State of Maryland
Public Employee Relations Board

In the matter of:	)	
	)	
AMERICAN FEDERATION OF TEACHERS	)	
	)	
Petitioner,	)	
	)	
and	)	PERB EL 2024-02
	)	
	)	
FREDERICK COUNTY COMMUNITY COLLEGE	)	
	)	
Community College	)	
	)	

Decision and Order

I. Introduction and Procedural Background

On August 21, 2023, the American Federation of Teachers - Maryland ("AFT-Maryland" or "the Union") filed a representation petition with the Public Employee Relations Board ("PERB" or "the Board") for it to serve as the exclusive collective bargaining representative for the full-time faculty at Frederick Community College ("FCC" or "the Employer"). Along with its representation petition, AFT-Maryland submitted to PERB evidence revealing the Union enjoyed support from more than a majority of the bargaining unit.

The PERB Executive Director notified FCC of the representation petition. In response, FCC provided to PERB information about bargaining unit members as required by Md. Code State Govt. ("SG") § 22-402(f). FCC's response indicated its belief that seven positions AFT-Maryland sought to include should be excluded from the bargaining unit - six who it classified as Department Chairs[1] and one Director of Clinical Education (Physical Therapy Assistant). FCC contended that these positions are "supervisory" and/or managerial", and not "faculty' within the meaning of Article § 16-701(j)(1). AFT-Maryland challenged these exclusions and requested that PERB make a determination with regard to these positions pursuant to SG § 22-403(a)(3).

On August 23, 2023, pursuant to the authority vested in PERB by Maryland State Government Article, Sections 22-101 and -406, the Board certified AFT-Maryland as the exclusive representative for:

[1] These positions include Chair of the Communication, Arts, and Language Department, Chair of the Mathematics Department, Chair of the English Department, Chair of the Science Department, Chair of the Social Sciences and Education Department, and Chair of the Computing and Business Technology Department.

> [a]ll eligible **Full Time Faculty** employees, as described in the Fair Labor Standards Act, and defined in Maryland State Education Article § 16-701(j)(1), employed by Frederick County Community College, excluding managerial employees,[2] supervisors, confidential employees, as defined in Maryland State Education Article § 16-701(j)(2).[3]

In a letter to PERB dated January 2, 2024, AFT-Maryland asserted that five additional employees were improperly omitted from the list of bargaining unit positions FCC had provided. These five positions consisted of two additional Directors of Clinical Education (for Surgical Technology and for Respiratory Care), two Directors of Education (Director of Surgical and Director of Physical Therapy Assistant Education), and Institute Manager, Hospitality, Culinary & Tourism.

On January 3, 2023, FCC filed a letter with PERB contending that the 12 positions AFT-Maryland sought to include in the faculty bargaining unit should be excluded as either supervisory or managerial.

The Board set the matter for a hearing that was held on January 22, 2024. Witnesses for both parties offered testimony.[4]

On March 4, PERB issued an Order stating that all employees with the job title of Department Chair or Director are included in the FCC bargaining unit. This decision provides the rationale for that Order.

Positions of the Parties

AFT-Maryland contends that the statute expressly includes "department heads"[5] in the definition of faculty: "Faculty means employees whose assignments involve academic

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[2] This term was included in the certification before PERB resolved whether any community college employees could be excluded as "managerial." In this decision, we find that managerial employees should not be excluded from a faculty bargaining unit based on the plain language of Md. Code State Govt. § 16-701(j)(2).

[3] Pursuant to the Public Employee Relations Act ("PERA"), PERB is mandated to "certify as exclusive representative the employee organization receiving the votes in an election from the majority of the employees voting in an election." Md. Code State Govt. § 22-406. An exception to certification without an election exists where three conditions are met:

> (1) a petition for an exclusive representative has been filed for a bargaining unit; (2) the Board finds that many of the employees in the bargaining unit have signed valid authorizations designating the employee organization as their exclusive representative; and (3) no other employee organization is currently certified or recognized as the exclusive representative of the bargaining unit.

These conditions were met by AFT-Maryland, resulting in the certification.

[4] After the hearing, in its post-hearing brief, the Union withdrew its challenge to the Institute Manager, Hospitality, Culinary & Tourism, agreeing with FCC that the position should not be included in the bargaining unit. PERB accepts that resolution.

[5] As noted earlier, FCC uses the term "chair" not "head" for this role in a "department." The terms "chair" and "head" are used interchangeably by Maryland community colleges for similar roles in faculty departments. Compare, for example, "Mathematics and Science Department Head" at Wor-Wic Community College (accessible at https://catalog.worwic.edu/content.php?catoid=2&navoid=91) with "Chair, Mathematics" at Howard Community College (accessible at https://www.howardcc.edu/about-us/contact-us/staff-directory/?lastname=h). We see no valid

responsibilities, including teachers and department heads." SG § 16-701(j)(1). And while the following subsection seemingly *excludes* "supervisors" from the faculty,[6] 1) there is no definition of the term supervisor; and 2) under generally accepted canons of statutory construction, when there is both a specific and a general provision covering the same subject, the specific provision should be controlling - meaning that the definition of faculty that includes department heads should prevail. AFT- Maryland provided substantial evidence to show that employees holding the eleven positions at issue have assignments that involve academic responsibilities. Accordingly, the Union contends the full-time faculty unit should include faculty members up to and including heads of academic departments, whether the title for that position is head, chair, director, coordinator, or some other title.

FCC argues that department chairs and directors are "supervisory employees" under SG § 16-701(j)(2), and as a result, should be excluded from the faculty bargaining unit. FCC notes that the Union did not seek to include all Directors, noting the Union did not seek to include the Director of Respiratory Care. FCC contends this undermines the Union's argument that Directors are not supervisors or managers.

The Employer also contends that the Health Service Directors have certain budgetary responsibilities, supervise adjunct faculty, and are leaders relied upon with regard to hiring, firing and discipline of faculty. These duties, they claim, render the positions "supervisory" that must be excluded from the bargaining unit under SG § 16-701(j)(2). In making this argument, FCC relies upon NLRA case law, generally, and two leading cases dealing with higher education cases, in particular. It also looks at how similar statutes from other states have been interpreted. FCC notes that the Directors and Department Heads at issue here have fewer teaching obligations than other full-time faculty. It also contends that *if* they are not supervisors, *then* the positions in question are "managerial" and should be excluded from the bargaining unit for that reason.

Analysis

Maryland's 2023 Public Employee Relations Act ("PERA"), and more specifically, Md. Code State Govt. § 22-306(a), outline the powers and responsibilities of the Board with regard to the community college system. Section 22-306(a) states, "[t]he Board is responsible for administering and enforcing provisions of… Title 16, Subtitle 7 of the Education Article…". Section 22-306(b) states that, "[i]n addition to any other powers or duties provided for elsewhere in… Title 16, Subtitle 7 of the Education Article… the Board may: (1) establish procedures for, supervise the conduct of, and resolve disputes about elections for exclusive representatives; [and] (2) establish procedures for and resolve disputes about petitions for bargaining unit clarification…". Reading these provisions together, the Board has the authority to resolve disputes concerning elections and certifications for exclusive representatives of employees of FCC.

Thus, PERB's authority to determine the unit scope and coverage in this case, like all PERB's authority, derives from PERA. PERA "grant[s] to public employees" the rights to choose

reason that FCC's use of the term "chair" rather than "head" in a faculty department should affect our decision in this case.

[6] "Faculty" does not include officers, supervisory employees, confidential employees, part-time faculty or student assistants. SG § 16-701(j)(2).

a representative employee organization to collectively bargain those employees' terms and conditions of employment. See State Government §§ 22-102 (a) & (b). Regarding its coverage, PERA includes multiple definitions of the term "public employee." Md. Code SG § 22-101(g); Educ.§ 16-701(o)(1). Under SG § 22-101(g) "[p]ublic employee" is "an individual who holds a position by appointment or employment in the service of a public employer with collective bargaining rights under" each of the provisions over which the Board has jurisdiction. See SG § 22-101(g). For community college employees, the referenced provisions are in Education Article, Title 16, Subtitle 7. That subtitle, which applies to community colleges, already had a definition of "public employee," enacted in 2021, which states it "means an employee employed by a public employer" but "does not include . . . supervisory or confidential employees . . . ." Md. Code. Educ. § 16-701(o).

The PERA definition of "public employee" references employees "with collective bargaining rights," and it is undisputed that community college faculty have collective bargaining rights. Therefore, we must consider the definition of "faculty" in the community college provisions. That definition is as follows:

> (1) 'Faculty' means employees whose assignments involve academic responsibilities, including teachers and department heads.
>
> (2) 'Faculty' does not include officers, supervisory employees, confidential employees, part-time faculty, or student assistants.
>
> Md. Code. Educ. § 16-701(j)(1)-(2).

Based on all these relevant definitions, the issue PERB must consider in this case is whether "department heads" with "academic responsibilities," who *might* be considered "supervisory," have "rights of collective bargaining." Such rights would include the right to be represented by an employee organization within a bargaining unit certified by the Board, such as the unit the Board certified for FCC's faculty.

FCC contends that the definitions of "public employee" in § 16-701(o)(3) and of "faculty" in § 16-701(j)(2), both of which state that the definition does not include "supervisory" employees, necessarily excludes from the coverage of PERA any "department head" who has any supervisory responsibility. The Union argues that, especially because "department heads" are specifically included in § 16-701(j)(1)'s definition of "faculty," department heads are covered regardless of whether they have any supervisory responsibility.

In resolving this dispute, PERB cannot rely on any Maryland statutory definition of "supervisor" or "supervisory," because none of the pertinent statutory provisions define those terms. When PERA was enacted in 2023, the General Assembly deleted from the community college provisions the prior definition of "supervisory employee."[7]

[7] See 2023 Maryland Laws Ch. 114, §16-701(s) (shown to be deleted). That deleted definition had provided that it was "a public employee who has full–time and exclusive authority to act on behalf of a public employer to: (1) Hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees; or (2) Adjust employee grievances."

Maryland courts have consistently held that the "cardinal rule" of statutory interpretation is "to ascertain and effectuate the General Assembly's purpose and intent when it enacted the statute." E.g., Elsberry v. Stanley Martin Companies, LLC, 482 Md. 159, 178 (Md. 2022) and decisions cited therein. Maryland courts' determination of legislative intent "begin[s] 'with the plain language of the statute." Doe v. Catholic Relief Services, 484 Md. 640, 679 (Md. 2023) (quoting Rowe v. Maryland Comm'n on Civil Rights, 483 Md. 329, 342-43 (Md. 2023)).

Maryland agencies, including PERB, are bound by normal rules of statutory construction, and are required to give statutes their ordinary meaning. Marriott Emps. Fed. Credit Union v. Motor Vehicle Admin., 346 Md. 437, 446 (Md. 1997) (an agency's interpretation of a statute will be reversed "when it conflicts with the unambiguous statutory language"). "In every case, the statute must be given a reasonable interpretation, not one that is absurd, illogical or incompatible with common sense." Wheeling v. Selene Fin. LP, 473 Md. 356, 377 (Md. 2021). We must "construe the statute as a whole, so that all provisions are considered together and, to the extent possible, reconciled and harmonized." Parker v. State, 193 Md. App. 469, 499 (Md. Ct. Spec. App. 2010). "[N]either the words in the statute nor any portion of the statutory scheme should be read so as to render the other, or any portion of it, meaningless, surplusage, superfluous, or nugatory." Office of People's Counsel v. Md. Pub. Serv. Comm'n, 355 Md. 1, 22 (Md. 1999).

And it is a well settled canon of statutory construction that when two provisions, one general and one specific, appear to cover the same subject but seem to conflict, the specific provision is controlling and prevails over the general. Patton v. Wells Fargo Financial Maryland, Inc., 437 Md. 83, 107 (Md. 2014); Young v. Anne Arundel County, 146 Md. App. 526, 576 (Md. Ct. Spec. App. 2002); *see also* Dixon v. Dept. of Public Safety & Corr. Servs., 175 Md. App. 384, 421 (Md. Ct. Spec. App. 2007). A conflict between statutory provisions is resolved by "treating … the more specific of the two as an exception to … the more general." Smack v. Dept. of Health & Mental Hygiene, 378 Md. 298, 312 (Md. 2003). "Therefore, when reconciling a specific and a general provision of a statute, a court should give effect to the specific provision in its entirety, while retaining as much of the general provision as is reasonably possible." Young, 146 Md. App. at 577.

Applying these rules in this case, we believe the inclusion of "department heads" in § 16-701(j)(1)'s definition of "faculty" is more specific than the exclusion of "supervisory employees" from that definition in § 16-701(j)(2). We note the record shows FCC has "supervisory employees" who are not "department heads" (e.g. the Vice Presidents, Deans/Vice Presidents and the Provost). However, it does not reveal any FCC "department heads" whom FCC does *not* claim to be "supervisory employees." At FCC (and perhaps all Maryland community colleges), the employee category of "supervisory employees" is broader and more general than the employee category of "department heads." The same is true of "department heads" when compared with § 16-701(o)(3)'s exclusion of "supervisory employees" from § 16-701(o)'s definition of "public employees." Each of the "supervisory employee" exclusions relied on by FCC continue to exclude many community college employees even if they do not apply to department heads.[8] However, the

[8] This also addresses the dissent's contention that finding "departments heads" to be covered would negate the exclusion of "supervisory employees" from the definitions of "faculty" and "public employees." Even if department heads are covered, those exclusions would still deny collective bargaining rights to many community college employees.

"department heads" exception to the exclusion of supervisors would be given no effect if all FCC department heads were deemed to be supervisors.

Interpreting the definition of "faculty" to cover at least some "department heads" who have "academic responsibilities" is consistent with the language defining "faculty" and with the legislative intent. The General Assembly would not have used the term "department heads" in the definition of community college faculty, in either the 2021 statute or 2023's PERA, unless it intended at least some community college department heads to have collective bargaining rights. If every Maryland community college could bar every department head from such rights, as FCC is contending it can by showing each head has at least one supervisory responsibility, that would totally obstruct the General Assembly's intentions for department heads.

A comparison to a Maryland appellate court decision, in a labor relations case where the court wrestled with seemingly conflicting statutory language, is instructive. In Montgomery County Career Fire Fighters Ass'n v. Montgomery County, 210 Md. App. 200 (Md. Ct. Spec. App. 2013), the court rejected the county's argument that the County Charter precluded the County's Labor Relations Administrator from finding the County Executive committed a "prohibited practice" by not including in a budget the funds sufficient to implement a collective bargaining agreement imposed by an arbitrator. 210 Md. App. at 203-04. The County contended that the County Executive had "a discretionary legislative function in proposing a budget delegated to him by Charter § 303 that cannot be divested by any collective bargaining laws enacted by the County Council." Id. at 211. The court recognized there was a conflict between Charter § 303 (or at least the County's interpretation of that section) and Charter § 510A, later enacted by the County Council to grant collective bargaining rights to county employees. Id. at 222-24.

To resolve the conflicting provisions, the court relied on the previously quoted canon that "[w]hen ... two statutes conflict and one is general and the other specific, the statutes may be harmonized by viewing the more specific statute as an exception to the more general one." Id. at 224 (quoting Smack v. Dep't of Health & Mental Hygiene, 378 Md. 298, 306, 835 A.2d 1175 (2003) (citations omitted)). Id. at 224. Applying that canon, the court found that "the County Executive has discretion as to what to recommend in the budget pursuant to Charter § 303, *except where* otherwise constrained by the later-enacted Charter § 510A and collective bargaining laws." Id. (emphasis added). The court thus treated the County Executive's discretion as the generally applicable provision, and the more narrowly applicable provisions on collective bargaining as the specific exception. The court next explained:

> To interpret the phrase "as otherwise required by law" in § 303 to exclude the collective bargaining provisions of the MCC is to render the words meaningless. Such an interpretation violates the canon of statutory interpretation requiring that no word is rendered superfluous or meaningless and, as discussed, would require interpreting § 303 inconsistently with rest of the Charter.

Id. (citing Atkinson, 428 Md. at 744–45, 53 A.3d 1184 [and] Office of Pub. Defender, 413 Md. at 465). Similarly, if the more general exclusion of "supervisory employees" from the definitions of community college "public employees" and "faculty" were interpreted to override the more specific inclusion of "department heads" as community college faculty, the words

"department heads" would be rendered meaningless according to FCC's claim that all department heads are barred from collective bargaining rights by the more general exclusion.

In sum, a correct interpretation of all the statutory provisions governing PERB, which conforms with Maryland judicial precedent, would give proper and full effect to the references to "department heads" with "academic responsibilities" in the definition of community college faculty, while also giving due effect to the exclusion of supervisory employees from that definition.

FCC contends that because none of the pertinent Maryland statutes define the terms "supervisor" or "supervisory," PERB should rely on National Labor Relations Board precedent in determining which employees are covered by our governing statutes. FCC brief at pp. 20-21. For this proposition, FCC also cites, without explanation, Md. Code SG § 22-103, which states that "[d]ecisions of the federal National Labor Relations Board ("NLRB") may be afforded persuasive weight in any interpretation of this title." The National Labor Relations Board (and court) decisions that FCC cites all applied, as FCC insists PERB should as well, an express definition of "supervisor" that sets forth a list of "authorities" definitively identified as being "supervisory." FCC brief at 21 (quoting National Labor Relations Act ("NLRA") §2(11), codified at 29 U.S.C. § 152(11)).[9]

Under NLRB precedent that we do adopt, the party seeking to assert supervisory status carries the burden of proving it, and to do so by a preponderance of the evidence. Oakwood Healthcare Inc., 348 NLRB 686, 694 (2006) (citing NLRB v Kentucky River Community Care, Inc., 532 U.S. 706, 711-712 (2001).

For now, we will note that PERB is given discretion over whether to follow NLRB precedents: PERB "may" give them "persuasive weight." The NLRA cases cited by FCC are from private 4-year universities and present significantly different fact patterns than the community colleges within PERB's jurisdiction.[10] PERB's governing statutes, unlike the NLRA, do not include a definition of supervisor. Moreover, when enacting PERA, the General Assembly deleted the definition of the term supervisor that had been in the predecessor statute covering community colleges. The legislative histories of the community college labor relations statutes include nothing to suggest that the General Assembly intended PERB to apply the NLRA definition of "supervisor," and the use of a more limited definition in 2021 is at least arguably evidence to the contrary. For these reasons, we find FCC's efforts to rely on NLRB cases are not persuasive.

FCC also relies on NLRA precedents that apply a non-statutory exclusion, that employees with "managerial status" are excluded from NLRA coverage. More specifically, FCC relies on Yeshiva University, 444 U.S. 672 (1980), in which the Court, overruling the NLRB, held that the University's full-time faculty were "managerial" and thus excluded from NLRA coverage. FCC

[9] At pp 10-12, we explain that we find the FCC department heads do not, in fact, exercise most of the NLRA's supervisory indicia, and none of them exercise supervisory authority when it comes to the faculty bargaining unit employees. We also explain we find PERA permits us to include department heads in the faculty unit when their exercise of supervisory authority is limited to non-bargaining unit employees, departing from Detroit College of Business, 296 NLRB 318 (1989), relied on by the dissent, and that decision's progeny.

[10] In her direct testimony, Associate Vice President Carlson acknowledged that "community college is different from traditional four-year institutions."

also relies on the NLRB's decision in Pacific Lutheran University, 361 NLRB 1404 (2014), although in that decision the NLRB concluded that the university's "contingent faculty" were not "managerial." See also Elon University, 370 NLRB No. 91 (2021) (holding that "contingent faculty" were not supervisory employees despite their inclusion on University committees). FCC does not propose any standard for defining what makes department heads "managerial." FCC also mentions numerous activities that both department heads and non-department head faculty engage in, such as serving on hiring and evaluation committees. See FCC brief at 16-18.

The precedents offered by FCC on the meaning of "managerial" do not support FCC's contention that its department heads meet that term's definition. In Pacific Lutheran, the NLRB found that the Supreme Court's "overarching determination" in Yeshiva University was "that the faculty in question 'substantially and pervasively' operated the university by exercising extensive control over decision-making and . . . 'determining . . . central policies of the institution.'" 361 NLRB at 1419 (quoting Yeshiva University, 444 U.S. at 679). When the Supreme Court in Yeshiva University found the full-time faculty had "managerial authority," the Court based that on faculty deciding, among other matters, "what courses will be offered, when they will be scheduled, and to whom they will be taught" and "the size of the student body, the tuition to be charged, and the location of a school." 444 U.S. at 686. FCC community college faculty, including departments heads, are not authorized to decide most such issues.

Even more importantly, the plain language of the General Assembly's statutes on representation for community college faculty reveals clear intent that no faculty should be excluded because they are "managerial." As the U.S. Supreme Court has stated, "We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." Jama v. Immigration and Customs Enforcement, 543 U.S. 335, 341 (2005). That principle applies to "managerial" employees under the 2023 Public Employee Relations Act. That statute, in its provisions on non-certificated public school employees, uses the term "managerial employee" and defines it as "an individual who is engaged mainly in executive and managerial functions." Ch. 49, Acts of 2023, §6-501(e) now codified at Education Article § 6-105(e). The 2023 statute excludes such "managerial employees" from the provisions on collective bargaining for non-certificated public school employees. Ch. 49, Acts of 2023, § 6-105(g)(3), now codified at Education Article §6-105(g)(3).

However, the statutes providing representation and collective bargaining rights to community college faculty, including in the 2023 PERA, have never included "managers" or "managerial employees" in the list of those to be excluded from "faculty" covered by the statute. Ch. 16, Acts of 2021, §§ 16-701(j)(1) & (2) (definition of any faculty); 2023 PERA, Ch. 114, same sections defining faculty, codified at Education §§ 16-701(j)(1) & (2). Thus, applying established principles of statutory interpretation, the plain language of the community college statutes proves that the General Assembly did not intend to exclude any faculty based on "managerial status."

The FCC also relies on statutes and decisions of other states that it contends PERB should consider as persuasive authority. We find those authorities to be distinguishable. For example, unlike PERA, the Illinois statute defines the key terms: managerial, supervisory and confidential employees. The Pennsylvania law also includes a definition of supervisors, and the department

chairs' supervisory and managerial responsibilities were more expansive than those of the employees at issue here.

We next turn to whether this Board is bound in this instance to follow opinions of prior Maryland labor boards. Maryland has had collective bargaining statutes prior to PERA, and labor relations boards preceding PERB. PERA provides that PERB "is bound by prior opinions and decisions" of those past boards. The only past labor relations board that had jurisdiction over community colleges was the State Higher Education Labor Relations Board ("SHELRB"). The dissent invokes as relevant for purposes of defining "supervisor" two SHELRB decisions in *non*-community college cases, Fraternal Order of Police Lodge 82 v. University of Baltimore County, SHELRB Opinion No. 22 (2006) ("UMBC") and Bowie State University v. Maryland Classified Employees Association, Inc., SHELRB Opinion No. 13 (2002) ("Bowie State"). In the latter decision, the SHELRB actually found that a university police sergeant was not a supervisor. In any event, we question reliance on either of these decisions, not only because both relied on the Maryland Board of Regents' definition of "supervisor," which does not apply to Maryland's community colleges, see Md. Code Educ. § 12-101 (b) (Board of Regents governs only institutions within the University System of Maryland), but also because both of these decisions involved different statutory definitions than those PERB must apply in this case. Accordingly, we conclude that there is no pertinent or binding precedent for PERB to apply.

For all of the above reasons, we find the department heads at FCC – Department Chairs and Directors – are properly included in the faculty bargaining unit, based on PERA's statutory language.

In addition, and as a second basis for including the FCC Department Chairs and Directors in the faculty bargaining unit, based on the evidentiary record we find that none of the Department Heads or Directors perform supervisory functions over other bargaining unit employees. Accordingly, we find they are properly included in the FCC faculty bargaining unit. In reaching this conclusion, we decline to follow NLRA decisions that find an employee who exercises supervisory authority only over non-bargaining unit employees are still deemed "supervisors" under the NLRA.[11]

Recognizing PERA is a new statute and does not include any definition of the term "supervisor," we applied our expertise as experienced labor practitioners, and find that the interests of the Department Chairs and Directors are much more-closely aligned with the full-time faculty in the bargaining unit than with upper management. Insofar as Department Chairs and Directors have and exercise the authority to hire and fire adjunct faculty and other non-unit employees (such as a department's office manager and lab techs), that kind of supervisory authority does not present

[11] Detroit College of Business, 296 NLRB 318 (1989) presents the closest fact pattern. In that case, the NLRB found that the department coordinators who supervised adjunct faculty were "supervisors" within the meaning of the NLRA and therefore excluded from the faculty unit, regardless of whether those tasks took more or less than 50% of their work time. However, we reject the NLRB's analysis in that decision, which the NLRB has never again applied in a higher education setting. We find more persuasive language quoted in that decision, from Adelphi University, 195 NLRB 639 (1972), which recognizes that the purpose for the exclusion of supervisors from a bargaining unit is to avoid a potential conflict of interest. However, when an employee's duties are of the same character as the bargaining unit employees (as is the case at FCC) they should not be isolated and excluded simply because they exercise supervisory authority over non-unit employees.

any conflict with the interests of the faculty. Indeed, the hiring of adjunct instructors and other non-unit employees (or firing poor ones) clearly furthers the interests of the faculty.

The record establishes that at FCC, all Department Chairs and Directors have assignments with substantial academic responsibilities, with *at least* 40-60% of their assigned work devoted to teaching. In analyzing whether their responsibilities include tasks that might be considered supervisory under the NLRA or our predecessor statutes, we found that some evidence was inconclusive[12] but that most indicia of supervisory status were absent from the responsibilities of both Department Chairs ("Chairs") and Directors, *except* with regard to adjunct instructors and other personnel excluded from the faculty bargaining unit that is at issue in this matter. With the burden of proving supervisory status on the party urging it[13], we find FCC has not met that burden.

Looking first at the Department Chairs, they either volunteer to serve a three-year term as Chair or they are elected by the faculty within their departments. The Provost does not select them to serve. Thus, although the paperwork indicates Chairs are technically "appointed" by the Provost, the Provost simply signs off on whatever name the Departments submit. The appointment letters list a number of duties expected of Chairs, but testimony from those who serve (and served) as a Chair established that, in reality, they do not perform many of the items listed, and others are advisory and collegial, not requiring them to exercise independent judgment. The written list of tasks set forth in the Chairs' appointment letters was less persuasive than the witness's testimony about what they do as a Department Chair.

Chairs receive supplemental pay when they fill the role of Chair, but testimony made it clear that faculty members agree to serve as chairs more out of a sense of service, to support their fellow department faculty. As part of their Chair duties, they must spend many hours processing paperwork and attending FCC meetings. Both Chairs who testified clearly view themselves as helping their colleagues when they serve as their department's chair. Math Department Chair Cross[14] spoke about the collegiality within the Math Department, and offered as an example of her work as a Chair her support of a faculty member who wants to try something new or needs a new piece of equipment. In these situations, Cross "represents" the faculty member before the Dean. The two Chairs described their roles as "facilitators" and "conduits" between faculty and management, sharing information between them.

Unequivocal evidence established that Department Chairs do not have independent authority to promote faculty within their department. When someone within their department seeks

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[12] For example, on search committees to hire faculty, Chairs often - but not always - participate in the interview process that culminates in committee recommendations. A Dean serves as the manager of all search committees and other, non-Chair, faculty participate in search committees. In any event, search committees generally reach a consensus about whom to recommend. In promotions and awarding continuous contracts (akin to tenure), Chairs do not have the final authority but participate on a committee, along with the Dean. In assigning classes, the evidence was mixed. The Dean, in reviewing the appointment letter provided to a Chair, read from the letter about it being the Chair's responsibility to assign classes to both faculty and adjunct instructors. However, Math Chair Cross testified that in her department the office manager takes care of class assignments, and that Cross only assigns classes to adjunct (e.g. non-bargaining unit) instructors.

[13] Oakwood*, supra*.

[14] We credit Cross's testimony about the activities she performs as Department Chair over any arguably conflicting testimony from the FCC witness about the tasks assigned to Chairs.

a promotion, the Chair serves as their "advocate," before the committee that considers all such applicants. The Chairs' interests in this measure are clearly more aligned with the full-time faculty members seeking promotion than with the Deans or Provost.

As for their role in managing the budget for their departments, Chairs have minimal duties, with budgets largely rolled forward from year to year. If the faculty within a department believes an additional position is warranted, the Chair can submit a request to the Dean or Provost. And if the department wishes to eliminate a class, that request also must be submitted to the Dean or Provost for action. Without Dean or Provost action these actions that impact the budget cannot be implemented.

Chairs cannot issue discipline against faculty members. If there are complaints raised against a faculty member, the Chair may try to mediate but if not successful in resolving the problem informally, they refer the matter to HR or a Dean.

In summary, we find Department Chairs are closely aligned with their fellow faculty members, serving as their advocates. Testimony revealed that the collegiality and camaraderie among faculty is not interrupted when a faculty member agrees to serve as Department Chair. Accordingly, they should not be precluded from sharing the same benefits of collective bargaining that their faculty colleagues enjoy, even during those periods when they are willing to hold a temporary term as a Chair.[15]

Turning to the Directors at FCC, we find that they also do not exercise supervisory authority within the meaning of PERA. This is first and foremost because, according to the uncontroverted testimony of Dean McCombe-Waller, there are only a total of six Directors at FCC[16] and *no other* bargaining unit faculty members work under their authority. Like Chairs, the Directors supervise adjunct instructors, but supervision of personnel outside the bargaining unit does not require their exclusion from the faculty bargaining unit. [17] Their duties in supervising adjunct instructors do not place them in conflict with any other bargaining unit members. As with Department Chairs, we find the purposes of PERA are best served by allowing the Directors to enjoy the benefits of collective bargaining in the faculty bargaining unit.

We find that the Chairs' and Directors' exercise of authority over adjunct instructors, administrative office managers, lab techs, and any other positions that are outside of the faculty bargaining unit that the Union represents at FCC does not present any conflict of interest between their colleagues and themselves, and that the provisions of PERA that exclude "supervisors" from a bargaining unit simply does not apply to these facts.

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[15] In exchange, FCC gets the benefit of smoother labor relations, with a system for communicating efficiently with its full-time faculty.

[16] Of the FCC Directors, only the placement of four Directors was at issue in this matter.

[17] We recognize that, unlike all the other positions discussed herein, Physical Therapist Assistant ("PTA") Education Director Amelia Iams had a significant role in developing the then-new PTA program. In developing the PTA Program – that did not have any employees to supervise - Director Iams was responsible for developing the PTA budget. However, that was a one-time event and the program is now up and running, so her ongoing duties will presumably closely resemble those of the other Directors.

Based on our analysis of the facts presented in this case, because the Department Chairs and Directors at FCC do not exercise supervisory authority over any other bargaining unit members, we find FCC has failed to prove they should be excluded from the faculty bargaining unit.

We also find that the job positions and classifications of "department chair" and "director," whose occupants lead FCC's departments, and whose academic responsibilities are comparable to that of department heads, are equivalent to "department heads" as identified in Section 16-701(j)(1), and are therefore included in the full time faculty bargaining unit.

Finally, with regard to the position of Institute Manager, Hospitality, Culinary and Tourism Institute, we find that this position is excluded from the definition of "[full time] faculty" under Section 16-701(j). The responsibilities of this position include managing a restaurant that serves members of the public, as well as supervising student employees. The supervisory responsibilities of this position are separate and distinct from "academic responsibilities" of community college department heads, chairs and directors, and therefore, the position of Institute Manager, Hospitality, Culinary and Tourism Institute falls within the exclusion to "[full time] faculty" under Section 16-701(j)(2).

Conclusions of Law

The positions of "department head," "department chair" and "director" of FCC, including those positions listed above, fall within the definition of "faculty" under Section 16-701(j).

The position of Institute Manager, Hospitality, Culinary and Tourism Institute is excluded from the definition of "faculty" under Section 16-701(j)(1) because it falls within an exception to this definition provided under Section 16-701(j)(2).

Order

It is hereby ordered that the positions of Department Head, Department Chair and/or Director of FCC shall be included in the bargaining unit of full time faculty represented by AFT-Maryland as certified by PERB in its August 23, 2023 Certification of Representation; and further, that the position of Institute Manager, Hospitality, Culinary and Tourism Institute of FCC shall be excluded from the bargaining unit of full time Faculty represented by AFT-Maryland as certified by PERB in its August 23, 2023 Certification of Representation.

Issue Date: June 12, 2024

For The Public Employee Relations Board:

Michael J. Hayes

Michael J. Hayes, Chair

Appeal Rights: *Any party aggrieved by this action of the Board may seek judicial review in accordance with Title 10 of the State Government Article, Annotated Code of Maryland, Section 10-222, and Maryland Rule 7-201, et. seq.*

DISSENTING OPINION OF MEMBERS COOPERMAN AND STEYER

For over 75 years, a universally recognized tenet of federal and public sector collective bargaining law is that supervisors and managers must be excluded from bargaining units of employees. This exclusion was created to avoid conflicts of interest that inevitably arise when supervisors and managers, who are agents of the employer, join with and become obligated to the other side--employees and their union--in collective bargaining with the employer. *See* Beasley v. Food Fair of North Carolina, Inc., 416 U.S. 653, 662 (1974). The Maryland Legislature recognized this principle by expressly excluding supervisors from the definitions of "public employee" and "faculty" in the Community College Collective Bargaining Law ("CCCBL"), Md. Code. Educ. § 16-701(o) and (j)(1)-(2).

The Board's majority decision completely obliterates this critical tenet. The majority holds that the CCCBL's express exclusion of supervisors does not apply to department chairs and directors, regardless of their responsibilities, simply because the statute's definition of "faculty" includes "department heads." The effect of the Board's holding is far-reaching and extends well beyond the parties in the instant case. Literally as a result of the majority's ruling, all department heads, chairs, directors, and conceivably any other department leader with academic responsibilities at every Maryland community college are automatically included in the faculty bargaining unit even if they exercise supervisory or managerial responsibilities on behalf of the college.

We respectfully dissent. We conclude that where the evidence establishes that department chairs, department heads, and directors exercise supervisory or managerial authority on behalf of the college they must be excluded from a unit of full-time faculty at Frederick Community College (FCC) and any other community college covered by the Public Employee Relations Act ("PERA"), Md. Code State Government, Title 22, and the CCCBL.

Supervisory Employees

PERA provides that "public employees" have the right to:

> (1) form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing;
>
> (2) be represented by employee organizations, to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder; and
>
> (3) be fairly represented by their exclusive bargaining representative, if any, in collective bargaining.

PERA, §22-201(b).

The term "Public Employee" in Title 22 of the State Government Article references, in relevant part, Maryland's CCCBL in Title 16, subtitle 7 of the Education Article. *See* SG §22-101(g). Under Title 16, "Public employees, public employers, and exclusive representatives are subject to the provisions of Title 22 of the State Government Article." §16-702(c).

Legislative intent expressed in CCCBL, §16-702(a) makes clear that the General Assembly intended to promote relationships with "*public employees* of the community college system." (emphasis added).

"Public employee" is defined in §16-701(o) of the CCCBL, as follows:

> (1) "Public employee" means an employee employed by a public employer.
> .....
>
> (3) "Public Employee" does not include
> .....
> (ii) Supervisory or confidential employees, ...

This statutory language is clear and unambiguous -- only "public employees" have the right to participate in collective bargaining, and supervisory employees are not public employees under Title 16. Because "a bargaining unit may consist only of public employees" under PERA, §22-403(c), supervisory employees are excluded from the unit.

Petitioner, AFT-Maryland, has been certified as the exclusive bargaining representative for full-time faculty at FCC. "Faculty" is defined in CCCBL, §16-701(j) as follows:

> (j)(1) "Faculty" means employees whose assignments involve academic responsibilities, including teachers and department heads.
>
> (2). "Faculty" does not include officers, supervisory employees, confidential employees, part-time faculty or student assistants.

The preliminary question presented is whether the exclusion of "supervisory employees" from the definition of both "faculty" and "public employee" applies to department chairs and directors who exercise supervisory responsibilities on behalf of FCC. Well-established principles of both statutory construction and labor law require this question be answered in the affirmative – the statute's exclusion of supervisors encompasses department chairs and directors with supervisory responsibilities and authority.

"It is a well-settled principle that the primary objective of statutory interpretation is 'to ascertain and effectuate the intention of the legislature.' The first step in this inquiry is to examine the plain language of the statute, and '[i]f the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meaning, we will give effect to the statute as it is written.' Thus, 'where the statutory language is plain and free from ambiguity, and expresses a definite and simple meaning, courts do not normally look beyond the words of the statute itself to determine legislative intent.' Furthermore, '[w]ords may not be added to, or removed from, an unambiguous statute in order to give it a meaning not reflected by the words the Legislature chose to use. . . .'" Montgomery County. v. Fraternal Order of Police, Montgomery County Lodge 35, Inc., 427 Md. 561, 572-573 (2012) (internal citations omitted).

Thus, in interpreting a statute, we must "assign the words their ordinary and natural meaning." Young v. Anne Arundel Cnty., 146 Md. App. 526, 574 (2002), quoting Lewis v. State, 348 Md. 648, 653(1998). The statutory provisions are to be construed "as a whole, so that all

provisions are considered together and to the extent possible, reconciled and harmonized." Young, 146 Md. App. at 575-76 citing Curran v. Price, 334 Md 149, 172, 638 A. 2d 93 (1994). "[N]either the words in the statute nor any portion of the statutory scheme should be read so as to render the other, or any portion of it, meaningless, surplusage, superfluous, or nugatory." Office of People's Counsel v. Md. Pub. Serv. Comm'n, 355 Md. 1, 22 (1999).

Moreover, "[w]here a statute is plainly susceptible of more than one meaning and thus contains an ambiguity, courts consider not only the literal or usual meaning of the words, but their meaning and effect in light of the setting, the objectives and purpose of the enactment. In such circumstances, the court, in seeking to ascertain legislative intent, may consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense." Tucker v. Fireman's Fund Ins. Co., 308 Md. 69, 75 (1986)(internal citations omitted).

Critically, a "statutory provision should be interpreted in the context of the entire statutory scheme, and reading the various provisions together and giving effect to each can aid in determining the intent of the legislature." Municipal And County Government Employees Organization v. Montgomery County Executive, 210 Md.App. 163, 181 (2013) (citations omitted). "Statutory construction 'is a holistic endeavor' and that the meaning of a provision is 'clarified by the remainder of the statutory scheme . . .[when] only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." U.S. v. Cleveland Indians Baseball Co., 532 U.S. 200, 217-218 (2001), citing United Say. Assn. of Tex. v Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988).

Reading the statutory provisions and scheme as a whole, we conclude that department chairs and directors may be included in a bargaining unit of faculty if they are non-supervisory employees, but must be excluded from the unit if they are supervisory employees.[1] This interpretation best and fully "reconciles and harmonizes" the language of §16-701(j), by protecting the rights of non-supervisory department chairs and directors to engage in collective bargaining in a unit of faculty members, while preserving the unambiguous language and clear intent of the statute that supervisory employees are not "public employees," do not have collective bargaining rights, and, that "[a] bargaining unit may consist only of public employees."

The majority's decision, which sanctions the inclusion of all department chairs and directors in the faculty bargaining unit regardless of their supervisory status, rests largely on a canon of statutory construction that when two provisions, one general and one specific, appear to cover the same subject but seem to conflict, the specific provision is controlling and prevails over the general. The majority opines that the term "department heads" in §16-701(j)(1) is specific whereas the term "supervisory employees" in §16-701(j)(2) is general. Opinion at 7.

The majority's analysis and its reliance on the specific/general canon is misplaced.[2] Rather than attempt to reconcile and harmonize the statutory provisions, which, as we explain, is required

[1] As discussed below, department heads, directors and clinical directors also may be excluded if they are "managerial" employees. *See, infra* at p. 18-20.

[2] The majority erroneously asserts that Montgomery County Career Fire Fighters Ass'n v. Montgomery County, 210 Md. App. 200 (2013) supports its interpretation that the supervisory exception to the definition of "faculty" in §16-

when interpreting statutes and can easily be done in interpreting §16-701(j)(1) and (2), the majority reads the words in the statute and portions of the statutory scheme in such a way as to render the supervisory exception to the definition of "faculty" and "public employee" meaningless and nugatory.[3] The majority's construction of the statute is precisely what the Maryland Supreme Court has admonished against.

The majority fails to explain their basis for concluding that the term "supervisory employee" in §16-701(j)(2) is general but the term "department heads" in §16-701(j)(1) is specific. Neither term is defined in the statute. Indeed, the employees at issue in this case are not "department heads;" they are "department chairs," "program directors," and "clinical directors." Without any evidence in the record or citation to legislative history explaining what is meant by "department head" or what the duties of a department head entail, the majority simply assumes that the titles of "Department Chair" and "Director" at FCC are "equivalent to 'department heads' as identified in Section 16-701(j)(1)." Opinion at 12. In fact, throughout their opinion, the majority repeatedly refers to FCC's department chairs as "department heads." Thus, according to the majority, the purportedly specific term "department heads," has a wide umbrella encompassing any department or division leader with academic responsibilities.

The statutory provisions applicable to community colleges are very specific: (i) only "public employees" may participate in collective bargaining; (ii) supervisory employees are not public employees; and (iii) a bargaining unit may consist of only public employees. These provisions are not only clear and unambiguous, they are consistent with the intent expressed by the General Assembly in §16-702(a) to "promote harmonious and cooperative relations with the *public employees* of the community college system by . . . protecting the rights of *public employees* . . ." (emphasis added). The majority's analysis ignores the critical fact that department heads, chairs, and directors who have supervisory authority are not "public employees" under both PERA and CCCBL. There is no "'department head' exception to the exclusion of supervisors"[4] from the definition of "public employee." Thus, the majority's interpretation is inconsistent with this statutory scheme, "not compatible" with the rest of the statute, and fails to harmonize and "construe the statutory provisions as a whole."

701(j) does not apply to department heads, chairs or directors, or to any employee with academic responsibilities. Opinion at 4-5. In fact, the opposite is true. In Career Fire Fighters, the Appellate Court reconciled allegedly conflicting statutory provisions by giving meaning to the language of each, because to do otherwise would "violate the canon of statutory interpretation requiring that no word is rendered superfluous or meaningless and, . . . would require interpretating §303 inconsistently with the rest of the Charter." 210 Md. App. at 224. Here, the majority's decision renders the supervisory exclusion in §16-701(j) completely meaningless, and is inconsistent with both PERA and CCCBL, which provide that supervisors are not "public employees," and only public employee have collective bargaining rights and can be members of a bargaining unit.

[3] The majority opines that their interpretation of "faculty" under §16-702(j) does not render the supervisory exclusion meaningless because "FCC has 'supervisory employees' who are not "department heads" (e.g. the Vice Presidents, Deans/Vice Presidents and the Provost)," so that "[e]ven if department heads are covered, those exclusions would still deny collective bargaining rights to many community college employees." Opinion at 5 and n. 8. The record does not support the majority's understanding. There is no evidence in the record that describes the duties of the Provost, Deans/Vice Presidents, or Vice Presidents as coming under §16-702(j). The Provost, Deans/Vice Presidents, and Vice Presidents would most appropriately be considered "managerial" employees and excluded from the definition of "public employee" under the managerial exception, which we believe applies, as explained herein.

[4] Opinion at 5.

The majority asserts that "[t]he General Assembly would not have used the term 'department heads' in the definition of community college faculty . . . unless it intended at least some community college department heads to have collective bargaining rights." Opinion at 6. We do not disagree. As we have said, the legislative intent is clear from the language of the statute -- department heads have collective bargaining rights and may be included in the faculty bargaining unit as long as they are not supervisors. The determination of supervisory status is a fact-intensive analysis, and the party asserting that certain employees are supervisors bears the burden of proving that they exercise such authority with independent judgment.

The majority, however, is not satisfied with the case-by-case analysis and determination of supervisory status because they are concerned that "every Maryland community college could bar every department head from such rights . . . by showing that each head has at least one supervisory responsibility." Opinion at 6. To address this concern, the majority throws the baby out with the bathwater and blanketly concludes that the supervisory exception to the term "faculty" simply does not apply to department heads. The majority's construction of CCCBL's statutory language to meet a targeted objective of ensuring that department heads are in the faculty unit is unacceptable. In Oakwood Healthcare Inc., 348 NLRB 686 (2006), the NLRB rejected a dissenting member analogous argument that a statutory term should be construed to meet a targeted objective, explaining as follows:

> Finally, the dissent also criticizes our interpretation of "assign" on the ground that it "threatens to sweep almost all staff nurses outside of the Act's protection." As we stated above, however, we decline to start with an objective—for example, keeping all staff nurses within the Act's protection—and fashioning definitions from there to meet that targeted objective. We have given "assign" the meaning we believe Congress intended. We are not swayed to abandon that interpretation by predictions of the results it will entail. We also do not prejudge what the result in any given case will be. We shall continue to analyze each case on its individual facts, applying the standards set forth herein in a manner consistent with the Congressional mandate set forth in Section 2(11) [NLRA's definition of supervisor].

The Legislature's determination that supervisors are not "public employees" under PERA and CCCBL and thus, do not have collective bargaining rights, adopts and codifies the well-established labor law principle that supervisors are to be excluded from employee collective bargaining units. This tenet was first established "[m]ore than half a century ago, [when] the United States Congress recognized the unpalatable consequences that flow from extending collective bargaining rights beyond workers to their supervisors and amended the National Labor Relations Act ["NLRA"] so "[t]he term 'employee'" did "not include any individual employed as a supervisor." 29 U.S.C. § 152(3)." Mayor and City Council of Ocean City v. Bunting, 168 Md.App. 134, 143 (2006). In Beasley, *supra*, the U.S. Supreme Court explained that the amendments excluded supervisors from the protections of the NLRA "because supervisors were management obliged to be loyal to their employer's interests." 416 U.S. at 659-660. "Management, like labor, must have faithful agents, . . . no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for any reason, he does not trust.'" 416 U.S. at 660-61, quoting H.R.Rep.No. 245, 80th Cong., 1st Sess. 16-17 (1947). *See also* NLRB v. Yeshiva University, 444 U.S. 672, 682, 687-688 (1980) ("an employer is entitled to the undivided loyalty of its representatives;" "the amendment was designed [t]o ensure that employees who,

exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union.").

It is clear from the statutory provisions and scheme of PERA and CCCBL that the reasoning expressed by Congress and the courts for excluding supervisors from collective bargaining rights under the NLRA, set forth the intent underlying the Maryland Legislature's decision to exclude supervisors from collective bargaining rights under PERA and CCCBL. *See* PERA, §22-102 ("The law of the State with respect to the labor rights of public sector employees is intended to follow the rights of employees under the federal National Labor Relations Act."). Community college employers are entitled to have the undivided loyalty of their supervisors, who exercise authority on behalf of the college. Exclusion of *all* supervisory employees from the faculty bargaining unit, regardless of their job title, is necessary to ensure that their loyalty to the employer is not compromised. *See* Mayor and City Council of Ocean City, *supra* (charter amendment that purportedly granted collective bargaining rights to lieutenants and captains "should not be read to create the untenable situation that the NLRA was wisely amended to avoid: the pitting of those who are entrusted with leading a department against the department itself in the name of collective bargaining.").

The National Labor Relations Board ("NLRB") has applied the supervisory exemption to department chairs and other department and division leaders at colleges and universities for well over fifty years. *See, e.g.*, C.W. Post Center of Long Island University, 189 NLRB 904 (1971); Adelphi University, 195 NLRB 639, 641-642 (1972); Syracuse University, 204 NLRB 641, 642 (1973); Point Park College, 209 NLRB 1064 (1972). Having been charged with the legislative mandate to "follow the rights of employees under the federal National Labor Relations Act" in enforcing the State labor laws under PERA and CCCBL, it is incumbent upon PERB to apply the supervisory exception to department chairs, heads, and directors who exercise supervisory responsibilities on behalf of the community college.

Managerial employees

Although the NLRA does not expressly mention the term "managerial employee," the NLRB has consistently construed the NLRA to exclude managerial employees from coverage. *See* Palace Laundry Dry Cleaning, 75 NLRB 320, 323 n. 4 (1947). In N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 276 (1974), the U.S. Supreme Court, upheld the judicially-created exemption for managerial employees. The Court defined "managerial employees" "as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." 416 U.S. at 288. Congress "regarded [such employees] as so clearly outside the Act that no specific exclusionary provision was thought to be necessary." 416 U.S. at 282.

In Yeshiva University, *supra*, the Supreme Court applied the managerial definition and exception to Yeshiva University's full-time faculty members. Finding that the faculty had absolute authority in academic matters, the Court concluded that the faculty exercised supervisory and managerial functions and were therefore excluded from the category of employees entitled to benefits of collective bargaining under the NLRA. *See also*, Pacific Lutheran, 361 NLRB 1404 (2014).

Although faculty are covered under federal law as "professional employees," the Court explained that "professionals, like other employees, may be exempted from coverage under the Act's exclusion for 'supervisors' who use independent judgment in overseeing other employees in the interest of the employer, or under the judicially implied exclusion for 'managerial employees' who are involved in developing and enforcing employer policy. Both exemptions grow out of the same concern: That an employer is entitled to undivided loyalty of its representatives." Yeshiva, 444 U.S. at 682, citing Beasley, 416 U.S. at 661-662; *see also* Bell Aerospace Co., 416 U.S. at 281-282 and 289 fn. 17 ("[a]lthough the Act makes no special provision for 'managerial employees', under a Board policy of long duration, this category of personnel has been excluded from the protections of the Act," citing International Garment Workers' Union v. NLRB., 339 F. 2d 116, 123 (2d Cir. 1964).).

The NLRB has been applying the Yeshiva principles for more than 40 years. *See* Pacific Lutheran, 361 NLRB at 1417 ("the Board's 30-plus years of applying Yeshiva" in 2014). As a result, there is an extensive body of law applying the "managerial" exclusion to cases involving faculty at institutions of higher learning, including cases involving the supervision of non-unit adjunct/contingent faculty. "Since the Court's Yeshiva decision, the Board has issued nearly two dozen published decisions addressing the managerial status of faculty at colleges and universities. In those cases, the Board examined various areas of university decision-making in which the faculty participated. The breadth of the examination has been sweeping." Pacific Lutheran, 361 NLRB at 1418 and fn. 30.[5]

PERB and its predecessor, the State Higher Education Labor Relations Board ("SHELRB"), have adopted the judicially created managerial exception to the definition of "public employee" and "faculty" by routinely excluding managerial employees from certifications of full-time and part-time faculty bargaining units at community colleges. *See* SHELRB EL 2023-02 (Harford Community College); PERB EL 2024-01(Anne Arundel Community College); PERB EL 2024-03 (Howard County Community College); PERB EL 2024-04 (Wor-Wic Community College); (PERB EL 2024-06 (Prince George's Community College). Indeed, the certification issued by PERB in the instant case expressly excludes managerial employees from the full-time faculty bargaining unit at FCC. *See* PERB EL 2024-02.

Accordingly, as we have found with respect to supervisory authority, where department chairs, department heads, program directors, or clinical directors formulate and effectuate management policies by expressing and making operative the decisions of their employer, they are managerial employees and must be excluded from the faculty bargaining unit. The principles of Yeshiva should be applied to PERA and CCCBL, and NLRB decisions pertaining to managerial employees and faculty units at colleges and universities should be afforded "persuasive weight." See PERA, §22-103.

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[5] The majority asserts that it is questionable to rely on Yeshiva and Pacific Lutheran in interpreting the CCCBL in which all "faculty" are expressly included because the issue in those cases was "whether all 'faculty' should be excluded from the NLRA's coverage." Opinion at 6. The determination of managerial authority is a fact-based analysis, where the duties and responsibilities of each individual in question, not necessarily the faculty as a whole, meet the definition of managerial established in Yeshiva and Pacific Lutheran. As such, the principles of those cases apply in determining whether department chairs and directors are managerial. *See, e.g.,* Bd. of Trs. of Univ. of Ill. v. Ill. Educ. Labor Relations Bd., 2018 IL App (4th) 170059, 421 Ill. Dec. 772, 101 N.E.3d 209 (2018).

For the reasons stated, we would apply the principles of Yeshiva and its progeny to community colleges under PERA, and conclude that "managerial employees" are excluded from bargaining units of faculty because they are not "public employees."

FCC Department Chairs are Supervisory Employees

The term "supervisory employee" is not defined in either PERA, §22-101 or CCCBL, §16-701. In two separate decisions, our predecessor, SHELRB, adopted and applied the University System of Maryland's Board of Regents ("BOR")[6] definition of "supervisor":

> A supervisory employee is an employee who has authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, 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.

Fraternal Order of Police Lodge 82 v. University of Baltimore County, SHELRB Opinion No. 22 at 4 (2006)("UMBC"); Bowie State University v. Maryland Classified Employees Association, Inc., SHELRB Opinion No. 13 at 2 (2002)("Bowie State"). SHELRB recognized that the BOR definition is modeled after Section 2(11) of the NLRA, which defines "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 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.

UMBC at 4 fn. 4. SHELRB stated that while it is not bound by NLRB precedent, "we find such precedent to be persuasive, as it is the preeminent federal agency interpreting labor law and similar issues as those before us today." *Id. See also,* Maryland State Employees Union, et al. v. Department of Maryland State Police, SLRB ULP Case No. 05-04, Opinion No. 8, at 4 fn 3 (2007)(". . . this State's collective bargaining law was modeled on the NLRA.").

Prior opinions and decisions of SHELRB are binding on PERB. PERA, §22-309(b) ("The Board is bound by prior opinions and decisions of a labor board listed under subsection (a) of this section," which includes SHELRB).[7] PERA further provides that decisions of the NLRB may be afforded persuasive weight. PERA, §§22-102 and 22-103. Additionally, the common elements of supervisory authority as defined by the NLRA and approved by SHELRB, have been widely adopted by Maryland counties and other jurisdiction in their respective public sector collective

[6] The University System of Maryland is comprised of twelve institutions and three Regional Higher Education Centers, https://www.usmd.edu/institutions/.

[7] The majority rejects the SHELRB precedent on the basis that the BOR definition approved by SHELRB does not apply to community colleges because community colleges are not governed by the Board of Regents. The majority misunderstands SHELRB 's holding. SHELRB expressly adopted BOR's definition of "supervisor" in deciding what criteria establish supervisory authority under the state law because it followed the well-accepted standard as set forth in the NLRA, which SHELRB found persuasive.

bargaining laws, including statutes applicable to community college faculty. *See, e.g.* Prince George's County Code, § 13A-102(f); Baltimore County Code, Title 5. Employee Relations Act, §4-5-102; Baltimore City Code, Art. 12, Municipal Labor Relations Act, § 1-1(k); Montgomery County Code, Article VII, Collective Bargaining, §10; Harford County, Ch. 38, Article I. Labor Relations, § 38-2; New Jersey Statutes, § 27:25-14 a. (2); Illinois Educational Labor Relations Act., Sec. 2(g); Oregon, ORS 243.650(23)(a).

The majority's logic for rejecting this widely accepted standard is confusing. They say the NLRA definition should not be applied because there is nothing in the legislative history to suggest "the General Assembly intended PERB to apply the NLRA definition of 'supervisor'." Opinion at 7-8. As such, they do not find the NLRA definition persuasive. They say SHELRB's definition of supervisor in prior cases should not apply because the definition originated with the BOR and was applied in cases involving BOR colleges, which community colleges are not. As such, they do not believe the SHELRB definition is binding or persuasive. Opinion at 9. They say other public sector laws and decisions that apply to community colleges are "distinguishable" because those laws expressly define "managerial, supervisory and confidential employees," whereas PERA does not. Opinion at 9. Thus, even though those laws virtually mirror the NLRA and SHELRB definitions and follow the widely accepted definition of "supervisor," the majority does not find this common definition persuasive. Most critically, although the majority rejects the common definition of "supervisor" approved by all of the cited authority, it offers no alternative definition to be applied to CCCBL faculty and public employees. Because the General Assembly chose not to define the term "supervisor" in the CCCBL, it is incumbent upon PERB to adopt a definition. This is PERB's statutory responsibility. *See* PERA, Section 22-306. In so doing, the General Assembly directed PERB both to follow prior SHELRB decisions and look to the NLRB for persuasive authority. Rather than follow this statutory mandate, the majority simply leaves this important statutory term undefined.

Accordingly, we would apply the definition of "supervisor" approved by SHELRB in UMBC and Bowie State to community colleges under CCCBL.

The definition of supervisor lists twelve separate supervisory responsibilities in the disjunctive. Thus, in determining whether an employee is a supervisor, "an employee must exercise at least one of the twelve enumerated activities and, in so doing, exercise 'independent judgment.'" UMBC at 5. *See also* Berry Schools v. NLRB, 627 F.2d 692, 697 (5th Cir. 1980) ("[I]n order for supervisory status to exist, the authority to perform at least one, but not necessarily all of the enumerated functions, is necessary.") Following NLRB precedent, SHELRB found that "in order to exercise independent judgment, 'an individual must at minimum act, or effectively recommend action, free of control of others and form an opinion or evaluation by discerning and comparing data.'" UMBC at 5, quoting Oakwood Healthcare, 348 NLRB at 692, 693.

The record evidence establishes that FCC's department chairs are supervisory employees as defined above. Department chairs are appointed by the Provost and receive a Department Chair Letter of Assignment, which identifies the functions and responsibilities of their position.[8] Department chairs receive additional pay in the range of $12,000-$13,000 per year for performing their chair responsibilities, and are expected to work twelve months each year, rather than the ten

[8] These department chair functions and responsibilities also appear in the Employee Handbook.

month annual schedule worked by regular full-time faculty. The number of course credits department chairs are required to teach is reduced by 60%. Specifically, department chairs are required to teach only twelve credits each year, as opposed to 30 teaching credits required of full-time faculty. Eighteen credits of reassigned time is to enable department chairs to fulfill their chair responsibilities. As such, the majority of a department chair's time is spent on their department chair functions, not academic responsibilities.

Dean McCombe-Waller[9] testified that department chairs have been delegated authority to manage their department and their full-time and adjunct faculty. This includes the authority to determine what courses are needed, the number of sections to be offered, and who should be teaching a particular course or section. Department chairs are responsible for scheduling classes and assigning full time and adjunct instructors to teach the specific courses and sections. Department chairs also recommend canceling courses. Dean McCombe-Waller testified that she "can't think of a time where [she] did not approve" a department chair's recommendation.

In UMBC, *supra*, SHELRB adopted the NLRB's holding in Oakwood Healthcare, *supra*, that "the authority to 'assign'" amounts to a supervisory function, when the assignment involves "'the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee.'" UMBC, *supra* at 6, quoting Oakwood Healthcare, 348 NLRB at 689. In Oakwood Healthcare, the NLRB concluded that "[i]n the healthcare setting, the term 'assign' encompasses the charge nurses' responsibility to assign nurses and aides to particular patients." *Id*. Likewise, in the community college setting, assigning full-time faculty to the specific courses they will teach, and the semesters, days and times they will teach the courses, is clearly the exercise of supervisory authority.

Department chairs have an important role in the continuous contract (equivalent of tenure) process for full-time faculty. Math Department Chair Kylena Cross testified that she "needs" to observe faculty before they get continuous contract status, and her observations go into their promotion folder. The decision on whether a faculty member is given continuous contract status is made by a committee of department chairs and the dean. The committee's decision is final.[10]

Department chairs serve as the first level of appeal under the Complaint Policy and Procedures for Students. This responsibility authorizes department chairs to handle complaints against full-time faculty, such as concerns about their performance, engagement, or teaching. As described by Dean McCombe-Waller, department chairs investigate such complaints and have the power to resolve disputes through mediation or by developing and putting in place a strategy for the faculty members to follow. If matters cannot be resolved at step 1, department chairs can refer the matter to Dean McCombe-Waller with the results of their investigation and a recommendation that may include disciplinary action.

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[9] Associate Vice President/Dean Sandra McCombe-Waller reports directly to the Provost and is a member of the leadership team that oversees the unit of teaching, learning and student success. Below her on the organization chart are department chairs, then program managers within the departments, and then faculty members. She is the direct supervisor of the department chairs and Health Science directors at issue.

[10] The majority credits the testimony of Department Chair Cross.

Dean McCombe-Waller testified that department chairs have reported to her concerns about faculty performance, faculty engagement, faculty teaching, complaints involving one faculty member against another, and student complaints about full-time faculty. As an example, she described a dispute between two faculty members that the department chair tried unsuccessfully to mediate. The department chair reported to the Dean that there were some personal issues between the two faculty members, described the attempts at reconciliation and recommended disciplinary action against both faculty members. Dean McCombe-Waller followed the recommendation of the department chair and issued verbal warnings to both faculty members. When asked how often does she follow the recommendations of department chairs in resolving personal disputes, Dean McCombe-Waller responded that she has always followed their recommendations,[11] confirming that department chairs effectively recommend disciplinary action through their dispute resolution responsibilities.

The majority discounts the department chairs authority over full-time faculty in deciding continuous contract status, investigating and addressing complaints against faculty under the Complaint Policy and Procedures for Students, investigating and resolving disputes between faculty members, reporting and recommending action regarding faculty performance, teaching, and engagement concerns, and recommending course cancelation because the department chairs are not the final decisionmaker. Supervisory authority, however, is not limited to those who make the final decision, but includes those who effectively recommend such actions.[12] Dean McCombe-Waller testified that she has always followed the recommendations of the department chairs. The undisputed record, therefore, established that FCC's department chairs effectively recommend many significant personnel decisions, actions, and terms and conditions of employment concerning full-time faculty.

Department chairs are the college's representative in dealings with the department faculty and staff. They provide leadership in implementing all college policies and procedures; regularly attend the Supervisors and Department Chair Forum and communicate the information provided in the forum sessions to their department; participate in the Learning Leadership Council to provide academic leadership for the college; and attend monthly meetings of the President's Cabinet. Department chairs participate in Academic Affairs recruitment and hiring processes, and encourage and support professional development for full-time faculty, adjuncts, and staff.

Department chairs have significant and extensive personnel management and supervisory responsibilities over adjunct faculty. They directly supervise the adjunct faculty, with the authority to hire, assess, and fire adjuncts as necessary, and have done so. Department chairs recommend the initial payment scale for adjunct faculty as well as movements up the pay scale. They conduct classroom observations and provide performance feedback to adjunct faculty. Department chairs investigate behavioral complaints involving adjunct faculty and determine the course of action, including implementing a development plan for the faculty member or terminating the adjunct's employment. They do not need approval of Dean McCombe-Waller to make such decisions.[13]

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[11] Her exact words were, "I have never not followed their recommendations." Tr. at 96.

[12] *See* cases cited at p. 26, *infra*.

[13] Math Department Chair Kylena Cross testified that she is responsible for hiring and evaluating adjunct faculty, and has the authority to remove an adjunct from their position.

Department chairs also have the authority to hire, evaluate, and fire support staff, which includes the academic office manager, lab manager, and technicians, provide performance feedback to program managers, and make recommendations and provide documentation concerning personnel issues.

In Detroit College of Business, *supra*, the NLRB considered whether department coordinators should be excluded from a bargaining unit as supervisors. The department coordinators, like the department chairs at FCC, taught classes and exercised supervisory authority over hiring and assigning non-unit part-time faculty. The NLRB held that the department coordinators were supervisors because they had authority to hire, fire, and evaluate the part-time faculty or effectively recommend such actions, even though their supervisory authority constituted only 25% of their duties and 75% of their work time was spent teaching classes and performing other activities related to their instructional duties. The NLRB rejected a "50-percent rule," which had required supervisory duties to be at least 50% or more to be excluded from the bargaining unit. While noting that the time spent performing supervisory duties is "relevant," the NLRB explained that other factors must be considered including: the mission of the business; the duties of the individuals exercising supervisory authority and those of bargaining unit employees; the supervisory functions being exercised; the degree of control exercised over the non-unit employees; and the relative amount of interest the individuals at issue have in furthering the policies of the employer as opposed to those of the bargaining unit in which they would be included.

Applying these factors to the record, the NLRB concluded the coordinators' "supervision of part-time nonunit faculty is part and parcel of their 'primary work product' rather than an ancillary part of their duties. The mission of the Employer, as stated in its academic bulletins, 'is to educate men and women for an enriched life and a successful career in any of a number of fields in business and related services.' To help achieve that mission, the bulletins state that it is the college's belief 'that its students are most effectively served by a [highly qualified] faculty with varied experience and background.'" The coordinators involvement in hiring the part-time faculty, evaluating their performance, recommending, if necessary, non-retention of those who fail to live up to the superior qualifications that the school seeks to maintain," is in furtherance of the college's mission. Detroit College, 296 NLRB at 321. *See also*, In the Matter of the Employees of Temple University, 46 PPER ¶ 43 (2014) (department chairs who hire and decide or effectively recommend the non-renewal of adjunct and non-tenure track faculty, evaluate and assign work to these employees, and hire non-faculty staff are supervisors under a definition modeled after §2(11) of the NLRA); Rite Aid Corp., 325 NLRB 717 (1998) (pharmacy managers were supervisors and excluded from the bargaining unit of pharmacists and interns because they were hired both to perform pharmaceutical work and to manage the pharmacy, including hiring, firing and disciplining pharmacy technicians who were not in the bargaining unit); Union Square Theatre Management, 326 NLRB 70 (1998) (technical directors whose primary duties involved physical craft and technical tasks, including repairs and maintenance, were supervisors because, at times, they hired temporary employees to perform repairs and maintenance, set their pay rates, and determined the workers' duration of employment, noting that these duties were a "significant, if irregular," part of the technical directors' duties).

While acknowledging the extensive supervisory authority FCC's department chairs exercise over adjunct faculty, the majority, nevertheless, concludes that this responsibility does not

make them "supervisors" under PERA, expressly rejecting the NLRB's analysis in Detroit College. The majority's basis for their conclusion is that because the adjunct faculty are not in the full-time faculty bargaining unit, no conflict of interest is created by including the department chairs in the bargaining unit with full-time faculty members.[14] In reaching their conclusion, the majority found persuasive the NLRB's language in Adelphi University, *supra*, "which," the majority states, "recognizes that the purpose for the exclusion of supervisors from a bargaining unit is to avoid a potential conflict of interest." Opinion at n. 11.

The majority, however, misunderstands the conflict of interest the NLRB was referring to in Adelphi. Specifically, the NLRB's language relied upon by the majority stated, "No danger of conflict of interest within the unit is presented, nor does the infrequent exercise of supervisory authority so ally such an employee with management as to create a more generalized conflict of interest of the type envisioned by Congress in adopting Section 2(11) of the Act." Adelphi, 195 NLRB at 644. As we have explained, the conflict of interest that Congress had envisioned in adopting the §2(11) supervisory exemption was the conflict that was created when supervisors, who are agents of the employer and are obliged to be loyal to their employer's interests, become obligated to the other side by inclusion in a bargaining unit with employees, and thus, may divide their loyalty between employer and employees. *See* H.R.Rep.No. 245, 80th Cong., 1st Sess. 16-17 (1947) and S.Rep.No.105, 80th Cong., 1st Sess. 5 (1947) quoted in *Beasley*, 416 U.S. at 659-660 and 662, respectively; Yeshiva University, *supra*, 444 U.S. at 687-688. Clearly, contrary to the majority's understanding, Congress's concern was not the potential conflict of interest that may arise within the bargaining unit between supervisors and other bargaining unit faculty, but rather the conflict that arises when management's agents become allied with the employee side in collective bargaining matters.

The supervision of adjunct faculty is of major importance to FCC because adjuncts, who comprise approximately 80% of FCC's faculty[15], contribute significantly to the college's mission of teaching and learning. Department chairs have the authority to hire, fire, evaluate, assign courses to and discipline adjunct faculty, and they have performed these essential supervisory functions directly using independent judgment and by effectively recommending such actions.[16] The fact that department chairs spend 60% of their time on non-teaching duties reflects the considerable importance of their supervisory duties to FCC.

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[14] This assumption is wrong. Given the department chairs' responsibility in assigning faculty to courses, recommending the cancelation of courses, investigating student complaints against faculty, reporting concerns with faculty performance, engagement, and teaching, and making effective recommendations to the dean regarding discipline and other action to be taken against full-time faculty members, inevitable conflicts of interest between department chairs and faculty members will arise if they are included in the same bargaining unit. For example, if faculty members grieve course assignment decisions made by the department chair or disciplinary actions that resulted from an investigation and recommendation of the department chair, which side is the department chair going to be on during each step of a negotiated grievance procedure?

[15] Dean McCombe-Waller testified that there are 56 full-time faculty under her direct supervision and "a couple of hundred" adjunct faculty.

[16] The record shows that department chairs also have authority to make or effectively recommend decisions relative to full-time faculty, including course/section assignments, canceling a course, awarding continuous contract status, and resolving complaints against faculty.

Accordingly, FCC's department chairs exercise many of the responsibilities enumerated in the definition of supervisory employee, and, as such, are supervisors under CCCBL and, therefore, should be excluded from the bargaining unit. Detroit College of Business, 296 NLRB 318 (1989) (department coordinators who hire and supervise adjunct faculty are supervisors); *See also*, C.W. Post Center of Long Island University, 189 NLRB 904 (1971) (department chairman who make effective recommendations as to the hiring and change of status of faculty members are supervisors and excluded from unit); Adelphi University, 195 NLRB 639, 641-642 (1972) (Department chairman with authority to effectively recommend the hire and reappointment (or non-reappointment) of all part-time faculty members are supervisors); Point Park College, 209 N.L.R.B. 1064 (1974) (department chairmen who evaluate instructors, recruit new faculty members, schedule classes, hold and preside over departmental meetings, and recommend renewal and nonrenewal of a contract found to be supervisors); Syracuse University, 204 N.L.R.B. 641, 642 (1973) (department chairmen who make effective recommendations as to hiring and change of status of faculty members and exercise substantial control over day-to-day operations of departments are supervisors); Berry School, 627 F.2d at 697-698) (department chairman who can effectively recommend important department policy possess supervisory authority); Trustees of Boston University, 281 N.L.R.B. 798 (1987) *aff'd* Boston University Chapter, American Association of University Professors v. NLRB, 835 F.2d 399 (1st Cir. 1987) (department chairs who review the performance of faculty and nonfaculty, schedule classes and administrative and clerical activities; hire, fire, discipline part-time faculty, clerical, technical, and administrative employees; direct department's teaching and scholarly activities, oversee expenditure of department budget and prepare next year's budget, are supervisors).

The majority rejects this longstanding NLRB precedent without the support of probative evidence or relevant case law, because they believe cases from four-year universities present "significantly different fact patterns than community colleges"[17] and thus find the NLRB precedent unpersuasive. Opinion at 6. To the contrary, the fact patterns relevant to determining the supervisory authority of FCC department chairs are actually quite similar to facts present at four-year colleges and universities. For example, both FCC and the four-year colleges/universities have: a mission to provide teaching and learning;[18] a hierarchy that includes department chairs above faculty; department chairs with supervisory duties and reduced teaching duties to allow for performance of supervisory and managerial activities; department chairs with supervisory authority over full-time faculty in a variety of matters; a significant presence of adjunct or part-time faculty; and department chairs with the supervisory authority over the adjunct/part-time faculty, including the authority to hire, discharge, discipline, and assign adjuncts, using independent judgment either directly or to effectively recommend such action. Detroit College of Business, *supra* ("department coordinators" with supervisory authority over adjunct faculty); *See also* University of Dubuque, 289 NLRB 349 (1988).

[17] In a footnote, the majority cites the testimony of Associate Vice President Carlson that "community college is different from four-year institutions." This quote is taken out of context. Her full statement was, "Well, community college is different from traditional four-year institutions, in that we have non-credit programming. I mean, some of them do, too, but that's a big part of our mission, to offer non-credit programming." Tr. at 9. This comment is of no probative value and clearly does not support the majority's rejection of longstanding NLRB caselaw applicable to higher education institutions.

[18] *See* FCC mission statement, https://frederick.edu/about-fcc.aspx.

As explained above, under the definition of "supervisor" approved by SHELRB and set forth in the NLRA, individuals are deemed to be supervisors and thus, excluded from the bargaining unit, if they possess at least one of the 12 responsibilities listed in the definition. They need not spend their full time or even a majority of their time performing supervisory functions.[19] The record evidence established that FCC's department chairs possess multiple supervisory responsibilities.

For all these reasons, the FCC department chairs are supervisors and should be excluded from the bargaining unit.

The Health Sciences Department Directors

FCC offers educational and clinical programs in Surgical Technology, Physical Therapist Assistant Education, and Respiratory Care. Each of these programs is accredited by the accrediting board for the respective health science discipline. The programs are overseen by four directors -- Surgical Technology has both a Director of Surgical Technology and Director of Clinical Education; Physical Therapist Assistant Education is headed by the Director of Physical Therapist Assistant Education; and Respiratory Care has a Director of Clinical Education. The program directors (Director of Surgical Technology and Director of Physical Therapist Assistant Education) have overall responsibility for their respective programs, and primarily oversee the academic portion of the program. The directors of clinical education are primarily responsible for the clinical part of the programming.

Directors are hired as "administrators," and sign an administrator contract, not a faculty contract. They work twelve months each year. While each director is expected to teach, they have a reduced teaching credit requirement of 18 credits/year compared to the 30 credits required of full-time faculty. The 12 reassigned credits, comprising 40% of their working time, is to enable them to perform their administrative responsibilities.

The Directors of Physical Therapist Assistant Education and of Surgical Technology Are Supervisory Employees.

The Director of Physical Therapist Assistant Education and the Director of Surgical Technology (collectively "Program Directors") are responsible for the overall administration and supervision of their respective programs, including ensuring the fulfillment of educational goals and objectives, maintaining program compliance with Middle States Standards, and maintaining full accreditation through the programs' accreditation boards. The program directors oversee the program, curricular, and budget development. Dean McCombe-Waller testified that these directors have ultimate responsibility over their programs.

The program directors have significant and extensive personnel management and supervisory authority over all full-time and part-time faculty in their program. They determine the number of faculty needed for the program, make teaching assignments, and decide faculty schedules. All academic staff, including full-time and part-time faculty, are observed and evaluated by the program directors who then provide the faculty feedback. Formal assessments of each

[19] PERA does not provide any threshold of time spent on teaching or other academic responsibilities to be deemed faculty or excluded from faculty bargaining units.

faculty member's teaching in accordance with contemporary practice and accreditation standards, are completed by the program directors and are used in determining whether to grant the faculty member continuous contract status or promotion. Program directors hire all adjunct faculty, and effectively recommend the hiring of full-time faculty, particularly the directors of clinical education. Accordingly, the program directors' supervision of faculty in their departments is of considerable importance to FCC and its mission.

We find that the Director of Physical Therapist Assistant Education and Director of Surgical Technology possess multiple indicia of supervisory responsibility. As such, these employees are supervisors under §16-701(j)(2) and should be excluded from the faculty bargaining unit.

The Directors of Clinical Education, Surgical Technology and Respiratory Are Not Supervisory Employees.

The Directors of Clinical Education ("Clinical Directors") oversee the clinical component of their program under the direction of the program director. The primary responsibility of the clinical directors is to ensure that the clinical portion of their respective program complies with the accreditation standards. This involves implementing and evaluating the clinical curriculum for students, faculty, and clinical community parties, including, among other things, identifying appropriate clinical sites and settings, and timing and exposure that students would need to meet the accreditation guidelines, securing clinical placements for students, assigning students to sites, and overseeing the clinical operations and experience for students. Together with the program director, the clinical directors decide the admission requirements, develop rubrics for admission, determine course composition within the confines of the accreditation standards, and the grades needed to pass the courses offered by the program.

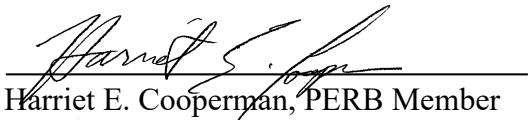
The clinical programs staff consist of adjunct faculty and clinical field experience staff ("CFES"). While the clinical directors have some supervisory responsibility over clinical faculty, their authority is limited. Clinical directors primarily train the clinical faculty to ensure they are aware of the accreditation standards and requirements, and instruct them how to properly assess students and provide feedback. Jessica Watson, Director of Clinical Education Surgical Technology, testified that she works with the clinical staff to create the best experience possible for the students and she plans and leads faculty meetings. She follows up on the weekly tasks of the CFES, and if tasks have not been completed, Ms. Watson asks them to do so. If their failure persists, she will talk to the program director and "we or she or, would decide if we're going to offer them a contract the next semester, but that's not a final decision that I would personally make." Ms. Watson has no role in the hiring of adjunct faculty other than informally being asked her opinion about a candidate by the program director. If a complaint is brought against a faculty member, Ms. Watson testified that she "would probably act as mediator and send it up the chain," namely to the program director and the Dean.

The record evidence failed to establish that the clinical directors meaningfully exercise any of the indicia of supervisory authority enumerated in the definition of supervisory employee. Accordingly, we find that the Director of Clinical Education, Surgical Technology and the Director of Clinical Education, Respiratory Therapy are not supervisory employees, and, as such, are properly included in the faculty bargaining unit at FCC.

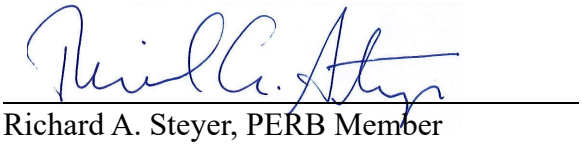
* * *

For all of the reasons stated, we would find that the supervisory exemption in §16-701(j)(2) of the CCCBL applies to Department Heads, Department Chairs, Directors, and any individual with academic responsibilities if they exercise supervisory authority as defined herein, that managerial employees are excluded from faculty bargaining units, and further, that the Department Chairs, Director of Surgical Technology, and Director of Physical Therapist Assistant Education are supervisory employees and should be excluded from the faculty bargaining unit at FCC.

Because the majority has refused to acknowledge the applicability of the managerial exclusion to community colleges, we make no determination of the managerial status of the FCC department chairs, program directors, or clinical directors. If the managerial exclusion is judicially applied to community colleges under the principles of Yeshiva, Pacific Lutheran, and their progeny, the record should be reopened to receive additional evidence and testimony as to whether the employees at issue are managerial.



Harriet E. Cooperman, PERB Member



Richard A. Steyer, PERB Member