Super 'Subs'? Maybe, Says Federal Appeals Court

BY ROBERT G. YOUNG • MARCH 28, 2019

In a decision issued on March 12, the United States Court of Appeals for the District of Columbia rejected an NLRB order that sought to require the University of Southern California to bargain with non-tenure track faculty at USC's Roski School of Art and Design. The NLRB had found that the non-tenure track faculty were not "managers," and thus were eligible to collectively bargain, because they did not constitute a majority of any policy-making committee at the University.

Drawing on prior Supreme Court precedent, the D.C. Circuit decided that this test was too narrow. Rather than focus on whether a subgroup of faculty can determine policy, the D.C. Circuit found that the proper inquiry for "manager" status is whether the defined subgroup was included within a faculty body that the institution has delegated managerial authority to. This is a broader inquiry than the NLRB had applied to the Roski faculty. The D.C. Circuit's formulation looks at whether the faculty subgroup participates in a faculty body that the institution vests with managerial responsibilities, rather than whether that subgroup can dictate the policies developed by the faculty body. Accordingly, the D.C. Circuit sent the case back to the NLRB for further proceedings.

Client Tip: As faculty organizing continues apace, institutions can take some solace in the Court's reasoning in this case and challenge the "managerial" makeup of a group seeking to collectively bargain.