

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION**

In the Matter of

THE LONGY SCHOOL OF MUSIC

Employer¹

and

AMERICAN FEDERATION OF
TEACHERS MASSACHUSETTS, AFL-CIO

Petitioner

Case 1-RC-22381

DECISION AND DIRECTION OF ELECTION²

The Petitioner seeks to represent a unit of faculty employed by The Longy School of Music. The parties have stipulated that all faculty currently teaching, and who have a weekly average of at least three benefit units in one of the last two fiscal years, shall be

¹ The name of the Employer appears as amended at the hearing.

² Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

included in the unit.³ The Employer maintains that those faculty who are chairs and associate chairs of departments in the The Longy School's Conservatory must be excluded from the unit, on the ground of their managerial status.⁴ The Petitioner seeks to include them as non-managerial employees. I find that the Conservatory department chairs and associate chairs are managerial and shall exclude them from the unit. I shall also exclude from the unit as managerial the Artistic Director for Large Ensembles, the Director for Experiential Education, and the Music Director for the Opera Department.

Background⁵

The Longy School of Music, located in Cambridge, Massachusetts, is a school of music that serves 223 undergraduate and graduate students and nearly 1000 children and adults. The Longy School has two main divisions, the Community Programs Division and the Conservatory. The Community Programs Division offers a Preparatory Studies Program that offers music classes and private instruction to children, as well as a Continuing Studies Program that offers a variety of music classes for adults.⁶

The Conservatory is the school's degree-granting division. The Conservatory offers a two-year masters degree, a two-year graduate performance diploma (GPD), a two-year artist diploma, a Dalcroze certificate and license, an undergraduate diploma, and a bachelor of music degree.⁷

³ According to page 50 of the 2009-2010 Employee Handbook, a benefit unit is a weighted measure assigned to faculty and teaching duties that reflects the number of hours worked and category of work. The parties have stipulated to exclude visiting faculty.

⁴ At the hearing, the Employer took the position that the Conservatory chairs and associate chairs are statutory supervisors as well as managers. In its post-hearing brief, the Employer did not pursue its contention that they are statutory supervisors. Accordingly, I have not addressed this issue separately, except to the degree that some of the factors typically associated with supervisory status are also part of the test for managerial status.

⁵ I take administrative notice of The Longy School of Music's website at www.longy.edu, which is the source of some of the background information about the school.

⁶ In its post-hearing brief, The Longy School states that the Petitioner filed a representation petition seeking to certify a unit consisting of "all adjunct faculty teaching at the Conservatory." I note that the record reflects that The Longy School also employs faculty and department chairs in its Community Programs Division. Although the parties did not expressly take a position on the record as to their inclusion, I note that the Petition sought "all faculty members employed by The Longy School" and that the parties subsequently stipulated to include "All faculty currently teaching" who meet the above-mentioned criteria with respect to benefit units. Therefore, I assume that The Longy School's reference in its brief to a unit limited to faculty at the Conservatory was inadvertent, and I shall include in the unit all faculty employed both at the Conservatory and in its Community Programs Division, as well as the department chairs in the Community Programs Division.

⁷ I take administrative notice that the Longy website referred to above describes the programs as follows: The masters program is more academically oriented, while the GPD program allows

The Conservatory includes the following departments: Chamber Music, Collaborative Piano,⁸ Composition and Theory, Dalcroze Eurhythmics, Early Music, Experiential Education, Large Ensembles, Mind/Body Studies, Modern American Music, Music History and Interdisciplinary Studies, Opera, Organ, Percussion, Piano, Strings, Voice, and Woodwinds and Brass.

Hierarchy

Karen Zorn is the president of The Longy School. Miriam Eckelhoefer is the Director of Community Programs. Wayne Chin, the Dean of the Conservatory, is the chief academic officer for Conservatory affairs. Jim Moylan is Associate Dean for Academic Affairs and Karyl Ryczek serves as the Assistant Dean for Program Development.⁹

Most of the Conservatory departments consist of a chair, who reports to Dean Chin, and faculty who report to the chair.¹⁰ Two departments, Early Music and Dalcroze

graduate-level performers to focus intensively on performance. The artist diploma, Longy's highest performance credential, centers on individual instruction and is awarded to exceptionally gifted performers who aspire to a professional career in music. The Dalcroze program trains music teachers using Dalcroze methods. The undergraduate diploma is a four-year course of musical study. As for the bachelor of music degree, students enrolled in Longy's undergraduate diploma program may simultaneously pursue a bachelor of music degree at Emerson College in Boston, Massachusetts.

⁸ The Collaborative Piano Department appears to train pianists who accompany other instrumentalists or singers or who play in chamber music groups.

⁹ The parties have stipulated to exclude administrators, managers, and supervisors from the unit, although the record does not reveal the titles of the positions that the parties agree fall within those excluded categories.

¹⁰ The chairs are:

Regina Campbell	Mind/Body Studies
Peter Cassino	Modern American Music
Wayman Chin	Chamber Music
Frances Fitch	Early Music
Hugh Hinton	Piano (acting chair)
Brian Moll	Collaborative Piano
John Morrison	Composition and Theory
Janet Packer	Strings
Lisa Parker	Dalcroze Eurhythmics
Donna Roll	Opera (director and chair)
Karyl Ryczek	Voice
Michelle Shoemaker	Woodwinds and Brass

Eurhythmics, also have associate chairs.¹¹ The chairs are appointed by the President, in consultation with the Dean. As of this academic year, chairs are appointed for a one-year term.¹² They need not re-apply for the position. Chin, who has been on the faculty since 1994 and was appointed Dean in June 2008, testified that he is aware of one instance in which a chair's term was not renewed, which occurred prior to the time he became Dean.

Conservatory governance

All chairs and associate chairs serve on a body called the Conservatory Academic Council (CAC). The chairs (apart from Chin who, as noted above, is himself a department chair as well as Dean) and associate chairs comprise 13 of the 20 members of the CAC. The remaining seven members of the CAC are Music Director of the Opera Department Thomas Enman, Artistic Director for Large Ensembles Julian Pellicano, Experiential Education Director Judith Bose, Library Director Roy Rudolph, Associate Dean for Academic Affairs Jim Moylan, Dean Chin, and President Zorn.¹³ Chin serves as the chair of the CAC.

The CAC is the highest body at the Conservatory.¹⁴ According to The Longy School's 2009-2010 Employee Handbook, the CAC is "the Conservatory's primary body

In addition to his role as Dean of the Conservatory, Chin also serves as chair of the Chamber Music Department and as a member of the faculty in the Collaborative Piano Department.

As noted above, Voice Department Chair Karyl Ryczek also serves as the assistant dean for program development. The record does not reveal whether the parties would consider her to be excluded from the unit as an administrator.

The record does not reveal how long Hugh Hinton has served as acting chair of the Piano Department or how long he is expected to serve as acting chair.

The Music History and Interdisciplinary Studies, Percussion, and Organ departments do not appear to have a chair or director.

¹¹ The associate chairs are Na'ama Lion in the Early Music Department and Melissa Tucker in Dalcroze Eurhythmics.

¹² Previously chairs were appointed for a four-year term. Some chairs have served for over ten years.

¹³ According to the current Employee Handbook, the President is an *ex officio*, non-voting member of the CAC.

¹⁴ Although there was no mention of a Board of Trustees at the hearing, the Employee Handbook that was submitted into evidence refers at page 43 to a Board of Trustees which, for example, has authorized the President to appoint faculty and to make faculty division assignments to the Conservatory, Preparatory, or Continuing Education Divisions. The record does not reveal what role, if any, the Board of Trustees plays in the academic matters considered by the CAC.

for the review, approval, and implementation of academic policy.”¹⁵ The CAC meets monthly.

Each CAC member also serves on a subcommittee. The subcommittees, which meet separately, come up with recommendations, and report back to the full CAC. The subcommittees are as follows: Curriculum Development Committee, Grade Appeal/Student Disciplinary Committee, Faculty Development Committee, Assessment of Student Learning Committee, and Course and Faculty Evaluation Committee. Dean Chin, in conjunction with Associate Deans Moylan and Ryczek, select the members of each committee.

Department chairs

According to the Employer’s employee handbook, the primary role of a department chair, program chair, or program director is to establish educational goals in their departments and to promote a positive climate for learning. Chin holds monthly one-on-one meetings with each department chair to discuss departmental affairs. They work collaboratively on long-range planning for the departments. In the fall of 2009, Dean Chin asked all of the department chairs to draft a statement of goals and objectives for their departments, which they did.¹⁶

All faculty are asked to recruit new students, but, a few months ago, Dean Chin asked each Conservatory chair to submit a written report outlining strategies for recruiting new students for his/her department, which they did. Chairs, like other faculty, participate in “juries,” for which candidates for admission to Longy audition, and assign a number grade to candidates. In the Composition and Theory Department, all faculty have the opportunity to review applicants’ portfolios and write an opinion of their work for the admissions department.

The chairs also work as faculty, teaching courses and giving private lessons to students in addition to their duties as chairs.¹⁷ Department chairs assign academic course

¹⁵ A prior 2007-2008 version of the Employee Handbook, then called the Faculty Handbook, stated that, while the principal functions of the CAC’s predecessor, the Faculty Advisory Council (FAC), “are to provide counsel to the President *and to deliberate* on important policy issues, the FAC serves as the School’s board of academic review.” [emphasis supplied] The Petitioner points out that the version of this sentence in the current Employee Handbook has eliminated the phrase, “*and to deliberate*.”

¹⁶ The chair of the Composition and Theory Department, for example, listed certain goals for his department with respect to recruitment of students, hiring for his department, seminars/student learning, and a problem with the department’s facilities for an ear-training lab. He also sought to implement a policy that every Longy student, school-wide, be required to perform at least one piece by a Longy composer during matriculation and to develop more emphasis on experience composing.

¹⁷ The record does not reveal the percentage of the chairs’ work at The Longy School that is attributable to their chair work. Chairs Brian Moll and John Morrison testified that they spend

credit to certain courses, but it is generally based on the number of hours the course meets. Chairs meet with degree students to advise them on teacher placement, curriculum, course selection, and repertoire choices. They assign students to studio instructors.

Chairs' role in their capacity as members of the CAC

In their capacity as members of the CAC, department chairs decide by vote on policies related to student standing at the Conservatory, including the following: academic and disciplinary probation, suspension, and dismissal; the granting of earned degrees and diplomas; graduation awards and honors; student appeals of decisions by the Dean, Department Chairs and faculty, including semester grades; and other student-faculty academic disputes not resolved through actions of the Dean and Department Chairs.¹⁸

The Department Chairs are responsible for coordination of new or revised course proposals and curriculum changes that are generated by the faculty in their departments or solicited by the Chairs. The Chairs review and approve such proposals and submit them to Dean Chin, who takes them to the Curriculum Development Committee (CDC) of the CAC, which deliberates and makes a recommendation to the full CAC.¹⁹ The CAC then votes on the CDC recommendations. According to the Employee Handbook, the CAC gives final approval to all CDC actions and may call up any decision for discussion, remand, or reversal. Fitch testified, for example, that the CAC has approved courses she submitted to them and put them into the course catalog. Department Chair Moll testified that the CDC and ultimately the CAC approved a curriculum change a few years ago in which a required opera aria course for collaborative piano majors and an opera workshop for voice majors were combined.

about ten hours per week on average on their chair work. Moll teaches seven courses for eleven hours per week, plus preparation time, and also spends six hours per week teaching private lessons to students.

¹⁸ Toward the end of the academic year, Associate Dean for Academic Affairs Jim Moylan sends an e-mail to the department chairs with a list of graduation candidates, asking them to check their department list and notify him of any inaccuracies or omissions. Chin testified that the CAC approves the list, and that the CAC vote is not pro forma. The CAC sometimes allows students to walk at the graduation ceremony without receiving their diploma if a recital or proficiency requirement is pending.

The department chairs also nominate students for graduation with distinction in their department, and, according to the minutes of a CAC meeting in evidence, the full CAC votes to approve all graduates with distinction.

¹⁹ According to the current Employee Handbook at p. 60, the Curriculum Development Committee is comprised of three or four members of the CAC and three at-large members of the faculty. The Dean, Associate Dean for Academic Affairs, and Assistant Dean for Program Development are *ex officio*, non-voting members of the Committee.

In their capacity as CAC members, the department chairs approve the creation of new departments. In 1995, Peter Cassino, who was then Chair of the Jazz Department, submitted a proposal to the predecessors of the CDC and CAC, then referred to as the Faculty Curriculum Committee and Faculty Advisory Council, to create a new department called the Department of Modern American Music, that would redefine what was previously the Jazz Department to embrace a broad range of musical styles and genres.²⁰

In their capacity as members of the CAC, the department chairs approve all proposed changes to departmental requirements and school-wide requirements. Chin testified further that the CAC must approve whether curriculum requirements may be waived, for example, whether piano study at another institution may be used to prove requisite study for purposes of waiver of a proficiency exam. According to the minutes of a CAC meeting, the CAC voted to approve a proposal to allow the passing of a course to meet a theory proficiency requirement.

The CAC's Assessment of Student Learning Committee, which is chaired by Composition and Theory Chair John Morrison, was charged in September 2009 with developing a school-wide assessment process to which every undergraduate and graduate Longy student would be subject in their final semester. Morrison testified that the Committee's plan is to submit its recommendations to the CAC by February 2010 and for the CAC to approve the school-wide assessment, with any revisions after feedback, by the end of the year.

As a secondary charge, the Assessment of Student Learning Committee was also charged in September 2009 with making recommendations concerning each department's assessment tools for meeting performance standards. In this regard, the students in the Conservatory's performance departments (Piano, Strings, Opera, etc.) must pass a performance exam called a "jury," in order to progress to the next year of study and to graduate. These juries are the main form of student assessment in a performance conservatory.²¹ In the fall of 2008, Chin asked all department chairs in the performance departments to submit revised jury requirements, which they did.²² Collaborative Piano Chair Brian Moll testified that he and three other faculty members in his department

²⁰ As noted above, Cassino is now the chair for the redefined department.

²¹ In addition to the jury requirements, the revised guidelines for the Collaborative Piano Department state that masters of music candidates must pass all sections of theory and history proficiency exams and invite singers and other instrumentalists to play with them for a certain number of lessons per semester.

²² For example, under the revised jury guidelines for the Piano Department, students in their first year of the undergraduate diploma program must play a 40-minute program that includes a Baroque work, a Classical piece, a Romantic piece, a 20th or 21st century piece, and a fast etude or other piece of virtuosity of specified types.

finalized the repertoire guidelines for the juries and recitals, although he took final responsibility for them.²³ Dean Chin testified that he reviewed the guidelines in a number of cases, but that he is not an expert, for example, in baroque flute, so he trusted the chair and faculty who wrote them. He approved the revised jury guidelines, which were then submitted to the CAC, where the various chairs looked at one another's guidelines. Chin testified that there was lively discussion of the guidelines but no vote, as a clarinetist chair cannot pass on the jury requirements for a pianist. The new jury requirements have not yet been implemented, because Chin requested them for purposes of reporting to an accrediting body in 2010.

Chairs' authority with respect to department budgets

The chairs have no control over the budget for faculty salaries. The chairs each manage a budget for his/her department, however. The chair for the Collaborative Piano Department testified that his department budget is about \$3000. The chair for the Early Music Department testified that her total department budget is about \$13,000, but the part that she has sole discretion over is \$3000. The chair of the Composition and Theory Department testified that his departmental budget is currently around \$10,000, which he expects to increase mid-year when the budget for the computer music studio is incorporated into his budget. In years past, the department chairs would meet with the former dean each year to discuss their budget proposals for the coming year. For the last two years, departmental budgets have been level-funded due to a freeze, so these meetings have not taken place.

Each budget has line items for outside guests who regularly perform or teach at Longy for a workshop, a day, or an extended residency. Dean Chin testified that the chairs decide which guest artists they will have and negotiate the rate, which can be, e.g., \$300 to \$500 for a two-hour workshop, without Chin's approval. Chairs Brian Moll, John Morrison, and Frances Fitch all testified, however, that the Dean must approve money paid to outside guests.²⁴ Morrison and Fitch also testified that Chin must also approve expenses for other Longy faculty that are invited to teach within their departments. Expenses that do not require an extra signature include the costs of hosting a reception and the cost of stipends for graduate teaching assistants. Graduate teaching assistants are paid a set rate from the Composition and Theory Department budget, but Morrison testified that he may decide to fill a position, split it, or leave it unfilled. Fitch testified that her budget includes money for on-campus employment of students. She has one student, whose pay she determines within a set range.²⁵

²³ As noted above, Chin is on the faculty of the Collaborative Piano Department. Moll testified that he sought Chin's input as a colleague in his department rather than as in his capacity as Dean.

²⁴ Fitch testified that she uses the going rate for outside performers, which is \$250.

²⁵ Fitch testified that her budget also includes line items for expenses such as accompanying, instrument rental, instrument repair, the annual faculty luncheon, scenery for a production, and a coach for a production, but it is unclear whether those are the items over which she has total discretion.

Collaborative Piano Department Chair Brian Moll is also in charge of the budget for paid accompaniment, which is about \$15,000 per year. In this regard, he pairs instrumentalists and vocalists who need accompaniment with paid accompanists, which he testified is one of his responsibilities as chair.²⁶ There is a set rate for student pianists, but he determines the amount of time they are assigned to play, and he can negotiate the rate for outside accompanists without the Dean's approval. He signs time sheets regarding paid accompaniment to the coordinator for paid accompaniment, who collects them and sends them to the business office for payment.

Department chairs' role in hiring and promotion

The idea to hire a new faculty member may come from any source. After the Dean or President consults with the relevant department chair, the President determines whether to authorize a search. The department chair drafts a job description, in collaboration with the Dean. The department chairs and faculty have expertise in recruiting in their particular fields. The Dean appoints a search committee composed of the department chair and up to three faculty members, as well as a chair for the committee. In one instance described in the record, a search committee also included two student representatives. The search committee reviews applications and sends its selections to the President, who may approve all, some, or none and may also add names for consideration. The committee then interviews applicants and observes them teaching, conducting, or demonstrating whatever skills are required of the position. The Dean does not ordinarily serve on search committees but usually interviews the candidates himself and talks to the President about it. The search committee makes a recommendation to the President, who has authority to approve or deny the recommendation. Department Chair Fitch described one instance years ago in which the President, whose title at the time was "Director," selected a different candidate from the one recommended by the search committee. The Director concurred with the committee's recommendations in three other hirings in which Fitch has participated over the years. Chin testified that there have been 12 hires since he became Dean, but the record does not reveal in how many of those cases the President approved the recommendation of the search committees.

Department chairs play no role in promotions, in the sense that there is no tenure at The Longy School and no distinction in the faculty rankings, such as associate or adjunct titles. Early Music Chair Fitch did recommend that faculty member Lion become her co-chair for a year, and Dean and the President approved Fitch's recommendation.

The department chairs' role in assigning teachers

²⁶ Assigned accompaniment is also a degree requirement in the Collaborative Piano Department, and Moll is also responsible for assigning unpaid accompanists, as well as paid accompanists. Moll receives a separate stipend for his work in assigning accompanists.

Early Music Chair Fitch testified that, in her department, there is more than one teacher for only two instruments, so she rarely has a reason to choose one teacher over the other. In the case of those two instruments, the students usually request the teacher they prefer and are automatically assigned to that teacher.

Collaborative Piano Chair Moll testified that there have been no changes in which faculty teaches which course over the years, except that in 1999, he had a problem with the quality/style of a course being taught by a teacher. He and the teacher mutually agreed that the teacher would be a guest in a seminar instead of teaching the course.

The department chairs' role in evaluations of faculty

Department chairs do not determine the compensation of the faculty in their department, a matter that is handled by the President and a faculty compensation committee that includes the Dean but not department chairs or faculty.

Until two years ago, the department chairs wrote annual evaluations of the faculty in their departments that led to merit increases. The former dean reviewed the evaluations. Fitch testified that the former dean told her that a good or excellent rating would probably result in a merit increase, but she was never told the amount of the increase. Chin testified that the chairs did not determine the percentage increases in their departments but that their evaluations were "seriously considered" by the administration.

For the last two years, all merit increases have been suspended for budgetary reasons, and no faculty evaluations have been performed during that time.

In September 2009, Dean Chin charged one of the CAC committees, the Course and Faculty Evaluations Committee, with developing a new faculty evaluation procedure to be reactivated for the 2010-2011 academic year. He asked the Committee to consider the types of categories to be evaluated, but there is no evidence that there will be any change with respect to the role of the department chairs in recommending merit increases.

The Course and Faculty Evaluation Committee is also charged with making recommendations for changes to the course evaluations in which students give feedback to the faculty.

The department chairs' role in discipline

Dean Chin testified that he looks to the department chairs to investigate and handle personnel issues, although he is aware of only two to three instances of faculty discipline in his fifteen years at the school. Chin and Composition and Theory Chair Morrison testified concerning the discipline of faculty member Howard Frazin. In 2004, prior to the time Chin became the Dean, Frazin engaged in a verbal tirade toward a student, and he later engaged in other egregious behavior. In each instance, Morrison submitted a written report of the incident to Longy's Human Resources Department and the prior dean. Morrison testified that he does not know what action The Longy School

took and there is no evidence that he made a recommendation for action. Morrison also reported these incidents in Frazin's evaluation, which Frazin refused to sign in 2006, even after the acting president agreed to set aside the evaluation and redo it. In March 2009, Chin, who was by then the Dean, decided not to renew Frazin's contract with Longy, after discussions with the director of Human Resources, and the President. Chin had read the prior dean's substantial file on Frazin, which factored into his decision, in which he found accounts of incidents over a period of years and rebukes to Frazin from the prior dean. Chin knew that Morrison was fearful of Frazin based on the file notes and discussions with him. Morrison testified that he was not involved in the decision not to renew Frazin's contract and did not know it was happening.

Collaborative Piano chair Moll testified that on one occasion, in his capacity as Interim Chair of Chamber Music, he received complaints from students that a faculty member was rough in manner and spoke to the faculty member about it. Early Music Chair Fitch testified that she has no authority to discipline faculty and has never done so.

Pay for chair duties

The faculty are paid on a per-service basis for teaching and administrative duties based on a complex formula. In addition to their faculty pay, the chairs receive a stipend for their work as chairs, based on the number of faculty and student majors in their department.²⁷ The chair stipend represents about 45 percent of the compensation of the String Department chair, one quarter of the compensation of the Composition and Theory chair, about one sixth of the compensation of the Early Music Department chair,²⁸ and one tenth of the compensation the Collaborative Piano Department chair.

ANALYSIS

In considering the managerial status of faculty in *NLRB v. Yeshiva University*,²⁹ the Supreme Court defined managerial employees to be those who formulate and effectuate management policies by expressing and making operative the decisions of their employers. The Court noted that managerial employees must exercise discretion within, or even independently of, established employer policy, must be aligned with management, and must represent management interests by taking or recommending discretionary actions that effectively control or implement employer policy. The Board

²⁷ Seven of the chairs and associate chairs receive an annual stipend ranging from \$3,000 to \$5,000 for their chair work. Two receive stipends in the \$9,000-\$10,000 range for being chairs. One receives a stipend of \$13,781, and the largest stipend, for the chair of the string department, is \$22,390.

²⁸ As of this year, the chair of the Early Music Department shares her chair duties and stipend with an associate chair, so that the chair now receives \$5000 and the associate chair receives \$4000.

²⁹ 444 U.S. 672 (1980).

has held that the party seeking to exclude individuals as managerial has the burden of coming forward with evidence necessary to establish such an exclusion. *Lemoyne-Owen College*;³⁰ *Montefiore Hospital & Medical Center*.³¹

Applying its managerial test to the faculty members in *Yeshiva*, the Supreme Court found them to be managerial employees, based on their extensive authority over academic matters such as the school's curriculum, academic calendar, course schedules, student admission, student retention, matriculation standards, teaching methods and grading policies. The Court noted that, on occasion, faculty views had determined the size of the student body, the tuition to be charged, and the location of a school. While the Court also noted the faculty's predominant authority in nonacademic matters, such as hiring, tenure, sabbaticals, termination, and promotion, which it found to have both managerial and supervisory characteristics, the Court did not rely primarily on these features of faculty authority but rather on their authority over academic affairs.³²

The Board has applied the *Yeshiva* decision in numerous cases in college and university settings, most of which involved the managerial status of rank-and-file faculty members rather than department chairs or their equivalents. The Board has emphasized the importance of faculty control or effective control over *academic* areas as opposed to nonacademic areas. *LeMoyne-Owen College*³³ (emphasis in original). The Board has generally found rank-and-file faculty to be managerial when they exercise substantial control over academic matters.

For example, in *Livingston College*,³⁴ the Board found faculty members to be managerial employees where they exercised substantial authority over curriculum, degree requirements, course content and selection, graduation requirements, matriculation standards, and scholarship recipients. The faculty members participated in academic governance through membership on various standing committees and by virtue of a faculty-wide vote on recommendations proposed by these committees. The Board placed only limited significance on the fact that the faculty had virtually no input into nonacademic matters such as the budget process, tenure decisions, selection of administrators, and no authority in the hiring and firing of faculty.

³⁰ 345 NLRB 1123, 1128 (2005).

³¹ 261 NLRB 569, 572 fn. 17 (1982)

³² The Court did not reach the issue of supervisory status. *LeMoyne-Owen College*, *supra* at 1127-1128, citing *NLRB v. Yeshiva University*, *supra* at 686 fn. 23.

³³ *Id.* at 1128 (2005).

³⁴ 286 NLRB 1308 (1987).

In *Elmira College*,³⁵ the Board found faculty members to be managerial where committees comprised predominantly of faculty members established the curriculum, had final authority to add new courses, to make changes in course content and level, to determine whether a particular course satisfied the College's requirements, and to approve student petitions to waive academic requirements. The faculty, through individual faculty members, divisions, or committees, approved degree candidates, student grading, course scheduling, class size, number of course sections, student advising, transfer course credits, and student retention and discipline related to academic performance. The Board held that, without more, the nature of faculty involvement in academic matters conclusively established their managerial status. In addition, however, they exercised considerable authority concerning the hiring of faculty and tenure decisions, although they had no authority over salaries. Faculty recommendations concerning both academic and nonacademic matters were generally followed by the college president.

In *LeMoyne-Owen College*,³⁶ the Board found the faculty to be managerial, where, through individual faculty members, a curriculum committee, an academic standards committee, and a faculty assembly composed entirely of faculty members except for two administrators, the faculty made or effectively controlled decisions with regard to curriculum, courses of study and course content, degrees and degree requirements, major and minors, academic programs, and academic divisions, the addition and deletion of courses, teaching methods, grading, academic retention, lists of graduates, selection of honors, admission standards, syllabi and textbooks. The faculty also made effective decisions in some nonacademic areas, including tenure standards, tenure selection, and the faculty evaluation process.

The Board has found rank-and-file faculty to be non-managerial in circumstances where they do not have substantial control over academic matters. *Carroll College, Inc.*³⁷ (proposals of faculty committee regarding degree requirements, curriculum, and the addition and deletion of majors and courses are independently reviewed by the college administration and have been rejected by the administration); *Florida Memorial College*³⁸ (curriculum not within the faculty's absolute control, and all curricular proposals had to be approved by the administration). Accord, *University of Great Falls*,³⁹ *St. Thomas University*.⁴⁰

³⁵ 309 NLRB 842 (1992).

³⁶ 345 NLRB 1123 (2005).

³⁷ 350 NLRB No. 30 (2007).

³⁸ 263 NLRB 1248 (1982).

³⁹ 325 NLRB 83 (1997).

⁴⁰ 298 NLRB 280 (1990).

Here, I find that department chairs at The Longy School are managerial employees by virtue of their exercise of control over academic matters, primarily as members of the CAC. The CAC is predominantly composed of department chairs. The CAC decides by vote on policies related to student standing, including academic and disciplinary probation, suspension, and dismissal, approval of the list of graduates, approval of awards and honors, and student appeals regarding academic matters. As members of the CAC, the department chairs give final approval to course proposals and curriculum changes. On one occasion the CAC has approved the creation of a new academic department. The CAC approves all changes to departmental and school-wide degree requirements as well as waivers from them. The CAC is charged with developing a school-wide assessment tool for students. In addition, department chairs have been asked to take the lead in developing the jury requirements for their own departments, which were reviewed by the CAC, although the CAC did not vote on them.

In concluding that department chairs here are managers, I note their placement in The Longy School's organizational structure is at a higher level than is often the case for the rank-and-file faculty members at issue in a typical *Yeshiva* case; indeed, the CAC is the highest governing body at the Conservatory. Although there appears to be a higher governing body for The Longy School as a whole, i.e., a Board of Trustees, there is no evidence that the Longy Board of Trustees plays any role in reviewing the academic matters that are entrusted to the CAC. Nor does the participation of the President, Dean, and Assistant Deans on the CAC preclude a finding that its other members, who constitute the majority of the group, are managerial employees. *LeMoyne-Owen College*⁴¹ (dean and assistant dean's participation in the faculty-dominated assembly does not undermine the finding that the faculty make effective academic recommendations, where the assembly is overwhelmingly comprised of faculty members, and there is no evidence that the dean or assistant dean have ever altered or rejected faculty recommendations). Cf. *University of Great Falls*⁴² (effective control of academic policies cannot be imputed to faculty when they comprise a minority of the committee which develops and reviews those policies); *Carroll College, Inc.*⁴³ (proposals of the faculty committees are independently reviewed and have been rejected by the administration).

Although of less significance in ascertaining managerial status, I note that the department chairs also effectively recommend discretionary action with respect to some nonacademic matters. In this regard, the chairs, in their capacity as CAC members, have been charged with the task of developing a new faculty evaluation procedure, a policy matter. *LeMoyne-Owens College*⁴⁴ (faculty effectively revised a faculty handbook

⁴¹ Supra, 345 NLRB at 1132.

⁴² 325 NLRB 83 (1997).

⁴³ Supra.

⁴⁴ Supra at 1127 and 1130.

section governing evaluation of faculty members that was approved by a board of trustees). Outside of their service on the CAC, the chairs administer their department budgets and have been tasked with developing long-term objective and recruiting strategies for their departments. *University of Dubuque*⁴⁵ (faculty members who function as department chairpersons prepare and administer their department budget). In finding the department chairs to be managers, I acknowledge that they play no role in setting the wages of the faculty. I do not rely on their role in the hiring process or on their role in faculty discipline, which I find not to be effective. Nor do I rely on the additional compensation received by chairs, which I find to be an insignificant factor.

The cases relied on by the Petitioner are distinguishable and do not warrant a finding that department chairs are non-managerial employees. For example, in *Florida Memorial College*,⁴⁶ the Board found that the division chairpersons' membership on an academic council was insufficient to establish their managerial status, where there was no showing that the council made operative decisions in addressing academic policy issues. Issues discussed at the meetings there were frequently mere announcements made to the chairpersons by administrators, and substantive decisions were deferred for consideration by the president's cabinet, which did not include the chairpersons. In *Kendall School of Design*,⁴⁷ the Board found that the chairpersons played no greater role in the curriculum committee's actions vis-à-vis the dean than did regular faculty members also found to be non-managerial, where final approval of all matters, including all curriculum changes, rested with a board of trustees. There, the trustees set, *inter alia*, course load requirements, matriculation, retention, and graduation requirements. Further, major decisions as to the future of the school, including the creation of a joint degree program, were made by the administration with *ex post facto* presentation to the faculty. Here, in contrast to both of these cases, the chairs, as CAC members, make final operative academic decisions.

The Petitioner also argues that the chairs principally teach and spend limited time on their chair duties, relying on *Kendall School of Design*⁴⁸ (time spent on chair functions, compared to their regular faculty tasks such as teaching, is insignificant). Here, the chairs spend, on average, ten hours per week on their chair duties, which I find to be substantial.

⁴⁵ 289 NLRB 349, 352 (1988).

⁴⁶ 263 NLRB 1248 (1982).

⁴⁷ 279 NLRB 281 (1986).

⁴⁸ *Id.*

Acting Chair of the Piano Department

Although no party has taken a position on the issue, I note that the chair of the piano department, Hugh Hinton, is listed on exhibits in the record as “acting” chair. I find the circumstance of an acting manager to be analogous to that of a substitute supervisor. The appropriate test for determining the status of employees who substitute for supervisors is whether the part-time supervisors spend a regular and substantial portion of their working time performing supervisory tasks. *St. Francis Medical Center-West*.⁴⁹ *Aladdin Hotel*.⁵⁰ The sporadic assumption of supervisory duties is not sufficient to establish supervisory status. *Jakel Motors*.⁵¹

Because the record is devoid of any evidence as to how long Hinton has served or is expected to serve as acting chair of the piano department, I shall permit him to vote under challenge.

Associate chairs

Associate chairs in the Early Music and Dalcroze Eurhythmics departments, Na’ama Lion and Melissa Tucker, assist their chairs with administrative duties. Chin testified that the chairs have the primary role, but the associate chairs attend the monthly CAC meetings,⁵² sometimes with the chair of their department and sometimes separately, depending on their schedules. They also attend the periodic meetings between the Dean and their chair. The associate chairs receive a stipend that is close to that of the chair. Tucker has been given authority to sign off on certain budget items for the Dalcroze department, such as payments to guest faculty.

Chin testified that Lion has been temporarily appointed to be an associate chair for the Early Music Department, and she will resume her faculty duties after this year. This position was created for the 2009-2010 academic year, in order to facilitate the transition of the chair, Frances Fitch, who is ready to leave the chair position. According to an e-mail that Fitch sent to the faculty, Chin will hold a formal search next year for a new chair, and Lion will be invited to apply. In a memo to faculty announcing their division of responsibilities, Fitch wrote that Lion is responsible for the department seminar, scheduling exams and juries, prospective students, class recitals, collecting course proposals from department faculty and overseeing their approval, the newsletter, and special events. According to the memo, Fitch remains responsible for advising, space use, instruments, budget, long-range planning, CAC, Community Programs

⁴⁹ 323 NLRB 1046 (1997).

⁵⁰ 270 NLRB 838, 840 (1984).

⁵¹ 288 NLRB 730 (1988).

⁵² Minutes of the CAC meetings that were submitted into evidence show that Tucker has attended several.

Advisory Council, hiring, and on-campus employment. Fitch acknowledged, however, that Lion serves on the CAC and has gone to one of the meetings.

Analysis

I find that the two associate chairs are also managers, by virtue of their role on the CAC. Although the Petitioner asserts that there is no evidence that Tucker actually attends the CAC meetings, the meeting minutes in evidence show otherwise.

In excluding Lion from the unit as a manager, I have considered the evidence concerning the temporary nature of her position. I find, based on evidence that she has been appointed to the position for a year, that her tenure as associate chair is regular and substantial enough, pursuant to the *Aladdin Hotel* test, to exclude her from the unit. See also *The Dow Chemical Co.*⁵³ (assignment of individual to a managerial position for almost two and a half years is not temporary in nature).

Directors

The Conservatory faculty includes three individuals with the title of “Director”: the Artistic Director, Director of the Experiential Education Department, and Music Director. All three directors are members of the CAC. Chin testified that the title of “Director” is considered to be at the same level and treated the same as the title of “Chair” although he also testified that the Music Director is not considered part of the Conservatory Chair group. The record reveals the following about the Directors, apart from their CAC duties:

Artistic Director Julian Pellicano is the sole member of the Large Ensemble Department; no faculty report to him. He conducts the Longy Chamber Orchestra and Longy Chamber Winds, teaches conducting classes, and participates in auditions and juries.

Director Judith Bose heads the Experiential Education Department.⁵⁴ One faculty member reports to her.

Music Director Thomas Enman reports to the director/chair of the Opera Department. There is no record evidence of his duties beyond his participation in the CAC.

⁵³ 237 NLRB 1276 (1978). (Truesdale, dissenting). I note that in this case, the majority found the disputed position, painters temporarily assigned to be inspectors, to be non-managerial. Member Truesdale, in dissent, found the position to be managerial and found, furthermore, that a two and a half year assignment to the job was not temporary.

⁵⁴ The Experiential Education Department teaches a course that is a school-wide requirement for all Conservatory students, in which they design outreach programs for schools and hospices under the guidance of a faculty mentor.

The record reveals that the Director of Experiential Education and the Artistic Director for Large Ensembles receive salaries of \$20,000 and \$50,000 respectively, which includes their teaching work. It does not appear that they receive a separate stipend for their chair/CAC work, as do the chairs and associate chairs. The record does not reveal anything about Enman's compensation.⁵⁵

Analysis

The Petitioner asserts in its post-hearing brief that the directors should be included in the unit. The Longy School did not expressly take a position on the inclusion or exclusion of the directors at the hearing or in its post-hearing brief, although the Dean's testimony and The Long School exhibit listing Conservatory Chair stipends appeared to distinguish between Pellicano and Bose, who are considered to be department chairs, and Enman, who is not considered to be a department chair.

Regardless of their status as department chairs, I find that all three directors should be excluded from the unit as managers, based upon their membership in the CAC, for the same reasons set forth above with respect to the chairs' role on the CAC.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All faculty currently teaching, and who have a weekly average of at least three benefit units in one of the last two fiscal years, excluding all other employees, visiting faculty, administrators, confidential employees, office clerical employees, managers, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by American Federation of Teachers Massachusetts, AFL-CIO. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees

⁵⁵ The names of Pellicano and Bose appear on an Exhibit submitted into evidence by the Employer, entitled "Conservatory Chair Stipends," while Enman's name does not appear on the list.

who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **December 16, 2009**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlrb.gov,⁵⁶ by mail, or by facsimile transmission at 617-565-6725. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

⁵⁶ To file the eligibility list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **December 23, 2009**. The request may be filed electronically through E-Gov on the Agency's website, www.nlr.gov,⁵⁷ but may not be filed by facsimile.

DATED: December 9, 2009

/s/ Rosemary Pye

Rosemary Pye, Regional Director
First Region
National Labor Relations Board
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⁵⁷ To file the request for review electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlr.gov.