

**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.

REPLY BRIEF OF EMPLOYER

Arnold E. Perl
Michael D. Tauer
Andre B. Mathis
GLANKLER BROWN, PLLC
6000 Poplar Avenue, Suite 400
Memphis, TN 38119
901-525-1322
901-525-2389 - fax

Attorneys for Point Park University

Table of Contents

Table of Contents i

Table of Authorities ii

Preliminary Statement 1

Argument 2

 I. The Briefs filed by both the Petitioner and union-side *amici* disregard the *Yeshiva* factors as the law of the land and improperly urge that the Board use this case for a “considered appraisal” of *Yeshiva*..... 2

 A. Contrary to the demands of the Petitioner and union-side *amici*, the Board’s adjudication of this matter is circumscribed by the United States Supreme Court and by the mandate of the D.C. Circuit..... 2

 B. Petitioner improperly asserts that faculty are not “exempt managerial employees” unless they “exercise nearly absolute authority” over academic matters..... 7

 II. When viewed through the lens of the *Yeshiva* factors, the facts in the record conclusively demonstrate that the faculty at Point Park are managerial..... 11

 A. Because of Point Park’s shared governance model, its faculty is like the faculties of those colleges and universities which the courts and the Board have found to be managerial..... 11

 B. The Briefs of Petitioner and the union-side *amici* largely ignore the compelling record evidence and seek to rely instead on the flawed findings of the Regional Director..... 13

 C. Many of the union-side *amici* focus on matters far outside the scope of this matter on remand..... 16

Conclusion..... 19

Table of Authorities

Cases:

<i>Amer. Int'l Coll.</i> , 282 NLRB 189 (1986)	8
<i>Beverly Enterprises v. NLRB</i> , 727 F.2d 591 (6 th Cir. 1984).....	18
<i>Bradford Coll.</i> , 261 NLRB 565 (1982).....	10
<i>Carroll Coll., Inc.</i> , 350 NLRB No. 30 (2007).....	14
<i>Carroll College, Inc. v. NLRB</i> , 558 F.3d 568 (D.C. Cir. 2009)	14
<i>David Wolcott Kendall Memorial School v. NLRB</i> , 866 F.2d 157 (6 th Cir. 1989).....	10
<i>Delgrosso v. Spang and Co.</i> , 903 F.2d 234 (3d Cir. 1990)	5
<i>Duquesne Univ. of the Holy Ghost</i> , 261 NLRB 587 (1982).....	9,18
<i>Elmira Coll.</i> , 309 NLRB 842, 850 (1992).....	11
<i>Ithaca Coll.</i> , 261 NLRB 577 (1982).....	9
<i>LeMoyne-Owen Coll.</i> , 345 NLRB 1123 (2005) (LeMoyne-Owen II).....	10
<i>LeMoyne-Owen Coll. v. NLRB</i> , 357 F.3d 55 (D.C. Cir. 2004).....	2,3,4,8,19
<i>Lewis & Clark Coll.</i> , 300 NLRB 155 (1990)	8,10,16
<i>Livingstone Coll.</i> , 286 NLRB 1308 (1987)	8
<i>Loretto Heights Coll. v. NLRB</i> , 742 F.2d 1245 (10 th Cir. 1984)	10
<i>NLRB v. Yeshiva Univ.</i> , 444 U.S. 672 (1980)	1,2,3,4,5,6,7,8,11,12,13,16,17
<i>Point Park Univ. v. NLRB</i> , 457 F.3d 42 (D.C. Cir. 2006).....	1,2,4,6,19
<i>St. Thomas Univ.</i> , 298 NLRB 280 (1990).....	10
<i>Thiel Coll.</i> , 261 NLRB 580 (1982).....	9
<i>Trustees of Boston Univ.</i> , 281 NLRB 798,798 (1986)	9
<i>Univ. of Dubuque</i> , 289 NLRB 349 (1988)	8,10,12
<i>Univ. of New Haven</i> , 267 NLRB 939 (1983)	9,11,18
<i>Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.</i> , 810 F.2d 243 (D.C. Cir. 1987)	4

Comes now the Employer Point Park University (hereinafter referred to as “Point Park” or “Employer”), pursuant to the Notice and Invitation to File Briefs, and responds to the Briefs of Petitioner and *amici*¹ as follows:

Preliminary Statement

The Briefs of Petitioner and the union-side *amici* evince a clear intent to significantly narrow the scope of the United States Supreme Court’s landmark decision in *NLRB v. Yeshiva* and blatantly disregard the specific mandate to the Board that was issued by the United States Court of Appeals for the District of Columbia Circuit.

These Briefs advocate the adoption of legal principles that are fundamentally at odds with *Yeshiva* and its progeny and would have the Board use this case as a vehicle for sweeping change to over thirty (30) years of Court and Board precedent. Moreover, they rely on purported trends in academia, which are disputed by the college and university briefs, are clearly not part of the record, and cannot be a substitute for what the D.C. Circuit instructed the Board to do on remand:

Yeshiva identified the relevant factors that the Board must consider. *LeMoyne-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 Univ. v. NLRB, 457 F.3d 42, 51 (D.C. Cir. 2006). The D.C. Circuit’s mandate constitutes the boundaries of this matter before the Board, especially where, as here, the Board in 2006 “decided to accept the remand from the Court of Appeals in the above proceeding and that

¹ Although Point Park responds to arguments raised by the union-side *amici*, it does not waive its argument that “any such brief which may be submitted by *Amici* who were not previously participants in this proceeding should be rejected and not considered by the Board.” (Employer’s Brief in Response to Notice and Invitation to File Briefs, p. 2 n.3).

all parties, should they so wish, may file statements of position *with respect to the issues raised by the remand.*”²

Argument

I. The Briefs filed by both the Petitioner and union-side amici disregard the *Yeshiva* factors as the law of the land and improperly urge that the Board use this case for a “considered reappraisal” of *Yeshiva*.

A. Contrary to the demands of the Petitioner and union-side amici, the Board’s adjudication of this matter is circumscribed by the United States Supreme Court and by the mandate of the D.C. Circuit.

The mandate of the D.C. Circuit could not be clearer. In *Point Park v. NLRB*, 457 F.3d 42, 51 (D.C. Cir. 2006), the D.C. Circuit lamented the fact that both the Regional Director and the Board failed to state “with clarity which [*Yeshiva*] factors were significant to the outcome and why.” Because of this failure, the D.C. Circuit held that it was prevented from reviewing the Board’s decision. In directing the Board in how to perform the required analysis, the D.C. Circuit explicitly stated the test the Board was to apply. *Id.* (holding that “*Yeshiva* identified the relevant factors that the Board must consider”). To avoid any confusion on the Board’s part as to the task it was to undertake, the D.C. Circuit added that “*LeMoyne-Owen* held that the Board must clearly explain its analysis” and that “[t]he failure to provide such an explanation is grounds for remand to the Board, which we do here.” *Id.* (internal citations omitted). It is difficult to imagine a clearer and more unequivocal statement of the instructions to the Board on remand; the Court plainly stated that the reason that case was remanded was because the Board failed to “explain its analysis” of the “relevant factors” that had been identified in *Yeshiva*.³

² Letter of Richard D. Hardick to the Parties, October 24, 2006 (emphasis added), a copy of which is reattached hereto as Exhibit “A”, noting that “the Board will take whatever action is consistent with the Court’s remand.”

³ The D.C. Circuit also instructed the Board that, to the extent it issued a decision that conflicted with its prior decisions, it must provide a “fulsome explanation of its decision” to so do. *Point Park*, 457 F.3d at 49.

The D.C. Circuit noted it has previously “stressed the need for a clear explanation by the Board *when applying* Yeshiva’s *multi-factor test*.” *Id.* (emphasis added). Additionally, the D.C. Circuit emphasized that “both the Board and the Regional Director failed to do what *Yeshiva* and *LeMoyne-Owen* mandate: explain ‘which factors are significant and which less so, and why’ in their determination that the faculty at Point Park were not ‘managerial employees.’” *Id.* at 50 (quoting *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004)). Thus, the D.C. Circuit clearly, repeatedly, and unambiguously instructed the Board to apply the *Yeshiva* factors to the record before it and to explain its explanation.

In defiance of the D.C. Circuit’s mandate and more than thirty years of court and Board precedent, the Petitioner boldly asserts that “the ‘*Yeshiva* factors’ do not constitute a legal test for determining whether professors are exempt ‘managerial’ employees.” (Petitioner’s Brief, p. 3). Given the fact that the D.C. Circuit repeatedly and unequivocally instructed the Board to apply the *Yeshiva* factors to the record developed before the Regional Director, the major thrust of the Petitioner’s and union-side *amici*’s argument constitutes a blatant attempt to scale back the historical, broad application of *Yeshiva*. As the National Education Association (“NEA”) acknowledged, “both *Yeshiva* and Board decisions after *Yeshiva* have rested on a strong view of the ‘shared governance’ university.” (NEA Brief, p. 19).

The reconstructionist effort by Petitioner contends that “[t]he ‘*Yeshiva* factors’ are nothing more than the concrete set of circumstances identified by the Supreme Court to support its conclusion that ‘the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial.’” (Petitioner’s Brief, p. 3 (quoting *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686 (1980))). Petitioner further argues that “nothing in the circuit court decisions following *Yeshiva*, including the decision of the D.C. Circuit in *LeMoyne-Owen*

College and in this case, requires the Board to determine the ‘managerial’ status of a college faculty through a point-by-point comparison with the factors treated as significant by the court in *Yeshiva*.” (Petitioner’s Brief, p. 5.) According to Petitioner, rather than requiring that the Board analyze the *Yeshiva* factors, “the import of the D.C. Circuit decisions is that the Board needs to explain what is “significant...and why,” in deciding whether particular faculty members are or are not ‘managerial’ employees.”⁴ (*Id.* at 5-6 (quoting *Point Park*, 457 F.3d at 50 (internal citations omitted)). Indeed, the Petitioner goes even further, stating that the Board “is not bound to continue that approach [i.e., *Yeshiva*’s multi-factor test] and is free to take a more analytical approach to applying the Supreme Court’s *Yeshiva* decision....” (*Id.* at 6.)

This argument is in direct conflict with the mandate of the D.C. Circuit, which, as noted above, repeatedly identified the *Yeshiva* factors as controlling this case by, for example, referring to “*Yeshiva*’s multi-factor test” and stating that “*Yeshiva* identified the *relevant factors* that the Board *must* consider.” *Point Park*, 457 F.3d at 49, 51 (emphasis added). This holding of the D.C. Circuit constitutes the “**law of the case**” and cannot be challenged on remand. *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987) (“Under the law of the case doctrine, a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.”) Accordingly, even if Petitioner has a jurisprudential leg to stand on in making these arguments, which it does not, the arguments have been waived pursuant to the law of the case doctrine because no appeal was taken from the D.C. Circuit’s decision in *Point Park*.

⁴ *Point Park* would note that Petitioner has disingenuously truncated this quotation from *Point Park*. The D.C. Circuit did not just ask the Board “what is significant;” rather, the Court instructed the Board to “explain ‘*which factors* are significant and which less so, and why’ in their determination that the faculty at *Point Park* were not ‘managerial employees.’” *Point Park*, 457 F.3d at 50 (quoting *LeMoyne-Owen*, 357 F.3d at 61 (emphasis added)).

In fact, the Petitioner's argument is also in direct conflict *with its own arguments* previously advanced before the Board. Specifically, in its Position Statement of Union on Remand, Petitioner states, "The Union respectfully submits that the task of the Board on remand is straightforward. The Board should clarify those factors that were critical to its earlier conclusion that the faculty members are non-managerial." (Letter from Joseph Pass and Robert Eberle to Lester Heltzer, December 14, 2006, p. 18.) Tellingly, in its Statement of Position, Petitioner never advocates that the *Yeshiva* multi-factor test be abandoned or that additional factors be considered. Petitioner has provided no explanation as to why it completely reversed its position in this regard. Furthermore, the doctrine of judicial estoppel "precludes a party from assuming a position in a legal proceeding that contradicts or is inconsistent with a previously asserted position." *Delgrosso v. Spang and Co.*, 903 F.2d 234, 241 (3d Cir. 1990).

Although the NEA's Brief does not go so far as to deny the existence of the *Yeshiva* factors, it nevertheless demands that the Board exceed the scope of the D.C. Circuit's mandate. Specifically, the NEA states that "[t]he D.C. Circuit's remand order in this case presents the Board with an opportunity both to clarify its application of the Supreme Court's teaching in *Yeshiva* in a way that is responsive the [sic] D.C. Circuit's direction that the Board 'explain 'which factors are significant and which less so, and why'' *and* to build on the *Yeshiva* factors...."⁵ (NEA Brief, p. 11 (internal citations omitted; emphasis added).) The NEA is only half right. Although, as noted above, the D.C. Circuit instructed the Board to apply the *Yeshiva* factors to the record before it and to explain its analysis, the D.C. Circuit's *Point Park* decision is

⁵ Initially, the NEA correctly identified the mandate of the D.C. Circuit. "That [remand] order instructs that the Board 'explain the weight of the various factors identified by the Supreme Court' in *NLRB v. Yeshiva*, 444 U.S. 672 (1980), and, more specifically, 'explain 'which factors are significant and which less so, and why' in determin[ing] that the faculty at Point Park were not 'managerial employees.'" (NEA Brief, p. 1.) Unfortunately, as discussed herein, the NEA quickly changes course and urges the Board to ignore the limited nature of the D.C. Circuit mandate.

devoid of any indication that the Board should “build on the *Yeshiva* factors.” Further, no Party who responded to the Board’s 2006 request for a Statement of Position on remand requested that the Board consider factors outside of those routinely applied by the Board in performing *Yeshiva*’s multi-factor test.

Similarly, the NEA, going even further, urges the Board to “eschew[] the case-by-case ‘laundry-list’ approach” because the “peculiarities of each particular case and each particular institution does not always provide adequate guidance in other cases....” (NEA Brief, p. 24.) Instead, the NEA argues that the Board should create a “blueprint for future cases” and should “develop a decisional matrix for evaluating” the managerial status of faculty. (NEA Brief, pp. 20-21.) The D.C. Circuit, however, explicitly held that “*Yeshiva* imposed significant demands upon the Board in determining whether faculty members are ‘managerial employees,’ holding that this mixed question of fact and law cannot be determined ‘on the basis of conclusory rationales rather than *examination of the facts of each case.*” *Point Park*, 457 F.3d at 48 (quoting *Yeshiva*, 444 U.S. at 691 (emphasis added)). The mandate issued to the Board by the D.C. Circuit does not instruct the Board to create a “blueprint” or “decisional matrix” for future cases; rather, as noted above, the D.C. Circuit instructed the Board to apply the *Yeshiva* factors to the record before it and to explain its analysis.

The “blueprint” submitted by the American Association of University Professors (“AAUP”) in its brief is that the nationwide trend of universities utilizing a corporate business model “has increased the likelihood that university administrations adopt and implement corporate management practices.” (AAUP Brief, pp. 6, 8). However, as the AAUP acknowledges, “context is everything. Every academic institution is different.” *Point Park*, 457 F.3d at 48. Thus, when considering whether Point Park’s faculty is managerial, the Board is

required to consider Point Park's reliance on shared governance, rather than any purported nationwide trends toward a corporate business model. While the AAUP cites to various articles, books, and surveys, none of those resources provide "evidence" in this matter that Point Park has adopted any such corporate business model at the expense of stripping the faculty's substantial control over academic matters.

B. Petitioner improperly asserts that faculty are not "exempt managerial employees" unless they "exercise nearly absolute authority" over academic matters.

Petitioner would have the Board adopt the position that "[u]nder *Yeshiva*, the central inquiry in determining whether college professors are exempt 'managerial' employees is whether the professors' 'authority in academic matters is *absolute*.'" (Petitioner's Brief, pp. 13-14 (emphasis added) (quoting *Yeshiva*, 444 U.S. at 686)). Even in *Yeshiva*, which dealt with a faculty that actually did have near absolute control over academic matters, the Supreme Court explicitly rejected the union's argument that faculty are only managerial if their control over academic matters is absolute:

[T]he fact that the administration holds a rarely exercised veto power does not diminish the faculty's effective power in policymaking and implementation. The statutory definition of "supervisor" expressly contemplates that those employees who "effectively ... recommend" the enumerated actions are to be excluded as supervisory. Consistent with the concern for divided loyalty, *the relevant consideration is effective recommendation or control rather than final authority*. That rationale applies with equal force to the managerial exclusion.

Yeshiva, 444 U.S. at 683 n.17 (internal citations omitted; emphasis added). Stated slightly differently, "[m]anagerial employees are defined as those who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.'" *Id.* at 682.

The D.C. Circuit has also recognized that absolute control over academic matters is not a prerequisite to managerial status. Granting LeMoyne-Owen's Petition for Review and denying the Board's Petition for Enforcement, the D.C. Circuit held that "[a]lthough there were some instances in which the administration has vetoed faculty proposals, the NLRB said that 'they are not substantial or predominant and do not show a pattern of unilateral action by the administration.'" *LeMoyne-Owen*, 357 F.3d at 57 (quoting *Amer. Int'l Coll.*, 282 NLRB 189, 202 (1986)). Most significantly, the Board on remand in *LeMoyne-Owen College*, reconsidered its original decision and, in compliance with the dictates of the D.C. Circuit, properly found that the faculty were indeed managerial.

For over thirty years, the Board has consistently rejected the argument that absolute control over academic affairs is a prerequisite to a finding that faculty are managerial. In *University of Dubuque*, the Board found the faculty to be managerial, in part, because "the faculty makes effective recommendations concerning course schedules, admission standards, student retention, the distribution of financial aid to students, and the modification of programs or departments." *Univ. of Dubuque*, 289 NLRB 349, 352 (1988). The Board used similar language in *Livingstone College* in ruling that the faculty was managerial. *Livingstone Coll.*, 286 NLRB 1308, 1314 (1987) (finding that "[t]he faculty members at Livingstone College effectively made decisions in a majority of the critical areas relied on in *Yeshiva*" and subsequent Board cases). In *Lewis & Clark*, the Board held that the mere "existence of an administrative hierarchy that routinely approves the faculty's academic recommendations is insufficient to establish [a] buffer" that would lessen the effectiveness of faculty recommendations. *Lewis & Clark Coll.*, 300 NLRB 155, 163 (1990). The Board addressed its prior precedent, and the *Yeshiva* decision, holding:

That the faculty in *Livingstone* had almost plenary authority, and in *Yeshiva* absolute authority, does not preclude finding managerial authority where, as here, the faculty effectively recommends and controls academic policy. Thus, that *Yeshiva* may have presented “an extreme case on its facts,” ... does not warrant ignoring the Court’s legal standard of *effective* recommendation and control.

Id. at 163 n.41 (emphasis in original). Thus, the Board concluded, “The fact that the faculty does not have absolute control over academic matters does not preclude finding managerial status.”

Id. at 163.

Similarly, in *University of New Haven*, the Board found faculty to be managerial based, in part, on its finding that the faculty had substantial authority “to recommend decisions which formulate, determine, and effectuate management policies, and that those recommendations are *in most cases, effective.*” *Univ. of New Haven*, 267 NLRB 939 (1983) (emphasis added). In *Elmira College*, the Board concluded that the faculty exercising “broad prerogatives” in connection with academic matters sufficiently demonstrated the faculty’s managerial status. *Elmira Coll.*, 309 NLRB 842, 849 (1992). The Board reached the same conclusion about the managerial status of faculty in *Trustees of Boston University*, holding that:

That ultimate authority for decision making at the University rests with the president and the board of trustees does not alter the fact that, in practice, faculty decisions on all those policy matters are effectuated *in the great majority of instances. Nor does the fact that the administration occasionally has made and implemented policy decisions without faculty input detract from the collegial managerial authority consistently exercised by the faculty.*

Trustees of Boston Univ., 281 NLRB 798, 798 (1986) (emphasis added); *see also Duquesne Univ. of the Holy Ghost*, 261 NLRB 587 (1982) (managerial status found where faculty had significant authority in matters such as curriculum, admissions, and matriculation); *Thiel Coll.*, 261 NLRB 580 (1982) (managerial status found where faculty had authority over curriculum and course offerings); *Ithaca Coll.*, 261 NLRB 577 (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). More recently, in *LeMoyne-Owen College*, the Board found the faculty to be managerial because “the faculty make or effectively recommend decisions in the majority of critical areas identified in *Yeshiva* and subsequent decisions interpreting and applying it.”⁶ *LeMoyne-Owen College*, 345 NLRB 1123, 1129 (2005) (LeMoyne-Owen II).

In contrast, when the Board has held that faculty are not managerial, it has done so, not because the faculty lacked “absolute authority,” or almost plenary authority, but because the faculty lacked “substantial authority.” In *Bradford College*, for example, the Board found that the faculty was not managerial because, “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...” *Bradford College*, 261 NLRB 565, 566-67 (1982) (emphasis added). Similarly, in *St. Thomas University*, the Board held that the faculty was not managerial because, when the faculty made recommendations “regarding academic or nonacademic policy [the recommendations] have *usually* been ignored or reversed by the administration.” *St. Thomas Univ.*, 298 NLRB 280, 286 (1990) (emphasis added). In sum, when faculty recommendations are “often” or “usually” disregarded, the Board has ruled that the faculty is not managerial. Such findings, however, never relied on the flawed standard of lacking “absolute authority.”⁷ Accordingly, Petitioner is advocating a position that has already been rejected by the Supreme Court, the D.C. Circuit, and the Board.

⁶ Significantly, although the NEA advocates that *Dubuque*, *Lewis & Clark*, and *Livingstone College* be overruled, it advances no such argument with regard to *LeMoyne-Owen II*. (NEA Brief, p. 34.)

⁷ While the AAUP places significance on *David Wolcott Kendall Memorial School v. NLRB*, 866 F.2d 157 (6th Cir. 1989), *NLRB v. Cooper Union for Advancement of Sciences and Art*, 783 F.2d 29 (2d Cir. 1986), and *Loretto Heights Coll. v. NLRB*, 742 F.2d 1245 (10th Cir. 1984), each of those cases is easily distinguishable because the faculty did not exercise nearly as much control over academic matters as the faculty at Point Park.

II. When viewed through the lens of the *Yeshiva* factors, the facts in the record conclusively demonstrate that the faculty at Point Park are managerial.

- A. Because of Point Park’s shared governance model, its faculty is like the faculties of those colleges and universities which the courts and the Board have found to be managerial.

As the NEA’s Brief acknowledges, the *Yeshiva* Court found that “private universities typically have ‘shared authority’ structures pursuant to which ‘authority ... is divided between a central administration and one or more collegial bodies.’” (NEA Brief, p. 14 (quoting *Yeshiva*, 444 U.S. at 680).) In this regard, Point Park is one of said private universities and is in the mainstream, like most other universities that operate on a model of shared governance and whose faculties have been found to be managerial by the court and the Board. This was confirmed by the Report of the Middle States Commission on Higher Education (“Middle States Report”), which concluded that, “based on interviews with Board members, the President, administrators, faculty, staff and students, and a thorough review of the documentary evidence provided by the College ... the faculty [at Point Park] have substantial input and control over the curriculum and input into academic policy-making.” (Er. Ex. 72 at 4.) Although the Regional Director erroneously disregarded the compelling conclusion reached in the Middle States Report, the Board has historically attached “great significance” to findings by the Middle States Commission on Higher Education and other accrediting bodies. *Elmira Coll.*, 309 NLRB 842, 850 (1992) (“Finally, of great significance is the recent statement by an outside party, the Middle States Commission on Higher Education, commending the College on the ‘participatory processes now in place,’ to insure faculty participation in governance.”); *see also Univ. of New Haven*, 269 NLRB at 939 n.1 (holding that “the Board traditionally has found such accreditation reports relevant, and has relied on them in reaching its decisions.”). Not surprisingly, the union-side *amici* sidestep the Middle States Report.

That Point Park functions under the normative, shared governance model is consistent with the *Yeshiva* Court’s earlier observation that:

[T]he predominant policy normally is to operate a quality institution of higher learning that will accomplish broadly defined goals within the limits of its financial resources. The “business” of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions.

Yeshiva, 444 U.S. at 688. Based, in part, on this language, the Board itself has held that “there is no indication in *Yeshiva* that the Court intended its holding to reach only institutions with facilities having as much or nearly as much input as the *Yeshiva* faculty. In fact, the implication is quite the opposite.” *Dubuque*, 289 NLRB at 353; *see also*, David M. Rabban, Distinguishing Excluded Managers from Covered Professionals Under the NLRA, 89 Colum. L. Rev. 1775, 1825 (December 1989) (arguing that, “[r]ead as a group,” early Board decisions interpreting *Yeshiva* “suggested that only egregious departures from the norms of academic life could justify a finding that faculty members are employees under the NLRA.”)⁸

Indeed, one member of the D.C. Circuit *Point Park* panel questioned whether the *Yeshiva* decision alters the burden of proof applied in the industrial complex such that a union would be required, in the context of higher education, to demonstrate that faculty is *not* managerial. Transcript of Proceedings, United States Court of Appeals for the District of Columbia Circuit, January 16, 2006, 31:11-14 (stating, “Well, any university relies on its faculty, and that’s why I wonder if *Yeshiva* doesn’t subsilinte [sic – presumably *sub silentio*] shift the burden from the burden that applies in the non-university context.”)⁹ Because Point Park governs itself in

⁸ In its Brief, the NEA cites to the same law review article but conspicuously omits reference to this portion of the author’s observation. (NEA Brief, p. 26).

⁹ It is noted that the amicus brief by the Higher Education Council of the Employment Law Alliance maintains that since “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

accordance with the model of shared authority recognized by the Supreme Court in *Yeshiva* and its progeny, its faculty plays a vital role in university governance, particularly with regard to academic affairs.¹⁰ Thus, Point Park's faculty are managerial.

B. The Briefs of Petitioner and the union-side *amici* largely ignore the compelling record evidence and seek to rely instead on the flawed findings of the Regional Director.

Employer dedicated a significant portion of its Brief on Review of the Regional Director's Supplemental Decision on Remand ("Employer's Brief on Remand") to identifying, based on specific citations to the record, those conclusions of the Regional Director that are "unsupported by, and contrary to, the evidence contained in the record."¹¹ (Employer's Brief on Remand, pp. 21-31.) Nevertheless, Petitioner and union-side *amici* rely, almost exclusively, on Regional Director's Decision and Determination of Election and the Regional Director's Supplemental Decision on Remand. (See, e.g., NEA's Brief, pp. 1-10; Petitioner's Brief, pp. 16-20). Because of the flaws in the Regional Director's analysis of the facts in the record, the best evidence for the Board to consider in performing the task assigned to it by the D.C. Circuit is the primary evidence in the record. Employer refers the Board to its Request for Review of the

faculty and institutions with a shared governance model are excluded managerial employees under the NLRA." (Higher Education Council of the Employment Law Alliance ("Higher Ed Council") Brief, p. 2, 9-12).

¹⁰ The AAUP amicus brief states that it "continues to adhere to its long-standing position that faculty engage in shared governance as part of their non-managerial responsibilities as professional employees under Section 2(12) of the NLRA." (AAUP Brief, p. 7 n.2). This is in direct conflict with the AAUP's own statement of the managerial role of faculty within the academic context. As expressed in their own statement on government of universities and colleges, "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 education process. (emphasis added) (See AAUP's *Statement on Government of Colleges and Universities, The Academic Institution: The Faculty* at <http://www.aaup.org/AAUP/pubsres/policydocs/contents/governancestatement.htm>).

¹¹ In this regard, Employer would note that the Board agreed to review the conclusions of the Regional Director on the ground that the Regional Director's Supplemental Decision on Remand "raises substantial issues warranting review." (Order, November 28, 2007.)

Regional Director's Supplemental Decision on Remand for a detailed analysis of the factual errors committed by the Regional Director.¹²

One of these factual errors warrants treatment herein, however, because Petitioner and the union-side *amici* have latched onto it in an attempt to salvage their position. In arguing that Employer's faculty are not managerial, both Petitioner and the NEA focus on Employer's having restructured in the early 2000's. They argue that "faculty members were not involved in the decision to change the structure of the school nor were they involved in Point Park's application for university status." (Petitioner's Brief, pp. 16-17; *see also*, NEA's Brief, pp. 5-6 (identifying the restructuring as the "most important[]" decision made by the administration "without faculty consultation or contrary to the stated position of the faculty".))

Preliminarily, the Board has recently held that such restructuring is a non-academic matter and, accordingly, "is less significant in ascertaining managerial status." *Carroll College, Inc.*, 350 NLRB No. 30, at *3 (2007) (decision vacated on other grounds, *Carroll College, Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009)). As such, Petitioner and the union-side *amici* attribute far more significance to the restructuring than is appropriate. In any event, however, faculty were involved both in the restructuring of Employer and in the application for university status. The genesis of the restructuring and application for university status were two Strategic Plans. In 1997, Dr. Katherine Henderson became president of Point Park College and initiated a strategic planning process. (Tr. 28, 3644; U.Ex. 126, p. 2.) Faculty members representing each of the academic departments were invited to serve on the Steering Committee, and 31 faculty members participated in the strategic planning process. (Er.Ex. 11, pp. ii-iii.) As a result of this process,

¹² Point Park details the erroneous factual conclusions made by the Regional Director on pages 21-30 of its Request for Review filed with the Board on or about August 23, 2007.

the 1998 Strategic Institutional Plan was established, providing for an examination of the structure and size of Point Park. (Er.Ex. 11, p. 4.)

In 2001, Employer held a retreat attended by faculty, students, administration, and members of the Board of Trustees. (Tr. 215-17.) Employer's president specifically encouraged faculty, staff, and students to participate in the development of the second Strategic Plan. (Tr. 221-22; Er.Ex. 13, App. A.) The decision to seek university status was one outgrowth of this second Strategic Plan, and Employer's president asked faculty to participate in the planning process for university status and to make recommendations about overall structure, schools, and departments. (Tr. 224-25, 228; Er.Ex. 13.) Based on this record, it is clear that faculty were involved in all aspects of the restructuring and application for university status and made effective recommendations in this regard.

Even assuming *arguendo* that Point Park's faculty was not involved in the restructuring and application for university status, the "treatment of the change to university status as a significant factor in academic governance is incorrect both as a practical matter and as a matter of Board precedent." (American Council on Education, National Association of Independent Colleges and Universities, Council of Independent Colleges, and the Association of Independent Colleges and Universities of Pennsylvania, August 24, 2007 Brief in Support of Point Park's Request for Review, p. 17). As ACE further noted: "As a practical matter, structural change is inevitable as schools seeks to maintain their competitive edge and enhance their standing in the academic community. Many structural innovations, however, have little effect on the core of teaching and learning at a college or university." (*Id.*). As a practical matter, structural changes are typically within the unique province of the trustees and the administration, although institutions are encouraged to consult and collaborate with the faculty and other institutional

stakeholders in implementing such changes. See AGB Statement of Institutional Governance, at 4 (Nov. 8, 1998).

In *Lewis & Clark*, for instance, the Board opined that policy considerations pertaining to an academic institution's financial viability and long-range planning "are much broader than those that the faculty members consider in their academic decision-making." 300 NLRB at 161-62. The Board further explained in *Lewis & Clark*:

An organization can have several levels of policy-making and, hence, several levels of managerial employees. There is, therefore, nothing inconsistent with the faculty members having authority over one level of policy (e.g., academics), and the administration (including the board of trustees), having control over another (e.g., financial viability and long-term planning). The board of trustees and others in the administration are entrusted with the ultimate policy-making and fiduciary responsibility for the College, not the faculty.... Thus, there are college policy questions (i.e., "financial resources," "general institutional goals," or "University-wide balance") that are broader than academic policy matters and from which the faculty members may be excluded yet they remain managerial employees....

Id. at 162 nn.33 & 36. As such, any significant reliance on the lack of faculty involvement in restructuring is grossly misplaced.

C. Many of the union-side amici focus on matters far outside the scope of this matter on remand.

As noted above, the D.C. Circuit gave the Board a direct and unambiguous mandate, tasking the Board with applying the *Yeshiva* factors to the record before it and explaining its analysis. Yet, many of the union-side amici overtly advocate that the Board exceed the D.C. Circuit's mandate. Unfortunately, it appears that the concerns raised by Employer in its prior Brief, that the sweeping scope set forth in the Notice and Invitation to File Briefs would cause the Board to exceed the scope of the D.C. Court's mandate and to impermissibly stray into rulemaking instead of adjudication, have been fully realized.

For example, the *Amicus* Brief of Employment and Labor Relations Scholars in Response to the Notice and Invitation to File Briefs (“ELRS Brief”) does not contain any analysis of the facts of this case. Rather, the ELRS Brief discusses, *inter alia*, the “context for industrial relations,” a “labor-management partnership” involving health care professionals, the airline industry, and Australian legislation. (ELRS Brief, pp. 3, 5, 10, & 13.) In addition, the Brief criticizes the *Yeshiva* Court, stating that “one cannot fathom *what* the Court had in mind by these Delphic dicta.” (*Id.* at 24 (emphasis in original).) What an *amicus* may not fathom in *Yeshiva* has been totally understood and applied by the D.C. Circuit, as evidenced by its mandate to the Board, holding that “*Yeshiva* identified the relevant factors that the Board must consider.” *Yeshiva*, 444 U.S. at 51.

The AAUP Brief spends significant time arguing that, in higher education generally, the “context of the university has changed in fundamental ways.” (AAUP Brief, p. 7.) It continues with an assertion that a corporate model of management has emerged in many universities with an expansion of the administrative hierarchy. It does not follow, however, as AAUP asserts, that such hierarchy exercises greater control over academic affairs. (AAUP Brief, p. 9). Indeed, the AAUP identifies a litany of reasons to explain the influence of the corporate business model¹³, and none of the cited reasons impinge on a faculty’s effective recommendations over academic areas as its brief maintains. That administrators act in response to external market forces does not strip faculty of their managerial status since market forces drive financial considerations which are typically outside the realm of faculty decision-making in academic matters.

¹³ According to the AAUP, these reasons include: (1) “competition for students and research dollars and resulting pressures on universities to ‘market’ themselves”; (2) “increasing costs, overall, of operating the university; (3) rising costs of research in the sciences and engineering”; (4) “the growing use of competitive rankings ... as indicators of presumed educational quality”; and (5) “the privatization of public functions.” (AAUP Brief, pp. 8-9).

In short, University administrations have broad and increasing responsibilities outside of academia and, in any event, the size of the administration is not necessarily indicative of the extent of administrative interference with effective faculty recommendations in the academic context. *See, e.g., Univ. of New Haven*, 267 NLRB at 943; *Duquesne Univ.*, 261 NLRB at 589.

The AAUP further asserts that “... the faculty’s interest in many universities today are not aligned with the interests of the administration.” (AAUP Brief, p. 12). Notwithstanding what may be happening elsewhere, as the D.C. Circuit Court of Appeals instructed in *Point Park*, “Every academic institution is different, and ... the Board must perform an exacting analysis of the particular institution and faculty at issue.” 457 F.3d at 45.

The D.C. Circuit did not instruct the Board to analyze “nationwide patterns;”¹⁴ rather, as has been emphasized throughout this Brief, the D.C. Circuit tasked the Board with applying the *Yeshiva* factors to the facts of this case and to explain its analysis. In the same vein, the mandate of the D.C. Circuit does not permit that the Board “enumerate additional factors relevant to determining whether a party has met its burden of proving that faculty are managerial employees;”¹⁵ instead, it explicitly instructs the Board to apply the *Yeshiva* factors. In short, the Petitioner and union-side *amici* Briefs do not conform to the scope of the D.C. Circuit’s remand in this proceeding.

As Employer has previously noted, “until reversed, the dictates of a Court of Appeals must be adhered to by those subject to the appellate court’s jurisdiction ... Administrative agencies are not more free to ignore this doctrine than are district courts.” *Beverly Enterprises v. NLRB*, 727 F.2d 591, 592-93 (6th Cir. 1984). Therefore, the Board is precluded from compromising *Yeshiva* and yielding to unabashed efforts by the Petitioner and union-side *amici*

¹⁴ NEA Brief, p. 18.

¹⁵ *Id.* at 4.

to have the Board rewrite more than thirty years of history of Board and Court precedent applying the *Yeshiva* factors.

Conclusion

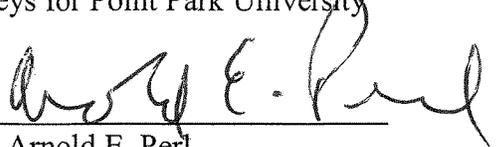
The Board's analysis of this case should begin and end with the D.C. Circuit's mandate, which limits the scope of the examination the Board is to undertake. This case does not present an opportunity for the Board to undertake a "considered reappraisal" of the United States Supreme Court's decision in *Yeshiva*, nor does it provide an acceptable forum for the Board to take into account national trends, allegedly emerging models of university governance, or even provide guidance for future cases. The instant case is an adjudication – not an exercise in *de facto* rulemaking.

After many years of unexplained delay, it is time for the Board to finally fulfill the 2006 mandate of the D.C. Circuit by applying the *Yeshiva* factors and "explain[ing] 'which factors are significant and which less so, and why' in [its] determination" of the managerial status of the faculty at Point Park. *Point Park*, 457 F.3d at 50 (quoting *LeMoyne-Owen*, 357 F.3d at 61). Application of these factors to the record of this case leads to the inescapable conclusion that Point Park's faculty are managerial.

As is aptly stated in ACE's Brief in response to the Board's Notice and Invitation to File Briefs, "*Yeshiva* remains the law of the land until the Supreme Court overturns *Yeshiva* or Congress amends relevant provisions of the Act. Neither has occurred." (ACE Brief, p. 9.)

Dated: July 20, 2012

GLANKLER BROWN, PLLC
Attorneys for Point Park University

By: 

Arnold E. Perl
Michael D. Tauer
Andre B. Mathis

6000 Poplar Avenue, Suite 400
Memphis, TN 38119
901-525-1322
901-525-2389 – fax
aperl@glankler.com
mtauer@glankler.com
amathis@glankler.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served electronically to the following on this 20th day of July 2012:

Richard H. Markowitz
Markowitz & Richman
121 South Broad Street
1100 North American Building
Philadelphia, PA 19107-4533
kbrookes@markowitzandrichman.com

Newspaper Guild of Pittsburgh
Communications Workers of America Local 38061 AFL-CIO CLC
60 Boulevard of the Allies, Suite 913
Pittsburgh, PA 15222-1214
Mary O'Melveny
Communications Workers of America, AFL-CIO, CLC
501 Third Street, N.W., Suite 800
Washington, D.C. 20001-2760
maryo@cwa-union.org

Joseph J. Pass
Jubelirer, Pass & Intrieri, P.C.
219 Fort Pitt Boulevard
Pittsburgh, PA 15222-1558
jjp@jpilaw.com

Robert Chester
Regional Director
Region 6, Pittsburgh, PA
National Labor Relations Board
1000 Liberty Avenue, Suite 904
Pittsburgh, PA 15222-4111

Edward A. Brill
David A. Munkittick
Proskauer Rose LLP
11 Times Square
New York, NY 10036-8299
ebrill@proskauer.com
dmunkittrick@proskauer.com

Lawrence Z. Lorber
James F. Segroves
Proskauer Rose LLP
1001 Pennsylvania Avenue, NW
Suite 400 South
Washington, DC 20004-2533
llorber@proskauer.com
jsegroves@proskauer.com

Kathi S. Westcott
American Association of University Professors
1133 19th Street, NW, Suite 200
Washington, DC 20036
Legal.dept@aaup.org

Bruce F. Mills
Center for the Analysis of Small Business Labor Policy
11715 Fox Road, Suite 400-109
Indianapolis, IN 46236

Matthew W. Finkin
College of Law, University of Illinois
Champaign, IL

Peter Jones
John Gaal
Bond Schoeneck & King, LLP
One Lincoln Center
Syracuse, NY 13202-1355

Natasha J. Baker
Curiale Hirshfeld 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 55402

Louis Benedict
Higher Education Administration
153 Troup Ave.
Bowling Green, OH 43402
lbenedi@aol.com

Alice O'Brien
Philip A. Hostak
Kristen Hollar
National Education Association
1201 16th Street NW, Suite 820
Washington, DC 20036

John C. Scully
National Right to Work Legal Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160
jcs@nrtw.org

Barbara Camens
Barr & Camens
1025 Connecticut Avenue, NW
Washington, DC 20036

Lynn K. Rhinehart
James B. Coppess
Donna R. Euben
Matthew J. Ginsburg
AFL-CIO
815 Sixteenth Street, NW
Washington, DC 20006





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

Arnold Perl, Esq.
Ford & Harrison
795 Ridge Lake Blvd., Suite 300
Memphis, Tennessee 38120

Joseph J. Pass, Esq.
Jubelirer, Pass & Intrieri PC
219 Fort Pitt Blvd.
Pittsburgh, PA 15222-1576

Richard H. Markowitz, Esq.
Markowitz & Richman
1100 North American Building
121 South Broad St.
Philadelphia, PA 19107

Regional Director Gerald Kobell
NLRB, Region 6
Two Chatham Center, Suite 510
112 Washington Place
Pittsburgh, PA 15219-3458

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,

Richard D. Hardick
Associate Executive Secretary

cc: Parties

