

**State of Maryland  
Public Employee Relations Board**

Maryland State Education Association/ Wor-Wic Community College Faculty Association	* * * * * *	PERB UC 2024-04
v.	*	
Wor-Wic Community College	*	
* * * * *	* * * * *	

**DECISION AND ORDER**

**PROCEDURAL AND FACTUAL BACKGROUND**

On October 10, 2023, the Maryland State Education Association (“MSEA”) filed with the Public Employee Relations Board (“PERB”) a certification petition with a majority showing of interest to represent full-time faculty at Wor-Wic Community College (“WWCC”). On October 27, 2023, PERB issued a Certification of Representative, defining the bargaining unit as:

All eligible **Full Time Faculty** employees, as described in the Federal Fair Labor Standards Act, and defined in Maryland State Education Article § 16-701(j)(1), employed by Wor-Wic Community College, excluding managerial employees, supervisors, confidential employees, as defined in Maryland State Education Article § 16-701(j)(2).

In the process of certification, WWCC excluded all department head positions from the full-time faculty unit. As a result, on December 18, 2023, MSEA filed with PERB a Clarification/Contest of Unit Designation Petition (“Petition”)<sup>1</sup> to exclude department heads from the full-time faculty bargaining unit at WWCC.<sup>2</sup> In its Petition, MSEA asserts that,

Per § 16-701 of the Education Article, ‘faculty’ is defined as ‘employees whose assignments involve academic responsibilities, including teachers and **department**

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<sup>1</sup> The unit clarification petition was filed pursuant to Md. Code Ann., State Gov’t § 22-403(a) of the Public Employee Relations Act (“PERA”), which grants to PERB the authority to “determine the appropriateness of each bargaining unit.”

<sup>2</sup> The specific positions MSEA sought to exclude were department heads of the following: Physical Therapist Assistant Program, Human Services Department, Business and Hospitality Department, Mathematics and Science Department, Nursing Arts & Humanities Department, Applied Technologies Department, Radiologic Technology Department, Occupational Therapy Assistant Program, and Emergency Medical Services Department.

**heads.**” (Emphasis added). While presently there is no definition of a ‘supervisory employee’ [under PERA], the intent of the General Assembly was to *include* department heads as faculty based upon the unequivocal, plain language of the law.

On January 15, 2024, WWCC submitted its response to MSEA’s Petition. In its response, WWCC contends that department heads are appropriately excluded from the full-time faculty bargaining unit.

Although a hearing was scheduled in March 2024, PERB postponed the hearing in light of its forthcoming decision involving the inclusion of department chairs in the full-time faculty bargaining unit at Frederick Community College. While there was a preliminary decision issued to include department chairs as part of the bargaining unit, the full decision was not issued by PERB until June 12, 2024. Because it was not dispositive of the dispute between the parties in the instant matter, an evidentiary hearing was conducted before PERB on August 16, 2024. At the hearing, testimony was provided by Charles Porter, Arts & Humanities Department Head and Associate Professor, Karie Solembrino, Dean of Health Professions, and Karen Berkheimer, Associate Vice President for Human Resources. Mr. Porter was the only department head to testify.

The issue before PERB is whether department heads are supervisory employees within the meaning of § 16-701(j) of the Education Article and therefore should be excluded from the bargaining unit representing full time faculty at WWCC certified by PERB on October 27, 2023.

## ANALYSIS

### *Pertinent Provisions of the Education Article*

In enacting the Public Employee Relations Act (PERA), the General Assembly established a statutory framework for determining whether certain employees, including department heads, should be included in faculty bargaining units. The relevant provision, Md. Code Ann., Educ. Art. § 16-701(j), states:

- (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.

Thus, the statute explicitly includes department heads as faculty but excludes "supervisory employees," creating the need for a clear standard to determine whether, in any particular case, a department head falls into the latter category.

### *Statutory Interpretation*

The Maryland Court of Appeals<sup>3</sup> has consistently emphasized that statutory interpretation begins with the plain language of the statute. In Kushell v. DNR, the Court explained:

The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature... Statutory construction begins with the plain language of the statute, and ordinary, popular understanding of the English language dictates interpretation of its terminology.

385 Md. 563, 576-77 (2005)(quoting Collins v. State, 383 Md. 684, 688 (2004)).

Furthermore, a statute must be interpreted as a whole, ensuring that all provisions are harmonized. Courts do not read statutory language in isolation but consider how each provision fits within the broader statutory scheme. Deville v. State, 383 Md. 217, 223 (2004); Navarro-Monzo v. Washington Adventist, 380 Md. 195, 204 (2004).

When statutory language is clear and unambiguous, courts will not look beyond the text. Smack v. Dep't of Health, 378 Md. 298, 304 (2003). However, if further clarification is needed, legislative history may be consulted to confirm legislative intent. Mayor & City Council of Baltimore v. Chase, 360 Md. 121, 131 (2000).

Here, the legislative history of § 16-701(j) supports the conclusion that the General Assembly intended for department heads with academic responsibilities to be part of the full-time faculty bargaining unit. The General Assembly's stated purpose in extending collective bargaining rights to the community college system was to:

promote harmonious and cooperative relationships with the public employees of the community college system by encouraging collective bargaining practices, protecting the rights of public employees to associate, organize, and vote for their own exclusive representatives, and recognize the dignity of labor for all employees of the community college system.

Md. Code Ann., Educ. Art. § 16-702(a)(1). Given this purpose, we find that the inclusion of department heads with academic responsibilities in faculty bargaining units is presumptively appropriate. However, because § 16-702(j)(2) excludes "supervisors" from faculty bargaining units, we must consider whether, in any particular case, a department head with academic responsibilities functions as a supervisor such that they are to be excluded from the bargaining unit under the law.

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<sup>3</sup> The Court of Appeals is now the Supreme Court of Maryland.

## ***Presumption of Inclusion and Burden of Proof***

Presumptions are widely used in legal proceedings to simplify decision-making processes by providing a logical framework for the proceedings. Presumptions occur in many contexts under Maryland labor laws.<sup>4</sup> Further, presumptions are widely used in National Labor Relations Board (NLRB) proceedings and have been approved by courts.<sup>5</sup>

Looking to the NLRB for guidance, we find persuasive the principle that unit configurations established under the National Labor Relations Act (NLRA) are presumptively appropriate, with the burden on the contesting party to prove otherwise. *See American Steel Construction, Inc.*, 372 NLRB No. 23 (2022).

In *American Steel*, the NLRB emphasized that unit determinations must focus on whether employees share a substantial mutual interest in wages, hours, and other conditions of employment, ensuring cohesion necessary for effective collective bargaining. It stated:

In elaborating on what renders a unit appropriate ‘for the purposes of collective bargaining,’ the Supreme Court has explained:

[T]he Board regards as its primary concern in resolving unit issues ‘to group together only employees who have substantial mutual interests in wages, hours, and other conditions of employment’.... Such mutuality of interest serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a functionally distinct minority group of employees from being submerged in an overly large unit.

372 NLRB No. 23 (2022) at 2. The NLRB further underscored that:

A cohesive unit—one relatively free of conflict of interest—serves the Act’s purpose of effective collective bargaining.” (cite omitted). If the petitioned-for employees have a sufficient mutuality of interests, then the unit is, absent countervailing considerations, appropriate for collective bargaining.

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<sup>4</sup> *See*, for example, COMAR 9.32.01.18 (presumption of employee status in unemployment compensation proceedings); Md. Code Ann., Labor and Employment § 3.903.1(c)(1)(presumption that employer-employee relationship exists in workplace fraud proceedings); and Md. Code Ann., Labor and Employment § 9-503 and -702 (various presumptions in worker compensation proceedings).

<sup>5</sup> *See*, for example, *Republic Aviation v. NLRB*, 324 US 804-805 (1944)(prohibiting solicitation on break time on company property presumed to be unreasonable impediment to self-organization); *Lee Lumber v. NLRB*, 117 F. 3d 1454 (DC Cir. 1997)(finding a presumption of causal nexus between employer’s unlawful refusal to bargain and union’s loss of majority); *Stericycle, Inc.*, 372 NLRB No. 113 (2023)(holding that a work rule that has a reasonable tendency to chill employees from exercising their rights is presumptively unlawful).

*Id.*

### ***Statutory Framework***

Department heads—who share academic responsibilities, employment conditions, and professional concerns with faculty—demonstrate the requisite mutuality of interest for inclusion in the bargaining unit. This cohesion is consistent with the General Assembly’s express inclusion of department heads in the statutory definition of "faculty" under Md. Code Ann., Educ. Art. § 16-701(j).

Accordingly, we adopt a presumption that department heads with academic responsibilities are included in the faculty bargaining unit, and the burden falls on the contesting party to rebut this presumption with persuasive evidence that department heads function as “supervisory employees.”<sup>6</sup>

Under our prior statute, supervisory status was determined by assessing whether a position exercised various types of authority on a full-time and exclusive basis. The current statute, however, eliminated the supervisory definition, but included in the definition of faculty department heads “whose assignments involve academic responsibilities”.

We recognize that the definition of faculty excludes supervisors. With the General Assembly’s removal of the supervisory definition in enacting PERA, we look to the NLRB for guidance. Section 2(11) of the NLRA defines a “supervisor” as:

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

29 US.C § 152(11).

The NLRB interprets "independent judgment" as the ability to act or effectively recommend action without being controlled by detailed policies, rules, or direct instructions from higher management. Oakwood Healthcare, Inc., 348 NLRB 686, 693 (2006). To establish authority to “effectively recommend” an action, there must be evidence that the recommendation is made using independent judgment and is not subject to further investigation by superiors.

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<sup>6</sup> Contrary to our dissenting colleagues’ assertion, we are not creating a new evidentiary standard. To rebut the presumption that department heads are included in the unit, the contesting party must establish by a preponderance of the evidence that the department heads are supervisors.

Tree-Free, 328 NLRB 389, 391-392 (1999); Children’s Farm Home, 324 NLRB 61 (1997); Direct TV, 357 NLRB 1747 (2011).

To rebut the presumption that department heads are part of the faculty unit, the contesting party must present substantial specific and current evidence showing that higher management has given department heads explicit authority to make effective recommendations using independent judgment. and that department heads regularly exercise that authority. Generalized or vague testimony is insufficient, and sporadic, occasional, or isolated instances do not meet the burden of proof needed to rebut the presumption.

While we rely on the NLRB for guidance on supervisory criteria, our approach differs in one key respect: we begin with the presumption that department heads are included in faculty bargaining units.<sup>7</sup> Thus, we are not adopting NLRB law regarding supervisory status in its entirety: we largely adopt the NLRB definition of supervisor, but will review the evidence of supervisory indicia in each case, consistent with the legislative intent.

The fatal flaw in our dissenting colleagues’ analysis is that they attach no significance whatsoever to the Legislature’s intentional inclusion of department heads in the faculty bargaining unit. It is axiomatic, as stated above, that the “cardinal rule” of statutory interpretation is “to ascertain and effectuate the General Assembly’s purpose and intent when it enacted the statute” and that Maryland courts’ determination of legislative intent “begin[s] with the plain language of the statute.” By ignoring the plain language of the unit description, our colleagues nullify the legislative intent and sweep all department heads out of the unit. Despite our dissenting colleagues’ assertion that they would include department heads who are not supervisors in faculty units, it is quite telling that in this case, as well as in AFT v. Frederick County Community College, PERB EL 2024-02 (2024), they have concluded that all department heads are supervisors. Simply put, our dissenting colleagues would reach the exact same result if the Legislature had not explicitly included department heads in faculty units.

### ***Application of Framework***

Applying this framework to the evidence in the record, we find that WWCC did not meet its burden of rebutting the presumption with persuasive evidence that department heads at WWCC are supervisors who should be included in the faculty unit. In this regard, we note that WWCC did not present any current department heads as witnesses; the only department head who testified was Charles Porter, whose testimony supports the finding that department heads do not meet the legal definition of “supervisory employees” under PERA. Further, the record is replete with testimony that the duties of department heads are proscribed by numerous detailed

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<sup>7</sup>In this regard, we find, for the reasons stated in American Federation of Teachers and Frederick County Community College, PERB EL 2024-02 (2024), that PERA permits us to include department heads in faculty units when their exercise of supervisory authority is limited to non-bargaining unit employees, including part-time adjunct faculty.

written policies and rubrics<sup>8</sup> and that their recommendations are closely reviewed by higher management, who have the authority to modify or reject them. On this record, the evidence fails to establish that department heads exercise independent supervisory authority over full-time faculty. In short, WWCC did not meet its burden of rebutting the presumption of inclusion of department heads in the faculty bargaining unit.

As indicated above, PERA establishes that "faculty" includes department heads but excludes "supervisory employees." The NLRB's standard defines a supervisor as an individual who exercises independent judgment in making employment decisions such as hiring, firing, discipline, promotions, and work assignments. Under 29 U.S.C § 152(11), a department head is only a supervisor if they have the authority to effectively recommend employment actions without further review. Testimony from Mr. Porter and others at WWCC demonstrates that department heads do not satisfy these criteria. Instead, their interests align more closely with faculty members, and their numerous administrative duties do not require them to use independent judgment or exercise supervisory authority.

*Charles Porter uses his role as Department Head to advocate for faculty within his department.*

Charles Porter, Arts & Humanities Department Head, was the only department head who testified. He has been on the WWCC faculty since 2006 and served as the department head for eighteen months immediately prior to the hearing in this matter.<sup>9</sup> The Arts & Humanities Department is the largest department at WWCC, with 13 full-time faculty members. Mr. Porter indicated that he considers his role as a department head as serving as an advocate in support of the faculty in his department and as a liaison between the department members and upper management. He considers his interests being aligned with the faculty members, and not with management. When he became the Department Head, he understood that it was a faculty position with "administrative responsibilities." As Department Head of the Arts & Humanities Department, Mr. Porter continues to teach classes, albeit on a reduced schedule according to an established formula. He is paid on the faculty scale, with an annual stipend of \$2600 that department heads began receiving in July 2023.<sup>10</sup>

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<sup>8</sup> None of the rubrics, although referred to by various witnesses, were admitted into evidence.

<sup>9</sup> Our dissenting colleagues minimize the value of Mr. Porter's testimony, disregarding his lengthy tenure in the department. Instead, they rely primarily on Ms. Solebrino who has not been a department head since mid-2019.

<sup>10</sup> While our dissenting colleagues assert that department heads' compensation is different from full-time faculty, we understand the evidence as establishing the same pay scale attaches to all faculty, including department heads. When Mr. Porter was considering applying to become a department head, he asked about the pay. Ms. Berkheimer told him it's a faculty position on the faculty scale.

Mr. Porter views his role as being the “interface for the department” and as a “champion” for the needs of the faculty in his department. He testified to *not* being authorized to: a) hire full-time faculty, nor to even recommend a specific candidate; b) effect salary changes, though he may offer suggestions in this regard; c) resolve employee grievances, just informally try to resolve disputes; d) terminate a full-time faculty member, but may send a memorandum documenting problems. Indeed, the only unilateral authority Mr. Porter has vis-à-vis full-time faculty is to sign their time sheets and approve leave requests.

When he observes faculty members in his department teach classes, Mr. Porter uses the experience as a tool for helping faculty to improve their skills. When he chairs a search committee, a task shared by faculty who are not department heads, he has no greater authority than any other member of the search committee.

### ***No Independent Authority in Hiring or Firing***

The hiring process at WWCC confirms that department heads do not exercise independent authority in selecting new faculty. Mr. Porter, like other department heads, chairs search committees where all members have equal input; he noted that some search committees are chaired by faculty who are not department heads. The hiring process is governed by pre-determined policies that require all applications to be ranked by a system called “Neogov.” It weighs criteria such as the candidate’s experience, credentials, and teaching background. The search committee cannot deviate from the Neogov-ranked order of candidates, eliminating any meaningful discretion on the part of the department head.

Further, all hiring decisions are ultimately made by the dean and vice president of academic affairs. When Mr. Porter attempted to deviate from the ranked list, he was explicitly told that deviation was not permitted unless there was a compelling reason. The hiring process is facilitated by human resources, and final approvals rest solely with senior administration. ,

While department heads have a role in hiring adjunct faculty, the PERB has previously held that the exercise of supervisory authority over non-unit employees does not remove an individual from a faculty bargaining unit. American Federation of Teachers v. Frederick Community College, PERB EL 2024-02 (2024).<sup>11</sup> Additionally, hiring authority for adjunct faculty is sometimes delegated to other full-time faculty members, further demonstrating that it is not an exclusive or meaningful exercise of independent judgment by department heads.

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<sup>11</sup> The dissent recites instances of supervisory authority department heads exercise over adjunct faculty and other non-bargaining unit employees. However, based on the rule set forth in American Federation of Teachers v. Frederick Community College, *supra*, none of that evidence is relevant here. Further, WWCC and the dissent, in listing supervisory responsibilities department heads exercise, fail to distinguish between the role they play vis-à-vis full-time versus part-time adjunct faculty, a fatal flaw in their analysis.



### ***No Independent Authority in Discipline or Termination***

Department heads at WWCC do not have independent authority to discipline or terminate full-time faculty members, given the prescribed procedures and multiple layers of administrative oversight. Testimony confirmed that the disciplinary process is guided by human resources; the dean, vice president, and president are responsible for making final determinations.

The department heads' role in disciplinary matters is limited to documentation—they may draft a memo detailing performance concerns, but any action beyond that requires intervention from senior administrators. Formal discipline must be reviewed by human resources and approved by the dean and vice president of academic affairs to ensure due process and compliance with institutional policies. Ms. Berkheimer, Associate Vice President for Human Resources, testified that human resources reviews documentation and guides the disciplinary process, underscoring that department heads do not have independent disciplinary authority.

When an issue arises about the quality of service of a full-time faculty-member, the department head is directed to alert the appropriate dean, who then observes the individual and works with the department head and that faculty member to improve the performance. If the improvement is inadequate, the department head is to submit a “non re-appointment” recommendation to the dean. Even in this instance, the recommendation is considered and renewed by the dean, and an academic Vice President, with the final decision resting solely with the president. Notably, there is no evidence of any department head having the final authority to dismiss a full-time faculty member. Given that the ability to “effectively recommend” termination must be accompanied by independent judgment, the lack of binding authority in these matters confirms that department heads are not supervisors. Mr. Porter testified about an instance when he identified a performance issue and reported it to his dean who advised him to document the concern. The only example of a department head disciplining a clinical coordinator was offered by Ms. Solebrino, who described one instance from about 15-16 years prior which we find to be too remote in time to be persuasive.

### ***No Independent Authority in Performance Evaluations or Salary Determination***

Department heads play a purely administrative and advisory role in performance evaluations and promotions, with no ability to independently determine outcomes. Evaluations of full-time faculty at WWCC are self-initiated and follow a standardized process that applies equally to faculty and department heads. The evaluation cycle is dictated by policy, with observations and reviews required at pre-determined intervals. The department heads review the evaluations for accuracy and include a recommendation about whether the faculty member should be promoted and/or re-appointed. After the department head completes their review, they submit the paperwork to the appropriate Dean who also reviews and makes a recommendation.

The paperwork is then submitted to the Vice-President for Academic Affairs, and then to the President for a final decision. At each step of this process, the reviewing official has the ability to disagree and stop the promotion or re-appointment.

Performance concerns are primarily identified through student evaluations, and the department head merely summarizes these findings and forwards them to the dean. The role of the department head does not reveal the exercise of independent judgment, and the department head's recommendations do not determine final outcomes.

Similarly, salary increases follow an electronic system that determines pay adjustments based on pre-set criteria. Department heads do not control salary decisions, and their input is merely part of the documentation process. The final decision for reappointment and salary increases is made by the president, reinforcing that department heads lack effective recommendation authority.

### ***Governance Structure and Faculty Alignment***

WWCC's governance structure aligns department heads with faculty, not administration. Department heads are part of the Faculty Council, while deans and directors—who are actual supervisors—participate in separate councils such as the Planning Council and Administrative Council. The College Council, a shared governance body, includes representatives from faculty, staff, and administration but maintains clear distinctions between faculty and supervisory roles.

Mr. Porter's testimony further supports the conclusion that department heads function as faculty members, not supervisors. He described his role as facilitating and supporting his colleagues, rather than exercising authority over them. Additionally, newly-created job descriptions confirm that department heads spend between 33-70% of their time teaching, consistent with faculty expectations.

### **CONCLUSIONS OF LAW**

We find that the department heads are not supervisors under PERA, and therefore, shall be included in the bargaining unit representing full time faculty at WWCC. Applying the framework described above, the evidence:

- failed to establish that department heads exercise independent judgment in hiring, firing, discipline, evaluations, or salary determinations of other full-time faculty;
- failed to establish the role of Department heads in faculty evaluations is binding, as final employment decisions rest with senior administration.

- established that the primary function of department heads remains teaching, and they share a common interest with faculty rather than management.

The contesting party, WWCC, has failed to provide sufficient, specific, and current evidence to rebut the presumption that department heads are part of the full-time faculty. Given this, department heads shall remain part of the faculty bargaining unit.

**ORDER**

IT IS HEREBY ORDERED THAT:

1. The department heads at Wor-Wic Community College are included in the faculty bargaining unit represented by MSEA/WWCEA.
2. The College shall recognize the department heads as members of the bargaining unit and engage in collective bargaining over terms and conditions of employment, as required under Maryland law.
3. Any further disputes regarding the status of department heads in the bargaining unit shall be resolved in accordance with the applicable statutory framework under PERA.

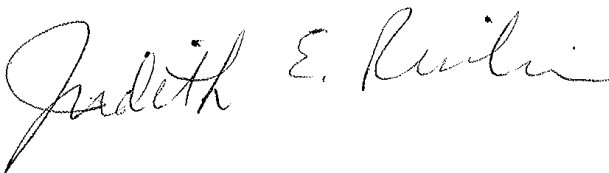
**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**



Lafe E. Solomon, Chair



Lynn A. Ohman, Member



Judith E. Rivlin, Member

**ANNAPOLIS, MD  
March 28, 2025**

## APPEAL RIGHTS

Any party aggrieved by this action of the PERB may seek judicial review in accordance with Title 10, Subtitle 2 of the State Government Article, Annotated Code of Maryland, Sec. 10-222 (Administrative Procedure Act-Contested Cases) and Maryland Rules CIR CT Rule 7-201 et seq. (Judicial Review of Administrative Agency Decisions).

### **OPINION OF MEMBERS COOPERMAN AND STEYER CONCURRING IN PART AND DISSENTING IN PART**

In 2021, the Maryland General Assembly enacted the Community College Collective Bargaining law (“CCCBL”), which granted certain public employees of Maryland’s community colleges the right to engage in collective bargaining with their college employer through a labor organization of their choosing. The law establishes four bargaining units at each college, including a full-time faculty unit. Section 16-701(j) defines “Faculty” as “employees whose assignments involve academic responsibilities, including teachers and department heads,” but expressly excludes “supervisory employees.” Although the original statute defined “supervisory employee,” the definition was removed and not replaced in the 2023 amendments to law.

The statutory language referencing “department heads” in the definition of faculty but excluding “supervisory employees,” together with the lack of a statutory definition of “supervisory employee,” has created a quandary for community colleges, employees, and the unions that seek to represent faculty bargaining units. As such, for the second time in the law’s brief existence, PERB has been called upon to address whether department heads with supervisory authority are to be included in the faculty bargaining unit.

In *American Federation of Teachers and Frederick County Community College*, PERB EL 2024-02 (2024) (“*FCC*”), a majority of the Board concluded that because the definition of “faculty” expressly includes “department heads,” the department chairs at Frederick Community College were to be included in the faculty bargaining unit *regardless* of whether they possess supervisory responsibilities. We dissented, explaining that under both Maryland’s established rules of statutory construction and the well-developed law under the National Labor Relations Act (“NLRA”), after which the Public Employee Relations Act (“PERA”) was modeled (§22-102(c)) and which may be considered persuasive authority (§22-103), department heads who possess supervisory responsibility must be excluded from the faculty bargaining unit. *FCC* at 13-18 (Cooperman and Steyer dissenting). In today’s decision, the Board’s majority partially overrules its holding in *FCC*, by adopting the statutory interpretation in our dissent and concluding that department chairs who have supervisory responsibilities cannot be included in the faculty bargaining unit. We agree. The majority, however, goes on to create a fictitious legal presumption that because department heads are referenced in the definition of “faculty”, department heads are presumptively in the faculty unit unless the college overcomes the presumption by presenting “persuasive” evidence that department heads function as supervisory employees. Opinion at 5 (emphasis added). Because this presumption conflicts with established Maryland and federal law, we must respectfully dissent.

While there is absolutely no legal basis for the majority’s creation of a presumption,<sup>12</sup> if the sole purpose of the presumption were simply to establish that a bargaining unit of full-time faculty and non-supervisory department heads is appropriate, then use of a presumption would be much ado about nothing.<sup>13</sup> The statute is clear that non-supervisory department heads are included in the full-time faculty unit and department heads who are supervisors are excluded from the faculty unit. The majority, however, does not stop there. Rather, as we explain herein, the majority uses their fabricated presumption to impose what amounts to a heightened burden of proof on the College to establish that departments heads are supervisors before they can be excluded from the unit. By using this heightened burden, the majority has exceeded its authority by going well beyond statutory interpretation and infringing on the province of the General Assembly to determine the applicable burden of proof in Maryland administrative proceedings, including proceedings before PERB under PERA.

### **Burden of Proof in Civil and Administrative Proceedings**

The Maryland Supreme Court has recognized that “[t]he most widely applied measure of the ultimate burden of persuasion in civil cases is by a preponderance of the evidence, and generally that standard also is applicable in administrative proceedings.” *Coleman v. Anne Arundel County Police Dept.*, 369 Md. 108, 134 (2002). The United States Supreme Court has likewise explained that “[t]he usual standard of proof in civil litigation is preponderance of the evidence. A more demanding standard applies only when a statute or the Constitution requires a heightened standard or in certain other rare cases, such as ‘when the government seeks to take unusual coercive action ... against an individual,’” such as taking away a person’s citizenship. *E.M.D. Sales, Inc. v. Carrera*, \_\_\_ U.S. \_\_\_, No. 23-217 at 3 and 7 (January 15, 2025) (citations omitted) (holding that the preponderance of evidence standard governs when an employer seeks to prove that an employee is exempt under the Fair Labor Standards Act). Absent these factors, “the Court has not otherwise used a heightened standard in civil matters.” *Id.* at 7.

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<sup>12</sup> The majority appears to justify both its presumption that department heads are in the faculty unit and its heightened evidence standard of proof by referencing the rigorous definition of “supervisory employee” that was in the predecessor statute and then stating that “[t]he current statute, however, eliminated the supervisory definition but included in the definition of faculty department heads ‘whose assignments involve academic responsibilities.’” Opinion at 5 (emphasis added). The majority suggests that the definition of “supervisory employee” in the prior law was removed in exchange for new language in the definition of “faculty” to support their creation of the presumption. In fact, the 2023 amendments to CCCBL did not change the definition of “faculty”. The definition of “faculty” under the CCCBL as first enacted in 2021 contained the identical language that appears in the current law’s definition, *Compare* Education Article, §16-701(j) (2015 Replacement Volume and 2022 Supplement) to Education Article, §16-701(j) (2023) (emphasis added).

<sup>13</sup> To support their creation of a presumption that department heads are in the faculty unit, the majority cites National Labor Relations Board (“NLRB”) decisions finding that various unit configurations are presumptively appropriate where the employees share a community of interest, and the unit is relatively free of conflict of interest. In such cases the burden is on the contesting party to prove that the unit is not appropriate. Opinion at 4. These cases are irrelevant to the issues here. This unit clarification case does not concern whether the inclusion of department heads in the faculty bargaining unit is appropriate. Indeed, by their creation of a full-time faculty bargaining unit in the CCCBL, which includes department heads in the statute’s definition of “faculty,” the General Assembly has determined that the inclusion of non-supervisory department heads in the faculty unit is appropriate. Rather, this case concerns the standard of proof to be applied to determine whether a department head is a supervisor and thus, excluded from the faculty bargaining unit. The majority cites no case, and we are not aware of any case, in which the NLRB has held that a particular job classification is *presumed* not to be a supervisor.

The Administrative Procedure Act (“APA”), State Government Article, §§10-201 et seq., “applies to all Maryland state administrative agencies not specifically exempted and provides a standard framework of fair and appropriate procedures for agencies that are responsible for both administration and adjudication of their respective statutes.” *Bragunier Masonry Contractors v. Md. Comm’r of Labor & Indus.*, 111 Md.App. 698, 705 (1996). In 1993, the Maryland General Assembly amended the APA to establish preponderance of the evidence as the generally applicable standard of proof to be used by covered state administrative agencies in contested hearings. *Coleman*, 369 Md. at 136, citing the APA, Md. Code (1984, 1993 Repl.Vol., 1995 Supp.), State Government Art., §§ 10–101–10–305. Recognizing the significance of the legislature’s adoption of the preponderance of evidence standard to contested administrative agency cases, the Maryland Supreme Court in *Coleman*, overruled its 1986 decision in *Everett v. Balt. Gas & Elec. Co.*, 307 Md. 286 (1986), which required the standard of clear and convincing evidence to prove allegations of fraud in civil proceedings. The Court explained that “[a]t the time *Everett* was decided, the contours of general state administrative law principles in Maryland were materially different than now. The Court then did not have the benefit of a broad public policy pronouncement by the State legislature that expressed a particular standard of proof requirement relative to contested administrative cases.” 369 Md. at 135-136.

Section 10-217 of the APA provides that “The standard of proof in a contested case shall be the preponderance of evidence unless the standard of clear and convincing evidence is imposed on the agency by regulation, statute, or constitution.” As an executive branch agency subject to the APA, PERB must fully comply with the APA’s procedural framework, including applying the preponderance evidence standard of proof when deciding contested cases. PERB’s own regulations expressly provide that the standard of proof applicable to all contested cases that come before PERB under the statutes it administers and enforces is preponderance of the evidence. *See* COMAR 14.30.08.21.<sup>14</sup>

“To prove by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.” *See Coleman*, 369 Md. at 126 n. 16. *See also Wagner v. Pierce*, 2025 WL 3983256 (2024); *Mathis v. Hargrove*, 166 Md.App. 286 (2005); *SEOLA v. Maryland Comptroller*, SLRB ULP Case No. UC 2016-02 (2019) (ALJD p. 7-8) citing *Coleman*.

Although in a footnote the majority states that they recognize that the burden the College must meet is preponderance of the evidence, in reality they do not apply this standard. Rather than determining whether the College has met its burden of proving that it is more likely than not that WWCC’s department heads are supervisors when all of the evidence is considered, the majority

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<sup>14</sup> The majority’s assertion that “[p]resumptions occur in many contexts under Maryland labor laws,” Opinion at 4, as support for its creation of a presumption that department heads are in the faculty unit under the CCCBL is completely misplaced. Each of the presumptions and concomitant burdens of proof cited by the majority at fn. 4, is expressly created by either state statute, *see* Md. Code Ann., Labor and Employment § 9-503 and -702 (worker compensation proceedings) and Md. Code Ann., Labor and Employment § 3.903.1(c)(1)(presumption that employer-employee relationship exists in workplace fraud proceedings), or regulation, COMAR 9.32.01.18 (presumption of employee status in unemployment compensation proceedings), as the APA requires. Neither the CCCBL nor PERA create any presumptions or heightened standard of proof in determining the supervisory status of department heads.

repeatedly rejects the weight of the probative evidence, which establishes supervisory authority, on the basis that this evidence does not rebut the presumption, thus applying a heightened standard of proof. The majority's application of the presumption and heightened burden directly contravenes PERB's obligation under the APA.

### **Standard for Determining Supervisory Status**

In the absence of a statutory definition of "supervisory employee" it is essential that PERB establish a definition to be applied in determining whether an employee is a supervisor under the CCCBL. In today's opinion, the majority adopts and applies the NLRA's definition of "supervisor" as set forth in §2(11) of that Act. We concur. The adoption of the NLRB definition is consistent with PERA's statutory directive that "[d]ecisions of the federal National Labor Relations Board may be afforded persuasive weight in any interpretation of this title." As we stated in *FCC*, the NLRA's definition had been adopted and applied by our predecessor State Higher Education Labor Relations Board in determining supervisory status of employees of Maryland's public colleges and universities. See *FCC* at 21 (Cooperman and Steyer dissenting), citing *Fraternal Order of Police Lodge 82 v. University of Maryland at Baltimore County*, SHELRB Opinion No. 22 (2006) ("UMBC"); *Bowie State University v. Maryland Classified Employees Association, Inc.*, SHELRB Opinion No. 13 (2002). The NLRA definition also has been widely implemented by Maryland counties and other jurisdictions in their respective public sector collective bargaining laws, including statutes applicable to community college faculty. *FCC* at 21-22 (citations omitted).

Section 2(11) of the NLRA defines a "supervisor" as:

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

29 U.S.C. § 152(11). "[I]n order for supervisory status to exist, the authority to perform at least one, but not necessarily all of the enumerated [supervisory] functions, is necessary." *Berry Schools v. NLRB*, 627 F.2d 692, 697 (5th Cir. 1980).

A party asserting that an employee is a supervisor must prove by a preponderance of the evidence that the employee (1) holds authority to engage in any one of 12 enumerated supervisory functions; (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. See *NLRB v. Kentucky River Community Care, Inc.* 532 U.S. 706, 710-713 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692, 687 (2006). 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.

In *Oakwood Healthcare*, the NLRB addressed what is meant by "independent judgment." "[I]n 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.” 348 NLRB at 692. *See also, UMBC* at 5. The “judgment must involve a degree of discretion that rises above the ‘routine or clerical,’” and lies somewhere between “situations where there are detailed instructions for the actor to follow [and] . . . situations where the actor is wholly free from constraints.” 348 NLRB at 693. The NLRB addressed the effect that an employer’s policies and procedures may have on the determination of whether the individual exercises independent judgment, explaining:

[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instruction of a higher authority, or in the provisions of a collective bargaining agreement. Thus, for example, a decision to staff a shift with a certain number of nurses would not involve independent judgment if it is determined by a fixed nurse-to-patient ratio. Similarly, if a collective-bargaining agreement required that only seniority be followed in making an assignment, that act of assignment would not be supervisory.

On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices. Thus, a registered nurse, when exercising his/her authority to recommend a person for hire, may be called upon to assess the applicants’ experience, ability, attitude, and character references, among other factors. If so, the nurse’s hiring recommendations likely involve the exercise of independent judgment.

*Id.* at 693.

The majority states that while they are relying on NLRB law regarding supervisory status, they are not adopting the NLRB law in its entirety due to their presumption. They aver that they “will review the evidence of supervisory indicia in each case, consistent with legislative intent.” Thus, the majority rejects NLRB precedent dealing with core functions of supervisory authority and disregards detailed and credible testimony supported by exhibits with specific examples proving supervisory status under a preponderance of the evidence standard, because it does not meet the burden that they have created of rebutting the presumption.

The majority asserts that we attach no significance to legislative intent and ignore the plain language of the unit description so as to “nullify the legislative intent and sweep all department heads out of the unit.” The majority mischaracterizes our opinion and analysis. Critically, the legislative intent equally reflects that department heads are in the unit and supervisors are not. To determine supervisory status, PERB is obliged to consider the evidence on a case by case basis. If the preponderance of the evidence establishes that all of a college’s department heads possess supervisory authority, then consistent with the statutory language and legislative intent, they must be excluded from the unit. Both here and in *FCC*, we interpreted the statute and applied the evidence presented. Indeed, contrary to the majority’s representation, in *FCC* we concluded that the some of the directors were not supervisors. *FCC* at 29 (Cooperman and Steyer dissenting). By comparison, the majority both in this case and *FCC* found that none of the department heads at those colleges were supervisors, even employees with job titles other than “department heads”, despite their demonstrated supervisory responsibilities. This includes individuals who spent three quarters or more of their time on supervisory and non-teaching duties.



We have not constructed the statutory language or applied the evidence to meet a targeted objective. As the NLRB said in *Oakwood Healthcare*:

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).

348 NLRB at 690.

The burden of establishing that department heads are supervisors lies with WWCC as the party asserting supervisory status. *Starwood Hotels & Resorts*, 350 NLRB 1114 (2007), citing *NLRB v. Kentucky River*, 532 U.S. at 711. Under the APA and PERB's regulations, WWCC bears the burden of proving by a preponderance of the evidence that the department heads possess the requisite authority to be deemed supervisors under §3-701(j) and therefore must be excluded from the faculty unit. This burden is consistent with the standard required by the NLRB to prove supervisory status. See *The Arc of South Norfolk*, 368 NLRB No. 32 at 3 citations omitted ("a party seeking to prove supervisory status need only establish it by a preponderance of the evidence."). For reasons set forth below, we find that WWCC has met its burden.

### **WWCC's Department Heads**

In 1975, the State Board for Community Colleges approved the creation of WWCC to serve the postsecondary vocational and technical education needs of the residents of Wicomico and Worcester counties. <https://www.worwic.edu/about-wor-wic/history/>. The stated mission of WWCC provides, in part, to "empower[] a diverse population of students to achieve success by delivering high-quality, affordable education." <https://www.worwic.edu/about-wor-wic/mission-vision-and-values/>.

In furtherance of its educational mandate and mission, WWCC currently has ten academic departments, including Nursing, Math & Science, Arts & Humanities, Human Services, Business & Hospitality, Applied Technology, Occupational Therapist Assistant, Radiologic Technology, Physical Therapy Assistant, and Emergency Medical Services, each of which is led by a department head. Department heads are in charge of their department's academic program. Their responsibilities include supervisory, administrative, and management functions, in addition to some teaching, which is significantly less than the teaching load of full-time faculty. For example, Arts & Humanities Department Head Charles Porter carries a teaching load that is just one-third the teaching load of full-time faculty. The position of department head is a distinct job classification to which applicants must apply. WWCC department heads are neither rotating positions nor elected by department faculty, as is the case at some community colleges.

WWCC's department heads are the direct supervisor of all faculty in their respective department, including both full-time and part-time faculty. The essential supervisory duties and responsibilities of department heads, as described in their employment agreements, include: supervise departmental instructional staff, faculty, and staff; develop faculty, instructional staff schedules, including office hours and teaching responsibilities; provide orientation to new structural and faculty members; train, evaluate, and recognize employees and handle disciplinary matters in consultation with human resources; and recommend dismissal when appropriate for full-time faculty members and other staff in the department. The record established that department heads use independent judgment in their regular exercise of supervisory authority over both full-time and part-time faculty. Department heads are also the first level supervisor engaged to resolve academic grievances involving full-time and part-time faculty. Dean Solembrino and AVP Berkheimer testified that deans and vice presidents do not directly supervise full-time or part-time faculty.<sup>15</sup>

### **Supervisory Authority Over Part-time Faculty**

The academic courses offered by WWCC departments are taught by both full-time and part-time faculty. WWCC's part-time faculty are critical to the College's academic program, comprising over 50% of the College's faculty. <https://www.worwic.edu/directory/>. For WWCC's larger departments, the complement of full-time and part-time faculty is significant. There currently are 13 full-time and 14 part-time faculty in the Arts & Humanities Department that Mr. Porter heads. <https://www.worwic.edu/Directory/?dept=ARHUM>; the Mathematics & Science Department has 12 full-time and 22 part-time faculty, <https://www.worwic.edu/Directory/?dept=MTHSC>; the Human Services Department has 9 full-time and 14 part-time faculty, <https://www.worwic.edu/Directory/?dept=HUMSV>; the Nursing Department has 12 full-time and 7 part-time faculty, <https://www.worwic.edu/Directory/?dept=NUR>; and the Business & Hospitality Department has 5 full-time and 6 part-time faculty <https://www.worwic.edu/Directory/?dept=BUS>, <https://www.worwic.edu/Directory/?dept=HMR>. Dean Solembrino testified that department heads make course assignments based on their determination of the respective qualifications of both full-time and part-time faculty members. Other than being employed under a semester contract and not eligible for a "permanent contract," and carrying a lesser teaching load than full-time faculty, the record evidence does not reflect that the academic responsibilities of part-time faculty are any different or less than that of full-time faculty.

Department heads use independent judgment in their exercise of broad supervisory authority over their department's part-time faculty. Dean Solembrino and Mr. Porter testified that department heads have absolute authority and discretion to hire part-time faculty. A department head also has sole discretion to terminate a part-time faculty mid-semester and to not renew a part-time faculty's contract for the following semester. They do not need to consult with higher

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<sup>15</sup> Dr. Karie Solembrino is the Dean of Health Professionals at the College, which includes the Nursing, Emergency Medical Services, Occupational Therapy Assistant and Radiologic Technology programs. The department heads in those programs report directly to Dean Solembrino. She reports to the Vice President for Academic Affairs. Ms. Karen Berkheimer is Associate Vice President for Human Resources.

management before taking such action. Mr. Porter testified, “If I have serious concerns [about a part-time faculty member] they probably will not be teaching for us next semester.”<sup>16</sup>

WWCC’s department heads’ extensive supervisory authority over part-time faculty establishes that they are “supervisory employees” under the NLRA’s definition, which PERB has now adopted. However, recognizing that the application of the definition to the department head’s supervision of part-time faculty would result in the exclusion of all of WWCC’s department heads from the faculty bargaining unit, the majority once again goes beyond statutory interpretation and wields their legislative pen to amend the statutory language of §16-701(j)(2). Instead of providing that “Faculty does not include . . . supervisory employees,” the majority changes the language to provide that that “Faculty does not include . . . supervisory employees who exercise supervisory authority over bargaining unit faculty.” In support of its holding, the majority cites to its reasoning in *FCC*. As we explained in our *FCC* dissent, the majority’s reasoning is flawed. *FCC* at 17-18 (Cooperman and Steyer dissenting). Their reasoning is even more unconvincing now that the full Board has reconsidered the *FCC* decision and has decided that that department heads who are supervisors under the adopted NLRA definition are excluded from a bargaining unit of non-supervisory full-time faculty.

There is no legal basis under either the CCCBL or NLRB law for the majority’s strained ruling. CCCBL’s exclusion of supervisory employees from the definition of “faculty” in §16-701(j)(2) applies to all supervisory employees without regard to whether they supervise employees who are within or outside the faculty bargaining unit. Notably, the expressed legislative intent of the CCCBL is “promote harmonious and cooperative relationships with the *public employees* of the community college system by . . . protecting the right of *public employees* to associate, organize, and vote for their own exclusive representatives . . .” Section 16-702(a)(1) (emphasis added). Section 16-701(o) excludes “supervisory employees” from the definition of “public employee” without any caveat as to whether the supervision is over employees who are inside or outside the bargaining unit that the individual supervisor wishes to join. Put simply, a supervisor is a supervisor is a supervisor, and under the CCCBL, no community college supervisor has the statutory right “to associate, organize, and vote for their own exclusive representatives.” The statute provides no special treatment or exception from the supervisory exclusion for department heads who exercise supervisory authority over their department’s part-time faculty.<sup>17</sup>

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<sup>16</sup> MSEA conceded that department heads have substantial supervisory authority over part-time faculty. Post Hearing Brief of MSEA at p.3, [...there is evidence that department heads hire and fire adjunct faculty...”

<sup>17</sup> In 2023, the General Assembly amended PERA to extend collective bargaining rights to certain supervisory employees in the executive branch of Maryland State Government. Recognizing that supervisory employees must not be in a bargaining unit with nonsupervisory employees, the amended law provides that state government supervisory employees are to be in a distinct bargaining unit separate from a bargaining unit that is comprised of non-supervisory state employees. The fact that under CCCBL supervisory employees do not have collective bargaining rights and thus, there is no supervisory bargaining unit for department heads with supervisory authority to be a part of, does not mean that the law should be contorted to allow department heads with supervisory authority to be in a bargaining unit with non-supervisory faculty as long as that unit does not include employees they supervise. Rather, as with the state employee collective bargaining law, CCCBL would need to be amended to first grant community college supervisory employees collective bargaining rights and further, to create a new community college bargaining unit of supervisory employees.

As we explained in our *FCC* dissent, the NLRB has repeatedly held that department chairs who exercise supervisory authority over non-bargaining unit adjunct or part-time faculty are supervisors under §2(11) of the NLRA and excluded from the faculty bargaining unit. *See FCC* at 25-26 (Cooperman and Steyer dissenting) and cases cited therein. In *Detroit College of Business*, 296 NLRB 318 (1989), the NLRB held that department coordinators who supervise part-time faculty were supervisors under §2(11) and could not be part of the faculty bargaining unit. The NLRB concluded that 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 qualifications the school seeks to maintain, is in furtherance of the college's mission. *Detroit College*, 296 NLRB at 321.

Part-time faculty, which comprise a majority of WWCC's faculty, are essential to the college's academic program. Like the department coordinators in *Detroit College*, WWCC's department heads' supervision of part-time faculty is "part and parcel of their 'primary work product,'" and their role in hiring the part-time faculty, evaluating their performance, discharging and deciding not to retain those faculty members who, in the department head's judgment, fail to live up to WWCC's faculty standards, is in furtherance of the College's mission of "delivering high-quality, affordable education." We therefore would find that because the department heads exercise supervisory authority over part-time employees using independent judgment, they are supervisory employees and therefore are excluded from the faculty bargaining unit.

### **Supervisory Authority Over Full-time Faculty**

The majority erroneously applies their presumption and heightened evidence standard and concludes that WWCC did not meet its burden of proving that its department heads are supervisory employees. The basis for the majority's conclusion is that department heads lack "*independent authority*" to take personnel actions, such as hire, discipline, and terminate full-time faculty, coupled with the majority's belief that various rubrics and policies developed by the College substantially constrain the department heads' exercise of authority, even though the rubrics never were entered into evidence nor described in any meaningful way by witness testimony.

The majority relies almost exclusively on the testimony of Charles Porter, who had been a department head for approximately 1½ years at the time he testified. Contrary to the majority's characterization of Mr. Porter's testimony, which they say established that he was not authorized to effect salary changes, resolve employee grievances, or terminate a full-time faculty, Mr. Porter actually testified that he had no experience in many of these areas because during his brief tenure as a department head no such issues had arisen in his department.<sup>18</sup> Mr. Porter's testimony largely

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<sup>18</sup> When asked about Performance Improvement Plans ("PIP"), Mr. Porter responded that he had not experienced a situation where a PIP was needed, stating "I have not been through that process yet." When asked whether he had "unilateral authority to recommend the dismissal or termination for poor performance of full-time faculty," Mr. Porter replied, "I have never experienced it." When asked about the role of a department head in faculty promotions, Mr.

reflected his “belief” of a department head’s supervisory authority, not his actual experience.<sup>19</sup> Because of Mr. Porter’s lack of experience, we find that his testimony is not credible regarding the supervisory authority of department heads.

The majority either ignores or discounts the testimony of Dean Solembrino.<sup>20</sup> This is despite the fact that the Dean is the direct supervisor of department heads, is intimately familiar with the nature and scope of their supervisory authority, their exercise of independent judgment, and that the College President, Vice President for Academic Affairs, and she have virtually always accepted department heads’ recommendations regarding full-time faculty discipline, termination, nonrenewal, promotions, and salary increases without conducting an independent investigation. The majority also misconstrues the testimony of AVP Berkheimer regarding the role of Human Resources in reviewing a department head’s recommended action. Documentary evidence providing specific examples of department heads exercising their authority also is largely disregarded by the majority.

Most critically, the majority misconstrues the nature and scope of the supervisory authority one must possess to be deemed a supervisor under the NLRA’s definition. The majority conflates *independent authority* with *independent judgment*. Contrary to the majority’s understanding, an individual does not need to have “independent authority” to be a supervisor, Rather, an individual must have authority to exercise at least one of the supervisory acts or effectively recommend at least one of the supervisory acts set forth in the §2(11) definition and do so with *independent judgment*, meaning that the 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.” *Oakwood Health*, 348 NLRB at 692 (emphasis added); *UMBC* at 5. The individual need not be the ultimate decisionmaker; rather, an individual is a supervisor if they have authority to effectively recommend action, and their recommendations are typically followed by the person with final authority. *Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114, 1116, fn. 4 (2007) citing,

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Porter answered, “I haven’t experienced faculty promotions from the department head side, because, in the year I’ve been here, nobody has put forward for a promotion plan.” Mr. Porter also was unable to describe the employee complaint process because “I haven’t experienced it firsthand.” Hiring is the only function Mr. Porter testified about where he had some experience. He testified that department heads do not have authority to hire full-time faculty. However, department heads need not have hiring authority to be supervisors. They just need to have any one of the 12 enumerated supervisory functions to be supervisory employee under the CCCBL. *UMBC* at 5; *Berry Schools v. NLRB*, 627 F.2d at 697 (5th Cir. 1980).

<sup>19</sup> Moreover, the questions put to Mr. Porter were mostly whether he had unilateral authority to solely effect these actions with respect to full-time faculty. His testimony has no probative value because WWCC does not claim that department heads have unilateral or sole authority to reappoint/non-reappoint, promote, or dismiss full-time faculty. WWCC asserts and the evidence amply demonstrates that department heads effectively recommend these actions using independent judgment and that their recommendations are virtually always followed by higher management. This evidence establishes supervisory authority.

<sup>20</sup> The majority minimizes Dr. Solembrino’s experience and knowledge of the department head’s role by asserting that she has not been a department head since mid-2019. They ignore the fact that Dr. Solembrino has been a dean for five years and as dean she directly supervises department heads, as well as the fact that prior to becoming a dean she was a department head for 12 years.

*Mountaineer Park*, 343 NLRB at 1475 (“[The] effective recommendation of discipline need not encompass the authority to make disciplinary decisions unilaterally.”).

The weight of the evidence, which was largely undisputed, establishes that WWCC’s department heads possess substantial authority over full-time faculty, in the interest of the College, to discipline, discharge, reappoint with salary adjustments, deny reappointment, promote, and deny promotion of full-time faculty, or to effectively recommend such action, and that department heads use independent judgment in the regular exercise of their authority.<sup>21</sup> We discuss the nature and scope of the department heads’ authority in each of these areas below.

### ***Discipline and Discharge of Faculty***

The testimony and exhibits demonstrate that department heads have a high degree of discretion when it comes to disciplining faculty. Department heads are responsible for meeting with faculty to discuss performance. If the department head determines that a faculty member’s performance is subpar, the department head, on their own authority and without consulting higher management, may implement a PIP for the individual and subsequently evaluate whether the PIP has been satisfied. PIPs may result from the normal evaluation process or occur in between evaluations if the performance warrants, as determined by the department head. PIPs may be included in the faculty member’s personnel file.

Department heads have the discretion to tailor PIPs to the specific faculty member and circumstances. Examples of PIPs made part of the record reflect the variety of plans initiated by department heads, such as improvement in: (Ex. 1) classroom management, instruction, communication with students, assignment completion, and other matters; (Ex. 2) lack of organization, time management, missed deadlines, inconsistent grading, and other matters; and (Ex. 3) office hours for students, course implementations, poor communications with department head, improper textbook changes, and other matters. Department heads also have the discretion to set the PIP’s duration and impose obligations and performance goals on the full-time faculty member who is subject to the PIP. The record is devoid of any rubric or policy directive that dictates the length of or other terms of a PIP that the department head must adhere to. For example, in one instance, the department head removed all teaching responsibilities from a faculty member for more than 2 months. In another, the department head established multiple dates for reviewing improvement. Both of these actions were within the sole discretionary judgment of the respective department heads to impose. The department heads, moreover, are responsible for determining whether the faculty member has satisfied the PIP’s requirements and goals. If they conclude that the individual has not done so, the department head then decides whether to recommend dismissal of the faculty member. Accordingly, when disciplining full-time faculty, department heads have much more than “one obvious and self-evident choice” to consider and their discretionary choices are neither “routine” nor “clerical”.

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<sup>21</sup> “‘Regular’ means according to a pattern or schedule” under the standard applied by the NLRB. Documentary evidence submitted by the College shows that department heads spend from 33-84% of their time on supervisory and non-teaching duties. “The Board has found supervisory status where individuals have served in a supervisory role for at least 10-15% of their total work time.” *Oakwood Healthcare*, 348 NLRB at 694 (citations omitted). See also *Detroit College of Business*, 296 NLRB at 318 (25% of the time).

Dean Solembrino testified that recommendations for dismissals of faculty are the responsibility of the department heads. They are authorized to recommend dismissal of full-time faculty at their discretion, including mid-contract. Department heads may recommend non-reappointment or dismissal if they determine that a PIP has not been satisfied, which illustrates how PIPs are directly linked to future disciplinary action by the recommendations of department heads. Examples of Dismissal Recommendations from department heads are included in the record. Their recommendations are typically followed. AVP Berkheimer testified that disciplinary matters are handled “at the department level” and although recommendations of dismissal go through higher management, a department head’s recommendation “has not been denied” during her ten plus years at the College. The testimony of Dean Solembrino and AVP Berkheimer was unrebutted.

WWCC maintains a policy for dismissal that allows for discretionary choices. The policy does not dictate instructions or controls that eliminate independent judgment from decision-making. The policy includes, but is not limited to, nine general grounds for dismissal, including: inability, incompetence, or persistent unsatisfactory performance; refusal to perform assigned responsibilities; misconduct, malfeasance or non-feasance; dishonesty; conviction of a serious crime; receiving a fee or gift in the expectation of receiving preferential treatment; negligence or willful acts that cause damage; bringing a weapon on college property or violating college policies or procedures. Unsatisfactory performance, incompetence, refusal to perform assigned responsibilities, and violating college policies and procedures are open-ended infractions and necessitate interpretation and independent judgment in their application. The policy plainly allows for discretionary choices as evidenced by the variety of matters reflected in PIPs and recommendations in the record. *See Oakwood Healthcare*, 348 NLRB at 693, fn. 43 citing *Quinnipiac College*, 256 F. 3d. 68,78 (2d Cir. 2001) (Evidence that the shift supervisors continued making assignment decisions, based on their own expertise and experience, despite the existence of college policies and procedures.)

The NLRB’s decision in *Mountaineer Park, Inc.*, 343 NLRB 1473, 1475 (2004), where the Board held that two assistant supervisors effectively recommended employee discipline and therefore were statutory supervisors under §2(11), is instructive. The Board stated:

[E]ven if the assistant supervisors do not issue discipline to employees on their own, they use independent judgment in effectively recommending discipline to the director of their department. In this regard, they have the authority to bring employee rule infractions and misconduct to (the director’s) attention, thereby initiating the disciplinary process; and in the process of doing so, they can write up recommendations for (the director) concerning what level of discipline they consider to be appropriate relative to the infraction or misconduct at issue. Further, and most significantly, when they decide to bring disciplinary issues to (the director’s) attention, it appears that (the director) does not conduct an independent investigation in question . . . (the director) has a policy of routinely ‘signing off’ on the disciplinary recommendations made by (the assistant supervisors) if he believes that the recommendations are justifiable.

*Id.* at 1474-1475.

The evidence shows that WWCC's department heads, like the assistant supervisors in *Mountaineer Park*, have the discretionary authority to decide whether to initiate discipline on their own volition. They have independent authority, without consulting higher management, to issue PIPs and to write up recommendations for disciplinary action they deem appropriate under the circumstances. Their recommendations have always or almost always been approved by the Dean and the Vice President for Academic Affairs, who review the documents but do not conduct independent investigations.<sup>22</sup> Likewise, the College President routinely signs off on the department head recommendations without conducting an independent investigation and, according to the testimony of AVP Berkheimer, has never made a decision different than what a department head recommended. *See also, Progressive Transportation Services*, 340 NLRB 1044 (2003) (deck lead supervisor possessed authority to effectively recommend discipline and was therefore a statutory supervisor under Section 2(11); *Starwood Hotels & Resorts Worldwide, supra*.

We conclude, therefore, that department heads, in the interest of WWCC, exercise their supervisory authority to discipline and effectively recommend dismissal of full-time faculty using independent judgment.

### ***Reappointment and Non-Reappointment***

Department heads observe, evaluate, and supervise full-time faculty annually. They have authority to recommend whether full-time faculty will be reappointed or not reappointed and if reappointed, what salary increase a faculty member will receive. They can recommend reappointment with a full salary increase, reappointment with a half salary increase, do not reappoint, or extend the contract for one year depending upon the length of the faculty member's employment.

The department head's recommendation is formed by the annual evaluation and rubric they complete for full-time faculty. The annual evaluation is based on the department head's judgment of the quality of the faculty member's instruction, department support, professional development, and institutional support. Department heads also assess performance expectations, progress reports, improvement plans and related matters discerned from various sources. Thus, the department heads independently form their evaluation of each faculty member by discerning and comparing data.<sup>23</sup> The results of the evaluation are "used as the basis for the reappointment recommendation and the extended reappointment recommendation." Non-reappointment can occur through the evaluation process or dismissal and department heads have the discretionary authority to initiate the action in both instances.

The testimony of Dean Solembrino and AVP Berkheimer showed that department heads have a high degree of discretion when it comes to recommending reappointment or non-

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<sup>22</sup> A manager's "review" of assistant supervisor recommendations is not an independent investigation where manager relies on recommendation by giving it significant weight and evidence that manager follows the recommendations in all cases before him. *Mountaineer Park*, 343 NLRB at 1476.

<sup>23</sup> The exercise of independent judgment by department heads is comparable to the independent judgment exercised by "a registered nurse, when exercising his/her authority to recommend a person for hire, may be called upon to assess the applicants' experience, ability, attitude, and character references, among other factors." *Oakwood Healthcare*, 348 NLRB at 693.



reappointment,<sup>24</sup> and that there is a direct link between a department head's evaluation of a faculty member's reappointment and salary increase. *See Bayou Manor Health Center*, 311 NLRB 955 (1993) (NLRB found that LPNs were statutory supervisors within the meaning of §2(11) where "the evaluations completed by the LPNs affect the CNAs' salaries, as there is a direct correlation between the evaluations and the merit increases or occasional departmental bonuses awarded"). Their testimony was credible and supported by a number of examples of Faculty Reappointment Recommendations in the record that include detailed and individualized evaluations by the department heads. No contrary evidence was presented.

WWCC maintains a Faculty Evaluation Policy, but the policy does not "dictate or control" the department heads' evaluations or recommendations. To the contrary, the policy is broadly written to encourage department heads to "take into account all aspects of the faculty member's performance, including classroom observations, professional development, department, institutional, and community involvement." The policy, therefore, allows department heads to discern and assess "all aspects" of the faculty member's performance and make discretionary choices in their exercise of independent judgment. *Quinnipiac College*, 256 F. 3d. at 78

Department heads' recommendations are sent to the Dean and then forwarded on to the Vice President for Academic Affairs. Dean Solembrino testified that the department heads' recommendations are given "tremendous weight" "because they are boots on the ground. They see what's going on in their departments and they have the ability to make that recommendation based on what they see." Dean Solembrino and the VP for Academic Affairs review the documentation to verify that "everything has been completed" and the recommendation is then signed off by the President. There is no evidence in the record that anyone in higher management has ever conducted an independent investigation of the department heads' recommendations.

The record shows that department heads' recommendations on reappointment and non-reappointment are always or almost always followed. Thus, Dean Solembrino testified, "I have never not supported a department head's recommendation because they have authority in their role" and "I have not seen anything that I've put forward, as approved by the department head, denied [by] the Vice President for Academic Affairs." AVP Berkheimer testified, that the President "has never made a decision different than what was recommended by the department head."<sup>25</sup> All of the Faculty Reappointment Recommendations introduced into the record were signed off as approved by higher management.

We conclude that department heads, in the interest of WWCC, effectively recommend the reappointment and non-reappointment of full-time faculty using independent judgment. *Adelphi University*, 195 NLRB 639, 641-642 (1972) (department chairman with authority to effectively recommend the hire and reappointment (or non-reappointment) of faculty members are

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<sup>24</sup> The implication in the majority's opinion that department heads lack discretion whether to recommend non-reappointment is not supported by the evidentiary record.

<sup>25</sup> "A putative supervisor engages in 'effective recommendation' where his or her recommendations are routinely or usually followed without independent investigation." *The Arc of South Norfolk*, 368 NLRB No. 32, at 3. *See, Venture Industries*, 327 NLRB 918,919 (1999) (finding supervisory authority to discipline where employer followed recommendations 75% of the time).

supervisors); *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); *Point Park College*, 209 NLRB 1064 (1974) (department chairmen who evaluate instructors, recruit new faculty members, schedule classes, hold and preside over department meetings, and effectively recommend renewal and nonrenewal of a contract found to be supervisors).

### ***Promotions***

Department heads make recommendations on whether full-time faculty will receive a promotion. Although the College has a promotion policy that includes requirements for promotion, it allows for discretionary choices and does not eliminate independent judgment from decision making. For example, department heads may consider broad categories including professional development, continuing education, qualifications, performance concerns if any, and student opinion. In a promotion recommendation introduced into evidence, the department head recommended promotion of an Associate Professor based on his performance and professional and academic accomplishments. The factors chosen by the department head in support of the recommendation reflect the department head's discretionary choices and independent judgment.

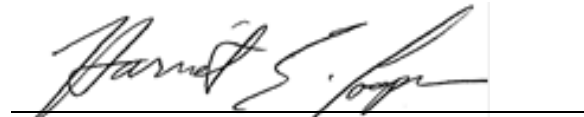
There is a direct link between a department head's recommendation and a promotion. Department head's recommendation for promotions are always or almost always approved. Dean Solembrino testified that if a department head does not support a request for promotion, then "it doesn't go forward." If a department head supports a request for promotion, then the recommendation goes to the Dean who reviews it to confirm the arithmetic regarding promotion criteria. There is no evidence that the Dean or any other person in higher management conduct an independent investigation. To the contrary, Dean Solembrino testified that she gives the department head's recommendation "considerable weight" and has neither denied a promotion request that a department head has endorsed nor supported a promotion request that a department head has not endorsed. *See Starwood Hotels & Resorts*, 350 NLRB at 1118 (finding that front desk supervisor effectively recommended hiring where manager testified that he would not hire an applicant if desk supervisor recommended against it.). This testimony was unrebutted.

The record, therefore, establishes that department heads, using their independent judgment, effectively recommend promotions of faculty, and thus, exercise supervisory authority over full-time faculty. *See Venture Industries, Inc., Id.* at 920 (1999) (Liebman concurring) (supervisors effectively recommending promotions of employees).

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We find that WWCC has satisfied its burden of proving by a preponderance of the evidence that the College's department heads are supervisors. The weight of the evidence establishes that WWCC department heads have authority to discipline, discharge, promote, reappoint, and deny reappointment to full-time and part-time faculty or to effectively recommend such action, in the interest of the College. The department heads' exercise of these supervisory functions is not of a merely routine or clerical nature but, rather, requires the use of independent judgment. The testimony of Dean Solembrino was detailed, specific, comprehensive, and credible. Her testimony

was supported and confirmed by the testimony of AVP Berkheimer and numerous documentary examples of department head recommendations, PIPs, and disciplinary actions, which established that department head use independent judgment in their exercise of supervisory authority over full-time faculty. Mr. Porter's testimony, by contrast, was limited by his inexperience, and was irrelevant when responding to questions about his "unilateral" or "sole" authority. Accordingly, department heads at WWCC should be excluded from the full-time faculty bargaining unit.



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Harriet E. Cooperman, PERB Member



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Richard Steyer, PERB Member