Proskauer

Higher Education Alert: NLRB Announces Two New Standards Favorable to Faculty Unions

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In *Pacific Lutheran University*, 361 NLRB No. 157, a case that had been watched closely by the higher education community, the National Labor Relations Board issued a 3-2 decision the week before Christmas announcing new standards for resolving two issues that frequently arise in the context of union organizing of faculty at private colleges and universities: (1) whether faculty members are managerial employees and thus not protected by the National Labor Relations Act; and (2) when the Board should decline to exercise jurisdiction over a college or university that claims to be a religious institution. The Board and appellate courts have grappled with – and disagreed over – these questions in numerous cases since the Supreme Court's decisions more than thirty years ago in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) and *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). But, as exemplified by the two dissenting opinions in *Pacific Lutheran* – and particularly the strongly worded opinion authored by Member Johnson – the debate is likely to continue and prompt further consideration by the courts. In the meantime, the Board's new tests would appear to make it easier than ever before for faculty unions to make inroads at private institutions of higher education. (See also Proskauer's previous client alert concerning the Board's new representation election rules and blog post concerning the *Specialty Healthcare* decision for other ways in which the Board's recent actions seemingly have bolstered unionization efforts more generally.)

Managerial Status of Faculty Members

In *Yeshiva* (in which Proskauer represented the university), the Supreme Court defined managerial employees in higher education as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." 444 U.S. at 682. Thus, as was the case in *Yeshiva* (where faculty members made effective decisions concerning course offerings, scheduling, admissions, retention, teaching methods, grading policies, matriculation standards, and other matters), faculty members who exercise control over academic and other areas are managerial employees excluded from coverage under the Act.

As noted by the majority in *Pacific Lutheran*, the Board has issued nearly two dozen published decisions addressing the managerial status of faculty at colleges and universities since *Yeshiva*. In so doing, however, the Board increasingly has come under fire – particularly from the Court of Appeals for the D.C. Circuit – for failing to provide sufficient guidance regarding the importance and relative weight of the factors (*i.e.*, areas of faculty decision making) examined in determining managerial status. The D.C. Circuit directed the Board in *LeMoyne-Owen College v. NLRB*, 357 F.3d 55 (D.C. Cir. 2004) and *Point Park University v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006) to explain "which facts are significant and which less so, and why."

Thus, the *Pacific Lutheran* majority purported to answer this question and to "develop a more workable, more predictable analytical framework to guide employers, unions and employees alike." This new framework examines the "breadth and depth of the faculty's authority."

First, in examining the "breadth" of faculty authority, the Board will look to areas of decision making that "affect the university as a whole, such as the product produced, the terms on which it is offered, and the customers served." The Board will give greater weight to faculty authority in three "primary" areas of decision making (academic programs, enrollment management, and finances), and less weight to faculty authority in two "secondary" areas of decision making (academic policy and personnel policy and decisions). The majority described the three "primary" areas as follows:

- *Academic Programs*: Curricular, research, major, minor, and certificate offerings and the requirements to complete successfully those offerings.

Enrollment Management: The size, scope, and makeup of the university's student body.

- *Finances*: Financial decisions – both income and expenditure – including net tuition.

Second, in examining the "depth" of faculty authority, the Board will analyze "whether the faculty actually exercise control or make effective recommendations over those areas of policy[, which] 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." The majority emphasized that the college or university "must prove actual—rather than mere paper—authority." And in perhaps the strictest element of its new test, the majority stated that "to be 'effective,' recommendations must *almost always* be followed by the administration." (Emphasis added.)

Notably, the petitioned-for unit in *Pacific Lutheran* included only "non-tenured contingent faculty," and the university contended only that *full-time* faculty members within this group were managerial employees. Thus, the status of *part-time* contingent faculty members, and of *regular* faculty, was not at issue. Applying its new test, the majority readily concluded that the university's full-time contingent faculty members were not managerial employees, because the university "failed to carry its burden of proving that . . . [they] actually control or make effective recommendations in *any* of the primary or secondary areas of decision-making." (Emphasis added.) In short, contingent faculty members were barred from serving on faculty standing committees and, while they were permitted to vote in the faculty assembly (except with respect to personnel decisions), there was no evidence that they actually had done so.

The dissenters agreed with the majority that the faculty members involved did not qualify as managerial employees, but took issue with the majority's new analytical framework. Members Miscimarra and Johnson both found the majority's test to be "too onerous and inflexible," with the potential to "improperly confer 'employee' status on some faculty members who should be considered 'managerial' employees . . . ." Specifically, the dissenters strongly disagreed with the majority's position that a faculty's recommendations must "almost always" be followed in order to find managerial status.

Member Johnson's discussion and criticism of the "breadth" factors provides perhaps the most significant takeaway from the majority's new framework:

[T]he majority does not really give guidance concerning how our regional directors and future Boards will decide the ultimate outcome based on the factors. For instance, if no primary factors are established, but one secondary factor is, is that sufficient to establish managerial status? If no primary, but two secondary factors? Is one primary factor alone sufficient? It appears that the majority finds no need to reach that issue, in light of their finding that the record does not establish that the faculty at issue actually control or make effective recommendations in any of the primary or secondary areas of decision making. But the majority has decided to create a comprehensive test here, and, therefore, the actual weighting of its factors, including what showing is sufficient to meet the majority's test, is a rather large analytical question to be left unresolved, particularly if the hope is to provide predictability and guidance with regard to how the Board will make these determinations in the future.

Indeed, the scarcity of evidence with respect to the contingent faculty's authority renders *Pacific Lutheran* a poor barometer for future, closer cases, although the majority and dissenting opinions, read together, strongly suggest an easier path for faculty unions. But more critically, the majority's test again apparently falls short of the D.C. Circuit's mandate to explain "which facts are significant and which less so, and why," thereby setting the stage for another round of appellate review.

NLRB Jurisdiction over Religiously-Affiliated Colleges and Universities

In *Catholic Bishop*, the Court held that the Board could not assert jurisdiction over lay teachers at a church-operated school because, under the policy of constitutional avoidance, to do so would create a "significant risk" that First Amendment religious rights would be infringed. 440 U.S. at 502, 507. After *Catholic Bishop*, the Board determined on a case-by-case basis whether a self-identified religious school 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. Over time, the courts of appeals took issue with the Board's analysis of this question, particularly insofar as the Board's inquiry constituted the very infringement that the Supreme Court sought to avoid in *Catholic Bishop*. Thus, in *University of Great Falls v. NLRB*, 278 F.3d 1335, 1343-44 (D.C. Cir. 2002), the D.C. Circuit denied enforcement of the Board's assertion of jurisdiction, and proposed and applied a three-part test, under which the Board would assert jurisdiction unless a college or university:

(a) holds itself out to students, faculty and the 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.

In *Pacific Lutheran*, the majority declined to adopt the D.C. Circuit's *Great Falls* test (which the court reaffirmed in *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009), another case handled by Proskauer), instead announcing a new, two-step standard. First, the college or university must, as a threshold matter, demonstrate "that it holds itself out as providing a religious educational environment . . . ." Next, it must show "that it holds out the petitioned-for faculty member's [sic] as performing a specific role in creating or maintaining the school's religious educational environment." The majority found that while Pacific Lutheran met the threshold requirement, it failed the second prong of the test and, thus, was subject to the Board's jurisdiction.

Members Miscimarra and Johnson dissented, arguing in favor of the *Great Falls* (or similar) test, and finding that, under that test, Pacific Lutheran should be deemed exempt from the Act's coverage. According to the dissenters, notwithstanding the majority's rejection of the "substantial religious character" test and its reliance only on a university's *own* statements about its religious environment and the faculty's role therein, the majority's second prong "suffer[ed] from the same infirmity denounced by the Supreme Court . . . and by the D.C. Circuit . . . entail[ing] an inquiry likely to produce an unacceptable risk of conflict with . . . the First Amendment."

Conclusion

The Board's decision in *Pacific Lutheran* will surely – at least in the short term – embolden unions seeking to organize faculty members at colleges and universities. Despite the majority's efforts to articulate workable standards consistent with the Supreme Court's decisions in *Yeshiva* and *Catholic Bishop*, however, it is highly improbable that *Pacific Lutheran* will be the last word on either issue addressed by the Board. As explained by the dissenters, the majority still does not adequately explain the reasons for its test for faculty managerial status or how it will be applied, and will likely provoke renewed criticism from the courts. Even more clearly, the majority's rejection of the D.C. Circuit's *Great Falls* test concerning jurisdiction over religiously-affiliated institutions all but ensures further appellate consideration of the subject.

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