

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**

MEDAILLE COLLEGE

Employer

and

Case 03-RC-265905

**MEDAILLE COLLEGE FACULTY
ASSOCIATION/NYSUT/AFT/NEA/AFL-CIO**

Petitioner

DECISION AND ORDER

Medaille College (“Medaille” or “Employer”) is a private college with its main campus located in Buffalo, New York. On September 11, 2020,¹ the Medaille College Faculty Association/NYSUT/AFT/NEA/AFL-CIO (“Petitioner”) filed a representation petition with the National Labor Relations Board (“Board”) under Section 9(c) of the National Labor Relations Act (“Act”). Petitioner seeks to represent a unit of approximately 70 full-time and regular part-time faculty.² Medaille asserts that the petition should be dismissed because the faculty are managerial employees and/or statutory supervisors.

On eleven days between October 1 to October 28, Hearing Officer Thomas Miller conducted the hearing in this matter by videoconference, during which the parties were invited to present their positions and supporting evidence. Thereafter, the parties submitted post-hearing briefs which I have duly considered.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. I find that the hearing officer’s rulings are free from prejudicial error and hereby affirm them. I further find that the Employer is engaged in commerce within the meaning of the Act;³ it

¹ All dates are in 2020 unless specified.

² The parties stipulated to the following unit description: All full-time and regular part-time faculty employed by the Employer at its Buffalo, New York and Rochester, New York facilities and online in the following positions: Assistant Professor, Associate Professor, Full Professor, Clinical Instructor, Clinical Assistant Professor, Clinical Associate Professor, Clinical Professor, Instructor of the Practice, Assistant Professor of the Practice, Associate Professor of the Practice, Full Professor of the Practice, Faculty Librarian and Library Director, including those full-time and regular part-time faculty who are Department Chairs and Program Directors, but excluding all adjunct faculty, adjunct instructors, non-academic Program Directors, managerial employees, guards, non-professional employees and supervisors as defined in the Act.

³ The Employer is a New York State not-for-profit corporation with facilities located at 18 Agassiz Circle, Buffalo and 1880 South Winston Road, Brighton, New York, where it is engaged in the operation of a nonprofit college. During the past twelve months, a representative period, the Employer derived gross revenues in excess of \$1,000,000, excluding contributions which are, by limitation of the grantor, not available for operating expenses. During the same period, the

will effectuate the purposes of the Act to assert jurisdiction; the individuals in the petitioned-for unit are professional employees within the meaning of Section 2(12) of the Act; the Petitioner is a labor organization within the meaning of the Act; and a question affecting commerce exists concerning the representation of certain of Medaille's employees.

Based on the record and consistent with Board law, I find that the Employer has met its burden of demonstrating that the faculty in the petitioned-for unit are managerial employees. I shall therefore dismiss the petition. Although it does not affect my final determination, I further find that Department Chairs and the Library Director are statutory supervisors within the meaning of the Act and that Program Directors are not.

Positions of the Parties

Medaille seeks dismissal of this petition. It asserts that, under *NLRB v. Yeshiva Univ.*, 44 U.S. 672 (1980) and *Pacific Lutheran Univ.*, 361 NLRB 1404 (2014), the faculty in the petitioned-for unit are managerial employees excluded under the Act. Anticipating Petitioner's arguments, it further maintains that recent changes to the faculty's terms and conditions of employment have not affected their managerial status. In the alternative, assuming the faculty are not managerial employees, Medaille contends that Department Chairs, Program Directors, and the Library Director should be excluded from the bargaining unit because they are supervisors under Section 2(11) of the Act.

Petitioner maintains that the unit is appropriate because the faculty are not managerial employees. It further urges that, even if the faculty could once have been considered managerial employees, that is no longer the case following recent changes to faculty's terms and conditions of employment. Petitioner further disputes that Department Chairs, Program Directors, and the Library Director possess supervisory authority under Section 2(11) of the Act.

Summary of Record Evidence as to Faculty's Managerial Status

Organizational Overview

Medaille operates a college that currently enrolls approximately 2,100 students across 30 undergraduate and graduate programs through which students can earn associate, bachelor's, and master's degrees as well as a doctoral degree in psychology. Medaille's main campus is in Buffalo, New York. It also operates a smaller campus in Rochester, New York and an online learning program.

Medaille's Board of Trustees has ultimate responsibility for governing and overseeing the school's operations. It selects the president, who acts as the college's chief executive officer. The president, in turn, oversees six administrative departments, each headed by a vice president. One of these vice presidents, the Vice President of Academic Affairs ("VPAA"), acts as Medaille's

Employer purchased and received goods at its Buffalo and Rochester, New York facilities goods valued in excess of \$5,000 directly from points outside the State of New York.

chief academic officer. She oversees Medaille's seven academic departments, each of which is headed by a Department Chair elected by the department's faculty. Program Directors oversee the various academic programs within a given department and report to the appropriate Department Chair.

Across its programs, Medaille employs about 70 full-time and 250 adjunct faculty. It appoints full-time faculty and pays them over a twelve-month period. In contrast, it hires adjunct faculty to teach individual courses and pays them a flat rate for each. All classifications at issue here are full-time faculty positions. Although certain faculty in the petitioned-for unit have tenure or are on the tenure-track, in spring 2020 Medaille rescinded authorization to add new tenure or tenure-track positions.

Shared Governance

The record demonstrates that faculty committees have traditionally collaborated with administration in managing Medaille through a "shared governance" model. As set forth in the 2020 Faculty Handbook, shared governance at Medaille means:⁴

[t]he faculty has paramount responsibility for such fundamental areas as curriculum, subject matter and method of instruction, research, faculty status, the creation, modification or deletion of departments and programs, faculty selection decisions and those aspects of student life that relate to the educational process. On these matters, the power of review or final decision is lodged in the Board of Trustees or delegated by it to the President.

Accordingly, through elected and appointed committees, faculty are responsible for many aspects of academic programs, policy, and personnel decisions.⁵

Recent Changes to Faculty's Terms and Conditions of Employment

Petitioner's argument that faculty are not managerial centers on recent significant changes to Medaille's Faculty Handbook, which has traditionally outlined faculty's terms and conditions employment and role in shared governance. Those changes took effect following the suspension of the 2018 Faculty Handbook during spring 2020 and adoption of the revised 2020 Faculty Handbook later in the year.

The 2018 Faculty Handbook was broadly consistent with its predecessor versions. It covered faculty status, titles, duties and criteria for faculty ranks; appointments, evaluations and

⁴ As will be discussed in greater detail herein, there are two relevant versions of the Faculty Handbook. The first was approved by the Board of Trustees in October 2018. On April 27, 2020, the college suspended this handbook and, in July 2020, issued a new handbook.

⁵ In recent years, faculty have also served on the president's cabinet, which is his chief advisory board. The current president also added an elected member of the faculty to the Board of Trustees and made the faculty compensation committee a full budget committee.

reviews; promotion, tenure and separation; workload, compensation and leave; conflict resolution, including mediation and grievances; and the procedures for revising the handbook. It also contained a section titled, "Faculty and Academic Governance" which provided a general statement on faculty and academic governance and described the operation and composition of the Faculty Assembly and various faculty committees.

In April, due to financial problems stemming from the COVID-19 pandemic, Medaille's president asked the Board of Trustees to suspend the 2018 Faculty Handbook pursuant to its "Act of God" clause.⁶ The parties initially had attempted to negotiate revisions that would provide the college with flexibility to cut academic programs and lay-off faculty. The faculty presented the president with proposals, which he found insufficient. Accordingly, he sent a red-lined version of the 2018 Faculty Handbook, proposing the following changes:

- Eliminating future tenure and tenure-track positions, although faculty members who already have tenure may retain it;
- Streamlining procedures for layoffs, including eliminating an appeals process and shortening faculty terms, with the ultimate decision on layoffs remaining with the president;
- Adding new teaching responsibilities for faculty related to student success and outcomes;
- Abbreviating the performance evaluation procedures for faculty members;
- Removing certain types of sabbatical, paid, and unpaid leave; and
- Eliminating faculty involvement in future handbook revisions.

With limited exceptions, Medaille's president did not propose changes to the section of the handbook dealing with faculty and academic governance.

On April 17, the Faculty Assembly unanimously rejected the proposed revisions but asked to continue negotiations. On April 27, the president informed the faculty that the Board of Trustees had approved his recommendation to suspend the 2018 Faculty Handbook. Thereafter, the Board of Trustees assumed control of the revisions. Although faculty were invited to make comments, the process stood in stark contrast to the procedures set forth in the 2018 Faculty Handbook which required faculty approval of any revisions.

⁶ "When the President, after consultation with the Faculty Council, determines that due to natural disasters, acts of God, declared states of emergency or other emergency situations it would be detrimental to the best interests of the College as a whole to follow the provisions set forth herein, he or she shall petition the Chair of the Board of Trustees to suspend the provisions of the Faculty Handbook/Volume IV."

On June 30, the Board of Trustees sent a copy of the proposed new handbook to the Faculty Council, along with a copy of a new employment agreement that it expected faculty members to sign. The faculty met and rejected the handbook revisions and unanimously agreed not to execute the new employment agreements. They conveyed this position to the Board of Trustees and received no response.

In July, the Board of Trustees approved the 2020 Faculty Handbook,⁷ generally incorporating the president's proposed changes. The 2020 Faculty Handbook retains language providing for "shared governance" but provides that future revisions will require only the Board of Trustees' approval. The revised handbook still includes an outline of faculty committees, but this outline now appears in an appendix, which is expressly excluded from the new revision procedure.⁸ This change ostensibly leaves faculty in control of the committee structure. Indeed, the appendix states that faculty retain the right to add, modify, or eliminate committees by majority vote.

Concurrently with releasing the 2020 Faculty Handbook, Medaille sent all faculty members new employment agreements. The handbook provides that faculty who fail to sign these agreements are "at-will" and that "no at-will employee shall claim any right or benefit under the Faculty Handbook." At the time of the hearing, faculty members had all refused to execute these agreements.

Other 2020 Changes to Medaille Operations

In addition to suspending and revising the Faculty Handbook, Medaille made other changes in the spring and summer of 2020 in response to the pandemic, including temporarily changing its grading policy, eliminating certain academic programs, and conducting lay-offs.

Medaille collaborated with faculty committees on the temporary changes to grading policy. The committees made various recommendations to accommodate the challenges students were facing due to the pandemic. The school's president approved these recommendations.

Medaille's administration also discontinued certain departments and conducted layoffs. It assembled a task force that included several faculty members. Although the task force solicited information from relevant departments, Medaille's administration evaluated and made the ultimate decision on which programs to discontinue. It also decided which faculty members to

⁷ The finalized version of the 2020 Faculty Handbook was not released to faculty until late fall 2020, while the hearing in this matter was ongoing. Notwithstanding this delay and Petitioner's contention that it led to a governance vacuum because the prior handbook had been suspended, the weight of the evidence demonstrates that committee business continued during this period in a manner largely consistent with past practice.

⁸ Medaille's president testified that the revised appendix is virtually identical to the provisions on faculty governance matters in the body of the 2018 Faculty Handbook, other than the absence of references to tenure.

layoff or move to part-time status, offered early retirement to some, and arranged for others to assume roles elsewhere within the school.

Faculty members were not involved in the administration's decisions about staff lay-offs. Indeed, Medaille's VPAA independently decided whether and when to layoff one department's administrative assistant without input from the department's faculty. The VPAA similarly decided on other staff layoffs, offered early retirement incentives, and reassigned staff as appropriate.

Academic Governance Before and After 2020 Changes

The record reflects that faculty are broadly responsible for academic governance matters. It further reveals little change to faculty control of these matters following the suspension of the 2018 Faculty Handbook and subsequent adoption of the 2020 version.

Faculty committees traditionally have had control over the content of undergraduate and graduate catalogs, which set forth Medaille's academic policies and standards, degree programs, and curriculum. A faculty committee is responsible for maintaining and regularly updating the policies and standards set forth in those catalogs, including policies and standards for repeating a course; academic progress, probation, suspension, and dismissal; academic integrity; and requirements for graduating with honors. The record does not reflect that faculty control over policies and standards changed meaningfully in 2020.

The same is true of faculty control of curriculum. Following suspension of the 2018 Faculty Handbook, faculty committees continued to control the catalogs' contents on undergraduate and graduate curricula, including which courses and programs to offer, the content of each course and program, and the requirements for each degree within the parameters set forth by certain licensing and regulatory bodies. As previously, the VPAA had to sign off on approved changes and, in a subset of cases, regulatory or licensing bodies also had to approve the changes following a "rubber stamp" from the president. In the past, the VPAA has denied only three of the 281 curricula changes proposed by these committees. Following the suspension of the 2018 Faculty Handbook, she directed the faculty committees to follow its "spirit" in reviewing the curriculum. Accordingly, the committees approved changes and elected new chairs as they have in the past and likely will in the future. Indeed, the 2020 Faculty Handbook reflects no changes to faculty's ownership of curriculum changes.

Handling of Academic Credits Before and After 2020 Changes

Within broad parameters set by licensing and regulatory bodies, faculty traditionally helped decide the number of credits a student needs to secure a particular degree. For example, Medaille recently reduced the number of credits required for its Master of Business Administration program as part of an effort to increase enrollment. The proposal originated with faculty within the department and required the approval from the VPAA and the New York State Department of Education.

Faculty also determine which course credits Medaille will accept from other institutions. They set the standards set forth in “articulation agreements” under which Medaille may accept credits from other institutions to expedite admissions and allow students to count credits toward their degree from Medaille. Indeed, one department chair testified that her recommendations regarding articulation agreements always have been accepted by Medaille in the past.

Similarly, chairs and program directors decide which credits transfer students can retain from their prior school. To make this determination, Medaille’s registrar provides them with course descriptions and syllabi. They then identify equivalent courses for transfer credits. The registrar and/or VPAA then must sign off on faculty recommendations.

Admissions Decisions Before and After 2020 Changes

Faculty committees play a central role in undergraduate and graduate admissions, subject to certain administrative oversight.⁹ This fact did not change following the 2020 revisions to the Faculty Handbook.

Current undergraduate admissions requirements likely originated years ago with a faculty committee within the parameters set by Medaille’s accrediting body. Medaille administration would have had to approve them. On an ongoing basis, faculty in individual departments and programs also set additional application requirements such as entrance exam scores, a statement of intent, or an autobiographical essay.¹⁰ Such changes are also subject to administrative approval. Medaille’s admissions department is charged with applying any approved admissions requirements in reviewing undergraduate applications.

Faculty members are involved more directly in graduate admissions. For example, in all graduate programs leading to licensure, faculty members interview each applicant and decide whether to grant admission.¹¹ Applicants to certain programs must also have faculty recommendations to secure an interview in the first place. For graduate programs that do not involve licensure, the admissions department applies a rubric that department faculty developed.

⁹ The undergraduate committee charged with admissions policies also regularly considers course scheduling, registration, academic advising, class size, and alternative means of obtaining academic credit. The record reflects that the committee’s recommendations are generally, but not always, followed. For example, Medaille administrators discontinued the deadline for final grades in 2019 to avoid interfering with commencement. Similarly, despite ongoing discussions about what to call “Columbus Day” going forward, Medaille administration announced that it now would be referred to as “Fall Holiday.”

¹⁰ This process is somewhat collaborative. At one point, faculty from one department wanted to add an admissions essay requirement but nixed the idea after push-back from the admissions department that it would prove burdensome to its staff.

¹¹ The record reflects that faculty have near absolute discretion in decisions on graduate applications. For example, decisions in the PsyD program are subject to review by the VPAA only when admission is denied. Of the 40 times faculty have denied an applicant admission since the beginning of the program, the VPAA has overruled the faculty’s decision only twice.

The rubric guides whether an applicant earns automatic admission, automatic rejection, or an interview with faculty. In the latter case, department faculty decide whether to admit the applicant following the interview. The record reflects that this process did not change in 2020.

Faculty Hiring Before and After 2020

The procedure and degree of faculty control over hiring and promotion decisions did not change in 2020. The protocol is set forth in the Faculty Search Committee Manual, last revised in 2011, not the Faculty Handbook that was subject to significant revisions in 2020. The search committee manual provides that, “[s]earches should involve a collaborative effort between academic departments, academic administration, and the Office of Human Resources.”

The VPAA provides authorization to a department chair to conduct a search for new or replacement faculty after the chair submits a form with the rank, title, job description, any minimum or preferred requirements, the justification for the position, and search committee members. Such approval to hire a new faculty member is routinely denied. However, when administration grants approval, faculty members have extensive control over the process. The department chair works with the director of human resources to develop a job description and advertisement and then forms a search committee consisting primarily of faculty within the department. The VPAA sometimes makes suggestions for search committee members. Human resources then collects and forwards applications to the search committee, which evaluates them, checks references, and conducts initial interviews. Finalists meet with the committee, department faculty, the president, and the VPAA. They also teach a class or make a presentation. The committee then deliberates and presents its recommendations to the VPAA, who retains “final decision-making authority and reserves the right not to accept a search committee’s recommendations” under the manual. Although the VPAA approved all 18 candidates the committee recommended from 2018 through 2020, the record reflects a collaborative process prior to that point. For example, administration has rejected proposals to change search parameters to permit the committee to hire a candidate without a Ph.D., but subsequently accepted a proposed change to accommodate hiring two non-tenure track candidates rather than one tenure and one non-tenure track candidate.

Faculty Promotions Before and After 2020

Aside from removal of references to tenured faculty, the 2020 Faculty Handbook provisions on promotions are consistent with those in the 2018 version. The committee consists of faculty, with the VPAA also serving as a non-voting committee member. The committee is responsible for evaluating faculty for promotions and renewals. After the committee votes, it forwards its decision to the VPAA for review. In at least some instances, the president also must give final approval. The record evidence shows that, since the 2015/2016 academic year, the VPAA and the president have always followed the committee’s recommendations.

In spring 2020, the faculty committee dealing with promotions and renewals was due to review several faculty members for reappointment. It proceeded with its work despite the suspension of the 2018 Faculty Handbook. As in the past, the president and VPAA approved all

of the committee's recommendations. The committee resumed its work at the start of the 2020/2021 academic year without change.

Faculty Sabbaticals Before and After 2020

In the past, a faculty committee had authority to consider any faculty member's application for a sabbatical to pursue research, writing, creative projects, or travel. Sabbaticals entail budgetary considerations because faculty members receive at least some portion of their salary and full health benefits during sabbaticals, while the school must still ensure adequate staffing in their absence. Accordingly, the VPAA had to give final approval to ensure due consideration to budgetary and staffing concerns. In recent years, the VPAA has approved all committee recommendations.

The 2020 Faculty Handbook includes certain changes to this process. Going forward, only tenured faculty members may request sabbatical leave. Further, it vests final authority to approve sabbaticals with the VPAA, who makes recommendations to the president for final approval. The committee met and continued its work in the fall semester, but Medaille's president informed it that budgetary issues would not permit any sabbaticals to be approved for the 2020/2021 academic year.

Faculty Dispute Resolution Before and After 2020

The 2020 revisions brought significant changes to how Medaille handles faculty grievances and hearings. Traditionally, a faculty grievance committee has reviewed all grievances filed against any entity within the college that has made a ruling, decision, or determination with which the grievant disagrees. The committee also provided a mediation program for grievances and decided which grievances to advance. The 2020 Faculty Handbook limited these functions to grievances involving issues of academic freedom. All other grievances now arise under other Medaille handbooks and contracts. For example, disputes over a faculty member's discipline or termination now arise under individual employment agreements which, to date, no faculty members have signed. Whereas a faculty hearing committee would have considered such disputes in the past, no procedure appears to be in place following the 2020 changes for faculty members who have no signed agreements.

Faculty Input into Budgetary Matters Before and After 2020

The 2020 Faculty Handbook includes no significant changes to the faculty's role in budget decisions, which has always been advisory. The faculty has a committee that attends the president's budget meetings, reviews budget data, makes recommendations about budget issues, represents faculty's interest in budget decision-making, and reports to the faculty at-large before the president submits a budget to the Board of Trustees for approval. In spring 2020, this committee met intermittently. It reconvened and continued to meet during the ensuing fall semester under the same limited auspices.

Another faculty committee has discretion over disbursements of funds allocated for certain faculty-development purposes in the approved budget. This committee has full authority to make allocations to individual faculty for travel, conferences, course release time, and other activities. Although most travel and events were canceled in the spring due to COVID-19, the committee met as usual and reimbursed faculty for any non-refundable expenses.

Analysis and Decision as to Faculty's Managerial Status

Applicable Standard and Analytical Framework

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) (quotation marks omitted)). The burden of proving managerial status rests on the party seeking to exclude individuals as managers. *Univ. of Great Falls*, 325 NLRB 83, 93 (1997), *aff'd* 331 NLRB 1663 (2000), *rev'd on other grounds*, 278 F.3d 1335 (D.C. Cir. 2002).

In *NLRB v. Yeshiva University*, the Supreme Court established a standard for evaluating when faculty members are managerial employees excluded from the Act. 444 U.S. at 683-86. 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 (citation omitted). In its decision, the Court reasoned that the university’s full-time faculty exercised managerial authority because the faculty effectively determined the university’s curriculum, grading system, course schedules, and admission and matriculation standards, and that administration implemented the overwhelming majority of the faculty’s recommendations as to faculty hiring, tenure, sabbaticals, terminations, and promotions. *Id.* at 686.

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.” For example, in *University of Dubuque*, the Board found faculty to be managerial because of their minority involvement on combined committees, substantial role in academic standards and policies such as curricula and degree requirements, and lesser minority involvement on committees for nonacademic areas of governance such as budgeting and personnel actions. 289 NLRB 349, 350 (1988). Similarly, in *American International College*, the Board found faculty to be managerial based principally on their significant role in academic decision-making despite no meaningful involvement in admissions and nonacademic matters. 282 NLRB 189 (1986); *see also Boston Univ.*, 281 NLRB 798 (1986) (holding faculty were managerial employees because they exercised effective control over such academic matters such as matriculation and graduation requirements, curriculum, academic calendars and course schedules, grading, teaching methods, and student discipline as well as certain nonacademic personnel issues). By contrast, the Board has held that faculty are not managerial employees where school administrators dictated or routinely overruled academic decision-making and controlled personnel matters. *See Bradford College*, 261 NLRB 565 (1982) (holding that faculty

were nonmanagerial despite governance documents that gave them substantial authority because, in practice, they did not effectively determine nonacademic matters such as personnel decisions and budget and were routinely overruled in hiring recommendations and academic matters such as grading policies); *see also Florida Mem. College*, 263 NLRB 1248 (1982) (finding faculty members to be nonmanagerial employees because committees did not meet regularly and lacked authority over such academic policy matters as curriculum, admissions policy, graduation requirements, and student conduct). Taken together, this lineage of cases demonstrates that control over academic policy matters are central to any analysis of whether faculty are managerial employees. Relying on these cases, one Regional Director found in a case later affirmed by the Board that “[w]ithout more, the nature of faculty involvement with respect to academic matters conclusively establishes their status as managerial employees under the foregoing case authority.” *Elmira College*, 309 NLRB 842, 849 (1992).

Most recently, in *Pacific Lutheran*, the Board established a framework for evaluating whether faculty are managerial employees under the *Yeshiva* standard. 361 NLRB at 1417-21. Through this framework, the Board assesses “both the breadth and depth of the faculty’s authority at the university.” *Id.* at 1419. It elaborated, “[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, such as the product produced, the terms on which it is offered, and the customers served.” To that end, the Board identified faculty’s participation in five areas of decision-making as central to any analysis: academic programs, enrollment management policies, finances, academic policies, and personnel policies and decisions. *Id.* at 1417. It indicated that more weight should be given to the first three “primary” areas of consideration “as they affect the [u]niversity as a whole,” and less weight to the two “secondary, i.e., less important” areas. *Id.* at 1417, 1420. The Board further stated that this examination must occur “in the context of the university’s [decision-making] structure and administrative hierarchy, as well as the nature of the employment relationship of the faculty in issue.” *Id.* at 1417.

In assessing the “depth of the faculty’s involvement” in the five decision-making areas, the evidence must demonstrate that “faculty actually exercise control or make effective recommendations.” *Id.* at 1421; *see also Univ. of Great Falls*, 325 NLRB at 95-96 (finding that faculty are not managerial in absence of evidence that administrators generally and routinely approved, independently reviewed, or evaluated recommendations). The Board noted that faculty do not have to control all aspects of a particular decision. *Pac. Lutheran*, at fn. 34. However, faculty members must constitute the majority of the committee in question to possess the requisite authority. *Id.* at fn. 36.

Faculty Exercise Managerial Decision-Making over Medaille’s Academic Programs

Here, Medaille has sustained its burden of showing that faculty play a central role in decision-making about academic programs, one of the “primary areas” of consideration under *Pacific Lutheran*.

The Board defined academic programs as a school’s “product” and as encompassing its curricular, research, major, minor, and certificate offerings and the requirements for successful

completion of those offerings. *Pac. Lutheran*, 361 NLRB at 1420. Here, Medaille faculty form the majority on committees that control undergraduate and graduate curricula, including which courses and programs to offer, the content of such courses and programs, and requirements for successful completion of degrees, subject only to parameters set by regulatory and licensing bodies and the mostly “rubberstamp” administrative approvals. Accordingly, by effectively controlling Medaille’s undergraduate and graduate curricula, the fulltime faculty effectively control Medaille’s educational “product” of academic programs. *Id.* at 1420; *see also Elmira College*, 309 NLRB at 842 (affirming Regional Director’s finding that faculty effectively controlled the college’s academic affairs because faculty committees dictated the college’s educational standards, determined the courses to be offered and their content, made recommendations about which major and minor subjects of study to offer, and set standards for student academic retention and discipline).

Faculty Exercise Managerial Control over Medaille’s Admissions Decisions

The record evidence also demonstrates that, through faculty-led committees, Medaille’s faculty exercise discretion and control as to the size, scope, and make-up of the school’s student body. As the Board explained in *Pacific Lutheran*, this area of decision-making is a primary factor in assessing faculty’s managerial status because admissions are central to a school’s function. 361 NLRB at 1420 (noting that “the targeted student body is a fundamental choice for any university, and the ability to attract and retain those students affects policies throughout the university”).

Here, although faculty members are not directly involved in individual undergraduate admissions decisions, they set the parameters for admissions routinely applied by the school’s admissions department.¹² The rubric that admissions staff uses to evaluate applicants originated with a faculty committee. Individual department faculty further have discretion to add additional application requirements for programs. Although the evidence suggests that such additions are made in conversation with admissions staff and require administrative approval, the weight of the evidence is that such recommendations are generally accepted.

Further, the record includes significant evidence that Medaille’s faculty have extensive discretion and involvement in graduate admissions decisions. For programs that lead to licensure, faculty routinely interview, evaluate, and decide upon every candidate. For programs that do not, the faculty establishes the rubric that admissions staff applies to determine which applicants are

¹² *Elmira College*, 309 NLRB at 849 (affirming that faculty are managerial in part because they participate in a committee that sets the standard for automatic acceptance of applicants and reviews all questionable applicants for admission and makes effective recommendations concerning the admission of a majority of those applicants); *see also Cooper Union of Science and Art*, 273 NLRB 1768, 1775 (1985) (holding that the admission of individual applicants does not rise to the level of a managerial function); *Am. Int’l College*, 282 NLRB at 201 (faculty who have played an active role in selecting particular candidates for admission are managerial); *St. Thomas Univ.*, 298 NLRB 280, 286 (1990) (making final decisions on admissions, expulsions, and graduations is managerial).

to be automatically admitted, automatically denied, or forwarded to the departments for more detailed consideration by the faculty. Departments also determine whether to require additional submissions from applicants, such as admissions tests or statements of intent. The record evidence is clear that faculty recommendations as to admissions decisions and standards are rarely, if ever, overruled by administrators. Medaille faculty therefore have significant decision-making authority in this primary area of consideration.

Faculty Do Not Exercise Managerial Control Over Medaille's Budget Decisions

As to the third primary area of consideration, Medaille's faculty do not exercise significant control or discretion over budgetary matters. The Board explained, "[t]he power to control or make effective recommendations regarding financial decisions—both income and expenditure—is one of the hallmarks of managerial control across all industries." *Pac. Lutheran*, 361 NLRB at 1420 (citing *Gen. Dynamics Corp.*, 213 NLRB 851, 860 (1974)). It elaborated, "[f]inancial decisions have broad effects across a university, and are not localized in a professor's classroom or lab," affecting net tuition which is the price-point for student customers and therefore whether a student will attend. *Id.*

Here, Medaille has not sustained its burden of demonstrating that faculty have input into this area of decision-making. A faculty budget committee participates in an advisory capacity in the overall budget process and mainly functions to convey information to a faculty assembly about the status of the overall budget. Departments have discretion in allocating approved funds and can advocate for additional funds. However, the evidence does not reflect that faculty make effective recommendations about the size, structure, or allocations of the university budget overall and certainly do not have a direct role in setting tuition. Absent evidence of direct involvement in the overall university budget process, Medaille has not sustained its burden of showing that Medaille faculty have managerial authority in this area.

Faculty Exercise Managerial Control over Medaille's Academic Policies

The Board in *Pacific Lutheran* established control over academic policy as a second-tier factor in evaluating whether faculty are managerial employees under the Act. 361 NLRB at 1420. It defined academic decision-making as encompassing teaching/research methods, grading policies, academic integrity policies, syllabus policies, research policies, and course content policies. *Id.*

Medaille has sustained its burden of demonstrating that its faculty have significant authority in academic policymaking. The record reflects that the faculty has primary responsibility for the undergraduate and graduate catalogs. These catalogs include policies and standards for grading; when students must repeat a course; academic progress and probation; suspension for poor academic performance; dismissal of students; admission to and retention in the Honors Program; academic integrity and dishonesty; and graduation honors requirements. The record further reflects that school administrators routinely approve faculty recommendations in these areas, such that faculty largely exercise managerial autonomy with respect to establishing these policies.

Faculty Exercise Managerial Control over Medaille's Personnel Decisions

The Board identified control over personnel decisions as a second-tier factor in assessing whether faculty have managerial authority. *See Pac. Lutheran*, 361 NLRB at 1420. It defined this area as encompassing decisions about hiring, promotion, tenure, leave, and dismissal.

Here, the record demonstrates that faculty participate in hiring, evaluating, and terminating faculty, staff, and – most especially – adjuncts. With respect to faculty hiring, the record shows that administration must approve a department's request to hire faculty or staff. When such approval is granted, faculty form a search committee that is responsible for all aspects of the hiring process, from determining the necessary qualifications and preparing the job advertisement to reviewing resumes, interviewing candidates, and recommending someone for hire. With one possible exception, the record demonstrates that administrators broadly approve and extend offers to the candidates a faculty search committee select. The process is similar – and possibly more autonomous – with respect to staff and adjunct hiring.

Faculty also exercise significant authority over faculty and staff evaluations. Although the process for faculty evaluations changed for the 2020/2021 academic year, the record reflects that faculty conduct performance reviews of both faculty and staff. The faculty committee can place an underperforming faculty member on a development plan which, if unsuccessful, can lead to non-renewal. The evidence shows that administration routinely approves the committee's recommendations regarding promotion, renewal, and non-renewal and has upheld them even in the face of appeals to the college's president. Accordingly, the record reflects that faculty exercise significant control over personnel decisions.

Faculty Have Managerial Authority within Context of Decision-Making Structure and Employment Relationship

Pacific Lutheran requires consideration of the structure of a university's administration and the nature of the faculty's employment relationship in assessing managerial status. The Petitioner contends that the changes to the Faculty Handbook in 2020 render the entire faculty contingent, similar to those faculty members the Board concluded were not managerial employees in *Pacific Lutheran*. However, not all faculty in the petitioned-for unit are contingent in this case; those in the unit who already have tenure will keep it. Further, unlike here, all faculty at issue in *Pacific Lutheran* were not permitted to participate in faculty committees. That circumstance greatly limited their ability to control or make effective recommendations about policy. *See* 361 NLRB at 1425. At Medaille, in contrast, all full-time faculty are eligible to serve on various committees which are comprised almost entirely of faculty members and which are charged with key areas of decision-making. The 2020 revisions to the Faculty Handbook may have altered many significant terms and conditions of the faculty's employment, but it did not change the structure, duties, and functions of these committees. Medaille's shared governance structure remains intact, including faculty committees and their discretion over many areas of policy. Those committees have continued to meet and operate as they always have.

Consequently, I find that Medaille's full-time faculty are managerial employees who are excluded from the Act. They exercise significant control over two of the three primary areas of consideration under the *Pacific Lutheran* framework as well as in both secondary areas of consideration. They exercise this control within a shared governance model of decision-making that gives faculty committees significant control over academic standards, admissions, personnel decisions, and academic policy. The changes to the Faculty Handbook implemented in 2020 did not significantly change the shared governance structure nor the areas in which faculty exercise managerial control. The petition should, therefore, be dismissed.

Summary of Record Evidence as to Supervisory Status

The Library Director

Medaille employs three full-time faculty librarians who serve on various faculty committees. It also employs library staff, including research librarians, a circulation supervisor, a systems analyst, and a support services coordinator. Library faculty and staff work in the college's main library in Buffalo and in a smaller one in Rochester.

The Library Director has broad responsibility over managing the department, including hiring and evaluating library faculty and staff. In addition, the Library Director has discretion over the library's budget, as allocated by the Board of Trustees. This budget includes operating and personnel expenses as well as capital expenditures for maintaining the library's collection.

Department Chairs

Medaille employees seven department chairs who are elected by the faculty of their department for three-year terms. The VPAA must approve the selections. Both the 2018 and 2020 Faculty Handbooks dictate that the VPAA must discuss the matter with the committee before rejecting a recommendation. However, the VPAA very rarely disagrees with the department's choice.

The record reflects that chairs are the "management representatives" of their departments and are responsible for all aspects of their operations, including the supervision of program directors; evaluation of faculty and staff; recommendations for hiring of new and replacement faculty and staff; planning and conduct of department meetings; and administration of department budgets. They also serve on faculty committees charged with curricula and academic policy; work with faculty and the registrar to prepare class schedules; and assign full-time and adjunct faculty to teach courses.

With respect to hiring, department chairs play a significant role in hiring faculty, adjuncts, and staff. For faculty hires, the VPAA must provide initial authorization. She will generally approve requests to replace faculty, but routinely rejects hiring for new positions due to budgetary constraints. Once a chair obtains authorization to hire, the appropriate faculty

committee takes the lead with the chair and VPAA becoming involved only in cases where the committee wishes to change the search parameters.

The chair has greater autonomy in hiring staff, including administrative, clinical, and laboratory assistants, and adjuncts. As with faculty hiring, a chair must first get authorization from the VPAA and then works with human resources and an appropriate faculty committee to recruit and consider applicants. The record contains no evidence that a request to advertise for and hire an adjunct has ever been denied. However, one department chair testified that administration ran an advertisement seeking adjunct applicants in 2020 despite her department needing none out concern over the staffing uncertainty posed by the pandemic. The chair conceded, however, that she has never been directed to hire an adjunct that she did not wish to hire. And, once hired, chairs have full discretion in assigning adjuncts to teach particular classes.

Department chairs also have nearly full autonomy in evaluating faculty, staff, and adjuncts. The chair will observe faculty members teaching, review their self-evaluations and student opinion surveys, complete evaluations, meet with the faculty members, and submit the final documents to the VPAA or a Dean.¹³ The chair's evaluations inform whether to place a faculty member on a development plan and, if the faculty member fails to improve, whether to terminate the individual's employment. These evaluations also inform promotions, renewals,¹⁴ and other employment actions. Similarly, chairs evaluate staff members and adjuncts, making substantive comments about their performance and recommendations about renewals, development plans, and terminations¹⁵ in the process.

Chairs are also responsible for approving schedules for faculty and adjuncts, although program directors appear to provide significant assistance with this process. They must coordinate their department's schedule with both the VPAA and the registrar. They also work with instructors and the registrar to request rooms and equipment, which are generally granted based on availability. This process may continue throughout a semester depending on changes in enrollment and other unforeseen circumstances. The VPAA must approve any cancellations, additions, or reductions in minimum class sizes (though not increases to class size limits).

Finally, the record reflects that department chairs are responsible for developing and administering department budgets approved by the Board of Trustees. They make requests for their departments during the budget development process and, following approval, have discretion to allocate and balance funds within the department for the year. Chairs must obtain

¹³ The 2020 Faculty Handbook greatly abbreviates the description of the faculty evaluation process. However, the record reflects that Medaille intends that all "prior evaluations methods continue" and that such intentions have been communicated to department chairs.

¹⁴ The record reflects that administration may overrule department chair's recommendations not to renew an underperforming faculty member. For example, the VPAA renewed one underperforming faculty member over a chair's objections. The faculty member was only terminated after continued underperformance.

¹⁵ Terminations in particular seem to require the VPAA's involvement. The record reflects that the VPAA has generally agreed with chairs' recommendations.

special approval from the VPAA to exceed the departmental budget. In spring 2020, chairs had to communicate ways to cut their budgets to the VPAA. They did this in consultation with faculty. Although certain departments were not able to cut their proposed budgets as much as requested, Medaille administration approved their proposals and even allowed some to secure additional funds because of compelling justifications.

Program Directors

Medaille employs 23 program directors who oversee different aspects of Medaille's seven academic departments. The VPAA appoints them to one-year terms in "conversation" with the appropriate department chair, who will ultimately delegate responsibilities to the selected director. The extent and nature of that delegation is left up to each department.

The scope of program directors' authority is less well-developed on the record than for chairs—partly, it seems, because the exact scope of their responsibilities varies by department and the needs of a given chair. It is undisputed, however, that in at least some departments program directors are primarily responsible for developing draft course schedules, deciding when to hire an adjunct, and making adjunct assignments. The record also contains evidence of three instances in which a program director submitted forms requesting authorization to hire faculty, and in each instance the department chair also signed off on the form. They may also collaborate with chairs in deciding whether to renew an adjunct.

Analysis and Decision as to Supervisory Status

Section 2(11) of the Act defines a "supervisor" as any individual having authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985). Such authority must be held in the interest of the employer. *G4S Gov't Solutions, Inc.*, 363 NLRB No. 113 (2016); *Oakwood Healthcare*, 348 NLRB 686, 687 (2006).

The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Ky. River Cmty. Care*, 532 U.S. 706 (2001). "[P]urely conclusory evidence is not sufficient to establish supervisory status." *Lynwood Manor*, 350 NLRB 489, 490 (2007). The fact that an employee exercises supervisory authority over a single employee is sufficient for the employee to qualify as a supervisor within the meaning of the Act. *U.S. Gypsum Co.*, 93 NLRB 91 fn. 9 (1951) (citing *Keystone Printing Serv.-Waukegan News-Sun*, 85 NLRB 157 (1949)).

Here, the record reflects that department chairs and the Library Director make effective recommendations regarding the hiring, evaluation, and termination of full-time faculty, adjunct faculty, and staff. As to department chairs, the record contains abundant evidence of several indicia of supervisory status, including assigning work and scheduling classes to faculty and

adjuncts; effectively recommending the hiring and firing of faculty; and evaluating faculty. Perhaps most clearly, they have near complete authority over the hiring, firing, and assignment of work to staff and adjunct faculty. Such authority is subject to budget constraints, but the record contains no evidence that administration has ever denied a chair's request to hire an adjunct. Indeed, department chairs have broad autonomy in crafting job advertisements, reviewing applications, and selecting their preferred candidates. The record also reflects that, although chairs may consult with and request assistance from human resources in terminating an adjunct or staff member, no evidence exists that they had to seek approval to do so.

Accordingly, I conclude that department chairs and the Library Director are supervisors within the meaning of the Act.¹⁶

In contrast, the record includes only limited evidence regarding the duties and responsibilities of program directors. The weight of the evidence suggests that their functions vary by department but provides few particulars. Without more detail, I cannot conclude that program directors are supervisors. To the extent that Medaille has shown that some program directors possess supervisory authority, it has not sustained its burden of demonstrating that all program directors, simply by virtue of their title, are statutory supervisors.

I therefore conclude that department chairs and the Library Director are statutory supervisors within the meaning of the Act, but that program directors are not.

Conclusion

Consistent with the precedent set forth herein, all faculty in the petitioned-for unit are managerial employees excluded from the Act. I find that recent changes to the Faculty Handbook did not affect this managerial status. Although it does not affect my final determination, I further find that department chairs and the Library Director are statutory supervisors and that program directors are not. It is hereby ordered that the petition in this matter is dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations

¹⁶ See *Detroit College of Bus*, 296 NLRB 318 (1989) (finding college department coordinators to be supervisors where they exercised hiring authority, evaluated faculty members, effectively recommended discharge and retention of faculty and made work assignments); *N.Y.U.*, 221 NLRB 1148 (1975) (finding college's department and area chairs and program directors to be supervisors because they effectively recommended hiring, termination, employment during summer term, and promotion of faculty; evaluated faculty performance; and assigned class schedules); *Rensselaer Polytechnic Inst.*, 218 NLRB 1435 (1975) (university department chairs were supervisors where they made effective hiring recommendations, were responsible for seeing that their departments were adequately staffed, settling grievances, developing academic programs and setting priorities in their departments).

Board, 1015 Half Street SE, Washington, DC 20570-0001. A copy of the request for review must be served on each of the other parties as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations. The request for review must contain a complete statement of the facts and reasons on which it is based.

Procedures for Filing Request for Review: Pursuant to Section 102.5 of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. A request for review filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules do not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations. The request for review must comply with the formatting requirements set forth in Section 102.67(i)(1) of the Board's Rules and Regulations. Detailed instructions for using the NLRB's E-Filing system can be found in the [E-Filing System User Guide](#).

A request for review must be received by the Executive Secretary of the Board in Washington, DC, by close of business (**5 p.m. Eastern Time**) on **March 9, 2021**, unless filed electronically. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time on March 9, 2021**.

Filing a request for review electronically may be accomplished by using the E-Filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review 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, absent a determination of technical failure of the site, with notice of such posted on the website.

Upon good cause shown, the Board may grant special permission for a longer period within which to file a request for review. A request for extension of time, which must also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Any party may, within 5 business days after the last day on which the request for review must be filed, file with the Board a statement in opposition to the request for review. An opposition must be filed with the Board in Washington, DC, and a copy filed with the Regional

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Direction and copies served on all the other parties. The opposition must comply with the formatting requirements set forth in §102.67(i)(1). Requests for an extension of time within which to file the opposition shall be filed pursuant to §102.2(c) with the Board in Washington, DC, and a certificate of service shall accompany the requests. The Board may grant or deny the request for review without awaiting a statement in opposition. No reply to the opposition may be filed except upon special leave of the Board.

Dated: February 23, 2021

/s/ Paul J. Murphy

PAUL J. MURPHY
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