

Management Alert



NLRB Poised To Issue Decisions That Will Impact Many Private Schools

During a period in which the National Labor Relations Board (“Board”) has been embroiled in a *sea of controversy*, it has quietly stockpiled a number of cases that, when issued, will impact tens of thousands of the nation’s religious primary and secondary schools. These cases also will impact religious colleges and universities. Other stockpiled cases will have a significant effect on private schools, religious or not, that use graduate students to teach or research.

The question is whether the Board will issue these decisions prior to the expiration of Chairman Pearce’s appointment on August 27, 2013. Even assuming that the Board is able to persuade the *Supreme Court* that the two remaining Members were properly appointed, the expiration of the Chairman’s appointment will leave the Board without a quorum and unable to act. Should this happen, these cases will continue to sit until the Board has a valid quorum, as discussed [here](#).

Although there is no way of telling if the current Board will issue the decisions in these cases prior to the expiration of the Chairman’s appointment, one thing is certain: the chance that a Board made up of a majority of Members appointed by a Democratic President will decline to exercise jurisdiction over tens of thousands of employers, or fail to extend collective bargaining rights to graduate students, is slightly less than the chance of an IRS auditor concluding that you are entitled to a tax refund.

Board Jurisdiction Over Religious Schools.

In the seminal case of *NLRB v Catholic Bishop*, 440 U.S. 490 (1979), the U.S. Supreme Court was asked to determine whether the Board could assert jurisdiction over two groups of Catholic high schools in the context of representation petitions filed by their faculties. Citing the risks of creating First Amendment entanglement issues, the Court held that the Board could not assert jurisdiction over the schools. The Court declared that “Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers.” While the Board initially applied the prohibitions of *Catholic Bishop* only to religious elementary and high schools, it later extended its application to religious colleges and universities. *The Faculty Ass’n of St. Joseph’s Coll.*, 282 NLRB 65, 68 (1986).

Since those decisions, the Board has attempted to narrowly apply the *Catholic Bishop* doctrine. In doing so, the Board developed its “substantial religious character” test to determine on a case-by-case basis whether jurisdiction may be asserted over various religious schools. Under this test, the Board generally considered “the purpose of the employer’s operations, the role of unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction.” *University of Great Falls*, 331 NLRB 1663 (2000). More specifically, the Board considered factors such as the organization’s mission statement, whether and to what degree curriculum requirements emphasize a particular faith, requirements that faculty teach or endorse the faith’s doctrines, funding by the religious organization, governance by a religious organization, and requirements for (or preference given to) administrators, faculty, or students who are members of the faith associated with the institution. *Id.*

The “substantial religious character” test provided the Board with a great degree of latitude in determining whether a school was “religious enough” to be removed from the Board’s jurisdiction under *Catholic Bishop*. Under this test, the Board rarely divested itself of jurisdiction over religious schools. However, this practice was brought to a halt by the D.C. Court of Appeals.

In reversing the Board’s decision to assert jurisdiction over a Catholic university, the D.C. Circuit Court of Appeals rejected the “substantial religious character” test and, in its place, developed a three factor test to determine whether the Board had jurisdiction over a religious school. Under this test, the Board was directed to limit its inquiry to three questions: 1) Does the institution hold itself out to students, faculty and community as providing a religious educational environment?; 2) Is the entity

organized as a “nonprofit” institution?; and 3) Is the entity affiliated with, owned, operated or controlled by a recognized religious organization? *Univ. of Great Falls Montana v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). Seven years later, the D.C. Circuit applied the same three factor test to hold that the Board had improperly asserted jurisdiction over a Presbyterian college. *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009).

Putting itself in a position to either directly reject the *Great Falls* test, or to apply it very narrowly, the Board has been stockpiling cases involving the scope of *Catholic Bishop*, the earliest of which has been pending before the Board since 2011. Among the religious school cases currently before the Board are *Manhattan College* (Case No. [02-RC-023543](#)) (election ordered); *St. Xavier University* (Case Nos. [13-RC-022025](#); [13-RC-092296](#)) (elections ordered); *Duquesne University of the Holy Spirit* (Case No. [06-RC-080933](#)) (elections ordered); and *Islamic Saudi Academy* (Case No. [05-RC-080474](#)) (election not ordered for teachers, but ordered for non-teacher employees). Seyfarth Shaw filed Amicus Briefs in both the *Manhattan College* ([here](#) and [here](#)) and *St. Xavier* ([here](#)) cases.

Of particular note in *Islamic Saudi Academy* is that, in addition to presenting the basic jurisdictional issue, it also presents the question of whether *Catholic Bishop* extends to cases other than those involving faculty. Unlike the other cases, this case involves an effort by a union to obtain an election among “all full-time and regular part-time employees” (with certain exceptions for managerial and temporary employees) employed by an Islamic not-for-profit private school operating under the auspices of the Kingdom of Saudi Arabia and its U.S. Embassy.

While the Board hangs on to these important cases, Regional Directors continue to issue decisions. Most recently, in *Pacific Lutheran University* (Case No. 19-RC-102521), the Regional Director of Region 19 in Seattle determined that the adjunct faculty members at the school, which is owned by the member congregations of the Northwest Region of the Evangelical Lutheran Church in America, were entitled to a Board-conducted election to determine if they wanted to be represented by the SEIU.

Pacific Lutheran has filed a request for review with the Board, noting that the Board already has accepted three cases posing the same *Catholic Bishop* issue (*Manhattan College*, *St. Xavier* and *Duquesne*). The school also has asked the Board to review the Regional Director’s decision that, under the Board’s controversial decision in *Specialty Healthcare*, 357 NLRB No. 83 (2011), the adjunct faculty constitute an appropriate bargaining separate from the other faculty members.

Religious schools will have to wait until the Board decides these cases before they will know if the Board will properly apply the *Great Falls* test, or whether it will continue to try to push the boundaries of *Catholic Bishop*.

Unionized Graduate Students?

The Board is also attempting to expand its influence over colleges and universities, religious or not, by re-visiting the issue of whether graduate students are students or employees under the National Labor Relations Act (“Act”). For the third time in 12 years, the Board is poised to review its decision in *Brown University*, 342 NLRB 483 (2004), which held that graduate students performing teaching and research services are not employees within the meaning of Section 2(3) of the Act. The Board’s review was brought on by efforts to unionize graduate students at New York University and the Polytechnic Institute of New York University. *New York University*, (Case No. 02-RC-023481); *Polytechnic Institute of New York University*, (Case No. 29-RC-012054).

Should the Board reverse its decision in *Brown*, the nation’s private colleges and universities can expect a dramatic increase in the efforts of unions to represent their graduate students involved in teaching and research.

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