We have seen this movie before. NLRB precedent established by the Board under the prior Administration conflicted sharply with decisions by the D.C. Circuit reviewing the Board. Then the current iteration of the Board reverses its own precedent and sides with the D.C. Circuit. This situation occurred recently with regard to whether the “clear and unmistakable waiver” standard or “contract coverage” test should apply to unilateral change cases.

We actually foreshadowed this very scenario in context of the Board’s jurisdiction over religious educational institutions in early January, when the D.C. Circuit vacated a NLRB decision that applied the more-expansive Pacific Lutheran University standard compared to the D.C. Circuit’s University of Great Falls three-pronged test.

On June 10, 2020, the NLRB predictably overruled Pacific Lutheran University, 361 NLRB 1404 (2014) and adopted University of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002), holding that it has no jurisdiction over faculty at bona fide religious educational institutions, regardless of what specific duties the petitioned-for faculty members at issue perform vis-à-vis the religious or secular functions of the school. Bethany College, 369 NLRB No. 98 (2020).
**Background: From Catholic Bishop to Pacific Lutheran to Great Falls**

The Board has declined to exercise jurisdiction over religious schools based on the First Amendment’s restriction on government interference with religious practices and the guarantee that religious organizations maintain independence. The distinction the Board has drawn is that where a school is “completely religious,” the Board may not exercise jurisdiction, and where a school is merely “religiously associated,” then the Board may act.

The question created by these standards is which should apply to determine whether the school is “completely religious.” This issue most often arises when a union petitions to represent a unit of faculty at an ostensibly religious institution.

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court reversed the Board and rejected the Board’s attempt to exercise jurisdiction over a religious institution, emphasizing the “significant risk” that the First Amendment would be infringed. The Board could not exercise jurisdiction “in the absence of a clear expression of Congress’ intent to bring teachers at church-operated schools within the jurisdiction of the Board,” which led to an analysis of whether the school had “substantial religious character” and if so, the institution would fall beyond the reach of the Board.

Subsequently, the Board decided a slew of cases based on the question of whether the institution at issue had a “substantial religious character,” which lead to maddeningly inconsistent Circuit Court decisions on review. In 2002, the D.C. Circuit in *Great Falls* established a bright-line test where if the following three elements were satisfied, then the Board must decline to exercise jurisdiction: the institution (a) “holds itself out to students, faculty, and community as providing a religious educational environment”; (b) is “organized as a nonprofit”; and (c) 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.”

Twelve years later, in *Pacific Lutheran*, the Board departed from *Great Falls* by adding an additional element that focused on the specific role of the petitioned-for faculty members. According to *Pacific Lutheran*, the Board could only decline to exercise jurisdiction if the *Great Falls* factors were met and the faculty members themselves were “held out” as performing a specific role in creating or maintaining the college or university’s religious educational environment. The Board thus added a significant gloss on the *Great Falls* test that focused on the role of the faculty – in addition to the institution – which could create an outcome where some faculty at the institution may fall within the Board’s grasp, and others could not.

**NLRB Overturns Pacific Lutheran and Reaffirms Great Falls**

In *Bethany College*, the Board found that the *Great Falls* test – not *Pacific Lutheran* – was more faithful to the Supreme Court’s principles, as set forth in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).
The Board concluded that the additional “holding out” inquiry in Pacific Lutheran was flawed because it required the Board to subjectively judge what constitutes a “specific religious function,” inevitably entangling the Board in an analysis of the religious tenets of the institution, and thus resulting in an intrusion into rights protected by the Religion Clauses of the First Amendment.

The Board concluded that applying the Great Falls test “will leave the determination of what constitutes religious activity versus secular activity precisely where it has always belonged: with the religiously affiliated institutions themselves . . . .”

**Application to Bethany College**

In overruling Pacific Lutheran, the Board reversed the judge’s findings that jurisdiction could be exercised over Bethany College and dismissed the complaint because the College (a) held it itself out as a religious institution to the public based on, *inter alia*, language in the school’s handbook and job postings, which alerted faculty to the religious nature of the school; (b) is established as a 501(c)(3) nonprofit institution; and (c) is owned and operated by the Central States Synod and the Arkansas/Oklahoma Synod of the ELCA. As a result, the Board could not exercise jurisdiction over the College

**Takeaways**

Religious educational institutions can now (at least for the immediate future – predicting what will happen tomorrow at the NLRB is risky business) comfortably rely on application of the Great Falls test to determine whether the Board could exercise jurisdiction under the National Labor Relations Act over its employees. The benefit of this test is that institutions may now have greater assurance that the Board will either have jurisdiction over the entire school or not. No longer will educational institutions have to conduct an exacting inquiry by parsing whether and the extent to which certain faculty perform “secular” or “religious” duties.

This decision demonstrates, once more, the Board’s recent predilection of adopting D.C. Circuit precedent that had conflicted with Board precedent established by the Board under the prior administration. Harmonizing Board and D.C. Circuit precedent is helpful for practitioners and parties alike because it avoids spending many years and dollars litigating a matter through a Board decision, when the decision likely would be overturned by the D.C. Circuit. As the election this Fall brings uncertainty to the future composition of the Board, we can expect more decisions overturning prior precedent during the next few months.

Stay tuned!

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