

## Doin' the Managerial Exclusion: What WPAs Might Need to Know about Collective Bargaining

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Many, if not most, discussions of the politics of WPA work have focused on the position of the WPA within the academic institution, whether in the department, the school, or the university. In this essay I look at how WPA work is regarded by certain influential institutions outside of academia—specifically, courts and labor boards. If those of us who are union members (as well as those who are not) do not know where and why the law has historically placed people who do what we do, then we may be unpleasantly surprised when we find our jobs—and ourselves—defined by a discourse we had no idea we were part of.

My interest in legal and labor definitions of what WPAs do stems from my position as a leader in my institution's faculty collective-bargaining unit. Not an attorney myself, I often find myself struck by the seeming strangeness of lawyers', courts, and labor leaders' perspectives on WPA work (and, indeed, on the work of all faculty, a point I will return to later). What seems self-evident to WPAs conversant in their field—the claim, for example, that WPAs have a good deal in common both with management and with faculty, that they are hybrids who lie somewhere in the middle (see, for example, Janangelo; Schwalm)—might well escape the reasoning of a faculty contract arbitrator who has to put program directors into one camp or the other, simply because the wording of said contract allows him or her very little choice. For non-unionized WPAs, courts' or labor boards' lines of thinking can still provide a window onto the hidden complexities of any particular WPA position—and, again, this is all to the good. As Douglas D. Hesse has written, “WPAs cannot afford to act like composition studies centers in the academic galaxy, let alone the social, political and economic universe in which that galaxy exists. They should not be surprised when matters of cur-

riculum, policy or assessment that strike them as self-evident do not strike others the same way. [. . .] WPAs should analyze the broader context in which they and writing programs exist” (299-300).

Any discussion of colleges, labor, and identity must necessarily begin with that *locus classicus* of faculty-union angst, the 1980 U.S. Supreme Court decision in *National Labor Relations Board v. Yeshiva University* (known in faculty collective-bargaining circles simply as *Yeshiva*), which has to-date effectively barred faculty in private colleges from unionizing. The Court had agreed to decide the question of whether or not the Yeshiva University faculty was entitled to bargain collectively, as the NLRB had ruled, or whether—as the university administration was claiming—the faculty were excluded from collective bargaining rights under the National Labor Relations Act. The NLRA distinguishes among “employees,” “professional employees,” and “supervisors”; typically, the first two are entitled to collective bargaining, while supervisors (or managerial employees) are not. The reasons for the exclusion of supervisors from the benefits of collective bargaining are embedded in the purpose of the NLRA, which was passed to safeguard not only collective bargaining rights but also—and primarily—“the free flow of commerce.” Strikes “and other forms of industrial strife or unrest” were considered, at the time of the passage of the NLRA in 1935, to be bad for business; hence, the NLRA was passed to rectify “inequality of bargaining power” between employers and employees (National Labor Relations Act). One of the things the Act does, then, is define who belongs on which side, in order to prevent conflicts of interest: supervisors are considered to act primarily in the interest of the employer and to implement the employer’s policies. By contrast, the Act holds that employees and professional employees act in their own interest.<sup>1</sup>

In the context of the *Yeshiva* decision, it is worth quoting at some length from the NLRA’s actual definition of “professional employee”:

[. . .] any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a

general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes [ . . . ]

Though this description, particularly items (i) and (iv), might seem beyond a reasonable doubt to apply to most college and university faculty, the Yeshiva administration had argued that the faculty were managerial employees because, professionalism notwithstanding, they had significant influence over university policy (*National*).

In a 5-4 decision, the Supreme Court sided with the Yeshiva administration. Since my purpose here is to demonstrate how WPAs are cast within a larger discourse, it is (again) necessary to quote at some length from both sides of the decision. The majority opinion held that

The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. [ . . . ] 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.

Regarding the seeming fit of faculty to the definition of “professional employee,” the Court dismissed the NLRB’s argument, saying that while the faculty might in fact act in its own interests, those interests could not be differentiated from those of the administration:

In arguing that a faculty member exercising independent judgment acts primarily in his own interest and therefore does not represent the interest of his employer, the Board assumes that the professional interests of the faculty and the interests of the institution are distinct, separable entities with which a faculty member could not simultaneously be aligned. [ . . . ] In fact, the faculty’s professional interests—as applied to governance at a university like Yeshiva—cannot be separated from those of the institution.

In such a university, the predominant policy normally is to operate a quality institution of higher learning that will accomplish broadly defined educational goals within the limits of its financial resources. The “business” of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions.

“It is fruitless,” the Court concluded, “to ask whether an employee is ‘expected to conform’ to one goal or another when the two are essentially the same” (*National*).

When I presented a version of this essay at the 2002 WPA summer conference in Park City, the appearance of the above passages on the overhead projector provoked head-shaking and snickers from the audience. The four-person dissent (which is a great thing to give your students if you want to show them how two parties can read the same data in two completely different ways) suggests why. Assailing the majority for its failure to recognize “fundamental differences between the authority structures of the typical industrial and academic institutions,” and claiming that the majority “views the governance structure of the modern-day university” through a “rose-colored lens,” the minority noted that

Unlike the purely hierarchical decision-making structure that prevails in the typical industrial organization, the bureaucratic foundation of most “mature” universities is characterized by dual authority systems. The primary decisional network is hierarchical in nature: Authority is lodged in the administration, and a formal chain of command runs from a lay governing board down through university officers to individual faculty members and students. At the same time, there exists a parallel professional network, in which formal mechanisms have been created to bring the expertise of the faculty into the decision-making process.

What the Board realized—and what the Court fails to apprehend—is that whatever influence the faculty wields in university decision making is attributable solely to its collective expertise as professional educators, and not to any managerial or supervisory prerogatives. Although the administration may look to the faculty for advice on matters of professional and academic concern, the faculty offers its recommendations in order to serve its own independent interest in creating the most effective environment for learning, teaching, and scholar-

ship. And while the administration may attempt to defer to the faculty's competence whenever possible [ . . . ] The University always retains the ultimate decision-making authority. [ . . . ]

Unlike the medieval university, the minority stated, "the university of today bears little resemblance to the 'community of scholars' of yesteryear"; administrations respond to concerns that may or may not have anything to do with education, as that word is commonly defined:

Education has become "big business" [ . . . ]. The past decade of budgetary cutbacks, declining enrollments, reductions in faculty appointments, curtailment of academic programs, and increasing calls for accountability to alumni and other special interest groups has only added to the erosion of the faculty's role in the institution's decision-making process. (*National*)

The *Yeshiva* decision's effects on certain areas of academic life are hard to understate. Again, it has—with some small exceptions—kept faculty in private colleges and universities from unionizing (public institutions are governed by state labor statutes, not the NLRA, and are therefore not controlled by the decision). And though faculty with administrative responsibilities—e.g., WPAs—are not explicitly mentioned in it, the *Yeshiva* decision should stand as a benchmark for them, since it foregrounds and applies to all faculty the divide between the administrative and the instructional that WPAs embody within themselves. *Yeshiva* turned that private split into a public debate, one worth paying attention to if only for the seeming foreignness of the warrants applied on at least one side. As law professor Deborah Malamud has written: "Should professors be treated as professionals or as managers? If our self-image and the way others in our society perceive us are the criteria, clearly we are professionals. But the law need not take this approach. It is perfectly legitimate for legal decision makers to answer such questions with reference to the purposes of a statute [in this case, the NLRA]—even when the result is culturally jarring" (22).

One might argue, however, that most important for WPAs is the manner in which the Supreme Court's decision was reached. First, there is the attention of the Court to the particular nuances of the faculty members' job(s). Even though each side read that data differently—where the majority saw managers, the dissenting minority saw employees—both opinions were nevertheless based on the justices' understanding of the actual duties of the faculty at *Yeshiva University* (e.g., "They debate and determine teaching methods, grading policies, and matriculation standards"). Second, the Court asked the question, "In whose interest does the faculty act?" This question has been asked repeatedly over time: even before *Yeshiva*, courts and the

NLRB issued decisions which have, perhaps, even more relevance to WPAs in that they addressed the labor status of faculty who had certain administrative duties. These cases were decided by looking at what, exactly, the faculty members in question did; second, how much authority they really had; and third, in whose interest they were acting. In one 1974 case, the NLRB—deciding who belonged in a proposed collective-bargaining unit at the University of Miami—noted that department chairs should be included in the unit because not only could they be replaced by faculty vote, but their authority was drawn from, and circumscribed by, departmental consensus:

The department chairmen [sic] are appointed by the dean of their school of their college, *after consultation with a committee of the departmental faculty concerned—whose recommendation is usually, although not always, followed.* [. . .]

With respect to decisions on tenure and promotion, separate recommendations from the chairman and the department faculty are forwarded up the chain of command [. . .]. In most cases, the faculty and chairmen are in agreement, but when they differ, the higher academic officials give greater weight to a strong faculty recommendation than to a contrary recommendation by their department chairman. (emphasis added)

Noting further that, though both the chair and the faculty participated in hiring, “after consultation between the chairman and faculty, the chairman makes a recommendation to the dean that is in conformity with that faculty consultation,” the NLRB determined that chairs were “not supervisors within the meaning of the Act [i.e., the NLRA]” and included them in the collective-bargaining unit. The chairs, then, acted in the interest of their department and, by extension, their field and their profession; hence their inclusion (*University of Miami*).

Similarly, in 1978 the first U.S. Circuit Court of Appeals upheld an NLRB decision that department chairs at Boston University were not subject to what labor lawyers call “the managerial exclusion” (Rabban). Chairs at BU, the Court noted, retained their faculty status when they stepped down, “lack[ed] discretion in formulating” their budgets, obtained faculty consensus on promotion and tenure decisions, spent about half of their time teaching, and were effectively chosen by the faculty:

While department chairpersons are selected by the appropriate dean, *the selection is usually based on a consensus of the faculty of the department.* [. . .] Based on this evidence, the Board was warranted in finding that the department chairpersons are not supervisors. Indeed, the selection process for department chair-

persons is such that they represent the interests of the tenured professors of the department rather than the University. (*Trustees*; emphasis added)

However, in a 1976 decision at the University of Vermont, where chairs were not only appointed but also evaluated by the dean, a different conclusion had been reached. Unlike the chairs at Miami or BU, chairs at UVM differed substantially from their departmental colleagues in salary and duties, spent a lot of time in meetings with high-level administrators, and were not expected to defer to departmental consensus when making a decision. Furthermore, they, and not the departments, were effectively the final arbiters of promotion, tenure, and hiring:

The chairmen have the responsibility and the authority to run their respective departments. They play a critical role in hiring both full- and part-time faculty and in setting initial salaries. The chairmen have the responsibility of evaluating the performance of the various faculty members in their departments. [ . . . ] The record shows that the recommendations of the chairmen based upon these evaluations are highly effective in determining promotions, tenure, reappointments, and salary increases, and are generally accepted without question by the university authorities.

Noting further that chairs had control of departments' budgets and were able to "exercise disciplinary authority over their faculties," the NLRB determined that chairs at Vermont were, in fact, supervisors and excluded from the bargaining unit (*University of Vermont*).

Though the *Yeshiva* decision has pretty much mooted the point of whether faculty in private colleges are management or labor, the NLRB's procedure in the above cases reflects the line of thinking that continues to be applied today when state labor boards decide whether or not certain people belong in a collective-bargaining unit.<sup>2</sup> Any time a faculty at a state college or university unionizes, the state labor board decides upon composition of the union, and it makes its decisions in part by looking at the duties of the faculty on a particular campus. Such faculty might be writing program directors or writing center directors as well as department chairs, and they are subject to a variety of state and local laws which differ tremendously from one other as well as (in some cases) from the NLRA.<sup>3</sup> As Stephen Finner, former Director of Chapter and State Services for the AAUP's national office, puts it, "there is no easy or formulaic answer" to the question of whether WPAs or department chairs belong in management or faculty: when AAUP organizes a campus for purposes of collective bargaining, it "look[s] first to the

governing law, and second to the local politics combined with what these people actually do [ . . . ] there are ‘directors’ who look, talk, walk, and act like department chairs and therefore should be treated the same way, and ‘directors’ who clearly are not supervisors over other bargaining unit faculty and therefore for whom there is no question” (Finner).

It seems, then, that our professional conversation notwithstanding, there is outside of that conversation a slightly more complicated—and exceedingly local—way of looking at what WPAs do and where they fit in the academic hierarchy. We employ terms like “management” and “labor” in conference discussions and in essays (see, for example, Miller, Horner, Bousquet, Mountford); yet, with some exceptions, the use of those terms is theoretical, which is fine (and desirable) in the context of academic argument but not so helpful when it comes to helping someone understand their own job and its politics—or, I would argue, the facts of how WPAs are situated. Occasionally I flash on post-plenary-session question-and-answer periods at summer WPA conferences, during which someone sometimes claims that WPAs are management in part because they hire and fire. But seen in the context of how labor boards or courts define “management” and “labor”—in other words, when trying to decide who is or is not entitled to collective bargaining—such a claim becomes harder to support. Any assertion that one “hires and fires” is complicated by the reality of who actually makes *final* hiring and firing decisions, and whose recommendations are followed, at any given institution. Similarly, Roxanne Mountford’s claim that “Unionization only brings into sharper focus the role of the WPA as a middle manager in the university hierarchy” (43) seems to me difficult to sustain if one examines what actually happens when faculties try to unionize.

The first lesson to be drawn from this look at courts and their decisions is quite practical. If the WPA works at an institution where the faculty is thinking about, or in the process of, organizing a union, it’s important for her to know where she might fall within that union, to present her understanding of her duties clearly to whoever is at the helm of any organizing process, and to make sure she gets represented accurately to the state labor board. A WPA at an already unionized campus should know where his union contract places him, and why. (The union president is usually a good source for this information, if it isn’t clear from the WPA’s appointment letter.) Having this knowledge is, it seems to me, key to helping the WPA understand his job and the parameters of his authority. It’s important, too, for union members to understand the faculty contract as a whole, as well as the local campus culture, when the contract is not as explicit on some points as it might be (again, the union president is a good source for this information, if the contract has not been provided to the WPA upon hiring). For

example, at my institution, very little is said in our contract about the day-to-day duties of program directors, who are in fact members of the union; however, program directors are required by contract to be members of academic departments, and throughout the contract it is made clear that it is academic departments acting consensually—not department chairs or anyone else acting alone—who “have responsibility for the content and development of courses, curriculum and programs of study within its discipline, research and service within its area, and for evaluation of the performance of all department members” (*Collective* 35). What this means for me is that the writing program I nominally direct is, finally, a collaborative product of the department of which I’m a member.

Which brings back that final question asked by the Supreme Court in *Yeshiva*: In whose interest do you act? If, for example, decisions about your program are made by a faculty committee, of whom is that faculty committee representative—the tenured faculty in an English department dominated by literature? A department of rhetoric? A department of language and linguistics? And are you, finally, acting for the party (or discipline) in whose interest you wish to be acting? This last question has implications that transcend our own working conditions or disciplinary integrity. In a recent essay in *JAC*, Marc Bousquet has argued compellingly that much WPA thinking which has focused on getting what we want from administrators—on the assumption that “non-market idealisms” will ultimately “be dismissed as the plaintive bleating of sheep”—has limited the goals of the discipline in disturbing ways. Some of us have, he says, lost sight of the goal of transforming institutions (which was, one could argue, one of the founding premises of the field of composition) and have settled for “pleasing the prince,” a tactic which “seeks to curb the ambitions of our speech and rhetoric” (512). We need to consider not only the rhetorical and political situations our employment contracts, or the realities of our departments, construct for us but also whether, in fact, we want to be in those situations at all. Whatever position one ultimately finds oneself in, it seems odd, indeed, that in a discipline so collegial—in which new WPAs are welcomed by seasoned (and famous!) WPAs into conference discussions, parties, cocktail hours, not to mention journals—there may, at least in certain peoples’ eyes, be no such thing as “us.”

## NOTES

<sup>1</sup> Congress amended the NLRA in 1947 with the Taft-Hartley Act; it was this emendation, not the original NLRA, that excluded supervisors from collective bargaining rights. For a further discussion of the history of the NLRA and its history and purpose, see Malamud; Rabban. Except where noted, I’m using the two terms

“supervisor” and “manager” interchangeably for the purposes of this discussion, since that is what most discussions of *Yeshiva* do.

<sup>2</sup> More faculty are unionized than one might think. As of 1994, about 44% of full-time faculty in public institutions were represented by collective-bargaining agents (“242,221 faculty on 1,057 campuses”). If one excludes research-university faculty (who tend, by and large, not to be unionized) from that figure, the percentage comes to 89% (Rhoades 9).

<sup>3</sup> Connecticut’s State Employee Relations Act, for instance, distinguishes between “supervisory employees” and “managerial employees.” The first type of employee is typically entitled to collective bargaining, while the second is not.

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