

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

POINT PARK UNIVERSITY,

Employer,

and

**No. 6-RC-12276
Case 6-CA-34243
457 F.3d. 42 (D.C. Cir. 2006)**

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

Petitioner.

BRIEF OF EMPLOYER

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Comes now the Employer Point Park University (hereinafter referred to as “Point Park” or the “University”), in response to the Notice and Invitation to File Briefs, and states as follows:

PRELIMINARY STATEMENT

The divided Board’s¹ issuance of the “Notice and Invitation to File Briefs” is unwarranted and totally inappropriate.

The United States Court of Appeals for the District of Columbia Circuit held that the Board had “failed to adequately explain why the faculty’s role at the University is not managerial.” *Point Park University v. NLRB*, 457 F.3d 42, 44 (D.C. Cir. 2006). The Court instructed the Board to identify which of the relevant factors set forth in *Yeshiva University* are significant and which are less so in its determination that the Employer’s faculty are not managerial employees and to explain why the factors are so weighted.

The Court’s remand order was unmistakably clear and succinct, holding that:

. . . *Yeshiva* identified the relevant factors that the Board must consider. *LeMoyné-Owen* held that the Board must clearly explain its analysis. The failure to provide such an explanation is grounds for remand to the Board, which we do here.

Point Park University v. NLRB, 457 F.3d 42, 51 (D.C. Cir. 2006) (internal citations omitted).

The Court made it clear that its remand of the case to the Board was “for proceedings consistent with this opinion so that the Board can provide such an explanation or reconsider its conclusion.”

See, Point Park University, 457 F.3d at 50-51.

On October 24, 2006, the Board notified the parties that it had accepted the remand from the D.C. Court of Appeals and invited the parties to file Statements of Position. Significantly, it

¹ Members Hayes and Flynn, dissenting.

limited such Statements of Position “to the issues raised by the remand.” in recognition of the narrow scope of the Court’s remand to the Board.² (Emphasis supplied.)

By contrast, the current invitation is **not** limited to the issues raised by the remand and totally disregards the narrow scope of the issues raised by the Court’s remand.³ The Board now raises a whole set of **new issues** on its own initiative, which were **not** part of the Court’s remand Order in this proceeding. The new issues raised by the Board not only far exceed the Court’s remand, they also raise issues that go beyond the scope of the record developed in this case. Nevertheless, Point Park submits this response to the Board’s Notice and Invitation to File Briefs.⁴

ARGUMENT

I. The Board improperly exercised its authority in issuing the Notice and Invitation to File Briefs.

A. The Board lacks the authority to issue the Notice and Invitation to File Briefs because the Board lacks the quorum necessary to conduct business.

When the Board issued its Notice and Invitation to File Briefs, it lacked the quorum necessary to do so. The Board consists of five members traditionally appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 153(a). Three members of the Board constitute a quorum of the Board, and the United States Supreme Court has held that the Board

² Letter of Richard D. Hardick to the Parties, October 24, 2006, a copy of which is attached hereto as Exhibit “A.” Exhibit “A” correctly styles this matter on remand as *Point Park University*, 6-CA-34243, 344 NLRB No. 17. Accordingly, the case caption herein should include this same case number.

³ In addition, the Board’s Notice and Invitation to File Briefs addressed to the Parties and *Amici* is both untimely and inappropriate. In all the circumstances, any such briefs which may be submitted by *Amici* who were not previously participants in this proceeding should be rejected and not considered by the Board.

⁴ Neither Point Park’s submission of the instant brief, nor the responses to some of the questions posed by the Board in its Notice and Invitation to File Briefs, should be construed as waiving Point Park’s argument that the Notice and Invitation to File Briefs was erroneously issued or that novel arguments advanced in responsive briefs should play no role in the Board’s adjudication of this matter. In addition, Point Park incorporates by reference the Briefs it has previously submitted to the Board in connection with this dispute.

requires at least three members to conduct business. *See, id.* § 153(b); *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, 2644 (2010).

The Constitution provides that the President “shall have Power to fill all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” U.S. Const., Art. II, § 2, Cl. 3. On or about January 4, 2012, the President, purportedly acting pursuant to his recess appointment power, appointed Sharon Block, Richard Griffin, Jr., and Terence F. Flynn to the Board. At the time that Ms. Block, Mr. Griffin, and Mr. Flynn were appointed to the Board, the Senate had been conducting “pro-forma” sessions every three days.

Because the Senate was technically in session when the recess appointments were made, the President was without power to make such appointments. As a consequence, the Board’s membership currently consists of only two validly appointed members, Chairman Mark Gaston Pearce and Member Brian E. Hayes. Accordingly, the Board currently lacks the statutorily required quorum to render a decision or, in this case, to issue the subject Notice and Invitation to File Briefs. *See, New Process Steel*, 130 S.Ct. at 2644.

B. Although purporting to engage in adjudication of the matter before it, the Board is actually engaging in rulemaking if it enters orders responsive to the questions raised in the Notice and Invitation to File Briefs.

The “choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1973). However, like all grants of discretion, the Supreme Court has acknowledged that there “may be situations where the Board’s reliance on adjudication [rather than rulemaking] would amount to an abuse of discretion under the [NLRA].” *Id.* Here, the Board, in issuing its Notice and Invitation to File Briefs, is ostensibly seeking to make sweeping changes to the analysis for determining whether a

college or university's faculty members are statutory employees or managerial employees under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). Notably, the questions directed to the parties in the Notice and Invitation to File Briefs are not limited to determining whether Point Park's full-time faculty can form a union, the actual issue at hand. As noted by Board Member Brian Hayes in *In re Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), the Board oversteps "the bounds of its discretion in making sweeping changes to established law through adjudication, without adhering to any approximation of a rulemaking procedure that would comply with requirements under the Administrative Procedures Act ("APA") designed to safeguard the process by ensuring scrutiny and broad-based review."

1. Rulemaking Versus Adjudication Generally.

Congress has given the Board the authority to "make, amend, and rescind, in the manner prescribed by [the APA], such rules and regulations as may be necessary to carry out the provisions of [the NLRA]." 29 U.S.C. § 156. First enacted in 1946, the APA was seen as a "strongly marked, long sought, and widely heralded advance in democratic government." Administrative Procedure Act: Legislative History, S. Doc. No. 79-248, at iii (1946) (statement of Sen. McCarran). Central to that advance in democratic government were the APA's rulemaking requirements, which "assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). The APA's rulemaking requirements also ensure that "affected parties have an opportunity to participate in and influence agency decision-making at an early stage, when the agency is more likely to give real consideration to alternative ideas." *N.J. Dep't of Env'tl. Prot. v. EPA*, 626 F.2d 1038, 1049-50 (D.C. Cir. 1980). As the D.C. Circuit has explained, "notice and an opportunity to comment are to precede rulemaking." *Id.*

The APA defines rulemaking as the “agency process for formulating, amending, or repealing a rule.” 5 U.S.C. § 551(5). A “rule” is broadly defined as the “whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy” *Id.* § 551(4). To engage in rulemaking, an agency must first publish a notice of proposed rulemaking in the *Federal Register*. *Id.* § 553(b). Among other things, that notice must include “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” *Id.* The agency must then give interested persons an opportunity to participate in the rulemaking “through submission of written data, views, or arguments with or without opportunity for oral presentation.” *Id.* § 553(c).

“After consideration of the relevant matter presented,” the agency must “incorporate in the rules adopted a concise general statement of their basis and purpose.” *Id.* Importantly, the product of the rulemaking process constitutes final agency action usually subject to immediate, broad-based judicial review by anyone aggrieved by the rule.” *See, e.g., Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606 (1991) (addressing pre-enforcement challenge of Board regulation by trade association on behalf of its members).

Adjudication is something altogether different. As defined by the APA, “adjudication” means the agency process for formulating an “order,” 5 U.S.C. § 551(7), which the APA defines as the “whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing.” 5 U.S.C. § 551(6). The APA’s procedural protections for adjudication do not govern proceedings for the “certification of worker representatives.” *Id.* § 554(a)(6). Moreover, the agency’s final order in an adjudication is not subject to immediate, broad-based attack by persons or entities who are not parties to the adjudication. Instead, one must wait until the agency order is applied to

it personally or participate as an *amicus* in a legal challenge of the original order. *See, Am. Fed'n of Lab. v. NLRB*, 308 U.S. 401, 411 (1940) (explaining Board order determining appropriate bargaining unit is usually not a final order subject to immediate judicial review).

2. The Board's Notice and Invitation to File Briefs.

A brief review of this case's history is important in understanding why the Board's Notice and Invitation to File Briefs is in actuality an invitation to allow the Board to wrongfully engage in rulemaking in an adjudicatory proceeding. In 2003, the Union filed a petition with the Board seeking to represent a bargaining unit consisting of all full-time faculty at Point Park. The University contested the petition on the grounds that all its full-time faculty members were managerial and therefore outside the Board's jurisdiction. After a hearing, the Region Six Regional Director issued a Decision and Direction of Election on April 27, 2004, finding that Point Park's full-time faculty members were not managerial employees. Subsequently, the Board denied Point Park's Request for Review of the Regional Director's Decision and Order. Thereafter, an election was held, and the Union was certified as the exclusive collective bargaining representative. In order to challenge the propriety of the Regional Director's ruling regarding the managerial status of the faculty, Point Park thereafter refused to recognize and bargain with the Union, and the Union filed unfair labor charges against Point Park. On February 15, 2005, the Board ruled in favor of the Union on the unfair labor charges. Point Park filed a Petition for Review with the United States Court of Appeals for the D.C. Circuit. The D.C. Circuit granted Point Park's Petition for Review and remanded the case to the Board "for proceedings consistent with this opinion so that the Board can provide such an explanation or reconsider its conclusion." *Point Park v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006). The Board, after accepting the Court's remand, in turn, remanded the case to the Region Six Regional Director.

In light of the D.C. Circuit's *Point Park* opinion, the Regional Director reopened the record and invited the parties to file briefs. On July 10, 2007, the Regional Director issued its Supplemental Decision on Remand reaffirming its original decision, and Point Park filed a Request for Review with the Board on or about August 23, 2007. The Board granted Point Park's Petition for Review on November 28, 2007.⁵ Since that time, all parties and *amici*, including the Union, have had ample opportunity to file briefs with the Board regarding their respective positions regarding the D.C. Circuit's *Point Park* opinion and the Regional Director's Supplemental Decision. As the dissenting Members noted in the Notice and Invitation to File Briefs, "the [Union] did not avail itself of its opportunity to file a brief," even though this matter has been pending before the Board for nearly five (5) years.

The questions in the Notice and Invitation to File Briefs include:

- (1) Which of the factors identified in *Yeshiva* and the relevant cases decided by the Board since *Yeshiva* are most significant in making a finding of managerial status for university faculty members and why?
- (2) In the areas identified as "significant," what evidence should be required to establish that faculty make or "effectively control" decisions?
- (3) Are the factors identified in the Board case law to date sufficient to correctly determine whether faculty are managerial?
- (4) If the factors are not sufficient, what additional factors would aid the Board in making a determination of managerial status for faculty?
- (5) Is the Board's application of the *Yeshiva* factors to faculty consistent with its determination of the managerial status of other categories of employees and, if not, (a) may the Board adopt a distinct approach for such determinations in an academic context or (b) can the Board more closely align its determinations in an academic context with its

⁵ The election in this matter was conducted on May 26, 2005, more than eight years ago. Approximately four-and-one-half years passed between the date on which this Board, following the D.C. Circuit's remand, accepted exclusive responsibility for adjudicating this dispute and the issuance of the Notice and Invitation to File Briefs. This Board has recently admitted that "[t]he Board and court are rightly concerned with administrative delay in Board certification proceedings, especially when it is coupled with other bases for questioning the continuing viability of the certified union's majority support." *Independence Residences, Inc.*, 358 NLRB 1, 4 (2012).

determinations in non-academic contexts in a manner that remains consistent with the decision in *Yeshiva*?

(6) Do the factors employed by the Board in determining the status of university faculty members properly distinguish between indicia of managerial status and indicia of professional status under the Act?

(7) Have there been developments in models of decision-making in private universities since the issuance of *Yeshiva* that are relevant to the factors the Board should consider in making a determination of faculty managerial status? If so, what are those developments and how should they influence the Board's analysis?

(8) As suggested in footnote 31 of the *Yeshiva* decision, are there useful distinctions to be drawn between and among different job classifications within a faculty—such as between professors, associate professors, assistant professors, and lecturers or between tenured and untenured faculty—depending on the faculty's structure and practices?

These questions evince an intent by the Board to promulgate rules in this proceeding rather than simply complying with the dictates of the D.C. Circuit's remand, which requested that the Board "explain why the faculty's role at the University is not managerial." *See, Point Park*, 457 F.3d at 42. The *Point Park* court further held that "*Yeshiva* identified the relevant factors that the Board must consider." *Id.* at 51. Yet the Board's questions go far beyond examining these factors and pose questions that are extremely far reaching and not limited to the circumstances of this particular case. Questions (2)-(8) are requesting that the parties and *amici* assist the Board in developing new rules regarding whether faculty members are managerial or statutory employees under *Yeshiva*.

Unfortunately, the Board, in setting the groundwork to make new rules regarding the ability of faculty members at colleges and universities to unionize, has failed to adhere to the rulemaking procedure specified by the APA. *See*, 5 U.S.C. § 551, *et seq.* The Board has not published any notice of rulemaking in the *Federal Register* nor has it provided an opportunity for interested persons to participate in the rulemaking process. *Id.* § 553. Instead, the Board will use

its Notice and Invitation to File Briefs to essentially preempt the rulemaking process, which is not allowable under federal law. Certainly, none of the parties involved in this case have requested the overly broad inquiry presented herein by this Board.

II. The Board is required to limit its consideration of this case to remedying the specific deficiencies in its prior ruling, as identified by the United States Court of Appeals for the District of Columbia Circuit.

As noted above, the D.C Circuit reviewed the ruling of the Board that the University's full-time faculty were not managerial and could therefore form a union. The Court reviewed applicable law, especially the United States Supreme Court's landmark decision in *NLRB v. Yeshiva* and the D.C. Circuit's previous decision in *LeMoyne-Owen College v. NLRB*,⁶ which, according to the Court, "provide the [NLRB] guidance on how to resolve this type of dispute." *Point Park*, 457 F.3d at 44. The Court concluded that "neither the Regional Director nor the Board followed that guidance and thus failed to adequately explain why the faculty's role at the University is not managerial." *Id.* Accordingly, the Court remanded this case "for further proceedings **consistent with this opinion** so that the Board can provide such an explanation or reconsider its conclusion." *Id.* (emphasis added).

In addition, the Court identified for the Board the precise analysis it was to undertake. Specifically, the Board is to perform the "fact-intensive" analysis that will allow it to distinguish between "excluded managers and included professional employees, [which] presents special challenges in the unique and often decentralized world of academia." *Id.* at 51. The Court also provided the Board with a clear roadmap for engaging in this analysis: "*Yeshiva* identified the relevant factors that the Board must consider. *LeMoyne-Owen* held that the Board must clearly explain its analysis." *Id.* (internal citations omitted). To the extent the Board's conclusion

⁶ *LeMoyne-Owen v. NLRB*, 357 F.3d 55 (D.C. Cir. 2004).

conflicts with its prior precedents, the Board must provide a “fulsome explanation” of its reasons for doing so. *Id.* at 49.

The tasks identified above represent the complete mandate given to this Board by the D.C. Circuit. “[U]ntil reversed, the dictates of a Court of Appeals must be adhered to by those subject to the appellate court’s jurisdiction ... Administrative agencies are no more free to ignore this doctrine than are district courts.” *Beverly Enterprises v. NLRB*, 727 F.2d 591, 592-93 (6th Cir. 1984) (chastising the Board for its “complete disregard ... in the treatment of a federal court mandate to a government agency.”). In addition, Point Park submits that the Board should be mindful of Member Leibman’s dissent in *LeMoyne-Owen College*, 345 NLRB 1123 (2005) (“LeMoyne-Owen II”) in which Member Leibman emphasized that the Board must confine itself to the scope of remand ordered by the Court of Appeals. 345 NLRB 1123, 1133 (2005).

Nevertheless, after a delay of nearly five years, the Board has issued its Notice and Invitation to File Briefs, which invites additional briefing and requests the submission of additional evidence unrelated to the instant dispute. The questions asked by the Board in the Notice and Invitation to File Briefs seek information that is not in the record before the Board and is unrelated to the parties to this dispute and seek answers to legal questions that have not been posed by the parties and, in any event, do not need to be answered in order to complete the task assigned by the Court. Rather, the D.C. Circuit plainly stated that the Board is to apply the *Yeshiva* factors to the evidence before it, state “with clarity which factors were significant to the outcome and why,” and, to the extent necessary, distinguish conflicting Board precedent. *Point Park*, 457 F.3d at 51. Therefore, Point Park urges the Board to confine its adjudication of this matter in a manner consistent with the opinion of the D.C. Circuit.

III. *Yeshiva* and its progeny clearly identify the most significant factors for evaluating the managerial status of faculty.⁷

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court found that faculty members at Yeshiva University were managerial employees who were excluded from coverage under the NLRA. The Supreme Court defined managerial employees as those who “formulate and effectuate management policies by expressing and making operative the decision of their employer.” *Id.* at 682. The Court further opined that managerial employees must represent “management interests by taking or recommending discretionary actions that effectively control or implement employer policy.” *Id.* at 683.

The Court emphasized:

The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these.

Id. at 686. Faculty playing a “predominant role in faculty hiring, tenure, sabbaticals, termination, and promotion” have managerial and supervisory characteristics. *Id.* at 686 n.23.

The Board, in decisions subsequent to *Yeshiva*, has “emphasized the importance of faculty control or effective control over *academic* areas, as opposed to nonacademic areas.”

⁷ Question (1) posed by the Board reflects the Board’s total inattention and inaction to what the D.C. Circuit instructed the Board to do as far back as 2004. As restated by the D.C. Circuit in *Point Park University v. NLRB*, “*Yeshiva* and our explanation of its application in *LeMoyne Owen College v. NLRB*, 357 F.3d 55 (D.C. Cir. 2004), provide the National Labor Relations Board . . . guidance on how to resolve this kind of dispute.” *Point Park University*, 457 F.3d at 44. The Board cannot now shift this burden to the parties or *Amici*. The D.C. Circuit charged the Board in 2004 and again in the instant case to explain, “in applying the [*Yeshiva*] test to varied fact situations, which factors are significant and which less so, and why . . .” *Id.* at 49 (emphasis in original) (quoting *LeMoyne-Owen*, 357 F.3d at 60). Some eight years later, the Board still has not done so.

LeMoyne-Owen II, 345 NLRB 1123, 1128 (2005) (citing *Livingston College*, 286 NLRB 1308, 1314 (1987)). Absolute control need not be demonstrated. *Id.*

Decisions with regard to curriculum and course offerings should be considered the most important and significant factors. The Board has consistently opined that faculty members are managerial when they make effective recommendations with regard to curriculum and course offerings. *See, LeMoyne-Owen II*, 345 NLRB 1123 (2005); *Elmira Coll.*, 309 NLRB 842 (1992); *Lewis & Clark Coll.*, 300 NLRB 155 (1990); *Univ. of Dubuque*, 289 NLRB 349 (1988); *Livingston Coll.*, 286 NLRB 1308 (1987); *Am. Int'l Coll.*, 282 NLRB 189 (1986); *Univ. of New Haven*, 267 NLRB 939 (1983). In *LeMoyne-Owen II*, the Board found the faculty to be managerial where the faculty made or effectively recommended curriculum decisions including courses of study, adding and dropping courses, degrees and degree requirements, majors and minors, academic programs and academic divisions.

Other academic factors, including course scheduling, grading methods, graduation policies, which students may be admitted or retained into a program of study, matriculation standards and teaching methods, are also significant factors in determining whether faculty members are managerial. The Board has also found the setting of the academic calendar, acceptance of transfer credits, and other factors may be indicative of managerial status. *Boston Univ.*, 281 NLRB 798; *Elmira Coll.*, 309 NLRB at 844. “Board cases generally have examined the faculty’s role in decision making ‘whether individually, by department consensus, through . . . committees, or in meetings of the whole.’” *LeMoyne-Owen II*, 345 NLRB at 1128 (quoting *Lewis & Clark Coll.*, 300 NLRB at 161).

IV. As has already been demonstrated in Point Park’s prior briefing, the factors identified above, when applied to the facts in the record, clearly demonstrate that Point Park’s faculty are managerial because they “effectively control” relevant decisions.

There are a number of factors that are significant for the Board to consider in finding that Point Park’s faculty are managerial and thus, excluded under the NLRA. These factors include Point Park’s faculty’s control over: (1) curriculum; (2) admissions standards; (3) scholarships and apprenticeships; (4) graduation standards; (5) teaching methods and classroom standards; (6) grading systems; (7) syllabus, academic calendar, and course scheduling; and (8) non-academic areas.⁸ Point Park’s faculty’s control in these various areas is significant in showing that the faculty effectively controls numerous academic areas as well as some non-academic areas. *See, LeMoyne-Owen II*, 345 NLRB at 1128. It further indicates that Point Park’s faculty plays a “predominant role in faculty hiring, tenure, sabbaticals, termination, and promotion.” *Yeshiva*, 444 U.S. at 686 n.23. Point Park already addressed these areas in depth in its Brief on Review of the Regional Director’s Supplemental Decision on Remand. As such, Point Park will briefly address these areas here.

A. Faculty Control over Curriculum.⁹

Point Park’s faculty is responsible for the development and implementation of curricula. For undergraduate curricula, course proposals are reviewed by the departmental faculty and then the Curriculum Committee of the Faculty Assembly. If the Curriculum Committee recommends the course proposal, the proposal goes to the Faculty Assembly. Approval by the Faculty Assembly is the final step for implementation of the undergraduate curricula.

⁸ The Regional Director’s Supplemental Decision on Remand failed to identify which factors are significant and failed to explain why certain factors were or were not significant, as is required under *Point Park v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006).

⁹ *See*, Point Park’s Brief on Review of Regional Director’s Supplemental Decision on Remand at II.B.

With regard to graduate programs, the academic departments submit a statement of design to the Pennsylvania Department of Education for approval. Once approved, a proposal is completed at the department level, then proceeds to the Graduate Council, and, if passed, proceeds to the Curriculum Committee and the Faculty Assembly. Point Park has adopted all new graduate programs recommended by the Curriculum Committee and Faculty Assembly.

The Curriculum Committee and ultimately the Faculty Assembly also effectively control proposals to discontinue academic programs as well as education program modifications. New courses are developed based on a proposal from a faculty member to the department, then on to the Curriculum Committee and the Faculty Assembly for approval. While there is a Core Curriculum for all first time undergraduate students, proposed changes to the Core Curriculum proceed through the Core Curriculum Subcommittee of the Curriculum Committee, then to the full Curriculum Committee and on to the Faculty Assembly.

No new programs have been introduced at the undergraduate level over the objection of the Curriculum Committee or the Faculty Assembly, and no new programs recommended by the Curriculum Committee or the Faculty Assembly were rejected by Point Park.

B. Faculty Control over Admissions Standards.¹⁰

The Faculty Assembly maintains a standing Committee on Admissions, Retention and Financial Aid. This Committee is responsible for recommending an admissions policy, reviewing the standards for the established policy, and enforcing the policy. The Curriculum Committee and the Faculty Assembly approve or reject the admissions standards for new programs. Admissions standards for graduate programs are established when the program proposal is approved by both the Curriculum Committee and the Faculty Assembly.

¹⁰ See, Point Park's Brief on Review of Regional Director's Supplemental Decision on Remand at II.C.

C. Faculty Control over Scholarships, Apprenticeships and other Honors.¹¹

Point Park's faculty has a significant role in awarding scholarships and apprenticeships at Point Park. For instance, the faculty at the Conservatory of Performing Arts determines scholarship awards and apprenticeships for students who pass their auditions. Also, in the vast majority of cases, the faculty and Department Chair (a full-time faculty member) agree on the awarding of apprenticeship or scholarship monies and the Dean accepts the faculty's recommendations as a matter of course. The faculty also proposes candidates for honorary degrees and selects candidates for Distinguished Lecturer programs.

D. Faculty Control over Graduation Standards.¹²

The curricular and credit requirement for each degree offered by Point Park are determined and approved by the full-time faculty through the Faculty Assembly's Curriculum Committee and the Faculty Assembly. Also, the faculty sets the courses, content and credit hours for any degree conferred. As such, the faculty determines graduation standards for each academic program. Additionally, the Curriculum Committee and the Faculty Assembly have the discretion to accept or reject particular degree requirements presented to them.

E. Faculty Control over Teaching Methods and Classroom Standards.¹³

The full-time faculty has complete discretion to determine the individual teaching methods used in the classroom. The manner and actual method of teaching is left to the faculty. Classroom standards of conduct are also determined by the full-time faculty.

¹¹ See, Point Park's Brief on Review of Regional Director's Supplemental Decision on Remand at II.D.

¹² See, Point Park's Brief on Review of Regional Director's Supplemental Decision on Remand at II.E.

¹³ See, Point Park's Brief on Review of Regional Director's Supplemental Decision on Remand at II.F.

F. Faculty Control over Grading Systems.¹⁴

The Curriculum Committee of the Faculty Assembly has primary responsibility for determining the grading system used at Point Park. The faculty, in fact, determines the grading policies. The full-time faculty of the Faculty Assembly voted that the faculty member in each school should have the ability to choose whether to switch to a plus/minus system school-wide.

Point Park's faculty also determines grade appeals in response to formal complaints made by students.

G. Faculty Control over Syllabus, Academic Calendar, Course Scheduling.¹⁵

Point Park's faculty members create the syllabi for courses and the content of the syllabi comes from the individual faculty members. The Curriculum Committee of the Faculty Assembly proposes an academic calendar that goes to the Faculty Assembly for approval and then goes to Point Park's Vice President of Academic Affairs and its President. The faculty's recommended academic calendar has never been rejected by Point Park's administration. The Curriculum Committee considers any modifications to the academic calendar made by the administration and then chooses to either approve or deny the modification.

With regard to course scheduling, faculty members select their individual preferences for classes as well as the time slots in the schedule for those classes. Department Chairs typically defer to faculty members' preferences for teaching particular classes and faculty members often have the ability to choose their exact schedules. Essentially, full-time faculty has authority to teach what they wish to teach and when.

¹⁴ See, Point Park's Brief on Review of Regional Director's Supplemental Decision on Remand at II.G.

¹⁵ See, Point Park's Brief on Review of Regional Director's Supplemental Decision on Remand at II.H.

H. Faculty Control over Non-Academic Areas.¹⁶

In addition to the various academic areas noted above, Point Park's faculty also has substantial control in non-academic areas. Full-time faculty determines tenure at Point Park as set forth in the Faculty Handbook. The departmental Tenure and Promotion Committees are also involved in promotions at Point Park. Full-time faculty effectively recommends the hiring of new, full-time tenure track faculty through search committees consisting of only faculty members. Departmental faculty, other than Department Chairs, is generally involved in the hiring process for full-time non-tenure track positions and adjunct positions.

I. The Regional Director improperly discounted the findings of the Report of the Middle States Commission on Higher Education.

Neither the Union, nor any other party to these proceedings, has ever raised the issue of what evidence should be required to establish that Point Park's faculty is managerial. However, in addition to other evidence that the Regional Director received, the Regional Director should have attached significant probative value to the Report of the Middle States Commission on Higher Education ("Middle States Report"). The Middle States Report found that the Point Park faculty has "substantial input and control over the curriculum and input in the academic policy-making," making it entitled to "great significance" in the determination of the faculty's managerial status. Yet, the Regional Director refused to accept the conclusion reached by the Middle States Report as probative evidence, thereby disregarding previous Board precedent.¹⁷

In *Elmira College*, 309 NLRB 842 (1992), the Board held that the conclusion reached by the Middle States Commission on Higher Education that the Elmira faculty was managerial should be accorded "great significance." Also, in *University of New Haven*, 267 NLRB 939

¹⁶ See, Point Park's Brief on Review of Regional Director's Supplemental Decision on Remand at II.I.

¹⁷ The Regional Director's substitution of his opinion for that of the Middle States' accreditation body represents a flagrant disregard of *Yeshiva's* dictate of the "special challenges in the unique and often decentralized world of academia."

(1983), the Board reversed the Administrative Law Judge’s rejection of an accreditation report from the Commission on Institutions of Higher Education of the New England Association of Schools and Colleges, finding that “the Board traditionally has found such accreditation reports relevant, and has relied on them in reaching its decisions.” *Id.* at 939 n.1. In *Bradford College*, 261 NLRB 565 (1982), the Board relied on an accreditation report to find that the Bradford faculty were not managerial.

V. Because Courts and the Board have been successfully applying the *Yeshiva* factors for over three decades, and because the facts of the instant case do not suggest a need for consideration of other factors, the Board must confine itself to consideration of the *Yeshiva* factors in adjudicating the matter at bar.

A. In *NLRB v. Yeshiva University*, the Supreme Court announced the test for determining whether faculty are managerial.

As the D.C. Circuit recognized, the *Yeshiva* decision represented a “seismic shift in the law of labor relations in American higher education.” *Point Park*, 457 F.3d at 46. Whereas the Board had previously assumed that faculty members were protected by the NLRA, “[t]hat all changes with *Yeshiva*” with its holding that “faculty members, even though they are professional employees, may also be ‘managerial employees,’ barred by the Act from union activities.” *Id.* at 47-48. Accordingly, consideration of the criteria for determining whether faculty are managerial employees must begin with the Supreme Court’s opinion in *Yeshiva*.

In *Yeshiva*, the Supreme Court recognized that the Board had first asserted jurisdiction over faculty in 1970, reasoning that faculty were “professional employees” within the meaning of the NLRA. *Id.* at 681-82. *Yeshiva University* did not argue that its faculty were not “professional;” rather, the university argued that, regardless of whether the faculty were professionals, they were also supervisors and/or managers and were therefore exempt from coverage of the NLRA. *Id.* The Court did not analyze whether the faculty were professionals,

instead holding that “[t]he controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial.”¹⁸ *Id.* at 685. Because the Supreme Court found the faculty at Yeshiva to be managerial, it held that they were outside the Board’s jurisdiction, as defined by the NLRA.

The Supreme Court premised this opinion on its holding that there are fundamental structural differences between academia and the industrial/commercial entities the NLRA was designed to regulate. *Yeshiva*, 444 U.S. at 680 (holding that “the authority structure of a university does not fit neatly within the statutory scheme we are asked to interpret”). As support for this holding, the Supreme Court relied, in part, on Board precedent recognizing that “the concept of collegiality ‘does not square with the traditional authority structures with which th[e] Act was designed to cope in the typical organizations of the commercial world.’” *Id.* (quoting *Adelphi University*, 195 NLRB 639, 648 (1972).) Therefore, “principles developed for use in the industrial setting cannot be ‘imposed blindly on the academic world.’” *Id.* at 681 (quoting *Syracuse University*, 204 NLRB 641, 643 (1973).) As such, “the analogy of the university to industry need not, and indeed cannot, be complete.” *Id.* at 689.

Because the Supreme Court specifically found there to be such broad and significant distinctions between “the industrial setting” and the “academic world,” the Supreme Court created a distinct set of factors for evaluating the managerial status of faculty. *Yeshiva*, 444 U.S. at 680-81; *see also*, *University of Dubuque*, 289 NLRB 349, 353 (1988) (rejecting a standard that

¹⁸ Because the parties in *Yeshiva* did not contest that the faculty were professional employees, the Supreme Court was directly presented with a situation in which it had to “distinguish between indicia of managerial status and indicia of professional status under the Act.” (*See*, Notice and Invitation to File Briefs, Q. (6).) Indeed, the Court held that it was “not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act” and that “employees whose decision-making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage.” *Yeshiva*, 444 U.S. at 690. Thus, in applying its newly formulated test for evaluating the managerial status of faculty, the Supreme Court clearly felt that the *Yeshiva* factors sufficiently distinguished between professional employees and managers. This Board should not substitute its judgment for that of the Supreme Court.

“fails to take into account the many different combinations and permutations of influence that render each academic body unique.”) Thus, not only should the Board refrain from reformulating the standards established by *Yeshiva*, but also it should certainly not attempt to “more closely align its determinations in an academic context with its determinations in a non-academic context” because to do so would be inconsistent with the Supreme Court’s *Yeshiva* decision.¹⁹

Rather than relying on strained analogies to unrelated industries, the Supreme Court realized that a unique test would be required to properly analyze the managerial status of employees in this unique context. In determining the nature of the test to be applied, the Supreme Court recognized that “[t]he ‘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.” *Id.* at 688. Based on this identification of the core function of a university, the Supreme Court held that faculty is managerial if it exercises authority with regard to academics, and offered the following observations regarding the faculty at Yeshiva University:

They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion, their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these.

Id. at 687. This oft-quoted passage has formed the basis for evaluating the managerial status of university faculty for over three decades.

¹⁹ See, Notice and Invitation to File Briefs, Q. (5).

B. The Courts of Appeal and this Board have consistently held that the Board must apply the *Yeshiva* factors in evaluating the managerial status of faculty.

Since the Supreme Court issued its decision in *Yeshiva*, the Courts of Appeal have consistently referenced the factors identified in *Yeshiva* as identifying the determinative factors in evaluating whether faculty at a university are managerial. As then Circuit Judge John Roberts noted, “predictability and intelligibility” can only be achieved through a “‘thorough, careful, and consistent application’ of a multifactor test,” such as the one announced in *Yeshiva*. *LeMoyné-Owen v. NLRB*, 357 F.3d 55, 61 (DC Cir. 2004) (quoting *Arrow Fastener Co. v. Stanley Works*, 59 F.3d 384, 400 (2d Cir. 1995)). Point Park submits that “predictability and intelligibility” are particularly crucial in the context of labor relations, as one of the “primary statutory objectives” of the NLRA is “peaceful and stable labor relations.” *Luden's, Inc. v. Local Union No. 6 of Bakery, Confectionery & Tobacco Workers' Int'l Union of Am.*, 28 F.3d 347, 364 (3d Cir. 1994). Because the *Yeshiva* factors have “become the template for Board analysis of whether faculty are managerial employees,”²⁰ and because the remand by the D.C. Circuit does not call for consideration of other factors, there is no basis for the Board to disrupt labor relations by substituting its own judgment for that of the United States Supreme Court.

In its decision remanding the instant case to the Board, the Court of Appeals for the District of Columbia explicitly held that “*Yeshiva* identified the relevant factors that the Board must consider.” *Point Park University*, 457 F.3d at 51. According to the Court of Appeals, the *Yeshiva* Court “set off a seismic shift in the law of labor relations in American higher education” in holding that “[t]he proper analysis . . . turns on the type of control faculty exercise over academic affairs at an institution.” *Id.* at 46. Because the Supreme Court has already identified this “proper analysis,” and because the facts of this case do not require consideration of

²⁰ *Point Park University*, 457 F.3d at 49.

additional factors, the Board must follow the instructions of the Court of Appeals by applying the *Yeshiva* factors and “clearly explain[ing] its analysis.” *Id.* at 51.

Other Courts of Appeal have similarly held that the *Yeshiva* factors identify the proper analysis for determining whether faculty is managerial. For example, the First Circuit Court of Appeals has held that, when it comes to evaluating the extent to which faculty are managerial for purpose of the NLRA, “our judicial hands are tied by *Yeshiva*.” *Boston University Chapter, Am. Assoc. of University Professors v. NLRB*, 835 F.2d 399, 401 (1st Cir. 1987). Similarly, the Seventh Circuit Court of Appeals found it to be undisputed that “the controlling legal analysis [for determining whether faculty are managerial] is set forth in the Supreme Court’s *Yeshiva* decision.” *NLRB v. Lewis University*, 765 F.2d 616, 620 (7th Cir. 1985). Given the uniform recognition among Courts of Appeal that the question at bar is controlled by the Supreme Court’s decision in *Yeshiva*, the Board should not disrupt this settled area of law by reformulating the Supreme Court’s test, especially when the disruption has not been requested by the parties and is not required by the facts in the record.

Not only have the Courts of Appeal identified *Yeshiva* as setting the standard for evaluating the managerial status of faculty, but also “the Board has developed a substantial body of cases that explicate and develop the *Yeshiva* standard.” *LeMoyne-Owen*, 357 F.3d at 57. Indeed, as the D.C. Circuit observed, the *Yeshiva* factors have become “the template for Board analysis of whether faculty are managerial employees.” *Id.* at 49. Thus, this Board has designated the use of *Yeshiva* factors in evaluating the managerial status of faculty as being “well-settled law.” *LeMoyne-Owen II*, 345 NLRB 1123, 1132 (2005); *see also, Elmira College*, 309 NLRB 842, 848 (1992) (noting that “[r]ecent Board decisions have applied the Supreme Court’s analysis in *Yeshiva* to determine whether college and university faculty members are

managerial employees in diverse faculty settings”). Indeed, in *University of Dubuque*, the Board explicitly addressed whether it could supplant the Supreme Court’s holding in *Yeshiva* with its own test. The Board properly rejected an alternative analytical framework and chastised the dissenting member on the basis that his “quarrel is essentially with the Court’s opinion in *Yeshiva* itself. . .” *University of Dubuque*, 289 NLRB 349, 353 (1988). In finding itself bound by the Supreme Court’s decision in *Yeshiva*, the Board held that “[w]hether any of us might be inclined under other circumstances to find that these factors fall short of establishing managerial status, in our view, *Yeshiva* leaves little choice as to the outcome.” *Id.*

Against the backdrop of over three decades of consistent application of the *Yeshiva* factors by the Board and Courts of Appeal, this Board now appears to be on the brink of undermining the “predictability and intelligibility” of this jurisprudence. This Board, however, is bound by decisions of the Supreme Court and the Court of Appeals and by its own precedents, and it should not disrupt decades of settled law by reformulating the test the Supreme Court announced in *Yeshiva*. In particular, this Board should not reformulate the *Yeshiva* test in the process of adjudicating a case that can and must be decided solely on existing law.

C. For over three decades, this Board has demonstrated its ability to evaluate the managerial status of faculty using the *Yeshiva* factors.

As noted above, this Board should not reformulate the standard announced by the Supreme Court in *Yeshiva*. In addition, this Board should refrain from substituting its judgment for that of the Supreme Court because, for over three decades, this Board has demonstrated that it is quite capable of applying the *Yeshiva* factors in evaluating the managerial status of faculty. Although the precise terminology has differed slightly from case to case, the Board has applied

the core analysis in *Yeshiva* (to wit, the extent of faculty control over academic matters) to distinguish faculty that exercises a managerial function from faculty that does not.²¹

In *University of New Haven*, this Board evaluated the managerial status of faculty and others at the University of New Haven. *University of New Haven*, 267 NLRB 939 (1983). The following were the determinative facts upon which this Board based its decision:

[T]he faculty effectively determines course and program offerings, course scheduling, admission to the graduate program, academic standards, graduation eligibility, teaching methods and teaching loads, student body size at the graduate school level, the use of physical resources, and the construction of new facilities and the status of academic disciplines and has substantial input in the budgetary process. In nonacademic areas, it effectively hires deans, chairmen, full-time and part-time faculty members and student employees, evaluates and effectively determines promotion and tenure of faculty members, evaluates chairmen and deans and grants paid sabbatical leave.

Id. at 943. This Board concluded that “the full-time faculty, including department chairmen, associate deans, and coordinators, are managerial employees without organizational rights protected by the Act.” *Id.*

In *American International College*, the Board considered a petition by a union to represent full-time faculty at American International College. *American Int’l College*, 282 NLRB 189 (1986). In announcing the factors upon which it made its decision, this Board stated as follows:

The faculty here, through their participation on faculty committees, as departmental chairpersons, and as members of the faculty as a whole, effectively determines the curriculum and academic policies and standards of the College and exerts significant influence in decisions regarding hiring, tenure, and evaluation of their fellow faculty members.

²¹ Accordingly, questions (2) and (3) asked by the Board are answered by the extensive body of case law developed by the Board over three decades.

Id. at 202. Based on these findings, this Board concluded that “the full-time faculty of the American International College are managerial employees and thus excluded from coverage under the Act.” *Id.*

In *Lewis and Clark College*, this Board evaluated a proposed unit of “all tenured and tenure-track undergraduate and graduate faculty.” *Lewis and Clark College*, 300 NLRB 155 (1990). This Board relied on the following analysis in determining whether these faculty members were managerial:

[W]hether individually, by department consensus, through constitutional committees, or in meetings of the whole, the faculty makes academic decisions or effective recommendation for such decisions in the following academic areas: teaching methods; grades; retention standards; scholastic standards; matriculation standards; admission standards; curriculum and course content; degree and degree requirements; teaching assignments; graduation and graduation requirements; academic calendars; departments of instruction; honors programs; scholarships; and financial aid. They also have made effective recommendations for school locations off campus and overseas, research funds, and individual class enrollment.

Id. at 161. On the basis of this analysis, this Board concluded that “the CAS faculty member’s responsibilities go beyond routine professional duties and are managerial in nature.” *Id.* at 163.

More recently, in *LeMoyne-Owen II*, this Board addressed the issue of whether certain faculty at LeMoyne-Owen College were managerial. After an exhaustive review of the record, this Board summarized its findings as follows:

To summarize, we find that through individual faculty members, the curriculum committee, the academic standards committee, and the faculty assembly, the faculty make or effectively control decisions with regard to curriculum, courses of study and course content, degrees and degree requirements, majors and minors, academic programs, academic divisions, the additional and deletion of courses, course content, teaching methods, grading, academic retention, lists of graduates, selection of honors, admission standards, syllabi, and textbooks. The faculty also makes effective decisions in some nonacademic areas, including tenure standards and selections, and faculty evaluation procedures.

LeMoyne-Owen II, 345 NLRB at 1130-31. Based on these findings, this Board held that “the faculty play a major and effective role in the formulation and effectuation of management policies at” LeMoyne-Owen College and were therefore managerial employees. *Id.* at 1132-33.

Point Park has provided the precise language from these decisions to illustrate the consistency with which this Board has applied the *Yeshiva* factors over the last three decades. Although the precise language differs in some of the cases, the above-quoted portions of these decisions demonstrate that this Board has had no difficulty in applying the test announced by the Supreme Court in *Yeshiva* to evaluate the managerial status of faculty. Tellingly, in some of these cases (such as *University of New Haven* and *LeMoyne-Owen II*) this Board found the faculty to be managerial, while in others (such as *Carroll College*,²² *Bradford College*²³ and *St.*

²² *Carroll College*, 350 NLRB No. 30 (2007), *reversed on other grounds, Carroll College, Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009). It should be noted that in the underlying representation case in *Carroll College*, the Board denied the employer’s request for review of the acting Regional Director’s finding that the faculty were not managerial. The acting Regional Director had found that, although the faculty made recommendations to the administration in academic areas, many such recommendations were rejected by the administration. Following the Board’s subsequent issuance of its decision in *LeMoyne Owen II* finding LeMoyne’s faculty to be managerial employees, and the decision of the D.C. Circuit in *Point Park University* denying enforcement of the Board order and remanding the case back to the Board, Carroll College requested the Board to reconsider its earlier denial of Carroll College’s request for review in the underlying representation case. The Board denied Carroll College’s request for reconsideration.

Carroll College filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit, arguing that it was exempt from jurisdiction under the NLRA and, further, that its faculty members were managerial employees. The D.C. Circuit held that Carroll College was indeed exempt from jurisdiction under *University of Great Falls v. NLRB*, 278 F.3d 1135 (D.C. Cir. 2002). In the circumstances, said the D.C. Circuit, “we thus need not address Carroll’s argument that its faculty members were managerial employees who fall outside the protection of the Act.” *Carroll College*, 558 F.3d at 575.

²³ In *Bradford College*, the union sought to represent a unit of “full-time and part-time (three-quarters and one-half time) faculty.” *Bradford College*, 261 NLRB 565 (1982). After analysis of scope of faculty influence over the affairs of the college, this Board found the following facts determinative of the issue of the faculty’s managerial status:

In sum, while the faculty and division chairs have the written right to make recommendations, the record shows that such recommendations were often ignored or reversed by the president, by the academic dean, or by both with respect to curriculum, admission policies, graduation of students, course leads, course scheduling, grading of students, faculty hiring or retention, tuition, and faculty salaries.

Id. at 566-67. Based on these findings, this Board concluded that the faculty in question were not managerial.

*Thomas University*²⁴), this Board concluded that the faculty were not managerial. It is, therefore, patently clear that the *Yeshiva* test provides this Board with a workable framework and suitable flexibility to “perform an exacting analysis of the particular institution and faculty at issue.” *Point Park University*, 457 F.3d at 48.

Thus, not only is the Board, by its own admission, bound by the decisions of the courts and by its own precedent to apply the standards announced in *Yeshiva*, but also the Board has proven itself quite capable of applying the *Yeshiva* factors to undertake a meaningful examination of the managerial status of faculty. Accordingly, there is no jurisprudential basis for revisiting the Supreme Court’s holding in *Yeshiva*. In addition, as is discussed elsewhere in this Brief, there is nothing unique about the facts of the case under consideration that would warrant the formulation of a new test to replace the factors announced in *Yeshiva*. Accordingly, the University respectfully submits that this Board must comply with the instructions of the Court of Appeals for the District of Columbia and simply explain its application of the *Yeshiva* factors to the record before it. There is simply no justification for this Board to use this case as a vehicle for reversing or reinterpreting decades of settled and established precedent.

²⁴ In *St. Thomas University*, this Board analyzed whether the faculty of St. Thomas University were an appropriate bargaining unit. *St. Thomas University*, 298 NLRB 280 (1990). After examining the structure and administration of St. Thomas University, this Board held as follows:

In this case, it is the St. Thomas administration and not the faculty that plays the predominant role in determining the University’s curriculum, grading policies, admission and matriculation standards, teaching methods, faculty hiring, and tenure. The administration proposes, drafts, and adopts the vast majority of academic policy and curriculum changes. The faculty must apply a grading schedule provided by the administration and has been ordered by the administration to grade within a certain range.

Id. at 286. Accordingly, this Board found that the faculty in question “are not managerial employees under *Yeshiva*, but are employees entitled to protection under the Act.” *Id.* at 287.

VI. The record in this case does not suggest that there are useful distinctions to be drawn among different job classifications in a university.

In the case currently before the Board, the Union only sought representation of all full-time faculty. Neither the Union nor Point Park have attempted to parse the proposed unit, so there is no basis, in this case, to draw distinctions among different job classifications, and the facts in the record do not suggest that any such parsing would be useful or productive.²⁵ Accordingly, any attempts by this Board to use this case as a vehicle for artificially creating divisions that are not urged by the parties would constitute an impermissible shift from adjudication to rulemaking. (*See, supra*, Sec. 1(B).)²⁶

CONCLUSION

For nearly a decade, the parties have been in limbo while waiting for this dispute to be resolved, and, for nearly half of that time, this Board has had the exclusive responsibility for providing this resolution. Yet the Board majority, after acknowledging that this case “has suffered from considerable delay already,” seeks to justify even greater delay for additional briefing on the basis of “the amount of time that has passed since the request for review was granted and the absence of a Brief on Review from the Petitioner” – a classic *non sequitor*. The panel majority further adds, “however, given the nature of the D.C. Circuit’s remand of the case, we believe that allowing a short time for additional briefing will aid the Board in deciding the

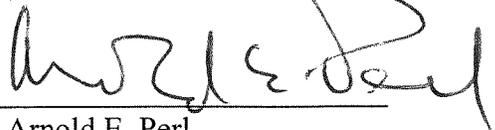
²⁵ Although the unit may be composed of both tenured and non-tenured faculty, there is no evidence that, in this case, this distinction is relevant to any of the *Yeshiva* factors. This Board has previously considered a unit of both tenured and non-tenured faculty and did not attach any significance to this distinction. *See e.g., Lewis and Clark*, 300 NLRB 155 (1990). Accordingly, Q. (8) posed by the Board in its Notice and Invitation to File Briefs is not applicable to the record herein.

²⁶ Furthermore, there are no useful distinctions to be made based on job classifications. Numerous courts have consistently rejected relying on job classifications as determinative of an employee’s coverage under the Act. *See e.g., Jochims v. NLRB*, 480 F.3d 1161, 1168 (D.C. Cir. 2007) (rejecting use of job classifications as means to determine supervisory status); *Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 590 (7th Cir. 2012) (same); *NLRB v. ADCO Elec., Inc.*, 6 F.3d 1110, 1117 (5th Cir. 1993) (“In determining whether someone is a supervisor, job titles reveal very little, if anything.”).

important issues at stake.” Contrary to the panel majority’s rationale, the D.C. Circuit can rightfully expect the Board to confirm its decision to the limited scope of its remand and to do so with reasonable diligence – neither of which has occurred to date. As Board Members Hayes and Flynn underscored in their dissent, it is “unwise to further delay the processing of this case to solicit additional briefing.”²⁷

Point Park respectfully urges the Board to confine itself to adjudication of the case before it. It is long overdue for the Board to avail itself of the option presented by the D.C. Circuit for the Board to “reconsider its conclusion” and find that Point Park’s full-time faculty are managerial.²⁸

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²⁷ The request for additional briefing also contravenes the recent admonition of NLRB Chairman, Mark Gaston Pearce, that “justice delayed is justice denied.” Keynote speech delivered at 65th Annual New York University Labor Law Conference.

²⁸ Likewise, in *LeMoyne Owen*, 345 NLRB 1123, the Board, following a remand from the D.C. Circuit, reconsidered its original decision and found the LeMoyne Owen faculty to be managerial.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served electronically to the following on this 6th day of July 2012:

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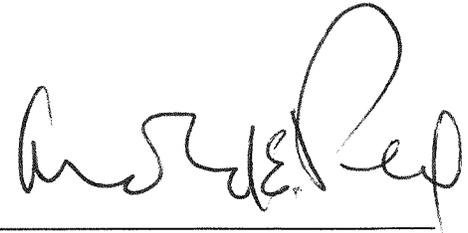
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4827-8746-4464, v. 2



United States Government

NATIONAL LABOR RELATIONS BOARD
1099 14th STREET NW
WASHINGTON DC 20570

October 24, 2006

Re: Point Park University
Case 6-CA-34243
344 NLRB No. 17

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Gentlemen:

This is to advise you that the Board has decided to accept the remand from the Court of Appeals in the above proceeding and that all parties, should they so wish, may file statements of position with respect to the issues raised by the remand.

Such statements of position must conform to Section 102.46(j) of the Board's Rules and Regulations and must be received by the Board in Washington, D.C. on or before November 14, 2006. Such filings must also be served on the other parties and the Regional Director. Thereafter, of course, the Board will take whatever action is consistent with the Court's remand.

Sincerely,

A handwritten signature in cursive script that reads "Richard D. Hardick".

Richard D. Hardick
Associate Executive Secretary

cc: Parties

