

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

POINT PARK UNIVERSITY,

Employer,

and

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

Petitioner

Case No.: 6-RC-12276

---

**Amicus Brief by  
the Higher Education Council  
of the Employment Law Alliance**

---

Peter Jones

John Gaal

**Bond Schoeneck & King, LLP**

One Lincoln Center

Syracuse, NY 13202-1355

Natasha J. Baker

**Curiale Hirschfeld Kraemer, LLP**

727 Sansome Street

San Francisco, CA 94111

Mark Mathison

Abigail Crouse

**Gray Plant Mooty**

500 IDS Center

80 South Eighth Street

Minneapolis, MN USA 55402

**COUNSEL FOR AMICI CURAE**

## TABLE OF CONTENTS

	Page
I. STATEMENT OF AMICUS CURAE.....	1
II. INTRODUCTION .....	2
III. LEGAL ARGUMENT .....	3
A. Institutions of Higher Education Are An Imperfect Fit Under the NLRA Insofar As It Applies in an Industrial Setting .....	3
B. <i>Yeshiva</i> Instructs the Board to Employ a Distinct Approach When Ascertaining Whether Faculty Are Excluded from a Unit as Managerial Employees.....	4
1. Faculty Hold a Unique Role in the Management of An Institution of Higher Education.....	4
a. Judicial Recognition of Shared Governance.....	5
b. The AAUP Advocates for Shared Governance and Faculty Control of Academic Decisions .....	6
2. This Distinct Approach Requires a Workable Standard Capable of Application by Faculty and Institutions.....	9
C. 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.....	11
IV. CONCLUSION.....	17

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Am. Int'l College,</i> 282 NLRB 189 (1986) .....	passim
<i>Boston University,</i> 281 NLRB 798 (1986) .....	7, 10
<i>Duquesne University of the Holy Ghost,</i> 261 NLRB 587 (1982) .....	15
<i>Elmira College,</i> 309 NLRB 842 (1992) .....	4, 14, 16
<i>Faculty In The Corporate University: Professional Identity, Law And Collective Action,</i> Cornell J. L. & Pub. Pol'y 263, 276 (Spring, 2007).....	6
<i>Ithaca College,</i> 261 NLRB 577 (1982) .....	10, 15
<i>Lemoyne-Owen College,</i> 345 N.L.R.B. 1123 (2005) .....	10, 14, 16
<i>Lewis &amp; Clark College,</i> 300 NLRB 155 (1990) .....	4, 11, 13, 16
<i>Livingstone College,</i> 286 NLRB 1308 (1987) .....	4, 14, 15
<i>Manhattan College,</i> 1999 NLRB LEXIS 903 (1999).....	10
<i>NLRB v. Bell Aerospace Co.,</i> 416 U.S. 267 .....	16
<i>NLRB v. Yeshiva University,</i> 444 U.S. 672 (1980).....	passim
<i>The Cooper Union for the Advancement of Science and Art,</i> 273 N.L.R.B. 1768 (1985) .....	10
<i>Thiel College,</i> 261 NLRB 580 (1982) .....	15

*University of Dubuque,*  
289 NLRB 349 (1988) .....4, 13, 14, 15

*University of New Haven,*  
267 NLRB 939 (1983) .....4

*University of New Haven*  
279 NLRB 294 (1986) .....10

**OTHER AUTHORITIES**

*AAUP's Statement on Government of Colleges and Universities, The Academic  
Institution: Joint Effort, Determination of General Educational Policy* .....7

## **I. STATEMENT OF AMICUS CURAE**

The Employment Law Alliance ("ELA") is an integrated, global practice network comprised of independent law firms that are distinguished for their practice in employment and labor law. With more than 3,000 experienced attorneys located in more than 130 countries, it is the world's largest network of labor and employment lawyers. The Higher Education Council of the ELA is a sub-Council of the ELA which includes the following United States law firms with labor and employment practices with significant expertise in the field of higher education.<sup>1</sup>

Bond, Schoeneck & King, PLLC  
Curiale Hirschfeld Kraemer LLP  
Dinse, Knapp & McAndrew PC  
Gray Plant Mooty LLP  
Jackson Kelly PLLC  
Miller Nash, LLP  
Parker Poe Adams & Bernstein LLP  
Pierce Atwood LLP  
Reed Smith LLP  
Shawe & Rosenthal, LLP

The Higher Education Council (the "ELA HEC" or "Council") collectively represents hundreds of private institutions of higher education across the United States. The Council submits this brief in order to seek clarity and a workable approach for its clients when determining whether and when faculty may be excluded from a bargaining unit on the basis of their managerial status.

---

<sup>1</sup> A full list of firms that have membership in the Higher Education Industry Council includes our international members: Anjarwalla & Khanna; Fromont-Briens and Rajah & Tann LLP.

## II. INTRODUCTION

Many colleges and universities in the United States have adopted a model of shared governance in which faculty members have authority to formulate, determine, and effectuate management policies. Over 30 years ago, in *NLRB v. Yeshiva University*, the United States Supreme Court recognized the significant distinctions between a shared governance model at a university and the management structure in a typical, hierarchical industrial setting. The Court held that “*Yeshiva* and like universities must rely on their faculties to participate in the making and implementation of their policies.” *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 689 (1980) (“*Yeshiva*”). The Court, therefore, held that the faculty at *Yeshiva* University were excluded managerial employees under the NLRA.

The NLRB has requested amicus briefs in the *Point Park University* case to help clarify the factors the Board should focus on in *Point Park* and other future faculty representation cases. The Council submits this brief to clarify that the Board should continue to focus on the essential elements of a shared governance model recognized in *Yeshiva* in determining whether faculty are excluded from a bargaining unit as managerial employees.

In addition to focusing on these essential elements and in light of the fact that the shared governance model contemplates that faculty will have *significant* involvement in formulating, determining, and effectuating the policies of a college or university, there should be a rebuttable presumption that faculty at institutions with a shared governance model are excluded managerial employees under the NLRA. This rebuttable presumption is consistent with *Yeshiva* and will help to clarify and streamline future faculty representation cases.

Moreover, because the shared governance model used in higher education is so distinct from the organizational structure used in most industries, it is appropriate for the Board to employ a distinct approach in faculty representation cases. This approach is consistent with the Board’s goal that “employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union.” *Yeshiva*, 444 U.S. at 688.

Furthermore, continued focus on the elements of a shared governance model properly distinguishes between the indicia of managerial and professional status under the NLRA. Faculty at colleges and universities are undoubtedly professionals, but when they are called upon to formulate and implement academic policy and to help steer an institution of higher education under a shared governance model, they are also managers whose interests are so closely aligned with their employer's that they must not be included as statutory employees under the Act.

### III. LEGAL ARGUMENT

#### A. Institutions of Higher Education Are An Imperfect Fit Under the NLRA Insofar As It Applies in an Industrial Setting

This Board and the courts have properly recognized that the assumptions underlying the National Labor Relations Act ("NLRA") are an imperfect fit for the structure of authority typical of institutions of higher education. As recognized by the United States Supreme Court, faculty often have more autonomy from hierarchical control and involvement in organization decision-making than their counterparts in the industrial setting. *Yeshiva*, 444 U.S. at 680. Within this unique framework, *Yeshiva* and early Board decisions applying *Yeshiva* have properly recognized the significant influence and unique position that faculty hold in formulating and effectuating various academic and even non-academic policies under the governance structure at many institutions of higher education. As the Supreme Court stated in *Yeshiva*, and which holds true today, "[t]he business of a university is education, and its vitality ultimately must depend on the academic policies that largely are formulated and generally are implemented by faculty governance decisions" and which aligns faculty members' interest with that of management. *Id.* at 688. Accordingly, where faculty members are involved in formulating and implementing policies regarding the "business of education" that reach beyond the faculty member's own classroom and/or professional scholarship, this formulation of policy goes beyond the "routine discharge of professional responsibilities," and faculty should fall under the managerial exclusion. *Id.*

**B. Yeshiva Instructs the Board to Employ a Distinct Approach When Ascertaining Whether Faculty Are Excluded from a Unit as Managerial Employees**

Given the unique position of tenured and tenure-track faculty (collectively “faculty”) at institutions of higher education, the Board must employ a distinct approach for determining the managerial status of faculty from that used in the non-academic context. Indeed, the United States Supreme Court articulated the distinct approach to be applied in *Yeshiva*, over 30 years ago. 444 U.S. at 689 (“Yeshiva and like universities must rely on their faculties to participate in the making and implementation of their policies.”) In *Yeshiva*, the Court defined managerial employees as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” 444 U.S. at 682. Consistent with *Yeshiva*, the Board has subsequently found that faculty were managers where they “effectively recommend” policies with respect to the curriculum and course offerings, two areas that are clearly core to the “business of education.” See, e.g., *Lewis & Clark Coll.*, 300 NLRB 155, 161-63 (1990); *Elmira Coll.*, 309 NLRB 842, 844 (1992); *Univ. of Dubuque*, 289 NLRB 349, 350, (1988); *Livingstone Coll.*, 286 NLRB 1308, 1310-11, 1313 (1987); *Am. Int’l Coll.*, 282 NLRB 189, 190, 201 (1986); *Univ. of New Haven*, 267 NLRB 939, 941 (1983). The Board has given more weight to those factors influencing institutional policy as a whole as opposed to control over the faculty members’ individual classroom and has properly identified those faculty members as managerial where their exercise of authority extends beyond the duties of determining the content of their own courses, evaluating their own students, and supervising their own research. This application strikes the appropriate balance between application of professional skills and training and the implementation of policy so as to reflect the integral role that faculty play in shaping the academic policies at many institutions of higher education.

**1. Faculty Hold a Unique Role in the Management of An Institution of Higher Education**

As a result of shared governance and their control over academic issues, faculty have a unique position that is different than “regular” managerial employees in non-academic settings.

This unique role has been judicially recognized by the courts and this Board and is a foundation of the American Association of University Professors' ("AAUP") governing documents, many of which have been wholly or partially adopted and integrated by private institutions of higher education.<sup>2</sup>

**a. Judicial Recognition of Shared Governance**

As recognized by the United States Supreme Court, "authority in the typical 'mature' private university is divided between a central administration and one or more collegial bodies." *Yeshiva*, 444 U.S. at 680, citing J. Baldrige, *Power and Conflict in the University* [full citation omitted] 114 (1971). This system of "shared authority" evolved from the medieval model of collegial decisionmaking in which guilds of scholars were responsible only to themselves. *Yeshiva*, 444 U.S. at 680 citing N. Fehl, *The Idea of a University in East and West* [full citation omitted] 36-46 (1962); D. Knowles, *The Evolution of Medieval Thought* [full citation omitted] 164-168 (1962).

In *Yeshiva*, the Supreme Court detailed the type of authority exercised by faculty at *Yeshiva* University that "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.

---

<sup>2</sup> As set forth on its website, "[t]he American Association of University Professors, founded in 1915, develops and advances principles and standards of sound academic practice governing the relationship between faculty and their institutions. The value of these principles and standards lies in their wide acceptance throughout the community of higher education. The 1940 Statement of Principles on Academic Freedom and Tenure, issued jointly by the AAUP and the Association of American Colleges and Universities, has been endorsed by more than 200 learned societies and educational organizations, and hundreds of colleges and universities have incorporated its provisions in their faculty regulations or handbooks. Noting this wide acceptance, courts have often referred to AAUP principles and standards in addressing what is customary in the academic world." (<http://www.aaup.org/AAUP/issues/AF/censure.htm>)

- On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school.

*Yeshiva* 444 US at 686.

"When one considers the function of a university, it is difficult to imagine decisions more managerial than these." *Yeshiva* 444 US at 686. "To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served." *Yeshiva* 444 US at 686.

This managerial authority is not limited to the unique facts of *Yeshiva*. Nor is this an outdated historical assumption regarding the role of faculty in the management of an institution of higher education. Many institutions still operate using a system of shared governance. Indeed, the faculty's authority and unique management position in the context of academic control of institutions of higher education has been recognized by the Board in the thirty years since *Yeshiva* was issued and continues to be recognized by the Board and commentators.<sup>3</sup>

**b. The AAUP Advocates for Shared Governance and Faculty Control of Academic Decisions**

In addition to the judicial recognition of the managerial authority afforded faculty, faculty participation at the highest levels of institutional decision-making with respect to academic issues is the model espoused by the Association of American University Professors ("AAUP") in its Statement on Government of Colleges and Universities, ("AAUP's Government Statement"). As noted in Boston University,

Generally, the [Government] [S]tatement calls for full and open communication between governing boards, administration, faculty, students and other elements affecting the institutional community.

---

<sup>3</sup>"As professional employees, faculty hold a privileged labor position in relation to other employees. ... Like other professional or skilled employees, the distribution of wealth and power create privileged faculty working conditions that are closer to university administrators than to rank and file employees. The differences include economic issues of salary, benefits, physical working conditions, and work schedules. Even more significantly, the degree of faculty autonomy over their work processes, work product, and even hiring and promotions of their colleagues provides working conditions normally enjoyed only by employers. The similarities between faculty and administrators are reinforced by the revolving nature of faculty in and out of administrative positions, from the level of department chairs, to college deans, to university provosts and presidents." Lieberwitz, Risa. L., *Faculty In The Corporate University: Professional Identity, Law And Collective Action*, 16 Cornell J. L. & Pub. Pol'y 263, 276 (Spring, 2007).

Beyond this theme, which runs through the whole document, the statement urges thoroughgoing cooperation, joint planning, if not joint agreement, on specific areas such as the determination of general educational policy, short term, or internal, operations of the institution, budgeting, choice of presidents and other academic administrators, and determination of faculty status, that is the hiring, retention and promotion of faculty. In order to ensure the equitable and efficient operation of these administrative functions, the statement reiterates, time after time, the necessity for the establishment and maintenance of clearly defined and carefully observed practices, procedures and regulations. This Statement on Government, together with the other ideas and concepts described in this introduction should provide, as noted at the outset, an understanding of the concepts and principles which underlie the relationships between Boston University and its faculty; ***concepts and principles which differ markedly from those encountered universally in the world of commerce and industry.*** Of course there are similarities as well between the university and commercial or industrial enterprises...

*Boston University*, 281 NLRB 798, 803-804 (1986).

At the outset, the AAUP's Government Statement articulates that faculty, administrators and Board are equal voices in the management of an institution of higher education:

Every board will wish to go beyond its formal trustee obligation to conserve the accomplishment of the past and to engage seriously with the future; every faculty will seek to conduct an operation worthy of scholarly standards of learning; every administrative officer will strive to meet his or her charge and to attain the goals of the institution. The interests of all are coordinate and related, and unilateral effort can lead to confusion or conflict.<sup>4</sup>

---

<sup>4</sup> AAUP's *Statement on Government of Colleges and Universities, The Academic Institution: Joint Effort, Determination of General Educational Policy*. As set forth on the AAUP's website "This statement was jointly formulated by the American Association of University Professors, the American Council on Education (ACE), and the Association of Governing Boards of Universities and Colleges (AGB). In October 1966, the board of directors of the ACE took action by which its council "recognizes the statement as a significant step forward in the clarification of the respective roles of governing boards, faculties, and administrations," and "commends it to the institutions which are members of the Council." The Council of the AAUP adopted the statement in October 1966, and the Fifty-third Annual Meeting endorsed it in April 1967. In November 1966, the executive committee of the AGB took action by which that organization also "recognizes the statement as a significant step forward in the clarification of the respective roles of governing boards, faculties, and administrations," and "commends it to the governing boards which are members of the Association." (In April 1990, the Council of the AAUP adopted several changes in language in order to remove gender-specific references from the original text.)" <http://www.aaup.org/AAUP/pubsres/policydocs/contents/governancestatement.htm> (last visited July 6, 2012).

Within this shared effort, faculty have been entrusted with oversight of the academic mission and implementation of an institution's academic goals, curriculum and quality – the very essence of an institution's "business." As stated in the AAUP's Government Statement:

When an educational goal has been established, it becomes the responsibility primarily of the faculty to determine the appropriate curriculum and procedures of student instruction.<sup>5</sup>

Nor is the faculty's participation simply limited to implementation:

Such matters as major changes in the size or composition of the student body and the relative emphasis to be given to the various elements of the educational and research program should involve participation of governing board, administration, and faculty prior to final decision.<sup>6</sup>

Indeed, the role of the faculty within the academic context under the Government Statement extends far beyond implementation and consultation:

The faculty has *primary responsibility* for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process.<sup>7</sup> On these matters the power of review or final decision lodged in the governing board or delegated by it to the president should be exercised adversely only in exceptional circumstances, and for reasons communicated to the faculty. It is desirable that the faculty should, following such communication, have opportunity for further consideration and further transmittal of its views to the president or board. Budgets, personnel limitations, the time element, and the policies of other groups, bodies, and agencies having jurisdiction over the institution may set limits to realization of faculty advice.<sup>8</sup>

The faculty sets the requirements for the degrees offered in course, determines when the requirements have been met, and authorizes the president and board to grant the degrees thus achieved.

---

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* See Footnote 4 to Statement on Government of Universities and Colleges, which provides: "With regard to student admissions, the faculty should have a meaningful role in establishing institutional policies, including the setting of standards for admission, and should be afforded opportunity for oversight of the entire admissions process." [Footnote adopted by the Council in June 2002.]

<sup>8</sup> *Id.* (Emphasis added).

The AAUP's Government Statement also calls upon the faculty to offer its opinion with respect to non-academic decisions, including those pertaining to faculty status.

*Faculty status and related matters are primarily a faculty responsibility*; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal. *The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy.* Furthermore, scholars in a particular field or activity have the chief competence for judging the work of their colleagues; in such competence it is implicit that responsibility exists for both adverse and favorable judgments. Likewise, there is the more general competence of experienced faculty personnel committees having a broader charge. Determinations in these matters should first be by faculty action through established procedures, reviewed by the chief academic officers with the concurrence of the board. The governing board and president should, on questions of faculty status, as in other matters where the faculty has primary responsibility, concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail.<sup>9</sup>

In a model of shared governance, faculty exercise substantial managerial authority over the academic decisions and affairs of an institution of higher education. Thus, to the extent institutions of higher education have a model of shared governance, the Board should employ a presumption that faculty at such institutions are managerial.

## **2. This Distinct Approach Requires a Workable Standard Capable of Application by Faculty and Institutions**

It is important to keep the *Yeshiva* approach (using the subsequently articulated factors noted by various Board decisions) in order to maintain a workable test for the management exclusion within the context of higher education. The *Yeshiva* approach requires an in-depth review of the proposed unit to assess whether any members should be excluded as members of management. As noted in *Point Park University*, *Yeshiva* imposed significant demands upon the Board in determining whether faculty members are "managerial employees," holding that this

---

<sup>9</sup> *Id.* (Emphasis added).

mixed question of fact and law cannot be determined "on the basis of conclusory rationales rather than examination of the facts of each case." 457 F.3d 42, 48 (2006) (citing *Yeshiva* 444 U.S. at 691.)

This case by case, in-depth review, may, at first, seem inconsistent with the Board's recent efforts to streamline the election process insofar as it can take days of hearings to review all of the positions at issue, in addition to other issues that may arise. See *Point Park*, 457 F.3d at 45 (19+ days of hearings); *Lemoyne-Owen College*, 345 N.L.R.B. 1123 (2005) (5 days of hearings); *Manhattan College*, 1999 NLRB LEXIS 903 (1999) (30 days of hearings); *Boston University*, supra 281 N.L.R.B. 798 (1986) (157 hearing days and consisting of 21,820 pages of testimony and 1180 exhibits); *University of New Haven* 279 N.L.R.B. 294 (1986) (12 hearing days, 43 witnesses and 190 exhibits); *The Cooper Union for the Advancement of Science and Art*, 273 N.L.R.B. 1768 (1985) (thirty one days of hearings); *Ithaca College*, 261 N.L.R.B. 577 (1982) (27 days of hearings).

However, the *Yeshiva* analysis may be streamlined and made more predictable by adoption of a rebuttable presumption of managerial status for tenured and tenure-track faculty members at institutions that have adopted a shared governance model, similar to the model at issue in *Yeshiva* and espoused by the AAUP Government Statement. Under such a shared governance model, faculty "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *Yeshiva*, 444 U.S. at 682 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 at 288). Thus, while shared governance models differ from institution to institution, the primary focus of the rebuttable presumption should be on the essential elements of shared governance that give rise to managerial control of the type recognized by the U.S. Supreme Court in *Yeshiva*. The rebuttable presumption should apply in cases where institutions have governance documents, such as a faculty manual or faculty handbook, institutional by-laws, or faculty assembly by-laws, which make clear that:

1. Faculty have primary responsibility for fundamental areas such as curriculum, subject matter, methods of instruction, and research;

2. Faculty are expected to be involved in developing or implementing educational policy (including making recommendations as to such policies); and/or
3. Faculty are primarily responsible for issues with respect to faculty status, including the ability to make recommendations as to hiring, tenure, and reappointments.

This rebuttable presumption could be established based solely on the governance documents, such as a faculty manual. If the presumption is established, the burden would be on the petitioning party to demonstrate, under *Yeshiva* and its progeny, that the shared governance model is not followed in practice or that other factors and events demonstrate that faculty do not, in fact, exercise sufficient academic control to be considered managers under *Yeshiva*. However, consistent with other Board decisions, the presumption *would not* be rebutted by evidence that faculty exercised their authority by committee rather than individually (see *Lewis & Clark Coll.*, 300 NLRB at 1128), or by the fact that the faculty's authority is subject to financial and budgetary constraints (*Lewis & Clark Coll.*, 300 NLRB at 162; *American Int'l Coll.*, 282 NLRB at 192). In cases where an institution's governance model did not meet the presumption, the burden would be on the institution to demonstrate why its faculty members are managers under *Yeshiva*.

This rebuttable presumption would help the Board to achieve its goal of streamlining election processes by making the question of employee/manager status more predictable in faculty cases. In addition, this rebuttable standard is consistent with the Court's decision in *Yeshiva*. Adoption of such a rebuttable presumption could save financial resources of both the parties and the Board by doing away with the need for lengthy hearings in many cases in which an institution has adopted a shared governance model.

**C. 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**

It also important to note that faculty at institutions that use a shared governance model have generally been considered managers, but they are also professionals. Indeed, the *Yeshiva* majority was mindful of the typical professional responsibilities faculty are expected to engage

in, recognizing that faculty responsibilities must go beyond those routine professional duties, such as determining the content of their own courses, evaluating their own students, and supervising their own research for faculty to be excluded as managerial under the Act. *Id.* at 690-91 fn. 31. In so reasoning, the Supreme Court articulated the typical application of professional skills expected of non-managerial faculty while emphasizing that the integral role faculty members hold at many institutions of higher education in formulating and implementing core academic policies of the institution warrants exclusion as managers under the Act. Although faculty may draw on their professional expertise and judgment in the exercise of their duties, where the duties performed entail the formulation of policy in these core areas, the Board has found the performance of these duties to constitute the exercise of sufficient managerial authority to exclude professional employees from the Act's coverage. Under this standard, faculty are to be excluded from the Act's coverage where the faculty member's managerial "activities fall outside of the scope of the duties routinely performed by similarly situated professionals." *Yeshiva*, 444 U.S. at 690, n.31. The factors employed by the Board in determining the status of faculty members properly distinguish between indicia of managerial status and indicia of professional status. Under well-established Board law, the managerial exclusion applies only to those professional employees whose activities "fall outside the scope of duties routinely performed by similarly situated professionals." *Yeshiva*, 444 U.S. at 690. As specifically applied to faculty members, those individuals who merely have the authority to engage in the routine duties of determining the content of their own courses, evaluating their own students, and supervising their own research may not be excluded as managerial. *Yeshiva*, 444 U.S. at 690-91 fn.31. The factors listed in *Yeshiva*, and the factors subsequently articulated in

various Board decisions, properly acknowledge that the discharge of these routine professional duties alone will not be sufficient to establish managerial status.

Instead, in finding managerial status, the *Yeshiva* court and subsequent Board decisions have appropriately focused on the faculty members' authority to make decisions, and to effectively recommend decisions, relating to academic policies and matters which have impact beyond merely their own courses, students, and research. *Id.* at 689-90; *see also Univ. of Dubuque*, 289 NLRB at 353. This application strikes the appropriate balance between the non-managerial faculty duties of teaching and research (*i.e.* the professional duties of faculty) and the formulation, effective recommendation, and implementation of a variety of core academic policies at institutions of higher education (*i.e.* the managerial role of faculty at many institutions). Given that the business of a college or university is education, it is the faculty members' participation in formulating and implementing the academic policies—the educational product of the institution—that aligns their interest with that of management, rendering them ineligible as managerial employees to receive the protections of the Act. *See Yeshiva*, 444 U.S. at 686-88. The Board has rejected the contention that decisions based on professional judgment or expertise cannot be managerial, particularly where this professional expertise is used in formulating policy. *Yeshiva*, 444 U.S. at 687, fn. 26, 689-90 (citations omitted).

The faculty role in the implementation of a variety of core academic policies is the critical inquiry in *Yeshiva* cases, as directed by the Supreme Court and as subsequently applied by the NLRB. It is indeed significant that the Board has never found that faculty were managerial employees where they did not at least “effectively recommend” policies with respect to curriculum and course offerings—two areas that are core to the “business of education” with an obvious impact well beyond a faculty member's individual classroom. *See, e.g., Lewis &*

*Clark Coll.*, 300 NLRB at 161-63 (faculty made academic decisions or effective recommendations regarding curriculum and course content, including approval of a new core curriculum, approving new minors, and changing foreign language, math, and writing policy requirements); *Elmira Coll.*, 309 NLRB at 848-49 (nature of faculty involvement in academic matters conclusively establishes status as managerial employees); *Univ. of Dubuque*, 289 NLRB at 350 (finding managerial status where faculty had authority to develop, recommend, and ultimately approve curricular content and course offerings); *Livingstone Coll.*, 286 NLRB at 1313-14 (faculty were found to be managerial based upon their control of academic and curricular policy including degree requirements, course content and selection, graduation requirements, and matriculation standards); *American Int'l Coll.*, 282 NLRB at 201 (faculty effectively controlled academic standards and curriculum). The Board has also considered additional factors—which are less critical than control over curriculum and course offerings—as indicia of managerial status, including course scheduling, grading, graduation policies, awarding of honors and scholarships, student admission and retention policies, matriculation standards, teaching methods, setting the academic calendar, acceptance of transfer credits, student absence policies, course enrollment level, and student advising. See *Yeshiva*, 444 U.S. at 676; see e.g., *LeMoyne Owen College*, 345 NLRB at 1128-1133. Finally, the Board has also considered faculty involvement in “non-academic” areas such as hiring, tenure, sabbaticals, terminations, promotions, and financial affairs as evidence of managerial status. *Yeshiva*, 444 U.S. at 676-77. However, in *Yeshiva*, the Court relied primarily upon the faculty’s extensive authority over academic affairs, while making note of the faculty’s significant control in non-academic areas. *Id.* Subsequent Board decisions have noted that the lack of involvement in non-academic areas is of lesser significance in determining managerial status and emphasized the importance of

faculty control over academic areas. See, e.g., *Thiel Coll.*, 261 NLRB 580, 586 fn.34 (1982); *Livingstone Coll.*, 286 NLRB at 1314; *American Int'l Coll.*, 282 NLRB at 192.

By placing greater emphasis on faculty members' influence over curriculum and course offerings in finding managerial status and recognizing that authority over one's own classroom alone is insufficient for a finding of managerial status, the Board has generally adhered to the distinction drawn by the Supreme Court in *Yeshiva* and also by the Board itself in early post-*Yeshiva* Board decisions. See, e.g., *Duquesne Univ. of the Holy Ghost*, 261 NLRB 587, 587-89 (1982) (managerial status found where faculty had significant authority in matters such as curriculum, admissions, and matriculation although authority in some matters was less than that found in *Yeshiva*); *Thiel Coll.*, 261 NLRB at 583-87 (managerial status found where faculty had authority over curriculum and course offerings); *Ithaca Coll.*, 261 NLRB 577, 577-79 (1982) (managerial status found where faculty had authority over curriculum, admissions policies, academic standards, class size, course schedules, teaching assignments, graduation requirements, and other academic matters); see also *Univ. of Dubuque*, 289 NLRB at 352-53 (recognizing that it is the faculty members' participation in the formulation of academic policy that aligns their interest with that of management and that there was no indication in *Yeshiva* that the Court intended its holding to reach only institutions with faculties having as much or nearly as much input as the *Yeshiva* faculty); *Livingstone Coll.*, 286 NLRB at 1314 (emphasizing that under *Yeshiva* it is the faculty's participation in formulating academic policy that aligns their interest with that of management).

The primary of these factors—exercise of authority with respect to core academic decisions—is also apparent across the spectrum of factual scenarios. Thus, authority in core academic areas has resulted in a finding of managerial status, regardless of whether faculty

exercise that discretion individually or by committee (*see Lewis & Clark Coll.*, 300 NLRB at 161; *Elmira Coll.*, 309 NLRB at 848-49); regardless of whether there is an administrative hierarchy that reviews, and may overrule faculty decisions (*see Lewis & Clark Coll.*, 300 NLRB at 163; *Le-Moyne Owen*, 345 NLRB at 1128); and regardless of whether that authority is subject to financial and budgetary constraints by central administration (*see Lewis & Clark Coll.*, 300 NLRB at 162; *American Int'l Coll.*, 282 NLRB at 192).

The Board's approach to post-*Yeshiva* cases is also consistent with the seminal Supreme Court decision on the interplay between professional status and managerial status—*NLRB v. Bell Aerospace*, 416 U.S. 267 (1974). In *Bell*, the court noted that professional employees are distinct from managerial employees, a critical distinction that will control as to their rights under the Act. Thus, individuals who would otherwise be covered under the Act as professional employees are not covered if they are “defined in terms of their authority ‘to formulate, determine and effectuate management policies.’” *Bell Aerospace*, 416 U.S. at 284 fn.13 (quoting *Ford Motor Co.*, 66 NLRB 1317, 1322 (1946)). The key question, in cases involving the management status of professional employees, is whether they exercise such discretion. This line of reasoning is present in *Yeshiva* and the Board's post-*Yeshiva* cases involving faculty.

Read together, *Yeshiva* and these post-*Yeshiva* Board decisions properly recognize that in the higher education environment, faculty who exercise shared governance in relation to core academic and other policies of the institution cannot be separated from the management interests of the institution, regardless of whether the faculty members may use aspects of their professional expertise in formulating such policies. *Yeshiva's* considered approach and resolution to the tension between professional and managerial status under the Act remains appropriate in the university context over 30 years later, and the Board should continue to adhere

to this approach in evaluating managerial status and to streamline it by applying the rebuttable presumption of managerial status discussed above.

#### **IV. CONCLUSION**

As noted by the courts, this Board and the AAUP, faculty, as professionals, hold an esteemed and unique role in the management of institutions of higher education. As such, the Board should continue to apply a distinct approach for determination of management status in an academic context.

Respectfully submitted,

/s/ Peter Jones

Peter Jones

John Gaal

**Bond Schoeneck & King, LLP**

/s/ Natasha J. Baker

Natasha J. Baker

**Curiale Hirschfeld Kraemer, LLP**

/s/ Abigail Crouse

Mark Mathison

Abigail Crouse

**Gray Plant Mooty**

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 6<sup>th</sup> day of July, 2012, I caused the following *Amicus Brief* to be filed using the National Labor Relations Board's E-Filing Program. The foregoing brief was also served by e-mail upon the following counsel:

Arnold E. Perl  
Michael D. Tauer  
Glankler Brown, PLLC  
6000 Poplar Avenue, Suite 400  
Memphis, TN 38119  
[aperl@glankler.com](mailto:aperl@glankler.com)  
[mtauer@glankler.com](mailto:mtauer@glankler.com)

*Counsel for Point Park University*

Richard H. Markowitz  
Markowitz & Richman  
121 S. Broad Street  
1100 North American Building  
Philadelphia, PA 19107-4533  
[kbrookes@markowitzandrichman.com](mailto:kbrookes@markowitzandrichman.com)

Joseph J. Pass  
Jubelirer, Pass & Intrieri PC  
219 Fort Pitt Boulevard  
Pittsburgh, PA 15222-1558  
[jjp@jpilaw.com](mailto:jjp@jpilaw.com)

Mary O'Melveny  
Communications Workers of America, AFL-CIO, CLC  
501 3<sup>rd</sup> Street, NW, Suite 800  
Washington, DC 20001-2760  
[maryo@cwa-union.org](mailto:maryo@cwa-union.org)

*Counsel for Newspaper Guild of Pittsburg/Communications Workers of America, Local 38061,  
AFL-CIO, CLC*

  
Cheri J. McCaffrey