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The NLRB Appears To Clear The Path Toward Greater Unionization Of Private Colleges And Universities

Education Law Notes

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In a decision notable for not just one, but two revisions to established National Labor Relations Board (the "Board") analytical framework, the Board appears to open the door toward increased unionization of private institutions of higher learning. In Pacific Lutheran University and SEIU Local 925, the Board exercised jurisdiction under the National Labor Relations Act (the "NLRA") over a group of nontenure-eligible (contingent) faculty members. In so doing, the Board rejected Pacific Lutheran's position that (1) it was a religious organization exempt from the provisions of the NLRA; and (2) the full-time, nontenure-eligible faculty members were managerial employees and thus not entitled to the benefits of collective bargaining.

While addressing Pacific Lutheran's asserted religious exemption, the Board had little choice but to deviate from its existing precedent. In NLRB v. Catholic Bishop, 440 U.S. 490 (1979), the Supreme Court determined that the Board lacked jurisdiction over lay teachers at "church operated schools" due to the significant risk that the Board's oversight of collective bargaining would require inquiry into the religious beliefs of the institutions and infringe on their First Amendment rights. After the Catholic Bishop ruling, the Board adopted a test wherein institutions with a "substantial religious character" were exempt as "church operated". While utilization of this "substantial religious character" test had been rejected by various federal Circuit Courts of Appeals as requiring evaluation of religious beliefs in violation of the Religious Clauses of the First Amendment, the Board had not modified that test in any discernible manner.

Given the opportunity to do so here, the Board adopted a new two-part test wherein it would exercise jurisdiction over private religious institutions unless the school both: (1) "holds itself out as providing a religious educational environment"; and (2) "holds out the petitioned-for faculty member's [sic] as performing a specific role in creating or maintaining the school's religious educational environment." While the Board viewed this (incorrectly, according to the dissent) as lessening the risk of an impermissible intrusion into the religious mission of such schools, the ruling signals the clear intent of the Board to again try and exercise jurisdiction, at least with respect to faculty members not teaching religious courses, over "church-operated" schools.

The Board also rejected Pacific Lutheran's assertion that its full-time nontenure-eligible faculty were managerial employees exempt from collective bargaining under NLRB v. Yeshiva University, 444 U.S. 672 (1980). In Yeshiva, the Supreme Court determined that the full-time faculty members of the university were "managerial employees" excluded from collective bargaining because they "formulate and effectuate

management policies by expressing and making operative the decisions of their employer." In response to what the Board referred to as judicial criticism over its post-Yeshiva efforts to identify and apply the standards determining managerial status, the Board issued and applied a new analytical framework. The Board concluded that in determining managerial status, the Board will review the faculty's participation in decision-making regarding academic programs, enrollment, management, finances, academic policy and personnel policies and decisions to determine whether faculty "actually control or make effective recommendations over those areas" (effective recommendations are those that are "almost always" followed by the administration) . If the Board concludes that they do, the faculty will be deemed managerial employees exempt from the provisions of the NLRA.

While the new framework certainly provides more guidance to colleges and universities, it also, at least according to the dissent, "raised the bar for establishing managerial status of faculty to an unattainable height" by "increasing the burden of proof for what the Board considers to be 'effective' recommendations", and by "failing to consider the actual, diverse processes of university business operations and governance."

Going Forward

The Board's decision, unless it is reversed or modified on appeal, suggests that it will be easier for faculty (both regular and contingent) to unionize. Religious institutions must now be concerned with whether they hold out all faculty as serving a religious function, and all institutions must now consider to what extent all faculty control or make recommendations that are almost always followed by the administration.

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