September 2016

Panel Handout: Year in Higher Education

Jerry Cutler
Montclair State University

Follow this and additional works at: http://thekeep.eiu.edu/jcba
Part of the Collective Bargaining Commons, and the Higher Education Commons

Recommended Citation

This Proceedings Material is brought to you for free and open access by The Keep. It has been accepted for inclusion in Journal of Collective Bargaining in the Academy by an authorized editor of The Keep. For more information, please contact tabruns@eiu.edu.
UNION REPRESENTATION IN HIGHER EDUCATION:
POST-PACIFIC LUTHERAN APPLICATION OF RELIGIOUS AND
MANAGERIAL EXEMPTION TESTS

JERRY M. CUTLER, ESQ.¹

INTRODUCTION

• Examine NLRB’s recent decision in Pacific Lutheran University
• How Pacific Lutheran has been applied by the various NLRB Regional Offices
• The implications of this ruling for union representation in higher education institutions

A. Pacific Lutheran Recap

In Pacific Lutheran University, the Board redefined its approach for determining what standard to apply:

(1) in determining when to decline jurisdiction over faculty members at religious colleges and universities; and

(2) in deciding whether faculty members are managerial employees, and therefore excluded from representation rights under the Labor Management Relations Act.

Facts:

• Union filed a petition with the NLRB seeking to represent a unit of approximately 176 full-time and regular part-time non-tenured contingent faculty

• University challenged the Union’s petition, arguing:

---

¹ Jerry M. Cutler is Vice President for Human Resources at Montclair State University. While in private practice, Jerry represented clients in complex federal civil litigation under the Labor Management Relations Act (LMRA), Employee Retirement Income Security Act (ERISA), and U.S. Bankruptcy Code, and in matters before the National Labor Relations Board (NLRB). Jerry has also served as Co-Chair of the American Bar Association’s Section of Litigation, Public Sector Labor and Employment Law Subcommittee, and has written for publications by Thomson Reuters, Bloomberg BNA, and West Publishing, including: Legal Guide to Human Resources; How Arbitration Works; HR Series: Policies and Practices; The Family and Medical Leave Act; The Fair Labor Standards Act; Discipline and Discharge in Arbitration; and International Human Resources Guide.
that it was a church-operated institution exempt from the Board’s jurisdiction consistent with the Supreme Court’s decision in *NLRB v. Catholic Bishop of Chicago*, and;

that certain members of its faculty—the **full-time** non-tenure track contingent faculty members in the proposed unit—were managerial employees excluded from the unit in accordance with the Supreme Court’s decision *NLRB v. Yeshiva University*

**Pacific Lutheran’s Religious Exemption Test**

**Background**

- In *Catholic Bishop*, the Supreme Court underscored “the critical and unique role of the teacher in fulfilling the mission of a church-operated school,” to hold that the Board could not assert jurisdiction over the petitioned-for teachers because doing so would create a “significant risk” that First Amendment religious rights would be infringed upon.

- Following *Catholic Bishop*, the Board decided on a case-by-case basis whether a religious institution had a “substantial religious character” such that exercise of the Board’s jurisdiction would present a significant risk of infringing on that employer’s First Amendment religious rights.

- In *University of Great Falls v. NLRB*, the appeals court took a somewhat different approach, applying a three-part test for determining when the Board should decline to assert jurisdiction under the religious exemption:
  
  - (1) the college or university must hold itself out to students, faculty and the community as providing a religious educational environment;

  - (2) the college or university must be organized as a nonprofit; and

  - (3) the college or university must be affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization.

**Pacific Lutheran’s Two-Part Religious Exemption Test**

In the *Pacific Lutheran*, the Board formulated a two-part test it believed was more in line with the Supreme Court’s earlier holding in the *Catholic Bishop* case. The Board explained that the LMRA permits jurisdiction over a unit of faculty members at an institution of higher learning unless the university or college demonstrates:
• that, as a threshold matter, it holds itself out as providing a religious educational environment;

• that it holds out the petitioned-for faculty members “as performing a specific role in creating or maintaining the school’s religious educational environment.”

The University Holds Itself out as Providing a Religious Educational Environment

In determining whether a University holds itself out as providing a religious educational environment, the Board will examine evidence such as:

• Handbooks, mission statements, corporate documents, course catalogs, and documents published on a school’s website.

• Press releases or other public statements by university officials could also be relevant.

A university’s contemporary presentation of itself is likely to be more probative than its founding documents and historical tradition in determining whether a University holds itself out as providing a religious educational environment.

The University Holds Out Petitioned-for Faculty Members out as Performing a Specific Role in Furtherance of its Religious Educational Environment

Once the Board determines that a university meets the threshold requirement of showing that it holds itself out as providing a religious educational environment, it will then examine whether the university holds out its petitioned-for faculty members as performing a specific role in creating and maintaining that environment.

In making this determination, the Board will look to evidence that the university has imposed on faculty members the obligation to create and maintain a religious educational environment:

• faculty members are expected to incorporate religion into their teaching or research;

• faculty members are required to serve as religious advisors to students;

• faculty members are expected to conform to the university’s religious doctrine, or have any religious requirements imposed on them,

• faculty members are required to propagate religious tenets, or engage in religious indoctrination or religious training, or;
• the religious nature of the university will have any impact at all on their employment.

This type of evidence could be found in employment contracts, faculty handbooks, statements to accrediting bodies, and statements to prospective and current faculty and students.

APPLICATION OF PACIFIC LUTHERAN’S RELIGIOUS EXEMPTION TEST

Saint Xavier University

Saint Xavier is a higher education institution with its main campus in Chicago, Illinois. The University and the petitioning union stipulated that a unit consisting of the following 180 to 200 adjunct positions was appropriate for purposes of collective bargaining. The University claimed that the Board lacked jurisdiction because of its status as a religiously operated institution.

Regional Director’s Decision

The following evidence was presented to the Regional Director:

• Job postings for adjuncts included the statement: “Understanding of and appreciation for the Catholic identity and Mercy heritage of the University required.”

• Interviewers did not inquire about the applicants’ religion and no preference was shown to applicants of a particular faith.

• Adjuncts were neither made aware of the University’s Catholic identity nor asked to support the Catholic faith in their teaching.

• Neither the oral or written offer of employment to adjuncts referenced Catholicism, Christianity, God, or religion.

• Adjuncts were invited to attend an optional employee orientation where University representatives speak about the University’s Catholic identity and how faith is incorporated into the educational mission of the University, but attendance was not mandatory and no evidence was presented on how many adjuncts attended.

• Adjunct performance was based primarily on student evaluations which contained no reference to Catholicism, Christianity, God, or religion.

• Adjunct witnesses testified that they were never instructed to disseminate the Catholic faith, nor was any aspect of religion addressed in their evaluations.
• Neither the University nor the Church reviews or approves the texts chosen and used by faculty, including adjuncts, in the classroom.

• The University has no requirement for adjuncts to emphasize or espouse Catholicism or Christianity in their teachings or to imbue students with the tenets of the Catholic faith.

• The Faculty Handbook subsections on “Faculty Credentials,” “Selection and Promotion of Faculty,” “Curriculum Development,” “Faculty Support and Development,” and “Teaching Evaluation and Recognition” do not reference the Catholicism, Christianity, God, or religion.

On this evidence, the Regional Director found that the University had not met its burden of establishing that its adjunct faculty serve a specific role in creating or maintaining the University’s religious educational environment, and that it was therefore appropriate for the Board to exercise jurisdiction over the case.

**Duquesne University**

Duquesne University is a private, coeducational institution located in Pittsburgh, Pennsylvania. The proposed unit consists of 88 adjunct faculty members. Duquesne claimed that it did not meet the jurisdictional standards of *Pacific Lutheran* as both the University itself and its employees in the petitioned for unit are held out as performing a religious function in a religious environment.

**Religious Institution Held Out as Providing a Religious Educational Environment**

• The University was founded in 1878 by members of a Catholic religious congregation and is organized as a nonprofit Pennsylvania membership corporation.

• Only Catholic priests and brothers can serve as its Members, whose powers include the appointment of the University’s Board, President, and officers and directors, as well as the authority to "determine or change the mission, the philosophy, objectives or purpose of the University."

• The University is officially recognized as a Catholic university by the local Bishop and listed as such in the *Official Catholic Directory*. The Bishop or the Bishop’s designee has an *ex officio* seat on the University’s Board of Trustees.

• The University identifies itself on its Internet website as "a Catholic University" and also features on its website as well as in other documents, including the student handbook and faculty handbook.
• The University has an Office of Mission and Identity whose purpose is to reach out to faculty through forums, presentations, and discussion groups to reinforce information about its Mission.

• The University community includes about a dozen priests who live on campus and serve the University as faculty, adjunct faculty, and/or administrators.

• The physical campus contains a Catholic chapel where Mass is said every day as well as on special occasions, and at the crossroads of the campus is a 25-foot tall crucifix. There are other items of religious art and Catholic symbols on the campus, including statues of Catholic saints and the Virgin Mary, which are in various locations.

The Role of Adjuncts within the University

The adjunct faculty members are part-time employees who are contracted to teach a particular scheduled class for a semester and are limited to teaching six credits each semester.

• Adjunct contracts do not reference religious duties, or any role that the adjunct would be expected to play in furthering the University’s religious educational environment.

• The University does not question any applicants regarding their faith, or lack thereof, and there is no requirement that faculty be Catholic, Christian, or hold any religious belief.

• The University’s advertisement for adjunct instructors does not reference any duties that the applicant will support and/or be knowledgeable about the University’s religious aspirations.

• Adjuncts are not evaluated on performance of any religious functions, nor is there any evidence of adjuncts having been disciplined for failure to perform any such functions.

• Adjuncts are not expected to serve as religious advisors to students, engage in religious training, educate students regarding any tenets of religious faith, or conform to any tenet of Catholicism in the course of their teaching duties.

Regional Director Decision

The Regional Director found that the University held itself out as providing a religious educational environment to students, applicants, and the general public, but that there was little evidence that adjuncts are expected to act in any way to advance the University’s religious message or to do anything with regard to it.

C. Carroll College I
Carroll College is a non-profit, Catholic, liberal arts college located in Helena, Montana. The Union petitioned to represent a unit of all tenured and tenure-track teaching faculty employed by the College. The College argued that it was not subject to the Board’s jurisdiction because it is a religiously operated institution under Pacific Lutheran.

Factual Background

- The College’s Statement of Mission, Handbook, articles of incorporation, bylaws, course catalogues, student handbook, and website, details the objectives and philosophy of the College as a Catholic, liberal arts college.

- The College is one of eight diocesan colleges in the United States, and has a direct relationship with the Bishop of the Diocese who serves as the chancellor of the College.

- The College’s Articles of Incorporation require the Bishop, as chancellor, to work closely with the Board and the College’s President to preserve the Catholic identity of the College, including reviewing and approving prospective appointments to the faculty in the departments of theology and philosophy, and the senior leadership positions.

- Faculty applicants and faculty are not required to be Catholic. However, the Handbook states that "as a Catholic college ... the College has had a long-standing policy of seeking to attract and retain on its faculty qualified ordained priests ..." which promotes and maintains the Catholic and diocesan nature.

- Job postings do not mention religious advising or any other religious function.

- The criteria for faculty evaluation, set forth in the Handbook, include teaching with effectiveness, academic advising, and professional service, but do not mention religion or Catholicism.

- The Handbook enumerates grounds for termination and dismissal including "continued serious disrespect or disregard for the Catholic character or mission" of the College.

Regional Director’s Decision

The Regional Director found that the Board should decline jurisdiction, as the College has met both prongs of the Pacific Lutheran standard.

- The College holds itself out as providing a religious educational environment.
• The College does not generally hold out the faculty as performing a specific religious function, but that the College met its burden due to the Handbook's language regarding discharge for serious cause, one of which is "continued serious disrespect or disregard for the Catholic character or mission" of the College.

• The record failed to establish that the College's Catholic nature plays a role in hiring, evaluation, or tenure.

• The record did not establish that the faculty members serve as religious advisors to students, propagate religious tenets, or engage in religious training of students.

**MANAGERIAL STATUS OF FULL-TIME CONTINGENT FACULTY MEMBERS**

**Yeshiva**

In *NLRB v. Yeshiva University*, the Supreme Court explained that to fall within managerial employee exemption, it must be shown that the petitioned-for faculty “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 relevant consideration is effective recommendation or control rather than final authority.”

Since *Yeshiva*, the Board has examined faculty participation in decisions affecting, among other things:

- Curriculum, degree offerings, academic structure, graduation requirements
- Enrollment, matriculation, student retention, tuition, finances
- Hiring/firing, promotions, tenure, evaluations, sabbaticals, teaching methods, teaching assignments
- Grading policy, syllabi, course size, course load, course content, textbooks, academic calendar, and course schedules.

**Pacific Lutheran’s Analytical Framework for Determining Managerial Status**
According to the Board, a determination of managerial status involves answering 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.

In making this determination, the Board explained that it would examine the faculty’s participation in the following decision-making areas:

- academic programs,
- enrollment management policies,
- finances,
- academic policies, and
- personnel policies and decisions

The Board gives greater weight to the first three areas ("primary"), than the last two ("secondary"). This examination will be considered in the context of the university’s decision-making structure and administrative hierarchy, as well as the nature of the employment relationship of the faculty in issue.

**Primary Areas of Decision-Making**

- **Academic Programs**: curricular, research, major, minor, and certificate offerings and the requirements to successfully complete those offerings [the Board explained that these affect the very nature of an academic institution, reflect its goals and its aspirations, and clearly fall outside the routine discharge of a professor’s duties];

- **Enrollment Management**: the power to control or make effective recommendations regarding the size, scope, and make-up of the university’s student body. [The targeted student body is a fundamental choice for any university, and the ability to attract and retain those students affects polices throughout the university. Enrollment decisions are managerial when they directly affect the customers who will be served by the university—i.e., its students, without which the university cannot sustain itself];

- **Finances**: the power to control or make effective recommendations regarding financial decisions—both income and expenditure—is one of the hallmarks of managerial control across all industries [financial decisions have broad effects across a university, and are not localized in a professor’s classroom or lab. What the school charges for its services—net tuition (tuition less financial assistance)—also sets the price point for its student-customers, and as any student (or parent)
knows, net tuition plays a significant role in determining which university a student will attend].

Secondary Areas of Decision-Making

- **Academic Policy**: teaching/research methods, grading policy, academic integrity policy, syllabus policy, research policy, and course content policy. The Board explained that these are not as central to the institution’s offerings as the primary decision-making area of academic programs, and do not have the same impact on the product delivered as does control over academic programs.

- **Personnel Policy Matters**: such as recruitment, promotion, and tenure.

Actual Control or Effective Recommendation

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 party asserting managerial status must prove actual—rather than mere paper—authority. 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.

- 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.

- An evaluation of whether faculty actually exercise control or make effective recommendations requires an 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.

On this latter point, the Board noted that contingent faculty members are often employed in teaching or research-only positions, with little or no support for faculty development or scholarship, providing them with a very different relationship to the university and its functions.

**Carroll College II**

Factual Background
As noted above, the Union petitioned to represent a unit of **all tenured and tenure-track teaching faculty** employed by the College.

Remember that the Regional Director found that the Board should decline jurisdiction as the College had met both prongs of the *Pacific Lutheran* religious exemption standard.

**Regional Director’s Decision**

On the managerial exemption issue, the Regional Director found that that the College had met its burden of establishing that petitioned-for faculty exercise managerial authority with regard to academic programs, academic policy, and personnel policy and decisions.

The Regional Director explained that the *Pacific Lutheran* Board’s decision did not provide clarity as to which types or numbers of factors a party must prove in order to meet its burden. Thus, looking at the record as a whole, the Regional Director found that the College had met its burden of proving that the faculty members are managers within the meaning of the Act.

**Primary decision-making – Academic Programs**

- faculty exercise decision-making authority over academic programs through relevant committees and the Faculty Assembly
- through this process, faculty make decisions involving the College’s curricula, major, minor, and certificate offerings, and the requirements for completing those offerings.
- the Curriculum Committee also has the authority to add certificate programs to the College’s offerings with only approval by the Faculty Assembly, without needing further approval by the Board.
- the Core Committee approves courses for and makes recommendations for changes regarding the curriculum required of all students at the College, of which only major changes require Assembly or Board approval.

**Primary decision-making – Enrollment Management**

- The faculty do not exercise decision-making authority over the size, scope, or make-up of the College’s student body

**Primary decision-making – Financial Decisions**

- The faculty did not exercise effective decision-making power over financial decisions, either income or expenditures.
Secondary decision-making – Academic Policy

The Regional Director found that faculty exercise decision-making authority in the areas of both academic policy and personnel policy and decisions.

• As to academic policy, the faculty make decisions regarding teaching/research methods, grading policy, academic integrity policy, syllabus policy, research policy, and course content policy.

• The Curriculum Committee, which is 50 percent faculty, handles the College’s syllabus’ policy.

• The Policy Committee, although minority faculty, makes major recommendations most notably the attendance policy, the academic integrity policy, and the waiver of core requirements for students already in possession of the bachelor’s degree.

Secondary decision-making – Personnel Policy

The Regional Director found that faculty possess and exercise decision-making authority regarding hiring, promotion, tenure, and leave.

• Hiring of Faculty: faculty exercise significant control over hiring, as the department chairs head department-level hiring committees made up of Unit faculty, who serve as the primary hiring mechanism for new faculty.

• Hiring and Termination of Adjuncts: faculty also exercise significant control over the hiring and termination of adjuncts, and can elect not to renew adjunct contracts without approval or oversight from the College.

• Evaluation and Tenure: the authority of the faculty-majority Rank and Tenure Committee over evaluation and tenure decisions for Unit faculty also weighs heavily in favor of finding managerial status. Although tenure decisions receive approval from the President and ultimately the Board, the vast majority of the Committee’s recommendations as to tenure are followed and that at least the President conducts no independent review.

• Sabbatical: the faculty-majority Faculty Development Committee makes decisions regarding sabbatical for faculty, which is a form of leave, that the President adopts pro forma without any independent review.

• Dismissal: though it appeared that the Rank and Tenure Committee was empowered to review dismissal appeals, there was insufficient evidence to show the nature and extent to which the appeal process was used. However, the Regional Director
concluded faculty exercise effective decision-making authority over personnel policy and decisions, and that this factor weighed in favor of finding that the College met its burden of proving managerial status.

Structure of decision-making

The final step in analyzing whether the petitioned-for faculty actually or effectively exercise control over decision making pertaining to central policies of the university involves an examination of the structure of decision-making at the College and where the faculty fit into that structure.

• The petitioned-for unit included only tenured and tenure-track faculty, not adjunct or contingent faculty

• All of the petitioned-for faculty participate in shared governance activities which play a crucial role in the College’s decision-making structure

The Regional Director found that the College had met its burden of proving that the petitioned-for faculty members were managers within the meaning of the Act.

University of Southern California

The Union filed petitions seeking to represent full-time and part-time non-tenure track faculty employees in the two separate units.

Factual Background

• The University opposed the petition based on the claim that the non-tenure track faculty members are managerial employees under Yeshiva, and under the Board’s current analysis set forth in Pacific Lutheran.

• The University stated that its history of shared faculty governance is evidenced by widespread faculty participation in various committees, many of which handle matters that are central to areas of faculty decision-making identified in Pacific Lutheran.

• The University also claimed that by participating in these committees, the faculty members exercise effective control over central policies such that they are aligned with management.

• The University maintained that this factor distinguished its non-tenure track faculty from the contingent faculty at issue in Pacific Lutheran, arguing that the employment relationship at USC supports the non-tenure track faculty’s role in shared governance.
• The University also noted that many of the non-tenure track faculty have job security in the form of one-year or multi-year appointments and that, in some respects, non-tenure track faculty have even more job security than their tenure-track counterparts who are probationary and will not receive tenure unless they are extraordinary.

• The University further stated that all non-tenure track faculty—including part-time faculty who have at least a 50% appointment—are eligible for most of the same benefits that are offered to tenured and tenure-track faculty.

Regional Director’s Decision

The Regional Director concluded that there was insufficient evidence to show that the faculty committees at the University exercised actual or effective decision-making with respect to academic programs.

• Enrollment Decisions: the Regional Director found that the faculty committee was very recently created and has made only a handful of decisions affecting enrollment, and that this brief history is insufficient to establish that the committee makes recommendations on enrollment management that are routinely implemented by USC. There was also no evidence that any faculty committee made effective recommendations about the specific size, scope, and make-up of the student body.

• Academic Policy: although there was some evidence that faculty played an active role in committees making decisions about academic policies, the Regional Director found that the record was too vague and undefined to conclude that the faculty’s role amounted to actual or effective control over this area. Even if some of these committees did exercise managerial control, the Regional Director determined that non-tenure track faculty constituted a majority on only one such committee.

• Personnel Policy: while non-tenure track faculty were involved in the personnel committee dealing with the promotion of non-tenure track faculty members, the Regional Director concluded that there was no evidence that this committee had ever considered any cases or made any recommendations.

On all of this evidence, the Regional Director decided that the University failed to meet its burden of showing that the non-tenure track faculty made actual or effective recommendations regarding personnel policies and decisions through these committees sufficient to demonstrate the exercise managerial authority and their exclusion from representation.