



# Defining the Bargaining Unit: Managerial and Supervisory Exclusions in Healthcare and Higher Education Under the National Labor Relations Act

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- Mr. Hawkins has represented higher education clients in a wide variety of labor and employment law matters and is a co-author of Sexual Harassment In Higher Education. In 2001, Mr. Hawkins argued the case of NLRB v. Kentucky River Community Care, Inc., before the U.S. Supreme Court.

## Background - The Importance of the Bargaining Unit

- When the parties to a representation proceeding disagree on the composition of the unit, the National Labor Relations Board (“the NLRB” or “the Board”) will determine whether the unit as defined by the petitioner is an “appropriate unit.”
- This determination is driven by an analysis of whether the employees have a mutual interest in wages, hours and conditions of work, otherwise known as a “community of interests.”

## Exclusions Defined by the Act and Caselaw

According to Section 2(11) of the Act, a supervisor is:

- [A]ny individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or to responsibly direct them...

## Exclusions Defined by the Act and Caselaw

According to Section 2(11) of the Act, a supervisor is:

- ...or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

## Exclusions Defined by the Act and Caselaw

- An exclusion has evolved from caselaw for what are termed “managerial” employees. In the case of N.L.R.B. v. Bell Aerospace, the Supreme Court held that employees who were even higher in the management structure, but who might not meet the definition of a supervisor, were implicitly also excluded from coverage of the Act.

## Exclusions Defined by the Act and Caselaw

- Managerial employees were defined as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.”



## Exclusions Defined by the Act and Caselaw

- Managerial employees must exercise independent judgment and discretion, perhaps even independent of employer policy, and must be “aligned with management”

## Professional Employee Defined by the Act and Caselaw

- A “professional employee” is defined as one who is engaged in work predominantly intellectual in nature, involving the consistent exercise of discretion and judgment, which cannot be measured in output over a certain period of time, and requiring advanced knowledge in a field of science or learning.

## Exclusions Defined by the Act and Caselaw

- A professional is also an employee with such education, performing work under the supervision of a professional in order to become qualified as a full professional.

## Yeshiva University and Subsequent Decisions – faculty as Managerial Employees

- In Yeshiva, the Union had petitioned the Board for certification of a bargaining unit consisting of the full time faculty at 10 of the 13 schools making up the University.
- The University opposed the Union's petition on the ground that the University's faculty were managerial employees. The Board held a series of hearings over a period of five months, and eventually granted the Union's petition.

## Yeshiva University and Subsequent Decisions – faculty as Managerial Employees

- The unit as certified included Assistant Deans, senior professors and department chairs, as well as associate professors, assistant professors and instructors.
- Deans and Directors, who headed up the individual schools, were excluded.
- Subsequently, the Union won the election and was certified by the Board as the bargaining agent for the employees.

## Yeshiva University and Subsequent Decisions – faculty as Managerial Employees

- When the University refused to bargain with the Union, the Union filed unfair labor practice charges, won at the Board level, and sought enforcement from the Second Circuit Court of Appeals.
- The Second Circuit refused to enforce the Board's order, holding that the faculty in the bargaining unit were not covered by the Act as they were managerial employees of the University.

## Yeshiva University and Subsequent Decisions – faculty as Managerial Employees

- The Yeshiva faculty were highly involved in a variety of decision making functions of the University, and especially within the individual schools. They had significant authority in:

# Yeshiva University and Subsequent Decisions – faculty as Managerial Employees

- Determining grading policies
- Teaching methods
- Matriculation standards
- Which students would be accepted retained and graduated.
- They had occasional input into the size of the student body, the tuition to be charged and the location of a school.



# Yeshiva University and Subsequent Decisions – faculty as Managerial Employees

- The Supreme Court held that the faculty exercised authority “which in any other context unquestionably would be managerial.”

# Yeshiva University and Subsequent Decisions – faculty as Managerial Employees

- Cases after Yeshiva tended to turn on intensive analysis of the extent of faculty involvement in university operations, especially in areas of broader university policy.

# Kentucky River – The Current State of the Supervisory Exclusion

- The N.L.R.B. has had a practice of attempting to define supervision primarily as a function of the exercise of “independent judgment,” particularly as related to Section 2(11)’s definition of a supervisor as one with authority “responsibly to direct” others.

# Kentucky River – The Current State of the Supervisory Exclusion

- In Kentucky River, the employer operated an 80 bed home for the mentally disabled. The facility employed approximately 110 professional and non professional employees in addition to about 12 clearly managerial or supervisory employees.
- When the Union petitioned the Board for certification of a unit including all 110 employees, the employer objected to the inclusion of six registered nurses entitled Building Supervisors.

# Kentucky River – The Current State of the Supervisory Exclusion

- The Board granted summary judgment to the Union, and the employer petitioned the Sixth Circuit Court of Appeals for review. The Board cross petitioned for enforcement of its order.
- The Sixth Circuit, holding that the Board's interpretation of the "independent judgment" language of Section 2(11) was in error, refused to enforce the Board's order.

# Kentucky River – The Current State of the Supervisory Exclusion

- The Board had argued that even where supervisory employees are imbued with authority to use independent judgment, that authority was insufficient to remove them from coverage of the Act, if it is only “ordinary professional or technical judgment in directing less skilled employees to deliver services.”
- The employer argued that this interpretation of independent judgment essentially eliminated all professionals from the supervision category, since they commonly exercise judgment based on technical training.

# Kentucky River – The Current State of the Supervisory Exclusion

- The Supreme Court held that the Board's interpretation was not supported by the language, history or intent of Section 2(11).
- The Court stated: "What supervisory judgment worth exercising, one must wonder, does not rest on some "professional or technical skill or experience"? If the Board applied this aspect of its test to every exercise of a supervisory function, it would virtually eliminate "supervisors" from the Act."

# Kentucky River – The Current State of the Supervisory Exclusion

- In N.L.R.B. v. Quinnipiac College, the Second Circuit applied Kentucky River to a bargaining unit of security guards at a private college. The college successfully argued that six of the security guards met the 2(11) requirement by performing at least three of the twelve supervisory functions. In addition, the court observed that in emergency situations the guards were authorized to use independent judgment based on their technical training. The court refused to enforce the Board's decision and order finding the college in violation of the Act.



# The New Battleground: Graduate Assistants, Research Assistants, Teaching Assistants, Medical Interns and Residents

- In Cedars Sinai Medical Center, the Board had decided that interns and residents were not statutory employees entitled to collective bargaining rights, partially based on general policy concerns such as the limitations on academic freedom that would be suffered by faculty who might be forced to negotiate standards with interns or residents.

# The New Battleground: Graduate Assistants, Research Assistants, Teaching Assistants, Medical Interns and Residents

- In St. Clare's Hospital & Health Center, the Board observed that interns and residents were primarily students, and not primarily employees, and their relationship with the institution was primarily academic and not economic.

# The New Battleground: Graduate Assistants, Research Assistants, Teaching Assistants, Medical Interns and Residents

- In 1999, the Board abandoned the rationale of Cedars Sinai and St. Clare's, and overruled both decisions.

# The New Battleground: Graduate Assistants, Research Assistants, Teaching Assistants, Medical Interns and Residents

- In Boston Medical Center, the Board conducted an extensive factual analysis of the status of interns and residents at the medical center, and determined that the earlier decisions had ignored the realities of these positions, and the breadth of the Act's definition of a covered employee.

## The New Battleground: Graduate Assistants, Research Assistants, Teaching Assistants, Medical Interns and Residents

- "Ample evidence exists here to support our finding that interns, residents and fellows fall within the broad definition of "employee" under Section 2(3), notwithstanding that a purpose of their being at a hospital may also be in part, educational. That house staff may also be students does not thereby change the evidence of their "employee" status."

# The New Battleground: Graduate Assistants, Research Assistants, Teaching Assistants, Medical Interns and Residents

- The Board also relied on Section 2(12)'s inclusion of professional employees, stating:  
“Literally read, Section 2(12)(b) embraces house staff. Interns, residents and fellows clearly are individuals who have completed a course of specialized intellectual instruction and study “in an institution of higher learning or a hospital.” Just as plainly, they are “performing related work under the supervision of a professional to qualify” to be a professional under the Act.”

# The New Battleground: Graduate Assistants, Research Assistants, Teaching Assistants, Medical Interns and Residents

- In New York University, the Board relied on the Boston Medical Center holding to determine that a unit of graduate teaching and research assistants was appropriate under the Act.
- GSA's spent only 15 percent of their time teaching or conducting research as opposed to the 80 percent of time Boston Medical Center interns spent on patient care.

## The New Battleground: Graduate Assistants, Research Assistants, Teaching Assistants, Medical Interns and Residents

- Further, the university argued that GSA's were not compensated for their time as employees would be, but were only receiving financial aid in the form of tuition discounts, and that the work was only performed in furtherance of a degree, unlike interns who already held a degree.
- The Board rejected all three arguments, stating: "Contrary to the Employer and others, we do not find this case significantly distinguishable from Boston Medical Center."



# The New Battleground: Graduate Assistants, Research Assistants, Teaching Assistants, Medical Interns and Residents

- In the wake of New York University, Professor Hayden has suggested that there are three general frameworks courts and the Board have used to analyze GSA's in the collective bargaining context:
  - GSA's are viewed as "students rather than employees.
  - GSA's are excluded from coverage because, on the balance, they are "primarily" students.
  - GSA's for policy reasons, because of the perceived negative effects GSA organization would have on the system of academic freedom.

# The New Battleground: Graduate Assistants, Research Assistants, Teaching Assistants, Medical Interns and Residents

- Hayden states: There is no reason that “student” and “employee” must be mutually exclusive categories.
- A student could easily also maintain a master-servant relationship with the institution.

# The New Battleground: Graduate Assistants, Research Assistants, Teaching Assistants, Medical Interns and Residents

- In light of the fact that stipends, salaries and other forms of financial aid often come out of general university funds, and are paid through payroll channels, there seems to be little useful distinction between pay for work and financial aid. Hayden argues that since the money paid to GSA's is not based on financial need, and is connected to services performed, it is compensation for employment.

# The New Battleground: Graduate Assistants, Research Assistants, Teaching Assistants, Medical Interns and Residents

- Hayden also rejects the argument that educational roles and concerns are primary for GSA's.
  - They may best be seen as performing a dual role that includes both student and employee status.

# The New Battleground: Graduate Assistants, Research Assistants, Teaching Assistants, Medical Interns and Residents

- Hayden reviews the argument that allowing GSA's to organize is bad policy, since it would interfere with academic freedom and disrupt faculty-student relationships.

## The New Battleground: Graduate Assistants, Research Assistants, Teaching Assistants, Medical Interns and Residents

- It is quite possible, however, that none of the exclusions discussed earlier will be consistently applied to GSA's, and the trend toward their organization will continue.

# Conclusion

- The Yeshiva University line of cases, establishing the factual circumstances where faculty might be excluded as an extension of management, is well settled. This line of cases may be seen as drawing a continuum of faculty involvement ranging from high involvement in a variety of university functions, to a point where faculty is only marginally involved and has no significant authority, especially in university business affairs.

# Conclusion

- The supervisory exclusion, especially as it relates to professional employees, has received some much needed clarification through Kentucky River. The Board's practice of limiting the definition of supervisor as applied to professionals was struck down, and the clear statutory language of Section 2(11) was given its due weight.



# Conclusion

- Employers have suffered a significant setback in the cases of Boston Medical Center and New York University. In reversing its own precedent and applying the Act to these categories of “employees,” the Board has created significant uncertainty. Since other established exclusions are not being applied (and arguably will not apply in most situations), employers in healthcare and higher education may be faced with a wave of organization efforts.

# Conclusion

## Practical Tips:

1. Make sure supervisors and managers are truly supervisors and managers
2. Always raise the issue of appropriate bargaining unit to presume right to challenge it.
3. Review the law and make factual distinctions work for your institution.