

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

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The authors explore the history and legal developments for labor unions in higher education in the United States. In addition, they propose mechanisms for evaluating whether labor unionization may or may not be appropriate at any institution of higher education.

INTRODUCTION

The question of whether private sector college and university faculty are entitled to union representation under the National Labor Relations Act (NLRA) remains a thorny question in academic employee relations. Are private sector faculty actually “managers” as defined under the NLRA, or are they employees simply taking direction from upper management in the execution of their duties? There is a significant disparity of perception among both members of the faculty and university and college administrators on this issue. The National Labor Relations Act covers the right of private sector employees to organize unions and engage in concerted activity for the purpose of collective bargaining with the employer and to bargain any issues that involve wages, hours and conditions of employment. This article identifies the stakeholders in these issues and will explore the central themes of legal research in this area. In addition, this formal discussion may be able to assist both faculty and administration in better defining the question of union representation of private sector university and college faculty.

In 2015, after twelve years of litigation, the administration of Point Park University in Pittsburgh, Pennsylvania, was ordered to bargain with a faculty union which had been designated through a certification election in February of 2003. The extent of this litigation and the complicated legal maneuvers involved revealed that the extension of union representation rights to private college and university faculty remains an unclarified area in labor law. The administration initially declined to abide by the results of a vote by the faculty claiming the members of the faculty were considered to be management employees and thus were not covered under the National Labor Relations Act (NLRA). This was eventually reversed with the decision of Point Park University to begin collective bargaining with its full-time faculty on July 20, 2015. (Brandolf, 2015). The question, however, remains not entirely resolved. Are college professors to be defined as “labor” and therefore eligible to be covered under the

terms of the National Labor Relations Act as amended? On the other hand, are these professors “management” and therefore not entitled to union representation as they make daily managerial decisions in the “business” of higher education? This article will attempt to define the duties of faculty revealing the crossover between management and labor in academia.

COLLECTIVE BARGAINING IN PRIVATE COLLEGES AND UNIVERSITIES

The issues of the recently resolved case involving Point Park University have again highlighted the question of the appropriateness of collective bargaining in colleges and universities. Does the process of collective bargaining “fit” with the so-called collegial model of the academic world? Collective bargaining in colleges and universities emanated principally from extensions of the legal right to collective bargaining, dramatic changes and upheaval in the academic labor market and demographic and financial changes in higher education in the late 1960s and early 1970s (Garbino, 1973).

The original National Labor Relations Act of 1935 was passed to extend collective bargaining rights to “all employees” excluding only those who were involved in agriculture or served as domestic servants (NLRA, 1935). Those employees with “management responsibilities” were also excluded. The Taft-Hartley amendments in 1947 further clarified that supervisors and managers were not covered but did allow the right to organization to be extended to professional employees (NLRA, 1947). In particular, the legal justification for collective bargaining was founded in 1967’s Taylor Law, which delineated the negotiation process, gave professional employees the right to choose representation, and provided for the administration of this law within the executive branch (Fisk & Puffer, 1973). Then, in 1971, the NLRB formally asserted jurisdiction over college faculty and defined them as “professional employees” who were entitled to organize for the purposes of collective bargaining (C.W. Post, 1971).

Regarding private colleges and universities, two competing cases have represented opposite poles in how courts have decided for or against the idea that faculty may engage in collective bargaining. At the beginning of the unionization push among various professions in the 1970s, St. John’s University was held to qualify for collective bargaining and representation by the American Association of University Professors (AAUP) after two campus elections and disagreements among the United Federation of College Teachers (AFCT), and the university’s Faculty Association (Hueppe, 1973). Until this ruling the AAUP had concentrated its professional activities on behalf of academic freedom and a limited set of work environment matters for professors; in 1971, the AAUP created its collective bargaining arm. Most of the private colleges and universities that elected to form union locals during this early period, and even recently, were essentially relying on the St. John’s case as the legal basis for their organizing. The St. John’s decision also allowed for Faculty/University Senate activities to occur alongside collective bargaining (Hueppe, 1973) although more recent decisions have suggested that faculty senate governance is incompatible with collective negotiation (Smallwood, 2003).

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

What is a “Managerial Employee?”

In a case unrelated to academia, the Supreme Court ruled that “Congress intended to exclude from the protections of the Act all employees properly classified and ‘managerial’” (NLRB v Bell Aerospace,

1971). The decision went on to clarify that those excluded from the protections of the Act included those employees who “formulate and effectuate management policies by expressing and making operative decisions of their employer,” (NLRB v Bell Aerospace, 1971), and *Yeshiva* took this one step further when citing questions if employees were ‘aligned’ with management. Herein lay the rather vague definition differentiating the managerial employee from the professional employee in academia. However vague, it is a question which continues to vex both faculty and administrators about faculty unions as well as ongoing developments in the academic labor market. The question of whether faculty actually engage in managerial activities has continued to be an issue in nearly every union drive in private universities since 1980.

Case of Point Park University

The issues noted above coupled with numerous labor technicalities caused the administration of Point Park University to decline to recognize a union certified to represent its faculty. In 2003, the Newspaper Guild of Pittsburgh/Communications Workers of America, Local 38061 petitioned for certification election to represent the faculty at Point Park College for the purposes of collective bargaining. After extensive hearings before District Six of the NLRB, the Regional Director ruled the faculty were entitled to go forward with the certification election. It was determined that under the terms of *Yeshiva*, the faculty did not exercise enough control to be denied representation. After removing certain faculty who were in actual supervisory roles, the NLRB ordered the election to go forward. The faculty chose to certify the union and the NLRB ordered the university to bargain. The administration of Point Park University again declined, and after lengthy case in the United States Court of Appeals for the District of Columbia, the Court of Appeals remanded the order to bargain back to the District Six for review saying the NLRB did not address the issue (U.S. Court of Appeals, Wash. D.C. No. 05-1060). Final agreement between and the union and the university came in 2015 when Point Park agreed to recognize the results of the election (Brandolf, 2015).

As previously noted, the Court ordered the NLRB to investigate “how a faculty is structured and operates”. It further called upon the NLRB to determine the actual role of the faculty in the administration of an institution. Did the faculty play a role in the actual management or were they simply employees in a hierarchy similar to those in a steel mill or an auto plant? On this determination would rest the NLRB’s case-by-case ruling as to whether the faculty could form a union. This article will now examine the major issues confronting the intersections of the various duties of college faculty that raise the question of whether faculty are actually managers or just fulfilling the duties of employees.

ASSESSING THE VIABILITY OF COLLECTIVE BARGAINING: PRINCIPAL ISSUES

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

Assurance of Learning

With rising tuition and the demand by parents for a return on their tuition dollars, universities along with accreditation bodies have initiated assurance of learning criteria to determine if expected outcomes in the classroom are being attained. These are often initiated through committees composed of faculty who see this as a valuable measure of their efforts in both teaching and outside the college classroom. While they may contribute their experiential learning coupled with recommendations to guide other faculty, they also may find themselves in the position of evaluating the performance of their colleagues. While the claim may be made that this is certainly not the case and the functions performed by the committee are only for the benefit of the student and the faculty, the sharing of the data with any facet of the university administration creates a conflict. Faculty unions may feel that faculty should not be placed

in the situation where they are sitting in judgment of fellow union members. This situation is untenable in a unionized workplace. In addition, should the administration select to take any corrective actions based on the data provided by the committee, the union would be put in the position of being unable to adequately represent the best interests of the member in the grievance procedure. This issue would be in conflict with the union's duty to represent laid down in Supreme Court rulings in *Steele v. Louisville & Nashville Railroad* and *Vaca v. Sipes*.

Course Selection

By practice faculty teach in their particular discipline where they are qualified. It would be agreed among both faculty and academic administrators that following a review of a faculty member's individual credentials, management would assign the appropriate course. The question would concern who assigns the course. How much power does the individual faculty member have in the selection of the courses he or she will teach? Are courses selected through a process of collegial consultation or simply assigned by the Chair of the particular department? The source of the final decision is important in determining which party is managing the process.

Syllabi

Academic tradition calls for total faculty control over the development of the individual syllabus for a particular course. An issue arises, however, when multiple sections of a particular course exist and various faculty are asked to confer to develop a standard departmental syllabus. Are the faculty members when they are developing such a syllabus actually engaging in administrative duties that could be seen as generating academic policy? How does this scenario play out when the Chair of the department is present in the conference?

Teaching Methods

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

Student Evaluation

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

Faculty Research

A member of a college faculty certainly has control of where he or she chooses to conduct research and on what subject the research involves. The execution and the completion of research projects has traditionally been the sole purview of the faculty member. When grants are extended to the university for the faculty member's research is the faculty member engaging in management duties when he or she participates in the disbursement of the grant?

Admissions

The admissions process for a university and the criteria for both graduate and undergraduate acceptances is a relevant part of the administration process at any university. The extent, however, in which the faculty members participate in the admissions function may be a critical factor in determining

whether or not a particular college faculty may be extended rights of representation under the NLRA. Are the faculty involved in standards for admission? Are they interviewing and evaluating applicant's records for consideration for admission? These are important questions that must be answered if it is to be determined the level of managerial accountability for the faculty member.

Matriculation

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

Retention

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

Tuition

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

Class Size

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

Evaluation for Tenure

While it is quite fashionable among politicians to attack the tenets of academic tenure, it is still a viable process in both represented and non-represented faculty. Often committees of senior faculty are placed in a position to evaluate junior members applying for tenure. Similar to the situation with assurance of learning, again we find union members being asked to evaluate the performance of their colleagues which would be unthinkable in a unionized environment. It has always been the exclusive purview of management to evaluate the performance of employees and the right of the union representing those employees to grieve the evaluations of management through the grievance procedure under the bargaining agreement between the two parties. Placing the faculty union member in the position of evaluating a fellow member for a position that will possibly enhance their wages, hours and working conditions is a direct affront to the basic tenets of the National Labor Relations Act and the role of a union in the workplace.

CONCLUSION

The authors offer this article as starting point to assist in clarifying the obligations of both faculty and administrators in an ever-changing environment in higher education. The authors not only envision a better alignment and conceptualization of duties but also the opening of a dialog on each campus that could result in a realignment of duties and responsibilities. Such a focusing upon these issues could lead to enhanced cooperation between faculty and administrators as the result of clearer delineation of accountabilities. This in turn could lead to enhance efficiency and effectiveness in the academic function as a whole. Future research would include a comparison across institutions of the results of the survey and the resulting realignments. Factor such as the size of the institution, the faculty /student ratio and to what degree the selected university was a research or teaching institution could also enhance this study.

The authors feel that these measures reveal the level of faculty participation in the various aspects of academic life. The ultimate goal would be to determine the unique balance of how faculty perceive their roles as opposed to how the administration views their contributions. Each institution may have its own unique criteria for interpretation. Future research could include the development of a set a variables that would allow institutions to be compared against one another. The variable of union representation, or the lack thereof, would be an important result of such a comparison to aid in answering the question posed in the title of this article.

Based on the above discussion the authors submit two surveys as a starting point for developing a guide for those concerned with the issues involving union representation for private colleges and universities. The surveys could be used by both private university administrators and college faculty confronted with these issues. As each university or college is unique in how it deals with these issues, future research could begin to ascertain the differences within private colleges and universities as well as explore the myriad of different interpretations of the issues suggested in this article. The legal and social environment of changing federal and state administrations have ongoing effects on the viability of collective bargaining in higher education, and these issues are bound to have currency as these developments occur.

The authors envision a collegial discussion based on the outcomes of the completed surveys. As each academic institution is unique, both sides would be required to ascertain where the duties delineated in this article align in the structure of the particular college or university. This analysis would need to be coupled with a sincere effort to understand how the issues presented fit into the mission of the particular institution and whether it perceives itself as a teaching or research institution or a combination of the two.

TABLE 1
FACULTY SURVEY

1-Strongly Disagree 2-Disagree 3-Neutral 4-Agree 5-Strongly Agree

	1	2	3	4	5
1. I am directly engaged in the development of curriculum.					
2. I am involved in the formulation and development of academic policies.					
3. I am involved in the enforcement of academic policies.					
4. I have input into the assignment of the courses I wish to teach.					
5. I develop both individual course and departmental syllabi.					
6. I control the teaching methods to be used in my classes.					
7. I have total control over the evaluation of students in my classes.					
8. I am engaged in the Admissions process including the evaluation of student candidates for admissions to specific programs.					
9. I have total jurisdiction over the subjects and contents of my research.					
10. I am involved in the development of standards and requirements for matriculation.					
11. I am involved in the criteria for retention and the enforcement of these criteria.					
12. I have input into setting tuition.					
13. I have jurisdiction over the size of my classes and number of students allowed in a particular class.					
14. I have supervisory responsibilities of part time and adjunct faculty teaching in my discipline.					
15. I am actively engaged in the development of the assurance of learning process and the evaluation of the outcomes.					
16. I am engaged in the supervision of assurance of learning goals with classes taught by part time and adjunct faculty in my areas.					
17. I am involved in the awarding of tenure.					
18. I am involved in the evaluation of colleagues for promotion in rank.					
19. I am involved in the evaluation of part time and adjunct faculty.					
20. I play a significant role in the hiring process of new full time faculty.					

TABLE 1
ADMINISTRATION SURVEY

1-Strongly Disagree 2-Disagree 3-Neutral 4-Agree 5-Strongly Agree

	1	2	3	4	5
1. Faculty are involved in the development of curriculum.					
2. Faculty are involved in the development of academic policies.					
3. Faculty are engaged in the enforcement of academic policies.					
4. Faculty are involved in the assignment of courses.					
5. Faculty develop both individual and departmental syllabi.					
6. Faculty have control over teaching methods in their classes.					
7. Faculty have sole control over student evaluation in their courses.					
8. Faculty are engaged in the Admissions process and evaluation of student candidates for admission to specific programs.					
9. Faculty have jurisdiction over the subject and content of their research.					
10. Faculty are involved in standards and requirements for matriculation.					
11. Faculty are involved in the criteria for retention and the enforcement of these criteria.					
12. Faculty have input in the setting tuition.					
13. Faculty have jurisdiction over the size of classes and the number of students allowed in a particular class.					
14. Full time faculty have management responsibilities for part-time and adjunct faculty teaching in the full time faculty member's discipline or on similar courses.					
15. Faculty are actively engaged in the development of assurance of learning criteria and the evaluation of outcomes.					
16. Full time faculty are engaged in the supervision of part time and adjunct faculty in their attainment of assurance of learning goals.					
17. Faculty are involved in the rewarding of tenure.					
18. Faculty are involved in the evaluation of colleagues for promotion in rank.					
19. Faculty are involved in the evaluation of part time and adjunct faculty.					
20. Faculty are involved in the hiring process for new full-time faculty.					

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