmyers@rsglabor.com)

**VIA EMAIL:**

The email transmission was complete and without error. The email was transmitted to the email addresses listed above on February 23, 2016.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on February 23, 2016, at Los Angeles, California.



Christine Wilson

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UNIVERSITY OF SOUTHERN CALIFORNIA

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 31

SERVICE EMPLOYEES  
INTERNATIONAL UNION, LOCAL 721,  
  
Petitioner,  
  
and  
  
UNIVERSITY OF SOUTHERN  
CALIFORNIA,  
  
Employer.

CASE NOS. 31-RC-164868 and 31-RC-164864

**USC'S MOTION TO REOPEN  
THE RECORD AND FOR  
RECONSIDERATION; POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

## MOTION

Pursuant to Section 102.65(e) of the Board's Rules and Regulations, the University of Southern California ("USC") hereby moves (1) to reopen Case Nos. 31-RC-164868 and 31-RC-164864 to receive new evidence, and (2) for reconsideration of the Regional Director's December 24, 2015 Decision and Direction of Election in light thereof.

Extraordinary circumstances justify re-opening the hearing. The Union witness on whom the Regional Director relied in deciding that USC's non-tenure-track faculty do not decide matters of significance with regard to University curriculum --- Professor Kate Levin --- recently testified to the exact opposite. Because decision-making over academic programs is a primary area of decision-making under *Pacific Lutheran Univ. & SEIU, Local 925*, 2014 NLRB LEXIS 1002 (N.L.R.B. Dec. 16, 2014), her new testimony is powerful evidence of managerial status. Professor Levin's post-election testimony (the relevant transcript pages of which are attached hereto) should be admitted into the record. This new testimony should lead the Regional Director to conclude that USC's non-tenure-track faculty, like all USC faculty, are managerial. Indeed, it is now clearer than ever that no question of representation exists in either of the two cases.

This motion is timely. Professor Levin's new testimony only came out at the post-election hearing (February 23-25, 2016). This new evidence was not available to USC at the time of the pre-election hearing. If this motion to re-open the record is not granted, USC will be unfairly prejudiced.

## POINTS AND AUTHORITIES IN SUPPORT

At issue in the pre-election hearing was whether USC's non-tenure-track faculty make decisions as to matters of significance in the five key areas identified by the Board in *Pacific Lutheran*. USC presented robust evidence that all of its faculty --- tenured, tenure-track, and non-tenure-track alike --- participate in its shared faculty governance system of University-wide faculty committees. Through those committees, faculty members make decisions on University policy in **all five Pacific Lutheran** areas: academic programs, enrollment management, finances, academic policy, and personnel decisions.

The SEIU contended that the work of non-tenure-track faculty in the area of academic programs is merely technical and clerical, not substantive decision-making. The SEIU relied on the testimony of Professor Kate Levin, a non-tenure-track faculty member who sits on a subcommittee of the University Committee on Curriculum (UCOC). She testified:

- “The work of [the UCOC] -- yeah, you know, mostly **we’re kind of reviewing these [course] proposals for kind of technical and clerical matters.**” Pre-Election Tr. 669:16-21 (emphasis added).<sup>1</sup>
- “**I wasn’t providing substantive feedback [on courses]. . . . I’ve never made any substantive decisions that have, you know, asked me to draw on any real judgment.**” Pre-Election Tr. 665:2-20 (emphasis added).
- “[T]he nature of the [UCOC’s] work is to make sure, you know, things like there are enough contact hours between professors and students, to make sure that the credits, you know, of the course match the contact hours, to make sure that, you know, the prerequisites of a given course match up with the specifications in the curriculum handbook, that sort of thing.” Pre-Election Tr. 663:13-664:1.

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<sup>1</sup> All cited testimony from the pre-election hearing is attached to this Motion as **Exhibit A**, and cited as “Pre-Election Tr. [page]:[line].” All cited testimony from the *post*-election hearing is attached as **Exhibit B**, and cited as “Post-Election Tr. [page]:[line].”

The SEIU urged the Regional Director to rely on this testimony, which was the only evidence it offered as to the UCOC, citing it in the briefing and arguing “that members of the UCOC exercise decision-making authority similar to that of clerical staff, not the professional expertise which is indispensable to the formulation and implementation of academic policy.” SEIU Brief at p. 38 (quoting *NLRB v. Yeshiva University*, 444 US 672, 689 (1980)).

The Regional Director *did* rely on Professor Levin --- finding that “[t]he role of the UCOC subcommittees seems to be simply to verify that the proposals meet pre-determined criteria, such as having a sufficient number of contact hours.” Decision and Direction of Election, p. 33. The UCOC (which decides USC’s academic programs) is arguably the most important faculty committee under the standards set by the Board in *Pacific Lutheran*, and this finding drove the result in these cases.

The January 2016 election ended in mixed results. In the Roski School, the SEIU was elected by the non-tenure-track faculty, and USC then appealed to the Board the Regional Director’s Decision allowing the election to occur in the first place. The SEIU opposed USC’s still-pending request for review, and its brief to the Board emphasized Professor Levin’s pre-election testimony --- that non-tenure-track faculty are supposedly deciding nothing more than technical and clerical matters.<sup>2</sup> See SEIU’s Opposition to Employer’s Request for Review of Decision and Direction of Election at pp. 7-8, 20.

In the Dornsife College, the SEIU failed to secure a majority of votes and served objections. During the February 2016 objections hearing, the SEIU took a starkly different position on faculty decision-making --- as did Professor Levin, the same witness, now making the opposite point. Far from arguing that non-tenure-track faculty on University-wide committees are powerless minions, the SEIU suddenly claimed that non-tenure-track faculty have a vital role in USC governance through such committees and that this power is an important

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<sup>2</sup> Because USC’s request for review is pending, USC is concurrently providing a courtesy copy of this motion and its attached exhibits to the Board.

benefit.<sup>3</sup> To that end, Professor Levin testified that she and the other UCOC members actually *do* make decisions about USC’s curriculum, and she described how much she enjoys her own influence in deciding what courses are offered. She testified:

- “**I enjoy having 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 any given [course] modification** because it’s often the case that a number of people will comment on a [course] proposal . . .” Post-Election Tr. 193:22-194:8 (emphasis added).
- “[W]e make recommendations about whether new courses . . . or changes to existing courses should go through.” Post-Election Tr. 246:20-247:1 (emphasis added).
- “[I joined the UCOC because] I was interested in getting a window into **how university curricula are shaped.**” Post-Election Tr. 192: 18-193:3 (emphasis added).
- “**Q: Do you regard your work on the curriculum committee as important? A: I do.**” Post-Election Tr. 246:3-5 (emphasis added).

Had Professor Levin been that candid in the *pre-election* hearing, it would have led to a different result. After all, faculty decision-making about academic programs is the first of the primary areas of decision-making and, standing alone, it is enough to make faculty managerial under *Pacific Lutheran*. Professor Levin’s testimony at the post-election hearing shows that USC should have prevailed on this issue in the pre-election hearing.

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<sup>3</sup> After all, the Union’s goals had changed. In the *pre-election* hearing, the Union was contending that the faculty members at issue were non-managerial. In that context, making faculty governance sound powerless was good. In the *post-election* hearing, the Union was contending that USC’s comments about possible changes to faculty governance following unionization were objectionable “threats.” In that context, making faculty governance sound powerless was bad.

This is an extraordinary situation. A key SEIU witness has totally undermined her own previous Board testimony --- testimony that the Regional Director relied upon, at the SEIU's insistence. Under Section 102.64(b) of the Board's Rules and Regulations, the hearing officer has the obligation to "obtain a full and complete record upon which the Board or the regional director may discharge their duties under Section 9(c) of the Act." 29 C.F.R. § 102.64(e). But because Professor Levin's new testimony was not known at the time of the pre-election hearing, the hearing officer could not inquire about it. The Regional Director was therefore deprived of a complete record on which to render the decision. These are compelling reasons to reopen the hearing. *See, e.g., Chicago Youth Centers*, 235 NLRB 915, \*\*1, fn.3 (1978) (concluding that evidence at the first hearing was "incomplete and somewhat misleading," therefore warranting reopening); *Oscopharmacy*, 2015 NLRB LEXIS 128, n1 (Feb. 25, 2015) (unpublished order upholding Regional Director's reopening pre-election representation hearing; "[t]he Regional Director is responsible for ensuring that the record is full and complete. Inherent in that responsibility is the authority to supplement an incomplete record by reopening a representation hearing.") (Hirozawa, Johnson, McFerran).

Once the new evidence is in the record, it is entirely appropriate for the Regional Director to reconsider the Decision and Direction of Election. *See e.g., Grandview Foods, LLC*, 2004 NLRB Reg. Dir. Dec. LEXIS 393 (Dec. 14, 2004) (granting a motion to reconsider, vacating the election, and dismissing the instant petition). Professor Levin's new testimony shows indisputably that non-tenure-track faculty make substantive, important decisions about USC's academic programs (the top-ranked decision-making area in *Pacific Lutheran*). Therefore, USC's faculty, including non-tenure-track faculty, exercise managerial authority. No question of

representation exists in either of the petitioned-for units, and upon reconsideration, the petitions should be dismissed.

DATED: March 31, 2016

PAUL HASTINGS LLP  
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CAMERON W. FOX

By:   
\_\_\_\_\_

CAMERON W. FOX

Attorneys for Employer  
UNIVERSITY OF SOUTHERN CALIFORNIA

# EXHIBIT A

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 31

In the Matter of:

University of Southern  
California,

Case No. 31-RC-164864  
31-RC-164868  
31-RC-164871

Employer,

and

Service Employees  
International Union, Local  
721,

Petitioner.

\_\_\_\_\_  
\_\_\_\_\_

Place: Los Angeles, California

Dates: December 10, 2015

Pages: 596 through 731

Volume: 4

OFFICIAL REPORTERS

AVTranz  
E-Reporting and E-Transcription  
7227 N. 16th Street #207  
Phoenix, AZ 85020  
(602) 263-0885

1 MS. MYERS: Thank you. Petitioner calls Professor Kate  
2 Levin.

3 HEARING OFFICER PEREIRA: Ms. Levin -- or Professor Levin,  
4 please raise your right hand.

5 Whereupon,

6 **KATE LEVIN**

7 having been duly sworn, was called as a witness herein and was  
8 examined and testified as follows:

9 HEARING OFFICER PEREIRA: Please state and spell your name  
10 for the record.

11 THE WITNESS: My first name is Kate, K-A-T-E. My last  
12 name is Levin, L-E-V-I-N.

13 **DIRECT EXAMINATION**

14 Q BY MS. MYERS: Good afternoon, Professor Levin.

15 A Good afternoon.

16 Q Professor, are you currently employed?

17 A Yes.

18 Q Who is your employer?

19 A The University of Southern California.

20 Q And what is your title?

21 A I'm a part-time lecturer.

22 Q And what school do you teach?

23 A Dornsife.

24 Q And what program do you teach?

25 A In the writing program.

1 provided it? I know you received it directly from the staff  
2 person, but do you know who drafted it? Do you have an idea?

3 THE WITNESS: I don't actually. I don't.

4 HEARING OFFICER PEREIRA: Okay. And, again, could you  
5 just tell me what the purpose was? Was it to assist you and  
6 other committee members in drafting proposals?

7 THE WITNESS: Not in drafting proposals but in reviewing  
8 proposals that had been drafted by others.

9 HEARING OFFICER PEREIRA: Okay.

10 THE WITNESS: Yes.

11 HEARING OFFICER PEREIRA: All right. Well, thank you.

12 THE WITNESS: Sure.

13 Q BY MS. MYERS: Professor, can you describe in more detail  
14 what your role is on this committee in terms of reviewing  
15 proposals that are drafted by others?

16 A Sure. So the chair of the committee assigns our  
17 subcommittee members, you know, a few tasks, right? We are --  
18 we might be tasked with reviewing a new course. We might be  
19 tasked with reviewing changes to an existing course or a  
20 program or a certificate.

21 Essentially, the nature of the work is to make sure, you  
22 know, things like there are enough contact hours between  
23 professors and students, to make sure that the credits, you  
24 know, of the course match the contact hours, to make sure that,  
25 you know, the prerequisites of a given course match up with the

1 specifications in the curriculum handbook, that sort of thing.

2 Q Okay. Have you received any assignments to review any  
3 courses or programs yet?

4 A I have. I've received three assignments.

5 Q Can you describe those assignments?

6 A Sure. One was reviewing a new political science course.  
7 It was a graduate level course on research methods. Another  
8 was to review a change to a certificate that the law school is  
9 offering, and another one was to review a change to a master's  
10 program offered by the business school.

11 Q Okay. Let me ask you about the first of those three.

12 With regard to the political science --

13 A Uh-huh, yeah.

14 Q -- do you have any academic training in political science?

15 A I took an undergrad course in political science, but not  
16 since then.

17 Q I think the second task that you mentioned was to review a  
18 new certificate program in the law school?

19 A Yes.

20 Q Do you have any legal training?

21 A No.

22 Q And your third task was to review a master's degree  
23 program in the business school; is that right?

24 A Yes, or a change to an existing program, yes, uh-huh.

25 Q Okay. Do you have any formal training in business?

1 A No.

2 Q Professor, how can you provide substantive feedback on  
3 courses or programs that are outside of the area of your  
4 academic expertise?

5 A I wasn't providing substantive feedback. Reviewing, you  
6 know, these three tasks probably amounted to about 45 minutes  
7 of work. As I said --

8 Q Forty-five minutes total, or 45 minutes for each --

9 A Total.

10 Q Okay.

11 A You know, again, you know, some of it is mathematical,  
12 just making sure that the contact hours are sufficient to a  
13 given course's credits, right. Making sure, you know, for  
14 example, for the law school certificate, there's a stipulation  
15 in the curriculum handbook that all the prerequisites have to  
16 be, you know of a 500 level, right? And some of the  
17 prerequisites here were a 200 level, right? So that's  
18 something I would flag, but I don't -- I've never made any  
19 substantive decisions that have, you know, asked me to draw on  
20 any real judgment.

21 Q What is your understanding of the process after you  
22 provide your feedback when you've reviewed a new course or  
23 program?

24 A Right. It seems that when I approve a program or, excuse  
25 me, you know, approve a given task, it then goes on to the

1 us what your work on the committee has been?

2 A Well, it's largely, you know, a group of part-time faculty  
3 talking to each other, you know, about our situations, but my  
4 sense of it is that the committee's -- excuse me, the  
5 subcommittee's powers are very limited. You know, we -- you  
6 know, as I said one of the first things that happened is that  
7 we sought just data on how many part-time faculty exist at the  
8 given schools and we're essentially told no. So, you know,  
9 that struck me as a real contradiction. You know, here's a new  
10 subcommittee that's formed, you know, to monitor and evaluate  
11 part-time faculty affairs at the school, but it seems that, you  
12 know, the administration was not willing to provide us with a  
13 key piece of what we would need to fulfill our charge. So my  
14 sense or our authority and our ability to get things done is  
15 that we're quite hampered by that and somewhat limited.

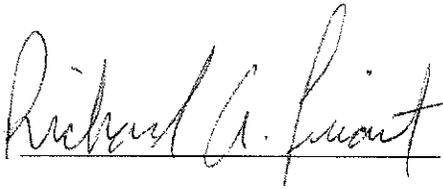
16 Q And with respect to your work on the University Committee  
17 on Curriculum, now that you've served a semester on that  
18 committee, can you describe what the work of the committee is.

19 A The work of -- yeah, you know, mostly we're kind of  
20 reviewing these proposals for kind of technical and clerical  
21 matters. You know, as I sort of alluded to before, I was a bit  
22 intimidated accepting the invitation to this committee because  
23 I, you know, I didn't know if I was sort of qualified to make  
24 decisions about, you know, new classes being proposed in other  
25 departments, and I didn't know how I would be able to do that

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This is to certify that the attached proceedings before the National Labor Relations Board (NLRB), Region 31, Case Numbers 31-RC-164864, 31-RC-164868, 31-RC-164871, University of Southern California and Service Employees International Union, Local 721 at the National Labor Relations Board, Region 31, 11500 West Olympic Boulevard, Suite 600, Hearing Room A, Room 603, Los Angeles, California 90064 on Thursday, December 10, 2015, at 9:35 Am. was held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.



RICHARD A FRIANT  
Official Reporter

# EXHIBIT B

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 31

In the Matter of:

University of Southern  
California,

Case No. 31-RC-164864

Employer,

and

Service Employees  
International Union,  
Local 721,

Petitioner.

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Place: Los Angeles, California

Dates: February 23, 2016

Pages: 1 through 230

Volume: 1

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Phoenix, AZ 85020  
(602) 263-0885

1 MR. NADURIS-WEISSMAN: Well, let's see. It's a really  
2 brief witness.

3 MR. LATHAM: Okay.

4 MR. NADURIS-WEISSMAN: So I think 10:00 a.m. would be  
5 fine.

6 MR. LATHAM: All right. Okay.

7 MR. NADURIS-WEISSMAN: Okay.

8 HEARING OFFICER PALENCIA: Off the record.

9 (Off the record at 4:19 p.m.)

10 HEARING OFFICER PALENCIA: Back on the record.

11 Whereupon,

12 KATE LEVIN

13 having been duly sworn, was called as a witness herein and was  
14 examined and testified as follows:

15 HEARING OFFICER PALENCIA: Can you please state your name  
16 for the record.

17 THE WITNESS: Sure. My name is Kate Levin.

18 HEARING OFFICER PALENCIA: L-E-V-I-N?

19 THE WITNESS: L-E-V-I-N.

20 HEARING OFFICER PALENCIA: Please speak loudly and make  
21 sure that you wait for the question to be completed before you  
22 answer. Also, make sure you understand the question. If you  
23 don't understand the question, say so and ask that it be  
24 rephrased.

25 THE WITNESS: Okay.

1 A Yes, I am.

2 Q Let me ask you about the Curriculum Committee. How did  
3 you get on this committee?

4 A Uh-huh. I received an invitation letter notifying me that  
5 I had been nominated to join the committee, and I received that  
6 in I believe it was August of 2015.

7 Q Okay. Do you know how you were selected?

8 A Only that I was nominated by -- I believe it was the  
9 Executive Committee.

10 Q The Executive Committee of what, do you know?

11 A I believe it was of the University Committee on  
12 Curriculum, although I don't remember if that was the exact  
13 language.

14 Q Okay.

15 HEARING OFFICER PALENCIA: Exact language of what?

16 THE WITNESS: Of the body that nominated me to join the  
17 committee.

18 Q BY MR. NADURIS-WEISSMAN: Okay. What does the -- what  
19 does the Curriculum Committee do?

20 A The Curriculum Committee reviews proposals for new  
21 courses. It also reviews proposals for new certificates, new  
22 programs at times. And it also reviews modifications to  
23 existing courses, programs, certificates.

24 Q And what was your interest in joining this committee?

25 A Uh-huh.

1 Q Or accepting the nomination?

2 A Uh-huh. I was interested in getting a window into how  
3 university curricula are shaped. I was interested in getting a  
4 look at how other professors design their courses in other  
5 disciplines. And I was interested in getting a chance to work  
6 with colleagues in other disciplines, other departments.

7 Q And did you receive any financial benefit for  
8 participating?

9 A I did.

10 Q And is that the -- is that something we discussed  
11 previously with the September 3rd employment contract  
12 modification?

13 A Yes.

14 Q Do you -- do you recall how much you receive?

15 A Yes. For the term spanning from September 2015 through  
16 April 2016, the compensation is \$752.96.

17 Q Okay. And -- all right. Well, I'll just -- how often has  
18 this committee met?

19 A We've met in person once.

20 Q How is the work done?

21 A Most of our work is conducted over email.

22 Q Are you still on this committee?

23 A I am.

24 Q Are you interested in continuing in the future?

25 A I am.

1 Q And why?

2 A Because I enjoy having a say in -- you know, in what  
3 courses are offered to students. I enjoy chiming in on  
4 discussions that my fellow committee members are having about  
5 any given course or any given modification because it's often  
6 the case that a number of people will comment on a proposal,  
7 and I enjoy seeing how other professors organized their  
8 materials, design their classes.

9 Q Okay. Thank you.

10 MR. NADURIS-WEISSMAN: Let me check if I'm -- I'm sorry.  
11 I lost track whether Union Exhibit 26 was admitted.

12 HEARING OFFICER PALENCIA: 26 has been admitted into  
13 evidence.

14 MR. NADURIS-WEISSMAN: Okay. And I will -- I've marked  
15 Union Exhibit 27. I will distribute.

16 Q BY MR. NADURIS-WEISSMAN: Ms. Levin, is this the letter  
17 you received that you previously mentioned that -- regarding  
18 your agreement to serve on the University Committee on  
19 Curriculum?

20 A This is a letter that I received after accepting the  
21 invitation to serve on that committee, yes.

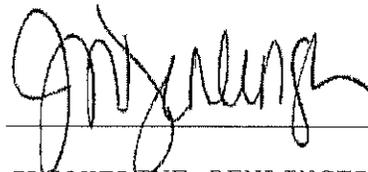
22 Q Okay. And the date, do you know if that represents when  
23 you received that letter?

24 A Yes, it does.

25 Q Thank you. The letter says -- the second paragraph states

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3 National Labor Relations Board (NLRB), Region 31, Case Number  
4 31-RC-164864, University of Southern California and Service  
5 Employees International Union, Local 721, at the National Labor  
6 Relations Board, Region 31, 11500 West Olympic Boulevard, Suite  
7 600, Los Angeles, California 90064, on Tuesday, February 23,  
8 2016, at 9:23 a.m. was held according to the record, and that  
9 this is the original, complete, and true and accurate  
10 transcript that has been compared to the reporting or  
11 recording, accomplished at the hearing, that the exhibit files  
12 have been checked for completeness and no exhibits received in  
13 evidence or in the rejected exhibit files are missing.

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18 JACQUELINE DENLINGER

19 Official Reporter  
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OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 31

In the Matter of:

University of Southern  
California,

Case No. 31-RC-164864

Employer,

and

Service Employees  
International Union,  
Local 721,

Petitioner.

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Place: Los Angeles, California

Dates: February 24, 2016

Pages: 231 through 334

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1 HEARING OFFICER PALENCIA: 34. And they're admitted into  
2 evidence.

3 **(Union Exhibit Number 30 through 34 Received into Evidence)**

4 MR. NADURIS-WEISSMAN: Thank you. Shall I get the  
5 witness?

6 HEARING OFFICER PALENCIA: Please. And I'm sorry, those  
7 were Exhibits 31 through 34, correct? So --

8 MR. NADURIS-WEISSMAN: Including 30 through 34.

9 HEARING OFFICER PALENCIA: Right. 30 through 34, yes. 30  
10 to 34 are admitted into the record and then -- so, okay. And  
11 let me just remind you that you're still under oath.  
12 Whereupon,

13

**KATE LEVIN**

14 having been previously sworn, was called as a witness herein  
15 and was examined and testified as follows:

16

**CROSS-EXAMINATION**

17 Q BY MR. LATHAM: Good morning, Professor Levin.

18 A Good morning.

19 Q Other than your counsel, the Union counsel, have you  
20 discussed your testimony with anyone since last evening?

21 A No.

22 Q You testified yesterday that you were in a union, a  
23 faculty union at the University of Michigan. Just for the  
24 record, the University of Michigan is a public school, correct?

25 A Correct.

1 curriculum committee. Do you recall that testimony?

2 A Yes.

3 Q Do you regard your work on the curriculum committee as  
4 important?

5 A I do.

6 MR. LATHAM: I have nothing further. Thank you.

7 MR. NADURIS-WEISSMAN: No redirect.

8 HEARING OFFICER PALENCIA: I have some questions. You  
9 testified about the curriculum committee and other types of  
10 committees. I have no idea how these committees work. Do  
11 these -- say your curriculum committee, do they make some type  
12 of recommendation --

13 THE WITNESS: Yes.

14 HEARING OFFICER PALENCIA: -- to upper management?

15 THE WITNESS: Yes.

16 HEARING OFFICER PALENCIA: Like what?

17 THE WITNESS: We --

18 MR. LATHAM: Madam Hearing Officer, I'm sorry, the term  
19 upper management just does not apply in the university context.

20 HEARING OFFICER PALENCIA: Okay. Do you make any types of  
21 recommendations?

22 THE WITNESS: Me personally or --

23 HEARING OFFICER PALENCIA: The committee.

24 THE WITNESS: We do -- we make recommendations about  
25 whether new courses let's say or changes to existing courses

1 should go through.

2 HEARING OFFICER PALENCIA: And who are these  
3 recommendations made to?

4 THE WITNESS: Well, at my level, it goes to the chair of  
5 our committee who's a faculty member and then she makes the  
6 recommendation to the administration. Though I couldn't tell  
7 you exactly to whom. I believe it goes to the deans and then  
8 above.

9 HEARING OFFICER PALENCIA: Okay. During direct, you  
10 talked -- you were asked about how USC communicated its message  
11 during the campaign. You also talked about what you understood  
12 these messages to be.

13 THE WITNESS: Yes.

14 HEARING OFFICER PALENCIA: And you talked about  
15 governance. What they meant -- what you understood them to  
16 mean with respect to governance.

17 THE WITNESS: Yes.

18 HEARING OFFICER PALENCIA: And I understand you talked  
19 about being a threat to governance?

20 THE WITNESS: The Union --

21 HEARING OFFICER PALENCIA: The messages?

22 THE WITNESS: The message -- yes, the message was that the  
23 Union shouldn't go through. It was a threat in fact to  
24 governance.

25 HEARING OFFICER PALENCIA: You understood that?

C E R T I F I C A T I O N

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4 31-RC-164864, University of Southern California and Service  
5 Employees International Union, Local 721, at the National Labor  
6 Relations Board, Region 31, 11500 West Olympic Boulevard, Suite  
7 600, Los Angeles, California 90064, on Wednesday, February 24,  
8 2016, at 9:28 a.m. was held according to the record, and that  
9 this is the original, complete, and true and accurate  
10 transcript that has been compared to the reporting or  
11 recording, accomplished at the hearing, that the exhibit files  
12 have been checked for completeness and no exhibits received in  
13 evidence or in the rejected exhibit files are missing.

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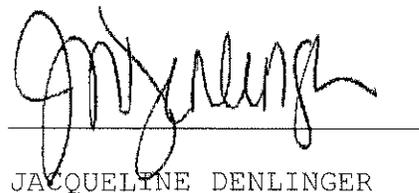
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JACQUELINE DENLINGER

Official Reporter

**CERTIFICATE OF SERVICE**

I am a citizen of the United States and employed in Los Angeles, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 515 South Flower Street, 25th Floor, Los Angeles, California 90071.

On March 31, 2016, I served the foregoing document described as:  
**USC'S MOTION TO REOPEN THE RECORD AND FOR RECONSIDERATION;  
POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the interested parties by electronic service and United States mail as follows:

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National Labor Relations Board  
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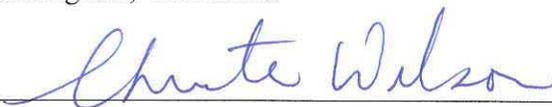
Nicole M. Pereira  
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Los Angeles, CA 90064-1753  
[Nicole.Pereira@nlrb.gov](mailto:Nicole.Pereira@nlrb.gov)

**VIA EMAIL:**

The email transmission was complete and without error. The email was transmitted to the email addresses listed above on March 31, 2016.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on March 31, 2016, at Los Angeles, California.

  
\_\_\_\_\_  
Christine Wilson

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31**

**UNIVERSITY OF SOUTHERN CALIFORNIA**

**Employer**

**and**

**SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 721**

**Case 31-RC-164864 and  
31-RC-164868**

**Petitioner**

**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 pre-election 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 post-election 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 pre-election 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 pre-election 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 post-election testimony that the UCOC “makes recommendations about whether new courses . . . or changes to existing courses should go through,” as contradicting her pre-election 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 pre-election hearing, and that this new testimony necessarily requires a finding that USC’s non-tenure track faculty in the relevant units exercise managerial authority, contrary to my previous decision. This, the Employer contends, constitutes extraordinary circumstances such that the pre-election 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 pre-election 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 pre-election 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 pre-election 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 non-tenure 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 pre-election 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 post-election 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.

Dated: May 26, 2016



---

MORI RUBIN  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
REGION 31  
11500 W Olympic Blvd Ste 600  
Los Angeles, CA 90064-1753

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

**SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 721,**

CASE NO. 31-RC-164868

**Petitioner,**

**and**

**UNIVERSITY OF SOUTHERN  
CALIFORNIA,**

**Employer.**

**UNIVERSITY OF SOUTHERN CALIFORNIA'S  
REQUEST FOR REVIEW OF ORDER DENYING EMPLOYER'S MOTION TO  
REOPEN THE RECORD AND FOR RECONSIDERATION,  
AND BRIEF IN SUPPORT THEREOF**

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**REGULATIONS**

29 CFR § 102.67 .....1

## **I. REQUEST FOR REVIEW**

Pursuant to 29 CFR § 102.67, the University of Southern California (“USC”) hereby requests review of the Regional Director’s (“RD”) Order Denying Employer’s Motion to Reopen the Record and For Reconsideration in Case No. 31-RC-164868 (the “Order”) (attached hereto as Exhibit A). The Region issued the Order on May 26, 2016 and, therefore, this request for review is timely. This request relates to USC’s Roski School of Art and Design only. To the extent the Order also affects Case No. 31-RC-164864 (Dornsife College of Arts and Sciences), USC is not seeking review at this time, because there has been no final disposition by the Regional Director of that case.

There are compelling reasons for the Board to grant review of the Order, specifically: (1) the RD’s Order on substantial factual issues is clearly erroneous on the record, and such errors have prejudicially affected USC’s rights, and (2) substantial questions of law and policy are raised by this case because the RD’s Order departed from officially reported Board precedent.

The Board should consolidate this request for review with USC’s currently-pending Request for Review of the RD’s Decision and Direction of Election in Case No. 31-RC-164868 (the “Direction of Election”), grant USC’s Motion to Reopen the Record and for Reconsideration, and find that USC’s faculty are managerial employees under the Act. The Union’s petition should then be dismissed.

## **II. BRIEF IN SUPPORT OF REQUEST FOR REVIEW**

### **A. INTRODUCTION AND BACKGROUND**

At issue in the pre-election hearing was whether USC’s non-tenure-track faculty make decisions as to matters of significance in the five key areas identified by the Board in *Pacific Lutheran Univ. & SEIU, Local 925*, 361 NLRB No. 157 (2014). USC presented robust evidence that all of its faculty --- tenured, tenure-track, and non-tenure-track alike --- participate in its shared faculty governance system of University-wide faculty committees. Through those

committees, faculty members make decisions on University policy in *all five Pacific Lutheran* areas: academic programs, enrollment management, finances, academic policy, and personnel decisions.

The SEIU contended that the work of non-tenure-track faculty in the area of academic programs is merely technical and clerical, not substantive decision-making. For that argument, the SEIU relied on the testimony of Professor Kate Levin, a non-tenure-track faculty member who sits on a subcommittee of the University Committee on Curriculum (UCOC). In her pre-election testimony, Professor Levin characterized the UCOC's role as "**technical and clerical,**" requiring faculty to do nothing more than check to see that "there are enough contact hours between professors and students," and that the "[course credits] match the contact hours." Pre-Election Tr. 663:13-664:1; 669:16-21.<sup>1</sup> When asked on direct examination by the Union's counsel about the extent of her decision-making on the UCOC, she testified: "**I wasn't providing substantive feedback [on courses]. . . . I've never made any substantive decisions** that have, you know, asked me to draw on any real judgment." Pre-Election Tr. 665:2-20 (emphasis added).

The SEIU urged the RD to rely on this testimony (the only evidence it offered as to the UCOC), citing it in the briefing and arguing "that members of the UCOC exercise decision-making authority similar to that of clerical staff, not the professional expertise which is indispensable to the formulation and implementation of academic policy." SEIU Post-Hearing Brief, filed December 16, 2015, at p. 38 (quoting *NLRB v. Yeshiva University*, 444 U.S. 672, 689 (1980)).

The Regional Director *did* rely on Professor Levin --- finding that "[t]he role of the UCOC subcommittees seems to be simply to verify that the proposals meet pre-determined criteria, such as having a sufficient number of contact hours." Direction of Election at p. 33.

---

<sup>1</sup> All cited testimony from the pre-election hearing is attached as **Exhibit B**, and cited as "Pre-Election Tr. [page]:[line]." All cited testimony from the *post*-election hearing is attached as **Exhibit C**, and cited as "Post-Election Tr. [page]:[line]."

Because the UCOC is arguably the most important faculty committee under the standards set by the Board in *Pacific Lutheran*, this finding drove the result in the pre-election case.

The election yielded different results in different units. In the Roski School, the SEIU won the vote and was certified; USC then filed a request for review of the Decision and Direction of Election. The SEIU opposed USC's request for review, emphasizing in its brief Professor Levin's pre-election testimony that non-tenure-track faculty are supposedly deciding nothing more than technical and clerical matters. See SEIU's Opposition to Employer's Request for Review of Decision and Direction of Election, filed March 10, 2016, at pp. 7-8, 20. USC's request for review is still pending before the Board.

In the Dornsife College, the SEIU failed to secure a majority of votes and filed objections. During the objections hearing, the SEIU took a starkly different position on faculty decision-making. Far from arguing that non-tenure-track faculty are powerless minions, the SEIU suddenly claimed that non-tenure-track faculty have a vital role in USC governance through such committees and that this power is an important benefit. Professor Levin testified again. But this time she testified that she and the other UCOC members actually *do* decide USC's curriculum, and she conceded her influence in deciding what courses are offered. In her words: **"I enjoy having 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 any given [course] modification** because it's often the case that a number of people will comment on a [course] proposal . . ." Post-Election Tr. 193:22-194:8 (emphasis added). She testified that her role on the UCOC gives her "a window into **how university curricula are shaped.**" Post-Election Tr. 192: 18-193:3 (emphasis added). And she admitted that her work on the UCOC is important work. Post-Election Tr. 246:3-5.

Compared to Professor Levin's earlier testimony, this was nothing short of a total reversal. Had she been that candid in the pre-election hearing, there would necessarily have been a different result. After all, faculty decision-making about academic programs is the first of the primary areas of decision-making and, *standing alone*, it is enough to make faculty managerial

under *Pacific Lutheran*. Professor Levin’s new testimony shows that USC should have prevailed on this issue at the pre-election hearing.

For these reasons, USC moved to reopen the pre-election hearing record to receive Professor Levin’s post-election testimony, and for reconsideration of the Decision and Direction of Election based on that new evidence.<sup>2</sup> But the RD denied USC’s motion based on findings and reasoning that are clearly erroneous. That decision should be reversed.

**B. THE REGIONAL DIRECTOR’S DENIAL OF USC’S MOTION IS ERRONEOUS**

**1. The Regional Director Wrongly Found That Professor Levin’s Post-Election Testimony Is Not Contrary To Her Pre-Election Testimony.**

The RD found that “none of Professor Levin’s testimony relied upon by the Employer is directly contrary to her pre-election testimony.” Order at p. 2, ¶ 2. The RD is plainly mistaken, as a side-by-side comparison of Professor Levin’s pre- and post-election testimony shows:

<p>Professor Levin, <i>pre</i>-election:  <b>“I wasn’t providing substantive feedback [on courses]. . . . I’ve never made any substantive decisions</b> that have, you know, asked me to draw on any real judgment.” Pre-Election Tr. 665:2-20 (emphasis added).</p>	<p>Professor Levin, <i>post</i>-election:  <b>“I enjoy having a say in --- you know, in what courses are offered to students.</b> I enjoy chiming in on discussions that my fellow committee members are having about any given course or any given [course] modification. . . .” Post-Election Tr. 193:22-194:8 (emphasis added).</p>
--	--

<p>Professor Levin, <i>pre</i>-election:  <b>“[T]he nature of the [UCOC’s] work is to make sure, you know, things like there are enough contact hours</b> between professors and students, <b>to make sure that the credits, you know, of the course match the contact hours, to make sure that, you know, the prerequisites of a given course match up with the specifications in the curriculum handbook,</b> that sort of thing.” Pre-Election</p>	<p>Professor Levin, <i>post</i>-election:  <b>“[W]e make recommendations about whether new courses . . . or changes to existing courses should go through.”</b> Post-Election Tr. 246:20-247:1 (emphasis added).</p>
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<sup>2</sup> That same day, USC gave notice of its motion to the Board in light of its pending request for review of the Direction of Election.

Tr. 663:13-664:1 (emphasis added).

Professor Levin, *pre*-election:

“**The work of [the UCOC] -- yeah, you know, mostly we’re kind of reviewing these [course] proposals for kind of technical and clerical matters.**” Pre-Election Tr. 669:16-21 (emphasis added).

Professor Levin, *post*-election:

“[I joined the UCOC because] I was interested in getting **a window into how university curricula are shaped.**” Post-Election Tr. 192:18-193:3 (emphasis added).

“Q: **Do you regard your work on the curriculum committee as important?**

A: **I do.**” Post-Election Tr. 246:3-5 (emphasis added).

Professor Levin’s pre-election and post-election statements are *irreconcilable*. The RD’s finding that the statements are not contrary is plain error.

2. **The Regional Director Reasoned That It Is “Irrelevant” That Professor Levin Gave Testimony That Was More Favorable To USC In The Later Proceeding; That Makes No Sense.**

The RD reasoned that the fact “[t]hat [Professor Levin’s] specific testimony in the post-election hearing may be more favorable to the Employer’s position on the issue of managerial authority is irrelevant.” Order at p. 2, ¶ 2. This makes no sense. How can it be irrelevant that the union’s *sole* witness on a *case-dispositive* issue, and on whom the RD *expressly relied* in ruling against USC at the pre-election hearing, *changed* her testimony in a later *Board* proceeding in a way that *proves USC’s pre-election case*? The RD’s rejection of Professor Levin’s changed testimony is clearly erroneous and cannot stand.

3. **The Regional Director Wrongly Found That Professor Levin’s Post-Election Testimony Would Have Been “Available” To USC At The Pre-Election Hearing If USC Had Cross-Examined Her Harder.**

The RD found that “Professor Levin’s [post-election] testimony does not constitute newly discovered evidence” because USC “could have [at the pre-election hearing] questioned her further or asked the same specific questions asked of her in her post-election examination.” Order at p. 2, ¶ 2. But the RD has failed to account for what *caused* Professor Levin to give

different testimony at the post-election hearing: the Union's goal had changed. In the *pre*-election hearing, the Union was contending that the faculty members at issue were non-managerial. In that context, making the faculty's role in governance sound powerless was helpful to the Union's cause. And the Union presented Professor Levin for that purpose. In the *post*-election hearing, the Union was contending that USC's comments about possible changes to faculty governance following unionization were objectionable "threats." In that context, making faculty governance sound powerless was *un*helpful. It was the Union's change in purpose that led to the change in Professor Levin's testimony. Given that, no amount of *additional* cross-examination at the pre-election hearing would have changed anything. It certainly would not have caused her to admit the importance and caliber of her work on the UCOC --- after all, that would have been totally contrary to the sworn testimony she had just given. The RD's suggestion that USC could have uncovered Professor Levin's post-election testimony just by cross-examining her harder at the pre-election hearing is just wrong.

4. **The Regional Director Was Wrong To Conclude That Professor Levin's Post-Election Testimony Does Not Require A Different Result On The Election Decision.**

The RD reasoned that Professor Levin's new testimony does not lead to a different result on the question of managerial status because her testimony was "unspecific as to the type of recommendations faculty made about University curricula, how they come to make those recommendations, and what happens to those recommendations once made." Order at p. 2, ¶ 3.

But what matters here is that Professor Levin does, in fact, make recommendations on University curricula, and she now admits that. Given that the RD expressly relied on Professor Levin's earlier testimony to find that faculty serving on the UCOC do *not* make effective recommendations ("I wasn't providing substantive feedback . . . I've never made any

substantive decisions”), Professor Levin’s new candor undermines the very basis for the RD’s Decision. That *compels* a different result.<sup>3</sup>

**5. The Regional Director Found USC’s Motion Was “Untimely,” But There Is Zero Basis --- Factually Or Legally --- For That Conclusion.**

The RD found that USC’s motion to reopen and for reconsideration was untimely. Not so. The Board’s Rules and Regulations require only that the motion be brought promptly, and USC’s certainly was.

On this point, the chronology is helpful: The parties were in trial on the SEIU’s objections for three full days, from February 23-25, 2016. The parties requested and were granted the right to file post-hearing briefs. For the 10 days that followed, USC’s sole focus was --- rightly --- preparation of its robust post-hearing brief. Both parties’ post-hearing briefs were filed and served on Monday March 7, 2016. USC analyzed the Union’s brief right away, and it discovered that the Union was attempting to introduce a mathematical calculation that was not raised at the hearing and that was not based on any evidence in the record. As a result, USC moved to strike that portion of the Union’s brief (or, in the alternative, asked the Hearing Officer to reopen the record to admit the needed evidence to set the record straight).<sup>4</sup> USC promptly filed those moving papers on March 15, 2016. The very next day, USC turned to the task of analyzing Professor Levin’s testimony at the objections hearing, and comparing it to the record evidence in the pre-election hearing, as well as analyzing the testimony of the union’s other witnesses for the same issue. USC completed that process, and prepared and filed its moving

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<sup>3</sup> The specifics that the RD says she found lacking in Professor Levin’s latest testimony were supplied at the pre-election hearing by USC’s witnesses. Indeed, Professor Elizabeth Graddy testified in great detail about the UCOC’s process of reviewing curricula, and she provided examples. She also testified to how the UCOC’s recommendations are implemented. See USC’s Request for Review of Decision and Direction of Election at pp. 21-24 (and evidence cited therein). So, there is no basis for the RD’s claim that these details are missing from the record.

<sup>4</sup> USC had to file this motion when it did. If it had not, the Union would certainly have contended later on appeal that the USC waived its objection.

papers, within the next 15 days. Given this timing --- all of which the Region knew --- there is absolutely no basis for suggesting that USC was dilatory.

Moreover, even if USC *had* just sat on its hands for the month between the close of the hearing and the filing of its motion, that would not make the motion untimely. Indeed, the Board has found similar (and *longer*) timing to be entirely appropriate. *See, e.g., C.F. Taffe Plumbing Co., Inc.*, 2011 WL 3898011 at \*1 (NLRB Sept. 1, 2011) (Pearce; Becker; Hayes, dissenting) (granting motion to reopen and directing ALJ to admit new evidence where motion to reopen was filed more than two months after the close of the hearing, and finding that was sufficiently prompt); *YWCA of Metro. Chicago*, 235 NLRB 788 (1978) (Petitioner's motion for reconsideration and to reopen the record was sufficiently prompt when filed one month after new evidence --- contrary witness testimony --- was presented in a later, separate Board proceeding). *See also J.P. Stevens & Co., Inc.*, 246 NLRB 1164 (1979) (motion to reopen the record filed more than 2 months after issuance of Decision was timely where Respondent had alerted the parties three days before the Decision was issued that a motion would be filed, and where there was no prejudice to the other party).

### **III. CONCLUSION**

The RD's denial of USC's motion was erroneous. Because decision-making over academic programs is a primary area of decision-making under *Pacific Lutheran*, Professor Levin's new testimony is powerful evidence of managerial status. Professor Levin's post-election testimony (the relevant transcript pages of which are attached hereto) should be admitted into the record. This new testimony, along with the other record evidence, should lead the Board

to conclude that USC's non-tenure-track faculty, like all USC faculty, are managerial and that no question of representation exists.

DATED: June 9, 2016

PAUL HASTINGS LLP  
J. AL LATHAM, JR.  
CAMERON W. FOX

By:  \_\_\_\_\_  
CAMERON W. FOX

Attorneys for Respondent  
UNIVERSITY OF SOUTHERN CALIFORNIA

# EXHIBIT A

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31

UNIVERSITY OF SOUTHERN CALIFORNIA

Employer

and

SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 721

Case 31-RC-164864 and  
31-RC-164868

Petitioner

**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 pre-election 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 post-election 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 pre-election 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 pre-election 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 post-election testimony that the UCOC “makes recommendations about whether new courses. .or changes to existing courses should go through,” as contradicting her pre-election 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 pre-election hearing, and that this new testimony necessarily requires a finding that USC’s non-tenure track faculty in the relevant units exercise managerial authority, contrary to my previous decision. This, the Employer contends, constitutes extraordinary circumstances such that the pre-election 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 pre-election 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 pre-election 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 pre-election 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 non-tenure 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 pre-election 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 post-election 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.

Dated: May 26, 2016



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MORI RUBIN  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
REGION 31  
11500 W Olympic Blvd Ste 600  
Los Angeles, CA 90064-1753

# EXHIBIT B

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 31

In the Matter of:

University of Southern  
California,

Case No. 31-RC-164864  
31-RC-164868  
31-RC-164871

Employer,

and

Service Employees  
International Union, Local  
721,

Petitioner.

---

Place: Los Angeles, California

Dates: December 10, 2015

Pages: 596 through 731

Volume: 4

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E-Reporting and E-Transcription  
7227 N. 16th Street #207  
Phoenix, AZ 85020  
(602) 263-0885

1 MS. MYERS: Thank you. Petitioner calls Professor Kate  
2 Levin.

3 HEARING OFFICER PEREIRA: Ms. Levin -- or Professor Levin,  
4 please raise your right hand.  
5 Whereupon,

6 KATE LEVIN  
7 having been duly sworn, was called as a witness herein and was  
8 examined and testified as follows:

9 HEARING OFFICER PEREIRA: Please state and spell your name  
10 for the record.

11 THE WITNESS: My first name is Kate, K-A-T-E. My last  
12 name is Levin, L-E-V-I-N.

13 DIRECT EXAMINATION

14 Q BY MS. MYERS: Good afternoon, Professor Levin.

15 A Good afternoon.

16 Q Professor, are you currently employed?

17 A Yes.

18 Q Who is your employer?

19 A The University of Southern California.

20 Q And what is your title?

21 A I'm a part-time lecturer.

22 Q And what school do you teach?

23 A Dornsife.

24 Q And what program do you teach?

25 A In the writing program.

1 provided it? I know you received it directly from the staff  
2 person, but do you know who drafted it? Do you have an idea?

3 THE WITNESS: I don't actually. I don't.

4 HEARING OFFICER PEREIRA: Okay. And, again, could you  
5 just tell me what the purpose was? Was it to assist you and  
6 other committee members in drafting proposals?

7 THE WITNESS: Not in drafting proposals but in reviewing  
8 proposals that had been drafted by others.

9 HEARING OFFICER PEREIRA: Okay.

10 THE WITNESS: Yes.

11 HEARING OFFICER PEREIRA: All right. Well, thank you.

12 THE WITNESS: Sure.

13 Q BY MS. MYERS: Professor, can you describe in more detail  
14 what your role is on this committee in terms of reviewing  
15 proposals that are drafted by others?

16 A Sure. So the chair of the committee assigns our  
17 subcommittee members, you know, a few tasks, right? We are --  
18 we might be tasked with reviewing a new course. We might be  
19 tasked with reviewing changes to an existing course or a  
20 program or a certificate.

21 Essentially, the nature of the work is to make sure, you  
22 know, things like there are enough contact hours between  
23 professors and students, to make sure that the credits, you  
24 know, of the course match the contact hours, to make sure that,  
25 you know, the prerequisites of a given course match up with the

1 specifications in the curriculum handbook, that sort of thing.

2 Q Okay. Have you received any assignments to review any  
3 courses or programs yet?

4 A I have. I've received three assignments.

5 Q Can you describe those assignments?

6 A Sure. One was reviewing a new political science course.  
7 It was a graduate level course on research methods. Another  
8 was to review a change to a certificate that the law school is  
9 offering, and another one was to review a change to a master's  
10 program offered by the business school.

11 Q Okay. Let me ask you about the first of those three.

12 With regard to the political science --

13 A Uh-huh, yeah.

14 Q -- do you have any academic training in political science?

15 A I took an undergrad course in political science, but not  
16 since then.

17 Q I think the second task that you mentioned was to review a  
18 new certificate program in the law school?

19 A Yes.

20 Q Do you have any legal training?

21 A No.

22 Q And your third task was to review a master's degree  
23 program in the business school; is that right?

24 A Yes, or a change to an existing program, yes, uh-huh.

25 Q Okay. Do you have any formal training in business?

1 A No.

2 Q Professor, how can you provide substantive feedback on  
3 courses or programs that are outside of the area of your  
4 academic expertise?

5 A I wasn't providing substantive feedback. Reviewing, you  
6 know, these three tasks probably amounted to about 45 minutes  
7 of work. As I said --

8 Q Forty-five minutes total, or 45 minutes for each --

9 A Total.

10 Q Okay.

11 A You know, again, you know, some of it is mathematical,  
12 just making sure that the contact hours are sufficient to a  
13 given course's credits, right. Making sure, you know, for  
14 example, for the law school certificate, there's a stipulation  
15 in the curriculum handbook that all the prerequisites have to  
16 be, you know of a 500 level, right? And some of the  
17 prerequisites here were a 200 level, right? So that's  
18 something I would flag, but I don't -- I've never made any  
19 substantive decisions that have, you know, asked me to draw on  
20 any real judgment.

21 Q What is your understanding of the process after you  
22 provide your feedback when you've reviewed a new course or  
23 program?

24 A Right. It seems that when I approve a program or, excuse  
25 me, you know, approve a given task, it then goes on to the

1 us what your work on the committee has been?

2 A Well, it's largely, you know, a group of part-time faculty  
3 talking to each other, you know, about our situations, but my  
4 sense of it is that the committee's -- excuse me, the  
5 subcommittee's powers are very limited. You know, we -- you  
6 know, as I said one of the first things that happened is that  
7 we sought just data on how many part-time faculty exist at the  
8 given schools and we're essentially told no. So, you know,  
9 that struck me as a real contradiction. You know, here's a new  
10 subcommittee that's formed, you know, to monitor and evaluate  
11 part-time faculty affairs at the school, but it seems that, you  
12 know, the administration was not willing to provide us with a  
13 key piece of what we would need to fulfill our charge. So my  
14 sense of our authority and our ability to get things done is  
15 that we're quite hampered by that and somewhat limited.

16 Q And with respect to your work on the University Committee  
17 on Curriculum, now that you've served a semester on that  
18 committee, can you describe what the work of the committee is.

19 A The work of -- yeah, you know, mostly we're kind of  
20 reviewing these proposals for kind of technical and clerical  
21 matters. You know, as I sort of alluded to before, I was a bit  
22 intimidated accepting the invitation to this committee because  
23 I, you know, I didn't know if I was sort of qualified to make  
24 decisions about, you know, new classes being proposed in other  
25 departments, and I didn't know how I would be able to do that

C E R T I F I C A T I O N

1  
2 This is to certify that the attached proceedings before the  
3 National Labor Relations Board (NLRB), Region 31, Case Numbers  
4 31-RC-164864, 31-RC-164868, 31-RC-164871, University of  
5 Southern California and Service Employees International Union,  
6 Local 721 at the National Labor Relations Board, Region 31,  
7 11500 West Olympic Boulevard, Suite 600, Hearing Room A, Room  
8 603, Los Angeles, California 90064 on Thursday, December 10,  
9 2015, at 9:35 Am. was held according to the record, and that  
10 this is the original, complete, and true and accurate  
11 transcript that has been compared to the reporting or  
12 recording, accomplished at the hearing, that the exhibit files  
13 have been checked for completeness and no exhibits received in  
14 evidence or in the rejected exhibit files are missing.

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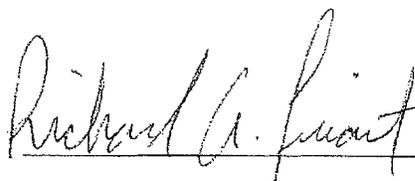
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RICHARD A FRIANT

Official Reporter

# EXHIBIT C

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 31

In the Matter of:

University of Southern  
California,

Case No. 31-RC-164864

Employer,

and

Service Employees  
International Union,  
Local 721,

Petitioner.

---

Place: Los Angeles, California

Dates: February 23, 2016

Pages: 1 through 230

Volume: 1

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7227 North 16th Street, Suite 207  
Phoenix, AZ 85020  
(602) 263-0885

1 MR. NADURIS-WEISSMAN: Well, let's see. It's a really  
2 brief witness.

3 MR. LATHAM: Okay.

4 MR. NADURIS-WEISSMAN: So I think 10:00 a.m. would be  
5 fine.

6 MR. LATHAM: All right. Okay.

7 MR. NADURIS-WEISSMAN: Okay.

8 HEARING OFFICER PALENCIA: Off the record.

9 (Off the record at 4:19 p.m.)

10 HEARING OFFICER PALENCIA: Back on the record.

11 Whereupon,

12 KATE LEVIN

13 having been duly sworn, was called as a witness herein and was  
14 examined and testified as follows:

15 HEARING OFFICER PALENCIA: Can you please state your name  
16 for the record.

17 THE WITNESS: Sure. My name is Kate Levin.

18 HEARING OFFICER PALENCIA: L-E-V-I-N?

19 THE WITNESS: L-E-V-I-N.

20 HEARING OFFICER PALENCIA: Please speak loudly and make  
21 sure that you wait for the question to be completed before you  
22 answer. Also, make sure you understand the question. If you  
23 don't understand the question, say so and ask that it be  
24 rephrased.

25 THE WITNESS: Okay.

1 A Yes, I am.

2 Q Let me ask you about the Curriculum Committee. How did  
3 you get on this committee?

4 A Uh-huh. I received an invitation letter notifying me that  
5 I had been nominated to join the committee, and I received that  
6 in I believe it was August of 2015.

7 Q Okay. Do you know how you were selected?

8 A Only that I was nominated by -- I believe it was the  
9 Executive Committee.

10 Q The Executive Committee of what, do you know?

11 A I believe it was of the University Committee on  
12 Curriculum, although I don't remember if that was the exact  
13 language.

14 Q Okay.

15 HEARING OFFICER PALENCIA: Exact language of what?

16 THE WITNESS: Of the body that nominated me to join the  
17 committee.

18 Q BY MR. NADURIS-WEISSMAN: Okay. What does the -- what  
19 does the Curriculum Committee do?

20 A The Curriculum Committee reviews proposals for new  
21 courses. It also reviews proposals for new certificates, new  
22 programs at times. And it also reviews modifications to  
23 existing courses, programs, certificates.

24 Q And what was your interest in joining this committee?

25 A Uh-huh.

1 Q Or accepting the nomination?

2 A Uh-huh. I was interested in getting a window into how  
3 university curricula are shaped. I was interested in getting a  
4 look at how other professors design their courses in other  
5 disciplines. And I was interested in getting a chance to work  
6 with colleagues in other disciplines, other departments.

7 Q And did you receive any financial benefit for  
8 participating?

9 A I did.

10 Q And is that the -- is that something we discussed  
11 previously with the September 3rd employment contract  
12 modification?

13 A Yes.

14 Q Do you -- do you recall how much you receive?

15 A Yes. For the term spanning from September 2015 through  
16 April 2016, the compensation is \$752.96.

17 Q Okay. And -- all right. Well, I'll just -- how often has  
18 this committee met?

19 A We've met in person once.

20 Q How is the work done?

21 A Most of our work is conducted over email.

22 Q Are you still on this committee?

23 A I am.

24 Q Are you interested in continuing in the future?

25 A I am.

1 Q And why?

2 A Because I enjoy having a say in -- you know, in what  
3 courses are offered to students. I enjoy chiming in on  
4 discussions that my fellow committee members are having about  
5 any given course or any given modification because it's often  
6 the case that a number of people will comment on a proposal,  
7 and I enjoy seeing how other professors organized their  
8 materials, design their classes.

9 Q Okay. Thank you.

10 MR. NADURIS-WEISSMAN: Let me check if I'm -- I'm sorry.  
11 I lost track whether Union Exhibit 26 was admitted.

12 HEARING OFFICER PALENCIA: 26 has been admitted into  
13 evidence.

14 MR. NADURIS-WEISSMAN: Okay. And I will -- I've marked  
15 Union Exhibit 27. I will distribute.

16 Q BY MR. NADURIS-WEISSMAN: Ms. Levin, is this the letter  
17 you received that you previously mentioned that -- regarding  
18 your agreement to serve on the University Committee on  
19 Curriculum?

20 A This is a letter that I received after accepting the  
21 invitation to serve on that committee, yes.

22 Q Okay. And the date, do you know if that represents when  
23 you received that letter?

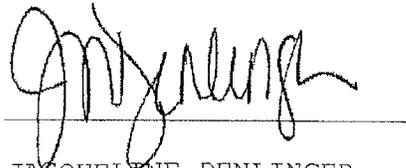
24 A Yes, it does.

25 Q Thank you. The letter says -- the second paragraph states

C E R T I F I C A T I O N

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This is to certify that the attached proceedings before the National Labor Relations Board (NLRB), Region 31, Case Number 31-RC-164864, University of Southern California and Service Employees International Union, Local 721, at the National Labor Relations Board, Region 31, 11500 West Olympic Boulevard, Suite 600, Los Angeles, California 90064, on Tuesday, February 23, 2016, at 9:23 a.m. was held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.



JACQUELINE DENLINGER

Official Reporter

OFFICIAL REPORT OF PROCEEDINGS  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD  
REGION 31

In the Matter of:

University of Southern  
California,

Case No. 31-RC-164864

Employer,

and

Service Employees  
International Union,  
Local 721,

Petitioner.

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Place: Los Angeles, California

Dates: February 24, 2016

Pages: 231 through 334

Volume: 2

OFFICIAL REPORTERS

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E-Reporting and E-Transcription  
7227 North 16th Street, Suite 207  
Phoenix, AZ 85020  
(602) 263-0885

1 HEARING OFFICER PALENCIA: 34. And they're admitted into  
2 evidence.

3 **(Union Exhibit Number 30 through 34 Received into Evidence)**

4 MR. NADURIS-WEISSMAN: Thank you. Shall I get the  
5 witness?

6 HEARING OFFICER PALENCIA: Please. And I'm sorry, those  
7 were Exhibits 31 through 34, correct? So --

8 MR. NADURIS-WEISSMAN: Including 30 through 34.

9 HEARING OFFICER PALENCIA: Right. 30 through 34, yes. 30  
10 to 34 are admitted into the record and then -- so, okay. And  
11 let me just remind you that you're still under oath.  
12 Whereupon,

13

**KATE LEVIN**

14 having been previously sworn, was called as a witness herein  
15 and was examined and testified as follows:

16

**CROSS-EXAMINATION**

17 Q BY MR. LATHAM: Good morning, Professor Levin.

18 A Good morning.

19 Q Other than your counsel, the Union counsel, have you  
20 discussed your testimony with anyone since last evening?

21 A No.

22 Q You testified yesterday that you were in a union, a  
23 faculty union at the University of Michigan. Just for the  
24 record, the University of Michigan is a public school, correct?

25 A Correct.

1 curriculum committee. Do you recall that testimony?

2 A Yes.

3 Q Do you regard your work on the curriculum committee as  
4 important?

5 A I do.

6 MR. LATHAM: I have nothing further. Thank you.

7 MR. NADURIS-WEISSMAN: No redirect.

8 HEARING OFFICER PALENCIA: I have some questions. You  
9 testified about the curriculum committee and other types of  
10 committees. I have no idea how these committees work. Do  
11 these -- say your curriculum committee, do they make some type  
12 of recommendation --

13 THE WITNESS: Yes.

14 HEARING OFFICER PALENCIA: -- to upper management?

15 THE WITNESS: Yes.

16 HEARING OFFICER PALENCIA: Like what?

17 THE WITNESS: We --

18 MR. LATHAM: Madam Hearing Officer, I'm sorry, the term  
19 upper management just does not apply in the university context.

20 HEARING OFFICER PALENCIA: Okay. Do you make any types of  
21 recommendations?

22 THE WITNESS: Me personally or --

23 HEARING OFFICER PALENCIA: The committee.

24 THE WITNESS: We do -- we make recommendations about  
25 whether new courses let's say or changes to existing courses

1 should go through.

2 HEARING OFFICER PALENCIA: And who are these  
3 recommendations made to?

4 THE WITNESS: Well, at my level, it goes to the chair of  
5 our committee who's a faculty member and then she makes the  
6 recommendation to the administration. Though I couldn't tell  
7 you exactly to whom. I believe it goes to the deans and then  
8 above.

9 HEARING OFFICER PALENCIA: Okay. During direct, you  
10 talked -- you were asked about how USC communicated its message  
11 during the campaign. You also talked about what you understood  
12 these messages to be.

13 THE WITNESS: Yes.

14 HEARING OFFICER PALENCIA: And you talked about  
15 governance. What they meant -- what you understood them to  
16 mean with respect to governance.

17 THE WITNESS: Yes.

18 HEARING OFFICER PALENCIA: And I understand you talked  
19 about being a threat to governance?

20 THE WITNESS: The Union --

21 HEARING OFFICER PALENCIA: The messages?

22 THE WITNESS: The message -- yes, the message was that the  
23 Union shouldn't go through. It was a threat in fact to  
24 governance.

25 HEARING OFFICER PALENCIA: You understood that?

C E R T I F I C A T I O N

1 This is to certify that the attached proceedings before the  
 2 National Labor Relations Board (NLRB), Region 31, Case Number  
 3 31-RC-164864, University of Southern California and Service  
 4 Employees International Union, Local 721, at the National Labor  
 5 Relations Board, Region 31, 11500 West Olympic Boulevard, Suite  
 6 600, Los Angeles, California 90064, on Wednesday, February 24,  
 7 2016, at 9:28 a.m. was held according to the record, and that  
 8 this is the original, complete, and true and accurate  
 9 transcript that has been compared to the reporting or  
 10 recording, accomplished at the hearing, that the exhibit files  
 11 have been checked for completeness and no exhibits received in  
 12 evidence or in the rejected exhibit files are missing.

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JACQUELINE DENLINGER

Official Reporter

**CERTIFICATE OF SERVICE**

I am a citizen of the United States and employed in Los Angeles, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 515 South Flower Street, 25th Floor, Los Angeles, California 90071.

On June 9, 2016, I served the foregoing document described as:

**UNIVERSITY OF SOUTHERN CALIFORNIA'S REQUEST FOR REVIEW OF ORDER DENYING EMPLOYER'S MOTION TO REOPEN THE RECORD AND FOR RECONSIDERATION, AND BRIEF IN SUPPORT THEREOF** on the interested parties by electronic service as follows:

Mori Rubin  
Regional Director  
National Labor Relations Board  
Region 31  
11500 W. Olympic Blvd., Suite 600  
Los Angeles, CA 90064-1753  
[Mori.Rubin@nlrb.gov](mailto:Mori.Rubin@nlrb.gov)

Eli Nadurris-Weissman  
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[mmyers@rsglabor.com](mailto:mmyers@rsglabor.com)

**VIA EMAIL:**

The email transmission was complete and without error. The email was transmitted to the email addresses listed above on June 9, 2016.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on June 9, 2016, at Los Angeles, California.

  
\_\_\_\_\_  
Arlene Figueroa

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**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

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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).

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;

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.

**ROTHNER, SEGALL & GREENSTONE**  
**ATTORNEYS**

510 SOUTH MARENGO AVENUE  
PASADENA, CALIFORNIA 91101-3115

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April 7, 2016

By E-Mail and U.S. Mail

Al Latham  
Cameron W. Fox  
Paul Hastings LLP  
515 South Flower Street, 25th Floor  
Los Angeles, CA 90071

Re: University of Southern California, 31-RC-164868 (Roski School of Art and Design)

Dear Mr. Latham and Ms. Fox:

As you know, our office represents the Service Employees International Union, Local 721 (“Local 721” or “Union”), petitioner in the above-referenced representation case. On February 2, 2016, the National Labor Relations Board tallied the results of the election and by a vote of 31 to 6, non-tenure track (“NTT”) faculty in the Roski School of Art and Design (“Roski”) of the University of Southern California (“USC” or “University”) elected Local 721 as their collective bargaining representative. On February 10, 2016, NLRB Region 31 certified Local 721 as the collective bargaining representative of Roski’s NTT faculty. By this letter, the Union requests to begin negotiations for a collective bargaining agreement for Roski NTT faculty.

As you know, the University’s obligation to bargain with the Union begins on the date of the election vote count. *Equitable Resources Exploration*, 307 NLRB 730, 746 (1992), *enfd.* 143 LRRM 3120 (4th Cir. 1993). Although the University has requested review of the Regional Director’s Decision and Direction of Election, the Board has long held that an employer is not excused from its bargaining obligations while it pursues an appeal. To the contrary, it acts at its peril in making changes to the terms and conditions of employment during the pendency of an appeal. *See, e.g., Mike O’Connor Chevrolet*, 209 NLRB 701, 703-04 (1974), *enf. denied on other grounds*, 512 F.2d 684 (8th Cir. 1975); *Saint-Gobain Abrasives, Inc.*, 343 NLRB 542, 561 (2004). Accordingly, the University has a continuing obligation to notify and bargain with the Union before making any changes to terms and conditions of employment for bargaining unit



faculty. Henceforth, the Union demands that the University make no unilateral changes with respect to the terms and conditions of employment of any employee in the bargaining unit without affording the Union an opportunity to bargain over the decision as well as the effects of such change. Please note that discretionary discipline is a mandatory subject of bargaining, and, as such, the University may not impose discretionary discipline unilaterally. *Alan Ritchey*, 359 NLRB No. 40 (2012). Accordingly, the Union requests that the University provide notice and an opportunity to bargain over the discretionary aspects of all discipline of bargaining unit employees prior to implementation.

In addition to our demand to bargain, the Union requests the following information which is necessary and relevant to carry out our responsibilities as the bargaining agent of non-tenure track faculty at Roski. Where requested information is available electronically and in sortable files, please provide it in that format.

1. A list of all bargaining unit employees. Please include, where applicable:
  - a. Name
  - b. Home address
  - c. Phone number
  - d. Work and personal email address (if known to the University)
  - e. Department or area assignment (if applicable)
  - f. Job classification
  - g. Date of hire
  - h. Start date and end date of current appointment
2. A list of all classes which members of the bargaining unit are assigned to teach for the current semester. Please include the class meeting times, location and number of contact hours for each class assignment.
3. A list of all classes which members of the bargaining unit are assigned to teach for the Fall 2016 semester. Please include the class meeting times, location and number of contact hours for each class assignment.
4. Copies of current appointment letters for all bargaining unit employees.
5. Copies of all University and Roski committee assignments for the 2015-16 academic year and 2016-17 academic year, if available.
6. Numbers of part-time and full-time non-tenure track, tenure-track and tenured faculty at Roski for the Spring 2016 semester, including rank and title.

7. Information regarding the pay range for tenure-track and tenured faculty at Roski, including the minimum to maximum, median and average pay for these faculty members.
8. Copies of all University personnel policies, practices, or procedures applicable to bargaining unit faculty.
9. The University expenditures for salary, benefits, and roll-up costs, as well as total number of employees, for each of the following categories of Roski employees during each of the last three (3) fiscal years:
  - a. Part-time non-tenure track faculty
  - b. Full-time non-tenure track faculty
  - c. Tenure-track faculty
  - d. Tenured faculty
  - e. Management staff, including but not limited to Deans, Vice Deans, Associate Deans, and Assistant Deans
  - f. Non-instructional, non-management part-time staff
  - g. Non-instructional, non-management full-time staff
10. Total University-wide monthly contributions by the University for health plans and number of employees covered by such plans.
11. Total University-wide monthly contribution by the University for pension and/or retirement plans and number of employees covered by such plans.
12. Copies of all University fringe benefit plans applicable to bargaining unit faculty, including but not limited to health and dental insurance, retirement benefits, child care, tuition assistance, tuition exchange, life insurance, vacation, sick leave, family leave, disability leave, and academic leave.
13. Copies of all current job descriptions for bargaining unit employees.
14. Copies of all disciplinary notices, warnings or records of disciplinary personnel actions for all bargaining unit employees for the past three (3) academic years.
15. Times and dates of any orientation session, departmental or other meetings scheduled to be held with bargaining unit employees in the next six (6) months.

April 7, 2016  
Page 4

Please provide responsive information as it becomes available. The Union reserves the right to request additional information. If you have any questions or concerns, please contact me at the number above.

Very truly yours,



Maria Keegan Myers

MKM/dm

cc: Roski School of Art and Design NTT Faculty  
Martin Manteca, Organizing Director, SEIU Local 721

S721.037

**ROTHNER, SEGALL & GREENSTONE**  
**ATTORNEYS**

510 SOUTH MARENGO AVENUE  
PASADENA, CALIFORNIA 91101-3115

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January 6, 2017

By Email and U.S. Mail

Al Latham  
Cameron Fox  
Paul Hastings LLP  
515 South Flower Street, 25<sup>th</sup> Floor  
Los Angeles, CA 90071

Re: University of Southern California, 31-RC-164868 (Roski School of Art and Design) – Renewed Demand to Bargain

Dear Mr. Latham and Ms. Fox:

As you know, our office represents the Service Employees International Union, Local 721 (“Local 721” or “Union”), petitioner in the above-referenced representation case. You may recall that on February 2, 2016, Region 31 of the National Labor Relations Board tallied the results of the election and by a vote of 31 to 6, non-tenure track (“NTT”) faculty in the Roski School of Art and Design (“Roski”) of the University of Southern California (“USC” or “University”) elected Local 721 as their collective bargaining representative. On February 10, 2016, Region 31 certified Local 721 as the collective bargaining representative of Roski's NTT faculty.

On April 7, 2016, I wrote to you on behalf of Local 721 to request that USC begin collective bargaining negotiations with the Union. *See* enclosed. On May 17, 2016, you responded to my letter and indicated that the University “declined to recognize SEIU Local 721 as the representative of Roski School faculty.” Your letter quoted remarks by Provost Michael Quick who stated that the University would seek review of Region 31’s determination by the NLRB, “and, if necessary thereafter, seek a definitive decision in a federal court of appeals.” *See* enclosed. Indeed, the University requested review of the Regional Director’s Decision and Direction of Election and that request was pending at the time of my April 7, 2016 demand to bargain.

On December 30, 2016, the Board issued an order denying the University’s request for review [*University of Southern California*, 365 NLRB No. 11 (December 30, 2016)]. *See* enclosed. In light of the Board’s order, the Union hereby renews its request to begin negotiations for a collective bargaining agreement for Roski NTT faculty.

January 6, 2017  
Page 2

Your May 17, 2016 correspondence, as well as the quoted remarks from Provost Quick, indicated that the University intends to test the Union's certification to a federal court of appeal. Please provide a response by no later than Friday, January 13, 2017 indicating whether the University intends to continue to challenge the certification as described in your correspondence or whether it will commence collective bargaining negotiations with the Union. If we do not receive a response from you by that date, we will assume the University intends to test the certification of this bargaining unit.

Very truly yours,



Maria Keegan Myers

MKM/dm

Enclosures

cc: Roski School of Art and Design NTT Faculty  
Bridget Shea, Director of Higher Education, SEIU Local 721

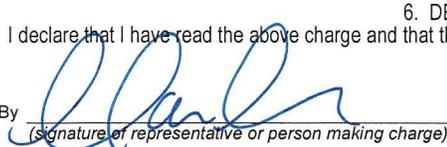
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UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 31-CA-178831	Date Filed 6/20/2016

**INSTRUCTIONS:**

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

<b>1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT</b>	
a. Name of Employer University of Southern California	b. Tel. No. 213-740-2111
	c. Cell No.
	f. Fax No. 213-821-1342
d. Address (Street, city, state, and ZIP code) University of Southern California Los Angeles, CA 90089-4019	e. Employer Representative Al Latham, Esq. Paul Hastings LLP 515 S. Flower St., 25th Floor Los Angeles, CA 90071
	g. e-Mail
	h. Number of workers employed 1000+
i. Type of Establishment (factory, mine, wholesaler, etc.) university	j. Identify principal product or service higher education
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (5) _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)	
<p>Within the past six months, the above-named employer, by and through its managers, supervisors, and agents, has interfered with, restrained, or coerced non-tenure track faculty at the Roski School of Art and Design ("Roski") in the exercise of their rights under Section 7 of the Act by (1) failing and refusing to bargain with the Service Employees International Union, Local 721 ("Faculty Union"), the certified representative of Roski non-tenure track faculty; (2) making unilateral changes to terms and conditions of employment for Roski non-tenure track faculty; (3) refusing to furnish information that is necessary and relevant to the Faculty Union's role as the exclusive bargaining agent of Roski non-tenure track faculty.</p>	
3. Full name of party filing charge (if labor organization, give full name, including local name and number)	
Service Employees International Union, Local 721, CtW, CLC	
4a. Address (Street and number, city, state, and ZIP code)	4b. Tel. No. 213-368-8660
1545 Wilshire Ave. Los Angeles, CA 90017	4c. Cell No.
	4d. Fax No. 213-380-8335
	4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)	
Service Employees International Union, CtW	
<b>6. DECLARATION</b>	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By  (Signature of representative or person making charge)	Maria Keegan Myers, attorney (Print/type name and title or office, if any)
Address Rothner, Segall & Greenstone, 510 S. Marengo Ave., Pasadena	
	6/20/2016 (date)
Tel. No. 626-796-7555	
Office, if any, Cell No.	
Fax No. 626-577-0124	
e-Mail mmyers@rsglabor.com	

**WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)**

**PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

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

**UNIVERSITY OF SOUTHERN CALIFORNIA**  
Charged Party  
and  
**SERVICE EMPLOYEES INTERNATIONAL  
UNION (SEIU), LOCAL 721**  
Charging Party

**Case 31-CA-178831**

**AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER**

I, the undersigned employee of the National Labor Relations Board, state under oath that on June 23, 2016, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

J. Al Latham Jr., Attorney at Law  
Paul Hastings, LLP  
515 S Flower St Fl 25  
Los Angeles, CA 90071-2228

University of Southern California  
University of Southern California  
Los Angeles, CA 90089-4019

June 23, 2016  
\_\_\_\_\_  
Date

Mickyla McDonald, Designated Agent of NLRB  
\_\_\_\_\_  
Name

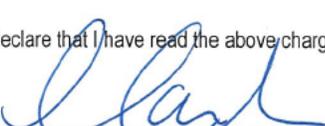
/s/ Mickyla McDonald  
\_\_\_\_\_  
Signature

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
**AMENDED CHARGE AGAINST  
EMPLOYER**

DO NOT WRITE IN THIS SPACE	
Case 31-CA-178831	Date Filed 7/14/16

**INSTRUCTIONS:**

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

<b>1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT</b>	
a. Name of Employer University of Southern California	b. Tel. No. (213) 740-2111
	c. Cell No.
	f. Fax No. (213) 821-1342
d. Address (Street, city, state, and ZIP code) University of Southern California Los Angeles, CA 90089-4019	e. Employer Representative Al Lathan, Esq. Paul Hastings LLP 515 South Flower Street, 25th Floor Los Angeles, CA 90071
	g. e-Mail
	h. Number of workers employed 1000+
i. Type of Establishment (factory, mine, wholesaler, etc.) University	j. Identify principal product or service
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (5) _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Within the past six months, the above-named employer, by and through its managers, supervisors and agents, has interfered with, restrained, and coerced non-tenure track faculty at the Roski School of Art and Design in the exercise of their rights under Section 7 of the Act by (1) failing and refusing to bargain with Service Employees International Union, Local 721 ("Faculty Union"), the certified representative of Roski non-tenure track faculty; and (2) refusing to furnish information that is necessary and relevant to the Faculty Union's role as the exclusive bargaining agent of Roski non-tenure track faculty.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) Service Employees International Union, Local 721, CTW, CLC	
4a. Address (Street and number, city, state, and ZIP code) 1545 Wilshire Boulevard Los Angeles, CA 90017	4b. Tel. No. (213) 368-8660
	4c. Cell No.
	4d. Fax No. (213) 380-8335
	4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) Service Employees International Union, CTW	
<b>6. DECLARATION</b>	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By  (signature of representative or person making charge)	Tel. No. (626) 796-7555
Maria Keegan Myers (Print/type name and title or office, if any)	Office, if any, Cell No.
	Fax No. (626) 577-0124
	e-Mail mmyers@rsglabor.com
Address Rothner, Segall & Greenstone, 510 S. Marengo, Pasadena, CA	7/14/16 (date)

**WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)**

**PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

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

**UNIVERSITY OF SOUTHERN CALIFORNIA**  
Charged Party  
and  
**SERVICE EMPLOYEES INTERNATIONAL  
UNION (SEIU), LOCAL 721**  
Charging Party

**Case 31-CA-178831**

**AFFIDAVIT OF SERVICE OF FIRST AMENDED CHARGE AGAINST EMPLOYER**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on July 19, 2016, I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

J. Al Latham Jr., Attorney  
Paul Hastings, LLP  
515 S Flower St Fl 25  
Los Angeles, CA 90071-2228

Cameron W. Fox, Attorney  
Paul Hastings LLP  
515 South Flower Street, 25th Floor  
Los Angeles, CA 90071-2228

University of Southern California  
University of Southern California  
Los Angeles, CA 90089-4019

July 19, 2016  
Date

Michelle Becknel, Designated Agent of NLRB  
Name

/s/ Michelle Becknel  
Signature

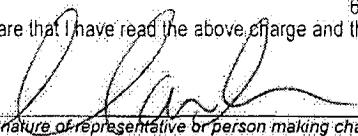
UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
**AMENDED CHARGE AGAINST  
EMPLOYER**

2nd

DO NOT WRITE IN THIS SPACE	
Case 31-CA-178831	Date Filed 8/4/2016

**INSTRUCTIONS:**

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

<b>1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT</b>	
a. Name of Employer University of Southern California	b. Tel. No. (213) 740-2111
	c. Cell No.
	f. Fax No. (213) 821-1342
d. Address (Street, city, state, and ZIP code) University of Southern California Los Angeles, CA 90089-4019	e. Employer Representative Al Latham, Esq. Paul Hastings LLP 515 South Flower Street, 25th Floor Los Angeles, CA 90071
	g. e-Mail
	h. Number of workers employed 1000+
i. Type of Establishment (factory, mine, wholesaler, etc.) University	j. Identify principal product or service
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Within the past six months, the above-named employer, by and through its managers, supervisors and agents, has interfered with, restrained, and coerced non-tenure track faculty at the Roski School of Art and Design in the exercise of their rights under Section 7 of the Act by failing and refusing to bargain with Service Employees International Union, Local 721 ("Faculty Union"), the certified representative of Roski non-tenure track faculty.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) Service Employees International Union, Local 721, CTW, CLC	
4a. Address (Street and number, city, state, and ZIP code) 1545 Wilshire Boulevard Los Angeles, CA 90017	4b. Tel. No. (213) 368-8660
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	4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) Service Employees International Union, CTW	
<b>6. DECLARATION</b>	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By  (signature of representative or person making charge)	Maria Keegan Myers (Print/type name and title or office, if any)
	Tel. No. (626) 796-7555
	Office, if any, Cell No.
	Fax No. (626) 577-0124
	e-Mail mmyers@rsglabor.com
Address Rothner, Segall & Greenstone, 510 S. Marengo, Pasadena, CA	8/4/16 (date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

**PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

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

**UNIVERSITY OF SOUTHERN CALIFORNIA**  
Charged Party  
and  
**SERVICE EMPLOYEES INTERNATIONAL  
UNION (SEIU), LOCAL 721**  
Charging Party

**Case 31-CA-178831**

**AFFIDAVIT OF SERVICE OF SECOND AMENDED CHARGE AGAINST EMPLOYER**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on August 8, 2016, I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

J. Al Latham, Attorney  
Paul Hastings, LLP  
515 S Flower Street, 25<sup>th</sup> Floor  
Los Angeles, CA 90071-2228

Cameron W. Fox, Attorney  
Paul Hastings LLP  
515 S Flower Street, 25<sup>th</sup> Floor  
Los Angeles, CA 90071-2228

University of Southern California  
University of Southern California  
Los Angeles, CA 90089-4019

August 8, 2016

Date

Michelle Becknel, Designated Agent of NLRB

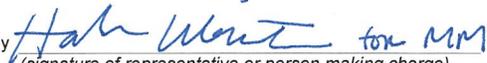
Name

/s/ Michelle Becknel

Signature

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
**CHARGE AGAINST EMPLOYER****DO NOT WRITE IN THIS SPACE**Case  
31-CA-192125Date Filed  
1/26/17**INSTRUCTIONS:**

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer University of Southern California	b. Tel. No. 213-740-2111
	c. Cell No.
	f. Fax No. 213-821-1342
d. Address (Street, city, state, and ZIP code) University of Southern California Los Angeles, CA 90089-4019	e. Employer Representative Al Latham, Esq. Paul Hastings LLP 515 S. Flower Street, 25th Floor Los Angeles, CA 90071
	g. e-Mail
	h. Number of workers employed 1000+
i. Type of Establishment (factory, mine, wholesaler, etc.) University	j. Identify principal product or service Higher Education
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)	
Within the past six months, the above-named employer, by and through its managers, supervisors, and agents, has interfered with, restrained, and coerced non-tenure-track faculty at the Roski School of Art and Design in the exercise of their rights under Section 7 of the Act by failing and refusing to bargain with Service Employees International Union, Local 721 ("Faculty Union"), the certified representative of Roski non-tenure-track faculty.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number)	
Service Employees International Union, Local 721, CtW, CLC	
4a. Address (Street and number, city, state, and ZIP code) 1545 Wilshire Blvd. Los Angeles, CA 90017	4b. Tel. No. 213-368-8660
	4c. Cell No.
	4d. Fax No. 213-380-8335
	4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) Service Employees International Union, CtW	
6. DECLARATION	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By  for MM (signature of representative or person making charge)	Maria Myers, Attorney (Print/type name and title or office, if any)
Address Rothner, Segall & Greenstone 510 S. Marengo Ave. Pasadena	1/26/2017 (date)
	Tel. No. 626-796-7555
	Office, if any, Cell No.
	Fax No. 626-577-0124
	e-Mail mmyers@rsglabor.com

**WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)****PRIVACY ACT STATEMENT**Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

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

**UNIVERSITY OF SOUTHERN CALIFORNIA**

Charged Party

and

**SERVICE EMPLOYEES INTERNATIONAL  
UNION (SEIU), CTW-CLC, LOCAL 721**

Charging Party

**Case 31-CA-192125**

**AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER**

I, the undersigned employee of the National Labor Relations Board, state under oath that on February 2, 2017, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

J. Al Latham Jr., Attorney at Law  
Paul Hastings, LLP  
515 S Flower St Fl 25  
Los Angeles, CA 90071-2228

University of Southern California  
University of Southern California  
Los Angeles, CA 90089-4019

February 2, 2017

Date

Jorge Romero, Designated Agent of NLRB

Name

/s/Jorge Romero

Signature

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31**

**UNIVERSITY OF SOUTHERN CALIFORNIA**

**and**

**Cases 31-CA-178831 and  
31-CA-192125**

**SERVICE EMPLOYEES INTERNATIONAL  
UNION (SEIU), LOCAL 721**

**ORDER CONSOLIDATING CASES, CONSOLIDATED  
COMPLAINT AND NOTICE OF HEARING**

Pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board (the Board) and to avoid unnecessary costs or delay, IT IS ORDERED THAT Case 31-CA-178831 and Case 31-CA-192125, which are based on charges filed by SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), LOCAL 721 (Charging Party or Union), against University of Southern California (Respondent) are consolidated.

This Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which is based on these charges, is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq. and Section 102.15 of the Board's Rules and Regulations, and alleges Respondent has violated the Act as described below.

1. The charges in this proceeding were filed by the Charging Party and a copy of each was served on Respondent by U.S. mail as set forth in the following table:

<b>Case No.</b>	<b>Amendment</b>	<b>Date Filed</b>	<b>Date Served</b>
31-CA-178831	N/A	6/20/16	6/23/16
31-CA-178831	Amended	7/14/16	7/19/16
31-CA-178831	Second Amended	8/4/16	8/8/16
31-CA-192125	N/A	1/26/17	2/2/17

2. (a) At all material times, Respondent has been a California corporation with an office and place of business in Los Angeles, California, and has been engaged in the business of providing higher education.

(b) In conducting its operations during the 12-month period ending December 24, 2015, Respondent derived gross revenues in excess of \$1,000,000.

(c) During the period described above in paragraph 2(b), the Employer purchased and received goods and materials valued in excess of \$5,000 directly from points located outside the State of California.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4. At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

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

6. (a) From January 13, 2016 through January 29, 2016, a representation election was conducted by mail ballot among the employees in the Unit, a tally of ballots issued on February 2, 2016, and, on February 10, 2016, the undersigned Regional Director issued a Certification of Representative, which certified the Union as the exclusive collective-bargaining representative of the Unit.

(b) On February 23, 2016, Respondent filed a request for review of the Certification of Representative.

(c) On December 30, 2016, the Board denied the Respondent's Request for Review.

7. At all times since February 2, 2016, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

8. (a) About April 7, 2016, the Union, by letter, requested that Respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(b) About January 7, 2017, the Union, by letter, again requested that Respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

9. Since about May 17, 2016, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

10. By the conduct described above in paragraph 9, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act.

11. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

**WHEREFORE**, as part of the remedy for Respondent's unfair labor practices alleged above in paragraph 9, the General Counsel seeks an Order requiring Respondent to bargain in good faith with the Union, on request, for the period required by *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), as the recognized bargaining representative in the appropriate unit. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

#### **ANSWER REQUIREMENT**

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the consolidated complaint. The answer must be **received by this office on or before February 23, 2017, or postmarked on or before February 22, 2017.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to [www.nlr.gov](http://www.nlr.gov), click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is

unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the consolidated complaint are true.

**NOTICE OF HEARING**

A hearing, if necessary, will be conducted at a time and date determined in the future

Dated: February 9, 2017



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MORI RUBIN  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
REGION 31  
11500 W Olympic Blvd Ste 600  
Los Angeles, CA 90064-1753

Attachments

## Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: [www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules\\_and\\_regs\\_part\\_102.pdf](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf).

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at [www.nlr.gov](http://www.nlr.gov), click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

**Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement.** The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

### I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.
- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

### II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence:** At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.
- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered

in evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.
- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.
- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

### III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.
- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.
- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
NOTICE

Case 31-CA-178831

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements **will not be granted** unless good and sufficient grounds are shown **and** the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in **detail**;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

J. AL LATHAM JR., Attorney at Law  
PAUL HASTINGS, LLP  
515 S FLOWER ST FL 25  
LOS ANGELES, CA 90071-2228

CAMERON W. FOX, ATTORNEY AT  
LAW  
PAUL HASTINGS LLP  
515 SOUTH FLOWER STREET, 25TH  
FLOOR  
LOS ANGELES, CA 90071-2228

University of Southern California  
University of Southern California  
Los Angeles, CA 90089-4019

MARIA KEEGAN MYERS , ESQ.  
ROTHER, SEGALL & GREENSTONE  
510 South Marengo Ave.  
Pasadena, CA 91101-3115

SERVICE EMPLOYEES  
INTERNATIONAL UNION (SEIU),  
LOCAL 721  
1545 Wilshire Blvd  
Los Angeles, CA 90017-2207

Service Employees International Union  
(SEIU), CTW-CLC, Local 721  
1545 Wilshire Blvd  
Los Angeles, CA 90017-2207

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31**

**UNIVERSITY OF SOUTHERN CALIFORNIA**

**and**

**Case 31-CA-178831; 31-CA-192125**

**SERVICE EMPLOYEES INTERNATIONAL  
UNION (SEIU), LOCAL 721**

**AFFIDAVIT OF SERVICE OF: Complaint and Notice of Hearing (with forms NLRB-4338 and NLRB-4668 attached)**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on February 9, 2017, I served the above-entitled document(s) by **certified or regular mail**, as noted below, upon the following persons, addressed to them at the following addresses:

J. Al Latham Jr., Attorney at Law  
Paul Hastings, LLP  
515 S Flower St Fl 25  
Los Angeles, CA 90071-2228

**FIRST CLASS MAIL**

Cameron W. Fox , Attorney at Law  
Paul Hastings LLP  
515 South Flower Street, 25th Floor  
Los Angeles, CA 90071-2228

**FIRST CLASS MAIL**

University of Southern California  
University of Southern California  
Los Angeles, CA 90089-4019

**CERTIFIED MAIL, RETURN RECEIPT  
REQUESTED**

Maria Keegan Myers , ESQ.  
Rother, Segall & Greenstone  
510 South Marengo Ave.  
Pasadena, CA 91101-3115

**FIRST CLASS MAIL**

Service Employees International Union  
(SEIU), CTW-CLC, Local 721  
1545 Wilshire Blvd  
Los Angeles, CA 90017-2207

**CERTIFIED MAIL**

February 9, 2017

Date

Jorge Romero, Designated Agent of NLRB

Name

/s/Jorge Romero

Signature

UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
NOTICE

Case 31-CA-178831

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
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Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

J. AL LATHAM JR., Attorney at Law  
PAUL HASTINGS, LLP  
515 S FLOWER ST FL 25  
LOS ANGELES, CA 90071-2228

CAMERON W. FOX , ATTORNEY AT  
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PAUL HASTINGS LLP  
515 SOUTH FLOWER STREET, 25TH  
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LOS ANGELES, CA 90071-2228

University of Southern California  
University of Southern California  
Los Angeles, CA 90089-4019

MARIA KEEGAN MYERS , ESQ.  
ROTHER, SEGALL & GREENSTONE  
510 South Marengo Ave.  
Pasadena, CA 91101-3115

SERVICE EMPLOYEES  
INTERNATIONAL UNION (SEIU),  
LOCAL 721  
1545 Wilshire Blvd  
Los Angeles, CA 90017-2207

Service Employees International Union  
(SEIU), CTW-CLC, Local 721  
1545 Wilshire Blvd  
Los Angeles, CA 90017-2207

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31**

UNIVERSITY OF SOUTHERN CALIFORNIA      Cases 31-CA-178831 and 31-CA-192125

and

SERVICE EMPLOYEES INTERNATIONAL  
UNION (SEIU), LOCAL 721

**ANSWER OF RESPONDENT UNIVERSITY OF SOUTHERN CALIFORNIA  
TO CONSOLIDATED COMPLAINT**

The University of Southern California (hereafter “USC” or “Respondent”) hereby answers the Consolidated Complaint dated February 9, 2017, as follows:

1.      Admit.
  
2.      Admit.
  
3.      Admit.
  
4.      Admit.
  
5.      Deny.

6. Admit.
7. Deny.
8. Admit.
9. Admit.
10. Deny.
11. Deny.

#### **FIRST AFFIRMATIVE DEFENSE**

The certification of representative is invalid for all of the reasons Respondent raised in the underlying representation case, Case No. 31-RC-164868, through its Statement of Position; the evidence and arguments presented at the hearing; its post-hearing briefing; its February 23, 2016, Request for Review of the Decision and Direction of Election; its March 31, 2016, Motion to Reopen the Record and for Reconsideration; and its June 9, 2016, Request for Review of Order Denying Employer's Motion to Reopen the Record and for Reconsideration. These reasons include, without limitation, the following:

- (a) The record evidence shows that USC's faculty, including those in the certified unit, exercise effective control in all five areas of decisionmaking identified by the Board in *Pacific Lutheran University*, 361 NLRB No. 157

(2014), each of which, or any combination of which, makes the faculty managerial employees outside the coverage of the Act.

(b) The denial of USC's motion to reopen the record and for reconsideration erroneously excluded highly relevant evidence undermining the basis upon which the Regional Director found no managerial status.

(c) The Board's decision in *Pacific Lutheran University* is contrary to the law established in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), and the certified unit is comprised of faculty who are managerial employees under *Yeshiva*.

(d) Even if *Pacific Lutheran* itself is not contrary to the Supreme Court's teaching in *Yeshiva*, the Board's application of *Pacific Lutheran* in the present case is contrary to *Yeshiva*. It is also contrary to the representations the Board made in its briefing to the *Yeshiva* Court and effectively overrules previous Board law applying *Yeshiva*.

(e) In *Pacific Lutheran* and the present case, the Board has not explained the weight to be accorded to each factor and what showing is sufficient to establish managerial status, thereby failing to meet the requirements of *LeMoyne-Owen College v. NLRB*, 357 F.3d 55 (D.C. Cir. 2004), and *Point Park University v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006).

(f) The Final Rule regarding the Board's election processes denies employers due process under the Fifth Amendment and free speech under the First Amendment, is contrary to the Act, and is facially invalid for these and all of

the other reasons set forth in the dissent from the Final Rule of then-Member (now-Chairman) Miscimarra and former Member Johnson.

## SECOND AFFIRMATIVE DEFENSE

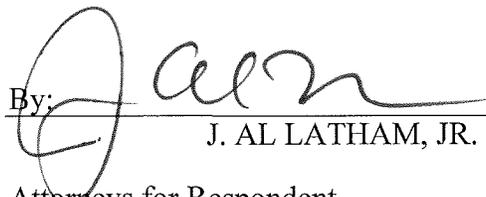
The Board's denial of USC's two requests for review is erroneous for all the reasons articulated in then-Member (now-Chairman) Miscimarra's dissenting opinion.

For all of the foregoing reasons, the Complaint should be dismissed in its entirety.

DATED: February 23, 2017

Respectfully Submitted,

PAUL HASTINGS LLP  
J. AL LATHAM, JR.  
CAMERON W. FOX

By:  \_\_\_\_\_  
J. AL LATHAM, JR.  
Attorneys for Respondent  
UNIVERSITY OF SOUTHERN CALIFORNIA

**CERTIFICATE OF SERVICE**

I am a citizen of the United States and employed in Los Angeles, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 515 South Flower Street, 25th Floor, Los Angeles, California 90071.

On February 23, 2017, I served the foregoing document described as:

**ANSWER OF RESPONDENT UNIVERSITY OF SOUTHERN CALIFORNIA TO CONSOLIDATED COMPLAINT** on the interested parties by electronic service and United States mail as follows:

Maria Keegan Myers  
Rothner, Segall & Greenstone  
510 South Marengo Avenue  
Pasadena, CA 91101-3115  
[mmyers@rsglabor.com](mailto:mmyers@rsglabor.com)

**VIA EMAIL:**

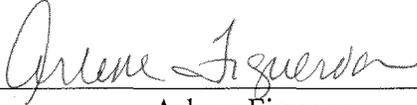
The email transmission was complete and without error. The email was transmitted to the email addresses listed above on February 23, 2017.

**VIA U.S. MAIL:**

I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice such sealed envelope(s) would be deposited with the U.S. postal service on February 23, 2017, with postage thereon fully prepaid, at Los Angeles, California.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on February 23, 2017, at Los Angeles, California.

  
\_\_\_\_\_  
Arlene Figueroa