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LeMoyne-Owen College *and* Faculty Organization, Lemoyne-Owen College, Charging Party. Case 26–CA–20953

September 30, 2005

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This case is on remand from the United States Court of Appeals for the District of Columbia Circuit. *LeMoyne-Owen College v. NLRB*, 357 F.3d 55 (D.C. Cir. 2004). The issue for this supplemental decision is whether the faculty at LeMoyne-Owen College (the College) are managerial employees under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), and subsequent Board precedent applying *Yeshiva*. After carefully considering the record and the position statements filed by the parties, we find that the faculty are managerial employees. We therefore dismiss the complaint and the petition, and we vacate the Union's certification.

I. PROCEDURAL HISTORY

On August 6, 2002, the Regional Director for Region 25 issued a Decision and Direction of Election in Case 25–RC–10120, in which he found that the petitioned-for unit of 50–60 full-time faculty members at the College are not managerial employees and constitute an appropriate unit for bargaining. The Regional Director found that the dean of the faculty, Barbara Frankle, and the assistant dean of academic affairs (Assistant Dean), Cary Booker, are managerial employees and excluded them from the unit.[1]

Thereafter, the College filed a timely request for review, contending that the faculty are managerial employees under *Yeshiva*, supra, and related Board precedent.[2] The Union filed an opposition. On September 4, 2002, the Board denied the College's request for review.[3] Following the election held on September 4, 2002, the Union was certified on September 17, 2002, as the exclusive collective-bargaining representative.

On January 17, 2003, the Board issued a Decision and Order finding that the College violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize the employees' certified representative and ordered the College to recognize and bargain with the Union.[4]

On February 10, 2004, the United States Court of Appeals for the District of Columbia Circuit granted the College's petition for review, denied the Board's cross-application for enforcement, and remanded this case to the Board for further proceedings. *LeMoyne-Owen College v. NLRB*, supra. In the remand, the court found that the Board failed to address "how its disposition is consistent with its contrary holdings in the post-*Yeshiva* cases that appear to have presented similar facts." 357 F.3d at 60. The court emphasized that the Regional Director "did not discuss or even mention a single one of the precedents on which the College relied." Id. at 60.[5] The court also singled out the testimony of the College president that he had never, in 6 years as president, failed to approve a faculty recommendation on degree requirements or other matters related to the courses taught at the College. In addition, the court emphasized testimony that the president had forwarded all faculty assembly recommendations on curricular changes to the board of trustees, without exception, and that the trustees had never rejected any of these recommendations. Id. at 58. The court concluded by stating that the "NLRB may have an adequate explanation for the result. . . . We cannot, however, assume that such an explanation exists unless we see it." Id. at 61.

On May 4, 2004, the Board advised the parties that it had accepted the remand from the D.C. Circuit and invited them to file statements of position with regard to the issues raised by the remand. The General Counsel, the College, and the Union filed position statements.

II. FACTS

A. Overview of the College

LeMoyne-Owen College is a relatively small, private 4-year liberal arts college located in Memphis, Tennessee. The College traces its roots to 1862 and is a "historically black college." The College is overseen by a board of trustees. The chief executive officer is the president. George Johnson Jr. has been president of the College since 1996. Barbara Frankle, a 31-year faculty member at the College, has been the dean of the faculty since 2000. Cary Booker has been the assistant sean of academic affairs (assistant dean) since 1999.

[1] The Regional Director also found that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[2] The College also sought review of the Regional Director's finding that the Union is a labor organization.

[3] Chairman Battista and Member Schaumber did not participate in the underlying representation proceeding.

[4] 338 NLRB No. 92 (2003) (not reported in Board volumes).

[5] I.e., *American International College*, 282 NLRB 189 (1986); *Livingstone College*, 286 NLRB 1308 (1987); *Lewis & Clark College*, 300 NLRB 155 (1990); and *Elmira College*, 309 NLRB 842 (1992). Id. at 57–58, 60.

The College offers three degrees: Bachelors of Arts, Science, and Business Administration. Enrollment averages about 1000 students. Nearly one-third of the student body is enrolled in or has taken courses in the school's division of education, one of five divisions at the College. The other divisions are: arts and humanities; business and economic development; natural science, math, and computer science; and social and behavioral science. Each division is further subdivided into academic areas. Each division is chaired by a faculty member, and each academic area is headed by a faculty member serving as an area coordinator. The division chairpersons and the area coordinators are included in the petitioned-for unit. The College is accredited by the Southern Association of Colleges and Schools (SACS).

B. Faculty Governance

The faculty handbook (handbook) sets forth the policies and procedures that govern the faculty. The faculty are required to follow handbook policies. The handbook states that faculty governance occurs through three entities: the faculty assembly, standing faculty committees, and an academic council.

The faculty assembly is a meeting of the entire full-time faculty which all are expected to attend. Dean Frankle presides over the meeting and determines its agenda. In addition to the full-time faculty, Dean Frankle and Assistant Dean Booker are permitted to vote in the assembly. From five to nine standing faculty committees operate at the College. Notable committees discussed in the record are the curriculum committee and the academic standards, honors, and selection committee (academic standards committee). For those current standing committees for which there is evidence of composition, virtually all members are faculty.[6] The president and the dean of the faculty are ex officio members of the standing committees but have no vote. Dean Frankle and Professor Cheryl Golden work together to assign faculty to the standing faculty committees, although Frankle has the ultimate authority over the assignments. The academic council is primarily comprised of faculty members, Frankle, and Booker.

A number of special or ad hoc-type committees have operated, or continue to operate, at the College. The most significant ad hoc committee, which is discussed further below, is the special committee to review the core curriculum.[7] In addition, at the time of the hearing, the school was in the midst of a "self-study" to prepare for an accreditation review by SACS. Nearly two dozen committees were involved in this process.

The handbook states that "the faculty has the primary responsibility of recommending academic policy," which is "carried out through the Faculty Assembly . . . and Academic Council." It states further that the faculty assembly "conducts the academic business of the Faculty" and "deliberates and makes recommendations on areas of faculty responsibility."[8] The handbook delineates some areas of faculty "responsibility," including admission standards, curriculum, education requirements, graduation requirements, standards for grading, candidates for graduation, and academic retention standards. The handbook also assigns academic functions to certain faculty standing committees, such as the curriculum committee and academic standards committee.

C. Curriculum and Related Decisions

According to the handbook, the curriculum committee possesses broad authority to "consider questions of the appropriateness of the College curriculum." The specific functions of the committee cited in the handbook include: approval of changes in education requirements; adoption of new majors/minors; creation or deletion of courses; approval of changes in course credit hours; approval of major reorganization of a curriculum area; approval of educational programs or innovations; and approval of any cross-divisional interdisciplinary or cross-area program.

Consistent with the handbook, the record demonstrates that proposals for new courses and programs of study are considered by the curriculum committee. Depending on the nature of the change, the committee can either approve the change or recommend the change to the faculty assembly. For example, if a faculty member recommends adding a new course or dropping a course, the curriculum committee can and has approved these determinations without further approval, except that Dean Frankle will ensure that the action does not have adverse

[6] The Regional Director described the composition of the curriculum committee according to the faculty handbook. The College also introduced a list describing the membership of the current curriculum committee and other standing faculty committees. Under either description, the curriculum committee is overwhelmingly comprised of faculty members included in the unit. The current academic standards committee also is comprised exclusively of faculty, except for Assistant Dean Booker.

[7] Other ad hoc committees include: the scholarship committee; committee on donors; teacher education committee; enrollment task force; calendar committee; catalogue committee; judiciary council; faculty handbook revision committee; faculty, secretarial, and presidential search committees; task force on faculty evaluations; tenure review committee; and benefits committee. Some ad hoc committees are faculty dominated, some are administration dominated, and the composition of others is unclear. For most of these committees, the method of selecting members is not clear from the record.

[8] Dean Frankle presides at the assembly meetings, and she determines its agenda, which includes reports of standing faculty committees.

financial implications. But if a faculty proposal involves a substantial change in the direction of the school, such as a change in the core curriculum,[9] or a change in a major or degree requirements, the change must also be approved by the faculty assembly. If the faculty assembly approves the proposal, the proposal then goes to Dean Frankle, who already has been consulted because of possible financial implications involved with substantial changes. President Johnson and then ultimately the board of trustees also must approve these major changes.

President Johnson testified that he never failed to approve faculty recommendations regarding degree requirements or any matters regarding courses that are taught. More specifically, he testified that when a proposal to change a program is made, the curriculum committee usually would make a recommendation to the faculty assembly, which in turn would make a recommendation to Dean Frankle, to him, and ultimately, to the board of trustees. Johnson testified he never failed to send any of these recommendations to the board of trustees. Further, he asserted that none of the curriculum recommendations voted on and approved by the faculty assembly had ever been rejected by the board of trustees.

In support of Johnson's testimony, the record contains specific examples of faculty recommendations that were followed by the College's administration. In 1999, the former provost of the College proposed "collapsing" the number of academic divisions from five to three. The recommendation was taken to the board of trustees to implement the change. However, the faculty objected to the restructuring plan without faculty input. The plan was suspended, and the faculty undertook a review. The faculty later recommended that the divisions remain the same, and the number of divisions has remained the same. Johnson testified that the administration "acceded to the recommendation of the faculty."

[9] Shortly after President Johnson arrived at the College in 1996, he proposed a committee of faculty, staff, students, trustees, several alumni, and a faculty member from a local college to examine the College's core curriculum offerings and to make some proposals. The precise composition of the committee is not in the record. However, Dr. Cheryl Golden, the president of the Union, may have been the chair of this committee. The committee was considered a "special" committee because it included other "constituencies" from the College in addition to the faculty. Although the curriculum committee was not directly involved in what was also called the "core project," the faculty were aware of the special committee's deliberations through faculty representation on the committee. Moreover, the curriculum committee did not cease considering curriculum matters during the functioning of this committee. The only evidence of any change emanating from the ad hoc committee is the ad hoc committee's recommendation to increase the number of credit hours that students must devote to core curriculum courses. There is no evidence that this recommendation was implemented without first being considered and approved by the faculty assembly, which must approve core curriculum changes.

Further, the full faculty approved the elimination of a graduate program in the education division, changes in the accelerated degree program in the business division, a new childhood education major in May, 2000, and an expanded curriculum for the W.E.B. Dubois Honors Program in spring, 2000. The administration implemented these changes.

D. Course Content, Teaching Methods, and Grading

The faculty members have virtually complete discretion over the content of the courses they teach. In addition, the administration does not direct faculty members how to teach, other than references in the handbook encouraging teachers to use their "most effective teaching method" and to apprise the chairperson of the division and the dean when "any departure from standard practices is planned." Grading of students in the classroom is within the sole discretion of the faculty, including the discretion to reduce grades for unexcused absences and late work. Although the handbook sets forth some criteria concerning an attendance policy affecting grades, the policy is not strictly enforced but left to the faculty's discretion. The handbook also contains a specific grading system with a specific scale (i.e., A-100-90, B-89-80, etc.), but there is no evidence as to how the grading scale was established. The handbook requires that an evaluation of a student's "English usage" comprise at least 10 percent of the student's grade. The faculty resolves student objections to grades. An objection is first considered by the individual faculty member, then by the division chair, and, if necessary, by a faculty committee. Dr. Ahmad, a 38-year faculty member and former division chair, testified that he had never heard of an instructor's grade being altered by the administration.

E. Honors, Academic Retention, Graduates

The academic standards committee, a standing faculty committee, oversees the awarding of academic honors. Dr. Golden is the current chair of this committee.[10] Individual faculty members recommend to the committee the names of students for a national honors program. The committee ensures that candidates for honors meet the appropriate criteria and then recommends their names to the faculty assembly. The faculty assembly votes on the recommendations, and no further approval of the honors is necessary.

In addition, a three-member subcommittee of the academic standards committee, composed of Professor Golden, a fellow faculty member, and Assistant Dean

[10] Although the minutes of some committee meetings in prior academic years show the attendance and participation of nonfaculty, the current academic standards committee is comprised entirely of faculty, except for Assistant Dean Booker.

Booker, developed procedures for the selection of students for certain honors on campus. The document memorializing these procedures lists seven honors at the school and describes when and where nominations are to be submitted. Most of the honors programs require submission of nominations to the academic standards committee, which in turn submits the nominations to the faculty assembly. The academic standards committee and the faculty assembly approved these procedures.

The academic standards committee also addresses appeals of academic dismissals or suspensions. The committee reviews the student's written appeal, meets with the student, and recommends a course of action. All decisions of the committee are subject to ratification by the faculty assembly. After the committee makes a decision, a student may appeal to the dean. If the student does not appeal to the dean, the faculty assembly ratifies the committee's decision, and there is no further review.

The academic standards committee also reviews a list of graduating seniors, and the full faculty approves that list. The board of trustees then ratifies the list. There is no evidence that the faculty's approval of any list has ever been changed by the board of trustees.

F. Syllabus and Textbooks

Although the handbook requires distribution of a syllabus that contains categories of information about a course, each individual faculty member prepares the syllabus. The syllabus is filed with the division chair, a fellow faculty member in the bargaining unit. President Johnson testified he was not aware of any syllabus revisions being required by the administration.

The handbook also states that every faculty member has the privilege of selecting textbooks to be used in courses "with the approval of the Division Chair and the [Dean of the Faculty]." There is no evidence of a faculty member's textbook selection being reviewed by the administration.

G. Admission Standards

Admission standards are created by the faculty and recommended to the board of trustees. For example, faculty from the "teacher education committee," which is comprised of faculty members from the division of education, determine the standards for admission to the teacher education program. Waivers from the College's requirements (but not the state's teacher requirements) can and have been granted by the division's faculty and the division chair.[11]

[11] Although the waivers are also sent to Dean Frankle, the record does not indicate what Frankle does with the waivers, if anything.

H. Accreditation

At the time of the hearing, the faculty was undertaking a self-study of the College in preparation for an accreditation review by the SACS. An accreditation review occurs every 10 years. Nearly two dozen committees and subcommittees were involved in this process. The committees included faculty, staff, students, trustees, and alumni. President Johnson characterized the study as "largely faculty-driven," emphasizing that the director of the self-study was a faculty member, which the SACS guidelines require. The president chose the director from a list of five names recommended by the faculty. Most of the self-study committees were comprised of a majority of faculty members, including the "Organization, Administration, Corporate Entities, and Finance and Physical Resources Committees," which are responsible for reviewing the management of the school.

I. Scholarships

Recommendations for scholarships are considered by a scholarship committee, an ad hoc committee that is comprised of faculty and nonfaculty. The precise composition of the committee is not indicated in the record. No further approval of the committee's recommendation is necessary.

J. Student Discipline

In addition to academic discipline, a mixed panel of faculty, administrators, and students from a larger "judiciary council" presides over hearings regarding infractions of the student handbook. The precise composition of the panel is unclear. Sanctions for violations may include probation, asking the student to leave for the remainder of the semester, or expulsion. The student generally is told of the decision the same day as the hearing and can appeal to the dean of students. If the dean upholds the council, the student may appeal to the president. An appeal board may also consider the issue, although the composition of that board is not clear from the record.

K. Other Academic Areas

The faculty serve on the library and research standing committee, which acts as a liaison between the library staff and academic community at the College. The committee is comprised entirely of faculty members. The committee promotes the proper use of the library materials, suggests programs for the library, informs faculty about funds available for the library, determines student opinions about the library, and invites scholars and other speakers. Further, a faculty committee is revising the handbook. The administration has discussed the

revisions with the committee. The trustees must ratify any revisions before they are final.

L. Nonacademic Decisions

Tenure: Within the last few years, a committee comprised exclusively of faculty members worked with President Johnson, Dean Frankle, and the board of trustees, to develop formal procedures governing tenure determinations. The faculty assembly and the board of trustees approved new procedures governing faculty who have been employed 5 years or more in 2001.[12] In the 2001–2002 academic year, the faculty committee applied these criteria and recommended to Dean Frankle and President Johnson that seven faculty members be granted tenure. Neither Frankle nor Johnson made any changes to the recommendations, and the board of trustees granted tenure to all seven candidates.

Evaluations: In 1998 or 1999, a faculty committee selected by the former provost drafted a revision of the Handbook section governing evaluation of faculty members. The faculty adopted the draft revisions and recommended them to the board of trustees. The board approved the revisions, and the faculty implemented the procedures in November, 1999.

Hiring: Faculty committees are established to fill faculty positions and secretarial positions. President Johnson testified generally that he has never rejected the recommendation of a search committee for a faculty member.[13] In 2000, a committee of the division chairs was formed to select two secretaries for division work. The committee interviewed four candidates and found one satisfactory candidate. That candidate eventually was hired. The faculty also has participated in the interview of administrators. At the time of the hearing, two faculty members sat on the search committee for a new president.

Discipline, Termination, and Layoffs: The faculty do not have any significant role in discipline or termination decisions, although the handbook provides for an appeal to a committee of faculty, with the results to be transmitted to the president for final action. In the spring of 2000, nonfaculty layoffs occurred, but the faculty had no input into these decisions.

Financial Matters: In 2002, two faculty members participated on a seven-person benefits committee, chaired by the director of human resources. The committee created an employee survey asking about improvements employees would like regarding health, life, and disability insurance, retirement, vacation, and sick leave. The committee analyzed the survey results and recommended that the current provider of health, dental, medical, and vision insurance be changed. After the benefits committee decided to change carriers, the committee presented the recommendation to the president's cabinet,[14] which approved the recommendation, and then to the chief financial officer, who signed off on the proposal. The board of trustees' human resource committee discussed the proposal, and ultimately, the officers of the college approved the decision to change carriers.

Tuition is determined by the board of trustees based on a recommendation of the administration.

III. THE *YESHIVA* DECISION

In *Yeshiva*, the Supreme Court found that faculty members at Yeshiva University were managerial employees who were excluded from coverage under the Act. The Court defined managerial employees as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." 444 U.S. 672, 682 (1980) (citations omitted). The Court held that managerial employees "must exercise discretion within, or even independently of, established employer policy and must be aligned with management," and that they must represent "management interests by taking or recommending discretionary actions that effectively control or implement employer policy." Id. at 683 (citations omitted).

The Court emphasized:

> The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. [444 U.S. at 686.]

The Court also commented on the occasional vetoes of faculty action, noting that the "administrative concerns with scarce resources and University-wide balance have led to occasional vetoes of faculty action. But such in-

[12] The faculty is currently working on procedures governing faculty who have been employed for less than 5 years.

[13] The record contains only one example of a faculty search committee. The committee recommended a faculty candidate be hired as a visiting professor. The individual was hired but as a regular tenure track faculty member.

[14] The cabinet is largely comprised of nonfaculty administrators.

frequent reversals in no way detract from the institution's primary concern with the academic responsibilities entrusted to the faculty." 444 U.S. at 688 fn. 27.

Although the faculty played a "predominant role in faculty hiring, tenure, sabbaticals, termination, and promotion," the Court noted that these decisions have both managerial and supervisory characteristics. Because the Court did not reach the question of supervisory status, it did not rely primarily on these features of faculty authority but on their authority over academic affairs. Id. at 686 fn. 23.

In its rationale, the Court emphasized:

> The problem of divided loyalty is particularly acute for a university like Yeshiva, which depends on the professional judgment of its faculty to formulate and apply crucial polices constrained only by necessarily general institutional goals. The university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy. [444 U.S. at 689 (footnote omitted).]

The Court explained that its decision "is a starting point only" for the analysis of whether professionals are managerial, and "that other factors not present here may enter into the analysis in other contexts." Id. at 690 fn. 31. The Court continued that "[i]t is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research." Id.

In subsequent Board decisions, the Board has emphasized that the party seeking to exclude faculty as managerial has the burden of coming forward with evidence necessary to establish such an exclusion. See e.g., *Montefiore Hospital & Medical Center*, 261 NLRB 569, 572 fn. 17 (1982). The Board has also emphasized the importance of faculty control or effective control over *academic* areas, as opposed to nonacademic areas. See *Livingstone College*, 286 NLRB 1308, 1314 (1987). "Absolute" control need not be demonstrated. See *Lewis & Clark College*, 300 NLRB 155, 163 fn. 41 (1990). Further, the Board has rejected a mechanical application of *Yeshiva*, i.e., counting and comparing the number of areas in which faculty have input with the number of such areas in *Yeshiva*. See *University of Dubuque*, 289 NLRB 349, 353 (1988). The Board emphasized in *University of Dubuque*, that such an approach fails to measure the "extent of [the] . . . influence . . . that render[s] each academic body unique." Id.

Board cases generally have examined the faculty's role in decision making "whether individually, by department consensus, through . . . committees, or in meetings of the whole[.]" *Lewis & Clark College*, 300 NLRB at 161; see *American International College*, 282 NLRB 189, 202 (1986). However, "[d]ecisions or recommendations made by committees only a minority of whose members consist of faculty representatives cannot be said to be faculty decisions or recommendations." *University of Great Falls*, 325 NLRB 83, 95 (1997), affd. 331 NLRB 1663 (2000), reversed on other grounds 278 F.3d 1335 (D.C. Cir. 2002).

Finally, the Board has also found that faculty can be managerial even though a college's administration is responsible for financial and budgetary decisions, and the faculty does not participate in such decisions. See *Lewis & Clark College*, 300 NLRB at 162; *American International College*, 282 NLRB at 192; *Livingstone College*, 286 NLRB at 1314. Further, the mere existence of an administrative hierarchy that reviews faculty decisions does not negate managerial status of the faculty. *Lewis & Clark College*, 300 NLRB at 163.

IV. THE REGIONAL DIRECTOR'S DECISION

Applying the Supreme Court's decision in *Yeshiva*, supra, the Regional Director in the Decision and Direction of Election found that the petitioned-for faculty are not managerial employees. The Regional Director found that the faculty do not possess absolute control over any facet of the school's operations, and that they do not effectively recommend changes to existing policy.

The Regional Director cited several reasons for this conclusion. First, the Regional Director found that the faculty standing committees and the faculty assembly are not necessarily comprised only of faculty. Therefore, the Regional Director concluded that recommendations by these faculty committees are not solely the recommendations of the faculty and cannot be "effective."

Second, the Regional Director emphasized that recommendations made by committees on which faculty serve "are subject to multiple levels of review, and subject to change by higher levels of authority." Further, "[a]s recommendations ascend though the hierarchy of the review process, the potential for effective faculty influence undergoes a corresponding decline . . . [and] the more levels of authority a recommendation must pass . . . the less likely the recommendation will be 'effective' because there is a lessened likelihood it will arrive at the top of the hierarchy in substantially unchanged form."

Finally, as further evidence of the faculty's lack of independence, the Regional Director cited evidence that the president of the College had "circumvented" standing committees by appointing individuals to special committees to study topics, such as the core curriculum requirements, that normally would fall within the purview of faculty standing committees. The Regional Director also

cited limitations on faculty authority contained in the faculty handbook.

V. ANALYSIS

Applying *Yeshiva* and its progeny to the facts in this case, we find that the faculty at LeMoyne-Owen College are managerial employees. Whether acting as individual faculty members, through committees, or in the faculty assembly,[15] we find that the faculty make or effectively recommend decisions in the majority of critical areas identified in *Yeshiva* and subsequent decisions interpreting and applying it. See e.g., *Elmira College*, 309 NLRB 842 (1992); *Lewis & Clark College*, 300 NLRB 155 (1990); *American International College*, 282 NLRB 189 (1986); *University of Dubuque*, 289 NLRB 349 (1988); and *Livingstone College*, 286 NLRB 1308 (1987).

The faculty governing document, the faculty handbook, states that the faculty have the primary responsibility of "recommending academic policy." It provides that this grant of authority shall be carried out through the faculty assembly, a body comprised entirely of faculty members, except for Dean Frankle and Assistant Dean Booker.[16] The handbook also designates faculty standing committees to address various academic policies, and these committees are comprised almost entirely of faculty.

The record evidence of actual decisionmaking by the faculty supports the grant of authority contained in the handbook. With regard to the curriculum, the faculty effectively controls curriculum decisions, including courses of study, adding and dropping courses, degrees and degree requirements, majors and minors, academic programs, and academic divisions. The record demonstrates that these curriculum decisions are made by the curriculum committee, approved by the faculty assembly if they involve major changes, and sent to President Johnson and the board of trustees.[17] The testimony of President Johnson indicates that the recommendations of the curriculum committee and the faculty assembly have been routinely approved by Johnson and the board of trustees. Evidence of specific recommendations for curriculum changes that the College's administrators followed were: the faculty prevented the reorganization of the College's academic divisions from five to three; the faculty approved the discontinuation of the College's graduate program[18] and ratified the modifications of a degree program in the division of business; the faculty approved a childhood education major as part of the school curriculum;[19] and the faculty approved an expanded curriculum for the W.E.B. Dubois Honors Program.

In *American International College*, 282 NLRB 189, 192 and fn. 13 (1986), the Board held that the faculty's role in curriculum decisions was effective as the board of trustees never had countermanded faculty decisions regarding a program of courses such as a major or minor, and the dean "could not recall any occasion on which the . . . [board] . . . had failed to approve a new program submitted by any of the schools after having been approved by the curriculum committee and the faculty." Similarly, in *Elmira College*, 309 NLRB 842 (1992), the Board found that curricular affairs committee recommendations were effective where, once approved by faculty, they were passed on to the college president for final approval, and during a 4-year period, all recommendations were approved. We find the above-cited record facts and this Board law support our conclusion that the College's faculty effectively recommend curriculum decisions.

Contrary to the Regional Director, we do not find that President Johnson's creation of the ad hoc, special committee to study the core curriculum circumvented or undermined the faculty's effective authority over curriculum decisions. We emphasize the evidence of the faculty's representation on this ad hoc committee and, thus, their full participation in its deliberations. However, and in any event, the record demonstrates that any changes to the core curriculum must go to the faculty assembly for approval. Thus, there is no evidence that the ad hoc committee's actions foreclosed the faculty's participation. Further, there is no evidence that any substantive changes were recommended by this ad hoc committee

[15] We agree with the Regional Director that the evidence does not demonstrate that the academic council makes or effectuates any managerial decisions.

[16] Contrary to our dissenting colleague's assertion, that Dean Frankle presides at these meetings does not undermine the faculty's control. The assembly's agenda is fairly well established, as are the kinds of decisions that Dean Frankle is compelled to cede to the assembly.

[17] Although Dean Frankle is consulted regarding major curriculum changes because of the possible financial implications, the record does not demonstrate that any faculty recommendations have been altered or rejected by Frankle's involvement. See *American International College*, 282 NLRB 189, 192 (1986); and *Livingstone College*, 286 NLRB 1308, 1312 (1987).

[18] The General Counsel's focus on the genesis of the idea to discontinue the graduate program misses the point that the decision did not become operative until the faculty considered and approved it.

[19] Thus, we disagree with the General Counsel that the record does not support a finding that the faculty effectively recommends changes to majors. Dean Frankle specifically testified about the faculty's role in the development and approval of the early childhood education major. In addition, the curriculum committee meeting minutes demonstrate that committee's involvement in many decisions impacting majors.

other than a change in the number of hours required for the core curriculum.[20]

As for other academic areas, it is undisputed that the individual faculty members have virtually complete discretion over the content of the courses they teach. In addition, the administration does not direct faculty members how to teach other than the handbook's admonition to use their "most effective teaching method" and to apprise the chair of the division, a fellow faculty member, when any departure from undefined standard practices is planned.

The faculty determine honors at the College. Nominations are made by individual faculty members, approved by the academic standards committee, and then submitted to the faculty assembly for final approval. A subcommittee of the academic standards committee developed selection procedures for honors, which the faculty assembly approved. The academic standards committee also makes determinations regarding academic retention.[21] Further, the academic standards committee reviews a list of graduating seniors, which the full faculty reviews and then submits to the board of trustees.[22]

Grading of students is within the discretion of the faculty, including the discretion to reduce grades for unexcused absences, and to resolve disputes over grading. The faculty also effectively control the syllabus and selection of textbooks. Although the handbook requires that certain categories of information be contained in a syllabus, it is the faculty members who prepare the syllabus and the information contained therein. Although the syllabus must be submitted to the division chair, a fellow faculty member, there is no evidence of syllabus revisions being required by the administration. Although textbooks must be approved by the division chair and the dean of the faculty, there is no evidence of any textbook being challenged by the administration.[23]

The division of education faculty effectively determines that division's admission standards and grants waivers from the College's teaching requirements.[24] The faculty also have an effective voice in the accreditation review.[25]

The faculty have also made effective decisions in several nonacademic areas. The strongest evidence is the faculty's role in tenure decisions. The faculty participated with the administration in developing formal procedures governing tenure determinations for faculty employed 5 years or more, which the faculty assembly and the board of trustees later approved. Based on those procedures and criteria, the faculty recommended tenure for seven applicants to Dean Frankle and President Johnson. The board of trustees granted tenure to all seven. The faculty also effectively revised and then implemented the faculty handbook section governing the evaluation of faculty.[26]

To summarize, we find that through individual faculty members, the curriculum committee, the academic standards committee, and the faculty assembly, the faculty make or effectively control decisions with regard to curriculum, courses of study and course content, degrees and degree requirements, majors and minors, academic programs, academic divisions, the addition and deletion

[20] We therefore reject the dissent's contention that effective decision making of the faculty is undercut by the creation of this committee. The dissent acknowledges that there is virtually no evidence regarding the results, if any, of the committee's deliberations.

[21] Although these determinations are subject to an appeal by the student to Dean Frankle, the record does not demonstrate that Dean Frankel has reversed the determinations of the committee.

[22] As with other actions by the academic standards committee and the full faculty, there is no evidence of the faculty's approval being changed by the board of trustees.

[23] The dissent argues that the faculty took no part in formulating these sections of the faculty handbook. However, faculty may be managerial if they take or recommend discretionary actions that control or "implement" employer policy. *Yeshiva*, 444 U.S. at 683. In applying these handbook sections, the faculty take discretionary actions that implement employer policy.

[24] As indicated, nearly one-third of the College's student body is enrolled in or takes courses in the education division. The dissent argues that we erroneously conclude that the faculty effectively determine admission standards because the board of trustees has final authority over admissions standards. However, the fact that ultimate decision-making authority lies with a board of trustees does not preclude a finding of managerial status where the faculty retain managerial authority, as here, through effective recommendations. See *Yeshiva*, 444 U.S. at 683 fn.17; *American International College*, 282 NLRB at 202.

[25] Although incomplete at the time of the hearing, the completed accreditation review will bear the faculty's effective imprint. President Johnson aptly characterized the review as "largely faculty-driven." The director of the self-study is a faculty member who was selected by the president from one of five faculty members recommended by the faculty. Moreover, most of the two dozen committees and subcommittees, including the committee charged with reviewing the management of the school, are comprised of a majority of faculty. The dissent contends that the incompleteness of the study makes the effectiveness of the faculty's views pure speculation. We disagree because the faculty's participation in the self-study is overwhelming, and the faculty's effective recommendation of academic policy already has been demonstrated. In these circumstances, it is not speculative to conclude that the study will bear the effective imprint of the faculty.

[26] The faculty serve on other committees making managerial decisions, although the record does not demonstrate that the faculty comprise a majority on these committees. The faculty serve on an ad hoc scholarship committee of faculty and administrators that makes determinations regarding the awarding of scholarships to students. The faculty also are members of judiciary council panels that preside over alleged infractions of the student handbook. In nonacademic areas, the faculty also serve on various search committees for faculty, administrators, staff, and a new president. The faculty participated on the benefits committee of faculty and administrators that recommended a change in the benefits carrier, which ultimately was approved by the administration and the board of trustees.

of courses, course content, teaching methods, grading, academic retention, lists of graduates, selection of honors, admission standards, syllabi, and textbooks. The faculty also will have an effective voice in the outcome of the accreditation review, which was incomplete at the time of the hearing. The faculty also makes effective decisions in some nonacademic areas, including tenure standards and selections, and faculty evaluation procedures.

We disagree with the Regional Director's analysis, which largely questions the independence and effectiveness of the faculty's recommendations. The Regional Director disputed the independence of the faculty standing committees and the faculty assembly because they included nonfaculty members. However, it is undisputed that the curriculum committee, academic standards committee, and the faculty assembly, which approve many academic decisions, are overwhelmingly comprised of faculty members. Even though the dean and assistant dean have a vote in the faculty assembly, the Board does not require faculty committees to be comprised solely of faculty members for the committee's recommendations to be effective. See *Elmira College,* 309 NLRB 842 (1992) (faculty are managerial "as the faculty committees . . . which deal with [academic] matters are comprised predominately, and in some cases, exclusively of faculty representatives"); *Lewis & Clark College,* 300 NLRB at 156 fn. 9 (emphasizing that policy is determined by a committee that consists of a "majority of voting faculty members"); cf. *Cooper Union for Advancement of Science & Art,* 273 NLRB 1768, 1775 (1973), enfd. 783 F.2d 29 (2d Cir. 1986) (faculty are not managerial as they constitute a minority on most governance committees and something less than a voting majority on about one-half of the committees).

The Regional Director also disputed the effectiveness of faculty recommendations because of the "potential" for the decline in faculty influence as recommendations ascend through the "hierarchy of the review process." However, there is no factual basis for the Regional Director's supposition that faculty recommendations are compromised as they proceed through the administrative hierarchy. To the contrary, the evidence demonstrates that the faculty's recommendations have been routinely approved by the administration. Rather than demonstrating a "decline in faculty influence," the testimony of President Johnson and the specific examples of faculty recommendations illustrate effective faculty decisions on academic matters. For example, President Johnson testified that he "acceded to the recommendation" of the faculty regarding the proposed reduction in the number of academic divisions. Most notably, the record contains virtually no evidence of faculty recommendations that the administration modified, diluted, rejected, reversed, or ignored.[27]

Puerto Rico Junior College, 265 NLRB 72 (1982), relied on by the Regional Director, is distinguishable. In that case, the Board found that the faculty's recommendations were "immediately diluted" as they traveled up the administrative hierarchy through several committees. Each committee in the hierarchy that considered recommendations had increasingly diminished faculty representation. Of four committees, the faculty were in the majority on one (the originating committee), no more than an equal voice on the second, and in the minority on the remaining two. Moreover, the faculty's recommendations were combined with other recommendations from non-faculty to produce an overall recommendation. Here, the evidence does not demonstrate the kind of diminution of faculty influence or change in recommendation that existed in *Puerto Rico Junior College*.[28]

We reject the dissent's assertion that we have used the court's remand requesting a reasoned explanation for the Regional Director's decision as an opportunity to "reverse course" and find that the faculty are managerial employees. This remand provides the first opportunity for the Board to review the record in the underlying representation proceeding.[29] Transcript pages and specific exhibits from the representation hearing are cited in the court's opinion. 357 F.3d at 58–59, remanding the case to us. It is incumbent upon the Board on remand to examine the Regional Director's factual findings against the full record and relevant precedent, *Yeshiva,* and its

[27] Compare, *St. Thomas University,* 298 NLRB 280, 286 fn. 48 (1990), in which the Board found that faculty were not managerial employees because of evidence that recommendations "often were ignored or reversed by the St. Thomas administration."

[28] To the extent that the Regional Director's rationale is that the mere existence of an administrative hierarchy is evidence that the faculty's recommendations are ineffective, that reasoning is contrary to Board precedent. See *Lewis & Clark College,* 300 NLRB at 163, in which the Board held that "[t]he mere existence of an administrative hierarchy is insufficient to establish . . . [a] buffer" that would negate managerial status; see also *Elmira College,* 309 NLRB at 849 (faculty managerial even though college president had final review of faculty decisions); *American International College,* 282 NLRB at 202 (administrative review of faculty decisions not inconsistent with managerial status).

[29] The Board denied the College's request for review of the Regional Director's Decision and Direction of Election because it concluded that no substantial issues requiring review were raised. The College also did not raise in the unfair labor practice proceeding any representation issue that was properly litigable. *LeMoyne-Owen,* 338 NLRB No. 92 (2003) (not reported in Board volumes). Chairman Battista and Member Schaumber did not participate in the underlying representation proceeding, but in granting the Motion for Summary Judgment in the unfair labor practice proceeding, they agreed that Respondent had not raised any new matters warranting a hearing. Id., slip. op. at 1, fn. 2.

progeny.[30] We have done so, and disagree with the Regional Director's findings and conclusions.

The dissent acknowledges that the faculty handbook may imbue the faculty, including faculty committees and the faculty assembly, with authority over the College's academic decisions, but the dissent concludes that the evidence is not sufficiently "clear" to prove that the faculty actually exercises this authority. More specifically, the dissent asserts that there is no evidence in this record to support the conclusion that the faculty's curriculum recommendations are "effective" because the testimony of President Johnson regarding faculty recommendations is, according to the dissent, generalized, conclusory, and vague. Furthermore, the dissent is concerned that the testimony of Johnson lacks a description of the review process followed by President Johnson or the board of trustees. We strongly disagree.

Contrary to the dissent, President Johnson testified specifically about the approval process for faculty recommendations with regard to major curriculum matters, including academic courses, degree requirements, and programs. President Johnson testified *without rebuttal*[31] that none of the curriculum recommendations voted on and approved by the faculty assembly had ever been rejected by the board of trustees. Moreover, the record includes specific evidence corroborating President Johnson's testimony. Faculty recommendations for the actual elimination and creation of programs, and the expansion of the curriculum, have been implemented by the administration. Again, these specific examples of the faculty's effective recommendations stand unrebutted.

We disagree with the dissent that further evidence regarding the extent of the review process is necessary to find the faculty's recommendations effective. Johnson's unrebutted testimony, corroborated by specific examples, is sufficient to support this finding. See *Elmira College*, supra, 309 NLRB 842. In *Elmira*, the Board found that the faculty were managerial employees based on evidence that all faculty recommendations concerning academic matters that were passed on to the college president over a 4-year period were approved. 309 NLRB at 845. The Board found the recommendations were effective without requiring additional evidence that inquired into the details of the president's review process.

University of Great Falls, supra, 325 NLRB 83, relied on by the dissent, is distinguishable. In *Great Falls*, there was testimony that the faculty's curriculum recommendations were never rejected, but the Board found such evidence insufficient to establish that faculty recommendations were generally followed. The testimony of the school's provost/vice president was found to be too vague to permit a meaningful assessment of the faculty's actions. However, unlike this case, the testimony was not unrebutted; the record contained testimony that contradicted the provost/vice president's testimony. 325 NLRB at 87–88, 96 fn. 42. The evidence here, however, is, as mentioned, unrebutted and corroborated by specific examples. Thus, contrary to the dissent, the evidence is sufficient to demonstrate that the faculty's academic recommendations are effective.

The dissent stretches logic a bit when it portrays Dean Frankle and Assistant Dean of Academic Affairs Booker as developing the faculty's recommendations before President Johnson reviews them, and concludes that this participation undercuts the finding that the faculty make effective recommendations. The dissent relies on Frankle's responsibility to preside at assembly meetings, set its agenda, and together with Booker, vote on proposed recommendations. However, Frankle's and Booker's participation in the faculty assembly does not preclude a finding that the faculty are managerial employees. There is no evidence that in setting the agenda, a faculty member has ever been precluded from presenting issues to the assembly. Moreover, the assembly is overwhelmingly comprised of faculty members, and there is no evidence that Dean Frankle or Assistant Dean Booker has ever altered or rejected faculty recommendations. Thus, the fact that Dean Frankle and Assistant Dean Booker participate and have a vote in the faculty-dominated assembly does not undermine the finding that the faculty make effective academic recommendations.[32]

[30] The dissent cites to "numerous" decisions in which faculty have been found to be employees to support the view that the Board has narrowly applied *Yeshiva*, but the Board decisions finding faculty within the managerial exclusion are numerous as well. See *Elmira College*, 309 NLRB 842 (1992); *Lewis & Clark College*, 300 NLRB 155 (1990); *University of Dubuque*, 289 NLRB 349 (1988); *Livingstone College*, 286 NLRB 1308 (1987); *American International College*, 282 NLRB 189 (1987); *Boston University*, 281 NLRB 798 (1986), affd. sub nom. *Boston University Chapter, AAUP v. NLRB*, 835 F.2d 399 (1st Cir. 1987); *University of New Haven*, 267 NLRB 939 (1983); *College of Osteopathic Medicine*, 265 NLRB 295 (1982); *Duquesne University*, 261 NLRB 587 (1982); *Thiel College*, 261 NLRB 580 (1982); and *Ithaca College*, 261 NLRB 577 (1982). Each case must be evaluated on its own facts. That is what we have done here.

[31] The hearing took place over a 5-day period, and included 12 witnesses, some of whom were included in the petitioned-for unit.

[32] The dissent attempts to elevate the evidence that Dean Frankle is consulted regarding the financial implications of major curriculum changes to a conclusion that she has "substantive" input into faculty recommendations on the curriculum. However, by ignoring the financial reasons for Dean Frankle's input, the dissent ignores the Court's recognition that a university's administrative concerns with scarce resources, and occasional vetoes of faculty actions, do not in any way detract from the academic responsibilities entrusted to the faculty. *Yeshiva University*, 444 U.S. at 688 fn. 27.

As detailed in this decision, the record demonstrates that the faculty exercise substantial authority in a majority of critical areas identified in *Yeshiva* and subsequent cases applying it.[33] Based on this well-settled law, we find the faculty play a major and effective role in the formulation and effectuation of management polices at the College. We therefore find the faculty members are managerial employees.

Conclusion

For the foregoing reasons, we find that the full-time faculty are managerial employees and are therefore excluded from coverage under the Act. Accordingly, we shall dismiss the complaint in Case 26–CA–20953, reopen Case 25–RC–10120, vacate the certification, and dismiss the petition.

ORDER

It is ordered that the complaint in Case 26–CA–30592 is dismissed.

IT IS FURTHER ORDERED that Case 25–RC–10120 is reopened, the certification in Case 25–RC–10120 issued September 17, 2002, is vacated, and the petition is dismissed.

Dated, Washington, D.C. September 30, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

In remanding this case, the U.S. Court of Appeals for the District of Columbia Circuit has asked the Board to supply a reasoned explanation for why this case is different from previous decisions in which the Board concluded that faculty members were managerial employees. Apparently concluding that no such reasoned explanation exists, the majority has decided to reverse course and find that the faculty members here are not entitled to the protections of the Act. But the Regional Director's contrary finding is consistent with Board cases applying *Yeshiva University*, 444 U.S. 672 (1980). The majority neglects the principle that statutory exclusions must be interpreted narrowly to avoid denying rights, which the Act is intended to protect. Instead, the majority (1) broadly interprets previous cases finding managerial status and concludes that those cases dictate a finding of managerial status here, and (2) relies on evidence concerning the effectiveness of the faculty's recommendations with regard to curriculum and other matters that is far too thin to support a finding of managerial status. Although I agree that the Court's remand required some further explanation of Board precedent, I disagree that the College has met its burden of proof. Thus, I would reaffirm the Board's prior Decision and Order finding that the College has violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

I.

The legal principles governing this case are well established. In *Yeshiva University*, supra, the Supreme Court emphasized that in applying the managerial exclusion to the Yeshiva faculty, it was "not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them." 444 U.S. at 690. The Court made clear that the result in *Yeshiva* is a "starting point only" and that "[there] may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominately nonmanagerial." Id. at 690 fn. 31.

Adhering to the Court's admonition, the Board has found numerous university and college faculties to be covered by the Act.[1] This is entirely consistent with the well-established principle that exclusions from the Act's protections are to be interpreted narrowly, in order to avoid denying rights which the Act was intended to protect, including the right to choose whether or not to be represented for the purposes of collective bargaining.

[33] Although the faculty's role in nonacademic decisions is not as substantial as their role in academic decisions, *Yeshiva* and subsequent Board cases emphasize the role of the faculty in academic decisions in determining the faculty's managerial status. See *Livingstone College*, supra, 286 NLRB at 1314 (lack of authority in nonacademic areas is of limited significance in determining faculty are managerial); and *Lewis & Clark College*, 300 NLRB at 161 fn. 30 (Board accords less weight to nonacademic factors); accord: *Elmira College*, 309 NLRB at 848–849 (1992) (without more, nature of faculty involvement in academic matters conclusively establishes status as managerial employees).

[1] See *University of Great Falls*, 325 NLRB 83 (1997), affd. 331 NLRB 1663 (2000), reversed on other grounds 278 F.3d 1335 (D.C. Cir. 2002); *St. Thomas University*, 298 NLRB 280 (1990); *Marymount College*, 280 NLRB 486 (1986); *Kendall School of Design*, 279 NLRB 281 (1986), enfd. 866 F.2d 157 (6th Cir. 1989); *Cooper Union of Science & Art*, 273 NLRB 1768 (1985), enfd. 783 F.2d 29 (2d Cir. 1986); *University of San Francisco*, 265 NLRB 1221 (1982); *Lewis University*, 265 NLRB 1239 (1982), enf. denied 765 F.2d 616 (7th Cir. 1985); *Puerto Rico Junior College*, 265 NLRB 72 (1982); *Loretto Heights College*, 264 NLRB 1107 (1982), enfd.742 F. 2d 1245 (10th Cir. 1984); *Florida Memorial College*, 263 NLRB 1248 (1982), enfd. 820 F.2d 1182 (11th Cir. 1987); *New York Medical College*, 263 NLRB 903 (1982); *Montefiore Hospital*, 261 NLRB 569 (1982); and *Bradford College*, 261 NLRB 565 (1982).

Rahco, Inc., 265 NLRB 235, 248 (1982); *Westinghouse Electric Corp.v. NLRB*, 424 F.2d 1151 (7th Cir. 1972), cert. denied 400 U.S. 831 (1970).

Because the exclusion must be interpreted narrowly, the burden of proving that faculty are managerial employees is on the party alleging such status. See *Montefiore Hospital & Medical Center*, 261 NLRB 569, 572 fn. 17 (1982) ("we do not believe the Court intended to preclude the Board from requiring the party seeking to exclude either a whole class of employees or particular individuals as managerial to come forward with evidence necessary to establish such exclusion"); *University of Great Falls*, 325 NLRB 83, 93 (1997) (same); cf. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 712 (2001) (burden of proving supervisory status is on the party alleging such status). As the majority recognizes, the College's burden in this case is to prove that the faculty represent "management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *Yeshiva*, supra at 683. It must present proof, therefore, that the faculty either make or effectively recommend decisions that control or implement the College's academic policy. This evidence must consist of more than mere conclusory testimony that the faculty, through committees or otherwise, make recommendations that are ultimately followed by the College's administration.

In *University of Great Falls*, supra, 325 NLRB at 97, the Board affirmed the Regional Director's decision, which found that "[e]ven though faculty, either though committees or as a whole, are empowered to make recommendations in many areas, the evidence is insufficient to warrant a conclusion that these recommendations effectively control or implement employer policy to . . . require exclusion of the nondean faculty from coverage under the Act." In *St. Thomas University*, supra, the Board reversed the Regional Director's finding that the faculty were managerial, even though the faculty served on committees authorized to make recommendations to the administration on a wide variety of policy matters, including academic decisions. The Board found that the evidence failed to demonstrate that through these committees the faculty had effectively recommended or been the moving force behind the formulation and adoption of university policies. In short, evidence that faculty committees make recommendations involving college policy is not enough; the College must prove that those faculty committees make recommendations which are *effective* to warrant a finding that they are managers.

II.

Applying these principles to the facts here demonstrates that the College has failed to carry its burden of proof.

The faculty handbook in theory grants certain defined authority to the faculty, faculty committees, and the faculty assembly. But as the cases applying *Yeshiva* illustrate, the Board compares evidence of faculty authority contained in the faculty handbook to the faculty's authority in practice. The Board seeks to determine whether the handbook authority actually is exercised. See *Bradford College*, 261 NLRB 565, 566 (1982); *Thiel College*, 261 NLRB 580, 586 (1982); *St. Thomas University*, 298 NLRB 280, 286 fn. 48 (1990). This handbook purports to grant the faculty authority over academic decisions, but there is insufficient evidence that faculty members actually exercise any such authority.

While the curriculum committee and faculty assembly consider curriculum decisions, the critical inquiry is what happens to the recommendations after they are sent to College President George Johnson Jr. If they are routinely approved, they are effective recommendations. But if they are independently reviewed by President Johnson and the board of trustees, then the College has not shown that they are effective recommendations within the meaning of *Yeshiva*.[2] The majority relies on the testimony of College President Johnson to support their conclusion that the faculty's recommendations are effective. He testified that he never failed to approve faculty curriculum recommendations, and that none of the curriculum recommendations voted on and approved by the faculty assembly had been rejected by the board of trustees. Missing from this generalized testimony, however, is any description of the extent of the review of faculty recommendations by him or the board of trustees. Johnson was not even asked whether he conducted an independent review. Thus, there is no evidence in this record to support the conclusion that the faculty's curriculum recommendations are in fact "effective."

The majority erroneously infers an absence of independent review from the absence of any clear evidence

[2] See *University of Great Falls*, 325 NLRB 83 (1997), affirmed 331 NLRB 1663 (2000), reversed on other grounds 278 F.3d 1335 (D.C. Cir. 2002) ("vague" testimony of university provost/vice president, lacking details on the nature and number of faculty recommendations, including to what extent, if any, higher administrators independently reviewed and evaluated recommendations, insufficient to establish that faculty made effective recommendations); *Lewis & Clark College*, 300 NLRB 155, 163 (1990); cf. *Franklin Hospital Medical Center*, 337 NLRB 826, 830 (2002) (in order to prove that an individual is a supervisor because he effectively recommends discipline, "the exercise of disciplinary authority must lead to personnel action, without independent investigation or review of other management personnel").

on this crucial process. At the center of this error is President Johnson's conclusory testimony. When considering statutory exclusions from the Act's protection, the Board has refused to rely on "conclusory statements made by witnesses in their testimony without supporting evidence." *Sears, Roebuck & Co.,* 304 NLRB 193 (1991). See also *United States Gypsum,* 118 NLRB 20, 25 (1957) (conclusory statements with regard to individuals' authority to "effectively recommend" discipline not sufficient to establish supervisory status).

In *University of Great Falls,* supra, 325 NLRB at 83, the Board found that faculty members were not managerial even though the school's provost/vice president testified that in his 2 years at the school all faculty recommendations regarding curriculum matters had been approved. The Board, in affirming the Regional Director's decision, emphasized the lack of "clear evidence that faculty recommendations were generally followed." Id. at 83. The information lacking was the nature and number of recommendations, including to what extent, if any, higher administrators independently reviewed and evaluated recommendations. The Board concluded that the testimony of the provost/vice president on this point was "too vague." Id. at 96. Here, there is similarly vague testimony by President Johnson and a similar lack of information regarding recommendations and the extent of independent review. Thus, as in *University of Great Falls,* there is no clear evidence here that faculty recommendations were actually effective.

The evidence also demonstrates that Dean Frankle, an administrator and manager, is involved in the process of formulating faculty recommendations even before they reach President Johnson. Dean Frankle testified that when a proposal for a new major goes through a division, curriculum committee, and then the full faculty for review, she "already has been in on the consultations . . . because financial implications are involved."[3] Dean Frankle also presides at the faculty assembly meetings, sets the assembly's agenda, and together with Assistant Dean of Academic Affairs Booker, may vote on proposed recommendations. Thus, college administrators are involved in developing the faculty's recommendations even before Johnson reviews them, further undercutting the majority's finding that it is the *faculty* that makes the effective recommendations on the curriculum.

The college president also created an ad hoc, special committee on the core curriculum, independent of the faculty curriculum committee. This committee included many "constituencies" outside of the college faculty. Although there is little record evidence as to the results of this committee's deliberations, the fact remains that the administration established this committee, outside the faculty committee structure, to study and act on the core curriculum, an area critical to the management of the College. This clearly undercuts the conclusion that the faculty is making effective decisions on curriculum matters and is the ultimate authority on the College's curriculum.

Turning to other academic matters, the record demonstrates only a few areas over which the faculty exercises control. Individual faculty members make recommendations for honors to the academic standards committee, which then makes recommendations to the faculty assembly for a final determination. The faculty also has discretion over grading and the content of their courses, although the administration has even placed some limitations on these areas. However, as the Court emphasized in *Yeshiva,* faculty may not be excluded "merely because they determine the content of their courses" or "evaluate their own students." 444 U.S. at 690 fn. 31. Thus, even assuming faculty members control or effectively control grading and the content of their courses, they cannot be excluded from the Act's protection because they perform these academic functions.

Although the handbook contains sections governing instructional policies, including the class syllabus, textbooks, and other matters, there is no evidence that the faculty took part in formulating these sections. Further, given record evidence that the board of trustees has final authority over admission standards, the majority erroneously concludes that the faculty effectively determines admission standards. As for the accreditation review, this process was incomplete at the time of the hearing, and it is pure speculation for the majority to suggest that the faculty's views will be effective.

With regard to nonacademic areas, while the faculty's tenure recommendations have been followed, President Johnson testified that he does a "substantive evaluation" of the candidates to ensure that the tenure criteria are satisfied. Although the faculty revised a section of the handbook governing faculty evaluations, the record does

[3] The majority suggests that Dean Frankle's participation in these consultations does not detract from the faculty's alleged managerial status because Dean Frankle is only concerned with the financial implications of the faculty's recommendations. The majority relies on cases which state that faculty can be managerial even if the college's administrators are responsible for financial and budgetary decisions, and the faculty has no say in those decisions. See *Lewis & Clark College,* 300 NLRB at 162; *Livingstone College,* 286 NLRB at 1314; *American International College,* 282 NLRB at 192. The curriculum decisions which Dean Frankle participates in, however, are not financial and budgetary decisions; they are substantive decisions about the curriculum. Thus, regardless of the reason for Dean Frankle's participation, the fact remains that she has substantive input into the faculty's recommendations, undercutting the argument that the faculty itself makes the effective recommendations on the curriculum.

not demonstrate that these evaluations have any clear impact on faculty advancement or other personnel decisions. The evidence regarding faculty hiring demonstrates that the recommendations of the faculty are not always followed. Decisions regarding benefits are made by the administration after an independent review and not by the benefits committee. It is undisputed that the faculty have virtually no demonstrated role in discipline, terminations, or layoffs.

I would, therefore, find that, at most, the faculty make or effectively control academic decisions in grading, the content of courses, and honors. However, the Court in *Yeshiva* held that such authority is not sufficient to remove faculty from the protection of the Act.

III.

The D.C. Circuit's remand requires the Board to address cases cited by the College. Those cases are distinguishable because they involved faculty with greater authority over academic areas than the faculty members here. By relying on these cases to support their conclusion that the faculty in this case are managerial, the majority disregards the insufficiency of the evidence that the faculty here make *effective* recommendations concerning core university policies.

In *American International College*, 282 NLRB 189, 193–195 (1986), the record contained specific evidence of numerous effective faculty decisions over curriculum matters. In contrast, the College here has not met its burden of proving that the faculty makes effective recommendations on the curriculum.

A key difference between *Livingstone College*, 286 NLRB 1308 (1987), and this case is that in *Livingstone*, once the faculty approved a recommendation, the policy was implemented without prior approval from the president or board of trustees. Here, in contrast, recommendations must be approved by the president and board of trustees.

In *Lewis & Clark*, supra, the Board found that the record demonstrated that faculty recommendations regarding academic areas had not been overturned by higher administrative levels. 300 NLRB at 156. The Board reached a similar conclusion in *Elmira College*, 309 NLRB 842 (1992). Here, the only evidence of effective recommendations by the faculty is College President Johnson's testimony, which lacks specifics and gives no details on whether or not the faculty's recommendations are independently reviewed. As the Board emphasized in *University of Great Falls*, supra, such testimony is insufficient to establish that the recommendations were in fact effective.

IV.

The Board must ensure that faculty members who do not truly have the authority to effectively control the academic decisions of their institution are not excluded from the protection of the Act. In this case, the College has not adduced sufficient evidence that the faculty's recommendations are actually effective. Accordingly, I would reaffirm the

Board's Decision and Order finding that the College has violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

Dated, Washington, D.C. September 30, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD