

Private College and University Faculty: Fish or Fowl/Management or Union?

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Abstract

The question of whether private sector college and university faculty are entitled to union representation under the National Labor Relations Act (NLRA) remains a thorny question in academic employee relations. Are private sector faculty actually “managers” defined under the NLRA or are they employees simply taking direction from upper management in the execution of their duties? The National Labor Relations Act covers the right of employees to organize unions and engage in concerted activity for the purpose of collective bargaining with the employer and to bargain any issues that involve wages, hours and conditions of employment. This paper will look at how the issues of curriculum development, syllabus generation, course scheduling, criteria for admission and other traditional faculty duties interface with the NLRA through the analysis of court decisions and National Labor relations Board rulings that have attempted to guide both faculty and administrators.

This paper looks to develop a rubric for faculty and academic administrators to guide both faculty unions and private college and university administrations in clarifying boundaries in what remains a complex relationship in management-labor relations.

A recent decision from the Court of Appeals overruling the National Labor Relations Board (NLRB) has revealed that the extension of union representation rights to private college and university faculty has yet to be clarified. The administration of Point Park University in Pittsburgh, Pennsylvania, was ordered to bargain its first contract with the union designated by the faculty through a certification election in February, 2005.. The administration refused to bargain saying that faculty were management employees and therefore we not covered under the National Labor Relations Act (NLRA). Are college professors to be defined as “labor” and therefore eligible to be covered under the terms of the National Labor Relations Act as amended? On the other hand, are these professors “management” and therefore not entitled to union representation as they make daily managerial decisions in the “business” of higher education.

Brief History of Collective Bargaining in Private Colleges and Universities

The issues of the current case involving Point Park University have brought the question of the appropriateness of collective bargaining in the academic model. Does the process of collective bargaining “fit” with the so-called collegial model of the academic world? The original National Labor Relations Act of 1935 was passed to extend collective bargaining rights to “all employees” excluding only those who were involved in agriculture or served as domestic servants. (NLRA 1935) The Taft-Hartley amendments in 1947 further clarified that supervisors and managers were not covered but did allow the right to organization to be extended to professional employees. (NLRA 1947) In 1971, the NLRB formally asserted jurisdiction over college faculty and defined them as “professional employees” who were entitled to organize for the purposes of collective bargaining. (*C.W.Post*)

In 1980, a landmark decision *Yeshiva v NLRB*, dramatically altered the landscape of academic labor relations. The faculty of Yeshiva University in New York City attempted to organize a union at the university that would represent the members of the faculty recognizing them as professional employees. The university countered that the members of the faculty at Yeshiva were not professional employees as defined under the NLRA but rather they were a integral part of the administration of Yeshiva and were in actuality managers. The university went on to note not only were they managers, but that the faculty were involved in making key decisions that impacted the direction of the university. In the *Yeshiva* case the Court found itself delving into “how the faculty is structured and operates.”(*Yeshiva*) The Court ruled that the faculty could be excluded from coverage of the NLRA and could be denied representation if they were engaged in management activities faculty(*Yeshiva*).

What is a “managerial employee?”

In a case unrelated to academia, the Supreme Court ruled in the *Bell Aerospace v. NLRB*, “ that “Congress intended to exclude from the protections of the Act all employees properly classified and “managerial”” (*Bell Aerospace v. NLRB.*) The decision went on the clarify that those excluded from the protections of the Act included those employees who “formulate and effectuate management policies by expressing and making operative decisions of their employer” (*Bell Aerospace*) *Yeshiva* took this one step further when citing questions if employees were “aligned with management.”(*Yeshiva*) Herein lay the rather vague definition differing the managerial employee from the professional employee in academia.

Point Park University

The issues noted above coupled with numerous labor technicalities have caused the administration of Point Park University to refuse to recognize a union certified to represent its faculty. In 2003, the Newspaper Guild of Pittsburgh/Communications Workers of America, Local 38061 petitioned for certification election to represent the faculty at Point Park College for the purposes of collective bargaining. After extensive hearing before District Six of the NLRB, the Regional Director ruled the faculty were entitled to go forward with the certification election. Under the terms of *Yeshiva* the faculty did not exercise enough control to be denied representation under the Act. After removing certain faculty who were in actual supervisory roles, the NLRB ordered the election to go forward. The faculty chose to certify the union and the NLRB ordered the university to bargain. The administration of Point Park University refused and after lengthy case in the United States Court of Appeals for the District of Columbia, the Court of Appeals remanded the order to bargain back to the District Six for review saying the NLRB did not address. (U.S. Court of Appeals, Wash. D.C. No. 05-1060)

Developing a Rubric

As previously noted, the Court ordered the NLRB to investigate “how a faculty is structured and operates.” It further called upon the NLRB to determine the actual role of the faculty in the administration of an institution. Did the faculty play a role in the actual management or were they simply employees in a hierarchy similar to those in a steel mill or an auto plant? On this determination would rest the NLRB’s case-by-case ruling as to whether the faculty could form a union.

A review of *Yeshiva* and related NLRB and court rulings allows the development of a set of criteria for academic administrations and potential faculty unions to review when determining the possible standing of faculty under the NLRA. Extrapolating from the text of court decisions and rulings allows the pinpointing of certain issues that should be reviewed. These issues must be integrated with the traditional functions of college faculty. From this analysis the following issues have been identified to be included in a rubric to serve as a checklist for both administrators and faculty looking at the issues of union representation.

Course Selection: Faculty usually teach in their particular discipline. It would be agreed among both faculty and academic administrators that following a review of a faculty member’s individual credentials management would assign the appropriate course. The question to be asked would be who assigns the course. How much power does the individual faculty member have in the selection of the courses he or she will teach? Are courses selected through a process of collegial consultation or simply assigned by the Chair of the particular department? The source of the final decision is important in determining which party is managing the process.

Syllabi: Academic tradition calls for total faculty control over the development of the individual syllabus for a particular course. The question arises, however, when there exist multiple sections of a particular course and faculty are asked to confer to develop a standard departmental syllabus. Are the faculty members when they are developing such a syllabus

actually engaging in administrative duties that could be seen as generating academic policy?
How does this scenario play out when the Chair of the department is present in the conference?

Teaching Methods: This has always been the purview of the individual faculty member. This now has become an area of enhanced attention by academic administration. With the advent of partially on-line and totally on-line courses, there is now more discussion which can lead to faculty making decisions aligned with the administration to change traditional teaching methods. If it is evolving into a relationship where the manager is demanding a new form of production and the employee must follow suit, then we have a traditional management/labor relationship where a union is totally appropriate. If, on the other hand, the faculty is guiding the process and making decisions for the university, we then have a faculty acting as management.

Student evaluation: This is by tradition the total responsibility of the faculty member. The assignment of grades to the students in the class is part of the job description of a college faculty member. If the faculty member, however, strays into the area of developing grading policy, there exists the possibility that the faculty member is engaging in management duties.

Faculty Research: A member of a college faculty certainly has control of where he or she chooses to conduct research and on what subject the research involves. The execution and the completion of research projects has traditionally been the sole purview of the faculty member.

Admissions: The admissions process for a university and the criteria for both graduate and undergraduate acceptances is a relevant part of the administration process at any university. The extent, however, in which the faculty members participate may be a critical factor in determining whether or not a particular college faculty may be extended rights of representation under the NLRA. Are the faculty involved in standards for admission? Are they interviewing and evaluating applicant's records for consideration for admission? These are important questions that must be answered if it is to be determined the level of accountability for the faculty member.

Matriculation: How are the faculty members involved in decisions resulting in matriculation? Is the final decision that a student is now ready to receive his or her degree in the hands of the faculty or the administration? This is especially interesting with the completion of graduate education. At this level the student's final defense of a thesis or dissertation will take place in front of a committee. This committee, usually chaired by a faculty member, has the final say as to whether a graduate student passes or fails. The extent to which faculty members are involved in the granting of degrees beyond simply recording grades becomes an important factor in determining the legality of union representation.

Retention: An important factor in the life of any university is retention of the students admitted for the full course leading to matriculation. The decision of what criteria should be used to retain or not allow a student to remain in school is most certainly a management prerogative. If, however, faculty become involved in the process, they are certainly making decisions that impact the future financial status of the university. In such a case the argument could be made they are accepting the accountability for retention.

Tuition: The decision of how much to charge students to attend classes dramatically impacts the financial health of a university. As many institutions are tuition driven, the complex decision on tuition level are often left to financial experts. If, however, members of the faculty become involved in such decisions they have certainly entered an area traditionally reserved for management. By playing an active role in this process, the question of being part of management is a mute point. In addition, if the faculty members have a say in the size of the overall student body and its impact on the financial status of the university, the faculty can only be said to be involved in the role of management.

Class size: Closely associated with the tuition is the issue of class size. The more students in a class the greater the financial return for the university. Faculty may express a preference for smaller classes. When faculty members engage with the administration in the process of determining class size they are directly impacting the revenue stream. Engaging in the process of determining class size as well as the number of sections offered would most certainly place the faculty in the role of management.

As can be seen, the role of the faculty member in the issues noted in the rubric greatly influences whether the members of a faculty may seek representation rights under the National Labor relations Act.

Future Research

The author submits this rubric as a starting point for developing a guide for those concerned with the issues involving union representation for private colleges and universities. The rubric could be used by university administrators, college faculty and labor organizations confronted with these issues. As each university or college is unique in how it deals with the issues in the rubric, future research could survey the different private colleges and universities to explore the myriad of different interpretations of the issues suggested in the rubric.

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