Fordham Law Review

Volume 45 | Issue 4 Article 10

1977

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Cover Page Footnote

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THE SUPERVISORY STATUS OF PROFESSIONAL EMPLOYEES

*MATTHEW W. FINKIN**

I. INTRODUCTION

THE National Labor Relations Act was amended in 1947 both explicitly to include professional employees (section 2(12))[1] and to exclude supervisors (section 2(11));[2] yet of necessity much professional work includes functions which would otherwise be viewed as supervisory under the Act.[3] In effect, Congress delegated to the National Labor Relations Board the responsibility for resolving the tension between these two overlapping directives.

Unfortunately, the Board's performance has not been satisfactory. With one exception, the "*Adelphi* rule,"[4] it has failed to develop an approach to distinguish the supervisory from non-supervisory professional employee which is at once theoretically sound and easily applied. Even that singular example has not been consistently followed

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1. Section 2(12) of the National Labor Relations Act, 29 U.S.C. § 152(12) (1970), defines a professional employee as "(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or (b) any employee, who (i) has completed the courses or specialized intellectual instruction and study described in clause (iv) of subparagraph (a) of this paragraph, and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in said paragraph (a)."

2. Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11) (1970), defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

3. For example, according to a 1969 survey, 18 percent of engineers had no regular supervisory responsibility, another 18 percent had indirect staff supervision, and 64 percent had supervisory responsibility ranging from small team to major organizations. The results are noted in E. Hoffman, Unionization of Professional Societies (Conference Board Report No 690) 19 (1976) [hereinafter cited as Hoffman].

4. See text accompanying notes 59-61 infra.

by the Board and has met thus far with a surprisingly tepid judicial reception.[5]

However, the issue is not inconsequential. Salaried professionals comprise a large and growing portion of the work force and increasingly they are becoming organized.[6] On the one hand, inclusion of those who exercise true managerial authority with those who are supervised would create considerable tension in bargaining and contract administration. On the other, the erroneous determination that professional employees are statutory supervisors would limit their participation in the campaign to select or reject a bargaining agent and would have an adverse effect on the bargaining process by narrowing the scope of bargaining and by denying the collective representative a source of support and leadership. Inasmuch as those challenged on supervisory grounds are often the immediate leaders of professional work groups, these consequences far transcend the number of those whose status may be in question. Moreover, several state public employment collective bargaining laws either deny bargaining rights to supervisors or place them in separate bargaining units.[7] Because the definition of a supervisor in these laws often tracks the federal Act, the Board's decisions can be expected to have a ripple effect as the issue is presented in the public sector.

Accordingly, this Article will first outline more fully the nature of the problem delegated to the Board. It will then explore and assess the Board's record in resolving the conflict. Finally, a standard will be suggested better attuned to the statutory mandate, the realities of professional service and the practicalities of unit determination proceedings.

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5. The Second Circuit has expressly declined to rule on the legality of the Adelphi rule terming it a "difficult" question. NLRB v. Mercy College, 536 F.2d 544, 550 (2d Cir. 1976). The First Circuit merely adverted to it in the context of a rather limited approval of the extension of the Act to college faculties. NLRB v. Wentworth Institute, 515 F.2d 550 (1st Cir. 1975). The Seventh Circuit, in an unreported decision, noted Adelphi with seeming approval as a buttress for a related holding. University of Chicago v. NLRB, 506 F.2d 1402 (7th Cir. 1974), discussed in the text accompanying notes 75-79 infra.

6. See generally Hoffman, supra note 3.

7. At least eleven states either exclude supervisors from the definition of an employee or place them in separate bargaining units. See, e.g., Hawaii Rev. Stat. §§ 89-1 to 20 (Supp. 1975); Iowa Code Ann. §§ 20.1-.27 (Supp. 1976); Kan. Stat. Ann. §§ 75-4321 to 37 (Supp. 1975); Me. Rev. Stat. Ann. tit. 26, §§ 1021-34 (Supp. 1976); Mich. Comp. Laws Ann. §§ 423.201-.216 (1967), as amended, §§ 423.201-.216 (Supp. 1976); Minn. Stat. Ann. §§ 179.61-.76 (Supp. 1976); Mont. Rev. Codes Ann. §§ 59-1601 to 17 (Supp. 1976); N.H. Rev. Stat. Ann. §§ 273-A:1 to 16 (Supp. 1975); N.J. Stat. Ann. §§ 34:13A-1 to 13 (1965), as amended, §§ 34:13A-1 to 11 (Supp. 1976); Ore. Rev. Stat. §§ 243.650-.782 (1975); Pa. Stat. Ann. tit. 43, §§ 1101.101-.2301 (Purdon Supp 1976).

II. The Initial Delegation To The Board

In fashioning the amendments in 1947, Congress legislated against the Supreme Court decision in *Packard Motor Car Co. v. NLRB*,[8] which had opened the door for the extension of collective bargaining to foremen in industrial plants. Thus a "supervisor" was deemed not to be an "employee" for the purposes of the Act.[9] The policy was explained in the Senate report:

> A recent development which probably more than any other single factor has upset any real balance of power in the collective-bargaining process has been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise.[10]

The Senate report further explained that "[i]n framing this [statutory] definition [of a supervisor] the committee exercised great care, desiring that the employees herein excluded from the coverage of the act be truly supervisory."[11] Although the House version[12] had cast a broader net than the Senate's, the Conference Committee accepted the Senate's more circumspect approach.

In the hearings, representatives of professional employees urged Congress to legislate against a line of NLRB decisions which had included professional employees in bargaining units of non-professionals. At the same time, some management representatives objected to giving bargaining rights to professional employees at all. In testimony before the House Committee, the president of the American Zinc, Lead & Smelting Company opined that professionals are part of management and should be excluded under the supervisory definition.[13] To similar effect, in appearing before the Senate Committee, the representative of the American Mining Congress stated flatly: "Our position is that not only foremen who are supervisors, but also professional and administrative and confidential employees should be exempted from the coverage of the act."[14] This statement elicited the following colloquy:

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8. 330 U.S. 485 (1947).

9. The statutory definition of an "employee," 29 U.S.C. § 152(3) (1970), excludes "any individual employed as a supervisor . . . ."

10. S. Rep. No. 105, 80th Cong., 1st Sess. 3 (1947) [hereinafter cited as Senate Report].

11. Id. at 19.

12. See H.R. Rep. No. 510, 80th Cong., 1st Sess. 1 (1947) [hereinafter cited as House Report].

13. Hearings on Amendments to the National Labor Relations Act Before the House Comm. on Education and Labor, 80th Cong., 1st Sess. 1225 (1947).

14. Hearings on S. 55 & S.J. Res. 22 Before Senate Comm. on Labor and Public Welfare, 80th Cong., 1st Sess. 694 (1947).

Senator Smith. . . . What we are trying to get at is the definition of supervisory employee or foreman, and I think it is agreed that they should not be employees of the same union with which they have to bargain. That makes them torn asunder between two masters. If they are bargaining for the management they should not be members of the union they are bargaining with. The principle is simple and most labor men I have talked to agree. *You are adding here professional* and administrative *employees. I do not think that has ever been questioned by anybody.* They do not belong to the union. They might, but I do not have any evidence.

Mr. Kuzell. Our position goes further than I understood from your statement of what it is. We believe that none of these groups, supervisory, professional, administrative, or confidential, should have the protection of the act, be exempt from the coverage of the act; in other words, those to be exempt from the coverage of the act, even if they are in independent organization. We go that far in our recommendation.

. . . .

Senator Ellender. *Well, there is no doubt in my mind if we exempt supervisory employees we should by all means exempt professional and administrative employees.*

Mr. Chairman, I suggest that Mr. Ryley, who is a good lawyer, take S. 55 and S. 44 and work on them so as to cover the professional and administrative employees.

Senator Smith. I think that is a good suggestion.[15]

The Senate declined to accept the suggestion endorsed by Senators Smith and Ellender. Congress did accept the argument made on behalf of professional employees and established presumptively separate professional bargaining units.[16]

These two provisions engender a considerable degree of tension. The supervisory exemption is founded upon the assumption of bureaucratic managerial structures widely followed in industry. In a bureaucracy the legitimacy of a decision rests ultimately upon the decision-maker's position in the hierarchy. Moreover, the demands of scientific management militate toward standardization, routinization, and accountability to higher authority. This stands in sharp contrast to the assumption upon which the professions proceed. Lengthy, specialized education gives rise to expertise; it is by resort to professional judgment rather than to hierarchical authority that the legitimacy of a professional decision is to be tested. This in turn yields claims to autonomy in professional work, greater stress on quality over efficiency, and to demands to participate in decisions bearing upon the performance of professional services. As a considerable body of sociological research shows,[17] the employment of professionals in large organizations places

15. Id. at 695 (emphasis added).

16. 29 U.S.C. § 159(b) (1970).

17. Some of the more recent writings include Alutto & Belasco, Determinants of Attitudinal Militancy among Nurses and Teachers, 27 Ind. & Lab. Rel. Rev. 216 (1974); Benson, The Analysis of Bureaucratic-Professional Conflict: Functional Versus Dialectical Approaches, 14 Sociological Q. 376 (1973); Corwin, The Professional Employee: A Study of Conflict in Nursing Roles, 66 Am. J. Soc. 604 (1961); Sorensen & Sorensen, The Conflict of Professionals in Bureaucratic Organizations, 19 Admin. Science Q. 98 (1974).

great strain on the structure of employing bureaucracies and results, though to varying degree, in accommodations to strongly held professional views. This is clearest in the university setting where, at least theoretically, considerable influence if not enforceable authority is exercised by the professional peer group. It is not, however, limited to the university. As Simon Marcson observed in his study of an industrial research laboratory: "The strains and conflicts in the authority system within which professional employees function in this industrial research organization lead it to adapt elements of the university system of colleague authority to its own needs."[18] The degree of accommodation doubtless varies with the business of the employing organization and the character of the employed professional group but the unifying factor is that professional employees consistently lay claim to authority independent of the hierarchy derived from their professional status.[19]

One of the major points of accommodation to professional claims lies in the mode of supervision. As William Kornhauser observed in his study of industrial research,

> the strain between professional autonomy and bureaucratic control is accommodated by the creation of new roles for research administration. Administrative matters are controlled on the basis of hierarchical principles of authority, while matters regarded by professionals as the primary responsibility of the individual are more subject to multilateral determination through colleague relations. Thus organizational controls are relied upon to a greater extent in the sphere of general policy, in research areas close to operations, and by top research directors, whereas professional controls are used more extensively in research assignments and procedures, in more basic research areas, and by first-line research supervisors.[20]

To some extent this alternative system of authority is recognized in the congressional willingness to give separate treatment to professionals. Section 2(12) defined two categories of professional employees—the full-fledged professional and those who have completed their academic studies and are "performing related work under the supervision of a professional" in order to qualify for full profes-

18. S. Marcson, The Scientist in American Industry 133 (1960).

19. See, e.g., Kronus, Occupational Values, Role Orientations, and Work Settings: The Case of Pharmacy, 16 Sociological Q. 171 (1975). "The chain store pharamacists are a particularly interesting case, as professionally oriented pharmacists in this setting were especially attuned to the promise of administrative authority, but equally attracted by autonomy." Id. at 181 n.8.

20. W. Kornhauser, Scientists in Industry 201-02 (1962). The lumping together of research scientists and engineers as aspiring to the same degree of independence has been criticized in Ritti, Work Goals of Scientists and Engineers, 7 Indus. Rel. 118 (1968). Nevertheless Ritti recognizes the close interrelationship between supervision and engineering work. Id. at 129-30. See generally S. Goldenberg, Professional Workers and Collective Bargaining, Task Force on Labour Relations Study No. 2 (1968); Imberman, As the Engineer Sees His Problem, 13 Conf. Bd. Rec. 30 (April 1976).

sional status.[21] As the Conference report observed: "This definition in general covers such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants."[22] Thus the statute assumed that professionals "supervise" their junior professional assistants; nevertheless it seems quite clear that that supervision was deemed insufficient to exempt those senior professionals under the supervisory exemption inasmuch as they were to be explicitly included with their professional assistants in professional bargaining units. It follows a fortiori that supervision of non-professionals by professionals should not result in triggering the supervisory exemption because much professional work cannot be performed without non-professional assistance and the separation of the two for unit purposes ameliorates the evil of dual loyalty which occasioned congressional concern. However, the Act did not exempt professionals altogether from the supervisory definition. Thus Congress compelled a line to be drawn *somewhere* between the truly supervisory and the non-supervisory professional and delegated the drawing of that line to the Board.

III. The Board's Resolution Of The Conflict

To a large extent the Board has viewed the various categories of professional employment it has encountered as sui generis; for example, it has not tended to compare its analysis in cases governing architects with those concerning pharmacists or nurses. Accordingly, while the Board has taken some approaches transcending the particulars of the job at issue, a firm grounding in the Board's experience with the major categories of professional employment is necessary before considering the larger question of whether case-by-case adjudication is the best means of developing a consistent, workable approach to the reconciliation of sections 2(11) and 2(12).

A. *Professionals in Industrial and Commercial Employment*

1. Scientific Personnel

The Board's approach to the supervisory status of industrial scientists and engineers has been entirely ad hoc. In some cases, the Board has viewed the supervisory exemption as precluding any finding of employee status without recourse to further consideration of whether the employee was a professional, *i.e.*, the Board has declined to acknowledge any overlap between sections 2(11) and 2(12). For exam-

21. 29 U.S.C. § 152(12)(b) (1970).

22. House Report, supra note 12, at 36.

ple, in *Warren Petroleum Corp.*,[23] the status of a chemist was placed in issue by the claim that he was either a supervisor or a professional excluded from the petitioned-for non-professional bargaining unit. The chemist had two admittedly non-professional assistants whom he had trained and who performed many of his operations in his absence. The Board found him to be a supervisor, thereby vitiating any necessity to decide his professional status. However, the supervisory determination was placed on the following ground:

> It does not appear that the chemist, who is under the supervision of the superintendent, may hire, discharge or otherwise effect changes in the status of the assistants. On the other hand, the chemist must of necessity responsibly control and direct the activities of the assistants.[24]

Thus the Board assumed that the responsible direction of the activities of non-professional assistants is sufficient to yield supervisory status whether the employee is a professional or not.[25]

In other decisions, the Board has analogized professional employees to non-professional leadmen or strawbosses. As a result it has found professional employees to be non-supervisory even if they direct the work of others. For example, in *Sonotone Corp.*,[26] decided two years before *Warren Petroleum,* the Board reasoned:

> The record shows that the engineers do not hire or discharge, do not have disciplinary or other powers included in the Act's definition of supervisors. The engineers direct the work of the associate and assistant engineers. We are of the opinion that the relationship of the engineer to the associate and assistant engineer is primarily that of the more skilled to the lesser skilled employee and not that of supervisor to subordinate.[27]

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23. 97 N.L.R.B. 1458 (1952).

24. Id. at 1459.

25. The decision therefore follows an earlier Board determination in Warren Petroleum Corp., 95 N.L.R.B. 1468 (1951). To similar effect see Dewey Portland Cement Co., 137 N.L.R.B. 944 (1962); Federal Cartridge Corp., 105 N.L.R.B. 529 (1953); Arthur A. Johnson Corp., 97 N.L.R.B. 1466, 1468 (1952); Union Elec. Power Co., 83 N.L.R.B. 872, 885 (1949) (librarian). Note especially the reasoning in Yale & Towne Mfg. Co., 135 N.L.R.B. 926, 928 (1962): "Wright, the design engineer, is engaged in developmental work on complicated structures, and designs the detailing of various projects under his control. For periods of 2 or 3 months he may work alone but at other times he assigns work to two or three draftsmen. He spends about 6 hours a day at the drafting board, the remainder checking the work of employees assigned to him and conferring with others on his projects. While he is not authorized to recommend hire, he can recommend disciplinary action, including discharge. We find that he is a supervisor within the meaning of the Act and exclude him."

26. 90 N.L.R.B. 1236 (1950).

27. Id. at 1239. See also Puget Sound Power & Light Co., 117 N.L.R.B. 1825 (1957) (distinguishing between engineers) and Pennsylvania Power & Light Co., 122 N.L.R.B. 293 (1958) where the Board concluded: "All engineers above-mentioned who work with assistants are required to make out merit rating reports from time to time on the work of the subordinates. This

The Board has acknowledged that "supervision" given junior professionals by their seniors is contemplated under section 2(12)(b) and, in some cases, has expressly relied on that subsection.[28] Moreover, it has considered direction given non-professionals by a professional as not being of a supervisory character even if the amount of direction was not insubstantial.[29] Sometimes estimates of the amount of time spent in various activities have been made.[30]

Special difficulty has been encountered in dealing with dual status professionals, *i.e.*, those who in addition to rank-and-file professional work (if it can be called that) assume added administrative responsibility. In *American Oil Co.*[31] the Board confronted the status of project managers responsible for research programs. They made "effective recommendations"[32] as to which employees should be assigned to the project team, assigned and evaluated their work while members of the team, and made recommendations for promotion based on that evaluation. They had a degree of latitude over the hours of team members

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applies not only to senior project engineers whose status is in dispute, but to all engineers to whom assistants are assigned. These reports are completed by answering a series of questions, customarily used in such matters.

"In support of its contention that the senior project engineers are supervisors, the Employer urges that (a) they responsibly direct the work of the project engineers and (b) they affect the status of their subordinates with regard to promotion and salary increases through the merit rating reports. We find no merit in these contentions. As to (a), it is clear from this record that the relationship between the senior project engineer and the project engineer, who is also a professional employee, is that of a more experienced to a less experienced person. The senior project engineer is more experienced and more knowledgeable in his specialty, and he gives technical advice, counsel, and guidance to his assistant. We are satisfied that the direction exercised by the senior project engineers, who have no formal responsibility beyond the project specifically assigned to them is not of a supervisory nature even though they have the right to ask for assistance of a lower rated engineer. The same relationship exists between the project engineer and lower classifications, yet, the Employer does not urge that the project engineers are made supervisors thereby. As to (b), routine merit rating reports are independently considered by at least two persons in a section, and in addition, all reports are again independently reviewed by the entire hierarchy of supervisors. Under such circumstances, we cannot find that the senior project engineers make effective recommendations within the meaning of the Act." Id. at 295-96 (footnote omitted).

28. Ryan Aeronautical Co., 132 N.L.R.B. 1160 (1961); Westinghouse Elec. Corp., 89 N.L.R.B. 8 (1950) (junior engineers); Union Elec. Power Co., 83 N.L.R.B. 872 (1949).

29. See cases cited in note 28 supra. See also Worden-Allen Co., 99 N.L.R.B. 410 (1952); Solar Mfg. Corp., 80 N.L.R.B. 1358 (1948); Cities Serv. Oil Co. (Pa.), 75 N.L.R.B. 468 (1947).

30. United States Metals Ref. Co., 93 N.L.R.B. 795 (1951), holding a spectrograph gangleader to be a professional (but not reaching the supervisory issue) with the observation that "[t]wenty percent of his time is spent in directing the work of his subordinates, 50 percent is spent in routine work, and the remaining 30 percent is spent in research and in developing better methods for spectrograph analysis." Id. at 798.

31. 155 N.L.R.B. 46 (1965).

32. Id. at 47.

and handled "informal grievances and complaints"[33] from employees on the project. The Board held them to be supervisors on the ground "that project managers exercise independent judgment in assigning work and in responsibly directing employees within their projects."[34] However, some researchers functioned as project managers only some of the time; thus they held a dual status. The Board held that inasmuch as they spent a "substantial amount of their work time"[35] as project managers they also should be excluded as supervisors.

The problem of dual status employment was reconsidered two years later in *Westinghouse Electric Corp.*[36] where professional engineers served part of the time as lead engineers during which period they exercised supervisory responsibilities over non-professional craftsmen. The Board considered them to be "primarily attached to the nonsupervisory work force"[37] and, following a decision governing non-professional seasonal supervisors,[38] held that any engineer who spent less than half his time during the preceding year engaged as a lead engineer would be eligible to vote for representation but that any bargaining agent selected may not represent such employees with respect to their supervisory duties. The Board stressed that the two roles were clearly demarcated both by function and in time and that "when employed as supervisory leadmen, their right to exercise supervisory authority does not extend to any other engineers but is limited, rather, to the nonprofessional craft employees hired for the project work."[39] This, the Board noted, lessened or obviated the problem of divided loyalty.

More recently, in *General Dynamics Corp.*,[40] the Board was compelled to consider (in far greater detail then it desired) the status of professional engineering employees who function as project leaders or program managers of research projects. The facts recounted seem indistinguishable from those in *American Oil*—the program manager selected the personnel he needed from various departments of the company, assigned and directed them, removed them from the project

33. Id.

34. Id. at 48.

35. Id. However, the Board held "research supervisors" to be non-supervisory even though they were called on to rate the performance of professional or non-professional associates. Id. See also Loral Electronics Sys., 200 N.L.R.B. 1019 (1972) on professional work as a group or team effort not resulting in supervisory status.

36. 163 N.L.R.B. 723 (1967), enforced, 424 F.2d 1151 (7th Cir.), cert. denied, 400 U.S. 831 (1970).

37. Id. at 727.

38. Great W. Sugar Co., 137 N.L.R.B. 551 (1962).

39. 163 N.L.R.B. at 727.

40. 213 N.L.R.B. 851 (1974).

if he deemed them unsatisfactory and evaluated their performance. However, he had no direct authority to hire, fire, discipline, discharge, promote or the like since these matters were the prerogatives of the team members' home departments from which they were borrowed for work on the project. Thus evaluation of team members by the leader was explained by the Board in somewhat perplexing language verging on a non sequitur:

> [S]ince they [the leaders] work directly with the disciplines in their groups for weeks, months, and sometimes years, they are more aware of the professional and/or technical aspects of the work performance of their team members than the members' functional supervisors [in their home departments] and, therefore, the project leader's "opinion weighs quite heavily." Beyond this, there is no specific evidence that such evaluations are afforded effective consideration by the functional supervisor, or that they have impacted a career.[41]

As with the dual status project managers in *American Oil* these leaders may serve simultaneously or successively as leaders and as team members on different projects. Nevertheless, the Board declined to find these lead engineers to be supervisors. The two member majority, citing to the legislative history, stressed that the possession of the powers enumerated in section 2(11) will not result in supervisory status "unless it is exercised in the genuine managerial sense."[42] Accordingly, they distinguished professional from supervisory work by relying on decisions concerning professional architects:

> Here, while, proposal managers, proposal team members, and project leaders exercise a certain amount of discretion in assigning work, that discretion primarily is [exercised] by the only people technically competent to [exercise] it and within the parameters set by the utilization of systems engineering. Such discretions [*sic*] as the professional engineers may have in work assignment and direction, moreover, are exercised in a professional sense and are directly related to a professional responsibility for the quality of work performed on the projects to which they are assigned. They merely are providing professional direction and coordination primarily for other professional employees.[43]

The Board concluded:

> In our view, true supervisorial authority is not vested in the senior engineering and administrative employees vis-a-vis the nonsenior employees in their work groups, nor is it vested in themselves as equals, who, for indeterminate periods of time, "supervise" coequals who, in turn, later "supervise" their equals while simultaneously being "supervised" by their coequals.[44]

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41. Id. at 857.

42. Id. at 858.

43. Id. at 858-59 (footnote omitted). The architect cases relied on are discussed at pt. III(A)(2) infra.

44. 213 N.L.R.B. at 859. The Board relied here on a decision concerning non-professional

General Dynamics implicitly repudiates the *Warren Petroleum* and *American Oil* approach to the supervisory status of professionals, *i.e.*, it concludes that the possession of any of the powers enumerated in section 2(11) by a professional is simply not sufficient to support a finding of supervisory status, as it is in the case of a non-professional, without further scrutiny. Moreover, the decision is at odds both with the result in *Westinghouse Electric* and with that portion of its reasoning which relied so heavily on the fact that those professionals supervised only non-professionals. In addition, the decision goes a good deal beyond the notion that the degree of supervision is merely that given by the more experienced to the less, as in the case of a leadman or strawboss. Thus it recognizes that the exercise of real supervisory power may nevertheless not render a professional a statutory supervisor. However, while *General Dynamics* opened the door to a candid reconciliation of the conflict between professional and supervisory status, the following year the Board decided a case[45] on grounds indistinguishable from *Warren Petroleum* wholly without reference to *General Dynamics*.

2. Architects

As in the instance of engineering project managers, professional architects may serve as project captains in which capacity they coordinate and direct architectural work. However, the Board has consistently declined to hold them to be supervisors. In one case it suggested that their relationship to their subordinates is merely based on greater experience; to that extent it tacitly follows the non-supervisory "leadmen" theory.[46] In two others the Board recognized their direction of others as part of the professional work necessary to complete an architectural project.[47] However, the Board stressed alternatively that only responsible direction rather than hiring and firing was involved[48]

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news editors. Post-Newsweek Stations, 203 N.L.R.B. 522 (1973). Chairman Miller, dissenting, rejected the alternative posed by Westinghouse Electric (though neither he nor the majority refers explicitly to that decision) because it "would present a totally unworkable situation . . and would inevitably create conflicts of interest for the employee, leaving him torn as to whether his real allegiance ought to be to the management or to his work group on the other side of the bargaining table." 213 N.L.R.B. at 870. Thus he would adhere to American Oil though, again, neither he nor the majority acknowledged that decision.

45. Aeronca, Inc., 90 L.R.R.M. 1709 (1975).

46. Frederick Confer & Assocs., 193 N.L.R.B. 910 (1971). See also Howard A Friedman & Assocs., 192 N.L.R.B. 919 (1971).

47. Wurster, Bernardi & Emmons, Inc., 192 N.L.R.B. 1049, 1051 (1971), Skidmore, Owings & Merrill, 192 N.L.R.B. 920, 921 (1971).

48. 192 N.L.R.B. at 1051.

and that the direction was only given other professionals.[49] The latter ground is plainly inconsistent with the reasoning supporting *Westinghouse Electric,* which is nowhere adverted to. The former implicitly suggests that sections 2(11) and 2(12) may be reconciled on the basis of distinguishing responsible direction by professionals as of lesser dimension than the performance of other supervisory functions enumerated in section 2(11). Given this tacit assumption it is not suprising that the Board majority in *General Dynamics,* relying upon the architect decisions, has so difficult a time in dealing with the project manager's role in evaluating team members as distinguished from his role in assigning and directing them.

3. Pharmacists

The Board has had no difficulty in concluding that a professional pharmacist, largely unassisted and working exclusively in the pharmacy department of a retail drug store, is not a supervisor.[50] On the other hand, the Board has held one to be a supervisor where he has the dual status of an assistant store manager with at least theoretically larger responsibilities for the entire store in the absence of the store manager.[51] This view was reaffirmed recently in *Superx Drugs of Texas, Inc.*,[52] over Member Fanning's strong dissent. He pointed out that the pharmacist spent 85 to 95 percent of the time working strictly in the pharmacy department and that his "supervision" in the absence of the store manager was routine or non-existent. It also should be noted that the other employees over whom the pharmacist possessed theoretical supervisory authority were sales and cosmetics personnel.

The Board has had greater difficulty where the pharmacist was in charge solely of the pharmacy department. In some cases it has considered the duties routine for a senior employee.[53] In others, where the responsibilities appear to have been more extensive especially in hiring and evaluating employees, the Board has found supervisory status even though the personnel involved were typists, clerks and drug interns, *i.e.,* non-professionals and "junior professional assis-

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49. 192 N.L.R.B. at 921.

50. See, e.g., Musselman's Apothecary, 188 N.L.R.B. 105 (1971); White Cross Stores, Inc., 186 N.L.R.B. 492 (1970) (and the cases discussed therein).

51. Hook Drugs, Inc., 191 N.L.R.B. 189, 192 (1971); Walgreen La. Co., 186 N.L.R.B. 129, 130 (1970); Walgreen La. Co., 182 N.L.R.B. 541, 542 (1970) (Brown, Member, dissenting); Sav-On Drugs, Inc., 138 N.L.R.B. 1032, 1035 (1962).

52. 89 L.R.R.M. 1193, 1194 (1975).

53. Skaggs Drug Centers, Inc., 197 N.L.R.B. 1240 (1972) (head pharmacist); cf. Lane Drug Co., 160 N.L.R.B. 1147, 1149 (1966) (chief pharmacist).

tants" clearly encompassed by section 2(12)(b).[54] Member Fanning, dissenting in a recent decision,[55] relied heavily on the fact that (as in other cases) the pharmacist's supervisory responsibilities were mandated by state law. Thus he drew a distinction between professional and supervisory responsibility: "The professional responsibility imposed upon the pharmacists-in-charge by the State regulations involves the exercise of 'discretion and judgment,' which are an index of 'professional employee' status under Section 2(12) of our Act, *rather than* supervisory status under Section 2(11)."[56] Unlike the Board majority, Member Fanning recognized the need to reconcile professional and supervisory status. However, his proposed analysis assumes that a clear distinction between "professional" and "supervisory" work can be drawn.

B. *Professionals in Education*

1. Faculties and Faculty Committees in Higher Education

In 1970 the Board extended its jurisdiction for private non-profit institutions of higher education.[57] Soon thereafter it confronted the assertion that faculty members were supervisors. The basis for the challenge lay in the system of governance widely recognized in American higher education which gives the faculty a significant role in recommendations on faculty appointment, promotion, re-appointment, tenure and dismissal as well as for matters of educational policy and program. Nevertheless, the Board has consistently refused to oust the faculty or members of its committees from the Act's protection.[58] It has relied upon three grounds. First, the authority possessed by the faculty or its committees, divisions and departments is purely recommenda-

54. Ward Cut-Rate Drug Co., 207 N.L.R.B. 589, 590 (1973); Grand Rx Drug Stores, 193 N.L.R.B. 525, 526 (1971); Katz Drug Co., 123 N.L.R.B. 1615, 1617 (1959).

55. Snyder Bros. Sun-Ray Drug, 208 N.L.R.B. 628 (1974).

56. Id. at 630 (emphasis added).

57. Cornell Univ., 183 N.L.R.B. 329, 331 (1970).

58. In chronological order the cases are C.W. Post Center, 189 N.L.R.B. 904 (1971); Fordham Univ., 193 N.L.R.B. 134 (1971) [Fordham I]; Adelphi Univ., 195 N.L.R.B. 639 (1972), New York Univ., 205 N.L.R.B. 4 (1973) [NYU I]; University of Miami, 213 N.L.R.B. 634 (1974); Fordham Univ., 87 L.R.R.M. 1643 (1974) [Fordham II]; Northeastern Univ., 89 L.R.R.M. 1862 (1975); Yeshiva Univ., 91 L.R.R.M. 1017 (1975); New York Univ., 91 L.R.R.M. 1165 (1975) [NYU II]. The First Circuit has agreed that faculty may appropriately be considered employees at least in institutions where they have limited influence. NLRB v. Wentworth Institute, 515 F.2d 550 (1st Cir. 1975). This and related issues are discussed more fully in Finkin, The NLRB in Higher Education, 5 U. Toledo L. Rev. 608 (1974); Kahn, The NLRB and Higher Education: The Failure of Policymaking Through Adjudication, 21 U.C.L.A.L. Rev. 63 (1973), Pollitt & Thompson, Collective Bargaining on the Campus: A Survey Five Years after Cornell, 1 Indus. Rel. L.J. 191 (1976).

tory with final decision-making authority vested in the institution's governing board or delegated by it to the administration. Second, section 2(11) speaks only of "any *individual*" who possesses any of the enumerated powers, not of collectives. Third, section 2(11) also requires that the authority be exercised "in the interest of the employer" which in turn assumes that one is acting for and thus is accountable to higher authority. Faculties, however, are not "accountable" to management in the sense of being subject to personal sanction or control based on management's assessment of the worth of the faculty recommendation. Thus it is not the kind of supervision contemplated by the Act.

However, faculty members may also hire, direct and fire some non-professional support staff. In *Adelphi University,*[59] the Board refused to hold an administrator, the director of admissions, to be a supervisor even though he had the authority to hire a secretary. Citing *Westinghouse Electric* the Board observed:

> [W]here professionals regularly (*more* than 50 percent of the time) supervised nonunit [non-professional] employees, they were nevertheless excluded from a unit of professional employees, since under such circumstances the principal interests of the excluded professionals were so allied with management as to establish a differentiation between them and other employees in the unit.[60]

The Board explained that the "sporadic exercise of supervisory authority" over non-professionals presents no real conflict of interest nor does it effectively make the professional an ally of management engendering the more generalized conflict to which section 2(11) was specifically directed. Later cases have elevated this observation into something of a rule that professionals who spend less than 50 percent of their time supervising non-professionals will not be deemed a supervisor.[61]

2. Department Chairmen

Academic offerings are usually organized into departments, divisions or programs and are presided over by a program member bearing the title of chairman, head, director, or coordinator, but which for convenience will all be treated here as "chairman." They make effective recommendations on the status of faculty members in their departments and may have more direct authority for the hiring of part-time faculty and non-professional staff. They are responsible for the administration of the department and may receive additional remuneration

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59. 195 N.L.R.B. 639, 643 (1972). Member Kennedy dissented in part.

60. Id. at 644 (emphasis added) (footnote omitted).

61. See, e.g., New York Univ., 91 L.R.R.M. 1165, 1171 (1975); Northeastern Univ., 89 L.R.R.M. 1862, 1870 (1975); Fordham Univ., 87 L.R.R.M. 1643, 1648 (1974).

and released time from teaching to perform those functions. They serve in that capacity for a stated term, often renewable, and are appointed and usually are removable by higher administration. On the other hand, by regulation or practice much of their discretion may be circumscribed by the role of the program's faculty. On those matters which the faculty deems of greatest importance, *e.g.*, appointment and tenure, the chairman's position may carry no greater weight than those of senior colleagues in the department. Where he exercises discretion, *e.g.*, in the hiring of part-time teachers or in assigning merit salary increments, it may be because the faculty has tacitly delegated that task to him to act on their behalf or has simply acquiesced to the need for one of their number to act. The faculty plays an often dispositive role in the selection of the chairman, who usually comes from and returns to their ranks, and an influential role in his retention or removal; chairmen continue to serve in their faculty positions though in some cases they may have their course load reduced to release them for the additional duties. In sum, the chairman, Janus-like, is often expected to represent the administration to his faculty and his faculty to the administration, in which latter role he may be expected to champion persons or causes highly unpopular with higher authority.

Thus it is not suprising that the Board has had considerable difficulty with these "dual status" employees. In effect, the Board has developed two lines of cases, neither of which appears to acknowledge the other. The first,[62] strongly reminiscent of the *Warren Petroleum* approach to industrial scientists, has simply looked to the authority possessed by the chairman. If his authority is effective and concerns any of the matters enumerated in section 2(11), the Board has held it, without more, to be supervisory. The second line[63] has looked to whether the chairman consults with the faculty or is otherwise constrained by the system of faculty governance. If he is, then the Board has declined to hold him a supervisor. However, the theoretical basis for the more sophisticated result remains somewhat ambiguous. The Board recently has observed that the authority of the chairman is

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62. University of Vermont, 91 L.R.R.M. 1570, 1574 (1976); Rensselaer Polytechnic Institute, 89 L.R.R.M. 1844, 1847 (1975); Point Park College, 209 N.L.R.B. 1064 (1974), Loretto Heights College, 205 N.L.R.B. 1134, 1136 (1973); Farleigh Dickinson Univ., 205 N.L.R.B. 673, 675 (1973); Syracuse Univ., 204 N.L.R.B. 641, 642 (1973); Adelphi Univ., 195 N.L.R.B. 639, 641-42 (1972); Long Island Univ. (Brooklyn Center), 189 N.L.R.B. 909 (1971); C.W. Post Center, 189 N.L.R.B. 904, 906 (1971).

63. Fordham Univ. I and II, supra note 58; NYU I and II, supra note 58, Yeshiva Univ., 91 L.R.R.M. 1017 (1975); Northeastern Univ., 89 L.R.R.M. 1862 (1975); University of Miami, 213 N.L.R.B. 634 (1974); Tusculum College, 199 N.L.R.B. 28 (1972); Florida S. College, 196 N.L.R.B. 888 (1972); University of Detroit, 193 N.L.R.B. 566 (1971).

"effectively diffused among the department faculty pursuant to the principle of collegiality."[64] This is identical to the second justification for rejecting the supervisory status of the entire faculty or its committees, *i.e.*, it is not really "individual" authority as required by section 2(11). Where chairmen do act individually on some matters, albeit in a strongly collegial environment, the Board has been compelled to view their actions as ineffective, on grounds that it is subject to review by higher authority, in order to hold them to be non-supervisory.[65] While in actuality the Board is determining whether chairmen function *primarily* in the interest of either the higher administrator or the collegial group, it is casting its decisions on grounds that the chairmen have no *effective* authority because it is "diffused" within the faculty or subject to further review.[66]

Moreover, the Board has buttressed its decisions holding chairmen to be supervisors by emphasizing the chairman's role in the hiring and direction of non-professional support staff.[67] However, under the *Adelphi* rule such activity, if engaged in less than half the time, would not result in supervisory status. As a result the Board has simply ignored the *Adelphi* rule when finding chairmen to be supervisors while simultaneously relying upon it when holding them not to be supervisors.[68]

3. Principal Investigators

Faculty members may receive grants from public or private sources to undertake research and are denominated the "principal investigator" under the grant. In that capacity a faculty member has authority to hire, fire and direct such supporting staff as the grant may allow, either professional, non-professional or both. In this he is limited only by the terms of the grant and by any institutional policies governing grant administration.

In its first confrontation the Board concluded that personnel employed on grant money were not employees of the University.[69] As a result faculty members who also were principal investigators were not viewed as supervising employees of the employer and thus were not supervisors under the Act. More recently the Board has realized that

64. 91 L.R.R.M. at 1020.

65. See, e.g., Fordham II, supra note 58, at 1648.

66. In parochial secondary education the Board has drawn a similar line. Compare Roman Catholic Archdiocese of Baltimore, 88 L.R.R.M. 1169 (1975) with Catholic Bishop of Chicago, 90 L.R.R.M. 1225 (1975).

67. Rensselaer Polytechnic Institute, 89 L.R.R.M. 1844, 1847 (1975); Syracuse Univ., 204 N.L.R.B. 641, 642 (1973).

68. NYU II, supra note 58, at 1175-76.

69. Fordham I, supra note 58; NYU I, supra note 58.

such "soft money" appointees nevertheless are carried on the payroll of the institution which administers the grant and are subject to its relevant policies governing personnel. Accordingly, it has rejected the non-employee status of grant support staff. As a result it has concluded that faculty members are supervisors when serving as principal investigators of grants which require them to supervise other professionals or non-professionals in the latter instance, presumably more than fifty percent of the time.[70] The Board has recognized that this approach created what is termed a "popcorn" unit, *i.e.*, with faculty popping in and out on the basis of receiving research funds which require the requisite degree of administration.[71]

However, in its reconsideration of the issue in the *New York University*[72] decision the Board supplied a far more refined analysis. It observed that the decision to apply for a particular grant is based on the interests of the faculty member who would become its principal investigator and that the degree of actual control exercised by the University is minimal. Indeed if the faculty member moves to another institution the common practice is for the grant to transfer with him. Thus the Board concluded that principal investigators do not supervise their support staff "in the interest of the University" and noted:

> There is nothing to suggest that any direction of a research project by a principal investigator is on behalf of the University rather than on behalf of the principal investigator and the contracting agency. . . . Significantly, there is no indication that the University requires principal investigators to evaluate the work of employees on his project or that the University evaluates a principal investigator's performance or ability as a supervisor. Any "employees" are also compensated by funds provided by the contracting agency for that purpose and there is no indication in the record that they are accountable to anyone other than the principal investigator for their work on the contract.[73]

As in its treatment of chairmen and industrial research project managers, the Board has not been consistent in dealing with principal investigators.[74]

4. Librarians

The Board has tended to apply the *Adelphi* rule fairly consistently to professional librarians.[75] However, the rule was not utilized in the

70. Yeshiva Univ., 91 L.R.R.M. 1017, 1021 (1975); Northeastern Univ., 89 L.R.R.M. 1862, 1870 (1975); Rensselaer Polytechnic Institute, 89 L.R.R.M. 1844, 1847-48 (1975).

71. Northeastern Univ., 89 L.R.R.M. 1862, 1870 (1975).

72. 91 L.R.R.M. 1165 (1975).

73. Id. at 1175.

74. University of Vermont, 91 L.R.R.M. 1570 (1976), decided four months after NYU II, concluded that principal investigators were supervisors without reference to NYU II or the approach embraced by it.

75. See, e.g., NYU II, supra note 58; Fordham II, supra note 58.

context of a charge against the University of Chicago that it had violated section 8(a)(2) of the Act[76] because of the involvement of alleged supervisory librarians in the affairs of a local union of professional librarians.[77] The administrative law judge reflected extensively on the relationship of professional work to supervisory status.[78] Nevertheless, he rejected the application of the *Adelphi* rule. It applied, in his opinion, solely to sporadic supervision severable from or tangential to the professional's "normal duties." Supervision of clerical employees by professional librarians was considered as a fully integrated part of the librarians' function.

The Board, differing in part with the administrative law judge, proceeded to hold all the challenged librarians to be supervisors. In so doing it agreed with the administrative law judge that it was irrelevant to the supervisory determination whether supervison by professionals was over non-professionals; the Board held some librarians to be supervisors even though such authority was exercised solely over non-professionals. However, the Board then held that as to that category no violation of section 8(a)(2) could be sustained where these supervisors were active only in a union of professional librarians. Although application of the *Adelphi* rule would have achieved the same result, the Board declined to apply it. The Seventh Circuit found no fault with the result relying, however, on the *Adelphi* decision.[79]

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76. 29 U.S.C. § 158(a)(2) (1970).

77. University of Chicago Library, 205 N.L.R.B. 220 (1973), enforced, 506 F.2d 1402 (7th Cir. 1974) (decision published without opinion).

78. "Like college teachers who plan school courses, instruct students, direct research assistants, and generally supervise the functioning of the institution as such, librarians too practice their profession in a very technical sense. In deciding, according to their professional expertise, how best to select books, catalogue them, index information, and efficiently make all materials available to the 'public,' they determine the duties of their subordinates, whether lower-echelon professionals or clerks and typists. They 'direct' the people below them in order to achieve the ultimate objective of a well-run library. In a real sense, these are not supervisory functions as traditionally envisaged in the industrial world. A more meaningful comparison would be to the skilled journeyman or craftsman who 'directs' his helper, or learner, and who in the process also decides how and when the assistant works. That the journeyman does not supervise his helper in the statutory meaning of the word has long been accepted under Board law.

"For these reasons I think the fact that some librarians at the University of Chicago make effective recommendations on how to organize their departments or sections, what type of employees to hire for one aspect of the work or another, how many to use here or there, or even what wage scale would be justified for the various subordinate or clerical duties, proves only their professional status, and serves not at all to prove they are supervisors in the statutory sense. And this is equally true of their duty to verify the precise job descriptions of other employees; certainly if they are responsible for recommending what the job contents should be, they must also certify that the employee is in fact doing what is called for." Id. at 229.

79. University of Chicago v. NLRB, 506 F.2d 1402 (7th Cir. 1974). The relevant portion of the opinion is appended to a case comment. 6 Loyola U.L.J. 758, 773 (1975).

While the reasoning in support of *University of Chicago Library* is compatible with the reasoning in *Adelphi*, the finding in the former that the librarians were statutory supervisors differs sharply with the result in *Adelphi*.

C. *Professionals in Medical and Social Services*

1. Registered Nurses

Prior to the 1974 amendments extending the Act to non-profit health care facilities,[80] the Board had considered the supervisory status of registered nurses in proprietary nursing homes. In *Doctors' Hospital*,[81] the Board held floor head nurses to be supervisors largely because of their role in assigning and evaluating the non-professional support personnel. In a supplemental decision in that case the Board rejected the application of *Westinghouse Electric* to relief head nurses because they performed mingled supervisory and non-supervisory duties over the same complement of employees.[82] The Board explained that

> registered nurses are a highly trained group of professionals who normally inform other, lesser skilled, employees as to the work to be performed for patients and insure that such work is done. But, their daily on-the-job duties and authority in this regard are solely a product of their highly developed professional skills and do not, without more, constitute an exercise of supervisory authority in the interest of their Employer. In the . . . [prior decision], we found the floor head nurses, *inter alia*, to be supervisors because, *in addition to* performing their professional duties and responsibilities, they also possessed the authority to make effective recommendations which affected the job status and pay of the employees working on their wings.[83]

The Board later held that registered nurses who serve as "house supervisors" were statutory supervisors.[84] As the sole registered nurse on duty for each shift, they responsibly directed non-professional support personnel; it was a sufficient basis for a finding of supervisory status. Similarly, in the context of an unfair labor practice, the Board affirmed a finding that a registered nurse was a supervisor based primarily on her role in the assignment, direction and evaluation of support staff.[85]

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80. 29 U.S.C. § 152(14) (Supp. V, 1975), amending 29 U.S.C. § 152 (1970).

81. 175 N.L.R.B. 354 (1969).

82. Doctors' Hospital of Modesto, Inc., 183 N.L.R.B. 950 (1970), enforced, 489 F.2d 772 (9th Cir. 1973).

83. Id. at 951-52. See also Convalescent Center of Honolulu, 180 N.L.R.B. 461 (1969) ("The registered nurses are a highly trained group of professionals who normally inform other, lesser skilled, employees as to the work to be performed for patients and insure that such work is done.")

84. Rockville Nursing Center, 193 N.L.R.B. 959, 962 (1971).

85. New Fairview Hall Convalescent Home, 206 N.L.R.B. 688 (1973).

Congress was called on to consider the supervisory role of professionals in health care when framing the 1974 amendments. The American Nurses Association pointed out that nursing care was provided by a team involving both professionals and non-professionals and called for an amendment which would make it clear that only those registered nurses "who truly and substantially possess and exercise such authority over other registered nurses"[86] should be deemed supervisory. On similar grounds the Committee of Interns and Residents argued for an amendment limiting the supervisory definition in case of health care professionals to those "engaged on a full time and exclusive basis in the performance of non-professional supervisory duties."[87] Nevertheless, the Senate committee concluded that such an amendment was not needed.

> Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of "supervisor." The Committee has studied this definition with particular reference to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians and concludes that the proposed amendment is unnecessary because of existing Board decisions. The Committee notes that the Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental the [*sic*] the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.
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> The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determinations.[88]

As a result, the Board has chosen to view the Committee's report as a virtual amendment of section 2(11) in the health care field. Thus it has inquired solely whether the supervision is an *incident* of professional service or *in addition to* professional service. This has produced some rather fine lines as well as disputes within the Board.[89] In

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86. Statement of the American Nurses' Ass'n in Hearings on S. 794 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 93d Cong., 1st Sess. 122 (1973) [hereinafter cited as Statement of Nurses].

87. Statement for the Committee of Interns and Residents, id. at 296 [hereinafter cited as Statement of Interns].

88. S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974). Against this legislative history the Board's refusal to consider interns and residents to be employees is, as dissenting Member Fanning made clear, nothing short of astonishing. Cedars-Sinai Medical Center, 91 L.R.R.M. 1398, 1401 (1976).

89. Fort Tryon Nursing Home, 223 N.L.R.B. No. 96 (1976) (nursing supervisors are supervisors); Valley Hosp., Ltd., 90 L.R.R.M. 1411 (1975) (neither head nurses nor charge nurses are supervisors); Victor Valley Hosp., 90 L.R.R.M. 1341 (1975) (shift supervisors are supervisors, charge nurses are not); St. Mary's Hosp., Inc., 90 L.R.R.M. 1316 (1975) (nursing clinicians are supervisors, nursing care coordinators are not); Oak Ridge Hosp., 90 L.R.R.M. 1217 (1975) (charge nurses and team leaders not supervisors); Meharry Medical College, 90 L.R.R.M. 1108 (1975) (charge nurses are not supervisors); Newton-Wellseley Hosp., 90 L.R.R.M. 1090 (1975) (head nurses are not supervisors); Gnaden Huetten Memorial Hosp., Inc., 89 L.R.R.M. 1761

Trustees of Noble Hospital,[90] for example, the three member majority held the nurse "supervisors" to be statutory supervisors while the head nurses and assistant head nurses were not. The former were fully in charge of their shifts including assignment, transfer and discipline of shift employees. To meet accreditation requirements, the supervisors prepared written evaluations for all shift employees. The Board, relying on the Senate report, noted that "beyond these professional considerations, the traditional standards for determining supervisory status remain applicable"[91] and held the duties presented to go beyond the exercise of professional judgment. The head nurses, however, were in charge of units (intensive care, emergency room, operating room, etc.) instead of shifts. They assign personnel, prepare work schedules, and evaluate employees in their units though some of what they did in this area was subject to approval by higher authority. This, the majority held, was all an exercise of professional judgment "incidental to their treatment of patients."[92] Later cases have made mention of whether the professional supervises only non-professionals and of the amount of time spent in administrative work.[93] Nevertheless, the touchstone has consistently been the language in the Senate report.

2. Social Workers

In *Child and Family Service of Springfield, Inc.,*[94] the Board held social workers to be professional employees. However, it held two

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(1975) (charge nurses are supervisors); Presbyterian Medical Center, 89 L.R.R.M 1752 (1975) (head nurses are supervisors, charge nurses are not); Doctors Hosp., 89 L.R.R.M. 1525 (1975) (nursing coordinators are not supervisors); Driftwood Convalescent Hosp., 89 L.R.R.M. 1493 (1975) (charge nurses are not supervisors); Bishop Randell Hosp., 89 L.R.R.M. 1249 (1975) (nurse supervisors and head nurses are supervisors); Wing Memorial Hosp., 89 L.R.R.M. 1183 (1975) (shift supervisors are statutory supervisors, head nurses are not).

90. 89 L.R.R.M. 1806 (1975).

91. Id. at 1808.

92. Id. at 1809. Chairman Murphy and Member Kennedy dissented. It appears from the opinion that Chairman Murphy also seems to accept Member Kennedy's disagreement with the Adelphi rule.

93. St. Mary's Hosp., Inc., 90 L.R.R.M. 1316, 1317 (1975) ("It is estimated that a clinician, as part of her regular duties, must spend 25 percent of her time doing administrative work on behalf of the Employer."); Newton-Wellesley Hosp., 90 L.R.R.M. 1090, 1094 n.9 (1975) ("Three of the four head nurses who testified in this proceeding testified without contradiction that they spend between 70 and 90 percent of their time in direct patient care."); Gnaden Huetten Memorial Hosp., Inc., 89 L.R.R.M. 1761, 1762 (1975) ("The head nurses spend about 10 percent of their time performing staff RN duties, and the charge nurses spend about 20 percent of their time performing RN duties. Both head and charge nurses spend their remaining time performing administrative and supervisory functions.") (footnote omitted); Doctors Hosp., 89 L.R.R.M. 1525, 1528 (1975) ("Coordinators also testified that, like the staff nurses, the vast majority of their time is spent in patient care.").

94. 90 L.R.R.M. 1211 (1975).

senior social workers to be supervisors. The total analysis was supplied by a single paragraph dealing primarily with one of the two. She spent 40 percent of her time in counseling and the remainder in scheduling and assigning personnel and in "overseeing the activities of two employees as well as students."[95] She had authority to grant time off, adjust grievances and reprimand, as well as evaluate employees. Similarly in *Mental Health Services—Erie County South East Corp. v. Buffalo,*[96] program directors who hired, supervised and assigned unit personnel were held to be supervisors. Thus the Board has totally ignored *Adelphi* and has proceeded, as in *Warren Petroleum,* on the basis of a straightforward application of section 2(11).

IV. An Assessment Of The Board's Performance

Any assessment must comprehend both the manner in which the Board has chosen to proceed as well as the substantive approaches it has taken. On the former, the Board has proceeded entirely on a case-by-case basis. While that is unsurprising,[97] total reliance on litigation as a means of formulating substantive doctrine has had unfortunate consequences. First, because each category of employment has been treated largely as sui generis there has been little comparison with other professional employments; this, in turn, has hindered the formulation of a single, generally applicable approach reconciling sections 2(11) and 2(12). Second, the Board's insistence on litigation has favored any management inclined to delay an election in order to dissipate union support, simply by challenging professionals on supervisory grounds. As a result, assuming the union declines to accede to a unit most favorable to the employer, the Board's own workload has been increased unnecessarily while affected employees have been denied the right to select or reject a representative. Third, the later determination that active union supporters were actually supervisors may create substantial problems, for example, vitiating so much of the union's showing of interest as the later-determined supervisors secured. Finally, the Board has been largely dependent on the parties to present the facts and bring relevant precedents to bear. Representation proceedings lack the formality and frequently the preparation involved in unfair labor practice cases; often the union is not represented by counsel. As a result, the Board has been relatively unconstrained to

95. Id. at 1213.

96. 90 L.R.R.M. 1394 (1975).

97. See generally Bernstein, The NLRB's Adjudication-Rule Making Dilemma under the Administrative Procedure Act, 79 Yale L.J. 571 (1970); Peck, A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudiation and Rule-Making, 117 U. Pa. L. Rev. 254 (1968).

explain contrary conclusions in comparable cases and has frequently ignored precedents at odds with the result in the particular case. This lessens the stature of the agency and casts doubt on the soundness of its conclusions generally. Moreover, the development of inconsistent lines of authority has served only to encourage further litigation and to exacerbate the problems of delay, workload and unpredictability.

Turning to the substantive aspects, as the foregoing amply evidences, the Board has developed wholly inconsistent lines of decisional authority not only for the determination of supervisory status of professionals generally but even as to discrete categories of employment within a profession. Nevertheless, review of the Board's record reveals five approaches transcending the particulars of the job at issue. The Board has: (1) applied section 2(11) precisely as it has to non-professionals; (2) distinguished responsible direction from other of the supervisory indices; (3) determined whether the supervisory work is "incident" or "in addition to" professional work; (4) determined whether the supervision is "genuinely managerial" rather than an "essential part of professional service"; and, (5) made distinctions based on whether the individual supervises professionals or non-professionals and how much time is spent on supervisory activity. Consideration should be given to each of these.

A. *Adherence to Industrial Precedents*

Under section 2(11) alone, the mere possession of authority over any one of the enumerated criteria results in supervisory status.[98] Application of this analysis to professionals is at odds with section 2(12) and its legislative history as well as with the realities of how professional work is performed. To be sure, in some cases the Board has drawn an analogy to decisions in which it found leaders of non-professional work groups or teams to be non-supervisory.[99] The analogy is quite close because the jobs involved in these cases required a high degree of craft or art very similar to the expertise engendered by professional educa-

98. The leading decision is Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir.), cert. denied, 338 U.S. 899 (1949), noted in 11 U. Pitt. L. Rev. 345 (1950). See generally Comment, The Status of Supervisors under the National Labor Relations Act, 35 La. L. Rev. 800 (1975).

99. For example, General Dynamics Corp., 213 N.L.R.B. 851 (1974), relied upon Post-Newsweek Stations, 203 N.L.R.B. 522 (1973) concerning news editors. To similar effect see Post-Newsweek Stations, 89 L.R.R.M. 1147 (1975); Golden West Broadcasters—KTLA, 88 L.R.R.M. 1053 (1974); Westinghouse Broadcasting Co., 209 N.L.R.B. 788, enforced per curiam, 503 F.2d 1055 (2d Cir. 1974). See also Musical Theater Ass'n, 90 L.R.R.M. 1633, 1636 (1975) ("[T]he artistic direction and instruction of performers by a director or choreographer is in the nature of professional direction and is not to be equated with the exercise of supervisory authority in the Employers' interest.").

tion. Those cases are themselves somewhat strained (if creative) extensions of industrial precedent and their further extension into professional employment as a consistent approach would be tantamount to the establishment of a legal fiction, *i.e.*, that professionals with actual authority to hire, assign and evaluate or effectively so to recommend are nevertheless to be viewed simply as mere "leadmen" or "strawbosses." As with legal fictions in general, the extension of this analogy beyond the reasonable limits of the language, in order to conform to perceived need, ultimately compels a more direct approach.[100] In sum, adherence to the analysis customarily applied to non-professional supervisors fails to acknowledge that Congress delegated a significant problem to the Board.

B. *Distinguishing Responsible Direction*

Implicit in a special exemption for responsible direction by professionals is the assumption that some accommodation between sections 2(11) and 2(12) must be made. Moreover, this approach can draw some sustenance from the Senate Committee's later observation that the Board had appropriately failed to find health care professionals to be supervisors if they give "direction" to others in the exercise of professional judgment "which direction is incidental" to the professional's role in patient care.[101] Indeed the Board's then General Counsel has read the report just this narrowly.[102]

However, in seeking an amendment the nurses' association pointed out that nurses exercise "professional judgment" in "evaluating whether good and adequate patient care is being given by others,"[103] *i.e.*, in preparing evaluations of the professional and non-professional staff, which would bear on the effective recommendatory role of nurses in decisions on retention, promotion and discipline. Moreover, the

100. See generally Fuller, Legal Fictions (pt. 1), 25 Ill. L. Rev. 363 (1930).

101. S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974).

102. Nash, Initial Questions from Hospital Legislative Amendments to the NLRA, in Proceedings of NYU Twenty-Seventh Conference on Labor 93, 103 (1975).

103. The Statement of Nurses, supra note 86, pointed out: "The health team providing the actual care to patients within the unit may consist of several types of personnel—the nursing aide, the practical nurse and the registered nurse. The registered nurse, as the professional member of this group, provides the direction for care of the patient. In this sense, the senior nurse or head nurse or the nurse 'in charge' of the nursing care unit or of a group of patients, functions as a patient care coordinator: determining the patient's needs, determining who among the staff shall care for the patient, and providing the advance and consultation needed by less prepared or less experienced team members. The nurse utilizes professional judgment in providing direct care to patients and in evaluating whether good and adequate patient care is being given by others, whether medical directives are being carried out appropriately and whether records are adequately maintained within the unit so that continuity of patient care can go on despite the shifts in personnel." Id. at 121.

Board has, as in *Noble Hospital,* considered the performance of other of the supervisory criteria as not necessarily resulting in supervisory status. Thus an exemption solely for responsible direction is simply too constricted. It is responsive to the situation of the rank-and-file professional who routinely directs non-professionals as a part of his work, *e.g.,* secretaries and technicians.[104] As a general approach, however, it suffers from two infirmities, one statutory, the other factual. The language of section 2(12) supplies no support for the exemption of professionals solely on grounds of responsible direction.[105] Moreover, as a factual matter, while professionals generally may engage more frequently in direction than in exercising other of the supervisory attributes, they may also perform other supervisory functions, such as evaluation, equally as part of their professional duties. Indeed as the studies noted earlier indicate, it is of especial importance to professionals that their supervision be in the hands of the profession;[106] thus a more comprehensive analysis is required.

C. *Distinguishing Supervision Which Is in Addition to Professional Work from that Which Is an Incident of Professional Work*

This approach is attractive because it recognizes that actual supervision going beyond responsible direction may not necessarily separate a professional from his colleagues and it has seemingly achieved congressional endorsement. However, upon closer scrutiny it becomes clear that this approach is based on too grudging a view of the Senate Committee's observations and supplies no workable standard for distinguishing the supervisor from the non-supervisor.

The Senate report rejected the amendments proposed by the nurses and the residents and interns not due to disagreement with the goals of the professional organizations but because the Committee concluded

104. If that is all the distinction is designed to do, it is unnecessary, for the Board had long held that such routine direction by a professional did not result in supervisory status Air Pilots Ass'n, 97 N.L.R.B. 929 (1951); Lumbermen's Mut. Cas. Co., 75 N.L.R.B. 1132 (1948). See generally Note, The Unionization of Attorneys, 71 Colum. L. Rev. 100 (1971).

105. Section 2(12) requires that professional work "involv[es] the consistent exercise of discretion and judgment" while 2(11) requires that all authority for any of the enumerated subjects be not "merely routine or clerical . . . , but requires the use of independent judgment." See notes 1-2 supra.

106. Note, for example, that the accreditation standards for hospitals require: "The nursing service shall be under the direction of a legally and professionally qualified registered nurse. There shall also be a sufficient number of duly licensed registered nurses on duty at all times *to plan, assign, supervise and evaluate* nursing care, as well as to give patients the nursing care that requires the judgment and specialized skills of a registered nurse." Accreditation Manual for Hospitals (Joint Commission on Accreditation of Hospitals) 53 (1973) (emphasis added).

an amendment was unnecessary due to the Board's ability to accommodate the exigencies of professional service within the existing language of the Act. It should be noted that at the time of the amendments the Board's *Adelphi* rule was two years old. *Adelphi* alone would have required reconsideration of the reasoning in *Doctors' Hospital,* which first supplied the "in addition to" test in the health care field. Moreover, the Senate Committee's attention was drawn explicitly to the Board's developing line of higher education decisions covering department chairmen.[107] Thus a view more in keeping with both the tone and substance of the Senate report, given the proposed amendments it was responding to, suggests that Congress merely continued to delegate to the Board the problem of reconciling section 2(11) with section 2(12) in the health care field but coupled the renewed delegation with an expression of confidence in the Board's sensitivity to the issue based on a nascent but developing body of case law. Accordingly, it does not follow that in rejecting the need for the proposed amendment the Committee necessarily precluded the Board from eventually accepting the substance of what its proponents desired, *i.e.,* a limitation of supervisory classification to those professionals engaged essentially in the full time supervision of other professionals.

Further, the notion of what is an "incident" of or "in addition to" professional work is highly porous. The standard seems most readily applied to dual status employees, *i.e.,* where in addition to work as engineer, architect, pharmacist, teacher or nurse, the professional assumes a role separable from the "rank-and-file" professional as project or department manager, principal investigator, or unit supervisor. However, as the cases themselves illustrate, professional judgment is an inextricable part of such ostensibly "supervisory" work and, even while acting in that capacity, the dual status employee may continue to share a strong community of professional interest with his non-supervisory colleagues, *i.e.,* he may not be truly aligned with management as opposed to the professional group. Hence narrow construction of the Committee report would compel the Board to proceed on the faulty assumption that professional work and supervisory work can be conveniently cabined.

D. *Distinguishing Supervision Which Is Genuinely Managerial from that Which Is Part of Professional Service*

This line of reasoning supplies the strongest theoretical basis for reconciling sections 2(11) and 2(12) for it candidly recognizes that the

107. Statement of Interns, supra note 87.

exercise of supervisory authority may nevertheless not outweigh the strong community of interest shared among professional colleagues. Moreover, it comports most closely to the line of reasoning inherent in the language and history of section 2(12). As the earlier discussion pointed out, section 2(12) assumes that senior professionals may supervise junior professionals without becoming statutory supervisors, *i.e.*, Congress concluded that the policy in favor of separate professional units will enable the collective representative to accommodate any internal conflicts engendered by the inclusion of the supervisor with the supervised. Given that policy it would distort the statute to conclude that Congress intended to narrow the supervisory exemption only in that situation. On the contrary, the reasoning in support of the policy suggests that the Act is better read as extending employee status to senior professionals who exercise professional judgment in supervising other senior professionals but whose allegiance to management in that capacity does not override the community of professional interest shared with the unit in general. However, this restatement underlines the fundamental drawback of this analysis as a device to resolve contested cases: it requires an almost exquisite exploration of the precise circumstances of the professional and employer involved on a job-by-job basis.[108] It should be noted that the vast majority of such disputes arises in unit determination proceedings which are not directly reviewable; in the absence of consistent judicial supervision the parties must depend more heavily on the merits of the agency's determinations. A review of the Board's erratic record cannot inspire confidence in its ability to proceed consistently with the extraordinary degree of care and judgment the application of this standard requires.

E. *Distinguishing Who Is Supervised and How Much Time Is Spent*

Unlike the determination of whether supervision is genuinely managerial, predicating a decision upon how much time is spent in supervision and who is supervised holds the possibility of a readily applied test. However, the Board has, with the singular exception of the *Adelphi* rule, treated these factors largely as makeweights, and in the case of the *Adelphi* rule itself has applied that test rather selectively.[109]

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108. Section 2(11) compels an examination of what each individual, challenged on supervisory grounds, has authority to do; nevertheless, the Board, as a practical matter, had to treat individuals in the aggregate when the challenge is that all incumbents in the position in question are supervisors even though, as in the department chairmanship, the degree of actual authority may vary from department to department.

109. Because the Adelphi decision is not a rule at all, the Board is able to decline to apply or

V. A Proposed Resolution

An excellent starting point is provided by the *Adelphi* "rule." The Board has established that any professional who supervises non-professionals less than half the time is not a statutory supervisor. This approach is entirely consistent with the Act; the individual is not primarily engaged as a supervisor and his inclusion in a professional unit will not engender the evil of dual loyalty which Congress was legislating against.[110] Moreover, it adequately confronts the realities of

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even acknowledge it, as is demonstrated in recent decisions on pharmacists, department chairmen, librarians and registered nurses. Moreover, simultaneous with the Board's failure to apply Adelphi consistently in professional cases is the Board's expansion of Adelphi to cases involving the supervisory status of non-professionals. In Automobile Club of Missouri, 209 N.L.R.B. 614 (1974), the Board held insurance salesmen who hire and direct telephone solicitors not to be supervisors because the employees supervised were casual employees not to be included in the salesmen's unit. Similarly, in Amalgamated Clothing Workers, 210 N.L.R.B. 928 (1974), the Board held members of the union label staff to be non-supervisory because the employees they hired and directed were part-time or casual picketers not to be included in any bargaining unit. Member Kennedy, who dissented in both cases, argued strongly in Automobile Club of Missouri, supra: "The exclusion of supervisors from the Section 2(3) definition of 'employee' rests upon whether an individual qualifies as a Section 2(11) supervisor, and not upon who he supervises . . . . Since the definitions of 'employee' and 'supervisor' are mutually exclusive . . . it follows that statutory supervisors—no matter who they supervise—may not appropriately be included in a bargaining unit . . . ." 209 N.L.R.B. at 616-17 (italics omitted).

The dissent is only partially correct. While the definition of employee and supervisor are mutually exclusive the definition of professional and supervisor are not.

110. In NYU II, supra note 58, the Board supplied explication of the Adelphi rule: "Obviously an employee may be engaged in supervising other employees even while not giving orders. It cannot be expected in every individual case that a hard and fast line can be drawn for this purpose. That, however, does not invalidate the standard. It is the Employer which assigns duties to its employees, and in the final analysis it is the duties actually assigned to, and performed by, the 'supervisor' which determine whether or not the employee is engaged in supervision outside the unit to an extent which requires exclusion from a unit. The standard is only an attempt to identify professional employees who, by virtue of their duties with respect to employees outside a professional unit, are essentially supervisors and not professionals with incidental nonunit supervisory authority.

. . . .

"In the case of professional employees in a professional unit the issue is not clear cut. Professionals, as well as supervisors, exercise discretion and judgment, and professional employees frequently require the ancillary services of non-professional employees in order to carry out their professional, not supervisory, responsibilities. But that does not change the nature of their work from professional to supervisory, nor their relation to management. They are not hired as supervisors but as professionals. The work of employees that may be 'supervised' by professionals in this category is merely adjunct to that of the professional and is not the primary work product. In short, we do not believe that any teacher, lawyer, architect, doctor, editor, etc., whose employer provides him with the services of a typist, secretary, draftsman, or similar support personnel, was intended by Congress to be excluded from the Act by the rote application of the statute without any reference to its purpose or the individual's place on the labor-management spectrum." Id. at 1175-76.

unit determination proceedings where the question of supervisory status is mot often presented, for the issue to be decided in such litigation solely concerns the amount of time an individual spends performing supervisory functions; thus it enjoys the benefit of ease of application and should be expected to curtail the time such challenges consume.[111] There are, however, two difficulties with *Adelphi* as a general solution to reconciling sections 2(11) and 2(12). First, it is not actually a rule. However, while the Board would be better advised to promulgate the *Adelphi* standard by rule-making, the Court has made clear that the Board may insist on proceeding by adjudication.[112] As a result, the courts of appeal must assume the burden of requiring consistent adherence to the *Adelphi* test when appropriate cases are presented. Second, *Adelphi* is only a partial solution for it does not deal with the more subtle problem of relationships among professionals. The threshold question is whether this determination properly lends itself to a rule or a rule-like approach. The degree of autonomy afforded the various professions and the context in which their work is performed doubtless differ.[113] Accordingly, if the Board could be trusted to produce decisions which consistently reflect an appreciation of the special circumstances of the profession and position at issue, the trade-off in delay inevitably occasioned by adjudication might be justified. Given the Board's record, however, the better approach would be to take a larger view of professions as a whole (as Congress did in fashioning section 2(12)) and to extend *Adelphi* to relationships with other professionals both senior and junior. Thus the Board should consider to be statutory supervisors only those professionals engaged primarily in the full-time supervision of other professionals. This result would be based on the valid inference that, in the aggregate, a professional whose time is primarily consumed in the supervision of other professionals would more readily tend to be aligned with management and less likely to be swayed by a community of interest shared with other professional employees.[114] By this approach the

111. It seems well beyond peradventure of serious doubt that the Board has the authority to refine the statutory inferences to be drawn from a given set of facts. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). Similarly, the courts have approved a quantitative approach to the analogous policy of the agricultural worker exemption. NLRB v. OLAA Sugar Co., 242 F.2d 714 (9th Cir. 1957). See also NLRB v. Kelly Bros. Nurseries, Inc., 341 F.2d 433 (2d Cir. 1965) and the cases cited therein.

112. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). Recently, the use of rule-making to refine the determination of supervisory status has been explicitly endorsed. 1976 Interim Report and Recommendations of the Chairman's Task Force on the NLRB, [1976] 1 Lab. Rel. Rep. (BNA) 221, 236.

113. See note 20 supra.

114. Cf. W. Kornhauser, Scientists in Industry 201-02 (1962): "The adaption of the scientist-

possibility of an erroneous determination is actually less than in an ad hoc application of the statute under current Board practice.[115] Moreover, both unions and management would know in advance which side of the line most professionals with some supervisory responsibility fall. As a result, the liklihood of later challenges to impermissible supervisory participation in the affairs of the collective representative would be lessened, the time consumed by representation proceedings curtailed, and the Board's own workload reduced.

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administrator tends to vary according to his rank: the higher the position, the more controlling are the norms of management and the organization; the lower the position, the more responsive is the scientist-administrator to professional norms and demands. Since the lower-level positions entail supervision of scientists on matters closest to their professional interests—such as their research assignments and procedures and the rating of their research performance—the greater responsiveness of men in this role is of special importance in accommodating professional norms. Since high-level scientist-administrators are viewed by the research staff as having primarily 'administrative' responsibilities—the formulation of broad policy, the selection of new personnel, the drawing up of a budget, and so on—their greater use of bureaucratic authority is more acceptable to the staff.

. . . .

"In sum, the strain between professional autonomy and bureaucratic control is accommodated by the creation of new roles for research administration. Administrative matters are controlled on the basis of hierarchial principles of authority, while matters regarded by professionals as the primary responsibility of the individual are more subject to multilateral determination through colleague relations."

115. This approach assumes that while the professional is acting in the interest of the employer, the performance of these functions does not so align him with management as to outweigh the community of interest shared with the professional groups. Even if a professional performed ostensibly supervisory functions more than half the time, it would still be possible to show that he did not do so in the interest of management and thus was not a statutory supervisor. See, e.g., NLRB v. Master Stevedores Ass'n, 418 F.2d 140 (5th Cir. 1969); International Union of Brewery Workers v. NLRB, 298 F.2d 297 (D.C. Cir. 1961), cert. denied, 369 U.S. 843 (1962).