

Management Alert



NLRB Receives An “Incomplete” In School Case

By Jeffrey A. Berman

If anything is sure these days, it is that many of the colleges, universities and schools on whose behalf numerous organizations filed amicus briefs in *Pacific Lutheran University* will give the National Labor Relations Board an “incomplete” in religion law and a “C” or less in academic governance law. *Pacific Lutheran University*, 361 NLRB No. 157 (2014).

In the early evening of December 19, the Board released a decision that will have significant impact on two very important issues: (i) when the Board can assert jurisdiction over religious schools without violating Supreme Court precedent and the First Amendment; (ii) the analysis to be applied in determining when faculty who participate in the governance of a private school are managerial employees and therefore may not unionize.

Organizations representing thousands of schools—K through 12, and colleges and universities, both religious and secular—filed amicus briefs on these key issues, but in the end a majority of the Board took contrary positions with respect to both issues.

Pacific Lutheran University, which is located in the State of Washington, is affiliated with the Evangelical Lutheran Church of America. When its adjunct faculty sought representation by a local of the SEIU, the University took the position that the Board could not assert jurisdiction over it as the result of the Supreme Court’s decision in *NLRB v. Catholic Bishop of Chicago*, as subsequently applied by the D.C. Circuit in *University of Great Falls v. NLRB* and *Carroll College v. NLRB*. In all three of these cases, efforts by the Board to assert jurisdiction over the religious schools were found to be improper.

The University also argued, pursuant to the Supreme Court’s decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), that, because of their involvement in the governance of the school, its adjunct faculty were managerial employees and, as such, could not unionize.

The Board’s Regional Director decided against the University on both issues. The University appealed that decision to the full Board, which subsequently invited amicus briefs on the issues addressed by the Regional Director and 12 related issues. Numerous amicus briefs were filed, primarily by schools, associations of schools, and unions.

In its decision, the Board announced a new standard for determining jurisdiction over religious colleges and universities, specifically rejecting the test established by the D.C. Circuit in *Great Falls* and *Carroll College*. Under the *Great Falls* test, the courts and the Board are to consider three factors: (i) does the school hold itself out as providing a religious educational environment; (ii) is the school a nonprofit, and (iii) is it affiliated with, or owned, operated or controlled by a recognized religious organization or an entity, membership of which is determined, at least in part, with reference to religion.

Under the new standard, the Board will only decline to assert jurisdiction over faculty members at a college or university that, in addition to claiming it “holds itself out as providing a religious educational environment,” can show that “it holds out the petitioned-for faculty members as performing a religious function.” According to the Board, in order to satisfy the second part of its new standard, the college or university must show “that it holds out those faculty as performing a specific role in creating or maintaining the university’s religious educational environment.”

With respect to the managerial status of faculty members, the Board purported to “refine” the standard by which it determined managerial status pursuant to *Yeshiva*, and enumerated the factors that it would consider in future cases.

Applying the two new tests to Pacific Lutheran University, the Board concluded that it should take jurisdiction over the election petition filed by the University’s adjunct faculty, and that none of the faculty members were managerial and therefore excluded from the voting unit.

Certainly, Pacific Lutheran University will give the Board a failing grade in both religion law and academic governance law. While some religious schools may applaud the new jurisdiction test, others will not, and others will give the Board an “incomplete” as it specifically limited its holding to faculty employed by colleges and universities. This leaves open the questions of whether the new jurisdiction test will be applied to K through 12, and whether it will be applied to non-faculty. As to the issue of academic governance, the grade that the Board will receive may depend on the governance model adopted by a particular school.

The New Faculty Function Test

Realizing that its pre-*Great Falls* inquiry into whether a self-identified religious school has a “substantial religious character” failed to pass muster under the First Amendment’s Establishment Clause, the three Democratic members of the Board, over strong dissents by the two Republican members, developed a new test. In so doing, the majority specifically rejected the three-part *Great Falls* test advocated by the University and its amici. It also rejected the test urged by the union and its amici—“the teacher religious function” test, which focused on whether teachers in the proposed unit perform religious functions as part of their jobs.

In contrast to the tests advocated by the parties and their respective amici, the Board developed a new test, which it characterized as being a combination of the two tests proposed by the parties. As an initial matter, the Board will look to see if the college or university holds itself out as providing a religious education environment. If the school satisfies this threshold test, the Board will then focus on whether the college or university holds out its faculty as being involved in performing a religious function by having a role in creating or maintaining the school’s religious educational environment. In the view of the majority, this new test strikes the appropriate balance between preserving the religious rights of the school, avoiding the intrusive inquiry forbidden by *Catholic Bishop*, and giving due consideration to the Section 7 rights of the faculty to engage in collective bargaining.

The first part of the new test—whether the college or university holds itself out as providing a religious education environment—is the same as the first prong of the *Great Falls* test. The Board held that it would examine such things as handbooks, mission statement, corporate documents, course catalogs, documents published on the school’s website, press release and other public statements.

With regard to the remaining prongs of the *Great Falls* test, as to the question of non-profit status the Board concluded that, while it is a factor to be considered, whether the school was a non-profit would not be determinative. The Board also rejected the third prong of the *Great Falls* test—the school must be affiliated with, or owned, operated or controlled by a recognized religious organization. According to the majority, this part of the *Great Falls* test had the effect of excluding from exemption schools that hold themselves out as providing a religious educational environment but are interdenominational or nondenominational.

Once the college or university meets the threshold requirement of showing that it holds itself out as providing a religious educational environment, the Board next examines whether the school holds out its petitioned-for faculty as performing a specific role in creating and maintaining that environment. According to the majority, sensitive First Amendment excessive entanglement issues are not involved if the school does not.

However, the Board stated that, although it would not examine the actual duties performed by faculty members, they need to be held out as performing a “*specific religious function*” and that generalized statements that faculty members are expected to, for example, support the goals or mission of the school are not alone sufficient. This is because such statements do not indicate that faculty members are expected to incorporate religion into their teaching or research, that they will

have any religious requirements imposed on them, or that the religious nature of the school will have any impact on their employment. According to the majority, this is especially true when the school also asserts a commitment to diversity and academic freedom.

The analysis of whether faculty members were held out as performing a “specific religious function” will include a review of job descriptions, employment contracts, faculty handbooks, statements to accrediting bodies, and statements to prospective and current faculty and students. The Board will not seek to look behind these documents. However, it will look to see whether faculty members are, for example, required to integrate the school’s religious teachings into coursework, serve as religious advisors to students, propagate religious tenets, or engage in religious indoctrination or teaching.

The Board also will look to determine if faculty members are subject to employment-related decisions that are based on religious considerations such as dismissal for teaching a doctrine at odds with the school’s religious faith, or if faculty are required to accept ecclesiastical sources of dispute resolution. Finally, the Board will determine if the school holds itself out as requiring its faculty to conform to its religious doctrine, or to particular tenets or beliefs in a manner that is specifically linked to their duties. The fact that the school does not require faculty members to attend religious services or be a member of a particular faith will not be required before the Board declines jurisdiction.

According to the Board majority, the University’s adjunct faculty did not satisfy the second part of new test as the University “does not hold its contingent faculty out as performing a specific role in creating or maintaining [a religious] environment, in its public representations to current or potential students and faculty members, or to the community at large.” It is for this reason that the majority concluded that it was proper to assert jurisdiction in this instance.

In a footnote, the Board specifically stated that its decision was limited to addressing the requirements for units of faculty members at colleges and universities. Thus, it remains unclear how the Board will treat jurisdictional issues raised by other types of schools or religious organizations, or with respect to non-faculty members employed by colleges and universities. Given that *Catholic Bishop of Chicago* involved high schools, it reasonably can be anticipated that the Board will extend its new standard beyond colleges and universities. However, in view of the composition of the current Board, it also can be reasonably anticipated that the Board will attempt to assert jurisdiction over non-faculty employees at all levels.

The Managerial Issue

The University contended that 39 of its 176 contingent faculty were managerial employees, and therefore excluded from the protections of the Act, pursuant to the Supreme Court’s holding in *Yeshiva University*. In rejecting this position, and similar to what it had done with the religious jurisdictional issue, the Board revised its analytical framework for addressing this issue.

Under the new analytical framework, the Board will determine whether faculty “actually or effectively exercise control over decision making pertaining to central policies of the university such that they are aligned with management.” Essentially, the Board will be analyzing the breadth and depth of the faculty’s decision-making authority.

In making this determination the Board will examine faculty participation in the following areas of decision-making: academic programs, enrollment management policies, finances, academic policies, and personnel policies and decisions, giving greater weight to the first three areas than the last two. This examination will be done in the context of the school’s decision-making structure, administrative hierarchy, and the nature of the employment relationship of the faculty in issue.

The majority indicated that it was adopting this new test, in part, as a result of the fact that some of its prior post-*Yeshiva* decisions have been criticized as failing to provide sufficient guidance regarding the importance and relative weight of the factors that it examines. The Board indicated that its new test would serve as a more predictable analytical framework to guide employers, unions and employees. That three pages of the Board’s decision are devoted just to how it will determine managerial status should, in fact, be of assistance to the parties, even to those parties that disagree with the new test.

The Dissents

Both Members Miscimarra and Johnson dissented from the majority’s holding with respect to the jurisdictional issue. Both

Members stated that the Board should adopt the three-part *Great Falls* test. Accordingly, they both rejected the portion of the new test adopted by the majority that requires that faculty members be held out as performing a role in creating or maintain the school's religious educational environment.

With respect to the managerial status of certain of the University's contingent faculty, Member Miscimarra concurred with the majority opinion, generally agreeing with the framework outlined by the majority, and also agreeing that the record in the case failed to support a finding that these faculty members were exempt managerial employees. Member Johnson dissented based on both his significant concerns about both the majority's formulation of the new post-Yeshiva test and its method for applying it.

Conclusion

No matter how one views the Board's decision in *Pacific Lutheran University*, one can be certain that we have not heard the last on either the jurisdictional issue or the managerial issue. Both issues already have gone to the Supreme Court, and there can be little doubt that one or both of them will be presented to the federal Circuit Courts of Appeal, and perhaps the Supreme Court, in the future.

On January 21, 2015, Seyfarth Shaw will be conducting a webinar for its educational employers to further discuss the holdings in the *Pacific Lutheran University* case, what steps schools should take based upon the Board's two new tests, and other labor issues such as the unionization of adjunct faculty, graduate students and student athletes. Invitations will be sent out in early January.

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