NONPROFIT FORUM

UNIONIZING ACTIVITY IN THE ACADEMY: TWO RECENT DEVELOPMENTS

S. Andrew Schaffer

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INTRODUCTION

During the past few years, there has been an acceleration in unionizing activity at colleges and universities aimed primarily at organizing graduate students performing a variety of academic functions but also involving continued efforts regarding faculty as well. This paper offers a preliminary examination of two very recent 1999 decisions which have the potential significantly to change the relevant legal landscape. In the first case the Regional Director for Region 2 of the National Labor Relations Board (NLRB) ordered a representation election for a faculty bargaining unit at Manhattan College; in the second the NLRB overruled its own long standing precedents and held that interns and residents at private hospitals are now to be considered employees within the meaning of the National Labor Relations Act (Act or NLRA) and, therefore, eligible to organize under the protection of the Act.

I. Faculty Unionization: Manhattan College

By decision dated November 9, 1999, the Regional Director for Region 2 certified a faculty bargaining unit at Manhattan College in Riverdale, New York and directed that an election be held on December 8 and 9, 1999. The decision, it can be argued, is an aggressive attempt to limit, perhaps obliterate, the effect of the landmark decision of the United States Supreme Court in National Labor Relations Board v. Yeshiva University, 444 U.S. 672 (1980) and a significant departure from the prevailing line of NLRB decisions following Yeshiva.

A. The Yeshiva Decision

In NLRB v. Yeshiva University, supra, the Supreme Court held (5-4) that the faculty at Yeshiva University were managerial employees and therefore, under the managerial exception originally recognized in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974), were ineligible to organize under the protection of the National Labor Relations Act (NLRA or Act).

The Yeshiva decision set forth the standards for analyzing the managerial status of college faculty. The Court reiterated that managerial employees are those who "formulate and effectuate management policies." 444 U.S. at 682 (quoting NLRB v. Bell Aerospace, supra). In order to be classified as managerial, a college faculty must exercise discretion within -- or even independent of -- established employer policy, and that they must represent management interests by "taking or recommending discretionary actions that effectively control or implement employer policy." 444 U.S. at 683. The Court described in detail the managerial role of the faculty at a "mature" college:

> "The controlling consideration in this case is that the faculty of Yeshiva University exercises 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 delegate 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. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served," 444 U.S. at 686 (footnote omitted).

The Court further recognized that the faculty at Yeshiva University were "professionals" as defined by the Act, but that their professional status did not keep them from being exempt from coverage under the Act either under the statutory exclusion for "supervisors" or under the judicial exclusion for managerial employees.[1]

Although the Yeshiva Court determined that the primary criterion of a faculty's managerial status is control of academic matters (augmented by its role in academic personnel matters), the Court made it clear that the faculty need only exercise effective recommendation or control, rather than final authority, to be deemed managerial:

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[1]The Court did not directly determine the status of Yeshiva University's faculty as supervisors (due to their role in personnel decisions) because of its determination on the managerial issue. However, the Court observed, "[t]he record shows that faculty members at Yeshiva also play a predominant role in faculty hiring, tenure, sabbaticals, termination and promotion. These decisions clearly have both managerial and supervisory characteristics. Since we do not reach the question of supervisory status, we need not rely primarily on these features of faculty authority." 444 U.S. at 686, n. 23 (citations omitted).

> "Ultimate authority ... has never been thought to be a prerequisite to supervisory or managerial status. Indeed it could not be since every corporation vests that power in its board of directors." 444 U.S. at 685, n. 21.

The Yeshiva faculty's managerial authority was not diminished by the existence of the administration's infrequently exercised veto power, 444 U.S. at 683, n. 17; by the administration's formulation of broad institution-wide policies in faculty-related areas, 444 U.S. at 675; or by instances when scarce resources motivated the University to impose constraints on certain faculty activities, 444 U.S. at 677, and the Court recognized that the inherent tension between faculty managers and the administrative hierarchy on some issues did not defeat managerial status:

> "At Yeshiva, administrative concerns with scarce resources and University-wide balance have led to occasional vetoes of faculty action. But such infrequent administrative reversals in no way detract from the institution's primary concerns with the academic responsibilities entrusted to the faculty. The suggestion that faculty interests depart from those of the institution with respect to salary and benefits is even less meritorious. The same is true of every supervisory or managerial employee. Indeed there is actually a greater community of interest on this point in the university than in industry, because the nature and quality of a university depend so heavily on the faculty attracted to the institution." 444 U.S. at 688-689, n. 27.

The Court described the decision-making authority of the Yeshiva administration:

> "University-wide policies are formulated by the central administration with the approval of the Board of Trustees and include general guidelines dealing with teaching loads, salary scales, tenure, sabbaticals, retirement and fringe benefits. The budget for each school is drafted by its Dean or Director, subject to approval by the President after consultation with a committee of administrators. The faculty participate in University-wide governance through their representatives on an elected student-faculty advisory council. The only University-wide faculty body is the Faculty Review Committee, composed of elected representatives who adjust grievances by informal negotiation and also may make formal recommendations to the Dean of the affected school or to the President. Such recommendations are purely advisory." 444 U.S. at 675-76 (footnote omitted).

At Yeshiva University, the individual schools -- which were "substantially autonomous" -- were headed by deans; at most of the schools, the faculty worked via committees, but at some of them the faculty met as a whole on educational policy matters. Some of the schools had formal meetings pursuant to written by-laws; some did not. 444 U.S. at 676. Faculty welfare committees negotiated with administrators concerning salary and conditions of employment. 444 U.S. at 676. The Court noted that two of the Yeshiva deans regarded faculty action as binding and had not vetoed faculty academic decisions, and in another school after the faculty disagreed with a dean's decision to remove a major, it was reinstated. 444 U.S. at 676, n. 4.

The faculty at Yeshiva made recommendations to their Deans (or Directors) concerning faculty hiring, tenure, sabbat-

icals, termination and promotion. The final decisions were reached by the central administration on the advice of the Dean, and "the overwhelming majority of faculty recommendations [were] implemented." 444 U.S. at 677, and at n. 5. The Court also noted that the faculties of some schools at Yeshiva made final decisions on admission, expulsion and graduation of individual students; and others -- but again, not all -- set teaching loads, student absence policies, tuition and enrollment levels, and, in one case, the location of a school. 444 U.S. at 677. The Court also noted, however, that when financial difficulties restricted Yeshiva's budget, the decisions were made "within the constraints imposed by the administration." Ibid.

In sum, the facts recited in Yeshiva showed that the authority of the faculty was shared with a central administration which promulgated institution-wide policies and general guidelines within which the faculty worked in formulating and implementing policy.

B. Post-Yeshiva Decisions

Over the years the NLRB has applied the Supreme Court's analysis in Yeshiva in diverse circumstances to determine whether college faculty are managerial employees. The primary emphasis has been on control of the curriculum and most of the decisions have also given some consideration to decision-making authority

in areas such as academic personnel matters (hiring, tenure, promotion, etc.).

1. Selected Cases Finding Managerial Status

In Elmira College, 309 N.L.R.B. 842 (1992), faculty were held to be managerial where they had final authority for developing and approving new courses; approving changes in course levels, majors and minors; adding courses to the curriculum; setting credit hours, course content, curriculum, grading of students, admissions, student advising, transfer course accreditation, degree requirements, graduation standards, setting the requirements for majors and minors, and academic discipline. In the area of academic personnel management, the Elmira faculty effectively decided the hiring of full-time faculty, had authority with respect to hiring part-time faculty, effectively determined which faculty would receive tenure, and participated in the hiring of academic deans. However, the faculty at Elmira did not participate in promotion decisions (other than tenure), had been overruled in hiring decisions in some instances, and had a limited role in salary, benefits and budget.

The Board acknowledged that the record contained facts which could be taken to indicate a lack of managerial status, but most were in areas outside the critical area of academic governance, or were remote in time, and under an earlier administration.

Similarly, in Lewis & Clark College, 300 N.L.R.B. 155, 1990 NLRB LEXIS 478 (1990), the faculty had been found to be managerial where they exercised effective control of academic matters. Nearly all of their recommendations were routinely approved, and some without the need for approval by higher management at all. The faculty effectively controlled teaching methods, grades, retention, scholastic and matriculation standards, curriculum and course content, degree requirements, teaching assignments, graduation requirements, academic calendars, departments of instruction, honors programs and scholarships. 1990 NLRB LEXIS 478, *7 - *11. They approved a new "core curriculum," approved new minors, converted the school of music to a department, and changed the requirements for mathematics, writing and foreign languages. Id., at *19. Of 57 tenure recommendations 52 were accepted by the administration and of 67 promotion recommendations 65 were accepted. Id., at *14.

While the Lewis & Clark faculty participated in the development of a new comprehensive salary structure, the administration did not accept all of the features of the faculty plan. It declined to use the faculty's "benchmark" list of other colleges and unilaterally froze cost of living increases during one academic year, without giving the faculty a role in the decision. When the administration decided to convene an ad hoc committee to examine the college's mission, the committee consisted of nine administrators and two faculty members and the

committee's report was issued and accepted by the board of trustees over the objection of both faculty members on the committee. Id., at *20 - *21. Similarly, when Lewis & Clark's board of trustees decided to review governance procedures, its Task Force on Governance was made up of five administrators and one faculty member, and the board chairman rejected a request that he not forward to the board any governance proposal lacking the support of the three faculty units. Id., *25 - *26.[2]

In Lewis & Clark, the Board reaffirmed adherence to the language in Yeshiva recognizing the delicate balance between the central administration and the faculty; and that legitimate administrative concerns with "scarce resources and University-wide balance" mean that occasional vetoes of faculty action do not defeat managerial status: "neither the Board nor the Court requires that a faculty possess absolute or plenary authority to be found managerial; the standard ... is 'effective recommendation or control'." Id., at *39 (citing 444 U.S. at 688, n. 27). The Board concluded that there are policy questions (such as "financial viability" and "long term planning") which are broader than academic policy matters -- and from which the faculty may be excluded, yet remain managerial. Id, at *35.

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[2]The Board stated that "[t]he faculty's lack of control over the process of determining how they and the College will be governed does not reflect on the faculty members' authority...". Id., at *32 (n. 31).

In support of its conclusion in Lewis & Clark, the Board looked to its earlier decision in American International College, 282 NLRB, 189, 202 (1989) where it concluded that administrative vetoes of faculty proposals did not preclude a finding that the faculty were managerial, so long as the incidents were not substantial, did not predominate, and did not show a pattern of unilateral action which undermined faculty authority.

A similar conclusion was reached in Boston University, 281 NLRB 798 (1986), enforced, 835 F.2d 399 (1st Cir. 1987), where faculty and department chairs were held to be managerial. There, the Board concluded, and the Circuit Court agreed that the faculty's managerial authority remained despite the administration's occasionally making and implementing policy decisions without faculty input.

The Board has also held that a faculty's managerial status is not defeated by a lack of faculty involvement regarding academic calendars, student absences, enrollment levels, tuition and the location of a school. Thiel College, 261 NLRB 580, 586 at n. 34 (1982). Similarly, in American International College, supra, faculty were found to be managerial despite their lack of involvement in fashioning or implementing admissions policies, and despite the fact that they had little meaningful input on non-academic matters. The Board held that faculty participation

in a number of active and productive committees, and their participation (as department chairs and as an entire faculty) in decisions such as whether to modify course requirements, add or delete course offerings, establish major fields of study, determine course content and schedule classes, rendered them managerial.

In University of Dubuque, 289 NLRB 349 (1988), the faculty were held to be managerial based on their substantial decision-making authority in the areas of curriculum and academic policy, despite the fact that the faculty had minority representation on combined committees, and despite the fact that much of their authority on academic matters derived from a collective bargaining agreement. The Board found (while acknowledging that it was of less significance) that the faculty's minority involvement on certain committees still afforded them an effective recommendation role in matters such as department staffing, budgeting, planning and academic personnel matters.

In Duquesne University, 261 NLRB 581 (1982), a law school faculty was held to be managerial where the dean never vetoed faculty curricular actions, although the institutional by-laws merely required the Dean to obtain faculty "consensus" on academic matters. The faculty controlled grading, matriculation standards, and admissions; had significant involvement in hiring and tenure decisions; and had voted to reduce class size. The

lack of a faculty role in termination was found not to be dispositive; and there was no discussion in the decision of a faculty role in course scheduling, teaching methods, enrollment levels, tuition, budgets, academic calendars or teaching loads.

Finally, where the NLRB found the faculty at Lewis University not to be managerial, the Seventh Circuit denied enforcement. Lewis University, 265 NLRB 1239 (1982), enforcement denied, 765 F.2d 616 (7th Cir. 1985).[3] The Court of Appeals discussed the historical roots of the university governance system and its contemporary manifestations, and then went on to stress the issue central to a Yeshiva analysis:

> "The full-time faculty, through their collective participation on faculty committees, as departmental chairpersons, and as members of the 'faculty convened' determine student admission policies, graduation requirements, grading guidelines, curriculum changes, degree offerings, academic calendar matters, faculty tenure, promotion, and faculty hiring within the College." 765 F.2d at 628.

The Court rejected the argument that the faculty's decisions were merely exercises of their independent "professional judgment";

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[3]The Seventh Circuit urged the NLRB to exercise caution in applying the managerial analysis so as not to interfere in the delicate balance of a college's governing structure. The court noted that private colleges are plagued with reductions in government support, spiraling costs and declining enrollments, and must rely on faculty and the collegial decision-making process to produce educational excellence within the bounds of limited financial resources. 765 F.2d at 625.

rather, given "the unique circumstances of a truly academic setting," the faculty were managers. 765 F.2d at 766.

2. Cases Finding No Managerial Status

In Bradford College, 261 NLRB 565 (1982), the college president had explicitly advised the faculty in writing that it had no power to make academic or administrative policies, and that he would run the College. Further, the regional accreditation agency had specifically identified the faculty's lack of participation in academic decision-making and had recommended that it be given a substantive role. In addition, there was strong evidence that the faculty recommendations which had been made were routinely ignored or rejected by the dean and president.

In Florida Memorial College, 263 NLRB 1248 (1982), enforced 820 F.2d 1182 (11th cir. 1987), the Court noted the following characteristics which differentiated Florida Memorial from Yeshiva: (i) lack of a faculty-wide organization (the faculty council met twice a year for the sole purpose of electing two non-voting delegates to the Board); (ii) faculty participation on committees was restricted to faculty members appointed by the vice president, and there were no all-faculty committees; (iii) much of the work of the committees was, in any event, ignored or rejected; (iv) new course proposals required administrative approval; (v) textbooks for courses had to be selected

with the Dean; (vi) teaching loads were set by the Dean; (vii) there was no evidence that faculty worked to establish college policies or graduation requirements; and (viii) faculty had no consistent role in hiring, sabbaticals, termination or promotion (there was no tenure) -- and their recommendations were often rejected.

In Loretto Heights College, 264 NLRB 1107 (1982), enforced, 742 F.2d 1245 (1984), the focus of both the Board and the Court was that the faculty's authority in most aspects of college governance was severely circumscribed, and that while faculty did take part in formulating and implementing some policies, their role did not rise to the level of "effective recommendation." 742 F.2d at 1255. The court specifically noted the "minor," "infrequent" and/or "insignificant" nature of committee work at Loretto Heights, the mixed membership of many committees (particularly key committees), the "major and powerful role of the Academic Dean," the faculty's limited decision-making authority, and the multiple layers of approval required for many decisions. Id., at 1252-1253, 1255. Indeed, general curriculum decisions made by a faculty committee required the subsequent approval of the Dean, President and Board of Trustees.

In St. Thomas University, 298 NLRB 280 (1990) every curriculum action required administrative approval, including syllabus preparation, selection of textbooks and class schedules.

Additionally, the administration unilaterally established a new school, eliminated entire degree programs, developed and implemented the majority of academic policies, and played the dominant role in determining curriculum, grading policies, faculty hiring, and tenure.

In Cooper Union, 273 NLRB 1768 (1985), enforced 783 F.2d 29 (2d Cir. 1986), cert. denied, 479 U.S. 815 (1986) the faculty had a considerable role in curricular matters but the Board's finding of non-managerial status emphasized the administration's unilateral creation and elimination of entire degree programs, either in the absence of faculty input or over faculty objection; administrative personnel actions in tenure and promotion cases either in the absence of faculty input or after rejecting faculty input; and the exclusion of a substantial part of the faculty from academic governance for a number of years.

And most recently (until the Manhattan College decision), in University of Great Falls, 325 NLRB No. 3 (1997), the Regional Director found that there was insufficient evidence in the record to determine the nature and number of faculty curricular recommendations and the extent to which higher administrators independently reviewed and evaluated them. Substantial decision-making was done either by the deans or required their approval, and while the deans were supposed to be hired with faculty input, no record was made as to whether or not that was the case. The

deans had unilateral power in many areas: they prepared annual performance evaluations of the faculty; had the power to discipline faculty; could make faculty termination recommendations which were acted upon without independent investigation; approved all sabbatical requests; could decide to change schedules and to offer additional classes; prepared, controlled and administered school budgets; hired adjunct faculty as they pleased; determined whether faculty could open accounts at the campus bookstore; approved all faculty textbook orders (and rejected them in several instances); determined whether certain courses should be offered; approved summer session courses; ruled on student grievances against faculty members; and could direct faculty members to change their method and manner of teaching.

The Regional Director also found that the university administration unilaterally established academic rules on courses and credits, and bypassed established committee structures. No evidence was offered of the faculty's input into or involvement with a major institutional reorganization, originated and developed by outside consultants. The Regional Director also concluded that the Great Falls faculty lacked effective authority in academic personnel matters, since the president followed the recommendation of the provost on promotion and tenure when the provost differed with faculty judgments. Faculty formed only a minority on faculty hiring committees which were in any case appointed by the deans, and the provost independently interviewed

and made his own determination about all candidates proposed by the hiring committee. Finally, the Regional Director concluded that it was the expertise of the provost and the dean which were relied upon to formulate and implement academic policy.

3. Summary

Within the Supreme Court's standard for managerial authority, one may discern a three-tiered model. The primary criterion of a faculty's managerial status rests on faculty actions related to academic/curricular matters. The second criterion is involvement in academic personnel matters. And finally, a third category of institutional concerns is examined.

There is no mandatory or model grouping of criteria required to establish managerial status.[4] Rather there is a

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[4]As articulated by various courts and the Board, the areas of faculty action to be examined include: curriculum requirements; courses to be taught; course content, credit hours and prerequisites; course schedules; new degree programs; student majors and minors; degree requirements; teaching methods and materials; attendance and grading policies; matriculation, retention and graduation requirements; enrollment levels; admissions and size of the student body; scholarships and financial aid; student honors; student conduct; faculty hiring; faculty tenure and promotion; sabbaticals and grants; faculty terminations and non-re-appointments; selection of department chairs; hiring and evaluation of administrators; teaching loads; faculty evaluations; faculty compensation and benefits; tuition and fees; budgetary matters; structure of academic units; location of schools or programs; administrative hierarchy; academic governance structure; faculty committees; deference accorded to faculty actions; unilateral action by administrators; institutional by-laws, handbooks or publications setting forth faculty responsibilities and rights; third party accreditation reports.

broad range of criteria encompassed within general categories, to determine if the aggregate of faculty actions are sufficient to sustain a finding of managerial status.

C. The Manhattan College Case

After a hearing spread over thirty hearing days (beginning on March 18, 1997 and ending on June 2, 1998) and the submission of post-hearing memoranda in July 1998, the Regional Director issued an 81 page decision ("Decision") on November 8, 1999 finding the faculty of Manhattan College non-managerial.[5] (In the Matter of Manhattan College, Case 2-RC-21735.)

The ruling first focuses on the definition of managerial employees used in Yeshiva:

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[5]The Regional Director also stated:

> The record herein before me establishes in my view that while the College still possess an unmistakably Catholic philosophy and mission which derives from the beliefs, history and vision of its founding Order, it operates at the present time effectively outside of the control and authority of either the Church or Order. I therefore conclude that the exercise of jurisdiction over the College does not pose a substantial risk of infringing the First Amendment's Religion Clauses. Accordingly, National Labor Relations Board v. Catholic Bishop of Chicago, 444 U.S. 490 (1979) does not require that the Board decline to exercise its jurisdiction. The "Catholic Bishop" doctrine and Manhattan College's objection to the Regional Director's having made a pronouncement on this subject is beyond the scope of this paper.

> In Yeshiva the Supreme Court found that faculty members at that institution were managerial employees excluded from the Act's coverage. The Court noted that managerial employees were those who 'formulate[d] and effectuate[d] management policies by expressing and making operative the decisions of their employer.' Further, the Court noted, managerial employees 'exercise discretion within; or even independently of, established employer policy and (are) aligned with management ... by taking or recommending discretionary actions that effectively control or implement employer policy.' (citations omitted) (Decision at 69).

It continued:

> The Court rejected the argument that the faculty was nonmanagerial because its decisions were either subject to the approval or veto of a higher authority. Rather, the Court noted that occasional vetoes of faculty action, usually due to concerns with 'scarce resources and University-wide balance ... in no way detract from ... the academic responsibilities entrusted to the faculty.' As the Court noted, 'the relevant consideration is effective recommendation or control rather than final authority.' (Ibid. at 69-70).

The Regional Director framed the issue to be decided as follows:

> In the instant case, it is not disputed that faculty members sit on numerous committees, which operate either by consensus, or by majority rule, to generate recommendations regarding a host of matters relating to the life and functioning of the College. The issue is fundamentally, whether faculty participation on these committees constitutes "effective recommendations" by which the Faculty, as a body, exercises managerial authority over the College." (Ibid, at 72).

In a footnote to this paragraph, he added a comment giving himself rather substantial latitude to escape from the Yeshiva decision:

> "The Yeshiva Court specifically noted that the Board failed to advance the argument that the role of the faculty was merely advisory, and thus not managerial. The Court distinguished between situations where faculty authority is advisory and where faculty effectively recommends action, notwithstanding the administration's rarely exercised veto power. Ibid, at 72, n. 21.

The balance of the Regional Director's 13 page legal analysis is an argument in support of a conclusion that the faculty is "fundamentally advisory" and, therefore, not managerial.[6]

In Yeshiva's core area of academic matters, the decision first isolates and confines the significance of faculty control of individual courses:

> "It is additionally not disputed that, at Manhattan College, faculty members and their departments are responsible for initial course development. They develop the subject of the course, its goals, the syllabus, the level of the course, to whom it will be taught and the texts to be used. In most schools, the course approval process ends at the department level. Once a course is approved, faculty may modify, revise, and update it without any securing approval from any higher body. Additionally, faculty members are individually responsible for grading

[6]I do not attempt to discern in the confined space of this presentation and the time available for its preparation whether the decision does or does not accurately present the voluminous factual record.

> their own courses, and have almost absolute control over the grades they give to students. However, as has been held in Yeshiva, and its progeny, such authority, absent more, is not determinative of managerial status." (Ibid.)

The decision next examines curriculum and academic policy in a broader sense, identifies the various groups which participate in its development, and concludes:

> "Thus, it cannot be said that the Faculty, rather than some amalgam of College constituencies, exercises effective control over either the work of the Senate, any of its standing commissions, or subsequent Administrative ratification of its proposals. Under these circumstances, while it is clear that the faculty has an obvious and pervasive influence on curricular and academic life at the College, their lack of majority representation on committees empowered to create academic policy militates against finding them managerial employees." (Ibid. at 75).

This passage is puzzling. Many of the post-Yeshiva cases have found either "effective control" or "effective recommendation" by the faculty despite a lack of numerical superiority on certain key committees. Why shouldn't "obvious and pervasive influence" be sufficient if faculty recommendations are, by and large, adopted? The decision, it may be added, does not identify any instances in which the administrative apparatus of Manhattan College took unilateral action on any academic matter; overturned a faculty decision; or acted in a manner contrary to a recommendation of the faculty. Indeed, the record evidence was that promotion decisions of the faculty-dominated Committee on Promo-

tion and Tenure were approved by the College President in 98 of 98 instances and decisions to grant tenure approved in 49 of 50.

In the area of academic personnel matters, the decision acknowledges strong faculty power, but then dilutes its significance by reciting areas where such power does not exist, blending together academic and non-academic topics:

> In contrast to the faculty's lack of majority voice in the areas of academic policy, it falls within the province of faculty-dominated committees to make recommendations regarding distinctive features of academic life such as promotion and tenure, summer grants, sabbaticals, reduced teaching loads and the hiring and retention of tenure-track personnel, among others. The faculty recommendations have, for the most part, been adopted by the College Administration. Of course, there have been times when such recommendations have been rejected.... It is true that "the fact that the administration occasionally has made and implemented policy decisions without faculty input [does not] detract from the collegial managerial authority consistently exercised by the faculty." Boston University, 281 NLRB 798, 798 (1986), enforced, 835 F.2d 399 (1st Cir. 1987). However,the record also reflects the fact that the faculty members exercise little to no power in a wide variety of areas. For instance, the faculty plays no role in admissions (other than to recommend standards through their representatives on the College Senate); have no voice in setting tuition rates; do not control the disposition of the College's real property; do not award financial aid (except in limited merit-based scholarship situations); and do not determine the size of the student body, the academic calendar, the length of a normal class period (although the Educational Affairs Commission is currently reviewing class length), or the minimum faculty teaching load. Additionally, the record reflects that the faculty has very little

> power in setting the financial terms of their employment relationship or in the adjustment of grievances. Moreover, the fact that the Administration has largely conferred its approval on faculty recommendations in non-academic areas cannot in and of itself establish managerial status, absent some other indication of faculty power and control. (Ibid. at 76-76).

The failure to differentiate in a disciplined manner the academically related topics from the non-academic may be said to distort the Yeshiva and post-Yeshiva holdings in two separate ways. First, had areas of weak or no faculty control (admissions, ("other than to recommend standards (sic)"), size of the student, body, the academic calendar, the length of a normal class period and the minimum faculty teaching load) been weighed alongside of promotion and tenure, summer grants, etc., there would have been scant reduction in the overall sense of the faculty's academic power. Second, the absence of faculty power in areas such as dispositions of real property and the setting of faculty salaries would emerge more clearly as within the categories of traditional administrative power recognized by the Supreme Court in Yeshiva itself.

Read against the prior case law in the courts and at the Board, the Regional Director's channeling of facts in support of the ruling seems somewhat strained and ultimately, capri-

cious.[7] Still more troublesome is the fundamental re-casting of the "effective recommendation" standard as the decision reaches its conclusion:

> The record fails to support a determination that the faculty, as a body, is empowered to commit the College to action or to develop policy independent of approval by the academic deans, the Provost, the President or the Board of Trustees, other than those matters pertaining directly to the conduct of classroom activities. Thus, the power and authority of the Manhattan College faculty is distinguishable from that enjoyed by the faculty in Yeshiva, where the Court, 'was faced with a faculty with broad powers and an all encompassing ambit of authority.' ... Thus, while the record clearly establishes that the Manhattan College faculty have a substantial role in the development of policy in academic and other spheres, in light of all the above considerations, I conclude that this role is fundamentally advisory in nature. The record establishes that, apart from basic academic decision-making, academic policy is largely set by administrative and supervisory personnel[8] or committees that do

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[7]There are those who have now characterized the decision in more colorful terms. Quoted in the Chronicle of Higher Education's headlines on November 17, 1999, "the president of Manhattan College called the decision 'wacko' and said the institution would appeal... (H)e said his hopes that the full board would reverse the regional board's decision were 'zippo' (and) the college was willing to take the case to the courts."

[8]In Yeshiva, the Supreme Court explicitly found that because the Yeshiva faculty were "managers," *it was not necessary to reach the question whether they were also outside the scope of the Act as "supervisors."* 444 U.S. at 682. In Manhattan College, the Regional Director reversed the inquiry. First, he excluded department chairs and librarians as "non-faculty" because they supervise non-unit personnel. He then ascribed much of the faculty's managerial authority to the chairs, and then concluded that the faculty does not exercise managerial authority.

(continued...)

> not have majority representation from among faculty members. Additionally, the College has specifically rejected the proposition that the Faculty have anything other than a consultative and collaborative role in other areas and has affirmed that the terms of their participation are subject to the discretion of the Board of Trustees. Ibid. at 78-79.

The prior decisions in the federal courts and at the Board have necessarily found that the ultimate decision-making authority of boards of trustees, presidents, and other adminis-

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[8](...continued)
In deciding to address the issue of managerial status first, and to consider supervisory status only after that, the Supreme Court was not merely making a decision of judicial economy; rather it arguably was interpreting an essential structure of the National Labor Relations Act. The Yeshiva Court found that managerial employees, who formulate and effectuate management policies, are "much higher in the managerial structure" that the supervisory classification specifically inserted into the Act's exclusions by Congress, because Congress regarded managers "as so clearly outside the Act that no specific exclusionary provision was thought necessary." 444 U.S. at 682. Thus, it can be argued that the structure of the Act itself caused the Supreme Court to first resolve the issue of faculty managerial authority, and having reached its conclusion, it did not need to resolve the question of supervisory status.

At Manhattan College, typical of many other institutions, all 23 department chairs are also regularly appointed full-time faculty. They are elected as chairs by their colleagues for limited terms to represent departments; they continue to teach; and they are subject (on the same terms as their colleagues) to all faculty rights and responsibilities including promotion, tenure, eligibility for sabbaticals and grants; and they are elected as faculty representatives to membership on search committees, standing committees, the all-faculty Council for Faculty Affairs, and the College Senate. The hearing record showed that in one School, fully a third of the faculty served as department chairs during a three year period. The hearing record also showed, through departmental minutes, that the chairs serve as the representative voices of their departmental colleagues, and take their instructions from the other faculty members in their departments. (See Decision at 36, 40, 73). At the ends of their terms, chairs return to their previous status.

trators does not preclude a finding of managerial status for faculty. The Regional Director's ruling in the Manhattan College case appears to re-interpret Yeshiva and its progeny in such a manner that he, at least, would be unlikely to find in the future any college or university faculty to be managerial.

II. Unionization of Interns, Residents and Graduate Students:

On November 26, 1999 the NLRB issued its long awaited ruling in Boston Medical Center (Case 1-RC-20574). Reversing two contrary holdings from 1976 and 1977,[9] the Board held (3-2), that interns and residents (house staff) at a private (i.e., non-public) academically affiliated hospital are employees under Section 2(3) of the NLRA and thus entitled to form a union under the protection of the statute. Given the efforts of graduate students, unsuccessful thus far, at New York University, Yale and several other private universities to form unions under federal law, there is widespread interest in the decision in Boston Medical and its impact in the academy.

While the decision in Boston Medical will undoubtedly have an important bearing on whether graduate students performing various academic functions ("graduate assistants") will be held to be employees under the Act, the NLRB itself seems to consider

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[9]Cedars-Sinai Medical Center, 223 NLRB 251 (1976); St. Clare's Hospital & Health Center, 229 NLRB 1000 (1977).

the issue to be an open one. Three days after the decision in Boston Medical, the Board issued a ruling in Yale University, which, inter alia, remanded the case for an evidentiary hearing to determine whether Yale's teaching fellows are employees under the Act.[10]

A. What Criteria Should Determine Whether Graduate Assistants Are To Be Considered Employees

1. The Statutory Language

Section 2(3) of the NLRA provides:

> The term "employee" shall include any employee ... unless the Act explicitly states otherwise ... but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual employed as an independent contractor....

The three member majority in Boston Medical declared:

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[10]Yale University, Case No. 34-CA-7347. A three member panel of the Board upheld the August 6, 1997 ruling of the Administrative Law Judge who had found that the grade strike at the end of the fall semester in 1995-96 by certain graduate students (in support of unionization) was "unprotected activity" under the NLRA and thus any action against the strikers could not be a violation of the Act. The Board remanded the case, however, for two purposes: first, for the ALJ to determine whether five anti-union statements made by certain faculty and administrators during the unionization activity constituted unlawful threats under Section 8(a)(1) of the Act; and second for the ALJ to make "findings of fact and conclusions of law on the issue of the employee status of the TFs (teaching fellows) under Section 2(3) of the Act, regardless of his ultimate findings on the issue of whether (there were unlawful threats under) Section 8(a)(1) of the Act." Decision at 5. (emphasis supplied).

> "The breadth of § 2(3)'s definition is striking. The Act specifically applies to 'any employee'. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891-892 (1984) (undocumented aliens plainly come within the broad statutory definition of 'employees'). The exclusions listed in the statute are limited and narrow, and do not, on their face, encompass the category, 'students.' Thus, unless there are other statutory or policy reasons for excluding house staff, they literally and plainly come within the meaning of 'employee' as defined in the Act. We find no such reasons. (Decision at 9).

It found the Act's definition of "employee" to be an outgrowth of the common law concept of "servant," itself rooted in common law concepts of agency:

> At common law, a servant was one who performed services for another and was subject to the other's control or right of control. Consideration, i.e., payment, is strongly indicative of employee status ... We agree with this analysis...
>
> The Supreme Court in Town & Country echoed the same logic in its analysis of Section 2(3). Specifically, the Court noted that the Board's definition of the term 'employee' as used in the Act reflected the common law agency doctrine of the conventional master-servant relationship. 516 U.S. at 93-95. In this recent case, the Court reiterated that the language of this section of the statute is 'broad.'
>
> > The ordinary dictionary definition of 'employee' includes any 'person who works for another in return for financial or other compensation...' The phrasing of the Act seems to reiterate the breadth of the ordinary dictionary definition, for it says '[t]he term 'employee' shall include any employee.'...
> >
> > "For another thing, the Board's broad,literal interpretation of the word

> 'employee' is consistent with several of the Act's purposes, such as protecting 'the right of employees to organize for mutual aid without employer interference' ... and 'encouraging the collective-bargaining process.'...
>
> We believe, therefore, that whatever other description may be fairly applied to house staff, it does not preclude a finding that individuals in such positions are, among other things, employees as defined by the Act. Decision at 9.

Dissenting Board Member Hurtgen responded. After noting the majority's reliance on the Supreme Court decisions in NLRB v. Town & Country Electric, 516 U.S. 85 (1995) and Sure-Tan v. NLRB, 467 U.S. 883 (1984), to overrule the NLRB's own precedent in Cedars-Sinai, supra, and St. Clare's, supra, (holding interns and residents to be primarily students rather than employees), he argued that the issue is one of policy, rather than statutory construction:

> Those cases do not support the position of the majority. Those cases hold only that it is permissible for the Board to treat illegal aliens and paid union organizers as employees. They do not require that these employees be included in bargaining units. Similarly, it may be permissible for the Board to treat house staff as employees. But surely the Board is not compelled to take the position that they are entitled to be in bargaining units. Rather, in all these cases the Board makes a policy choice to include or exclude the group at issue. This is precisely what the Board did in Cedars-Sinai and St. Clare's. The Board there exercised its discretion by holding that "collective bargaining should not be applied to what is fundamentally an educational relationship."
>
> The majority goes to some length to establish that house staff fall within the statutory

> definition of employee. They thereby miss my essential point. I am not necessarily suggesting that house staff cannot fall within the statutory definition. Rather, I conclude that, as a policy matter, the Board should continue to exercise its discretion to exclude them for purposes of collective bargaining.
>
> No case has held that the Act compels a conclusion that house staff are employees for purposes of collective bargaining. Nor does the language of Section 2(3) compel that result. That section provides that "the term 'employee' shall include any employee... Thus, the Act defines the word "employee" by reference to the word itself. This is hardly a statutory command that house staff must be regarded as employees for bargaining purposes.
>
> Secondly, I note that all courts considering the matter have upheld the Board's discretion to exclude house staff from the status of employees who are entitled to the collective-bargaining provisions of the Act.

Dissenting Opinion of Member Hurtgen. Decision at 18.

2. The Policy Arguments

In St. Clare's Hospital and Health Ctr., 229 N.L.R.B. 1000 (1977) (denying motion to reconsider its decision dismissing the petition in 223 N.L.R.B. 1002 (1976)), overruled by Boston Medical, the Board had expressed its view that the relationship between students and their educational institution is fundamentally different from, and inconsistent with, the relationship of employer and employee:

> The rationale for dismissing such petition is a relatively simple and straightforward one.

> Since the individuals are rendering services which are directly related to -- and indeed constitute an integral part of -- their educational program, they are serving primarily as students and not primarily as employees. In our view this is a very fundamental distinction for it means that the mutual interests of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature. Such interests are completely foreign to the normal employment relationship and, in our judgment, are not readily adaptable to the collective-bargaining process. It is for this reason that the Board has determined that the national labor policy does not require -- and in fact precludes -- the extension of collective-bargaining rights and obligations to situations such as the one now before us.

Id., at 1002 (emphasis added).

The Board further explained that collective bargaining "in many respects may be said to represent the very antithesis of personal individualized education" -- primarily on the graduate and professional levels. Id. Students and teachers, the Board observed, possess a "mutuality of goals [that] rarely exists in the typical employment relationship, and goes far towards explaining why collective bargaining can flourish in one sphere while constituting an anathema in the other." Id., at 1002-03.

The Board explained that its decisions in this area reflected not only the basic incompatibility of collective bargaining and the structure of higher education, but also

serious concerns about governmental intrusion upon traditional academic freedom:

> In addition to believing that collective bargaining is not adaptable to the structure of higher education, we also believe that there exists a grave danger that it may unduly infringe upon traditional academic freedoms. Such freedoms encompass not only the right to speak freely in the classrooms, but also such fundamental matters as the right to determine course length and content; to establish standards for advancement and graduation; to administer examinations; and to resolve a multitude of other administrative and educational concerns. If one were to conclude that the student-teacher and employee-employer relationships were in fact analogous, then it would follow that many academic freedoms would become bargainable as wages, hours, or terms and conditions of employment. Once this occurs, Board involvement in matters of strictly academic concern is only a petition or an unfair labor practice away.

Id. at 1003.

The majority in Boston Medical, after expressing the view that Cedars-Sinai and St. Clare's had failed to apply a required broad, common-law definition to the term "employee," (see above), addressed the issue of potential interference with academic freedom:

> As a policy matter, we do not believe that the fact that house staff are also students warrants depriving them of collective-bargaining rights... The Employer and Member Brame argue strenuously that by granting employee status to house staff, the Board will improperly permit intrusion by collective bargaining into areas involving academic freedom. This argument puts the proverbial cart before the horse. The contour of col-

> lective bargaining is dynamic with new issues frequently arising out of new factual contexts: what can be bargained about, what the parties wish to bargain about or concentrate on, and what the parties are free to bargain about, may change... We need not define here the boundaries between permissive and mandatory subjects of bargaining concerning interns and residents, and between what can be bargained over and what cannot. We will address those issues later, it they arise... Decision at 13.

In support of its belief that issues of potential academic infringement could adequately be addressed in the future, the majority cites language from two cases decided, respectively, by the Supreme Courts in Michigan and California:

> The Michigan Supreme Court faced a constitutional argument that by finding house staff to be employees, the court would infringe on the constitutional autonomy of the Board of Regents. Regents of the University of Michigan, 204 N.W.2d 218 (Mich. 1973). The court noted that because of the "unique nature" of the University of Michigan, the scope of bargaining "may be limited" if the matter fell "clearly" within the educational sphere. 204 N.W.2d at 224. The court continued:
>
> For example, the Association clearly can bargain with the Regents on the salary that their members receive since it is not within the educational sphere. While normally employees can bargain to discontinue a certain aspect of a particular job, the Association does not have the same latitude as other public employees. For example, interns could not negotiate working in the pathology department because they found such work distasteful. If the administrators of medical schools felt that a certain number of hours devoted to pathology was necessary to the education of the intern, our Court would not interfere since this does fall within the autonomy of the Regents under Article VIII, § 5. Numerous other issues may arise which fall between these two extremes and they will

> have to be decided on a case by case basis. 204 N.W.2d at 224.
>
> The Supreme Court of California addressed a similar argument:
>
> The University asserts that if collective bargaining rights were given to house staff the University's educational mission would be undermined by requiring bargaining on subjects which are intrinsically tied to the educational aspects of the residency programs. This "doomsday cry" seems somewhat exaggerated in light of the fact that the University engaged in meet-and-confer sessions with employee organizations representing house staff prior to the effective date of [the relevant statute]. Moreover, the University's argument is premature. The argument basically concerns the appropriate scope of representation under the Act. (See § 3562, subd. (q). Such issues will undoubtedly arise in specific factual contexts in which one side wishes to bargain over a certain subject and the other side does not. These scope-of-representation issues may be resolved by the [PERB] when they arise. The Regents of the University of California v. PERB, 715 P.2d at 604. Ibid.

As discussed below (Section II.B. infra), however, significant limitations on the right to strike and the narrowed scope of mandatory bargaining under state law may produce significantly more protection of academic freedom than would result under the NLRA where such limitations do not appear.

3. Factual Issues

In describing the characteristics of the relationship between Boston Medical Center and its interns and residents which are said to be indicative of an employment relationship, the

Board has identified a wide spectrum of facts some of which may be found in the relationship between universities and graduate assistants and some not:

- house staff are compensated for their services;
- compensation comes (in part) in the form of a stipend, not excludable from income under the Internal Revenue Code;
- the Hospital withholds federal and state income taxes, as well as social security, on their salaries;
- workers' compensation is provided;
- they receive paid vacation, sick-leave, parental and bereavement leave;
- the Hospital provides health, dental and life insurance, as well as malpractice insurance;
- house staff spend up to 80 percent of their time at the Hospital engaged in direct patient care.

And in a passage which may prove particularly important to future decisions involving graduate students, the majority makes the following additional factual observations:

> Additionally, while house staff possess certain attributes of student status, they are unlike many others in the traditional academic setting. Interns, residents, and fellows do not pay tuition or student fees. They do not take typical examinations in a classroom setting, nor do they receive grades as such. They do not register in a traditional fashion. Their educational and student status is geared to gaining sufficient experience and knowledge to become Board-certified in a specialty. Decision at 10.

B. The Relevance of State Law and Collective Bargaining Experiences at Public Universities

Given the concern with the effect of collective bargaining on academic relationships, are the experiences with collective bargaining by graduate assistants at public universities (and interns and residents at public hospitals) instructive as to the likely effects at private universities? In the early stages of the New York University hearing (June, 1999) on a petition for an election by the United Automobile Workers to represent a unit of some 1600 graduate assistants, the UAW sought to introduce evidence of experiences with collective bargaining at three campuses -- Berkeley, the University of Massachusetts at Amherst and the University of Michigan. New York University moved to exclude such evidence, inter alia, on grounds of relevance, given the non-existent (or diminished) right to strike and the limited scope of mandatory bargaining under state public labor relations statutes. The motion to exclude was granted. But given the references in Boston Medical to Supreme Court opinions in Michigan and California which refer to collective bargaining experiences with house staff at those public universities (see above), it may be useful to look briefly at the two key issues which differentiate federal from state law, especially in those very states, and in Massachusetts where Boston Medical arose.

1. The Right to Strike Under California, Massachusetts and Michigan Law

Unlike the NLRA, state public employee labor relations laws generally prohibit or severely restrict the right to strike. Massachusetts and Michigan both expressly prohibit the right to strike by statute[11] and California limits the right to strike by imposing an impasse procedure on state employees.

The California Higher Education Employer-Employee Relations Act ("HEERA") (which covers higher education employees) contains a provision making it unlawful for a public employee organization to "refuse to participate in good faith in the impasse procedure" set forth in the act.[12] Cal. Gov. Code §3571.1(d)(1997). The PERB has repeatedly interpreted a similar provision in the Educational Employment Relations Act ("EERA") (which governs public school employees) to require the exhaustion of impasse procedures before a strike is permissible. Irvine

[11]Section 9A of the Massachusetts Public Employee Labor Relations Act states that "[n]o public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees." Mass. Ann. Laws ch. 150E, § 9A(a)(1998). Similarly, section 423.202 of the Michigan Public Employment Relations Act provides that "[a] public employee shall not strike." Mich. Comp. Laws Ann. § 423.202(1998).

[12]Under the HEERA impasse procedures, either party may declare an impasse and request that the California Public Employment Relations Board ("PERB") appoint a mediator. If the dispute cannot be resolved by mediation within fifteen days, a fact finding panel may be appointed. If the parties' dispute has not been resolved within thirty days of the panel's appointment, it is to submit its findings to the parties and, ten days later, to the public. Cal. Govt. Code §§3590-3594 (1997).

Unified Sch. Dist. v. Irvine Teachers Ass'n, 11 PERC ¶ 18128 (1987); Westminster Teachers Ass'n v. Westminster Sch. Dist., 7 PERC ¶ 14034 (1982). As the California Supreme Court explained, the impasse procedures under EERA were designed to "head[] off strikes" and "assume deferment of a strike at least until their completion." San Diego Teachers Ass'n v. Superior Court, 154 Cal Rptr. 893, 898 (1979). A strike prior to completing the statutory impasse procedure creates a rebuttable presumption of an unlawful failure to participate in impasse procedures. Irvine, 11 PERC ¶ 18128; Westminster, 7 PERC ¶ 14034.[13]

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[13]Other states that have permitted such representation of graduate students similarly prohibit or greatly restrict the right to strike by public employees. See Wis. Stat. § 111.84(2)(e) (1998) ("It is an unfair practice for an employee individually or in concert with others to engage in, induce or encourage any employee to engage in a strike, or a concerted refusal to work or perform their usual duties as employees"); Board of Educ. v. New Jersey Educ. Ass'n, 247 A.2d 867, 871-72 (N.J. 1968) ("It has long been the rule in our State that public employees may not strike"); Fla. Stat. Ann. § 447.505 (1998) ("No public employee or employee organization may participate in a strike against a public employer by instigating or supporting, in any manner, a strike"), Fla. Const., Art. I, § 6 (1998) ("Public employees shall not have the right to strike"); Iowa Code Ann. § 20.12(1) (1998) ("It shall be unlawful for any public employee or any employee organization, directly or indirectly, to induce, instigate, encourage, authorize, ratify or participate in a strike against any public employer"); Kan. Stat. Ann. § 75-4333(c)(5) (1998) ("It shall be a prohibited practice for public employees or employee organizations willfully to engage in a strike"); N.Y. Civ. Serv. Law § 201(1) (1999) ("No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike"); Or. Rev. Stat. § 243.726 (1997) (permitting public employees to strike under certain limited circumstances only).

2. The Scope of Mandatory Bargaining

Much like the limitations imposed on the right to strike, state public employee labor relations laws often limit the scope of collective bargaining. See, e.g., In re Paterson Police PBA Local No. 1 v. City of Paterson, 432 A.2d 847, 853-55 (N.J. 1981) ("Differences between what a private employer is free to do and what a public employer may properly do result in different concepts of the scope of negotiations for each ... [t]he determination of governmental policy at the negotiating table or in a grievance resolution proceeding is antithetical to our system of government."); Rosen v. Public Employment Relations Bd., 526 N.E.2d 25, 26-28 (N.Y. 1988) (same). This is particularly the case with respect to employers in the public education sphere. In California, the Higher Education Employer-Employee Labor Relations Act ("HEERA") expressly excludes a wide range of issues from bargaining, including:

- Admission requirements for students.
- Conditions for the award of certificates and degree to students.
- The content and supervision of courses, curricula, and research programs.
- The amount of any fees which are not a term or condition of employment.
- Procedures and policies to be used for the appointment, promotion, and tenure of members of the academic senate [the regular tenure and tenure track faculty]; and
- Consideration of the merits, necessity, or organization of any service, activity, or program established by law or

> resolution of the regents or the directors, except for the terms and conditions of employment of employees who may be affected thereby.

Cal. Govt. code § 3562(q)(1997).

In Michigan, the Employment Relations Commission ("MERC") has held that the scope of mandatory subjects of bargaining is even narrower than it is for other Michigan public employees when an educational institution is negotiating with student employees. University of Mich. and Graduate Employees Org., Local 3550, 4 MPER (LRP) P22,039; 1991 MPER (LRP) LEXIS 18 (feb. 20, 1990), aff'd, No. 138394, LC No. C-87 L-338 (Mich. Ct. App. Sept. 10, 1993). There, the University of Michigan refused to bargain with its graduate assistants over the University's "ten-term-rule" which limited the number of terms that graduate students could serve as teaching assistants. According to MERC, the University had no duty to bargain over matters "clearly within the educational sphere" even if the matters impact the employment status of teaching assistants and are otherwise conditions of employment. Id. at *2-5, *22-26. In addition, the Michigan Supreme Court has held that medical student interns could not negotiate whether or how much they work in a particular department if their instructors determined that a certain number of hours in that particular department was necessary to their education. Regents of the Univ. of Mich. v. Employment Relations Comm'n, 204 N.W. 2d 218, 224 (Mich. 1973).

In Massachusetts as well, the Labor Relations Commission ("MLRC") and the courts have emphasized that the scope of collective bargaining is more restricted under the Massachusetts Labor Relations Law than under the NLRA. School Comm. v. Boston Teachers Union Local 66, 389 N.E.2d 970, 973 (Mass. 1979). For example, determining what is included among mandatory bargaining subjects, Massachusetts has developed a balancing test which limits the scope of bargaining where resolution of the issue through bargaining would conflict with the public employer's managerial prerogative or the requirements of public policy in the issue subject to dispute is so comparatively heavy that collective bargaining ... on the subject is, as a matter of law, to be denied effect." Boston, 389 N.E.2d at 973. This approach has been applied in the public education context resulting in the exclusion of various issues from mandatory bargaining including, inter alia: the size of an institution's teaching staff, decisions to reduce a teacher's workload, multiyear job security clauses, tenure decisions and the abolition of supervisory academic positions. See School Comm. v. Labor Relations Comm'n, 447 N.E.2d 1201, 1207 (Mass. 1983); Boston Teachers Union, Local 66 v. School Comm, 434 N.E.2d 1258 (Mass. 1982).