CLIENT ALERT

Changing Landscape for Labor Unions at Academic Institutions: Implications of *Pacific Lutheran University*

Jan.30.2015

On December 16, 2014, the National Labor Relations Board (NLRB) decided *Pacific Lutheran University.* The case attracted significant interest within the higher education community, as the NLRB had requested *amicus* briefing as to its intention to reconsider the standard on which the agency would assert jurisdiction over a religiously-affiliated university. The NLRB also signaled its desire to revisit its test for determining whether faculty members are managerial employees excluded from coverage under the National Labor Relations Act (Act).

The NLRB's blockbuster decision did not disappoint. It announces significant change in applicable legal standards on both issues in what is unquestionably a big win for organized labor. Although the underlying dispute is likely moot, unions now have significant new arguments that full-time regular faculty at private institutions are not managerial employees.

Factual Background

A local union affiliate of the Service Employees International Union (SEIU) sought to organize adjunct faculty at Pacific Lutheran University by filing a representation petition with the NLRB's regional office in Seattle. Pacific Lutheran University, founded in 1890 in Tacoma, Washington, is one of 26 U.S. colleges and universities affiliated with the Evangelical Lutheran Church in America. The University has approximately 180 full-time tenure-track faculty members and almost the same number of adjuncts.

The University challenged the petition, arguing that it is a church-operated institution exempt from the Board's jurisdiction under the Supreme Court's 1979 decision in *NLRB v. Catholic Bishop*. The University also argued that 39 of the adjunct faculty members at issue are managers who must be excluded from collective bargaining under *NLRB v. Yeshiva University*. The NLRB's Regional Director rejected both arguments and directed that an election be conducted. The University appealed that decision to the NLRB. In the meantime, the election was held in October 2013, with the ballots impounded, pending consideration of the University's appeal.

In last month's 3-2 decision, the NLRB affirmed the Regional Director's decision. The NLRB rejected the University's positions and ordered that the impounded ballots be counted.

At the January 8, 2015 ballot count, nearly a third of the ballots were challenged by the University. Challenges involved questions about faculty voting eligibility, the validity of ballots that were received late due to the October 2013 government shut-down, the status of duplicate ballots because of the NLRB's accidental mailing of two sets of ballots, and ballots returned in a different envelope. Because of the number of challenges, the remaining ballots were not counted. On January 15, SEIU withdrew the petition. The union presumably recognized that it had an uphill battle in what would have a long and costly process.

The resolution of the current organizing campaign does not negate the importance of the NLRB's decision. The majority announced that it would apply its new rules in all pending cases, and the agency is certain to follow the same standards in newly-filed cases.

The NLRB's Decision

A New Approach to Asserting Jurisdiction over Religious Universities

Observers correctly predicted that the NLRB's deliberations in *Pacific Lutheran* (and four other pending cases involving religious schools) would involve a reassessment of the agency's approach to election petitions filed at religious institutions. In response to *NLRB v. Catholic Bishop of Chicago,* the NLRB has applied a test that sought to determine whether the institution embodied a "substantial religious character." Several reviewing courts have rejected versions of that test, concluding that it implicated substantial issues under the Religion Clauses of the First Amendment. In *University of Great Falls v. NLRB,* 2002, for example, the D.C. Circuit rejected the NLRB's analysis as problematic under the First Amendment. The court announced a different test that would not require the agency to become entangled in an assessment of the religious mission of an institution. The court held that the NLRB should not assert jurisdiction over a religious college or university where the institution: (1) holds itself out to students, faculty and the community as providing a religious educational environment; 2) is organized as a non-profit organization; and 3) is affiliated with (or owned, operated or controlled by) a recognized religious organization.

The NLRB's decision in *Pacific Lutheran* recognizes that the "substantial religious character" test presents First Amendment issues. But the agency rejected the standard announced by the D.C. Circuit in *Great Falls*. Under its new standard, the NLRB will only decline jurisdiction when a university or college shows that it "holds itself out as providing a religious educational environment" (a requirement adopted from the *Great Falls* decision) and shows that "it holds out the petitioned-for faculty members as performing a religious function." The latter requirement means that faculty must perform a "specific role in creating or maintaining the college or university's religious educational environment, as demonstrated by its representations to current or potential students and faculty members, and the community at large." In making this determination, the NLRB will consider evidence that might include job descriptions, employment agreements, faculty handbooks, and public statements by the university.

The majority opinion states that its new standard provides a "better approach to protecting employees' rights while being sensitive to First Amendment concerns." The NLRB noted that evidence of a university holding itself out as providing a religious educational environment would include a variety of internal and external statements, including handbooks, mission statements, press releases or other public statements. The NLRB determined that the University satisfied this part of the test, relying on statements to prospective students on its website, articles of incorporation, bylaws, faculty handbook, course catalog, and other publications, all of which indicated the University's intention to provide a religious educational environment.

The NLRB majority then addressed the second part of its new test - whether the University holds its faculty members out as performing a religious function. Evidence of this requirement can include showing "that faculty members are required to serve a religious function, such as integrating the institution's religious teachings into coursework, serving as religious advisors to students, propagating religious tenets, or engaging in religious indoctrination or religious training." Documents used by a university in recruiting faculty and staff also could be relevant. The majority opinion is clear that general or aspirational statements will not suffice.

The majority concluded that the University failed to carry its burden on this issue. The NLRB found that "PLU does not take into account a contingent faculty member's adherence to Lutheranism, membership in a Lutheran congregation, or knowledge of Lutheranism in making hiring, promotion, tenure, or evaluation decisions. PLU's contingent faculty job postings do not list the need to serve any religious function or be or become knowledgeable about the Lutheran religion." The majority also relied on the fact that PLU's contingent faculty contracts do not mention religion generally or Lutheranism in particular. It noted that the general statement in those contracts that PLU requires faculty members "to be committed to the mission and objectives of the University" does not communicate the message that employees are expected to perform a specific religious function and is not specifically linked to any job duties to be performed by the faculty.

Both Republican members of the NLRB wrote strongly-worded dissents on this issue. The opinions are worth careful review for readers interested in the complex First Amendment issues presented in cases like this.

Recalibration of the Test for Determining whether Faculty Are Eligible for Unionization

After deciding that it was appropriate to assert jurisdiction over the University, the NLRB announced a new test regarding whether faculty are managerial employees. The majority provided a summary of Board and court decisions applying *Yeshiva University,* concluding (quite correctly) that the case law has resulted in an inconsistent application of the Court's holding and rationale. The NLRB set out a new approach to resolve this issue, by announcing the following test for determining managerial status of faculty members:

Do faculty actually or effectively exercise control over decision making pertaining to central policies of the university such that they are aligned with management?

To determine if the faculty meets this test, the NLRB will consider the faculty's participation in decision making regarding: (1) academic programs, enrollment management policies, and finances as primary considerations; and (2) academic policies and personnel policies of secondary importance. Where the faculty's role in these areas includes decision making or effective recommendation, the faculty will be found to be managerial employees properly excluded from the Act.

In applying the new test, the NLRB announced that faculty will be found to control or effectively control an issue only if its decision/recommendations are "almost always . . . followed by the administration." Furthermore, faculty recommendations are "effective" if they generally become operative without independent review by administration.

Practical Implications for Higher Ed – Not Just Adjuncts

The NLRB's announcement of a new standard for asserting jurisdiction over religious institutions is likely to be appealed, either in one of the four pending cases in the queue with *Pacific Lutheran University,* or in newly-filed representation petitions. The dissent makes strong arguments about the First Amendment issues implicated by the Board's test. It is unclear how the NLRB will avoid "entanglement" with religion if it must undertake an analysis of whether particular employees are performing a religious function. Given that the Supreme Court reached a unanimous conclusion in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,* that the EEOC had overstepped its authority in deciding whether the "ministerial exception" to Title VII applied to the employee at issue there, it would be no surprise to learn that this part of the NLRB's decision will not withstand judicial review.

Yet nothing is certain in this area. Religious universities that would prefer not to be subject to the NLRB's jurisdiction should consider an audit of their operations and administrative structure. Subsequent cases will focus on whether such institutions can demonstrate that they affirmatively "hold out" their faculty as serving specific religious functions. If they do not, the NLRB will find them to be covered employers under *Pacific Lutheran*.

For non-religious universities, the most obvious consequence of *Pacific Lutheran University* is an increased likelihood of union organizing activity targeting adjuncts. The NLRB's new test for determining whether faculty can be considered "managerial" employees will be extremely difficult to satisfy; adjuncts at most institutions are typically devoted to their teaching (or research) responsibilities, and have very little involvement in the various activities typically described as managerial. The SEIU has an aggressive nationwide campaign focused on adjunct organizing and institutions should be prepared to confront this situation.

But *Pacific Lutheran University's* most significant takeaway involves the potential impact on full-time regular faculty. The NLRB's re-articulation of the *Yeshiva University* test is not limited to adjuncts. The decision thus should motivate private-sector institutions to reevaluate their vulnerability to union organizing among their faculty. For institutions that view their faculty as truly "managerial," the decision suggests increased uncertainty about how institutions structure the relationship between faculty and administration.

Institutions should assess their administrative structure to determine the extent to which their faculty (whether regular or contingent) make "effective recommendations" which are "almost always" followed by the administration, without review. Institutions wishing to maintain union-free status among their faculty should consider appropriate training for their administrators as part of an overall review of their human resources strategy. Like other private sector employers, managers at academic institutions should be prepared to respond legally and effectively to organizing activities. An effective response typically includes a understanding of how union organizing works under the National Labor Relations Act, and a sophisticated approach to recognizing organizing activities, and educating faculty regarding the pros and cons of collective bargaining.

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