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Impact of Pacific Lutheran on Collective Bargaining at Catholic Colleges & Universities (CLE): NLRB RD Decision

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**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

SEATTLE UNIVERSITY

Employer

and

Case 19-RC-122863

**SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 925**

Petitioner

SUPPLEMENTAL DECISION AND ORDER

The above-captioned matter is before me on remand from the National Labor Relations Board (Board). On April 17, 2014, I issued a Decision and Direction of Election. However, the Employer appealed my Decision to the Board. On April 30, 2014, and following a mail ballot election held from May 14 to June 2, 2014, the ballots were impounded.

On December 16, 2014, the Board issued its decision in *Pacific Lutheran University*, 361 NLRB No. 157, revising its standards for declining jurisdiction over faculty members at self-identified religious colleges and universities and determining faculty managerial status. Following that decision, the Board issued an order remanding this proceeding to me for further appropriate action consistent with *Pacific Lutheran University*, including reopening the record, if necessary.

On February 6, 2015, I issued an Order Directing Parties to Submit Positions on Whether to Reopen the Record. Both parties submitted position statements. After considering the Board's decision in *Pacific Lutheran University*, the record in this matter, and the parties' positions, I have decided that the existing record is sufficient to decide this matter without reopening the record.

Therefore, upon the entire record in this proceeding, I make the following findings and conclusions.¹

¹ As stated in my previous Decision and Direction of Election in this matter, upon the entire record in this proceeding, I find that:

- a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed;
- b. The Employer is a non-profit corporation for education purposes with its principal place of business in Seattle, Washington. During the last 12 months, in conducting its operations, the Employer derived gross revenues in excess of \$1,000,000. During that same period, the Employer purchased and received at its Seattle, Washington, location goods valued in excess of \$5,000 directly from points outside of the State of Washington. The Employer is therefore engaged in commerce within the meaning of the Act;
- c. The labor organization involved claims to represent certain employees of the University;
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections (2)(6) and (7) of the Act.

I. SUMMARY

Seattle University (hereinafter “Employer” or “University”) is an institution of higher learning with its campus in Seattle, Washington, and a small satellite facility in Bellevue, Washington. The Petitioner seeks a unit of all non-tenure-eligible contingent faculty employed by the University except those teaching in nursing and law.² Petitioner stated at the hearing that it was willing to proceed to election in any unit found appropriate by me.

At hearing, on brief, and in its request for review to the Board, the Employer asserted that:

1. The Board lacks jurisdiction because the Employer is a religiously operated institution that is not subject to the Act according to the principles of *Univ. of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), *denying enforcement of Univ. of Great Falls*, 331 NLRB 1663 (2000), and *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009), *denying enforcement of Carroll College*, 350 NLRB No. 30 (2007).
2. The full-time faculty in the petitioned-for unit are managers pursuant to *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).
3. The proposed unit is not appropriate because the employees within it do not share a sufficient community of interest.
4. The proposed unit is not appropriate because it does not include faculty teaching in the College of Nursing and School of Law, as well as clinical faculty.

Because the Board’s decision in *Pacific Lutheran University* does not modify community of interest standards, I will not herein revisit my previous Decision and Direction of Election as to the issues contested above in items 3 and 4. For the reasons given in my previous decision, I find that the employees within the petitioned-for unit share a community of interest and that because the employees the Employer seeks to include do not share an overwhelming community of interest with the petitioned-for unit, none of the additional employees must be included.

I have carefully reviewed and considered the record evidence and the arguments of the parties both at the hearing and in their respective post-hearing briefs.³ Based on the entire record in this proceeding and for the reasons set forth below, I find that the University is not a church-operated institution within the meaning of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). I therefore conclude that the Board may properly assert jurisdiction over the University in this case.

² The petition additionally excluded the following: professors emeritus, tenure-eligible faculty, administrative faculty, full-time staff who are not additionally compensated for teaching, administrators, department administrators, campus clergy, deans, associate deans, campus safety personnel, lab assistants, graduate assistants, teaching assistants, managers, guards, and supervisors as defined in the Act. At the hearing, the Petitioner amended its petition to also exclude the following: program coordinators, program directors, directors, clinical professor series, library faculty, research faculty, research scientists/scholars, post-doctoral scholars/fellows, truly visiting faculty, distinguished professors, professors in residence, and endowed chairs.

³ Both parties timely filed briefs both after the hearing in this matter and to the Board. Both parties filed position statements following the Board’s decision in *Pacific Lutheran University*.

I further find that none of the faculty in the petitioned-for unit should be excluded as a manager.

II. RECORD EVIDENCE⁴

The University is a private, non-profit co-educational university. It offers undergraduate and graduate degrees at its campus in Seattle, Washington. It is organized into five colleges—Arts and Sciences, Science and Engineering, Education, Nursing, and Matteo Ricci⁵—and three schools—Business and Economics, Law, and Theology and Ministry, which together offer 64 undergraduate programs, 31 graduate programs, and 28 certificate programs. In the fall of 2013, the University enrolled 7,422 students (about 4,600 of them undergraduates) and employed about 329 tenured or tenure-track faculty and 437 non-tenure-track faculty. With the exception of the School of Law, which operates on a semester schedule, the University operates on a quarterly schedule. Classes began for the fall quarter on September 21, 2013, winter quarter began on January 6, 2014, and the spring quarter ended on June 9, 2014. Some limited classes are offered during the summer.

A. Religious Nature of the University and Its Faculty

Seattle University was founded in 1891 under the “auspices” of the Catholic Society of Jesus.

1. How the University holds itself out

The University is one of the 28 U.S. Jesuit Colleges and Universities. It is listed in the registry of U.S. Catholic universities maintained by the Catholic Church. According to the University’s articles of incorporation, its purpose is “the instruction of students and graduate scholars in various branches of the arts and sciences and related subjects, and to confer degrees, diplomas, and certificates to such persons as shall in the judgment of the faculty merit the same.” The University’s mission statement, displayed prominently in a number of locations on its campus and website, asserts that “Seattle University is dedicated to educating the whole person, to professional formation, and to empowering leaders for a just and humane world.” Its vision statement, typically displayed alongside the mission statement, asserts that “We will be the premier independent university of the Northwest in academic quality, Jesuit Catholic inspiration, and service to society.”

The brochure given to incoming students contains several references to faith and spirituality, although it makes no mention of Christianity, Catholicism, or God. The mandatory orientation for incoming students includes a liturgy and a talk by the provost on Jesuit education at the University, and the welcome packet includes a document called “Becoming Fully Alive: Jesuit Education and You.” The home page of the school’s website regularly features banners on Jesuit or Catholic events (such as Holy Week or the installation of Pope Francis as the first Jesuit pope), and the school’s Jesuit Catholic identity is mentioned on the school’s main

⁴ References to the transcript will be designated as “(Tr. __).” References to Employer exhibits will be designated as “(ER __).” References to Union exhibits will be designated as “U __).”

⁵ A small undergraduate college that offers a combined high school and undergraduate program.

admissions page. The school's seal, featured on its website and campus buildings, contains references to Jesuit origins and the initials "IHS." These initials typically appear on Catholic churches and, as a faculty witness explained, stand for "in hoc signo vinces," "in this sign you will conquer," a phrase that, according to legend, appeared from heaven to the Emperor Constantine in a battle in the year 312 AD.⁶

The University offers daily Catholic masses on campus, although students are not required to attend them.

The president of the University must be a Jesuit, as must all seven members of the Board of Members and seven members of the Board of Trustees (including the president; see below). Approximately 30 percent of the University's student body is Catholic. It appears from the record that, although the University recruits heavily at Catholic high schools, it provides no financial support specifically for Catholic students. There is no evidence in the record that Catholics receive any preference in admission, and the president of the University, Father Stephen Sundborg, testified that there is no quota for Catholics at the school. Undergraduate students are required to take two theology courses, one of which must include a component on the Catholic tradition. Twenty-six Jesuits live on the Seattle University campus, 13 of them in apartments within the student dormitories.

The University is organized as a non-profit corporation for education purposes and is granted federal tax exemption under § 501(c)(3) of the Internal Revenue Code.

2. How the University holds out its faculty

Two full-time faculty job postings and one adjunct faculty posting are included in the record (a "sample adjunct faculty position" in the English Department is also included as part of the Recruitment and Hiring Policy and Procedure). Except for identifying the school as a Jesuit Catholic university, there is no mention of God, Christianity, Catholicism, or Jesuits in any of these postings. All three postings include non-discrimination statements providing that the University does not discriminate on the basis of religion.

The University's interview guidelines mandate that it is unacceptable to ask interviewees questions about religion or creed. There is no requirement of faculty that they be Christian or Catholic or hold or inculcate any Catholic doctrine. Sundborg testified that he asks every person who interviews with him for hire by the University how he or she will contribute to the Catholic Jesuit mission of the University. However, Sundborg interviews only candidates for dean, division head, and vice president and does not interview anyone in the petitioned-for unit. Finalists for tenure-track faculty positions are provided with material on the University's mission, vision, and values and asked to write an essay that responds to them; non-tenure track faculty have no such requirement.

The three non-tenure-track faculty who testified for the Union stated that during their interview processes there was no mention of the Catholic identity of the school (the non-tenure-

⁶ The same witness who explained that background, Michael Ng, noted that Constantine embraced both Christianity and paganism and was not baptized as a Christian until after his death.

The transcript contains what must be an error, as it states the year as 8312, a time that is about 6 millennia in the future. Presumably the witness said, "AD 312."

track faculty member who testified for the Employer did not mention whether religion was mentioned during his hiring). One faculty witness stated that when he was hired the only time religion was discussed was when he asked the professor interviewing him if it was a problem that he was an atheist and was told no.

The University's president begins the annual training for new full-time faculty with a speech on the school's Jesuit Catholic inspiration. Part-time faculty do not attend this training.

The section in the faculty handbook on faculty duties and responsibilities states that by accepting a teaching contract with the University, "the faculty member becomes committed to the University's mission of educating the whole person, providing professional formation, and empowering leaders for a just and humane world," "within the context of the Catholic and Jesuit educational tradition." There is no other reference to religion in the section on faculty duties. The subsection "Specific Responsibilities of Seattle University Faculty Members" states that faculty must maintain competence as teachers and an understanding of current developments in their disciplines; the subsection makes no reference to religion.

The section of the faculty handbook entitled "Elements of Faculty Quality," under the subhead "General Considerations," states that because "the religious dimension of human life is fundamental to the identity of a Jesuit university ... [e]ach member of the faculty is expected to show respect for the religious dimension of human life."⁷ The president testified that students have on occasion come to him to complain that their Catholicism was demeaned by professors and that he would on those occasions direct the faculty member's department chair to remind the faculty member of that passage in the handbook. The president also testified that he would respond in the same way if a student complained about being demeaned for being Jewish or Muslim or non-religious. The president was not aware of any faculty member ever being sanctioned for conduct not in harmony with Catholic teachings.

According to the faculty who testified, adherence to Catholic or any religious doctrine plays no role in faculty evaluations. There is no mention of God, Christianity, Catholicism, or Jesuits on the student evaluations of faculty, which are the primary, and in many cases sole, method by which non-tenure-track faculty are evaluated.

It would appear from Employer exhibits that approximately 10 faculty members are Jesuits, although it is not clear whether any of these 10 hold non-tenure-track positions.⁸ The Society of Jesus periodically provides the University a roster of Jesuits who are trained as academics and available for hire as faculty; to be hired as faculty, such a Jesuit priest must go through a similar hiring process as any other candidate, and once hired, these priests receive the same salary as other faculty.

Provost Isiaah Crawford testified that, due to Catholic policy on abortions, nursing students are barred from receiving any training on or participating in abortions (and

⁷ Immediately following these "general considerations," are "essential considerations," which describe teaching excellence as the critical ingredient of quality for faculty and make no mention of God or adherence to any doctrine. ER 3, section 3.1(b).

⁸ See ER 9, p.4.

presumably nursing faculty are barred from providing any such training).

As noted above, all undergraduate students are required to take two theology courses, one of which must include a component on the Catholic tradition. To teach this latter course, as Provost Isiaah Crawford testified, the instructor would have to have expertise in Catholic theology. He also testified that he was not aware of anyone teaching it who was not either a Jesuit or a member of the theology department or School of Theology. There is no evidence in the record as to whether any of those teaching this course are members of the petitioned-for unit, nor whether there is any special requirement on these instructors to adhere to current Catholic doctrine in their presentation of Catholic theology in this course. However, there is general evidence that no student or faculty member is required to adhere to or instill Catholic or Jesuit doctrine.

B. Managerial Indicia of Faculty

Provost Crawford describes the University's organizational model as shared governance. The most important vehicle for faculty participation in University governance is the Academic Assembly. According to the assembly's bylaws, the assembly plays a "key leadership role in determining university policy" in the areas of "faculty welfare," curriculum, and student recruitment and enrollment, and "represents faculty interests" in strategic planning, budgets, technology, and physical facilities. Although the provost testified to the strong weight the Academic Assembly's recommendations carry with him, minutes of the assembly indicate that both programmatic and budgetary decisions are regularly made by deans or other administrators without the involvement of the assembly.

The assembly consists of 19 faculty representing, in proportion to their share of the total University faculty, each of the University's colleges and schools. The faculty from the colleges and schools elect the representatives, but there is no information in the record as to how or when that election occurs. The provost testified that two seats on the assembly are set aside for non-tenure-track faculty, but there is no such provision in the assembly bylaws. The provost also testified that part-time non-tenure-track faculty "do not hold seats on the academic assembly at this time;" nothing in the assembly bylaws specifies whether part-time faculty are eligible to serve on the assembly or vote for representatives to it. Although the assembly's bylaws state that "non-tenure-track faculty are encouraged to participate," none of the non-tenure-track faculty witnesses testified that they had been given an opportunity to vote for representatives or run for election to the assembly. The assembly bylaws specify that at least 50 percent of the representatives from each college or school must be tenured.

The assembly meets every two weeks during the academic year. To accommodate this work, members of the assembly receive release from teaching the equivalent of one course per year. Members are elected to three-year terms. The record does not make clear how these terms would be accommodated to faculty on single-year, quarterly, or semester-long contracts, nor whether non-tenure-track are eligible for course release, although one faculty witness testified that in his experience non-tenure-track faculty are not eligible. All adjuncts and most other non-tenure-track faculty are on single-year or shorter contracts. It appears that 20 or fewer members of the petitioned-for unit are on multi-year contracts.⁹

⁹ According to testimony by the provost, the exhibit listing contingent faculty with multi-year appointments includes both program directors and administrators who also do some teaching. Once program directors, administrators, and visiting professors are excluded, only a small number of contingent faculty have multi-year

The record indicates that proposals for programmatic change arise from departments, go through colleges and schools, and only then reach the Academic Assembly. Proposals then go to an assembly subcommittee, the Program Review Committee, on which, according to its membership rules, only tenured faculty can sit.¹⁰ The Program Review Committee reports back to the assembly, and the assembly in turn reports to the provost. The provost has full veto power over the assembly's decisions, although he testified that in practice he rarely does reject the assembly's recommendations (but, as noted in the Union's brief, there was some discrepancy between his testimony on this point and the assembly minutes).

In addition to the Academic Assembly, there are 13 University-wide standing committees within academic affairs on which rank-and-file faculty serve. The University Rank and Tenure Committee is limited to tenured faculty. There are also an unknown number of college- or school-wide committees. Many committees, including all those within the College of Science and Engineering, are limited to tenure-track faculty, others to tenure-track and full-time non-tenure-track faculty. In any case, all committees for which evidence was provided have multi-year terms. As in the case of the Academic Assembly, the record does not make clear how faculty on single-year or shorter contracts would serve these terms. One contingent faculty witness testified that he serves on a business school committee, the MBA Marketing Committee, and the Employer provided a list of 273 non-tenure-track faculty who served on committees between 2010 and the date of the hearing; that list did not make clear which of the listed people are members of the petitioned-for unit. There is a non-tenure-track subcommittee of the Arts and Sciences faculty assembly, which discusses issues of concern to non-tenure-track faculty, such as office space and job security; the Employer's list of non-tenure-track faculty on committees shows four non-tenure-track faculty serving on this committee. There was no evidence as to what if any authority this subcommittee has.

Significant governance also occurs at the departmental level, by way of departmental meetings. The University's faculty handbook limits to tenured faculty departmental tenure-review committees, which initiate tenure recommendations and pass them to college- or school-level review committees and then to the University Rank and Tenure Committee. The handbook specifies that full-time faculty are expected to attend departmental meetings, but testimony shows that not all departments follow this policy. The College of Education's adjunct faculty handbook invites adjunct faculty to attend departmental and College-wide faculty meetings, but the other faculty handbooks that were entered into the record contain no such invitation. One contingent faculty witness, Lawrence Cushnie, testified that he was never invited to attend departmental meetings, but once he shifted from part-time to full-time he requested to attend and was allowed to attend those meetings at which no hiring decisions were made (with the result that he attended one meeting). Another contingent faculty witness, Jerome Veith, testified that his department chair told him that non-tenure-track faculty were not allowed to attend department meetings.

III. ANALYSIS

appointments (fewer than 20 outside of the School of Law). ER 44; Tr. 1194 & 1232-34. These appointments are typically for three years, but may be as long as five years. Tr. 1195; ER 35 & 44.

¹⁰ U 31. However, the Employer lists a non-tenure-track faculty member as sitting on this committee. ER 32.

At hearing, in its brief, and in its appeal to the Board, the Employer raised four issues: 1) the Employer is not subject to Board jurisdiction as a religious institution, 2) full-time members of the proposed unit are managers, 3) the unit is not appropriate because full-time and part-time contingent faculty do not share a community of interest, and 4) law, nursing, and clinical faculty should be included in the bargaining unit. As noted above, I am not herein revisiting my decision as regards items 3 and 4, as community of interest standards were not modified by the Board in *Pacific Lutheran University*.

A. Board Jurisdiction Does Not Risk Church-State Entanglement.

The Employer contends that it is a religious institution and that the Board's exercise of jurisdiction would violate the First Amendment to the United States Constitution.

1. The applicable legal standard

In *NLRB v. Catholic Bishop of Chicago*, the Supreme Court overturned the Board's policy to "to decline jurisdiction over religiously sponsored organizations 'only when they are completely religious, not just religiously associated.'" 440 U.S. at 492 (quoting *Roman Catholic Archdiocese of Baltimore*, 216 NLRB 249, 250 (1975)). Instead, the Court stated that the Act must be construed to exclude church-operated schools because to do otherwise "will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Catholic Bishop*, 440 U.S. at 502. The Board's engagement in such inquiry would violate the First Amendment. *Id.* Although it invoked the doctrine of constitutional avoidance, the Court nevertheless posited that Board assertion of jurisdiction over church-operated schools would "give rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). The "admitted and obvious fact [is] that the *raison d'être* of parochial schools is the propagation of a religious faith." *Id.* at 503 (quoting *Lemon*, 403 U.S. at 628, Douglas, J., concurring).

For many years, the Board applied a "substantial religious character" test to assess whether, under *Catholic Bishop*, exercise of the Board's jurisdiction presents a significant risk of infringing the First Amendment. See, e.g., *Trustees of St. Joseph's College*, 282 NLRB 65, 68 (1986). However, this year, in *Pacific Lutheran University*, the Board adopted a new, two-part standard. The Board will not decline to exercise jurisdiction over faculty members at a university that claims to be a religious institution unless the university demonstrates that 1) it holds itself out as providing a religious educational environment, and 2) the university holds the petitioned-for faculty out as performing a specific role in creating or maintaining the university's religious educational environment. *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 6–8.

The Board's step 1 is identical to the first step of the D.C. Circuit's three-part test for exemption from Board jurisdiction. See *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). The Board noted that it also agreed with the D.C. Circuit's requirement that, to be exempt from the Board's jurisdiction, the institution must be organized as a nonprofit. 361 NLRB No. 157, slip op. at 7. However, instead of treating this as an independent second step, as the D.C. Circuit had, the Board stated that it was "relevant in an examination of how a university holds itself out." *Id.*

In step 1, the Board will give more weight to contemporary self-presentation than to

founding and historical documents. *Id.* Documents demonstrating this self-presentation would include “handbooks, mission statement, corporate documents, course catalogs, and documents published on a school’s website.” *Id.*, slip op. at 6. This showing is “minimal,” and “does not impose a heavy burden.” *Id.*, slip op. at 7. Step 1 is a threshold showing.

Step 2 is where the focus of inquiry lies, namely on the petitioned-for faculty, rather than the university as a whole. Again, the focus is on how the university *holds out* these faculty, avoiding an intrusive inquiry into the nature of the religious tenets of the institution or how effective the university is at inculcating them. *Id.*, slip op. at 8. Nor will the Board look behind publicly available documents to assess the university actual practice or investigate any individual teacher’s specific actions. *Id.*, slip op. at 9. However, the inquiry is demanding; the faculty must be held out as performing a specific religious function and “[g]eneralized statements that faculty members are expected to, for example, support the goals or mission of the university are not alone sufficient.” *Id.*, slip op. at 8. When the Board applied its new standard to the facts of PLU itself, it examined the statement in the faculty constitution that a faculty member ““becomes a member of a community of scholars who respect and uphold the principles of Lutheran Higher Education...”” *Id.*, slip op. at 12 n.22. The Board found this statement to be merely aspirational and that it did not demonstrate that faculty members were required to perform any specific religious role. *Id.*

Conversely, evidence showing that faculty members are required to integrate the institution’s religious tenets into coursework, serve as religious advisors to students, propagate those tenets, engage in religious training, or conform to the tenets in a manner specifically linked to their job duties is sufficient to exempt an institution from Board jurisdiction. *Id.*, slip op. at 9. Such evidence will be found in the school’s statements to students, faculty, and the public, including on its website and in its handbooks, employment contracts, and job descriptions. *Id.*, slip op. at 10. The issue boils down to “whether a reasonable prospective applicant would conclude that performance of their faculty responsibilities would require furtherance of the college or university’s religious mission.” *Id.*, slip op. at 9.

2. Employer holds itself out as providing a religious educational environment

The University consistently identifies itself as a Jesuit Catholic institution and publicly describes those values as inspiring the education it provides. It prominently features Catholic themes on its website, discusses its Jesuit Catholic educational environment in student orientation, mentions its Jesuit Catholic identity in its widely displayed vision statement, is registered as a Catholic university, and includes Catholic symbols on its seal. The University is organized as a non-profit institution. Therefore, the University meets the first step of the *Pacific Lutheran University* standard.

3. Employer does not hold the petitioned-for faculty members out as performing a religious function

At hearing the Employer emphasized the portion of the University’s faculty handbook stating that “[e]ach member of the faculty is expected to show respect for the religious dimension of human life.” However, this is the sort of generalized statement that the Board in *Pacific Lutheran University* found insufficient. Indeed, it is significantly weaker than PLU’s statement that faculty members must “uphold the principles of Lutheran Higher Education...” The faculty handbook states that faculty “specific responsibilities” are not to serve a religious

role but to “maintain competence as teachers and an understanding of current developments in their disciplines.”

There is no evidence in the record that faculty members are required to serve as religious advisors to students, propagate the tenets of the Society of Jesus, engage in religious training, or conform to the tenets of Catholicism in the course of their job duties. The instructors of the required course on Catholicism must of necessity integrate the tenets of Catholicism into the coursework, but there is no evidence that these faculty are required to hold any particular view on those tenets (or indeed any particular interpretation of what those tenets are). It is also not clear that any of these instructors are members of the petitioned-for unit.

None of the job postings in the record included any statements that faculty members must integrate the Catholic Church’s or Society of Jesus’s tenets into coursework, serve as religious advisors to students, propagate the tenets of the Society of Jesus, engage in religious training, or conform to the tenets of Catholicism in the course of their job duties. Adjunct faculty witnesses testified that during the hiring process, and after, they have never been informed that they must adhere to or propagate any Catholic doctrine as part of their jobs. In short, a reasonable candidate for a contingent faculty position at Seattle University would not conclude that performance of their faculty responsibilities would require furtherance of a religious mission.

For these reasons, I find that the Employer has not met its burden of establishing that its faculty serve a specific role in creating or maintaining the university’s religious educational environment. Therefore exercise of Board jurisdiction over the Employer is proper.

B. No Members of the Proposed Unit Are Managers

The Employer contends that the full-time non-tenure track faculty are managers and therefore must be excluded from the unit.

1. The applicable legal standard

The Supreme Court has held that faculty members who effectively determine curriculum, grading systems, admissions, tuition, matriculation standards, academic calendars, and course schedules through faculty-wide meetings and faculty committees are managers excluded from the Act’s coverage. *Yeshiva*, 444 U.S. at 682. The Court cautioned that not all professors are managers, and professors may not be excluded from a bargaining unit merely because “they determine the content of their own courses, evaluate their own students, and supervise their own research...” *Id.* It suggested that in some contexts “a rational line could be drawn between tenured and untenured faculty members...” *Id.* at 690 n.31. The Court does not seem to have contemplated *non-tenure-track* faculty members, perhaps because these faculty were much rarer at the time of its decision than now. See *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 19 n.43.

In *Yeshiva*, collegial bodies of faculty had extensive authority over curriculum, academic calendars, course schedules, grading policies, teaching methods, admission and matriculation standards, and admissions, retention, and graduation of individual students. *Id.* at 686. The faculty bodies also sometimes set tuition and enrollment levels and made budget requests that were followed. *Id.* The Court therefore considered the *Yeshiva* faculty to be

managerial, and it stated that the sharing of management of the university between the administration and the faculty was “typical.” *Id.* at 680.

Because the petitioned-for unit in *Yeshiva* was the university’s faculty as a whole, the Court did not address how to analyze the managerial authority of some petitioned-for subset of faculty. The Court in *Yeshiva* also did not provide an analytical framework for deciding what areas of faculty decision-making should be considered or given what weight or for assessing when their control over an given area was effective. The Board in its numerous cases applying *Yeshiva* examined numerous decision-making areas without specifying their relative significance. *See, e.g., Point Park University v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006).

In *Pacific Lutheran University*, the Board set out a framework for assessing faculty managerial status pursuant to *Yeshiva*. First, decision-making authority that affects the university as a whole is most suggestive of managerial status and it is therefore this type of decision-making that will weigh most heavily in Board analysis. *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 16. Second, the Board organized faculty decision making into five areas, of which three affect universities as whole and are therefore primary, while two do not affect whole universities and are therefore secondary. *Id.*, slip op. at 17–18. The primary areas are academic programs, enrollment management, and finances. *Id.* The secondary areas are academic policy and personnel policy and decisions. *Id.*

Finally, the Board held that for decisions in a particular area to be attributed to faculty, first, the party asserting managerial status must demonstrate, with specific evidence of actual exercise of the authority, that the authority is actual, not theoretical. *Id.*, slip op. at 18. Second, to count as “effective,” recommendations must almost always be followed by the university administration. *Id.* The Board stated further that without evidence that faculty recommendations become operative without independent review by administration it will not consider these recommendations effective. *Id.*

The Board noted that the division of managerial authority between faculty and administrative typical when the Court decided *Yeshiva* in 1980 may be so no longer. *Id.*, slip op. at 19. Universities are now increasingly run on a corporate model, with power shifted toward administrators and away from faculty. *Id.* Furthermore, the typical faculty member is no longer tenured or tenure track, but increasingly hired on a contingent basis without prospect of tenure and no guarantee of employment beyond the academic year or indeed the academic term, *id.*, with the result that even where it can be said that “...authority in the ... university is divided between a central administration and one or more [faculty] collegial bodies,” *Yeshiva*, 444 U.S. at 680, the specific faculty petitioned for may not have any share in the authority of the collegial bodies.

The Board in *Pacific Lutheran University* stated that, when a committee controls action in a particular decision-making area, the party asserting that the faculty are managers must prove that faculty constitute a majority of the committee. *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 18. The Board did not specify whether the party must prove that the *petitioned-for subset* of faculty constitute a majority of the decision-making body, but in applying its new framework to the facts of PLU itself it extensively detailed the exclusion of the petitioned-for faculty from participation in decision-making faculty bodies, and therefore found them not to be managerial. *Id.*, slip op. at 24. Furthermore, the Board emphasized the importance of

scrutinizing the specific employment relationship at issue: “Our inquiry, therefore, must include an examination of whether the nature of the employment in issue prevents those affected from helping shape the academy as a whole at their individual institutions.” *Id.*, slip op. at 20.

The Board in *Pacific Lutheran University* left untouched the longstanding allocation of the burden of proof of managerial status; that burden lies with the party asserting managerial status. NLRB No. 157, slip op. at 17 n.33.

2. Full-time contingent faculty lack authority in primary areas

According to the testimony of the provost, the Academic Assembly has authority in the primary area of academic programs, specifically over curricula and matriculation standards. However, the assembly has no say in the second primary area, enrollment management, in that it lacks any authority over student body size. The assembly has minimal authority over the third primary area, finances, in that it has no authority over tuition and merely “represents faculty interests” in the areas of strategic planning, budgets, and physical facilities.

In any case, because the assembly bylaws require that tenured faculty make up a majority of the representatives from each school, contingent faculty cannot ever make up more than a minority of the assembly; currently only 2 of the 19 members are contingent faculty. Furthermore, no contingent faculty can serve on the Program Review Committee, through which all proposals for curricular change pass before going to the provost. The Employer provided evidence of full-time contingent faculty serving on committees, but did not provide any evidence as to what fraction of any committee is made up of contingent faculty. While tenure-eligible faculty have a stake in participation in University governance, because it plays a role in their evaluation for tenure, contingent faculty have no such incentive. Furthermore, the year-to-year contracts of most contingent faculty pose a hurdle to serving three-year terms on committees, and any contingent faculty who served on these committees would likely be in the minority.

I therefore find that full-time contingent faculty lack authority in primary areas.

3. Full-time contingent faculty lack authority in secondary areas

The secondary areas of decision-making are academic policy and personnel policy and decisions. The University’s contingent faculty can determine the content of their courses, evaluate their students, and supervise their own research. However, academic policy largely arises in department- and college-level meetings, which contingent faculty testified they typically are not invited to attend. Contingent faculty are excluded from the University Rank and Tenure Committee and from departmental meetings at which personnel decisions are made; they therefore lack any personnel authority.

I therefore find that full-time contingent faculty lack authority in secondary areas.

4. Full-time contingent faculty lack actual control or power of effective recommendation

All decisions of the University’s Academic Assembly must be approved by administration (the provost). Although the provost testified to the strong weight the Academic

Assembly's recommendations carry with him, minutes of the assembly indicate that both programmatic and budgetary decisions are regularly made by deans or other administrators without the involvement of the assembly. Furthermore, as noted above, due to the nature of their employment relationship with the University, contingent faculty have minimal opportunity to participate in University governance structures. There is therefore a lack of evidence that they have either actual control or the power to effectively recommend decisions on university policy.

As noted above, the burden is on the party asserting managerial status to produce evidence to support it. That burden has not been met here as to full-time contingent faculty or any other members of the proposed unit.

For the reasons given above, I find that none of the members of the petitioned-for unit should be excluded as managers.

III. CONCLUSION

Based on the foregoing, my previous Decision and Direction of Election in this matter, and the entire record herein, I direct that the ballots previously collected in this matter be opened and counted.

VI. ORDER

IT IS HEREBY ORDERED that the ballots previously impounded in this matter be counted and a tally of ballots issue.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by **March 17, 2015**.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so.

Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the website, select the E-Gov tab and click on E-Filing.

Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

DATED at Seattle, Washington, this 3rd day of March 2015.

A handwritten signature in black ink, appearing to read "R. K. Hooks", is written over a horizontal line.

Ronald K. Hooks, Regional Director
National Labor Relations Board
Region 19
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915 2nd Avenue
Seattle, Washington 98174