



members: Class A and Class B. The Class A members are physicians performing both clinical and academic responsibilities on behalf of the Employer and who have or are eligible to receive faculty appointments at Brown University.<sup>3</sup> The Charging Party was a Class A member. The sole Class B member is BPI.

All Class A member-physicians are bound by the Employer's Articles of Incorporation, its Bylaws, and its rules, regulations, policies, and resolutions. The Employer's affairs are managed by a ten-person Board of Directors that includes the Employer's President (who serves as the Board's President), a representative from Lifespan Corporation,<sup>4</sup> the Dean of Brown University's medical school, and seven Class A member-physicians who are elected by the Class A membership at their annual meeting.<sup>5</sup> Class A member-physicians participate in the governance of the Employer, in part, through their representatives on the elected Board of Directors. Under Article 3 of the Bylaws, if at least two-thirds of the Class A member-physicians approve, they have the ability to call special membership meetings to vote on a course of action for the organization, including overriding the Board President's veto of a decision by the Board of Directors.<sup>6</sup> Under Article 6, Section 1 of the Bylaws, Class A members also may serve on ad hoc committees set up by the Board of Directors, including serving on disciplinary committees that hear allegations and make recommendations concerning work issues involving other Class A members. Class A

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<sup>3</sup> Class A member-physicians are paid a salary and do not have an equity interest in the Employer.

<sup>4</sup> Lifespan Corporation is a parent organization that owns and operates certain area hospitals, including Rhode Island Hospital and The Miriam Hospital.

<sup>5</sup> Under Article 5 of the Bylaws, the Employer also has a set of officers apart from its Board of Directors. The President of the Board of Directors, who is the Chair of the Department of Emergency Medicine at Brown University's medical school, also serves as the chief officer of the Employer's organization. If Lifespan Corporation does not appoint that same individual as Chief of Emergency Medicine at Rhode Island Hospital, then the RIH Chief is to serve as the Employer's President and the Board President.

<sup>6</sup> Under Article 4, Section 4 of the Bylaws, the Board's President has the authority to veto certain Board decisions, including those the Board President believes would jeopardize the University's or an affiliated hospital's academic program, institute major structural change in the emergency medicine organization, or amend the Employer's bylaws. If a majority of Class A members vote to override the Board President's veto, that override vote is then subject to the approval of Class B member-BPI.

members serving on one of these committees exercise all the authority delegated to the committee by the Board. Under Article 4, Section 5 of the Bylaws, the Class B member-BPI is granted final approval authority over many matters of corporate governance and operations including budgeting, financial matters, significant changes to Class A member compensation, vetoes of Board actions by the Class A member-physicians, and future mergers. Class B member-BPI cannot exercise this power over any policy or directive that has not been voted on by the Board of the Directors or the Class A member-physicians (depending on the circumstances).

Class A members have both academic and clinical responsibilities, with some physicians primarily serving in one capacity or the other. Within their academic responsibilities, Class A members are part of the Brown University medical school faculty where they teach medical students, residents, and interns in the Emergency Medicine Physician Extender Development Program, conduct research, and engage in other academic activities. On the clinical side, Class A members spend a certain number of hours per week at one of the affiliated hospital emergency departments. The Charging Party was a Class A member-physician with the Employer for about ten years, providing primarily clinical services at Rhode Island Hospital.

The Employer's Board of Directors meets quarterly each year. In the months when the Board meets, it holds two meetings. The first is an informational meeting for the Class A member-physicians so that the Board can solicit their input before voting on an issue. The second meeting, which is held two weeks later, is when the Board votes. The Employer also has an annual Class A membership meeting each December where the Class A members elect their representatives to the Board of Directors.

On December 21, 2017, the Board of Directors voted to increase the required number of clinical hours to be performed by all Class A member-physicians, based on a formula of clinical hours and academic rank at the University. On January 9, 2018, the Board of Director's decision was reported to the Class A members at a faculty meeting. On January 10, the President of the Board announced that based on feedback from the Class A member-physicians about the new policy, the Board of Directors would convene for a special meeting regarding the issue on January 22, but that a forum open to all Class A members to discuss the concerns they had raised would first be held on January 18.

On January 18, the Employer held the forum with about 70 Class A member-physicians in attendance. After the President of the Board gave a brief presentation related to the Employer's finances, the Board of Directors then conducted an open forum allowing Class A members to raise questions from the floor. Shortly after the meeting began, many Class A members received an anonymous email from someone using the alias (b) (6), (b) (7)(C) criticizing the Board of Directors' recent vote to

increase clinical hours as having an uneven effect on primarily clinical physicians versus primarily academic physicians. Attached to the (b) (6), (b) (7)(C) email was the work schedule of a Class A member-physician who primarily performed academic responsibilities; the email implied that the attached schedule was evidence that academics were not shouldering their fair share of clinical hours, and that the Employer's proposed new formula would exacerbate the problem. About 15 minutes after the email was sent, the Charging Party arrived at the Class A member forum. As the forum went on, several Class A members who received the email spoke up during the forum and said that whoever sent the (b) (6), (b) (7)(C) email needed to stop sending mass anonymous emails.<sup>7</sup>

After the meeting ended, the President of the Board sent an email response to (b) (6), (b) (7)(C) (copying the other Class A members who had received the anonymous email) stating that the initial email was harmful and divisive because it seemed to question the contributions of the Class A member whose schedule had been attached. Over the next 24 hours, several other Class A members responded to the email thread with similar denunciations of (b) (6), (b) (7)(C) while some Class A members agreed with the substance of the sender's primary concern about the increase in clinical hours.

Several days after the January 18 forum, the Employer began an IT investigation to determine the identity of (b) (6), (b) (7)(C) based on where both the April 27, 2017, and the January 18, 2018 emails had originated. Based on this investigation, the Employer determined that the Charging Party had been the only Class A member in both locations at the times the emails had been sent. On January 31, after reviewing the findings of the IT investigation, the President of the Board convened a special committee of several Vice Chairs, Medical Directors, and Administrative officers from the hospitals and the University, as well as about ten Class A member-physicians. At this meeting, the committee discussed the findings from the IT investigation and concluded, as a group, that the Charging Party should be terminated based on the belief both that (b) was (b) (6), (b) (7)(C) and that (b) attachment of the academic physician's work schedule inappropriately denigrated (b) clinical contributions. The Employer discharged the Charging Party later that day.

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<sup>7</sup> On April 27, 2017, before UEMF member-physicians had voted to merge with BPI, (b) (6), (b) (7)(C) had sent a similar anonymous email to the member-physicians encouraging them to vote against the merger.

In late April, the Charging Party filed a charge alleging that the Employer violated Section 8(a)(1) by terminating (b) for engaging in protected concerted activity. The Employer's primary defense is that the Charging Party is a managerial employee not protected by the Act.

### ACTION

We conclude that the Charging Party is a managerial employee under *NLRB v. Yeshiva University* and related Board decisions and, thus, is not protected by the Act.

Because an employer is entitled to the undivided loyalty of its representatives, the Act's coverage does not extend to managerial employees.<sup>8</sup> Managerial employees are those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer," or who have discretion in the performance of their jobs independent of their employer's established policy.<sup>9</sup> Moreover, "final authority is not required to show managerial status, [but] 'the relevant consideration is effective recommendation or control.'"<sup>10</sup> Regarding professional employees specifically, the Board has held that medical employees may be managerial "if their activities on behalf of their employer fall outside the scope of decision-making routinely performed by similarly situated health care professionals and that is primarily incident to their treatment of patients."<sup>11</sup>

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<sup>8</sup> See *NLRB v. Yeshiva University*, 444 U.S. at 682. Cf. *Citywide Corporate Transportation, Inc.*, 338 NLRB 444, 450 (2002) ("Where a group of individuals already has the power to collectively influence the policies of an organization . . . , they do not need the Act's protection.")

<sup>9</sup> *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974). See also *NLRB v. Yeshiva University*, 444 U.S. at 687 ("normally an employee may be excluded [from the Act's protection] as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy"); *Republican Co.*, 361 NLRB 93, 95–96 (2014) (finding newspaper's editorial page editor, who was responsible for the content of the entire editorial page, to be a managerial employee despite his publisher having a rarely exercised veto power).

<sup>10</sup> *Republican Co.*, 361 NLRB at 96 (quoting *Yeshiva University*, 444 U.S. at 683, n.17 ("the fact that the administration holds a rarely exercised veto power does not diminish the faculty's effective power in policymaking and implementation"))).

<sup>11</sup> *FHP, Inc.*, 274 NLRB 1141, 1142–43 (1985) (citing *Montefiore Hospital & Medical Center*, 261 NLRB 569, 570 (1982)). See also *Joint Diseases, North General Hospital*, 288 NLRB 291, 297 (1988) (same).

Applying those general principles, the Board in *FHP, Inc.* concluded that physicians with a health maintenance organization were managerial employees not covered by the Act.<sup>12</sup> The physicians' roles on six standing committees and various ad hoc committees, including effectively recommending the discipline of other physicians, indicated that they served as more than advisors and that department heads regularly followed committee recommendations concerning core aspects of the organization's operations, such as protocol changes and employee compensation.<sup>13</sup> Similarly, in *Citywide Corporation Transportation, Inc.*, the Board accepted the employer's defense that it was not liable for an alleged unfair labor practice because its driver-shareholders were managerial employees not covered by the Act.<sup>14</sup> The facts showed that the driver-shareholders possessed, as a group, an effective voice in formulating and determining corporate policy.<sup>15</sup> Specifically, the ALJ, who the Board affirmed, emphasized that they cumulatively owned "at least 200 of the 277 voting shares, [which represented] a sufficient majority to elect or impeach officers, board members, and elected committee persons, to rescind working rules and even to amend or change the [employer's] constitution."<sup>16</sup> The ALJ concluded that "[i]n essence, the drivers are working for themselves, not for an employer with conflicting interests."<sup>17</sup>

In this case, the evidence provided by the parties demonstrates that the Charging Party, like the physicians in *FHP* and driver-shareholders in *Citywide*, is a

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<sup>12</sup> 274 NLRB at 1143.

<sup>13</sup> *Id.*

<sup>14</sup> 338 NLRB at 444 n.1, 447, 450.

<sup>15</sup> *Id.* at 450.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* Cf. *Montefiore Hospital & Medical Center*, 261 NLRB at 570 (finding physicians were not managerial employees because the department chairmen "make every major administrative decision that is not dictated" by central administration; although the physicians had some input, it was only in the form of recommendations that the chairmen or their designees considered); *Joint Diseases, North General Hospital*, 288 NLRB at 298–99 (finding physicians were not managerial employees because the employer's major administrative and policy decisions were made by its president-CEO and the "administrative side of the hospital," and any committees that the physicians served on did not engage in the same type of "detailed, nonpatient-related decisionmaking" as the physician committees in *FHP*).

managerial employee not protected by the Act. Pursuant the Employer's Bylaws, Class A member-physicians, which the Charging Party had been, participate in the formulation and effectuation of management policies at every level of the Employer's decision-making.<sup>18</sup> Initially, Class A member-physicians, as a group, effectively control the Employer's Board of Directors, which is the body that manages the Employer's affairs. Under the Employer's Bylaws, although the Board of Directors includes three non-Class A members, the remaining seven members are selected exclusively from and by the Class A member-physicians. Although Class B member-BPI and the President of the Board retain the power to veto Board decisions to pursue or reject policies, neither possesses an ultimate veto power that would completely negate the ability of Class A members to direct the Employer's affairs. Indeed, while BPI retains ultimate approval authority over several key managerial aspects of the Employer, such as budget issues, Class A member compensation, and future mergers, the Employer's organizational structure ensures that BPI reviews only those proposals that are supported by a majority of the Class A members on the Board of Directors or a majority of the Class A membership. In short, Class A members have authority similar to the driver-shareholders in *Citywide*,<sup>19</sup> who because of their majority stake and role in corporate governance, were constantly in a position to formulate and determine corporate policy.

Apart from how the Bylaws establish their role in corporate governance, the managerial status of Class A member-physicians is also apparent based on the Employer obtaining their approval for workplace policies. After Class A members raised concerns about the new policy on clinical hours, the President of the Board announced the Board would reconvene on the issue only after holding a forum during which it would obtain feedback from the Class A members. Similarly, the President of the Board convened a committee that included ten Class A members to determine the proper discipline for the Charging Party based on the results of the IT investigation and the content of the email. The Employer terminated the Charging Party only after the disciplinary committee met and determined, as a group, that [REDACTED] discharge was the appropriate course of action. Both above-mentioned actions demonstrate that the Employer relies on the input and approval of Class A members for significant personnel decisions. This process is similar to that in *FHP*,<sup>20</sup> where the Board held that physicians were managerial employees because they effectively recommended

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<sup>18</sup> Although Class A member-physicians do not have an equity interest in the Employer, their various voting rights in the Employer's system of corporate governance makes them very similar to traditional stockholders.

<sup>19</sup> 338 NLRB at 450.

<sup>20</sup> 274 NLRB at 1143.

their employer's policies, including discipline for other physicians, in their capacity as committee members.<sup>21</sup> In short, these examples of actual authority displayed by the Class A member-physicians strongly support concluding that they are managerial employees under the Act.

Accordingly, the Region should dismiss the charge, absent withdrawal, because the Charging Party is managerial employee not protected by the Act.<sup>22</sup>

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<sup>21</sup> *Cf. Montefiore Hospital & Medical Center*, 261 NLRB at 570 (concluding that doctors were statutory employees and not managerial because, among other things, they did not participate or have input in the discipline of other doctors).

<sup>22</sup> Because we conclude that the Charging Party is a managerial employee excluded from the Act's protection, we do not reach whether (b) was a supervisor under Section 2(11) or whether sending the (b) (6), (b) (7)(C) emails constituted protected concerted activity.