Higher Education Faculty Unionization: NLRB RC Decision Applies Pacific Lutheran Standard to Adjuncts

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On June 1, 2015, NLRB Region 13 Regional Director Peter Sung Ohr issued a Decision in Saint Xavier University, which applied the NLRB’s new standard set forth in Pacific Lutheran University regarding declining jurisdiction over faculty members at self-identified religious colleges. The revised standard favors unionization and could have a major impact on religious schools.

In Saint Xavier University, the union sought to represent part-time faculty, also known as “adjuncts.” The University argued: 1) that the Board lacked jurisdiction because it is a religiously operated institution that is not subject to the Act according to the Board’s new standard set forth in Pacific Lutheran; and 2) in the alternative, that certain petitioned-for employees—adjuncts who teach in the Department of Religious Studies, in the Pastoral Ministry Institute, Catholic theology—were exempt under Pacific Lutheran as they were held out as performing a specific religious function.

Under the Pacific Lutheran standard, the Board will decline to exercise jurisdiction over employees at a university that claims to be a religious institution only if the employer demonstrates that:

1. it holds itself out as providing a religious educational environment, and
2. holds the petitioned-for employees out as performing a specific role in creating or maintaining the university’s religious educational environment.

In support of the Regional Director’s finding that the University holds itself out as providing a religious educational environment, the Regional Director relied on the University’s consistent self-identification as a Catholic institution and its many publicly available programs and publications that prominently feature the themes of its religious founders and Catholicism. To avoid an intrusive inquiry into the beliefs and religious tenets of religious institutions, which may violate the First Amendment, the first prong of the test involves a “threshold showing,” “merely an examination of how [the University] holds itself out to students, faculty, and the public.”

Regarding the second prong of the Pacific Lutheran standard, the Regional Director found that the University failed to establish that it holds out its part-time faculty (including adjuncts in the Department of Religious Studies), other than the part-time faculty while teaching courses in Pastoral Ministry Institute, as performing a religious function. The Regional Director cited the following facts in support of his finding:

- No employment applications or any of the job postings in the record include any statements that adjuncts must integrate the Church’s or the Sisters of Mercy’s tenets into coursework, serve as religious advisors to students, propagate the tenets of the Sisters of Mercy, engage in religious training, or conform to the tenets of Catholicism in the course of their job duties;
- Adjuncts have never been informed that they must adhere to or propagate any Catholic doctrine as part of their jobs;
- The faculty handbook does not mention the Sisters of Mercy, Catholicism, Christianity, God, or even religion

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The University does not discriminate in hiring, promotion, or termination based on religion or religious profession as stated in the articles of incorporation; and

- The University’s religious retreats and programming are entirely optional for adjuncts; and

- There is no evidence of any action resulting from an adjunct’s failure to understand, appreciate, support, or be committed to the University’s Catholic mission.

With respect to adjuncts teaching in its Department of Religious Studies, the lack of evidence suggesting that adjuncts teaching religious studies courses must have expertise in Catholicism or any particular religion demonstrated that such adjuncts are not held out as performing a specific religious function. According to the Regional Director, the University’s requirement that adjuncts teaching Catholic-specific courses “faithfully teach the Catholic tradition in their classes” is specific to the “particularized coursework being taught and, on its face, is no different than a mathematics instructor being required to teach calculus accurately.”

In contrast, adjuncts teaching courses in the Pastoral Ministry Institute were found to be held out as performing a specific religious function because the Institute served the Archdiocese of Chicago and course offerings were tailored for the Catholic ministry and ministerial training, i.e., the coursework was “inextricably linked with the University’s religious mission.”

This case provides an excellent example of the thin line between NLRB-exempt faculty and non-exempt faculty. The NLRB is clearly willing to reach into religious departments within religious institutions to determine which faculty members have a right to unionize under the NLRA. The case demonstrates the fact-intensive NLRB analysis. Religious institutions looking to stay outside of the NLRB’s jurisdiction should take notice of the facts relied upon by the Regional Director. The Board’s test with regard to religious exemption is likely to be rejected by the courts. We will have to wait and see how the courts rule on the Pacific Lutheran line of cases.

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