

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
TEMPLE UNIVERSITY : Case No. PERA-U-12-332-E
:

PROPOSED ORDER OF UNIT CLARIFICATION

On October 23, 2012, Temple University (Temple or University) filed a petition for unit clarification with the Pennsylvania Labor Relations Board (Board) seeking to exclude the department chairs from the full time faculty unit certified by the Board in 1973 and represented by the Temple Association of University Professors (Union or TAUP).

On November 19, 2012, the Secretary of the Board issued an order and notice of hearing in which the matter was scheduled for a pre-hearing conference on January 9, 2013 to resolve the matters in dispute by mutual agreement of the parties and May 3, 2013 in Harrisburg as the time and place of hearing, if necessary.

The hearing was necessary, but was held on June 18, 2013. Seven additional days of hearing were held, on June 24 and 25, July 15 and 16, and September 9, 10 and 23, 2013.

The parties were afforded the opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

On January 16, 2014, the parties submitted a joint stipulation.

On January 24, 2014, Temple filed a brief. On March 13, 2014, the Union filed a brief. On March 26, 2014, Temple filed a reply brief.

The Examiner, on the basis of the evidence presented at the hearings and from all other documents of record makes the following:

FINDINGS OF FACT

1. Temple University is a public employer as defined in Section 301(1) of the Public Employe Relations Act, 43 P.S. § 1101.301(1).
2. Temple Association of University Professors (TAUP) is an employee organization as defined in Section 301(3) of PERA, 43 P. S. §1101.301(3) and was certified by the Board in 1973 as the exclusive collective bargaining representative of a bargaining unit of:

...all full-time faculty including department chairmen
Employed at Temple University including professional
Librarians on the Paley Library budget, librarians in the
School of Social Administration, the College of Education,
and the College of Allied Health Professions; counselors
and academic advisors at the College of Liberal Arts,
Counseling Center and Student Resources Center; supervisors
of practice teaching at the College of Education; non-
faculty support professionals in the intern teaching
program for college graduates; other support professionals
who meet the definition of being necessary or adjunct to
the teaching of students or research projects of the
University, excluding the faculty at Rome, Italy and the
faculty at the Medical School, Law School and Dental School
and the Hospital, and further excluding all other non-
faculty and professional employes, computer personnel,

management, supervisors, first-level supervisors and confidential employees as defined in Act 195.

(Board Exhibit 1, Nisi Order of Certification dated July 5, 1973, in PLRB Case No. PERA-R-1123-E, as amended at PERA-U-87-266-E and PERA-U-90-265-E.)

3. When the Union was originally certified to represent the bargaining unit, Temple asserted that Department Chairs should be excluded from the bargaining unit as supervisors. The Board rejected that claim. (Order Fixing Time and Place of Pre-Election Conference, August 11, 1972, at p. 5) and 3 PPER 209. (Final Order, 1973).
4. Temple is comprised of seventeen Schools and Colleges and a Division of Theater and Film and Media Arts, thirteen of which (including the Division) are covered by the collective bargaining agreement. (Joint Exhibit 1 at ¶ 4; N.T. 12-13, 21-22, 502-03).
5. The full-time faculty in the following Schools and Colleges and the Division are covered by the collective bargaining agreement between Temple and the Union: Boyer College of Music and Dance, College of Health Professions and Social Work, College of Liberal Arts, School of Environmental Design, College of Science and Technology, division of Theater and Film and Media Arts, College of Education, College of Engineering, Fox School of Business, School of Pharmacy, School of Media and Communications, School of Tourism & Hospitality Management, and the Tyler School of Art. (N.T. 12-13, 21-22, 502-03, Joint Exhibit 1 at ¶ 4)
6. Temple's governing body is its Board of Trustees, which is responsible for Temple's educational mission and fiscal policies. (N.T. 20-21, Joint Exhibit 1 at ¶ 1)
7. The Board of Trustees has final authority and responsibility for the policies and governance of Temple. (N.T. 20-21, Joint Exhibit 1 at ¶ 1)
8. The Board of Trustees is comprised of thirty-six voting members, twenty-four of whom are elected and twelve of whom are appointed by officials of the Commonwealth of Pennsylvania. (N.T. 20-21, Joint Exhibit 1 at ¶ 1)
9. Additionally, the Governor of the Commonwealth of Pennsylvania, the Secretary of Education of the Commonwealth of Pennsylvania, and the Mayor of the City of Philadelphia serve as non-voting Trustees. N.T. 20-21, Joint Exhibit 1 at ¶ 1)
10. Temple's President is responsible for supporting and managing all of Temple's academic, administrative, and financial operations. (N.T. 21, Joint Exhibit 1 at ¶ 2)
11. Assisting the President in managing Temple's research and educational operations, support services, and institutional outreach is a team of senior administrators, one of whom is Temple's Provost. (N.T. 21, Joint Exhibit 1 at ¶ 3).
12. Temple's Provost is the Chief Academic Officer of Temple, who is responsible for the overall leadership of academic affairs. (Joint Exhibit 1 at ¶ 3).
13. Each School and College and the Division has a Dean (or Acting or Interim Dean), each of whom reports to the Provost. (N.T. 22-23, Joint Exhibit 1, at ¶ 5)
14. Temple's Deans are the Chief Academic Officers of their respective Schools, Colleges, and Division, responsible for academics, research, budgeting, and planning for their respective Schools, Colleges, and the Division. (Joint Exhibit 1 at ¶ 5)

15. Most Deans have appointed Vice, Associate, or Assistant Deans to aid them in effecting the work of the School or College. (N.T. 23, Joint Exhibit 1 at ¶ 6)
16. Within each School and College and the Division, there are academic Departments. (N.T. 23-24, Joint Exhibit 1 at ¶ 7)
17. Each Department has a Department Chair (or Acting or Interim Chair). (Joint Exhibit 1 at ¶ 7).
18. In 1973, the Board found, "Almost universally department chairmen are chosen by the department faculty and the chairman serves as a vehicle to conduct the consensus of the department's thinking to the dean of the school and vice versa." (Board Exhibit 1, Order Fixing Time and Place of Pre-Election Conference, 1972, at 4, at ¶ 16).
19. Now, the Department Chairs are appointed by the Dean and "at all times serve at the pleasure of the Dean" as set forth in the CBA. (Joint Exhibit 1 at Exhibit A at 45).
20. At the inception of the hearings, those Departments and their Chairs were as follows:
 - a. Boyer College of Music and Dance:
 1. Choral: Paul Rardin
 2. Dance: Sherrill Dodds
 3. Instrumental Studies: Terrell Stafford
 4. Keyboard: Charles Abramovic
 5. Music Education and Therapy: Rollo Dilworth
 6. Music Studies/Music Education: Michael Klein
 7. Vocal Studies: Christine Anderson
 - b. College of Health Professions and Social Work:
 1. Rehab Science: Mark Salzer
 2. Comm Sci and Disorders: Carol Hammer
 3. Health Information Management: Cynthia Marselis
 4. Kinesiology: Michael Sachs
 5. Nursing: Jane Kurz
 6. Physical Therapy: Emily Keshner
 7. Public Health: Alice Hausman
 8. Social Work: Jeffrey Draine
 - c. College of Liberal Arts:
 1. African American Studies: Molefi Asante
 2. Anthropology: Mindie Lazarus-Black

3. Criminal Justice: Jerry Ratcliffe
 4. Critical Languages: Louis Mangione
 5. Economics: Michael Bognanno
 6. English: Joyce Joyce
 7. French, German, Italian & Slavic: Louis Mangione
 8. Geography and Urban Studies: Melissa Gilbert
 9. Greek and Roman Classics: Robin Mitchell-Boyask
 10. History: Jonathan Wells
 11. Philosophy: David Wolfsdorf
 12. Political Science: Richard Deeg
 13. Psychology: Marsha Weinraub
 14. Religion: Laura Levitt
 15. Sociology: Robert Kaufman
 16. Spanish and Portuguese: Luis Gonzales del Valle
- d. School of Environmental Design:
1. Community/Regional Planning: Deborah Howe
 2. Landscape Architecture and Horticulture: Pauline Hurley-Kurz
- e. College of Science and Technology:
1. Biology: Allen Nicholson
 2. Chemistry: Robert Levis
 3. Computer and Information Science: Jie Wu
 4. Earth and Environmental Science: Jonathan Nyquist
 5. Mathematics: Edward Letzter
 6. Physics: Rongjia Tao
- f. Division of Theater and Film and Media Arts:
1. Film and Media Arts: Nora Alter
 2. Theater: Doug Wager
- g. College of Education:
1. Teaching and Learning: Michael Smith
 2. Psych, Organizational & Leadership Studies: James Byrnes
- h. College of Engineering:

1. Bioengineering: Peter Lelkes
 2. Civil and Environmental Engineering: Philip Udo-Inyang
 3. Electrical and Computer Engineering: Saroj Biswas
 4. Mechanical Engineering: Mohammed Kiani
- i. Fox School of Business:
1. Accounting: Eric Press
 2. Finance: Ronald Anderson
 3. Human Resource Management: Deanna Geddes
 4. Legal Studies: Samuel Hodge
 5. Management Information Systems: Munir Mandviwalla
 6. Marketing & Supply Chain Management: Michal Smith
 7. Risk, Insurance, Healthcare Management: Rob Drennen
 8. Statistics: Sanat Sarkar
 9. Strategic Management: Arvind Parkhe
- j. School of Pharmacy:
1. Pharmaceutical Sciences: Daniel Canney
 2. Pharmaceutical Practice: Michael Mancanno
- k. School of Media and Communications:
1. Advertising: Michael Maynard
 2. Media Studies and Production: Jan Fernback
 3. Journalism: Andrew Mendelson
 4. Strategic & Organizational Communications: Cornelius Pratt
- l. School of Tourism and Hospitality Management:
1. Sport and Recreation Management Program: Aubrey Kent
- m. Tyler School of Art:
1. Architecture: Kate Wingert-Playdon
 2. Art and Art Education: Pepon Osorio
 3. Crafts: Nicholas Kripal
 4. Foundations: Gerard Brown
 5. Graphic Arts and Design: Stephanie Knopp
 6. Painting, Drawing & Sculpt: Margo Margolis

7. Art History: Gerald Silk

(Joint Exhibit 1 at ¶ 7)

21. Within each academic department, there are rank and file, also called "departmental" faculty. (N.T. 715).
22. There are four types of faculty at Temple - tenured, tenure track, non-tenure track ("NTT"), and part-time, or "adjunct" faculty. (N.T. 36-37)
23. There are approximately 800 tenure track (TT) and tenured faculty, 550 non-tenure track (NTT) faculty and 1,300 adjunct faculty in the schools and colleges at issue in this case. The adjunct faculty are not in the collective bargaining unit. (N.T. 51-52, 501-502).
24. Tenure track faculty are charged with Temple's tripartite mission of service, teaching, and research. (N.T. 36-37)
25. NTT faculty typically focus on one of the three parts of the mission and are appointed for a term at the end of which they may be reappointed. (N.T. 36-37)
26. Adjuncts are part-time faculty appointed to fill the specialized needs of the department - - i.e., for a specialty that is essential to the department, to teach a particular course that requires a particular expertise or to fill a last-minute vacancy because a faculty member goes out on leave or because there is some other emergency. (N.T. 36-37, 53).
27. In 2005, Temple created a job description for its Department Chairs, which was distributed to all Deans and Department Chairs and made clear that the Department Chairperson is the "designated head of an academic department or degree granting program." (N.T. 26-27, Temple Exhibit 1, [Memorandum to Deans from Provost Ira M. Schwartz dated May 12, 2005 re: Appointment/Responsibilities of Department Chairpersons] (attaching Roles and Responsibilities of the Department Chairperson in TAUP-Bargaining Unit Schools and Colleges) and Temple Exhibit 2 [Memoranda to Department Chairpersons from Provost Ira M. Schwartz dated June 7, 2005 re: Appointment, Role, and Responsibilities of the Department Chairperson])
28. That job description also stated that the job duties of Department Chairs included the review of department faculty for promotion and tenure; the initiation of dismissal or discipline of faculty; consultation with the Dean on the processes of appointment, reappointment, and promotion for NTT faculty; the nomination of faculty for merit and consultation with the Dean regarding merit awards; as well as other duties that could be assigned by the Dean at his/her discretion, including class scheduling; faculty assignment; the review of tenure track and NTT faculty for contract renewals; mentoring new faculty; the review of departmental budgets, reporting for the Administration to the faculty; reporting for the faculty to the Administration; overseeing non-faculty department staff; the annual review of faculty; reviewing student academic grievances and other student matters; leading and overseeing curricular matters; leading departmental strategic planning, periodic program reviews and accreditation reviews; monitoring departmental compliance with University policies; attending and participating in leadership meetings as requested by the Dean; supervising non-faculty staff; and directing, overseeing, and/or supervising the work of graduate teaching assistants and graduate research assistants. (N.T. 26-30, Temple Exhibit 1[Memorandum to Deans from Ira M. Schwartz dated May 12, 2005 re: Appointment/Responsibilities of Department Chairpersons]).
29. That job description also stated that the University may, in its sole discretion, assign other management rights and responsibilities to the

Department Chairperson and further explained that a faculty member shall receive additional compensation for serving as a Chairperson, which could include a reduction in the base teaching load, an administrative attachment to salary for the duration of service as a Department Chairperson, a stipend for summer service, or a combination of those. (N.T. 26-30, Temple Exhibit 1)

30. In 2008, Temple and the Union entered negotiations for a new collective bargaining agreement. (N.T. 712, 806-07)
31. At that time, Temple asked for the Union's agreement to exclude Department Chairs from the collective bargaining agreement. (N.T. 856).
32. The Union would not agree. However, the Union did agree that the University may assign management rights and responsibilities to Department Chairs. Article 16 (E) of the CBA states, in relevant part:

The University may, in its sole discretion, assign management rights and responsibilities to the Department Chairs which may include but are not limited to:

1. Class scheduling and faculty assignment
2. Review of faculty for tenure and promotion
3. Review of faculty for merit pay awards
4. Review of departmental budgets
5. Reporting for the Administration to the faculty and the faculty to the Administration

(N.T. 11, Joint Exhibit 1 at Exhibit A [Collective Bargaining Agreement between Temple and the Union ("CBA")]).

33. In 1972, at the time of the Board's certification of the faculty bargaining unit, the Department Chairs made no unilateral hiring decisions. (Board Exhibit 1, Case No PERA-R-1123-E, Order Fixing Time and Place of Pre-Election Conference, 1972, at 4, ¶ 16)
34. Temple employs approximately 1,300 adjunct faculty. (N.T. 51-52, 501-502)
35. Dr. Joseph DuCette, Senior Associate Dean of Graduate Programs and Research at the School of Education, testified that Department Chairs "hire the adjuncts." (N.T. 681)
36. Dr. DuCette's testimony on the Department Chairs' exercise of hiring authority was corroborated by several witnesses, including Mohammed Kiani, the Chair of the Department of Mechanical Engineering, Andrew Mendelson, the Chair of the Department of Journalism and Ronald Anderson, Chair of the Department of Finance. (N.T. 129, 166-167, 199-200, 929, 974, 1004)
37. In recent years, Dr. Ronald Anderson, Chair of the Department of Finance, decided to reduce the number of adjuncts from five to two in his department because he could not control the quality of the adjuncts' teaching very well. (N.T. 205)
38. Dr. Richard Englert, who is currently Chancellor of the University and who has held a variety of management positions over 37 years of employment at Temple, including Provost, testified that the Department Chairs effectively recommend the hiring of NTT faculty. (N.T. 50)

39. Dr. Englert's testimony on the chairs' effective hiring of the NTT faculty was corroborated by several witnesses, including Dr. Michael R. Sitler, deputy provost for operations and former Dean of the College of Health Professionals; Dr. Robert Levis, Chair of the Department of Chemistry and Dr. Michael Klein, Chair of the Department of Music. (N.T. 372-373; 483, 734-735)
40. Dr. Englert testified that the Department Chairs determine whether there is a continuing need for an adjunct, both in terms of whether the department will continue to teach a particular course taught by an adjunct and whether to bring back the particular adjunct based on the Chair's assessment of that individual's performance, including the Chair's review of student feedback forms for that adjunct. (N.T. 55-56, 62-63, 75-76, 101).
41. Dr. Rajan Chandran, Vice Dean of the Fox School of Business, corroborated Dean Englert's testimony on the Department Chairs' exercise of authority to decide whether to renew adjuncts. (N.T. 327, 334)
42. Several witnesses corroborated Dean Englert's testimony on the Chairs' exercise of their authority to decide whether to renew adjuncts. These witnesses included Dr. Mohammed Kiani, the Chair of the Department of Mechanical Engineering; Dr. Ronald Anderson, Chair of the Department of Finance; Dr. Arvind Parkhe, Chair of the Strategic Management Department of the Fox School of Business; Dr. Michael Klein, Chair of the Department of Music; Dr. Michael R. Sitler, Deputy Provost for Operations; Dr. Kevin Delaney, Vice-Dean of Faculty Affairs in the College of Liberal Arts; Dr. Joseph DuCette, Senior Associate Dean of the College of Education; Dr. Rollo Dilworth, Chair of the Department of Music Education and Therapy; and Dr. James Byrnes, Chair of the Department of Psychological, Organizational and Leadership Studies (N.T. 129, 144-145, 200, 251, 374-375, 465, 558-559, 682, 621, 631-632, 645)
43. The Department Chairs decide whether to hire NTT faculty and whether to renew the NTT faculty appointment. John Nyquist, the Chair of the Department of Earth and Environmental Science, testified to such decision making. (N.T. 1338-1340, Temple Exhibits 48 and 49)
44. Dr. Englert testified that the Department Chairs regularly evaluate tenure track, NTT and adjunct faculty. In evaluating the faculty, the Chairs utilize the Faculty Development Plan (FDP) form, which evaluates the faculty's teaching, research and service of the faculty in his or her department. (N.T. 98-101)
45. The Chairs use the evaluation of faculty to determine work assignments and course load reductions; to determine whether to renew non-tenure track faculty; to determine whether to renew adjuncts; to recommend merit pay and for strategic planning and curriculum development. (N.T. 128-129, 133-134, 144-145, 192-193, 201, 204, 376, 313, 330-331, 420, 1148-1149, 1204,)
46. The Department Chairs assign work to the faculty. This includes determining what the research, teaching and service of the faculty in the department will be. (N.T. 76-78, 95, 97, 109, 328)
47. The Chair determines teaching loads and how many courses the faculty in each department teach in a given semester. (N.T. 76-78, 95, 97, 109, 133-134, 192-193, 328)
48. In 1972, at the time of the Board's certification, the Board found "[w]here the department is large enough to have non-professional help such as a stenographic pool or research help such help cannot be hired, promoted, or directed by the departmental chairman, but only by the non-professional supervisor of such people from the University personnel department." (Board Exhibit 1, Order Fixing Time and Place of Pre-Election Conference, 1972, at 4, ¶ 16)

49. Today, many departments have non-faculty staff such as secretaries and technical professionals. The department chairs are responsible for hiring these employees. For example, Dr. Arvind Parkhe, Chair of the Department of Strategic Management, has hired non-faculty staff and also discharged a staff member. (N.T. 99-100, 280-81)
50. The Department Chairs evaluate the non-faculty staff, following a personal development plan (PDP) which serves as the basis for determining raises. Dr. Kiani, Dr. Anderson and Dr. Parkhe are Department Chairs who testified that they evaluate their non-faculty staff. (N.T. 137, 146, 280-81)
51. Professor James Byrne, the Chair of the Department of Psychological Organization and Leadership Studies, supervises a department manager, Marcia Whitaker, who in turn supervises a clerical employee. Professor Byrne was able to recommend a promotion to a higher pay grade for Ms. Whitaker. (N.T. 647)
52. The Department Chairs assign work to the non-faculty staff. For example Professor Jerry Ratcliffe, Chair of the Criminal Justice Department, is responsible for assigning work to four non-faculty staff: the department coordinator, graduate secretary, student advisor and the person who runs the Criminal Justice Training Program. (N.T. 424)
53. These non-faculty staff report to the Department Chair, who does an annual review of their work using the professional development plan (PDP). The annual review impacts the salary increase that the particular non-faculty staff will receive. (N.T. 99-100)
54. The Department Chairs are responsible for managing the operating budget for their departments. The Chairs receive the department budget from the Dean's office and it then becomes the chair's responsibility to make certain that all expenditures are within the budget. They also have access to additional funds, such as "overhead return," "recovery dollars" and "gift accounts". These are funds over which the Chair has control and can be used at the discretion of the Chair. (N.T. 101-104, 1253, 1338, Temple Exhibit 47)
55. As an example of the department chair's budget management, Dr. Arvind Parkhe, Chair of the Department of Strategic Management in the Fox School of Business, is responsible for developing a balanced budget for the department, reviewing expenditures and minimizing costs. (N.T. 270-271)
56. Dr. Parkhe appointed David Nash, an NTT faculty, to be a "checks and balance" person to assist him in maintaining the department's budget log to make sure that the expenses and the revenues in the budget are accurate. His appointment of Nash is in keeping with the Dean's decision to have an internal budget control person in addition to the administrative board and the department's administrative coordinator to assist the chairperson monitor the budget. (N.T. 271-272)
57. Dr. Parkhe also decided to increase revenue for the department by increasing the number of summer classes and summer credit hours available in the department. He encouraged the faculty to consider offering a number of offerings that would have high enrollments. He also worked with the international business and entrepreneurship academic directors to market the department offerings to increase enrollments. (N.T. 270-271)
58. Dr. Kiani, Chair of the Department of Mechanical Engineering, worked to increase the research funds for the department. He succeeded in increasing those funds from \$200,000 to \$2 million per year. The increased revenue allows Dr. Kiani to send students to conferences and to give more money in hiring packages. (N.T. 119-120)

59. Dr. Joseph Levis, Chair of the Chemistry Department, has increased the annual research funding for his department from about \$800,000 to \$5-6 million. (N.T. 639-740)
60. The Department Chairs decide how to spend the discretionary funds of their department. (N.T. 101-102, 756-757, 956, 1159, 1255)
61. In the case of the College of Health Professions and Social Work, the discretionary part of the budget can be as high as 7-10% of the individual department's budget. (N.T. 472-474)
62. As an example of the Chairs' deciding how to spend discretionary funds, Dr. Andrew Mendelson, Chair of the Department of Journalism, has discretion over the money for adjuncts and has recently added more to the starting salary to attract an adjunct to sign. (N.T. 950)
63. Dr. Mendelson also has discretion over a non-compensation part of the budget in the amount of \$40,000. He has used this to purchase technology, to bring in guest speakers and to buy food for special events. (N.T. 950-951)
64. Dr. Marsha Weinraub, Chair of the Department of Psychology, has the authority to exercise discretion over approximately \$700,000 of a total budget of about \$6 million. She has used this amount to purchase technology and supplies and pay for travel expenses. (N.T. 1052-1053)
65. Dr. Weinraub has also increased the revenue available to add staff by her decisions to encourage the faculty to do research. When a research grant is approved, part of the grant goes into a pot of money from which Dr. Weinraub decides to hire such positions as assistant directors. (N.T. 1053-1055)
66. Further examples of the Department Chair's budget management responsibilities were given in testimony by Dr. Rollo Dilworth, Chair of the Department of Music Education and Therapy. He decides how to spend money on instrument repair, guest speakers, travel and equipment. (N.T. 602)
67. Dr. Deborah Howe, Chair of the Department of Community and Regional Planning, has decided to increase the rate of pay for adjunct faculty, to support students traveling to national conferences, to replace equipment, to donate to sponsor EarthFest and to hire students. (N.T. 1253-1256)

DISCUSSION

Temple's petition for unit clarification seeks to remove 70 Department Chairs from a faculty unit of approximately 1,350 employees.

Temple contends that the department chairs are both supervisors within the meaning of Section 301(6) of PERA, 43 P.S. §1101.301(6) and management level within the meaning of Section 301(16) of PERA, 43 P.S. §1101.301(3) of PERA.

There are approximately 800 tenure track (TT) and tenured faculty, 550 non-tenure track (NTT) faculty and 1,300 adjunct faculty in the schools and colleges at issue in this proceeding. The adjunct faculty are not in the collective bargaining unit.

Temple, as the party seeking to exclude the Department Chairs from the bargaining unit, has the burden of proving the asserted exclusions. **In the Matter of the Employees of State System of Higher Education**, 29 PPER ¶ 29234 (Final Order, 1998), aff'd, 737 A.2d 213 (Pa. Cmwlth. 1999).

In 1973, the Board certified the American Association of University Professors (AAUP) Temple Chapter as the exclusive representative of a unit of faculty in Case Nos. PERA-R-1123-E, (Nisi Order of Certification, February 9, 1973), aff'd, **Temple University**, 3 PPER 209 (Final Order, July 5, 1973). The Board found that the department chairmen (as

they were then called) were not first level supervisors. The Board did not decide the question of the management level status of the department chairmen.

Because Temple seeks to clarify positions that have previously been litigated and rejected by the Board, the University must show, as an initial matter, either (1) a change in circumstances or (2) a change in the law or interpretation of the law. **Gateway School District v. PLRB**, 470 A. 2d 185, 188, n. 3 (Pa. Cmwlth. 1984); **Philadelphia Community College**, 19 PPER ¶ 19110 (Final Order, 1988).

Temple asserts that in the past 41 years, the duties of the department chairs have changed in several ways. Temple begins its case by arguing that the change in duties can be proven through two documents. The first document is the 2004-2008 collective bargaining agreement and its extensions, which contains a clause stating that Temple has the authority to assign managerial duties to faculty. The second document is the collection of the Department Chairs' 2005 job descriptions, revised in 2011. Temple asserts that these documents demonstrate that the Department Chairs clearly exercise supervisory and management level duties that they did not exercise in 1973.

However, as the Union correctly argues, the relevant inquiry is not into what Temple expects Department chairs to do or what is listed on the employer drafted job description. Rather the Board has long held that its determination of the supervisory or management level status of a position must be based upon the actual duties performed by the employes in the position at the time of the filing of the unit clarification petition. **North Hills School District v. PLRB**, 29 PPER ¶ 28221 (Allegheny County CCP, 1998), aff'd 722 A.2d 1155, 1159 (Pa. Cmwlth. 1999).

There have been several significant changes in the circumstances surrounding the Department Chairs' duties since 1973. One is the very nature of their appointment. In 1973, the Board found, "Almost universally department chairmen are chosen by the department faculty and the chairman serves as a vehicle to conduct the consensus of the department's thinking to the dean of the school and vice versa." (Board Exhibit 1, Order Fixing Time and Place of Pre-Election Conference, 1972, at 4, at ¶ 16). Now, the Department Chairs are appointed by the Dean and "at all times serve at the pleasure of the Dean." (Joint Exhibit 1 at Exhibit A at 45). From this changed circumstance, it follows that the Department Chairs exercise their "authority in the interests of the employer," as required by Section 301(6), since their authority as Chairs now comes directly from their Dean and not from their department colleagues.

Building on the evidence of this change in the source of the Chairs' authority, Temple has put forward substantial evidence to show that the Chairs perform duties that fall within the supervisory and management level exclusions.

Supervisory Allegations

As for the first issue, whether the department chairs are supervisors, Section 301(6) of PERA defines a supervisor as

"...any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment."

43 P.S. § 1101.301(6).

Employes must be excluded from the bargaining unit as supervisory if they have the authority to perform one or more of the functions listed in Section 301(6), actually exercise such authority and use independent judgment in exercising that authority. **McKeesport Area School District**, 14 PPER ¶ 14165 (Final Order, 1983). The distinguishing

characteristic of an alleged supervisor is that the person holds authority that calls for the use of independent judgment and carries with it the power to reward or sanction employees. **Mifflin County**, 14 PPER ¶ 14012 (Proposed Decision and Order, 1982); 14 PPER ¶ 14051 (Final Order, 1983).

Temple has proven that the Department Chairs now exercise supervisory duties under Section 301(6) of PERA that they did not exercise in 1973. Through the examination or cross-examination of 22 witnesses, including 14 Department Chairs, Temple has made its case that the department chairs are supervisors. The witnesses included individuals who spoke for entire schools and colleges, including the former Provost and current Chancellor, Dr. Richard Englert, and Deans and Assistant and Vice Deans of schools and colleges.

Among the supervisory duties proven by Temple, the Department Chairs hire adjunct faculty, non-tenure track faculty and non-faculty staff. The Department Chairs decide or, to a substantial degree, effectively recommend the non-renewal (i.e. firing) of non-tenure track and adjunct faculty. The Department Chairs also assign work to these employees. They make these decisions based on regular job evaluations of these employees. The job evaluations also serve as the basis for deciding promotions and merit pay. This last duty perhaps best exemplifies the meaning of the "ability to reward or sanction" employees. **Mifflin County**, *supra*.

It does not matter that some of these supervised employees may not be in the faculty bargaining unit. In **University of Pittsburgh**, 18 PPER ¶ 18077 (Order Directing Submission of Eligibility List, 1987), 21 PPER ¶ 21203 (Order Directing Remand to Board Representative for Further Proceedings, 1990), Hearing Examiner Elliot Newman excluded the department chairs as supervisory even though they supervised non-bargaining unit personnel.

The Union objects that the testimony of some of the department chairs merely showed supervisory duties that they plan to do in the future, not what they actually have done. The Board cannot make a unit decision on speculative duties. **Mifflin County**, *supra*. However, Temple also offered considerable testimony from Department Chairs as to what their actual duties have been in the time leading up to Temple's filing of its unit clarification petition. From this evidence, it is clear that the employer as a whole is using Department Chairs in ways that meet the statutory definition of a supervisor.

Through these examples of duties actually exercised by the Department Chairs, Temple has met its burden of proving the Department Chairs are supervisors under Section 301(6) of PERA.

Management Level Allegations

Temple also contends that the Department Chairs are management level. Section 301(16) of PERA states

"Management level employe" means any individual who is involved directly in the determination of policy or who responsibly directs implementation of policy and shall include all employees above the first level of supervision.

43 P.S. § 1101.301(16).

As stated above, the Board did not decide the management level status of the Department Chairs when it certified this unit in 1973. It only found that the Department Chairs were not supervisors under PERA. Accordingly, it is necessary to judge Temple's petition under the caselaw as developed by the Board and the courts.

Temple asserts that **University of Pittsburgh**, *supra*, supports finding the Department Chairs in this case are *ipso facto* management level.

The parties in that case stipulated that Department Chairpersons were first level supervisors of non-bargaining unit personnel, but disagreed regarding whether or not they were first level supervisors of faculty. See 18 PPER 18077, at p. 222. Significantly, the parties also stipulated that the only matter to be resolved regarding the status of faculty was the legal question of whether participation of faculty in shared governance comparable to that at issue in **NLRB v. Yeshiva University**, 444 U.S. 672 (1980) rendered them management level employees under PERA. *University of Pittsburgh*, 18 PPER 18077, at pp 217, 222, 224. In what was a case of first impression at the time, Hearing Examiner Elliot Newman decided that the reasoning of **Yeshiva** was equally applicable under Pennsylvania law, and for that reason held that all tenured, tenure-stream and full-time non-tenure stream faculty of the University of Pittsburgh were management level employees under PERA. 18 PPER ¶ 18077, at p. 231.

With regard to department chairs, the Hearing Examiner held that those chairs who were tenured, tenure-stream or full-time non-tenure stream faculty were management level because of their status in one of those three categories, not because of their particular duties as department chairs. He also held that they were first level supervisors of non-bargaining unit staff, based upon the parties' stipulation, not based upon any legal analysis of their duties. *Id.* at p. 232.

On review, the Board considered whether the Hearing Examiner erred in finding that all tenure stream and full-time non-tenure stream faculty were management level. See **University of Pittsburgh**, 21 PPER ¶ 21203 (Order Directing Remand to Board Representative for Further Proceedings, 1990), at p. 519. The exclusion of department chairs was not litigated before the full Board, inasmuch as no party filed exceptions to the Hearing Examiner's exclusion of department chairs from the unit pursuant to the parties' stipulation that the department chairpersons were first level supervisors. The only mention of department chairpersons in the entire Board decision is at end, in the unit description. *Id.* at p. 524 (¶ 15)

With regard to the management level status of the faculty (and therefore the chairs), the full Board noted that the roughly ten percent of the faculty who actually participated in the faculty assembly, the council of the senate and the 14 standing committees performed some tasks that might be considered management level under section 301(16) of PERA. **University of Pittsburgh**, 21 PPER 21203 (Order Directing Remand to Board Representative for Further Proceedings, 1990), at 520. However, the Board also noted that while the university administration consulted with these bodies on matters of university-wide concern that affect university policy, by and large, the administration deferred to faculty committee recommendations only on matters within their academic expertise, and not with regard to matters concerning the managerial and budgetary interests of the employer as a whole. *Id.*, at pp. 521-522.

Therefore, because **University of Pittsburgh** does not clearly address the issue of whether the Department Chairs in the present case are performing duties that would constitute management level duties, the Union correctly argues that is necessary to determine whether the duties that they do perform are management level duties as defined by the Board and the courts.

The Board has interpreted Section 301(16) on various occasions. In **Pennsylvania Ass'n of State Mental Hosp. Physicians v. PLRB**, 554 A. 2d 1021 (Pa. Cmwlth. 1989) the Commonwealth Court adopted the Board's test for determining whether an employe is a management level employe under Section 301(16). This test provides that an employe will be managerial if any one of the following three factors are established: (1) the employe is involved directly in the determination of policy; (2) the employe directs the implementation of policy; or (3) the employe is above the first level of supervision. *Id.* at 1023. See also **Lackawanna Career Technology Center**, 33 PPER ¶ 33201 (Final Order, 2002).

In **Horsham Township**, 9 PPER ¶ 9157 (Final Order, 1978), the Board interpreted the policy determination part of the test of management level status as follows:

"An individual who is involved directly in the determination of

policy would include not only a person who has the authority or responsibility to select among options and put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such a proposal into effect. Our reading of the Statute does not include a person who simply drafts language for the statement of policy without meaningful participation in the decisional process, nor would it include one who simply engaged in research or the collection of data necessary for the development of a policy proposal."

9 PPER at 327.

The Board went on to interpret "implementation of policy" to include the following:

"[T]hose persons who have a responsible role in giving practical effect to and ensuring the actual fulfillment of policy by concrete measures, provided that such role is not of a routine or clerical nature and bears managerial responsibility to ensure completion of the task. The administration of policy involves basically two functions:

(1) observance of the terms of the policy and (2) interpretation of the policy both within and without the procedures outlined in the policy. The observance of the terms of the policy is largely a routine and ministerial function. There will be occasion where the implementation of policy will necessitate a change in procedure or methods of operation. The person who effects such implementation and change exercises that managerial responsibility and would be responsibly directing the implementation of policy."

Id.

In its remand order in **University of Pittsburgh**, 21 PPER ¶ 21203, (Order Directing Remand to Board Representative for Further Proceedings, 1990), the Board offered guidance as to what sort of duties would be "determination of policy" or "implementation of policy" under section 301(16) of PERA.

Our review of the record in this case and our reading of **Yeshiva** discloses greater reliance on the faculty at Yeshiva with regard to matters beyond the academic expertise of the faculty. For example, in the area of budget, the record in **Yeshiva** shows substantially greater reliance on the recommendations of the faculty than is shown in the record in this case. Pitt, like other public and quasi-public universities, has a substantial administrative arm, separate and apart from the faculty members at issue here, whose responsibility includes budget and finance.

. . .

The parties' stipulation indicates that although faculty committee recommendations are generally followed with regard to a wide range of academic matters, faculty recommendations regarding budgetary matters such as distribution of faculty salary increments and university investment policy are generally not followed.

Id. at 521.

In the present case, one basis for finding the Department Chairs "responsibly direct the implementation of policy" is that they decide how to spend the non-personnel

portion of the department's budget. The Deans give the chairs an overall non-personnel budget to follow. The Chairs then exercise discretion on how to maintain the appropriate level of expenses and income within that budget. The Department Chairs make a myriad of spending decisions on such things as paying adjuncts additional money, sending students to conferences, supporting and hiring students and replacing equipment and supplies. These are the Department Chairs' decisions and not their recommendations. This is evidence that demonstrates that the Department Chairs exercise authority over matters that go beyond the "academic expertise" cited in **University of Pittsburgh** as an insufficient basis to find management level status.

These actual spending decisions are evidence that the Chairs responsibly direct the implementation of policy. They go beyond the recommendation of purchasing equipment found to be insufficient facts to establish management level status in **Berks County**, 35 PPER 25 (Final Order, 2004), at p. 82. Furthermore, the making of the non-personnel portion of the budget and the spending within that budget is entirely under the authority of department chairs, unlike the budgetary role of the athletic directors in **State System of Higher Education**, 28 PPER ¶ 28046 (Final Order, 1997), which was to pass on to the respective coaches the athletic department budgets made by "universities' student government associations and/or the athletic committees." Id. at 100.

On the revenue side of the budget, the Chairs make decisions to increase the discretionary part of the budget. As an example, Dr. Arvind Parkhe, Chair of the Strategic Management Department in the Fox School of Business, has worked to increase the summer enrollments, which increases his discretionary budget. Dr. Mohammed Kiani, Chair of the Mechanical Engineering Department, worked to increase the research funds for the department. He succeeded in increasing those funds from \$200,000 to \$2 million per year. The increased revenue allows Dr. Kiani to send students to conferences and to give more money in hiring packages.

Another basis for finding the Department Chairs "responsibly direct the implementation of policy" is that the Department Chairs effectively assign workloads, assign courses and assign faculty service requirements. In **Carlynton Area School District**, 377 A.2d 1033 (Pa. Cmwlth. 1977), the Board determined that the principals and assistant principal were management level employees where they were involved in hiring, room and course assignments, preparation of master schedules, and teacher evaluations, even though their policy determination and any implementation were subject to rejection, change, approval, or acceptance by the superintendent or school board. Therefore, it follows that the Department Chairs in the present case, who make such decisions without being subject to review by their superiors, are also management level employees.

Temple has satisfied its burden of proving that the Department Chairs responsibly direct the implementation of policy, and thus are management level employees under Section 301(16) of PERA.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. Temple University is a public employer under Section 301(1) of the PERA.
2. Temple Association of University Professors is an employe organization under Section 301(3) of the PERA.
3. The Board has jurisdiction over the parties.
4. The Department Chairs are supervisors under Section 301(6) of PERA
5. The Department Chairs are management level employes under Section 301(16) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the Department Chairs are excluded from the bargaining unit.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall be final.

SIGNED, DATED and MAILED from Harrisburg, Pennsylvania, this thirty-first day of October, 2014.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner