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It Is Time to Revisit the Yeshiva Decision: The Myth of "Shared University Governance"

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Abstract
This article considers issues raised in the seminal United States Supreme Court *Yeshiva* case in light of the decision of the National Labor Relations Board (NLRB) in November 2014 in *Pacific Lutheran* to reevaluate its import. The article discusses the *Catholic Bishop* case which provides the basis for a First Amendment analysis, as well as other important NLRB rulings, cases, and statutory materials. While the decision in *Pacific Lutheran* will no doubt be reviewed by the Ninth Circuit Court of Appeals and perhaps the United States Supreme Court, its reconsideration by the NLRB raises an important point: Is it time to review the *Yeshiva* decision itself in light of current realities and practicalities in higher education?

Keywords: Yeshiva, Collective bargaining, Shared governance, Religion clauses of the First Amendment, Managerial employees, National Labor Relations Act, NLRB.

1. The *Yeshiva* Decision

The *Yeshiva* decision has been both praised and derided in its application to faculty seeking to determine if it will be represented by a group or union or faculty association of its choice in dealing with the university administration on matters of concern to faculty. What did the Court actually find in *Yeshiva*?

1.1 The Factual Background

The following narrative has been adapted from the decision of the United States Supreme Court in *NLRB v. Yeshiva University* (*Yeshiva*) (444 U.S. 672 (1980)) and from facts cited in an article written by Bernard Prusak (2010):

Yeshiva University is a private university which operates five undergraduate and eight graduate schools in New York City. The schools are primarily involved in offering traditional "arts and science" programs. On October 30, 1974, the Yeshiva University Faculty Association (for the purposes of this study, the "Union") filed a representation petition with the National Labor Relations Board (NLRB). The Union sought certification as the bargaining agent for the full-time faculty members at 10 of the 13 schools. Yeshiva University opposed the petition on the ground that all of its faculty members were *managerial* or *supervisory* personnel, and hence not "employees" within the meaning of the National Labor Relations Act (Act). (49 Stat. 449 (1935), 29 U.S.C. §§ 151-169). As is the practice before the NLRB, a Board-appointed hearing officer held a series of hearings over a period of five months, generating a voluminous record in which "interested parties" were invited to present their views on the matter.

The evidence elicited at the hearings indicated that a central administrative hierarchy serves all of the University's schools. Ultimate administrative authority at Yeshiva is vested in a Board of Trustees, whose members (other than the President of the University) hold no administrative positions at the University. The President of the University sits on the Board of Trustees and serves as chief executive officer. The President is assisted by four Vice Presidents who oversee the following units: medical affairs and science, student affairs, business affairs, and academic affairs. Yeshiva also operates under the aegis of an Executive Council of Deans and Administrators which makes recommendations to the President on a wide variety of academic, administrative, and other matters. The administrative structure of Yeshiva resembles that of many colleges and universities in the United States.

University-wide *academic policies* are formulated by the central administration with the approval of the Board of Trustees. These policies include formulating general guidelines dealing with teaching loads, salary scales, tenure, sabbaticals, retirement, and fringe benefits offered both to faculty and to administrative personnel. The budget for each school or unit is drafted by its individual Dean or Director, subject to approval by the President after consultation with a committee of administrators. Governance at Yeshiva is carried on in a variety of forums. The faculty as a whole participate in University-wide governance through their representatives on an elected student-faculty advisory council. There is also a University-wide faculty body which is called the Faculty Review Committee, composed of elected faculty representatives who deal with various grievances through a process of informal negotiation. The Faculty Review Committee may also make formal recommendations to the Dean of the affected school or to the President of the University on matters of university-wide concern. However, such recommendations are purely advisory and carry no executory authority.

Governance at Yeshiva proceeds on the same lines as would be prevalent at most higher academic institutions throughout the United States. The individual schools within Yeshiva are substantially autonomous, while still operating under the larger umbrella of university-wide governance. Each school is headed by a Dean or Director. Faculty members at each school meet both formally and informally to discuss matters of institutional and professional concern. At four schools, formal faculty meetings are convened on a regular basis and faculty conduct meetings pursuant to written bylaws adopted by each faculty group. The remaining faculties meet when convened by the Dean or Director. Most of the schools also have faculty committees that are concerned with specific areas of educational policy. Faculty committees meet and negotiate with administrators concerning salary and other terms and conditions of employment. The United States Supreme Court noted in its opinion that it is through these meetings and committees that the faculty at each school effectively determine its "curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules." (*Yeshiva*, 1980, p. 679).

The authority of the faculty at Yeshiva's schools extends beyond strictly academic concerns. The system of governance allows the faculty at each school to make recommendations to the Dean or Director in every case of faculty hiring, tenure, sabbaticals, and perhaps most importantly from the standpoint of the faculty, termination and promotion. The Court did note, however, that "although the final decision is reached by the central administration on the advice of the Dean or Director," as a matter of fact at Yeshiva, "the overwhelming majority of faculty recommendations are implemented." (*Yeshiva*, 1980, p. 673).

The Supreme Court took special note that when financial problems in the early 1970's plagued Yeshiva and restricted Yeshiva's budget, faculty recommendations largely controlled personnel decisions made within the constraints imposed by the administration. In addition, the University has devolved to some of its some faculties the ability to make final decisions regarding the admission, expulsion, and graduation of individual students. Other faculty have assumed authority involving teaching loads, student absence policies, tuition and enrollment levels, and in one case, the actual location of a school. All of these factors were considered critical in its analysis.

1.2 The Procedural Background

A three-member panel of the National Labor Relations Board (the Board) granted the Union's petition in December 1975, and directed an election in a bargaining unit consisting of *all full-time faculty members* at the affected schools. (221 N.L.R.B. 1053 (1975)). The unit included various Assistant Deans, senior professors, and department chairmen, as well as associate professors, assistant professors, and instructors. Deans and Directors were excluded by the Board as "managerial employees." In making its determination, the Board rejected the University's contention that its entire faculty are *managerial employees*, and thus are exempted from the Act. The Board referred generally to the record and found no "significan[t]" difference between this faculty and others it had considered for representational purposes. The Board concluded that while the faculty are *professional employees,* they were nonetheless entitled to the protection of the Act because "faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than `in the interest of the employer,' and final authority rests with the board of trustees." (*Yeshiva*, 1980, p. 679).

The Union won the election and was certified by the Board as the exclusive bargaining agent as the Yeshiva University Faculty Association (the Union). However, the University refused to bargain, reasserting its view that the faculty are "managerial" and not professional employees. In the subsequent *unfair labor practice proceeding*, the Board refused to reconsider its holding in the representation proceeding and ordered the University to bargain with the Union. (231 N.L.R.B. 597 (1977)). The University, as was its right under procedures implemented in such cases, still refused to bargain with the Union. The Board then sought enforcement of its order in the Court of Appeals for the Second Circuit, which denied the petition. (582 F.2d 686 (2nd Cir. 1978)).

The procedure was complicated by the fact that the Board had made no findings of fact in the matter. Thus, the Circuit Court examined the record of the proceedings essentially "de novo" to that date. It agreed that the faculty were "professional employees" under Section 2(12) of the Act. However, the Circuit Court found that the Board had ignored "the extensive control of Yeshiva's faculty" over academic and personnel decisions, as well as the "crucial role of the full-time faculty in determining other central policies of the institution." (582 F.2d at 698). The Second Circuit concluded that such power is not an exercise of individual professional expertise. Rather, the faculty are, "in effect, substantially and pervasively operating the enterprise." (582 F.2d at 698). Accordingly, the Circuit Court refused to enforce the order of the NLRB, holding that the faculty are endowed with "managerial status" sufficient to remove

them from the coverage of the Act. The Supreme Court granted *certiorari* (review) and affirmed the decision of the Second Circuit as to the core issue of the status of the Yeshiva faculty as managerial employees.

1.3 The Essence of the Supreme Court Decision

The Supreme Court made several sweeping declarations in deciding Y*eshiva.* In affirming the judgment of the appellate court, the United States Supreme Court decided that faculty members of Yeshiva University were in effect "substantially and pervasively" operating the enterprise. Two factors were held to be most important: the extensive control of the faculty over academic and personnel decisions and the faculty's crucial role in determining other "central policies" of Yeshiva. The Supreme Court said that the exercise of these two important responsibilities had endowed the faculty with *managerial status* that would be sufficient to remove them from employee status under the National Labor Relations Act. Thus, as managers of the University, the Yeshiva faculty was not entitled to the benefits of collective bargaining under the Act.

The ruling of the United States Supreme Court applied to the full-time faculty members at Yeshiva University who were seeking to be represented by a union, but would also be extended over the years to other faculty at private universities as well who were said to have been "*Yeshivaed*." Certain areas were determined to be critical in which the faculty would be expected to exercise what the Court said was "absolute authority," which "in any other context, would unquestionably be managerial." At Yeshiva University, the faculty:

- decide what courses will be offered, when they will be scheduled, and to whom they will be taught;
- debate and determine teaching methods, grading policies and matriculation standards;
- effectively decide which students will be admitted, retained, and graduated; and
- determine, on occasion, the size of the student body, the tuition to be charged, and the location of the university's schools. (444 U.S. at 686).

The application of the "managerial exclusion" was held "not inappropriate" even though in the exercise of these core responsibilities they were not necessarily "aligned with management." In deciding such matters as found above, faculty are expected to exercise "independent professional judgment" while participating in academic governance, and to pursue professional values rather than institutional interests. (It should be noted that Justices Brennan, White, Marshall, and Blackmun dissented from this portion of the majority holding of the case.) This principle has often been termed as "shared governance" by adherents to the *Yeshiva* decision. It seeks to distinguish ultimate authority in decision-making from meaningful participation in these same matters.

The theory of excluding an employee from the ability to form and join a union was discussed by the Supreme Court in the context of faculty being considered as "professional persons" or "professional employees." There were two bases for the Court's conclusion: professional employees may be excluded either under the Act's exclusion for "supervisors" who use independent judgment in overseeing other employees in the interest of the employer; or under the judicially-created exclusion for managerial employees who are involved in developing and enforcing employer policy.

The judicially-implied exclusion from the coverage of the National Labor Relations Act for "managerial" employees applies to those employees who both *formulate* and *effectuate* management policies by expressing and making operative the decisions of their employer. The Court noted that in normal circumstances, an employee may be excluded as managerial only if he or she represents management interests by "taking or recommending discretionary

actions that effectively control or implement employer policy." (*Yeshiva*, 1980, p. 683). Managerial employees must exercise discretion within, or even independently of, established employer policy. The Court then added, however, that these employees must essentially be "aligned with management."

It is interesting to note that the Court would further comment on the relevant considerations in determining whether a particular employee is a supervisor within the meaning of the Act and who would therefore be excluded from the coverage of the Act. The major considerations concern the employee's ability to effectively *recommend or control* those actions enumerated in Section 152(11), and not necessarily the employee's possession of final authority. It is also important to note that the same core rationale applies "with equal force to the judicially-implied exclusion from the Act for managerial employees." (*Yeshiva*, 1980, p. 684, note 17).

The *Yeshiva* decision has been very controversial. However, it has stood for more than thirty-five years. Was it time for a reappraisal?

2. Time for a Reappraisal?

On September 23, 2013, the NLRB, through Chairman Pearce, and Members Miscimarra and Hirozawa), granted the Employer's Request for Review of the Regional Director's Decision and Direction of Election because it raised "substantial issues warranting review… with respect to the assertion of jurisdiction over the Employer and the determination that certain faculty members are not managerial employees" under the Act. The case involved a petition filed by the Service Employees International Union, Local 925 (the Union) seeking to represent a unit of all nontenure-eligible contingent faculty members employed by Pacific Lutheran University. The case was initially filed on April 11, 2013,

At the outset, it should be noted that a "Request for Review" does not *necessarily* indicate that the Board may be ready to effect a change in policy—just that it is interested in taking a fresh look at either the underlying facts or the rational for one of its prior decisions. At that time, the Board invited comments from "interested parties" and others in relation to the following twelve questions:

1. What is the test the Board should apply under *NLRB v. Catholic Bishop of Chicago* (440 U.S. 490 (1979)), to determine whether self-identified "religiously affiliated educational institutions" are exempt from the Board's jurisdiction?
2. What factors should the Board consider in determining the appropriate standard for evaluating jurisdiction under *Catholic Bishop*?
3. Applying the appropriate test, should the Board assert jurisdiction over this Employer?
4. Which of the factors identified in *NLRB v. Yeshiva University*, and the relevant cases decided by the Board since *Yeshiva* are most significant in making a finding of managerial status for university faculty members and why?
5. In the areas identified as "significant," what evidence should be required to establish that faculty make or "effectively control" decisions?
6. Are the factors identified in the Board case law to date sufficient to correctly determine which faculty are managerial?
7. If the factors are not sufficient, what additional factors would aid the Board in making a determination of managerial status for faculty?
8. Is the Board's application of the *Yeshiva* factors to faculty consistent with its determination of the managerial status of other categories of employees and, if not, (a) May the Board adopt a distinct approach for such determinations in an academic context, or (b) can the Board more closely align its determinations in an academic

context with its determinations in non-academic contexts in a manner that remains consistent with the decision in *Yeshiva*?

9. Do the factors employed by the Board in determining the status of university faculty members properly distinguish between indicia of managerial status and indicia of professional status under the Act?
10. Have there been developments in models of decision making in private universities since the issuance of *Yeshiva* that are relevant to the factors the Board should consider in making a determination of faculty managerial status? If so, what are those developments and how should they influence the Board's analysis?
11. As suggested in footnote 31 of the *Yeshiva* decision, are there useful distinctions to be drawn between and among different job classifications within a faculty–such as between professors, associate professors, assistant professors, and lecturers or between tenured and untenured faculty-depending on the faculty's structure and practices?

The text of this footnote states:

> "We recognize that this is a starting point only, and that other factors not present here may enter into the analysis in other contexts. It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research. There thus may be institutions of higher learning unlike Yeshiva where the faculty is entirely or predominantly nonmanagerial. There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit. It may be that a rational line could be drawn between tenured and untenured faculty members, depending upon how a faculty is structured and operates. But we express no opinion on these questions, for it is clear that the unit approved by the Board was far too broad." (*Yeshiva*, p. 690, note 31).

12. Did the Regional Director correctly find the faculty members involved in this case to be employees?

On December 16, 2014, the Board issued a Decision and Order in *Pacific Lutheran and Service Employees International, Local 925, Petitioner*. (Case 19-RC-105251, dated December 16, 2014.)

At the outset, it may be important to discuss the issues presented in *Catholic Bishop* that relate to faculty organizational efforts at "self identified religious colleges and universities."

2.1 Catholic Bishop of Chicago

The National Labor Relations Board (NLRB) certified unions as bargaining agents for lay teachers in schools operated by the respondents, the Bishop of Chicago (Illinois) and the Bishop of the Diocese of Fort Wayne-South Bend (Indiana), which then refused to recognize or bargain with the unions.

In actuality, two groups of schools were involved. One group was operated by the Catholic Bishop of Chicago, a corporation sole. (A corporation sole is a legal entity organized under the statutes of an individual state consisting of a single ("sole") incorporated office, occupied by a single ("sole") person. The "corporation sole" is often the Bishop of an individual diocese. This allows the corporation to pass without a break in time from one office holder to the next successor-in-office, giving the positions legal continuity with a subsequent office holder, i.e., the Bishop, possessing identical legal powers to their predecessors). The other group of schools is operated by the Diocese of Fort Wayne-South Bend, Inc.

The group operated by the Catholic Bishop of Chicago consists of two schools, Quigley North and Quigley South (the Quigley Schools or Quigley), which were termed "minor seminaries," generally serving students of high school age. These schools chiefly educate young men who may eventually elect to become Catholic priests. At one time, only students who indicated a vocation to become a priest were admitted to the Quigley schools. (It might be noted that the minor seminaries were finally closed in June of 2007). The record indicated that "In 1970, the requirement was changed so that students admitted to these schools need not show a definite inclination toward the priesthood. Now the students need only be recommended by their parish priest as having a potential for the priesthood or for Christian leadership." While offering an education in Catholic theology of a different, more intense, quality than other Catholic high schools, Quigley North and Quigley South also offered the same basic college preparatory curriculum as did public secondary schools or other schools organized by the Archdiocese of Chicago. Students at Quigley participated in a variety of extracurricular activities which include secular as well as religious events. The schools were recognized by the State of Illinois and accredited by a regional educational organization.

The Diocese of Fort Wayne-South Bend, Inc. operated five high schools. Unlike the Quigley schools which required a special recommendation of a priest, admission to one of the five Catholic high schools operated by the Diocese of Fort Wayne-South Bend did not require the recommendation of a priest as a prerequisite for admission. Similar to the Quigley schools, however, these high schools provided a traditional secular education, but oriented to the "tenets of the Roman Catholic faith." Religious training was also mandatory in the schools. These schools were similarly certified by the State.

When the respondents refused to bargain with the union after the election had been conducted, the NLRB issued cease-and-desist orders against the respondents, holding that it had properly assumed jurisdiction over the schools. (Catholic Bishop of Chicago, 224 N.L.R.B. 1221 (1976); Diocese of Fort Wayne-South Bend, Inc., 224 N.L.R.B. 1226 (1976)).

The Board asserted that the exercise of jurisdiction was in accord with the Board's policy of declining jurisdiction in cases when schools were "completely religious" not just "religiously associated." The Board made its determination because the schools taught secular as well as religious subjects.

The respondents challenged the NLRB orders. Upon reaching the Court of Appeals in an enforcement action, the Court of Appeals for the Seventh Circuit disagreed with the NLRB and denied enforcement. The Seventh Circuit held that the NLRB standard failed to provide a workable guide for the exercise of its discretion, and that the NLRB's assumption of jurisdiction was foreclosed by the "Religion Clauses" of the First Amendment. It reasoned that, from the initial act of certifying a union as the bargaining agent for lay teachers, the Board's action would impinge upon the freedom of church authorities to shape and direct teaching in accord with the requirements of their religious beliefs. It analyzed the Board's action in this way:

> "At some point, factual inquiry by courts or agencies into such matters [separating secular from religious training] would almost necessarily raise First Amendment problems. If history demonstrates, as it does, that Roman Catholics founded an alternative school system for essentially religious reasons and continued to maintain them as an 'integral part of the religious mission of the Catholic Church,' (Lemon v. Kurtzman, 403 U. S. 602 (1971)), courts and agencies would be hard-pressed to take official or judicial notice that these purposes were undermined or eviscerated by the determination to offer such secular subjects as mathematics, physics, chemistry, and English literature." (*Catholic Bishop*, 559 F.2d 1112 (7th Cir. 1977), at p. 496).
> The Supreme Court agreed to hear the case and granted *certiorari*.

At the core of its ruling, the Supreme Court decided that schools operated by a church to teach both religious and secular subjects are not within the jurisdiction granted by the National Labor Relations Act, and the NLRB was therefore without authority to issue the orders against respondents. (Generally, Macri, 2014).

The decision of the United States Supreme Court was based on the following two considerations:

(a) There would be a significant risk of infringement of the Religion Clauses of the First Amendment if the Act conferred jurisdiction over church-operated schools. (Citing Lemon v. Kurtzman, 403 U. S. 602 (1971));
(b) Neither the language of the statute nor its legislative history discloses any affirmative intention by Congress that church-operated schools be within the NLRB's jurisdiction, and, absent a clear expression of Congress' intent to bring teachers of church-operated schools within the NLRB's jurisdiction, the Court will not construe the Act in such a way as would call for the resolution of difficult and sensitive First Amendment questions. (Gaul, 2007).

The language of the Supreme Court in *Catholic Bishop* would later be quoted in *Pacific Lutheran* and is quite instructive:

> "Emphasizing "the critical and unique role of the teacher in fulfilling the mission of a church-operated school, "the Court held that the Board could not assert jurisdiction over the petitioned-for lay teachers because to do so would create a "significant risk" that First Amendment religious rights would be infringed. The Court feared that Board jurisdiction would "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the schools' religious mission" and that "[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." The Court predicted that if the Act conferred jurisdiction over these teachers, the Board could not "avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining."" (*Pacific Lutheran*, 2014, p. 3; *contra*, Hankins v. N.Y. Annual Conference of the United Methodist Church, 351 Fed. App'x. 489 (2d Cir. 2009)).

What are the implications of both *Catholic Bishop* and *Yeshiva* in the *Pacific Lutheran* controversy? How might the NLRB differentiate this case from the two prior decisions? Was it time to take a new and fresh look at *Yeshiva* in light of a different set of facts and circumstances?

3. Pacific Lutheran

Pacific Lutheran University or PLU was founded in 1890 by Lutherans from the Puget Sound area of Washington in order to assist immigrants adjust and find jobs "and to serve the church and community." It is one of twenty-six colleges and universities affiliated with the Evangelical Lutheran Church in America (ECLA). PLU is organized as a not-for-profit corporation for education purposes. It is exempt from Federal taxation pursuant to Section 501(c) (3) of the Internal Revenue Code.

The University offers both undergraduate and graduate degrees at its campus in Tacoma, Washington. The University consists of one college and four schools: the College of Arts and Sciences, the School of Arts and Communication, the School of Business, the School of Education and Movement Studies, and the School of Nursing. The Board stated that during

the 2012–2013 academic year, PLU had a total enrollment of 3,473 students and employed about 180 tenured or tenure-track faculty and 176 contingent faculty. [Depending on the hiring institution, *contingent faculty* can be known as adjuncts, adjunct professors, postdocs, TAs, non-tenure-track faculty, clinical faculty, part-timer faculty, term faculty, lecturers, or instructors.]

The NLRB was called on to reexamine two significant precedents pertaining to collective-bargaining rights under the National Labor Relations Act relating to faculty members at private colleges and universities. Two seminal questions were addressed: First, the Board was asked to reexamine the standard it had applied in determining when the Board should decline to exercise jurisdiction over faculty members at self-identified religious colleges and universities under the precedent established by the Supreme Court in *NLRB v. Catholic Bishop of Chicago* (440 U.S. 490 (1979)). Second, the Board was asked to reexamine its standard for determining when faculty members are managerial employees, whose rights to engage in collective bargaining are not protected by the Act under the precedent established in *NLRB v. Yeshiva University* (444 U.S. 672 (1980)).

It is very interesting to note that all parties understood quite well that the stakes were very high. Indeed, the sheer number of parties who weighed in as *amici* (friends of the court) indicated the interest that parties on all sides of the argument accorded to a resolution of this controversy. The following interested parties filed briefs generally supporting the Employer: brief filed collectively by the Association of Catholic Colleges and Universities, Congregation for Mercy Higher Education, Lasallian Association of College and University Presidents, Association of Jesuit Colleges and Universities, Association of Benedictine Colleges and Universities, and Association of Franciscan Colleges and Universities (the following universities filed letters expressing support for brief filed by the Association of Catholic Colleges and Universities, et al.: Assumption College, College of Mount Saint Joseph, Duquesne University, Fairfield University, Saint Joseph's University, and Saint Leo University); Augustana College; the Beckett Fund for Religious Liberty; brief filed collectively by the Cardinal Newman Society, Benedictine College, Desales University, Holy Spirit College, John Paul the Great Catholic University, Thomas Aquinas College, Thomas More College of Liberal Arts, Aquinas College, Ignatius-Angelicum Liberal Studies Program, University of St. Thomas Houston, and Wyoming Catholic College; brief filed collectively by the General Conference of Seventh-Day Adventists, Association of Christian Schools International,

California Association of Private School Organizations, Council for Christian Colleges and Universities, Azusa Pacific University, and Brigham Young University; the Islamic Saudi Academy; the Lutheran Educational Conference of North America; and the National Right to Work Legal Defense and Education Foundation, Inc.

The following interested parties filed briefs generally supporting the Union:

AFL–CIO; Catholic Scholars for Workers Justice; SEIU Local 925 and Service Employees International Union; and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO/CLC. Not all amici addressed both issues. After the briefing period ended, the General Conference of Seventh- Day Adventists, Association of Christian Schools International, California Association of Private School Organizations, Council for Christian Colleges and Universities, Azusa Pacific University, and Brigham Young University (collectively) and the National Right to Work Legal Defense and Education Foundation filed letters calling the Board's attention to recently issued case authority, and the Petitioner filed a letter in response. Pursuant to *Reliant Energy***,** 339 NLRB 66 (2003), the Board accepted these submissions.

3.1 The Facts

On April 11, 2013, the Service Employees International Union, Local 925 (the Union) filed a petition seeking to represent a unit of all nontenure-eligible contingent faculty members employed by Pacific Lutheran University (PLU or the University). The University challenged the Union's petition, arguing that PLU is a church-operated institution and that it was exempt from the Board's jurisdiction under *NLRB v. Catholic Bishop of Chicago* (440 U.S. 490 (1979)), and that certain of its faculty—the full-time contingent faculty members in the proposed unit—are managerial employees who must be excluded from the unit under *NLRB v. Yeshiva University* (444 U.S. 672 (1980)).

Following a hearing, on June 7, 2013, the Regional Director issued a Decision and Direction of Election that rejected both arguments. In accordance with Section 102.67 of the Board's Rules and Regulations, PLU filed a timely request for review of the Regional Director's decision. With respect to the Board's assertion of jurisdiction, PLU once again argued that, under the test articulated by the D.C. Circuit in *University of Great Falls v. NLRB* (278 F.3d 1335 (2002)), PLU is exempt from the Board's jurisdiction as a religious organization. Second, the University argued that its full-time contingent faculty members are managerial employees excluded from coverage under the Act. PLU did not challenge the standard articulated by the Regional Director, but instead argued that the Regional Director failed to apply that standard properly.

3.2 Competing Interests Identified

In terms of the first question, it was apparent that both the NLRB and the various courts that have considered this question have determined that any decision must accommodate two competing interests when deciding whether the Board may assert jurisdiction over faculty members at religiously affiliated colleges and universities. "One interest is the need to ensure that assertion of the Board's jurisdiction, and the test the Board uses when deciding whether to assert jurisdiction, do not violate the Free Exercise Clause and the Establishment Clause of the First Amendment to the Constitution ("the Religion Clauses")." (*Pacific Lutheran*, 2014, p. 3). An application of this consideration would require that the Board avoid "any intrusive inquiry into the character or sincerity of a university's religious views." In attempting to frame correctly this balancing, the Board also noted that a decision to assert jurisdiction over faculty members does not, however, "involve only a consideration of concerns raised by the Religion Clauses. Also at issue is the effective implementation of Federal labor policy as embodied in the National Labor Relations Act and enforced by the Board." (*Pacific Lutheran*, 2014, p. 3).

The Board sought to clarify issues relating to the Establishment clause. The Board cited *University of Great Falls* (331 N.L.R.B. 1663 (2000)) in which it held that the University of Great Falls did *not* have a substantial religious character. Therefore, in that case, the Board decided that that the exercise of the Board's jurisdiction would not present a significant risk of infringing on that employer's religious rights. The D.C. Circuit, however, rejected both the Board's conclusion and its analysis. (University of Great Falls v. N.L.R.B., 278 F.3d 1335 (D.C. Cir. 2002)). The court insisted that "[d]espite its protestations to the contrary, the nature of the Board's inquiry boils down to 'is [the university] *sufficiently* religious?'"

The D.C. Circuit, however, proposed and applied a three-part test, which it drew largely from then-Judge Breyer's decision in *Bayamon* (Universidad Central de Bayamon v. N.L.R.B., 793 F.2d 383 (1st Cir. 1985)), under which the Board would assert jurisdiction *unless* a college or university:

- holds itself out to students, faculty and the community as providing a religious educational environment;
- is organized as a nonprofit; and
- is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.

The D.C. Court touted the benefits of its test because it "avoids the constitutional infirmities" of the Board's substantial religious character test because it "does not intrude upon the free exercise of religion nor subject the institution to questioning about its motives or beliefs." (*Great Falls*, 2002, p. 1344). The test also "avoids asking how effective the institution is at inculcating its beliefs…" which the Court stated was an irrelevant inquiry.

However, because the Board had refused either to accept or reject the test enunciated in *Bayamon*, the Board in *Pacific Lutheran* decided "to articulate a new test that is faithful to the holding of *Catholic Bishop*, sensitive to the concerns raised by the parties and amici, and consistent with our statutory duty."

Thus, the NLRB announced that henceforth it would apply the following criteria in determining if a University should be brought within its jurisdiction:

> "Our consideration of prior cases, the arguments of the parties and amici, and the Act lead us to conclude that the Act permits jurisdiction over a unit of faculty members at an institution of higher learning unless the university or college demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment, and that it holds out the petitioned-for faculty member's as performing a specific role in creating or maintaining the school's religious educational environment." (*Pacific Lutheran*, 2014, p. 5).

In applying that test to the facts presented, the Board found with respect to the petitioned-for unit of contingent (i.e., nontenure track) faculty at Pacific Lutheran University, that although PLU had met the threshold requirement, it has failed to establish that it holds out its contingent faculty members as *performing a religious function*. Accordingly, the Board determined that it had the authority to assert jurisdiction over these employees in this case.

Amplifying on this principle, the Board noted that its focus of its inquiry into whether there is a "significant risk" of infringement under *Catholic Bishop* must be on the faculty members themselves rather than on the nature or religious character of the university as a whole in order to determine if they are employees eligible for coverage under the Act so that the petitioned-for employees are not improperly denied the opportunity to vote on representation.

In referencing the balancing criteria, the Board noted that "if teachers play a "critical and unique role" in creating and sustaining a religious environment, the assertion of jurisdiction over this group could result in interference in management prerogatives and "open the door to conflicts between clergy-administrators and the Board." In contrast, where faculty members are "not expected to play such a role in effectuating the university's religious mission and are not under religious control or discipline, the same sensitive First Amendment concerns of excessive entanglement raised by the Court are not implicated. In these circumstances, it is appropriate for the Board to assert jurisdiction or the same reasons that it is appropriate to assert jurisdiction over employees at other types of religious organizations, that is, because assertion of the Board's jurisdiction does not raise concerns under either the Free Exercise Clause or the Establishment Clause of the First Amendment." Thus, faculty members who are not expected to perform a specific role or function in creating or maintaining the school's religious educational environment are "indistinguishable from faculty at colleges and

universities which do not identify themselves as religious institutions and which are indisputably subject to the Board's jurisdiction. Both faculty provide nonreligious instruction and are hired, fired, and assessed under criteria that do not implicate religious considerations." (*Pacific Lutheran*, 2014, pp. 7-8).

The Board concluded: "For the Board to assert jurisdiction over such employees does no harm to the university's religious mission and does not impermissibly entangle the Board in any of the university's religious beliefs or practices…. On the other hand, excluding such faculty members based solely on the *nature of the institution* erases the Section 7 rights of an entire group of employees who are indistinguishable from their counterparts at universities that do not claim any religious affiliations or connections." (*Pacific Lutheran*, 2014, p. 8).

Having articulated a new, discreet standard relating to the Establishment Clause, the Board then reexamined its standard for determining when faculty members are managerial employees, whose rights to engage in collective bargaining are not protected by the Act under the precedent established in *NLRB v. Yeshiva University* (444 U.S. 672 (1980)).

The Board noted:

"Because we are charged with protecting workers' exercise of their rights under the Act to the fullest permissible extent, we must carefully examine any claims that a group of employees is excluded from our jurisdiction and thus not afforded any of the protections of the Act, including the right to representation and collective bargaining." (*Pacific Lutheran*, p. 3).

With respect to the managerial status of faculty members, after again taking careful note of the relevant precedents and the positions of the parties and amici, the Board decided to refine the standard by which it would determine the managerial status of these faculty pursuant to *NLRB v. Yeshiva University*. In so doing, the Board explained which factors are significant in assessing managerial status, and why, and the weight to be accorded such factors.

> "In sum, where a party asserts that university faculty are managerial employees, we will examine the faculty's participation in the following areas of decision-making: *academic programs, enrollment management, finances, academic policy, and personnel policies and decisions*, giving greater weight to the first three areas than the last two areas. We will then determine, in the context of the university's decision making structure and the nature of the faculty's employment relationship with the university, whether the faculty actually control or make effective recommendation over those areas. If they do, we will find that they are managerial employees and, therefore, excluded from the Act's protections." (*Pacific Lutheran*, 2014, p. 20).

Applying that standard to Pacific Lutheran University, the Board concluded that the University had failed to demonstrate that full-time contingent faculty members are managerial employees and thus would be exempt from the reaches of the Act. Further, and perhaps more importantly, on policy grounds, *could not these standards be applied to regular tenure and tenure-track faculty as well?*

In reaching this decision, it is interesting to take a close look at the points raised by the NLRB (*Pacific Lutheran*, 2014, pp. 14-25 (scattered)):

- "Ultimately, our analysis is designed to answer the question whether faculty in a university setting actually or effectively exercise control over decision making pertaining to central policies of the university such that they are aligned with management (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), where the Court explained, managerial employees "must exercise discretion within, or even

independently of, established employer policy and must be aligned with management.””)

- “To determine whether an employee is “aligned with management,” the Court held that an employee must “represent management interests by taking or recommending discretionary actions that effectively control or implement employer policy.”

- “The Court further observed that “the relevant consideration is effective recommendation or control rather than final authority.””

- “The Court emphasized, “the fact that the administration holds a rarely exercised veto power does not diminish the faculty effective power in policymaking and implementation.””

- “The Board has examined faculty participation in decisions affecting, among other things, curriculum, certificate/program/degree offerings, university/academic structure, graduation requirements/ lists, honors, university catalogues, admissions, enrollment, matriculation, student retention, tuition, finances, hiring/firing, promotions, tenure, salary, evaluations, sabbaticals, teaching methods, teaching assignments, grading policy, syllabi, course size, course load, course content, textbooks, academic calendar, and course schedules. The Board never specifically addressed the relative significance of particular areas of decision-making, although it tended to give more weight to those decisions deemed “academic” rather than “nonacademic” because, as the Supreme Court said, “academic” decisions affect the “business” of the university.”

- “The Board also examined whether faculty participation in a particular area of decision-making amounted to effective control over that area, “whether individually, by department consensus, through . . . committees, or in meetings of the whole.””

- “The *Yeshiva* Court established some basic markers—faculty who determine the product to be produced, on what terms, and for whom are likely to be managerial, whereas faculty whose purview is limited to their own academic affairs likely are not.”

- “In examining the breadth of the faculty’s authority, we will give more weight to those areas of policy making that affect the university as a whole, such as the product produced, the terms on which it is offered, and the customers served. In examining the depth of their authority, we seek to determine whether the faculty actually exercise control or make effective recommendations over those areas of policy; this inquiry will necessarily be informed by the administrative structure of the particular university, as well as the nature of the faculty’s employment with that university.”

- “In order for decisions in a particular policy area to be attributed to the faculty, the party asserting managerial status must demonstrate that faculty actually exercise control or make effective recommendations.”

- ““The relevant concern is effective recommendation or control””:

“First, the party asserting managerial status must prove actual—rather than mere paper—authority (emphasizing that the Board must “look beyond self-serving descriptions of the role of faculty or the administration of a university” to the “actual role of the faculty”). A faculty handbook may state that the faculty has authority over or responsibility for a particular decision-making area, but it must be demonstrated that the faculty exercises such authority *in*

fact. We emphasize the need for specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decision-making area, and the subsequent review of those decisions or recommendations, if any, by the university administration prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed."

"Second, to be "effective," recommendations must almost always be followed by the administration. Further, faculty recommendations are "effective" if they routinely become operative without independent review by the administration."

"Finally, an evaluation of whether faculty actually exercise control or make effective recommendations requires our inquiry into both the structure of university decision-making and where the faculty at issue fit within that structure, including the nature of the employment relationship held by such faculty (e.g., tenured vs. tenure eligible vs. nontenure eligible; regular vs. contingent)."

- "We conclude that PLU has failed to prove that its fulltime contingent faculty exercise managerial authority on behalf of their employer, PLU. In particular, we find that there is insufficient evidence that the full-time contingent faculty are substantially involved in decision-making affecting the key areas of academic programs, enrollment management, and finances. Even in the secondary areas of academic policy and personnel policy or decisions, their decision-making authority is essentially limited to matters concerning their own classrooms or departments."

- "To the extent full-time contingent faculty do have opportunities to participate in those areas of decision making, the record is clear that their involvement falls well short of actual control or effective recommendation, given the university's decision making structure."

It is also most interesting to note the comments of the Board regarding the actual role faculty play in general in administrative matters:

> "Indeed, our experience applying *Yeshiva* has generally shown that colleges and universities are increasingly run by administrators, which has the effect of concentrating and centering authority away from the faculty in a way that was contemplated in *Yeshiva*, but found not to exist at Yeshiva University itself. Such considerations are relevant to our assessment of whether the faculty constitute managerial employees." (*Pacific Lutheran*, 2014, p. 19).

These comments comport to those of Professor Michael Olivas, who stated: "Just as the Yeshiva case misapprehended how normative academic decision-making is actually undertaken, as if the faculty were the drivers of all the institutional decisions, so they are really elided with management, and so cannot collectively bargain in collegial colleges." (Olivas, 2013, pp. 128-129). The NLRB had reached a similar conclusion in *Pacific Lutheran*.

4. Concluding Comments: The "Beginning of the End" of the Saga of *Yeshiva*?

No doubt, *Pacific Lutheran* is not the end of a process or the end of a discussion. What we have been considering is the determination of the NLRB which will in all likelihood come before the Ninth Circuit Court of Appeals in an enforcement action. At that point, there is at least some chance that the case may reach the United States Supreme Court, where the Justices will once again weigh in on the issues. Certainly, the issue of religious freedom

relating to certain employers and issues relating to the status of employees who may or may not be classified as "managerial" will be fiercely contested as they have been in the past in *Yeshiva*, *Catholic Bishop*, and *Great Falls*.

With the stakes so high, and with a possible application to regular, full-time tenured and tenure track faculty, there is every reason to believe that a variety of litigants may seek further clarifications and perhaps these or other exemptions from the Act in the future. *Pacific Lutheran* is just another step—albeit an important one—in the process.

Post Script

On February 5, 2015, the National Labor Relations Board issued three decisions regarding religious colleges where faculty members had attempted to form unions and where administrators had objected, arguing that their "spiritual affiliation" as Roman Catholic placed them outside of the board's jurisdiction. However, in the cases of Seattle University, Saint Xavier University, and Manhattan College, the board remanded the case back to the NLRB regional directors to take "appropriate action" in light of the NLRB decision regarding Pacific Lutheran University.

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