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***NLRB v. Yeshiva University*: Teacher Participants in University Policy Formulation Deemed Managerial Under NLRA**

The development of a "status quo" for teacher bargaining unit certification was brought to an abrupt halt by the recent Supreme Court Yeshiva decision. The author, in agreement with the majority opinion, examines the development of this "status quo" and the cases leading up to and including the Supreme Court's determination that the Yeshiva faculty were managerial employees and thus exempt from coverage under the National Labor Relations Act. Also, the author illustrates the Supreme Court's unfavorable reaction to the National Labor Relations Board's cursory and inconsistent administrative decisions and opinions.

I. INTRODUCTION

The recent United States Supreme Court decision of *NLRB v. Yeshiva University*¹ threatens to negate ten years of National Labor Relations Board holdings and alter the development of faculty collective bargaining in private, nonprofit educational institutions. In affirming the court of appeals' holding that Yeshiva University's full-time faculty members were *managerial* employees, excluded from the collective bargaining provisions of the National Labor Relations Act,² the Court has overruled Board policy concerning certification of faculty bargaining units in private, nonprofit educational institutions.

The purpose of this note is to present an analysis of the Supreme Court's reasoning and rationale in holding that faculty members of a private, nonprofit university are exempt from the collective bargaining provisions of the Act as managerial employees.

II. BACKGROUND

Commencing in 1951 and continuing until 1970, the National Labor Relations Board, in an exercise of broad discretion, refused to

1. 444 U.S. 672 (1980).

2. National Labor Relations Act, 29 U.S.C. §§ 151-68 (1976), as amended by the Labor Management Relations Act of 1947, Pub. L. No. 101, 61 Stat. 136, and the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519.

assert jurisdiction over private, nonprofit educational institutions in bargaining unit certification proceedings.³ The 1951 decision of *The Trustees of Columbia University*⁴ was based on the Board's finding that the policies of the National Labor Relations Act would not be effectuated should the Board exercise jurisdiction where the activities of the institution were "noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution."⁵

In *Columbia University*, the petitioners, a local chapter of the Community and Social Agency Employees Union-CIO, sought certification to represent a bargaining unit of all clerical employees in the university's libraries. The university, as employer, opposed an exercise of jurisdiction by the Board on grounds that the university was not engaged in commerce within the meaning of the Act.⁶ The university also argued that it was a nonprofit educational corporation, chartered by a special New York legislative act, and was solely supported by endowment, gifts and student tuition. Finally, the university contended that even if it did engage in interstate commerce, thereby providing Board jurisdiction over the university's activities, the Board should decline to assert jurisdiction in an exercise of discretion.

The Board denied jurisdiction based upon its interpretation of

3. The rights of employees to organize into labor organizations and to bargain collectively with their employers are two of the basic rights guaranteed under the National Labor Relations Act. Section 7 of the Act provides, in pertinent part: "[e]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining" 29 U.S.C. § 157 (1976).

Section 9(a) of the Act guarantees that representatives selected by a majority of the employees in an appropriate unit shall be the exclusive representatives for the employees included in the unit. 29 U.S.C. § 159(a)(1976). Under the power granted by § 3(b), § 9(b) and (c) of the Act, the National Labor Relations Board [hereinafter Board] is authorized to conduct certification proceedings to determine the appropriate class of employees to be included within a unit to be represented. 29 U.S.C. §§ 153(b), 159(b)-(c) (1976).

In determining the appropriate class of employees to be included in a particular unit, the Board applies a number of factors which may include: 1) the similarity of duties, skills, wages, and working conditions of employees involved; 2) pertinent collective bargaining history, if any, among employees involved; and 3) the history, extent and type of union organization in other plants of the same company of the same industry.

Embodied within the Board's authorization to determine the appropriate unit of employees is the power to investigate and conduct hearings for the determination of such units, direct elections, and certify to the parties involved the name or names of those selected to exclusively represent the unit. 29 U.S.C. § 159(c)(1)(B) (1976).

4. 97 N.L.R.B. 424 (1951), *overruled*, 183 N.L.R.B. 329 (1970).

5. *Id.* at 427.

6. 29 U.S.C. §§ 151-68 (1976).

congressional intent to exclude nonprofit organizations from the Act. The Board stated that the Senate Conference Report on the Labor Management Relations Act of 1947⁷ *impliedly* approved the Board's previous refusals to exert jurisdiction over nonprofit organizations except in certain situations. According to the Conference Report,

nonprofit organizatons (other than hospitals) . . . are not specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act.⁸

The Board concluded that "[r]egardless of whether or not the conference report literally recite[d] the Board's practice prior to the amendment of the Act, it . . . indicate[d] approval of and reliance upon the Board's asserting jurisdiction over nonprofit organizations only in exceptional circumstances and in connection with *purely commercial activities* of such organizations."⁹ The Board conceded that while the language of the conference report did not necessarily provide a mandate, it certainly provided a guide for the Board to assert or deny jurisdiction in a noncommercial setting. Consequently, the Board noted that while the activities of Columbia University sufficiently affected commerce to satisfy the Board's jurisdictional requirements outside of the nonprofit organization context, it did not believe an exercise of jurisdiction in that context would be proper. This conclusion was based upon the Board's determination that the activities of Columbia University were predominantly noncommercial in nature and were intimately connected with the charitable purposes and educational activities of the institution.¹⁰

Ironically, the *Columbia University* decision did not completely preclude the future exercise of jurisdiction over nonprofit educational institutions. The Board clearly stated that it had not, and presumably would not, exempt such nonprofit organizations from the operation of the Act "where the particular activities involved have been commercial in the generally accepted sense."¹¹ But,

7. H.R. REP. NO. 510, 80th Cong., 1st Sess. 32 (1947), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 505 (1948).

8. *Id.* at 536.

9. 97 N.L.R.B. at 427 (emphasis added).

10. *Id.* at 425.

11. *Id.* The Board, supporting its statement that nonprofit organization exclusion is not absolute, cited numerous decisions in which it had exerted jurisdiction

for nineteen years following the *Columbia University* decision, the Board adhered to its policy to decline assertion of jurisdiction over private, nonprofit educational institutions. However, in 1970 the Board explicitly overruled *Columbia University* in a decision involving New York's Cornell and Syracuse Universities.¹²

In *Cornell*, the Board addressed the issue of whether an assertion of jurisdiction over nonprofit colleges and universities would be proper in light of the 1951 *Columbia University* decision.¹³

The Board noted that although the Act, as amended, specifically excluded nonprofit hospitals, "it contain[ed] no such exclusion of private, nonprofit educational institutons."¹⁴ The Board pointed out that its prior decision to decline jurisdiction over such institutions was an exercise of discretion¹⁵ and that in amending the Act, "Congress was content to leave to the Board's informed discretion in the future as it had in the past, whether and when to assert jurisdiction over nonprofit organizations whose operations had a substantial impact upon interstate commerce."¹⁶

In *Cornell*, the Board took note of the substantial increase in commercial activities of private colleges and universities and determined that while education continued to be the *primary* goal of these institutions, greater commercial involvement had become necessary to carry out educative functions.¹⁷ The Board agreed with petitioners Cornell and Syracuse that the rapidly expanding activities and operations of colleges and universities had substantial impact on interstate commerce. Noting that educational operations had increasingly become matters of federal interest, the Board concluded that "this interest coupled with the failure of the States adequately to recognize and legislate for labor relations,"¹⁸

over such organizations, including nonprofit educational institutions. *Id.* at n.3 (citing Sunday School Board of the Southern Baptist Convention, 92 N.L.R.B. 801 (1950)) (corporation editing and publishing religious literature); Port Arthur College, 92 N.L.R.B. 152 (1950), *overruled*, 97 N.L.R.B. 384 (1951) (college operating a commercial radio station); Illinois Inst. of Technology, 81 N.L.R.B. (1949) (college and affiliated research foundations performing industrial research sponsored by business concerns); Association Canado-Americaine, 72 N.L.R.B. 520 (1947) (fraternal society operating insurance business); Henry Ford Trade School, 63 N.L.R.B. 1134 (1945) (vocational school performing services for industrial concern).

12. *Cornell University*, 183 N.L.R.B. 329 (1970). The Board consolidated Cornell and Syracuse's petitions seeking election and certification of bargaining representatives for a unit composed of nonacademic employees.

13. *Id.* at 329.

14. *Id.* at 330. *See* note 8 *supra*.

15. 183 N.L.R.B. at 331. The Board stated that the congressional grant of discretionary power "hardly seem[ed] inadvertent Congress was well aware that the Board's discretionary standards for asserting jurisdiction [were] not fixed, but had been changed from time to time." *Id.*

16. *Id.* at 331.

17. *Id.* at 332.

18. *Id.* at 329. Additionally, the Board recognized the futility of the situation

justified an assertion of jurisdiction by the Board. The Board's position was amply stated when it held that it could

no longer adhere to the position set forth in the *Columbia University* decision. Accordingly, that case is overruled. Charged with providing peaceful and orderly procedures to resolve labor controversy, we conclude that we can best effectuate the policies of the Act by asserting jurisdiction over nonprofit, private educational institutions where we find it to be appropriate.¹⁹

Following the initial assertion of jurisdiction in *Cornell*, a new issue began to emerge concerning the classification of employees to be included in appropriate bargaining units²⁰ at private, nonprofit colleges and universities. The issue of classifying faculty and professional staff members for inclusion in appropriate bargaining units, thereby entitling them to the benefits and protections of the Act, first arose in *C.W. Post Center of Long Island University*.²¹ In *C.W. Post Center*, the local chapter of the United Federation of College Teachers (union) sought certification to represent a separate bargaining unit of all *professional* employees²² involved directly or indirectly in student instruction.²³ The

when it stated "[w]ith or without Federal regulation, union organization is already a *fait accompli* at many universities." *Id.* at 333 (noting Ferguson, *Collective Bargaining in Universities and Colleges*, 19 LAB. L. J. 778, 791-804 (1968)).

19. 183 N.L.R.B. at 334. The Board's new position was perhaps more strongly propounded when it proclaimed "we are convinced that assertion of jurisdiction is required over those private colleges and universities whose operations have a substantial effect on commerce to insure the orderly, effective and uniform application of the national labor policy." *Id.*

The Board's rationale reflects the policy enumerated in the National Labor Relations Act which provides in pertinent part:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1976). Notably, the Board did not believe it was prepared at the time of the *Cornell* decision to establish jurisdictional standards for the class of nonprofit educational institutions and deferred determination of the issue until sufficient data could be provided.

20. See note 3 *supra*.

21. 189 N.L.R.B. 904 (1971).

22. The petition for certification to represent a *separate* unit comprised of *professional* employees was requested in compliance with § 9(b)(1) of the Act. 29 U.S.C. § 159(b)(1) (1976). The section mandates that the Board shall not declare any unit which includes both professional and nonprofessional employees as an appropriate unit unless a majority of the professional employees vote to include nonprofessional employees within the unit. The Act, as amended, provides:

Board noted that *C.W. Post Center* was “the first case in which the Board [was] called upon to make appropriate [bargaining] unit determinations in regard to university teaching staffs.”²⁴

In opposition to the petition, the university argued that an assertion of jurisdiction should not be applied to its professional personnel and, in the alternative, that full-time faculty members should not be included in the bargaining unit of professional employees. The university believed that the responsibilities and authority held by full-time faculty rendered them exempt from coverage of the Act as supervisory²⁵ or managerial²⁶ employees.

The term ‘professional employee’ means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

29 U.S.C. § 152(12) (1976).

23. The petitioner’s request in *C.W. Post Center* to represent a separate bargaining unit of all professional employees included all full-time faculty, adjunct faculty, librarians, counselors, research associates, and laboratory assistants.

24. 189 N.L.R.B. at 904.

25. Employees classified as “supervisors” are specifically excluded from the provisions of the Act under § 2(3). 29 U.S.C. § 152(3) (1976). Section 2(11) of the Act, as amended, provides:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (1976).

Judicial interpretation of § 2(11) has established that possession of any one of the enumerated powers in § 2(11) or the power to effectively recommend with respect to any one of them is sufficient to satisfy the statutory definition of a supervisor. *NLRB v. Metropolitan Life Ins. Co.*, 405 F.2d 1169, 1177 (2d Cir. 1968).

The statutory exclusion of supervisors from the Act arose from congressional concern for the protection of the rights of rank-and-file employees to organize and bargain collectively without undue influence from other employees closely associated with management interests. Additionally, the exemption reflected a congressional belief that the unionization of supervisors deprives employers of their right to the undivided loyalty of their representatives. *Id.* at 1178.

26. The National Labor Relations Act does not mention or define managerial employees. The exemption developed as a result of the Board’s recognition that Congress intended, albeit impliedly, to exclude employees classified as “manage-

The Board summarily dismissed the university's jurisdictional claim by ruling that professional personnel²⁷ who "have the usual incidents of the employer-employee relationship . . . are employees within the meaning of the Act . . . [and] are entitled to its benefits."²⁸

Addressing itself to the university's claim that full-time faculty were exempt from the Act's coverage,²⁹ the Board discussed the structure of Long Island University and the authority and responsibilities of professional personnel involved in student instruction.

rial" from the provisions of the Act. One of the rationales for the exemption is that because these types of employees are so much higher in the authority hierarchy than those expressly exempted, Congress believed no specific exclusionary provision was necessary. *NLRB v. Bell Aerospace*, 416 U.S. 267, 283-84 (1974). A second rationale, similar to that supporting the supervisory exemption, stems from a congressional and judicial belief that an employer is entitled to the undivided loyalty of its representative. *Id.* at 281.

In *Ford Motor Co.*, 66 N.L.R.B. 1317 (1946), the Board defined managerial personnel as "employees who are in a position to formulate, determine, and effectuate management policies. These employees we have considered and . . . deem to be 'managerial,' in that they express and make operative the decisions of management." *Id.* at 1322.

Judicial approval of the exemption is found in *Bell Aerospace* where the Supreme Court concluded that managerial employees were unmistakably excluded from the Act. In *Bell Aerospace*, the Court cited with the approval the opinion of the Court of Appeals for the Seventh Circuit in the case of *Illinois State Journal-Register, Inc. v. NLRB*, 412 F.2d 37 (7th Cir. 1969), which explained that the managerial exclusion

embraced not only an employee 'so closely related to or aligned with management as to place the employee in a position of conflict of interest between his employer on the one hand and his fellow workers on the other' but also one who is 'formulating, determining and effectuating his employer's policies or has discretion independent of an employer's established policy, in the performance of his duties.'

Id. at 41.

Thus, the exclusion, as interpreted in *Bell Aerospace*, is applied to those employees found to be: 1) aligned with management; 2) formulating, determining and effectuating management policies; and 3) exercising discretion within or independently of established employer policy.

27. See note 22 *supra*.

28. 189 N.L.R.B. at 904 (citing *Lumbermen's Mut. Cas. Co.*, 75 N.L.R.B. 1132 (1948)).

The Act, as amended, provides in pertinent part:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of independent contractor, or any individual employed as a supervisor. . . .

29 U.S.C. § 152(3) (1973).

29. See notes 25 and 26 *supra*.

The Board found that the university was governed by a board of trustees, a chancellor, and three presidents, each assigned to one of the three centers operated by the university. The authority, duties and responsibilities of faculty members were found to be governed by university-established "statutes" under which full-time faculty were granted the power to formulate and recommend various student and faculty policies.³⁰ However, the Board found that these faculty "decisions" were in fact subject to final review by the university's administration and board of trustees. Additionally, the Board determined that in exercising their authority, "the faculty acts as a group, on the basis of collective discussion and consensus."³¹ Expanding upon this observation, the Board concluded:

[T]he policymaking and quasi-supervisory authority which adheres to full-time faculty status *but is exercised by them only as a group* does not make them supervisors within the meaning of Section 2(11)³² of the Act, or managerial employees. . . . Accordingly, we find that full-time university faculty members qualify in every respect as professional employees under Section 2(12) of the Act,³³ and are therefore entitled to all the benefits of collective bargaining³⁴

The Board, in *C.W. Post Center*, used two rationales in determining whether faculty members were supervisors or managers. The rationales included the *collectivity of faculty decisional actions* and the *ultimate authority of administrators to review faculty actions*.

A third rationale, the proposition that *collective authority is exercised in the faculty's own interest* and not on behalf of the university, was introduced in the Board's *Adelphi University*³⁵

30. Under the governing statutes, faculty were given the power and responsibility to formulate student admission, curriculum, graduation and honor assignment policy. Concurrently, the faculty also made determinations concerning "[f]aculty status including appointment, reappointment, promotion, tenure, and dismissal" 189 N.L.R.B. at 905.

31. *Id.*

32. See notes 25 and 26 *supra*.

33. See note 22 *supra*.

34. 189 N.L.R.B. at 905 (emphasis added). The Board's opinion further determined that all professors, associate professors, assistant professors, instructors, adjunct professors, adjunct associate professors, adjunct assistant professors, lecturers, professional librarians, research associates and guidance counselors were to be included in the bargaining unit of professional employees. *Id.* at 908. The Board's finding was based upon the conclusion that adjunct faculty members "are regular part-time professional employees whose qualifications and chief function, teaching, are identical with those of the full-time faculty." *Id.* at 905-06.

Excluded from the unit were deans and department chairmen, who were found to be supervisors, *id.* at 906; laboratory assistants who performed "merely technical functions," *id.* at 907; and admissions and academic counselors who do not perform "the intellectual and varied tasks contemplated . . . in Section 2(11) of the Act . . ." *Id.* at 908.

35. 195 N.L.R.B. 639 (1972). In *Adelphi University*, the Board included in the unit faculty members who had been elected to a personnel grievance committee

opinion. This rationale fortified the Board's denial of supervisory or managerial exemptions to full-time faculty. Subsequently, a majority of Board decisions denying the exemptions in faculty representation cases were based upon the rationales announced in *C.W. Post* and *Adelphi University*.³⁶

As demonstrated by its continued adherence to these rationales,³⁷ the Board desired to maintain the newly developed "status quo" criteria in faculty representation cases. However, the Supreme Court's decision in *Yeshiva*³⁸ and the determination that the university's faculty were managerial employees may serve to indicate that there can be no "status quo" in faculty representation cases.

III. FACTS OF THE CASE

Yeshiva University is a private, nonprofit institution of higher learning that operates five undergraduate and eight graduate schools on four campuses in New York City. In October 1974, the Yeshiva University Faculty Association filed a petition for certification to represent a bargaining unit composed of full-time faculty members at ten of the thirteen schools.³⁹ The trustees of the university, in opposition to the petition, contended that all of its faculty members were managerial personnel and therefore not employees within the meaning of the Act.⁴⁰ Between November 1974 and May 1975, hearings were conducted before a Board-ap-

which dealt with all issues concerning full-time faculty. The Board found no merit in the university's claim that committee members exercised supervisory authority because it believed the trustees sought only *advice* from the committee and the faculty had agreed to channel its collective advice through the committee. Thus, *Adelphi University* clarified the Board's position on "ultimate authority" in addition to advancing the rationale that authority is exercised in the faculty's own interest.

36. See, e.g., *Northeastern Univ.*, 218 N.L.R.B. 247 (1975); *University of Miami*, 213 N.L.R.B. 634 (1974); *Tusculum College*, 199 N.L.R.B. 28 (1972); *New York Univ.*, 205 N.L.R.B. 4 (1973); *Fordham Univ.*, 193 N.L.R.B. 134 (1971), *overruled*, 201 N.L.R.B. 1026 (1973).

37. See note 36 *supra*.

38. 444 U.S. 672 (1980).

39. The schools involved were Yeshiva College, Stern College for Women, Erna Michael College, Yeshiva Program, James Striar School of General Jewish Studies, Belfer Graduate School of Science, Ferkauf Graduate School of Humanities and Social Sciences, Wurzweiler School of Social Work, Bernard Revel Graduate School and Teacher's Institute for Women. *Id.* at 675 n.2.

40. See note 26 *supra*.

pointed officer.⁴¹ The case was subsequently heard on three levels. In order to maintain clarity, each decision will be discussed separately.

A. National Labor Relations Board Findings and Decision

During the hearings, the Board determined that the university is governed by a central administration and directed by a board of trustees. Members of the board of trustees, other than the President who acts as the university's chief executive, hold no other administrative positions within the university. The President is assisted by four vice-presidents responsible for student affairs, business affairs, academic affairs, and medical and science affairs. An Executive Council composed of deans and administrators from the several schools makes recommendations to the President and trustees with respect to various matters. Two other committees⁴² consisting of elected student and faculty representatives and the dean or director of each academic unit participate in the formulation of university-wide policies concerning such matters as teaching loads, salary scales, tenure, sabbaticals, retirement and fringe benefits. Faculty members, along with students and administrators, also sit on the Committee on Academic Priorities and Resource Allocation, organized for the purpose of providing long-range academic and fiscal priorities at Yeshiva. The committee is also empowered to re-evaluate the objectives of the schools of the university and to review class sizes, staffing patterns, physical facilities and tuition levels. Through these elected student-faculty advisory councils, *the faculty actively participates in university-wide governance*. The only university-wide faculty body is the Faculty Review Committee, composed of eight tenured faculty members elected from the various schools to adjust faculty grievances by informal negotiation and formal advisory recommendations to the President.

During the hearings, it was established that each program, school and college at Yeshiva enjoys substantial autonomy in formulating and implementing its own institutional, academic and professional policies. It was additionally determined that through formal and informal faculty meetings and committees at each

41. Section 3(b) of the Act, as amended, provides, in pertinent part: "The Board is also authorized to delegate to its regional directors its powers . . . to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election . . . and certify the results thereof. . . ." 29 U.S.C. § 153(b) (1976). *See also* note 3 *supra*.

42. The two other committees participating in university-wide governance were the Council of Graduate Schools and the Council of Undergraduate Schools.

school, *the members of the faculty effectively formulate, determine and implement major policies*⁴³ concerning student, faculty, academic and administrative matters.⁴⁴

Despite findings that the faculty at Yeshiva exercise substantial autonomy, the Board rejected the trustee's contention that all faculty members were managerial. Consistent with the rationales set forth in *C.W. Post Center* and *Adelphi University*, the Board concluded that the faculty were professional employees entitled to the benefits of collective bargaining. This conclusion was based upon the Board's determination that Yeshiva faculty participation in collegiate decision-making was "on a collective rather than individual basis . . . , exercised in the faculty's own interest rather than in the interest of the employer, and final authority rested with the board of trustees."⁴⁵

The Board found that the Yeshiva University Faculty Association was a labor organization within the meaning of the Act⁴⁶ and that a unit composed of full-time faculty was an appropriate bargaining unit.⁴⁷ In December 1975, the Board granted the Association's petition and directed an election.⁴⁸ Pursuant to the Board's direction, an election was held and the Faculty Association was

43. Testimony by one dean established that an estimated 98 percent of faculty recommendations from his school were approved and implemented by the central administration. 444 U.S. at 677 n.5.

44. Records of the hearings established that faculty members at each school determined and effectuated major policy concerning admissions, scholastic standards, curriculum, scheduling, grading systems, matriculation requirements, hiring, appointment and reappointment of faculty, promotion and tenure, starting salaries, salary increases, budgets and administrative requirements. 582 F.2d 686, 689-94 (2d Cir. 1978).

45. *Yeshiva University*, 221 N.L.R.B. at 1054 (1975).

46. The Act, as amended, provides:

the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5) (1976).

47. The bargaining unit approved by the Board included full-time faculty with the titles of professor, instructor, and any adjunct or visiting faculty member with such rank, department chairmen, division chairmen, senior faculty and assistant deans. The Board also found that "terminal" faculty, those who at the date of the election had received notice of termination or nonrenewal of appointment, or had reached mandatory retirement age or had given notice of intent to resign, were eligible to vote in the representation election if still employed at the date of election. 221 N.L.R.B. at 1056-57.

48. 221 N.L.R.B. at 1057.

certified as the exclusive bargaining representative of the employees in the unit.

Maintaining its original position that full-time faculty were exempt as managerial personnel, the university refused to bargain with the union. Consequently, an unfair labor practice proceeding was instituted in February 1977. The Board found the university to be acting in violation of sections 8(a)(1) and (5) of the Act⁴⁹ and ordered the university to bargain collectively with the union.⁵⁰ The university continued its refusal to bargain which resulted in the filing of a petition for enforcement of the Board's order with the Court of Appeals for the Second Circuit.

B. Court of Appeals Findings and Decision

The second circuit denied the Board's petition and refused to enforce the order, stating that "without any analysis the Board found that Yeshiva's full-time faculty were neither supervisors nor managerial personnel simply by stating that the substantial authority of the faculty was wielded in their capacity as professionals and by invoking three doctrines promulgated in earlier Board rulings."⁵¹

The court sharply criticized the Board for failing to appropriately analyze the facts⁵² surrounding the university's claim that the faculty exercised sufficient authority to bring them within the managerial exemption defined in *Bell Aerospace*.⁵³ According to the court, the Board's failure to acknowledge the degree of control and authority retained by Yeshiva's faculty resulted in the Board's application of "unjustified [and] arbitrary standards"⁵⁴ in denying a supervisory or managerial exemption.

49. Section 8(a)(1) of the Act provides that it is unfair labor practice for an employer to interfere with, restrain or coerce employees in their right to organize and to engage in collective bargaining. Section 8(a)(5) provides that refusal by employers to bargain collectively with representatives of employees is also unfair labor practice. See 29 U.S.C. § 158(a)(1) and (a)(5) (1976).

50. 231 N.L.R.B. 597 (1977), *rev'd*, 582 F.2d 686 (2d Cir. 1978).

51. 582 F.2d 686, 696 (2d Cir. 1978), *aff'd*, 444 U.S. 672 (1980). See note 36 *supra* and accompanying text.

52. In reviewing the rulings of the Board-appointed officer, the Board made no findings of fact regarding Yeshiva University. See 444 U.S. at 679; 582 F.2d at 702; 221 N.L.R.B. at 1053. See also note 54 *infra*.

53. See note 26 *supra*.

54. 582 F.2d at 703. The court believed that since the Board had made no findings of fact, an inquiry into the record was necessary. *Id.* at 702. Upon an examination of the record, the court found that the authority exercised by the Yeshiva faculty compelled a finding that faculty members were managerial employees under the *Bell Aerospace* decision. *Id.* at 703. Thus, the court determined that the application of "unjustified" and "arbitrary standards" was a result of the Board's failure to make findings of fact and apply faculty authority to the principles of *Bell Aerospace*.

Upon a closer examination of the facts, the court found that as a result of the broad power exercised by Yeshiva faculty in the formulation and implementation of major university policy, the faculty members were, "in effect, substantially and pervasively operating the enterprise."⁵⁵ The second circuit then ruled, regardless of the rationales advanced by the Board that, "the facts compel the conclusion under long established standards that the full-time faculty has managerial status."⁵⁶

On petition for writ of certiorari from the Board, the United States Supreme Court noted probable jurisdiction and granted certiorari.⁵⁷ Subsequently, the Supreme Court affirmed the judgment of the second circuit⁵⁸ and signaled a change in policy regarding labor relations in private non-profit educational institutions.

IV. SUPREME COURT ANALYSIS

In announcing its affirmation of the second circuit's ruling that Yeshiva faculty members were managerial employees and thus excluded from the Act's coverage, the *Yeshiva* Court⁵⁹ initiated its analysis with a discussion of the Board's initial exercise of jurisdiction over private, nonprofit educational institutions and the development of the three rationales announced in *C.W. Post Center* and *Adelphi University*.⁶⁰ The Court criticized these rationales, stating

without explanation, the Board initially announced . . . [the] rationales for faculty cases, then quickly transformed them into a litany to be repeated in case after case: (i) faculty authority is collective, (ii) it is exercised in the faculty's own interest rather than in the interest of the university, and (iii) final authority rests with the board of trustees.⁶¹

55. *Id.* at 698.

56. *Id.* at 703 (emphasis added). See note 54 *supra*.

57. 440 U.S. 906 (1979).

58. 444 U.S. at 673.

59. Justice Powell delivered the opinion of the Court, in which Chief Justice Burger, and Associate Justices Stewart, Rehnquist, and Stevens joined.

60. See notes 1-36 *supra* and accompanying text.

61. 444 U.S. at 684-85 (citations omitted). The Court's condemnation of the Board's lack of explanation in announcing the three rationales is not without support. In *C.W. Post Center*, the Board simply stated that it was their "view" that the collectivity of faculty decisionmaking and the power of ultimate authority reserved by administrators did not make faculty members supervisors within the meaning of the Act; nor did the Board cite *any* precedent for their "view." 189 N.L.R.B. at 905. Again in *Adelphi University*, the Board failed to cite a single case as precedent to support the "interest of the faculty" rationale, resorting only to *C.W. Post*

The Court recognized, as did the Board, that Yeshiva faculty were professional employees within the meaning of the Act,⁶² and as such, *may* be exempted from the Act as either supervisors who exercise independent judgment in the interest of their employer⁶³ or as managerial employees involved in formulation and implementation of employer policy.⁶⁴ The Court determined that an application of the managerial exclusion, rather than the supervisory exclusion, would be appropriate in *Yeshiva*. This determination was based upon the Court's belief that an analysis of the faculty's supervisory status was unnecessary due to the Court's approval of the second circuit's application of the managerial exclusion.⁶⁵

Center as precedent for advancing the "collective authority" and "ultimate authority" rationales. 195 N.L.R.B. at 648.

62. See note 22 *supra*.

63. See note 25 *supra*. As established by several Board decisions, classification of employees as professionals under § 2(12) of the Act does not necessarily preclude the supervisory exemption.

In *Sutter Community Hosps. of Sacramento*, 227 N.L.R.B. 181 (1976), professional registered nurses with authority to interpret and direct patient care, assign duties and evaluate performance of other nursing personnel were excluded as supervisors from a bargaining unit comprised of other professional nurses. In a similar case, *Presbyterian Medical Center*, 218 N.L.R.B. 1266 (1975), 18 registered nurses appointed as "head nurses" for patient care units were excluded as supervisors as their duties included authority to assign work and evaluate other nurses within their respective care units, effectively recommend salary increases, approve vacations and leaves of absence, take disciplinary actions and settle grievances.

In the educational context, department chairmen and directors of various intradepartmental programs at the University of Vermont who performed supervisory functions of hiring full and part-time faculty, setting salaries, assigning and scheduling courses, preparing and allocating budgets, and administering verbal and written discipline were classified as supervisors by the Board. *University of Vermont*, 223 N.L.R.B. 423 (1976).

64. See note 26 *supra*. The Board has repeatedly excluded those professional employees found to be managerial under *Bell Aerospace*. In *Neighborhood Legal Servs.*, 236 N.L.R.B. 1269 (1978), an attorney employed as an "assistant trainer" by a nonprofit corporation providing legal services to indigent clients was found to be a managerial employee and excluded from a bargaining unit of other legal professionals. The Board determined that, in addition to training, assisting and directing other attorneys and legal assistants, the affected attorney's authority to review overall programs and implement overall goals of the employer justified the managerial exclusion. 236 N.L.R.B. at 1269.

Similarly, a clinical medical specialist assigned to a new hospital department was subject to the managerial exemption as the degree of responsibility exercised in the development of new care methods, policies and procedures closely aligned her with management interest. Notably, the clinical specialist was a *subordinate* of the director and associate director of nursing who were classified only as supervisors. *Sutter Hospitals*, 227 N.L.R.B. at 192-93.

65. 444 U.S. at 682. The Court also stated that the supervisory status of the faculty need not be addressed as the second circuit had not ruled on that issue. *Id.* Although the second circuit made no determination of the issue, it thoroughly analyzed the application of the supervisory exemption as it applied to Yeshiva's faculty. The second circuit reasoned that the faculty did *not* clearly fit into the statutory definition of a supervisor as the section requires that an *individual* pos-

A. *Managerial Exclusion As Applied to Yeshiva University*

In applying the managerial exclusion, the Court re-examined the definition of a managerial employee as it related to the authority exercised by Yeshiva faculty members. Noting that the *Bell Aerospace* decision provided judicial approval of the Board's policy regarding the exemption,⁶⁶ the Court summarized the definition of managerial employees as "those who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.'"⁶⁷

According to the Court, in order to fall within the managerial exemption, employees must (i) exercise discretion within or independently of established employer policy; and (ii) be aligned with management.⁶⁸ Thus, prior to classifying an employee or a group of employees as managerial, it must be established that those employees are in fact performing functions within the two prongs of the *Bell Aerospace* test. As noted by the Court, the Board has never established any firm criteria for determining when employees are aligned with management. However, the Court, broadly interpreting the Board's decision in *Sutter Hospitals*,⁶⁹ determined that an employee "may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy."⁷⁰

In *Yeshiva*, the Board argued that faculty members failed to meet the latter prong of the *Bell Aerospace* test because as pro-

sess one or more of the enumerated powers and faculty supervisory authority is in fact exercised collectively. See note 25 *supra*. Additionally, since supervisory authority must be exercised with respect to *employees*, 29 U.S.C. § 152(11) (1976), the faculty also failed to meet this requirement since their supervisory authority was directed to students. However, as the second circuit noted, this argument was weakened considerably upon recognition of the fact that full-time faculty exercised supervisory authority over part-time faculty. 582 F.2d at 699.

Finally, the second circuit concluded that the technicalities of faculty supervisory authority need not be resolved as the definition of "managerial employee" did not require the exercise of "individual" authority. See note 26 *supra*. Consequently, the second circuit determined that the *Bell Aerospace* managerial exemption was applicable to Yeshiva University faculty members. 582 F.2d at 699-700.

66. See note 26 *supra*.

67. 444 U.S. at 682 (quoting *Bell Aerospace*, 416 U.S. at 288). See also note 26 *supra*.

68. 444 U.S. at 683. See also *Bell Aerospace*, 416 U.S. at 286-87, and note 26 *supra*.

69. See note 64 *supra*.

70. 444 U.S. at 683.

fessional employees, faculty members were neither “expected to conform to management policies [nor] judged according to their effectiveness in carrying out those policies.”⁷¹ Additionally, the Board contended that the university *expected* faculty members to exercise “‘independent professional judgment’ while participating in academic governance.”⁷² According to the Board, this exercise of independent professional judgment gives the *appearance* that faculty exercise managerial authority when they actually only perform routine professional duties.⁷³ Thus, the Board concluded that the exercise of independent professional judgment negated a finding that the faculty members were aligned with management because the university *expected* the faculty to “pursue professional values rather than institutional interests.”⁷⁴

The Supreme Court was not convinced that the exercise of independent professional judgment removed the faculty from the managerial exclusion.⁷⁵ At first glance, it appears that the Court failed to consider the language of prior Board decisions⁷⁶ in its

71. *Id.* at 684.

72. *Id.* The Board has previously held that performance of routine job duties by professional employees necessarily involves a high degree of independent professional discretion and judgment which, by its very nature, effectuates or implements employer policy. However, this exercise of “independent professional judgment” does not automatically confer managerial status upon those professional employees. Thus, in *General Dynamics*, 213 N.L.R.B. 851 (1974), the Board denied managerial status to senior engineering and administrative personnel who routinely exercised discretion in employee work assignment and direction having a direct bearing on employer policy. The denial of managerial status was based upon the Board’s determination that such discretion was grounded solely upon professional competence and responsibility and did not involve the exercise of managerial authority. *Id.* at 857-59.

The Board, citing *General Dynamics*, reiterated its position with the opposite result in *Sutter Hospitals*, see note 64 *supra*, when it stated that “professional employees are not the same as management employees merely because their professional competence necessarily involves a consistent exercise of discretion and judgment in a manner which may affect an employer’s business direction or established policy.” 227 N.L.R.B. at 193. However, the Board did find that the professional employee involved in *Sutter Hospitals* was exercising managerial authority in that the work performed went “beyond that incidental to professional training and experience and . . . actually involve[d] the formulation of policies and procedures. . . .” *Id.*

73. 444 U.S. at 683-84.

74. *Id.* at 684.

75. *Id.* at 686. The Court observed that the Board did not cite any cases directly applying an “independent professional judgment” standard. The only case cited by the Board in support of the contention that the exercise of independent professional judgment necessarily removed the faculty from the managerial exclusion was that of *NLRB v. Fullerton Publishing Co.*, 283 F.2d 545, 549 (9th Cir. 1960), in which a news editor could be deemed nonsupervisory as he did not “direct” employees within the meaning of the exemption. See note 25 *supra*. Because the case was not applicable to *Yeshiva* as it involved only the *supervisory exemption*, the Court chastized the Board for incorrectly citing *Fullerton Publishing Co.* as authority in a managerial context. 444 U.S. at 687 n.24.

76. See note 72 *supra*.

haste to condemn the Board for attempting to create a new "independent professional judgment" criterion. But a closer analysis of Justice Powell's reasoning reveals an underlying dissatisfaction with the Board's inconsistent application of the managerial exemption policy to university faculties.⁷⁷

The rationale for dismissing the Board's contention that the exercise of independent professional judgment precluded an application of the managerial exemption hinged upon the Court's interpretation of previous Board policy. While recognizing that the Act's exclusion of managerial employees and inclusion of professional employees created somewhat of a conflict,⁷⁸ the Court reasoned that prior Board decisions had excluded professionals as managerial employees without determining whether decision-making was primarily an exercise of independent professional judgment or managerial authority.⁷⁹ The Court noted that in *Sutter Hospitals* the Board had excluded professional employees who relied upon professional judgment to exercise managerial authority,⁸⁰ thus giving rise to the inference that the Board itself had "implicitly rejected the contention that decisions based on professional judgment cannot be managerial."⁸¹ The Court determined that an application of an independent professional criterion would, by implication, overrule Board precedent and "result in the indiscriminate recharacterization . . . of professionals working in supervisory and managerial capacities"⁸² as employ-

77. 444 U.S. at 684-85. Additionally, the Court chastized the Board for suggesting that an application of an independent professional judgment criterion would be appropriate in *Yeshiva* since the Board itself had not relied on such a rationale in its own decision. *Id.*

78. The Court explained that tension between the exclusion of managerial employees and the Act's inclusion of professional employees is created by the fact that professional employees continue to rely on their special skills and training in exercising managerial authority. This simultaneous exercise of independent professional judgment and managerial authority creates a conflict in determining whether these employees should be classified as professional employees entitled to the protections of the Act or excluded as managerial employees under *Bell Aerospace*. *Id.* at 686-87.

79. See *Neighborhood Legal Servs.*, 236 N.L.R.B. 1269 (1978), and note 64 *supra*.

80. See note 64 *supra*.

81. 444 U.S. at 687.

82. *Id.* The Court found an additional flaw in the Board's analysis of the faculty's exercise of independent professional judgment. As previously referenced, see text accompanying note 71, the Board relied upon the premise that faculty members were not expected to conform to university policies to advance the argument that faculty were not aligned with management. Justifiably, the

ees covered by the Act.

The Court was dissatisfied with the Board's inconsistent application of established policy regarding professionals and the managerial exclusion. This dissatisfaction was manifested in the Court's application of the managerial exemption to the Yeshiva faculty in a manner consistent with established Board policy, something which the Board itself had failed to do in this and other faculty representation cases.⁸³ The Court determined that the controlling consideration in *Yeshiva* was the extent of authority exercised by the faculty.⁸⁴ In an attempt to promote consistent implementation of prior policy, the Court noted that "the faculty at Yeshiva University exercise authority which in any other context unquestionably would be managerial."⁸⁵ Finally, the Court concluded that "[t]o the extent the industrial analogy⁸⁶ 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."⁸⁷

Upon first glance, Justice Powell's use of an industrial analogy appears incongruous within a university context analysis.⁸⁸ How-

Court criticized the Board's reliance on this statement by pointing out that "a conformity to management policy" test was untenable since managerial employees, according to the first prong of the *Bell Aerospace* test, necessarily exercise discretion within or *independently* of employer policy. See note 68 *supra* and accompanying text.

83. See note 36 *supra*.

84. 444 U.S. at 686. The Court's determination of this "controlling consideration" was *completely* consistent with both judicial and Board policy regarding the managerial exclusion. In *Palace Laundry Dry Cleaning Corp.*, 75 N.L.R.B. 320 (1947), the Board stated that "[t]he determination of 'managerial,' like the determination of 'supervisory,' is to some extent necessarily a matter of the *degree* of authority *exercised*." *Id.* at 323 n.4 (emphasis added). In *N.L.R.B. v. Bell Aerospace*, 416 U.S. 267 (1978), the Court established that "the specific job title of the employees involved is not in itself controlling . . . the question whether particular employees are 'managerial' must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management." *Id.* at 290 n.19.

These statements are not to be interpreted as substitutes or separate tests for the determination of managerial status. They are merely *factors* to be considered in application of the *Bell Aerospace* test.

85. 444 U.S. at 686. As indicated by the facts of the case, Yeshiva faculty members effectively exercised authority in formulating and implementing major university policy. See notes 41-44, 52-53 *supra* and accompanying text. See also note 103 *infra* and accompanying text. Within the industrial context the exercise of this type of authority has been unanimously deemed supervisory or managerial. See notes 25 and 26 *supra*.

86. Justice Powell's reference to an industrial analogy pertains to the historical fact that the Act and its various exemptions were designed to accommodate the employer-employee relationship which exists in the hierarchical authority structure found in private industry. 444 U.S. at 680. See also *Adelphi University*, 195 N.L.R.B. at 634, 648 (1972).

87. 444 U.S. at 686.

88. An industrial analogy appears inappropriate because private, nonprofit institutions have not traditionally been viewed as "industries" in that they are not

ever, reference to an industrial analogy is *not* inappropriate in view of the Board's failure to analyze the factual implications of the extent of authority exercised by university faculties. This failure resulted in the development of the "collective authority," "ultimate authority," and "interest of the faculty" rationales—rationales which, as will be seen, are inconsistent with previous exemption policy. Thus, an industrial analogy⁸⁹ is useful in the consistent application of managerial exemption policy in faculty representation cases.

Focusing on the invalidity of the "interest of the faculty" rationale, the Court did not discuss the "collective authority" or "ultimate authority" rationales in any depth. However, for purposes of presenting a clear understanding of the *Yeshiva* decision, the Court's treatment of each rationale will be discussed separately.

B. The "Collective Authority" Rationale

The lack of in-depth discussion regarding the "collective authority" rationale cannot be viewed as a failure by the Court to properly address Board rationale. Rather, it was the result of the Board's abandonment of this rationale in its appeal before the Supreme Court.⁹⁰

Notwithstanding this abandonment, the Court concluded that the "collective authority" rationale was, as with the independent professional judgment criterion proposed by the Board, "flatly inconsistent with [the Board's] precedents."⁹¹ This conclusion is not unreasonable in light of the inconsistency of prior Board decisions which held that the exercise of collective authority *was* sufficient grounds for granting an exclusion.⁹² Additionally, no

considered to be profitmaking enterprises. But as the Board itself recognized in *Cornell*, colleges and universities have increasingly become involved in a number of commercial activities and, in fact, realize commercial profits from their operations. 183 N.L.R.B. at 332.

89. See notes 86 and 88 *supra*.

90. 444 U.S. at 685 n.20. Indeed, the Court indicated that the Board no longer claimed the "collective authority" and "ultimate authority" were legal rationales for consideration in *Yeshiva*. Rather, the Board argued that the rationales were facts which supported the contention that the faculty exercised authority only to serve their own interests.

91. 444 U.S. at 685.

92. See *Florida Southern College*, 196 N.L.R.B. 888, 889 (1972) (dean who retained faculty position excluded from bargaining unit because he sat on a *committee* which made effective recommendations regarding the status of faculty members); *Sida of Hawaii, Inc.*, 191 N.L.R.B. 194, 195 (1971) (individuals of em-

legislative history exists which supports the Board's reliance on the "collective authority" rationale.⁹³ Indeed, neither the second circuit nor the Supreme Court discovered *any* precedent for the rationale, a finding substantiated by the failure of the Board to cite even one case upon which to base its rationale.⁹⁴

As indicated by the second circuit and impliedly approved by the Supreme Court, in the absence of support for the rationale, a more realistic approach to the exercise of collective authority is to exclude those individuals who *effectively* exercise authority through groups or committees.⁹⁵ Indeed, the reasonableness of this approach becomes evident upon consideration that collective consultation and authority is the norm in modern corporate and institutional decisionmaking.⁹⁶

Regardless of the norms of modern corporate decisionmaking, the fatal flaw in denying *managerial* status based upon a "collective authority" rationale is the fact that the Board has made no distinction between individual and collective exercise of authority in the application of the managerial exclusion in non-university contexts.⁹⁷ This fact, coupled with the Board's inconsistent application of the rationale and failure to cite any supporting precedent in *C.W. Post Center* or subsequent cases, led the Court to the conclusion that the "collective authority" rationale was neither tenable nor logical.⁹⁸

C. The "Ultimate Authority" Rationale

As with the "collective authority" rationale, the Board did not advance the "ultimate authority" rationale as a basis for denying exemption to the Yeshiva faculty⁹⁹ even though it was one of the

ployee-stockholder *group* excluded from bargaining unit as they were found to have an effective voice in determining company policy as well as terms and conditions of their employment); *Red and White Airway Cab Co.*, 123 N.L.R.B. 83, 85 (1959) (one hundred thirteen employee-stockholders excluded from bargaining unit because their collective authority provided them an effective voice in the formulation and determination of corporate policy).

93. See S. REP. NO. 105, 80th Cong., 1st Sess., 3-5 (1947); H.R. REP. NO. 245, 80th Cong., 1st Sess., 13-18 (1947); H.R. REP. NO. 510, 80th Cong., 1st Sess., 35-36 (1947).

94. 189 N.L.R.B. at 905. The Board's key statement in *C.W. Post Center*, which denied supervisory or managerial status based upon the exercise of collective authority, was noticeably devoid of *any* supporting precedent. See also note 61 *supra*.

95. 582 F.2d at 699.

96. 444 U.S. at 699. (citing N. JACOBY, CORPORATE POWER AND SOCIAL RESPONSIBILITY 58 (1973); H. OLECK, NON-PROFIT CORPORATIONS AND ASSOCIATIONS, § 183, (1956)).

97. See note 92 *supra*.

98. 444 U.S. at 685-86 nn.21 & 22.

99. See note 90 *supra*.

grounds upon which the Board relied in its own decision.¹⁰⁰ Again, the Court indicated that the "ultimate authority" rationale was inconsistent with Board precedent. In rejecting the rationale, the Court stated that the concept of "ultimate authority" was not viable for support of denying supervisory or managerial status as "every corporation vests that power in its board of directors."¹⁰¹

The reasoning behind the Court's conclusion is illustrated in the second circuit's opinion. In the lower court's view, the "ultimate authority" rationale is untenable in that although *every* corporation is subject to the ultimate authority of the board of directors, this fact "has never precluded a finding that there are managerial or supervisory employees in the corporation."¹⁰² It follows that if the "ultimate authority" rationale was to be *consistently* relied upon, there would be virtually no situation where the exemptions could be applied since every corporate employee who exercises managerial or supervisory authority is subject to the ultimate authority of a board of directors.

In any event, the ultimate authority reserved by trustees in the university context, and especially at Yeshiva, has no appreciable effect on university governance as authority is *delegated* to faculty and administrators by the trustees.¹⁰³ Thus, it is evident that the concept of "ultimate authority" can have no effect, legally or logically, on the determination of managerial or supervisory status.

D. The "Interest of the Faculty" Rationale

The Court sharply criticized the "interest of the faculty" rationale when it indicated that the Board had merely *assumed* that Yeshiva faculty members, in exercising independent professional judgment, acted solely in their own interest and not in the interest of their employer. Pointing out that the Board had failed to make any findings of fact,¹⁰⁴ the Court determined that an examination of the record disclosed no basis upon which the Board

100. 221 N.L.R.B. at 1054.

101. 444 U.S. at 685 n.21.

102. 582 F.2d at 701.

103. For a discussion of the diffused authority of university trustees and the unique governance structure of educational institutions, see McHugh, *Collective Bargaining With Professionals in Higher Education: Problems in Unit Determinations*, 1971 WIS. L. REV. 55 (1971).

104. 444 U.S. at 679.

could reasonably conclude that faculty and university interests were “distinct, separable entities.”¹⁰⁵ Instead, the Court found that a factual analysis of the faculty’s crucial role in university governance¹⁰⁶ indicated that “the faculty’s professional interest . . . cannot be separated from those of the institution.”¹⁰⁷

The Court’s conclusion is clarified and supported by Justice Powell’s comparison of university and faculty interests. As explained by the Court, the university’s interests lie in establishing and maintaining a quality educational institution. Accordingly, the university’s primary interest is academic excellence, the accomplishment of which is dependent upon the formulation and implementation of sound academic policies through faculty decisionmaking.¹⁰⁸ Correspondingly, faculty professional interests, by nature, also concern academic excellence and the advancement of scholastic standards. From this comparison, it is clear that a community of interests exists between the university and faculty members.¹⁰⁹

In addition to this community of interest, the Court determined that the university, *qua* employer, necessarily depends upon faculty exercise of professional judgment in establishing major policy. In fact, “[t]he university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of university policies.”¹¹⁰

As a result of the comparison of interests and university-faculty interdependence analysis, the Court concluded that “there can be no doubt that the quest for academic excellence and institutional distinction is a ‘policy’ to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal.”¹¹¹ This “policy” to which faculty are expected to adhere, coupled with the factual implications that faculty members effectively formulate and implement major university pol-

105. *Id.* at 688.

106. *See* notes 42-44, 55 *supra* and 114 *infra* and accompanying text.

107. 444 U.S. at 688.

108. *Id.* (citing K. MORTIMER & T. MCCONNELL, *SHARING AUTHORITY EFFECTIVELY* 23-24 (1978)).

109. The Court was particularly unconvinced by a claim that salary and benefit issues resulted in a divergence between faculty and university interests. Conversely, the Court asserted that “there is arguably a greater community of interest on this point . . . because the nature and quality of a university depend so heavily on the faculty attracted to the institution.” 444 U.S. at 688-89 n.27, (citing B. RICHMAN & R. FARMER, *LEADERSHIP, GOALS AND POWER IN HIGHER EDUCATION* 258 (1974); D. BORNHEIMER, G. BURNS & G. DUMKE, *THE FACULTY IN HIGHER EDUCATION* 174-75 (1973)).

110. 444 U.S. at 689.

111. *Id.* at 688.

icy,¹¹² bring the Yeshiva faculty squarely within the *Bell Aerospace* definition of managerial employees. Thus, the Board's contention that faculty members acted solely in their own interest was undermined by the reasoning of the Court.¹¹³

Aside from Justice Powell's analysis, there are additional indications that the "interest of the faculty" rationale is an unsupported theory in *Yeshiva* and other factually similar cases. An examination of the *Yeshiva* facts establishes that faculty and university interests are inextricably interwoven. An analysis of the *extent* of authority exercised by faculty members reveals that their role in the governance structure was not merely advisory. Rather, the record establishes that faculty decisions and formulation of major university policy proved definitive in university governance.¹¹⁴

The inapplicability of the "interest of the faculty" rationale is perhaps clarified by a brief examination of the university-faculty relationship as set forth in one authority.¹¹⁵ As explained by the author,

[t]he faculty, by the very nature of the educational process in institutions of higher education, participates in decision making which in private industry would normally be regarded as a management prerogative The university is, ideally, a professional community in which common educational interests supersede all potential divisions between the faculty and administration. The university's unique set of goals (education, research and service) is achieved only by a series of specialist communities working together. . . . Thus, there is no sharp dividing line between the community of administrators and the community of faculty, for both have the common goal of striving to further the institution as a house of learn-

112. See notes 42-44, 55 *supra* and 114 *infra* and accompanying text.

113. See notes 71-74 *supra* and accompanying text.

114. The faculty's effectiveness in formulating and effectuating major policy is evidenced by the record in *Yeshiva*. For example, the dean of Yeshiva College testified that he felt compelled to execute decisions of the Faculty Assembly which had authority to establish admissions and scholastic standards, grading systems and other academic policy. The dean further noted that during his 16 years as dean, the University President had never vetoed a Faculty Assembly decision.

At the Teacher's Institute for Women, applicants for teaching positions were not hired if any faculty member expressed the slightest objection. In one instance, the faculty effectively overruled the dean's decision to release a faculty member for budgetary reasons.

Faculty members at Belfer Graduate School retain jurisdiction over curriculum, department formulation and class size, and financial policies. Hiring, promotion, tenure, and nonrenewal of appointment are determined by department faculty members. Additionally, the faculty at Belfer successfully removed the dean in 1968. See 582 F.2d at 690-94.

115. Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. REV. 63 (1973).

ing.¹¹⁶

This principle of "shared authority" negates the proposition that faculty members act primarily in their own interest because faculty, administrators and trustees have joint authority and responsibility for the governance of the university.¹¹⁷ It can readily be seen that reliance on the "interest of the faculty" rationale results in a "strained [and] artificial separation" of faculty and university interests.¹¹⁸

V. THE DISSENT

Supporting the Board's rationales and conclusion that faculty members were not managerial employees, Justice Brennan's dissent¹¹⁹ found little merit in the reasoning advanced by the Court. Not surprisingly, the language of the dissent closely resembled that of the Board's in denying supervisory or managerial status to faculty members.

The tone of the dissenting opinion strongly indicates the minority's dissatisfaction with the Court's determination that faculty interests cannot be separated from those of the university.¹²⁰ Indeed, a closer reading of the dissent reveals that the dissenting justices believed the Court's analysis suffered from the majority's failure to recognize that faculty influence in university governance was not a result of the exercise of any managerial authority but consisted only of collective professional *advice*.¹²¹ As explained by Justice Brennan, the administration merely solicited faculty *advice*, which in turn was offered by the faculty as a means by which to serve its own interests.¹²² Consequently, administrators deferred to faculty recommendations only when the recommendations were deemed consistent with administrative needs and policy. Based on the foregoing, the dissent concluded, as the Board had, that faculty authority was collectively exercised and always subject to the ultimate decisionmaking authority of administrators and trustees.¹²³

116. *Id.* at 68.

117. For an excellent discussion of the concept of "shared authority," see *Statement on Government of Colleges and Universities*, 52 A.A.U.P. BULL. 375 (1966).

118. 582 F.2d at 701.

119. 444 U.S. at 691 (Brennan, J., dissenting, joined by White, Marshall, and Blackman, J.J.).

120. *Id.* at 694-704.

121. The dissent apparently believed the Court had completely misinterpreted the characteristics and the faculty's exact role within the decisionmaking process. *Id.* at 696. Contrary to the Court's determination that the concept of shared authority prevailed at Yeshiva, the dissent maintained that the university's authority structure was primarily hierarchial in nature. *Id.* at 697.

122. *Id.* at 697.

123. *Id.* at 698.

The assertion that faculty participation in university governance is merely advisory seems rather simplistic and unpersuasive in light of the factual implications presented in the case. Apparently, the dissenting justices did not fully consider the actual *effect* of faculty decisions and policy formulation at Yeshiva.¹²⁴ Ignoring factual findings that both university and faculty interests in maintaining a quality institution and achieving academic excellence are accomplished by sharing authority,¹²⁵ the dissent seemingly chose to disregard the established policy that employees who formulate and effectuate management policies are, as set forth in *Bell Aerospace*,¹²⁶ managerial employees.

The dissent also contended that the faculty members were afforded authority over academic policies such as hiring, promotion and decisions traditionally considered managerial, and "such discretion does *not* constitute an adequate basis for the conferral of managerial or supervisory status."¹²⁷ The obvious invalidity of this statement is that its effect would operate to completely emasculate the supervisory and managerial exemptions as the authority deemed "inadequate" by the dissent is precisely the type of authority which, when exercised effectively, is deemed supervisory or managerial.¹²⁸

The dissent states that the *Yeshiva* decision would operate to destroy the Act's deterrent value in protecting professional teachers from unreasonable administrative action.¹²⁹ The dissenting justices concluded that the majority's decision would ultimately result in "strikes or other forms of economic warfare"¹³⁰ on the nation's campuses. The defect of these criticisms is that they are fraught with the same misinterpretations as those of the Board: the failure to recognize that the relationship between faculty and university is that of a *community of interest*. The dissent's arguments may be appropriate for a number of universities where, un-

124. See notes 41-44, 52-53 and 114 *supra* and accompanying text.

125. See note 108 *supra* and accompanying text.

126. See note 26 *supra*.

127. 444 U.S. at 698 n.8 (emphasis added). The dissent believed the faculty's authority was analogous to "hiring-hall agreements" in which the employees' union is given the exclusive right to recommend personnel to the employer. *Id.* The dissent fails to recognize that in addition to exercising authority with respect to hiring, faculty members were given discretion in establishing a number of other university policies. See notes 42-44 *supra* and accompanying text.

128. See notes 25 and 26 *supra*.

129. 444 U.S. at 705.

130. *Id.*

like Yeshiva, significant tensions exist between faculty professional goals and administrative economic priorities. However, the record in the present case clearly indicated that these types of conflicts do not exist at Yeshiva. Given the dissent's own belief that university administrations strive to defer to faculty professional interests,¹³¹ the likelihood of incidents of labor-management strife on the nation's campuses seem patently remote.

VI. IMPACT OF THE CASE

While only practical application of the guidelines delineated by the Court will demonstrate the actual impact of the decision, a close analysis reveals that the decision was not intended to result in the reclassification of all university professionals as supervisors or managers as suggested by the dissent.¹³² Likewise, whether future reliance on the *C.W. Post Center* and *Adelphi University* rationales will be permitted is questionable. Although the *Yeshiva* decision did not expressly preclude an application of the "collective authority," "ultimate authority" or "interest of the faculty" rationales in future faculty representation cases, the language of the opinion strongly suggests that the Court does not consider them sufficient grounds upon which the Board may deny supervisory or managerial status. Conversely, the opinion does not purport to establish a set test or particular rationale to be applied in determining faculty status for collective bargaining purposes. Rather, the opinion specifies, consistent with prior Board policy,¹³³ that a professional employee will be deemed aligned with management and classified exempt only if that professional employee is found to be performing duties beyond those incidental to similarly situated professionals.¹³⁴ This conclusion clearly indicates that the key factor, to be considered on a case-by-case basis in future faculty representation cases, is the extent of authority exercised by faculty members in the formulation and implementation of university policy.¹³⁵ Thus, when such authority is granted to faculty members, whether expressly granted or impliedly conferred through consistent deference to faculty advice, those faculty members will be found to be performing duties beyond those incidental to similarly situated faculty members and will be deemed aligned with management and classified as exempt.¹³⁶

131. *Id.* at 697.

132. See notes 129-30 *supra* and accompanying text.

133. See notes 64 and 72 *supra*.

134. 444 U.S. at 690.

135. See note 84 *supra* and accompanying text.

136. See note 134 *supra*.

Perhaps the most significant indication of the intended impact of *Yeshiva* is evidenced in the closing footnote of the opinion.¹³⁷ The footnote unmistakably qualifies the decision by stating that it is meant only to provide a *starting point* for analysis in determining whether university faculty members exercise the type of authority sufficient to bring them within the exemptions.¹³⁸

The underlying theme of the *Yeshiva* decision, as previously discussed, is the Court's dissatisfaction with the Board's inconsistent and cursory application of established exemption policy to university faculties.¹³⁹ While recognizing that the Act was specifically designed to cope with labor relations in an industrial context, the Court did not believe that the unique characteristics of the employer-employee relationship in universities justified a departure from these policies.

VII. CONCLUSION

A realistic interpretation of the opinion suggests that the Board must alter its cursory rationales and methods for determining the status of faculty members in appropriate bargaining unit composition. Thus, the decision can be seen as a redirection of Board analysis to effectuate consistent application of established criteria for the determination of managerial status. In any event, the opinion leaves no doubt that the Board is now compelled to engage in meaningful analysis¹⁴⁰ that can only be viewed as befit-

137. 444 U.S. at 690-91 n.31.

138. See notes 25 and 26 *supra*. The Court noted that

other factors not present [in *Yeshiva*] . . . may enter into the analysis in other contexts. . . . There thus may be institutions of higher learning unlike *Yeshiva* where the faculty are entirely or predominately nonmanagerial. There also may be faculty members at . . . like universities who properly could be included in a bargaining unit. It may be that a rational line could be drawn between tenured and untenured faculty members, depending upon how a faculty is structured and operates.

444 U.S. at 690-91 n.31.

139. See note 77 *supra*. See also notes 25 and 26 *supra*.

140. The lower court's reversal of the Board's *Yeshiva* decision was upheld on grounds that the Board's opinion failed to state relevant findings of fact and was devoid of factual analysis. 444 U.S. at 673. Citing *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978), the Court reiterated that it "accord[s] great respect to the expertise of the Board when its conclusions are rationally based on articulated facts and consistent with the Act. In this case, we hold that the Board's decision satisfies neither criterion." 444 U.S. at 691.

See also 5 U.S.C. § 557(c)(A)-(B) (1976), which provides in pertinent part:

The record shall show the ruling on each finding, conclusion, or exception

ting a governmental agency charged with the responsibility of administering national labor policy.

VALERIE A. MOORE

presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

According to K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 16.03 (3d ed. 1972), the policy behind the above requirements is to 1) facilitate judicial review of administrative proceedings; 2) avoid judicial usurpation of administrative functions; 3) assure careful administrative consideration; 4) aid parties in planning cases for rehearing and judicial review; and 5) keep administrative agencies within their jurisdictions.