

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Memphis, TN

LEMOYNE-OWEN COLLEGE
Employer

and

Case 25-RC-10120
(formerly Case 26-RC-8328)

FACULTY ORGANIZATION,
LEMOYNE-OWEN COLLEGE
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on May 22, June 5, 6, and 10, 2002, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.¹

I. ISSUES

The Petitioner seeks an election within a unit comprised of full-time faculty members employed by LeMoyne-Owen College at its Memphis, Tennessee campus. The Employer maintains that this is not an appropriate unit for three reasons: 1) that all members of the proposed unit are managerial employees and therefore ineligible to participate in collective-

¹ Upon the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.

b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

c. The labor organization involved claims to represent certain employees of the Employer.

d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

bargaining ; 2) that the Division Chairs and other members of the faculty are supervisors within the meaning of Section 2(11) of the National Labor Relations Act; and 3) that the Faculty Organization which seeks to represent the above employees is not a labor organization as defined in Section 2(5) of the Act, and therefore it is disqualified from representing employees because it is comprised solely of supervisory/managerial employees.

II. DECISION

For the reasons discussed in detail below, including the faculty's lack of control over any facet of the school's operations, it is concluded that full-time faculty members of the Employer are not managerial employees, but are eligible for union representation under the Act. Moreover, it is concluded that the Employer's full-time faculty share a community of interest and therefore comprise an appropriate bargaining unit. It is also concluded that full-time faculty members are not supervisors within the meaning of Section 2(11) of the Act.² Lastly, it is concluded that the LeMoyné-Owen Faculty Organization is a labor organization within the meaning of Section 2(5) of the Act.

The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time³ faculty employed by the Employer at its Walker Avenue campus located in Memphis, Tennessee; BUT EXCLUDING all office clerical employees, maintenance employees, guards and supervisors as defined in the Act, and all other persons.⁴

² While the Employer asserted that faculty are supervisory personnel in its position statement at the opening of the hearing herein, it did not reassert this position in its post-hearing brief. Nonetheless, the undersigned has considered and weighed all of the record evidence to determine whether any members of the petitioned unit are supervisors within the meaning of the Act.

³ The Petitioner seeks a unit comprised of all "full-time" faculty members; however, it has not proposed a definition of the term "full-time." In the absence of any definition proposed by the parties, the undersigned has adopted the definition of "full-time" faculty found in Sections 4.02 and 4.05 of the Employer's Faculty Handbook. These sections define a full-time faculty member as an individual who maintains a teaching load of a minimum of 12 hours per semester or its equivalent. In addition, the job description for the position of "Faculty" dated June 30, 2002, defines a faculty members as "one who holds an academic area contract, which identifies academic rank and title. Their primary function, incorporating 65% of their effort, includes instructing 12 credit hours per semester, or the equivalent, and student advisement." The record does not indicate the number of hours each semester that each prospective member of the above unit generally teaches. It identifies only two persons who may not teach 12 credit hours a semester (the Dean of Faculty and Chair Muhammad Shafi) although there may be other faculty who are not included within the bargaining unit due to a lack of instructional hours.

The unit found appropriate herein consists of approximately 50 to 60 full-time faculty members for whom no history of collective bargaining exists.

A. The Employer's Organizational Structure and Facts Relevant to the Managerial Issue

The Employer, LeMoyne-Owen College (hereinafter referred to as the "Employer" or the "College") is a private, liberal arts college located in Memphis, Tennessee which offers four-year academic programs involving majors in 24 areas of study which lead to one of three degrees: Bachelor of Arts, Bachelor of Science, and Bachelor of Business Administration. The Employer is a "historically black" college which traces its origins to 1862. In the intervening years, the institution has been a normal school, a high school, a junior college and most recently a four year college known as LeMoyne College. The institution was incorporated as LeMoyne-Owen College in 1968, when it merged with Owen College, a local junior college.

The ultimate governing authority of the College is its Board of Trustees. According to the College's Faculty Handbook, the Board's principal functions include the execution of corporate legal transactions, the establishment of institutional policy, fund raising, the appointment of the President of the College, and the conferral of degrees upon candidates recommended by the College. There are presently 35 Trustees with a maximum complement of 42. The full Board meets three times a year to transact College business matters.

Between meetings, an Executive Committee of the Board possesses the authority to transact business on behalf of the Trustees, with the exception of appointing or replacing the College's president. The Executive Committee is comprised of the Board's officers and the chairpersons of the Board's various standing committees. In January, 2002, the Trustees approved a proposal to allow faculty members to serve on each of its seven committees, with the exception of the Policy Committee and the Executive Committee. Faculty who serve on these committees may participate in discussions among committee members, but have no voting rights. Two faculty members were also appointed to the Board of Trustees, subject to the same limitations as those who serve on committees.

The College's President is its Chief Executive Officer, a voting member of the Board, and responsible for all facets of the day-to-day operations of the College. Reporting to the President are members of the College's executive staff who form an administrative "Cabinet"⁵. In addition to the President, the Cabinet includes an Administrative Assistant, the Dean of Faculty, the Dean of Students, the Chief Financial Officer, the Chief Administrative Officer, the Chief Officer for Advancement⁶, the Chief Information Officer, and the Hollis Price Fellow.⁷ The cabinet meets

⁴ At hearing the Petitioner amended its petition to exclude from the unit found appropriate herein, all office employees, maintenance employees, guards and supervisors as defined in the Act.

⁵ This group is also referred to in the record as the Executive Staff.

⁶ This position is currently vacant.

weekly, and has been described by the Dean of Faculty as "a managerial body that meets to discuss managerial issues in the institution." The Dean of Faculty provides the cabinet with reports and updates involving academic matters.

The Academic Council is described by the Dean of Faculty as "a managerial body" and is comprised of the five Chairpersons of each of the College's five Divisions, the Registrar, the Head Librarian, the Director of the African American Program, the Director of Core Curriculum, the Director of Self-Study, and the President of the Faculty Organization. The Dean of Faculty chairs the Council. According to the Dean of Faculty, the Council does not establish policy for the College, but discusses "avenues for implementing policy." The Council also discusses such topics as course scheduling, the academic calendar and agendas for the faculty assembly (which the Dean also chairs). On those occasions when the Council may consider recommending a change in such matters as the criteria for students to receive credit for courses taken at another institution, the Council's recommendations are forwarded to the full Faculty Assembly for consideration. It is not known to whom the Assembly's recommendations are forwarded. There is no evidence that any recommendation of the Council can be implemented without the approval of one or more levels of superior authority. Nor does the record identify the levels of authority whose approval is required. Thus, it cannot be concluded that decisions of the Council are "final." It cannot be concluded that any of the Council's recommendations are "effective" either, since no final outcomes of recommendations made by the Council are known.

The Vice President for Academic Affairs (more commonly referred to as the Dean of Faculty) oversees the operations of the College's five academic divisions. Each division in turn, is overseen by a Division Chair (hereinafter referred to as "Chairs"). The divisions are: Fine Arts and Humanities; Business and Economic Development; Education; Natural Science, Mathematics and Computer Science; and Social and Behavioral Sciences. Each division is further divided into areas. For example, the Division of Fine Arts and Humanities includes the areas of Art, English, Humanities, and Music. The Employer's faculty members -- those whose unit placement is disputed herein -- are employed within these academic divisions, and their primary functions are the instruction and advisement of students. The Division Chairs are the principal administrators of academic affairs within the Divisions they oversee. Approximately 50% of their time is devoted to administrative duties and 50% to teaching. The position of "Coordinator" also exists in apparently those Divisions which contain a significant number of faculty. Divisions are subdivided into smaller organizational groups called "areas." For example, the Division of Mathematics, Natural Science and Computer Science has a Mathematics area in which all math professors are grouped; a Chemistry area; a Biology area and a Computer Science area. A "coordinator" assigned to each area, serves as a conduit of information between the faculty of each area and the Division Chair.

⁷ The individual currently serving as the Hollis Price Fellow described the position as that of an assistant to the President who is responsible for the "organization of board meetings and keeping the cabinet organized and on task." This individual also occupies several other positions, including Assistant Dean of Faculty, Director of the W.E.B. DeBois Scholars Program and Assistant Professor of Scientific Division of Education.

The Dean of Faculty is the highest ranking faculty member within the academic Divisions. Her job description indicates that she is the "Chief Academic Officer responsible for the leadership, administration and management of Academic Affairs." She reports directly to the President of the College. She has a multitude of responsibilities, including the creation and administration of all courses and academic programs offered by the College; the recruitment, retention and development of all faculty; the establishment and enforcement of all academic standards; and the creation and management of a budget for all five academic Divisions. The Dean teaches one course per semester, with the remainder of her time dedicated to her administrative duties. The Dean is assisted by an "Assistant Director of Academic Affairs," (also referred to at times as the Assistant Dean of Faculty) who occupies four separate positions, including that of assistant to the President.

According to the Faculty Handbook, faculty members participate in the governance of the College through 1) an Academic Council, 2) a Faculty Assembly, and 3) Standing Committees of the faculty. The Academic Council "deliberates and makes recommendations on administrative policies and procedures" concerning academic affairs. Council members include the Dean of Faculty, Associate Dean of Faculty, each of the five Division Chairs, the Head Librarian, the Academic Skills Center Director, and the College's Registrar. The record fails to identify any managerial functions which the Council may possess or exercise, and it is undisputed that the Council does not establish policy for the College. It is not known how often the Council meets.

The primary function of the Faculty Assembly as defined in the Handbook is the conduct of the academic business of the faculty, and making recommendations in areas involving faculty responsibility. The Dean of Faculty calls and chairs all Faculty Assembly meetings. The Dean also determines the agenda for each meeting. According to the Dean, the Academic Council generally suggests items for the agenda, and occasionally a member of the faculty will do so, too. All full-time faculty are expected to attend the meetings and are voting members of the Assembly, as are the members of the Academic Council. Part-time and adjunct faculty may attend meetings as non-voting members. Each standing committee (discussed below) generally gives a committee report at each meeting.

1. Standing Committees

Each full-time member of the faculty is appointed to a standing committee at some point during his/her career with the College, if not necessarily each school term. The Faculty Handbook identifies six standing committees: Academic Standards, Honors Selection Committee, Curriculum Committee, Library and Research Committee, Promotion and Tenure Committee, Faculty Affairs Committee, and Academic Area Coordinators. Evidence adduced at hearing indicates that faculty were assigned to five standing committees during the 2001-2002 academic year: Academic Standards, Honors Selection; Curriculum; Faculty and Instructional Development; Library and Research; and Student Development. Additionally, the record indicates that other committees of temporary duration such as a Core Committee, Catalog Committee and a Tenure Committee were functional during this most recent academic year. The President and Dean of Faculty are ex-officio members of each standing faculty committee, with

the right to attend the meetings and participate in discussion. However, neither of these individuals has the right to vote.

Standing committee appointments are generally made at the beginning of each school year and are sometimes for the duration of the school year, while apparently at other times, for a longer duration. Faculty were assigned to the Standing Committees for the 2001-2002 school year through a collaboration between the Dean of Faculty and the President of the Faculty Organization. Details of this process are not known except to the extent that a questionnaire is generally submitted to each faculty member at the beginning of the school year and each individual is asked to choose his/her first, second and third choice for assignment to a standing committee. An attempt is made to assign each faculty member his/her first choice, consistent with other objectives such as securing representation from a cross-section of the College's academic Divisions.

During the 2001-2002 school year, the Academic Standards, Honors Selection Committee was comprised of eleven members. The Committee has not historically been comprised solely of faculty members. Also members are and have been the Hollis Price Fellow, counselors, the Director of Admissions, the Director of Student Financial Aid, and a representative from the Student Affairs Department. Included among the functions of the committee are the review of academic standards, the review of cases of academic probation and dismissal, and the review of students nominated for student honors. The Committee hears appeals from students who are subject to suspension and dismissal, and reviews student applications for readmission to the College. The Committee makes recommendations on these matters to the Faculty Assembly. Students can appeal Committee decisions to the Dean of Students. In addition, it appears that each year the Committee receives a list prepared from College records of students eligible for honors, and reviews the qualifications of nominated students to ensure that they meet the criteria for each honor. The committee also reviews the qualifications of students who appear eligible to graduate and forwards its recommendation concerning each candidate to the Faculty Assembly for its review. Recommendations of the Faculty Assembly are in turn forwarded to the Academic Affairs Committee of the Board of Trustees, and that Committee ultimately passes along its recommendations to the full membership of the Board.

According to the Dean of Faculty, proposed changes in curriculum are generally reviewed by the Curriculum Committee. The committee reviews the appropriateness of the College's curriculum and makes recommendations for changes in the curriculum. These might include changes in general education requirements, adoption of new majors or minors, the creation or deletion of courses, changes in course credit hours, major reorganization in a curriculum area, approval of educational programs, and approval of cross-divisional programs. The type of change recommended by the Committee determines the number and identity of the superior authorities who must approve the recommendation before it can be implemented. For example, all changes proposed by the Curriculum Committee which have a potential budgetary impact must be reviewed by a Dean.⁸ Documentary evidence indicates that a recommendation

⁸ The record does identify whether it is the Dean of Students or Dean of Faculty who is involved in this process.

from the Committee that a new course be added to the College's curricula requires the approval of both the Dean of Faculty and the President of the College. Major course changes, such as the deletion of an area in which a student may earn a major or minor degree, or the discontinuance of a course required for a degree, require the approval of the Faculty Assembly, the Dean of Faculty, the President, and ultimately the Board of Trustees.⁹ The President of the College testified that he could not recall the Board ever having rejected a recommendation which had been made by the Committee and approved by the other levels of review. The Curriculum Committee is not comprised solely of faculty members. In addition to its eleven faculty members, its membership includes all Division Chairs, the Head Librarian, the Registrar, the Assistant Dean of Faculty, and the Director of Graduate Studies and Lifelong Learning/Continuing Education. In addition, as will be discussed later in the discussion regarding the "Core Committee," the College has chosen not to involve its Curriculum Committee in some curriculum matters.

Another faculty committee is the Library and Research Committee. During the 2001-2002 academic year nine faculty members were appointed to the Committee in addition to the Head Librarian. One of the functions of the Committee is to work with the librarian on acquisitions for the College's library, within an established budget. Another responsibility of the Committee is to extend invitations to scholars and other noteworthy individuals to address the student body. Administrative approval of invitations to speak is not necessary; however, the record does not reflect whether the expenses associated with speakers require such approval, or if a budget is provided to the committee to cover such costs.

No evidence was adduced at the hearing concerning the functions or composition of the remaining standing committees: the Student Development Committee and the Faculty and Instructional Development Committee.

2. Ad Hoc Committees

Ad hoc committees and task forces have been established from time to time to accomplish specific tasks. A Catalog Committee was created to assist in the preparation of the school's annual course catalog. In addition, the record indicates the existence of a Promotion and Tenure Committee, a Faculty Affairs Committee, a Student Development Committee, a Scholarship Committee, an Editorial Committee, a Calendar Committee, a Benefits Committee, a Committee for Core Review, a Division of Education Task Force, an Enrollment Task Force, and a Faculty and Instructional Development Committee. The record contains information concerning some of these committees, and no information concerning others.

The Promotion and Tenure Committee was established by the President a few years ago. For reasons unknown, tenure had been suspended several years prior to the President's assumption of office. There were several faculty members who had been hired with the understanding that they would be on a "tenure track," but who, upon completion of their probationary period and after having been employed in excess of five years, had not yet been

⁹ The Committee's by-laws describe these review processes, but the by-laws were not made a part of this record.

considered for tenure. The President created the Promotion and Tenure Committee to recommend procedures and standards for granting tenure. Tenured faculty members worked for a year and a half in conjunction with the Dean of Faculty and President to develop these procedures and standards. Some changes were made to the recommended tenure criteria by the President and Dean of Faculty before they were forwarded to the Board. Following Board approval of the new tenure criteria for faculty who had been employed five years or more, tenure candidates submitted their portfolios to the Committee which determined whether the candidates met tenure criteria. The Committee recommended that seven candidates be granted tenure. This recommendation was submitted to the Dean of Faculty who made her recommendation regarding the candidates to the President who made his recommendation to the Academic Affairs Committee of the Board, which made its recommendation to the full Board of Trustees. The Board granted tenure to the seven candidates. The Committee is currently developing tenure criteria for faculty who have been employed by the College less than five years.

Faculty play no role in the financial affairs of the College with the limited exception of the Benefits Committee. This committee was convened during 2002. The Committee was chaired by the Director of Human Resources and consisted of seven members, two of whom were faculty members. The purpose of the Committee was to review economic benefits currently available for all of the College's employees; to survey employee sentiments regarding these benefits; and to recommend any changes they believed appropriate. The Committee reviewed health, life, and disability insurance, vacation and sick leave, and retirement plans. As a result of its review, the Committee recommended that the College change its carrier for health, dental, and vision insurance, but that other benefits remain unchanged. The Committee's recommendation was presented to the Cabinet which ultimately approved it.¹⁰

The "core" curriculum of the College consists of 43 of the 120 hours required for a student's graduation. Shortly after his arrival, the President undertook a review of the existing curriculum. The President assembled a committee of faculty, staff, students, trustees, and at least one individual from outside the College. The record does not reflect the precise number of faculty members who were involved in the process; however, it is undisputed that the standing Curriculum Committee was not involved. The final recommendations of the Core Committee are not known, nor are the scope of any curriculum changes which may have resulted from the recommendations.

The College sought to review the relationship between its Division of Education and the local community. To this end, a Division of Education Task Force was assembled. The Task Force was comprised of faculty members of the Division of Education, representatives of a local school district, and three outside consultants. From the record it appears that the results of this Task Force were presented as part of a report to the College's national accreditation agency. There is no evidence that any faculty standing committee was involved in this process, and the record does not indicate the proportion of faculty members on this Task Force.

¹⁰ The criteria used by the Committee and the bases for its recommendation is not known; therefore, it cannot be determined whether the recommendation was the product of an exercise of discretion or the merely the ministerial act of relaying the survey's results.

During the 2000-2001 academic year the Dean of Faculty commissioned a task force to review enrollment policies. She recruited representatives from the faculty, from the Admissions Department, Financial Aid, Budget, and Counseling services. The record does not reflect what, if any, recommendations or changes occurred as a result of the work of this committee. Nor is there any evidence of the percentage of the committee which was composed of faculty. There is no evidence that any faculty standing committee took part in the process.

3. The Interview Process

Committees are sometimes impaneled to screen employment applicants for both faculty and non-faculty positions.¹¹ When a staff vacancy occurs, a requisition to fill the position is submitted to the Human Resource Department who forwards it for approval to the Chief Financial Officer of the College. Following CFO approval, the position is posted internally and/or outside the College. Although the record is not entirely clear, it appears that at times a panel of faculty members and other representatives of the College may interview applicants and recommend an applicant for hire to the Human Resource Department which, following a background investigation of the applicant, extends an offer of employment to the successful applicant.

When a faculty vacancy arises and after hiring authorization is secured from the CFO, the Dean of Faculty notifies the Department of Human Resources where and how the position should be advertised. The HR Department places advertisements accordingly. Resumes received in response to the advertisements are forwarded by Human Resources to the Dean of Faculty who then determines whether to appoint a committee (which may be comprised of faculty and non-faculty representatives of the administration), to review applicants' qualifications and make a recommendation for hire to the Dean of Faculty. The Dean interviews applicants recommended by the committee and recommends her choice to the President. All offers of faculty employment are extended by the President. Decisions regarding salary levels are also made by the President, usually in consultation with the Dean of Faculty. Faculty committees have made recommendations regarding salaries and types of appointment upon occasion, but these recommendations have not necessarily been adopted by the College.

4. The Dismissal of Staff and Faculty

In the year 2000 the College encountered some financial difficulties. As a result, a process called re-engineering occurred. Re-engineering involved the dismissal of certain clerical employees and proposed across-the-board pay cuts for the remaining faculty and staff. These changes were announced to all employees of College by the administration at a meeting in which employees were told that a number of staff members were to be laid-off and the remainder to receive salary reductions. The meeting was called and chaired by the President. During the

¹¹ Non-faculty positions, whether administrative, clerical, or otherwise, are referred to as "staff positions."

meeting, employees suggested alternatives to pay cuts; however, they were told that the decision had already been made and was final. The Division Chairs were then instructed to return to their offices to await the receipt of a telephone call which would notify them whether any clerical assigned to their Divisions were among those employees who would be terminated. Dismissed clericals were required to clean out their desks and leave the campus immediately. Approximately 30 employees lost their jobs as a result of the re-engineering process. The Petitioner protested the proposed salary reductions and ultimately no reductions occurred. No faculty members played any role in the decisions to terminate employees or to reduce salaries, and there is no evidence that any faculty were even apprised that these matters were under consideration prior to the announcement of their implementation.

The only other evidence of record concerning the role of faculty in the dismissal process, involved two incidents. The first incident concerned the unsuccessful efforts of the Athletic Director to secure the dismissal of a coach for his alleged inadequate job performance. According to the Athletic Director, for a period of four to six years she had repeatedly recommended to her superior, the Dean of Students, that a particular coach be terminated. The coach was ultimately terminated only after the President of the College retained a consultant to evaluate and improve the Athletic Department. This consultant agreed with the Athletic Director's recommendation, and when he recommended the coach's dismissal to the College's President, the coach was dismissed. A former Division Chair also testified that a faculty member in his Division was dismissed without notice to the Chair, and without his having made a dismissal recommendation.

5. The Faculty's Role Involving Grants

As mentioned above, faculty play no role in the budget process or in any other financial affairs of the College. Their role involving financial affairs is so restricted that even when faculty secure grant monies for the College, they must obtain permission to spend the money. Grants are a substantial source of funding for the College. Faculty may author grant applications in order to fund the salaries of clerical employees within an academic Division, to fund research, or to provide equipment and supplies to a Division. Any staff member can write a grant application; however, prior approval must be received from the Dean of Faculty,¹² who reviews grant proposals to determine whether the object of the grant is one the College wishes to pursue. After obtaining approval and drafting the grant application, its author submits the document to the Dean of Faculty and/or the President for signature(s). Grant monies become part of the College's general fund and are managed by the College's fiscal office. For example, if a grant is for clerical salaries, the salaries will be paid in the normal course of business by the fiscal office. Grant monies received for other purposes, however, are released to faculty members only after approval for the expenditure has been secured from the affected Division's Chair and the Dean of Faculty.

¹² There is a brief reference to a grants office in the record, but such an entity no longer appears to exist.

B. Discussion of the Managerial Status of Faculty

1. Full-time Faculty Members

The party seeking to exclude either a whole class of employees or particular individuals as managerial has the burden of presenting sufficient evidence to establish this exclusion, Montefiore Hospital & Medical Center, 261 NLRB 569 (1982) at fn. 17; University of Great Falls, 325 NLRB 83, 93 (1997). Here, such evidence is lacking. With the exception of the Dean of Faculty and Assistant Dean of Faculty, it is concluded that full-time faculty of LeMoyne-Owen College are not managerial employees within the meaning of the Act.

Managerial employees have been excluded from coverage of the Act based upon the policy determination that members of management would pose a conflict of interest if they were permitted to engage in collective bargaining. The Board and courts have defined managerial employees as those "who have the authority to formulate, determine, or effectuate employer policies by expressing and making operative the decisions of their employer and those who have discretion in the performance of their jobs independent of the employer's established policies, (emphasis added), Bell Aerospace, 219 NLRB 384 (1975); NLRB v. Yeshiva University, 444 U.S. 672, 100 S.Ct. 856 (1980). In Yeshiva University the Supreme Court found its faculty were managerial employees because they possessed total control over academic matters, determining each school's curriculum, grading system, admissions and matriculation standards, academic calendars and course schedules. Outside of the academic affairs, the faculty "effectively" determined faculty hiring, tenure, sabbaticals, terminations, and promotions.

In the case at hand, the faculty of Le-Moyne Owen College neither possess absolute control over any facet of the school's operations, nor "effectively" recommend policies affecting its administration. They neither establish new policy nor effectively recommend changes to existing policy. And there is not a scintilla of evidence that faculty may, at their discretion, diverge from established policy.

Recommendations made by virtually every committee discussed in this record are subject to multiple levels of review, and subject to change by higher levels of authority. For example, students can appeal to the Dean of Students, recommendations made by the Academic Standards Committee which involve student expulsion or which place conditions upon students' continued enrollment in the College. Committee recommendations regarding student graduation eligibility are subject to review and revision by the Faculty Assembly, Academic Affairs Committee of the Board and ultimately the full Board. Recommendations of the Curriculum Committee are subject to review and revision by the Dean of Faculty, President of the College, and under certain circumstances, by the Board of Trustees. Recommendations of the Promotion and Tenure Committee are submitted to the Dean of Faculty who makes her recommendations to the President who makes his recommendations to the Academic Affairs Committee of the Board, which makes its recommendations to the full Board. Recommendations of the Benefits Committee were submitted to the President's Cabinet for ultimate approval. Panels which review the applications of employment applicants and which interview applicants make their

recommendations to the Human Resource Department and in the case of faculty applicants, to the Dean of Students who makes her recommendation to the President.

Standing Committees do not operate independently. The Dean of Faculty and President are *ex officio* members with a right to participate in committee discussions. A member of the President's Cabinet (the Hollis Price Fellow who is also Assistant Dean of Faculty) serves on the Academic Standards Committee although he was not apparently appointed to the Committee by either the Dean of Faculty or the President of the Faculty Organization. As recommendations ascend through the hierarchy of the review process, the potential for effective faculty influence undergoes a corresponding decline. The more levels of authority a recommendation must pass through, 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, Puerto Rico Junior College, 265 NLRB 72,75 (1982); Florida Memorial College, 263 NLRB 1248 (1982).

Standing committees are not necessarily comprised only of faculty. To the contrary, the only such committee appears to be the ad hoc Tenure and Promotions Committee recently established. Members of administrative and fiscal departments, students, and members of the outside community often also serve on other standing and ad hoc committees. Therefore, even recommendations made by these committees are not solely the recommendations of faculty.

Not only does the record fail to establish that committee recommendations are "effective," it also demonstrates that at times the President has chosen to circumvent standing committees by appointing persons to special committees for the purpose of considering topics which would normally fall within the purview of a standing committee. For example, the Core Committee appointed by the President and comprised of members of the faculty, staff, students, trustees and outside community, reviewed "core" curricula, a subject matter normally within the jurisdiction of the standing Curriculum Committee

Even the Faculty Assembly does not function independent of the administration for it is the Dean of Faculty who calls the meetings and determines each meeting's agenda.

Faculty members exercise no role in the financial affairs of the College. Even when faculty have been instrumental in securing grant monies for the College, approval from the College's financial office is necessary before any of the funds can be released to the originating faculty member for the purchase of grant-approved supplies and services.

As mentioned above, faculty play a limited role in the selection of applicants for hire, but no role in the decision to dismiss staff or faculty from employment. Faculty panels screen applicants and recommend those for hire, but their recommendations are not necessarily followed. In one case, a screening panel recommended that an applicant be hired as a "visiting" professor of chemistry rather than a "regular" professor, because the applicant's degree was in pharmacology rather than chemistry, and the screening panel was concerned that the applicant might not be qualified to teach chemistry under national college accreditation standards. The committee's recommendation was rejected by the Dean of Faculty, and the applicant was hired as a regular faculty member. There is no evidence that faculty have been involved in decisions not to renew the contracts of faculty members. In the one incident in which a faculty member

recommended the dismissal of a coach, the recommendation was not "effective." In another incident, a faculty member was dismissed without the advance knowledge of the Chair of the Division in which the individual was employed. In the case of the termination of approximately 30 staff employees and the proposed reduction in salaries of other employees, not only were the faculty not consulted in advance, they were not even apprised that these matters were under consideration by the administration.

There is no record evidence that faculty possess or have exercised the power to issue other forms of discipline.

There is no evidence that faculty can promote or effectively recommend the promotion of staff or faculty. The evaluations which Division Chairs complete at the end of each school term concerning faculty within their Division appear to have no influence upon the tenure, terms or conditions of employment of the evaluated faculty.

The Faculty Handbook also contains further limitations upon the authority of faculty. Section 10.00 describes instructional policies which must be followed by the faculty. These policies include a requirement that faculty prepare a course syllabus and that it be kept on file. Meeting times and locations of classes cannot be permanently changed without the approval of the Dean of Faculty and Division Chair. The Handbook also itemizes topics each professor must discuss with students during the first class meeting of each semester. The amount of outside class preparation a faculty member should require of students and the percentage of each grade which is to be allocated to correct English usage are also subjects mandated by the Handbook. The Handbook also states the College's attendance policy governing students, including circumstances under which absences may be excused. It also mandates that faculty record student attendance. The Handbook limits the circumstances in which faculty members can change a grade and sets a grading scale for faculty members to follow. Course schedules are prepared by the Registrar and there is no evidence that the faculty have any input into the process. Although the Employer stated at hearing that certain faculty are currently drafting a new faculty handbook, no evidence was adduced concerning its content or the work of the committee. The record is also silent regarding the genesis of the current Handbook. Thus, unlike the faculty in Yeshiva, where the court found that faculty control in academic matters was "absolute," in the instant case, faculty have no control over even relatively minor academic matters such as classroom location and student attendance.

The court in Yeshiva recognized that not all professional employees are necessarily managerial. Specifically, the court stated:

The Board has recognized that employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee's activities fall outside the scope of duties routinely performed by similarly situated professionals will he be found aligned with management, *Supra* at 690.

Here, the evidence is clear that the decision making authority of LeMoyne-Owen faculty is routine, lacking the breadth and the discretion envisioned by the Act as indicia of managerial status. Accordingly, it is concluded that full-time faculty members of LeMoyne-Owen College are not managerial employees and constitute a unit appropriate for purposes of collective bargaining, University of Great Falls, *Supra*; Kendall School of Design, 279 NLRB 281 (1986).

2. The Dean and Assistant Dean of Faculty

In contrast, it is concluded that the Dean of Faculty and Assistant Dean of Faculty possess the authority to act or to recommend discretionary actions in both academic and nonacademic areas which effectively control or implement College policies, and are therefore managerial employees, University of Great Falls, *Supra*.

The Dean of Faculty is the highest ranking faculty member within the area of academic affairs. She reports directly to the College's President. Her job description indicates that she is the "Chief Academic Officer responsible for the leadership, administration and management of Academic Affairs." She performs a host of functions, including supervision of the creation of new courses and programs, as well as supervision of existing courses and programs. She is responsible for the creation and management of a budget for all five academic Divisions. She is a member of the President's cabinet, a body comprised of the College's executive staff which has been described as "a managerial body that meets to discuss managerial issues." The Dean of Faculty also chairs the Academic Council which she has also described as "a managerial body" which discusses "avenues for implementing" College policies. The Dean of Faculty chairs and establishes the agenda for the Faculty Assembly. She oversees the operations of the College's five academic Divisions. Major changes in the College's curricula, such as the addition or elimination of a course require the Dean's approval. Recommendations of the Tenure Committee that a faculty member should or should not be granted tenure receive concurrence or dissent from the Dean and her recommendations are submitted to the President. The Dean interviews applicants for teaching positions and transmits her recommendations directly to the President who makes the ultimate hiring decision. It is evident from the functions performed by the Dean, that she works closely with the President to administer the College's academic operations and that she is empowered to "effectuate management policies." Accordingly, it is concluded that the Dean of Faculty is a managerial employee who is excluded from the unit found appropriate herein.

So, too, the record indicates that the Dean's assistant works closely with the President and other administrators of the College to "effectuate" its management policies. The Assistant Dean of Faculty is also the Hollis Price Fellow, Director of the W.E. DeBois Scholarship Program, and a Professor of Scientific Division of Education. In his capacity as the Hollis Price Fellow the Assistant Dean reports directly to the President and works with both the Board of Directors and the President's Cabinet. Although he described his functions with the Cabinet and Board as largely administrative (keeping the Board members "organized," and keeping Cabinet members "on task"), his job description indicates that as an assistant to the President his duties are assigned "as needed," and consequently may involve a variety of functions. In light of these duties which align the Assistant Dean of Faculty with the administration of the College, it is

concluded that the Assistant Dean is also a managerial employee excluded from the unit found appropriate herein.

C. Additional Facts Regarding the Supervisory Issue

During 2001, the Director of Human Resources offered selected faculty members supervisory training involving "Progressive Discipline" and "Timekeeping I and II." Approximately ten faculty were invited to attend, all of whom appear to be Division Chairs. Approximately five attended one or more of the courses, and no adverse action was taken against those who did not attend.

The Employer also identified ten faculty members whom it asserts supervise one or more individuals.¹³ According to the Human Resource Director, these faculty members evaluate the work performance of the clericals they oversee. The content of these evaluations, however, is unknown, nor is the evaluation process known. It also is not known whether these evaluations affect the tenure or terms and conditions of employment of the clericals. The record contains little evidence which would shed light on the relationship of these individuals and the employees they allegedly supervise.

Faculty other than Division Chairs and their superiors play no role in the renewal of faculty members' contracts.¹⁴ When a contract is due to expire, the Chair of the Division in which the member is employed makes a recommendation to the Dean of Faculty concerning whether the member should be offered a contract for the next year. The Dean forwards her recommendation to the President of the College who makes the ultimate decision. Whether recommendations involving contractual renewals generated by Division Chairs have been generally "effective," cannot be determined since no statistical data was provided from which a conclusion can be drawn. Nor is it known whether the Dean's recommendations have generally been effective.

¹³ These individuals are Cary Booker, Assistant Dean of Faculty, who allegedly supervises the staff of the Admissions Department; Barbara Frankle, Dean of Faculty who allegedly supervises all faculty; Juanita Bass, a faculty member in the Division of Humanities who allegedly oversees one clerical employee; Ruby Burgess, Chair of the Education Division who allegedly supervises two administrative assistants; Loretta Davenport whose Division is not known, and who allegedly supervises one clerical; Margaret James, from the Division of Behavioral Sciences, who allegedly supervises one administrative assistant; Muhammad Shafi, Chair of the Mathematics/Science Division who supervises one administrative assistant; Clifford Merryman, Director of the Records Department, who allegedly supervises one or more clericals; Annette Hunt-Berhe, Head Librarian, who allegedly supervises all librarians, and E.D. Wilkens, the Athletic Director who allegedly supervises all coaches.

¹⁴ The role of the faculty in the hiring process of both staff and faculty has been discussed in an earlier section of this decision.

In respect to the evaluation of faculty, at the commencement of each school year the Chair of the Division and each faculty member in the Division "negotiate" a set of goals with each teacher; or in some Divisions the faculty members establish their goals without input from the Chair. These goals fall within three areas: 65% of the faculty member's goals should be devoted to teaching and advising, and approximately 35% of the goals should be devoted to the areas of professional growth and research, and College/community service. At the conclusion of the school term the Chair discusses with each faculty member, his/her progress in achieving these goals. This evaluation is written and a score or comments from the Chair are assigned to each area. The evaluation forms are forwarded to the Dean of Faculty. How the College may utilize these evaluations, if at all, is not known. For example, it is not known whether these scores affect the salary, tenure, or other terms of faculty members' employment in subsequent school years.

There is limited record evidence regarding discipline allegedly issued by members of the faculty. In one incident which occurred in May of 2001, the Registrar (who is also a faculty member who teaches history) reported to the Human Resource Department that an employee in the Registrar's office had made a threatening remark to two co-workers. A written report of the incident was completed by the Registrar. The subsequent investigation of the incident and the decision to discharge the individual was made by the Director of Human Resources. In another incident, a non-faculty coach in the Athletics Department was terminated after the Athletic Director had unsuccessfully recommended his termination for several years. The coach was ultimately terminated after the President of the College retained a consultant to evaluate and improve the Athletic Department. The Director of Athletics recommended the termination of the coach to the consultant who agreed, and ultimately the coach was dismissed. A former Division Chair also testified that a faculty member in his Division was dismissed without notice to him and without his having made such a recommendation. As mentioned previously, faculty also played no role in the College's decision to terminate certain employees and reduce the salaries as the result of the re-engineering which occurred in the year 2000.

Two documents which the Employer produced in response to a subpoena from the Petitioner which requested the production of disciplinary records, appear to be memoranda. One was authored by the Academic Affairs Director and the other by the Human Resource Director. The memoranda memorialize meetings held by these administrators with staff employees, and outline performance improvement plans for the employees. Two other documents are memoranda from the Registrar to staff reminding them that lunch hours are limited to one hour, and that it is never appropriate to express a derogatory opinion about staff in the presence of students.

Section 3.00 of the Faculty Handbook is entitled "Faculty Policy and Procedural Authority." The duties of Division Chairs are set forth in Section 3.02. These include spending 50% of their time engaged in "administering" their respective divisions; and 50% of their time engaged in teaching. Also included within their duties are "Providing leadership, management and evaluation of all divisional activities," but there is no express reference to supervisory authority or responsibility.

The only evidence of potential supervisory authority pertains to the Athletic Director. In April of 2002 the Athletic Director (who is also a faculty member) issued "Letters of Reprimand" to six coaches for their failure to timely submit game scores to the local newspaper, the NCAA and the SAIC.¹⁵ Their failure to do so had apparently resulted in the issuance of a fine to the College by the SAIC. Each letter contains a reminder to the coaches that "three letters of reprimand received by any coach within one school year warrants a recommendation for termination."

D. Discussion Regarding The Supervisory Authority of Faculty

Section 2(3) of the Act excludes from the definition of the term "employee" any individual employed as a supervisor, and Section 2(11) of the Act defines a supervisor as a person who possesses any of the twelve powers listed therein, or the authority to effectively recommend such personnel actions if in doing so s/he exercises independent judgment. In determining whether an individual is a statutory supervisor, the Board and the courts are reluctant to interpret Section 2(11) with an expansive approach since the finding of supervisory status denies to the individual the rights and protections of the Act, Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996). To this end, the Board closely examines the record in its determination of supervisory status, and conclusionary statements made by witnesses in their testimony, without supporting evidence, are insufficient to establish supervisory authority, Sears, Roebuck & Co., 304 NLRB 193 (1991).

In representation proceedings the burden of proving that an individual is a statutory supervisor rests upon the party making the assertion, The Ohio Masonic Home, Inc., 295 NLRB 390, 393 (1989); Tucson Gas & Electric Co., 241 NLRB 181 (1979). Here the record evidence is insufficient to establish that members of the proposed bargaining unit are statutory supervisors within Section 2(11) of the Act, with the possible exception of the Athletic Director.

The role of faculty members in the evaluation of staff employees or other faculty is unclear, and there is no evidence that any such evaluations affect employees' terms and conditions of employment. Absent evidence that assessments of performance directly affect employees' terms or tenure of employment, it cannot be concluded that the assessments have been "effective" within the meaning of Section 2(11) of the Act, MJM Metal Products, Inc., 325 NLRB 240 (1997); Necedah Screw Machine Products, Inc., 323 NLRB 574, 577 (1997); Northcrest Nursing Home, 313 NLRB 491, 498, fns. 36 & 37 (1993).

The evidence indicates that the Registrar's role in respect to the discharge of an employee for making threatening statements to co-workers, was merely reportorial. Merely reporting employee misconduct without recommending any particular corrective action, is not an indicia of supervisory status, Rest Haven Nursing Home, 322 NLRB 210 (1996). Similarly, where discipline recommendations are made but they are only given weight to the extent they may lead

¹⁵ These represent the National Collegiate Athletic Association and the Southern Intercollegiate Athletic Conference, respectively.

to an investigation of the facts, such recommendations are not "effective" within the meaning of Section 2(11), E.I. DuPont de Nemours & Co., 69 NLRB 509, 517 (1946).

The only other evidence of potential supervisory authority involving employee discipline concerns the Athletic Director's issuance of reprimands to six coaches. The Athletic Director has been a faculty member (instructor in the areas of wellness and fitness) of the College for 25 years and its Athletic Director for the past 13 years. She is directly supervised by the Dean of Students. According to the Athletic Director, she plays no role in the hire or discharge of persons employed within her department; these functions are handled by the Dean of Students. Each year for four to six years, she had recommended the discharge of a specific coach for poor work performance. Her recommendations went unheeded. It was not until the President of the College hired a consultant to improve matters within the department who agreed with the Director's recommendation of termination, that the coach was dismissed. Thus, there is no evidence that the Athletic Director possesses the power to hire or fire, or to effectively recommend such actions. As mentioned above, the only evidence of the exercise of any supervisory power on the part of the Athletic Director is her issuance of letters of reprimand to six coaches. There is no evidence that the Director was requested or instructed to issue these letters from any superior. Nor, however, is there any evidence that the Director has at any other time during her 13-year tenure as Athletic Director, issued any other discipline. The sporadic exercise of Section 2(11) powers does not confer supervisory status under the Act; the authority must be exercised regularly and substantially for supervisory status to accrue, Brown & Root, Inc., 314 NLRB 19, 20-21 (1994); Fred Rogers Company, 226 NLRB 1160, 1161 (1976). Thus, even assuming that the letters issued the coaches constitute an exercise of supervisory authority, the record does not establish that this assumption of authority is anything other than insubstantial, irregular, and sporadic.

Since the evidence regarding the supervisory status of the Athletic Director is inconclusive, she shall be allowed to vote subject to challenge, and a final determination regarding her eligibility to vote shall be made, if necessary, in post-election proceedings. In respect to other full-time faculty members, it is concluded that they do not possess supervisory authority within the meaning of Section 2(11) of the Act. Accordingly, they are included within the unit found appropriate herein.

E. The Status of the Faculty Organization as a Labor Organization

The College asserts that the Petitioner is not a labor organization within the meaning of Section 2(5) of the Act either because its membership is comprised solely of persons who are managerial and/or supervisory, or because it otherwise fails to meet the prerequisites of Section 2(5).

As fully discussed above, it has been concluded that full-time faculty are neither managerial nor supervisory personnel. Moreover, even if some of the Petitioner's members are excluded from the unit found appropriate herein because they fail to teach 12 hours or more each

semester, the membership of non-unit individuals within a union does not necessarily disqualify it as a labor organization.¹⁶

Section 2(5) of the Act states:

(5) 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.

The record establishes that the Faculty Organization meets these two criteria. The Faculty Organization's membership is comprised of full-time faculty members. The focus of the organization is the well-being of faculty, including salary and job security. The record indicates that the Organization has "dealt with" the College regarding the terms and conditions of faculty member's employment, on several occasions in the recent past. Most noteworthy was its protest of the College's planned reduction in faculty salaries in the year 2000. Following a protest and threat of litigation by the Faculty Organization, the College agreed not to reduce the salaries of any staff. In addition, the President of the Faculty Organization "dealt with" the Dean of Faculty in the selection of faculty for appointment to committees during the 2001-2002 school term. Thus, it is concluded that the Faculty Organization is a labor organization within the meaning of the Act, NLRB v. Cabot Carbon, 360 U.S. 203 (1959); Prime Time Shuttle International, Inc., 314 NLRB 838 (1994).

III. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees in the unit who are engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the unit who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are former unit employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the

¹⁶ In Sierra Vista Hospital, Inc., 241 NLRB 631, 632 (1979), the Board held that the presence of statutory supervisors in a bargaining unit was "virtually irrelevant to determining status under Section 2(5) of the Act;" *See also* International Organization of Masters Mates and Pilots of America, Inc., 144 NLRB 1172, 1177 (1963).

election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the Faculty Organization, Le-Moyne-Owen College.

IV. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices, Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

V. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director of Region 26 within 7 days from the date of this Decision. North Macon Health Care Facility, 315 NLRB 359 (1994). The Regional Director of Region 26 shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 26's Office located at 1407 Union Avenue, Suite 800, Memphis TN 38104-3627, on or before **August 13, 2002**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by August 20, 2002.

DATED AT Indianapolis, Indiana, this 6th day of August, 2002.

Roberto G. Chavarry
Regional Director
National Labor Relations Board
Region 25
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