

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**MANHATTAN COLLEGE
Employer**

Case No. 2-RC-23543

**MANHATTAN COLLEGE ADJUNCT FACULTY
UNION, NEW YORK STATE UNITED TEACHERS,
AFT/NEA/AFL-CIO
Petitioner**

DECISION AND DIRECTION OF ELECTION

On October 5, 2010, Manhattan College Adjunct Faculty Union, New York State United Teachers, AFT/NEA/AFL-CIO (the “Petitioner”) filed a petition, pursuant to Section 9(b) of the National Labor Relations Act (the “Act”), seeking to represent certain employees at a facility operated by Manhattan College (the “College”) located at 413 Manhattan College Parkway, Bronx, New York, 10471.

In accordance with the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its authority in this proceeding to the Regional Director, Region 2. A hearing was held before a Hearing Officer of the Board on various dates in October and November 2010.

The sole issue requiring resolution is whether the Board should exercise jurisdiction in this matter. The Employer contends that it is a church-operated institution whose faculty are exempt from the Board’s jurisdiction under the Supreme Court’s decision in *N.L.R.B. v. Catholic Bishop*, 440 U.S. 490 (1979). I have considered all of the evidence presented at the hearing and the briefs of the parties, and for the reasons discussed below, I find that the College is not a

church-operated institution within the meaning of *Catholic Bishop*, and therefore conclude that the Board may properly assert jurisdiction over the College in this case.

Upon the entire record in this proceeding¹, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that the Employer is an employer engaged in commerce as defined in the Act. The only issue, as noted above, is whether the Supreme Court's decision in *Catholic Bishop*, supra, precludes the exercise of jurisdiction over the adjunct professor's sought by the petition.

On November 9, 1999, the Regional Director of Region 2 of the National Labor Relations Board, acting with authority delegated by the Board under Section 3(b) of the Act, upon a petition filed by Manhattan College Faculty Coalition, NYSUT, a/w AFT, AFL-CIO, seeking to represent full-time and regular part-time teaching faculty employed by the College, issued a Supplemental Decision and Direction of Election. *Manhattan College*, 2-RC-21735 (Nov. 9, 1999) ("1999 Decision"). The 1999 Decision, with the Employer declining to take any position on the issue, considered the question of whether the College was a church-operated institution within the meaning of *Catholic Bishop*, and concluded that, based on the evidence presented, the Board should properly assert jurisdiction over the College. Thus, the decision in the instant case will focus on any facts which have either changed in the intervening period since the 1999 Decision or any facts which distinguish this group of employees from the proposed unit considered in the 1999 Decision.²

¹ Briefs filed by the parties have been duly considered.

² While the Employer objects to the Hearing Officer's decision to make the 1999 Decision part of the record in this case, it is properly considered to the extent noted herein and thus, the Hearing Officer's decision was free from prejudicial error.

As set forth in the 1999 Decision, the College is a four-year institution of higher education located in the Bronx, New York. The College is comprised of five schools: Arts, Sciences, Business, Education, and Engineering.

College Governance

The College is organized as a not-for-profit corporation for educational purposes and granted federal tax exemption pursuant to section 501(c)(3) of the Internal Revenue Code. As found in the 1999 Decision, it continues to be owned, operated, and controlled by an independent Board of Trustees, not by the Catholic Church or any other religious entity. However, the College is recognized as a Catholic institution located within the Archdiocese of New York, as evidenced by the school's inclusion in The Official Catholic Directory (2010 edition).

The current by-laws of the Board of Trustees of Manhattan College (the "By-laws"), most recently revised on June 11, 2009, provide that the "purpose of the corporation shall be the promotion of education." The By-laws provide that, in the event of dissolution, at least one-half of the remaining assets are to be distributed to the De La Salle Christian Brothers ("Christian Brothers") to be used for their educational works, provided those works qualify under Section 501(c)(3) of the Internal Revenue Code.

The by-laws require that the Board of Trustees ("Trustees") consist of no more than thirty-seven trustees, consisting of: the President of the College; the immediate past president of the College's Alumni Council; and thirty-five additional members consisting of five classes of seven members each, with staggered five-year terms. Further, the Trustees must include the following: (1) at least ten laypersons who are graduates of the College; (2) each of the five classes must include a member of the Christian Brothers "to the extent one is available"; and (3) the Brother Provincial of the District of Eastern North America of the Christian Brothers (the

“District”) or his designee. Currently, the Trustees consist of thirty-two lay persons and five Christian Brothers.

The by-laws require that the Chair of the Trustees be one of the members, other than the President and immediate-past president of the Alumni Council (the “at-large Trustees”). In addition to presiding over all meetings of the Trustees, the chair is an ex officio member of all committees and is ex officio chair of the Executive Committee. The by-laws provide for two vice-chairs: one vice-chair who is elected from among the at-large Trustees (the “Elected Vice-Chair”) and one vice-chair who is the Brother Provincial or his designee. The by-laws provide that, in the absence or incapacity of the chair, the elected vice-chair will have the powers and duties of the chair. The by-laws do not specify the duties and powers of the Provincial Vice-Chair, other than serving on the Executive Committee along with the chair, elected vice-chair, President of the College, and three-to-six other trustees.

On December 17, 2002, the College entered into a “Sponsorship Covenant” (the “Covenant”) with the Christian Brothers, a new agreement which did not exist at the time of the 1999 Decision. As set forth in that document, the rationale for creating the Covenant was the parties’ “intertwined history since the College was founded in 1853”; “the mutually beneficial collaboration that has characterized [the parties’] relationship”; and “the strong desire of both parties to continue and to enhance this relationship and the benefits accruing to each, as we move into the 21st century.” The Covenant states, “The role of the Brothers at Manhattan College in the 21st century will be different from their role in the 20th century. This change results from many factors.” One of the factors identified is, “In the past, the Brothers’ influence on Manhattan College resulting from large numbers of Brothers working in every facet of the College. Now a smaller number of Brothers, dispersed throughout the College . . . articulate the

Lasallian tradition . . . in collaboration with a significant number of [lay] colleagues...” This was also described in the testimony of Barbara Fabé, Vice President for Human Resources. Fabé testified, “With less Christian Brothers playing a role at the college, over the years and certain[ly] over the last decade . . . it became necessary to assure the community that we would remain true to our heritage and true to what the college has always stood for. First and foremost, it’s a Catholic institution. And it has always been sponsored by the Christian Brothers.”

The Covenant also sets forth certain requirements for the College’s hiring practices. In particular, in the hiring of faculty and staff, the College will “discuss the mission statement, the College’s Catholic identity, and its Lasallian Tradition.” In addition, all letters of appointment and employment contracts must include an “agreement to respect the College’s Catholic identity and Lasallian tradition.” Further, the Covenant provides an affirmative hiring statement concerning Christian Brothers: “the College considers a candidate’s status as a Brother of the Christian Schools as a positive factor” in its hiring process.

At the time the Covenant was executed, the current College President and all of the College’s past presidents had been Christian Brothers. However, the Covenant contemplates the hiring of a College President who is not a Christian Brother stating that if there is no qualified Christian Brother applicant, “the Board shall seek someone strong in the knowledge and in the practice of the Catholic faith and who understands and values the Lasallian Tradition.” Indeed, in 2009, the College appointed Brennan O’Donnell as president, the first president of the College who was not a member of the Christian Brothers.

The Covenant also established the position of Vice President of Mission. In particular, the Covenant provides, “the President will consult with the Brother Provincial to employ a qualified Lasallian Educator to assist the President and the College community in its

understanding of the College's Mission and Lasallian Catholic identity." According to Fabé's testimony, this post was established in response to the concerns that the presence of the Christian Brothers at the College was diminishing and that the next president would not be a member of the Christian Brothers. Thus, the Trustees decided that a high-level post should be established to perform the work of "continuing the traditions, continuing the process of education, [and] work[ing] with faculty in matters that may be of concern with them."

Although the Covenant sets forth the afore-mentioned provisions which further the purpose, as Fabé testified, "to make sure that the relationships and benefits [between the College and the Brothers] continued into the next century," the Covenant also contains provisions emphasizing the College's academic freedom and diversity. Included among the "General Principles for Implementation of the College's Mission" are the provisions that "the College affirms its commitment to academic freedom and responsibility, and to institutional autonomy, which are requisites for its effective functioning and the achievement of its Mission," and "the College, blessed with a diverse student body, faculty and staff from different faiths and traditions, all of whom make valued contributions to the mission and enrich each other intellectually, socially and spiritually, affirms its embrace of this diversity and its commitment to freedom of conscience and to the religious liberty of each member of the College community."

Although the Covenant acknowledges the Christian Brothers' "extraordinary financial generosity", the section entitled "Funding" makes no reference whatsoever to any financial support that the College receives from the Christian Brothers. Instead, that section provides in full, "The College provides funds in its annual operating budget for the various activities and endeavors needed to implement the goals of this Sponsorship Covenant."

In the 1999 Decision, the Regional Director, Region 2, found that the College received approximately \$100,000 from the Christian Brothers, out of a total annual operating budget of \$42 million. *Manhattan College*, at p. 5. The record in the instant case is silent with respect to any financial contributions by the Christian Brothers or the Church and, therefore, I will assume that this fact has not changed since it was adjudicated in 1999. As in 1999, the College continues to receive approximately \$350,000 per year in aid from the state. However, the College's annual operating budget has doubled since the 1999 Decision to approximately \$84 million in 2009.

Student Recruitment and Academics

The College brochure for prospective students that includes the application for admission (hereinafter, the "Admissions Brochure") makes certain references to St. John Baptist de La Salle, but does not include any reference to the Catholic Church or Catholicism.³ The Brochure makes various references to Lasallian education; a characteristic description is: "Learning De La Salle style means that your teachers are exceptional, devoted to a personal approach that centers on you and your success. That what you learn is both practical and cutting-edge. That values and compassion lie at the heart of whatever you do. . . . The Lasallian education is about embracing a full, caring and meaningful life." A description of the College's history and mission in the Brochure states, "In 1848, four Brothers of the De La Salle Christian Schools were sent from France to St. Vincent's Parish on Canal Street in New York City. Their mission was to begin a school for French-speaking immigrants." Following a brief summary of the intervening history, it goes on to state, "The mission of Manhattan College . . . is unchanged: to provide a

³ Certain documents, including Employer's Exhibit 49, identified as the application for admission to the College, were offered at the hearing and marked for purposes of identification, but do not appear to have been moved or admitted into evidence. I hereby receive Employer's Exhibit 49 into evidence, taking administrative notice that it is an admissions brochure, containing the application for admission to the College.

person-centered, contemporary educational experience characterized by high academic standards, reflection on values and principles, and preparation for a dynamic, lifelong career.”

Inside the Brochure, the Application for Admission contains no reference whatsoever to religion, faith, or the Church. The required essay asks students to describe “their career objectives, educational goals, and reasons for considering Manhattan College.” The application also contains the College’s Non-Discrimination Policy, stating that the College does not discriminate on the basis of any protected category, including religion.

William Merriman, Dean of the School of Education, testified about new academic requirements implemented since the 1999 Decision. As described in the 1999 Decision, the College previously had a Religious Studies requirement for all students in which they were required to complete three three-credit courses in Religious Studies as a graduation requirement. *Manhattan College*, at 11. This requirement included a freshman-year course entitled “The Nature and Experience of Religion” and one elected course from each of two groups, “The Religious Traditions” and “Religion and Contemporary Thought.” Within the past few years, the College modified these requirements so that three of the nine credits must be earned from one of a list of offerings in “Catholic Studies”. The other six credits are earned from the same required freshman-year course and a selection from the list of offerings in “Global Studies and Contemporary Issues”. Prior to this change, it was possible for students to fulfill the Religious Studies requirement without completing any coursework focused on Catholicism. The required Catholic Studies course is an academic course on the Catholic intellectual tradition and does not require students to learn prayers, learn Catholic rituals, or express Christian faith. The Catholic Studies requirement may be satisfied by courses in the Religious Studies Department as diverse as “Jesus”, “Urban America and Catholic Social Teaching”, or “Early Christian Thought”, as

well as by Art History courses “Monasticism and the Arts” and “Medieval Art,” and the Music course “Catholic Mass and its Music.” These required courses, like all Religious Studies courses at the College, are academic in nature and have the goal of teaching students to “critically read and analyze religious texts.”

As described by Religious Studies faculty member Dr. Joseph Fahey, the required Catholic Studies course “is a process to study Catholic ethics or rituals or teaching, but not to make people Catholic. It is not designed to indoctrinate in any way.” Fahey contrasted this academic focus with the purpose of theology courses and the overall purpose of the College when he was initially hired in 1966. At that time, the “primary purpose of the college” was not only educational, but also “to indoctrinate students into the Catholic faith and to proselytize students.” This extended to Fahey’s job responsibilities as a theology professor, in which he understood his job duty as “not just academic to teach [students] theology, but also to make them Catholic.”

Hiring of Adjunct Faculty

The job application completed by most applicants for employment at the College (the “Application”), including adjunct faculty, includes certain inserts included so that “at the time of application for a position at the college, applicants know the school, that we are a Lasallian Catholic college,. . . and that they are going to be comfortable with who we are.” In particular, the Application includes the College Mission Statement (hereinafter, the “Mission Statement”), a 16-page report entitled, “Manhattan College: Lasallian, Catholic, and Independent” (hereinafter, the “Trustees Report”), and an Appendix entitled “Characteristics of the Lasallian School” (hereinafter, the “Appendix”).

The Mission provides that the College:

“...is an independent Catholic institution of higher learning, which embraces qualified men and women of all faiths, races, and ethnic backgrounds. Established in 1853, the College is founded upon the Lasallian tradition of excellence in teaching, respect for individual dignity, and commitment to social justice inspired by the innovator of modern pedagogy, John Baptist de la Salle. The mission of Manhattan College is to provide a contemporary, person-centered educational experience characterized by high academic standards, reflection on faith, value and ethics, and life-long career preparation. This is achieved in two ways: by offering students programs which integrate a broad liberal education with a concentration in specific disciplines in the arts and sciences or with professional preparation in business, education and engineering; and by nurturing a caring, pluralistic campus community.”

A page in the application requires applicants to sign the Mission Statement, attesting that they have “read it, understand it, and have had the opportunity to ask any questions,” and that they will “abide by this document.” The Human Resources office then collects the signed statements from applicants. This document has been included in the College’s application materials for at least fifteen years, pre-dating the Board’s 1999 Decision.

The Application also contains the Trustees Report, a new addition to the application since the 1999 Decision. The Trustees Report includes the March 1999 Board of Trustees resolution (the “1999 Trustees Resolution”) accepting the Trustees Report as “a useful summary of the various . . . issues raised to date relative to the Catholic identity of Manhattan College” and directing the Report to be “widely disseminated.” Following the 1999 Trustees Resolution is a statement endorsed by the Council for Faculty Affairs on November 10, 1999 (“Faculty Affairs Statement”), in response to the Trustees Report, “reaffirm[ing] its commitment to academic freedom . . . [and] to diversity and to freedom [of] conscience and religious liberty of each member of the Manhattan College community.” The Faculty Affairs Statement also provides, “Consistent with this commitment to academic freedom is a professional responsibility to

recognize that Manhattan is a Catholic institution committed to Catholic values and principles and that its identity is respected by all segments of the College community. This, of course, places no obligation whatsoever on anyone as far as their personal beliefs or religious practices are concerned. The Council recognizes the importance of Catholic intellectual tradition as an aspect of the College's identity."

The Trustees Report itself states its goal as "arriving ultimately at a consensus statement on the Catholic Identity of Manhattan College that will have wide support among all the constituents of the Manhattan College educational community." The Trustees Report sets forth the reasons "why such a statement seems advisable at this time." These include: "the erosion since the 1960's of so many elements that unequivocally identified the College as Catholic;" "the fact that the College has never renounced its Catholic character;" "the publication in 1990 of the Apostolic Constitution *Ex Corde Ecclesiae*, signaling the entrance of church authority into the discussion of what it means for an institution to call itself Catholic;" "a scholarly re-examination of the achievement and vision of St. John Baptist de La Salle;" and the example of a similar process that had taken place at Georgetown University making clear that "the question of Catholic identity has a legitimacy broader than and independent from some of the concerns at Manhattan College."

A section of the Trustees Report titled "Manhattan College as Lasallian" sets forth the history of Manhattan College, including its roots as a church-operated academy and establishment of a corporate educational institution in 1863. This section also describes recent scholarship concerning De La Salle, stating that this scholarship "has made it possible to disengage his educational achievement from its roots in the Catholic France of the 17th century and implant the characteristic Lasallian vision in a variety of cultural and religiously pluralistic

contexts. This has made it possible for persons who are not Catholics to find inspiration in John Baptist de La Salle and to feel at home in a Lasallian institution.” While citing the continued presence and influence of the Christian Brothers on the College, the Report notes that because of their decreasing numbers, “The Brothers realize that they can no longer be the sole agents to carry on the Lasallian tradition of the College, nor do they any longer hold a monopoly on the heritage deriving from De La Salle.” Thus, “it becomes possible for anyone in the community that is Manhattan College, to the extent that one wishes to do so, to embrace, to share, and to perpetuate its Lasallian heritage.”

Another section of the Trustees Report, titled “Manhattan College as Catholic”, describes the history of the College’s relation to the Church and Catholicism. The Report notes that “[f]rom the time of its foundation until the mid-1960’s it would have been impossible to think of Manhattan as anything but staunchly Catholic”, but by the 1960’s, “the Board of Trustees had eliminated any structures of control by authorities of the Church or the Institute [of the Brothers].” Moreover, as of the 1960’s, “[t]here were no longer any compulsory religious activities and, although the requirement of courses in religious studies remained high for all students, no Catholic courses as such were required. These adjustments, plus a long-standing tradition of no religious test for admission or employment, made the College eligible for aid from New York State under the Bundy Law.” While reaffirming the College’s continued Catholic identity, the Trustees Report asserts that “[t]here is no intention on the part of the Board, the administration, or the faculty to impose Church affiliation and religious observance as a condition for hiring or admission, to set quotas based on religious affiliation, to require loyalty oaths, attendance at religious services, or courses in Catholic theology.”

A third section describes “Manhattan College as Independent.” Before explaining what is meant by this phrase, the section describes the ways in which the College is dependent on the state government, federal government, Institute of the Brothers, and the Catholic Church. With respect to the Church, the Report explains that the College is dependent on the Church for the right to call itself Catholic. The Report goes on to state,

As an institution of higher learning, however, the mission of the College within the Church is strikingly different from that of the parochial schools and Catholic high schools where indoctrination in the faith and insistence on religious observance is seen as part of their mission. Implicit in church approval to function as a College is the recognition that [the College] must first be a college with characteristic academic freedom for teachers to pursue research and to present the truth as they see it with critical and professional objectivity.

Finally, the Trustees Report concludes with a list of “new avenues to be explored to enhance the College’s identity.” Among these are proposals for discussion on enhancing the Lasallian character of the College, maintaining the “present balance between the Catholic identity of the College and the religious pluralism of its personnel”, finding ways to enhance the Catholic character of the College, and expanding public and liturgical celebrations of other faiths and inter-faith dialogue. The final proposal is to “continue to maintain the principle of academic freedom” by “exploring ways to resolve actual or potential conflict between church authority and independent research and thought.”

Another copy of both the Mission Statement and the Trustees Report are distributed to potential hires in the form of a fifty-one page glossy booklet entitled, “Manhattan College: An introduction to the Catholic Culture and to our Lasallian Heritage” (hereinafter, the “Introduction Booklet”). The Introduction Booklet was created about two years ago and is distributed to candidates who receive job offers or reach an advanced stage of the hiring process. The cover of

the Introduction Booklet contains the Mission Statement along with a drawing of St. John Baptist de La Salle surrounded by Christian Brothers of his era and Christian Brothers who have been employed at Manhattan College. Inside the Booklet, a letter addressed, “Dear Prospective Employee,” describes the contents of the booklet and states that the Introduction Booklet is presented “as a means of familiarizing prospective faculty with the heritage and culture of the institution” so that the prospective candidate will have “a clear sense of the Catholic culture and Lasallian heritage of Manhattan College.” The letter states that “Because the worldwide Lasallian system of schools, colleges and universities is fully recognized by the Roman Catholic Church, it is also a Catholic college.” It goes on to note, “Yet the College is independent or private, neither controlled by the state or the Church. It is, as such, an accredited institution of higher learning in New York State and recognized by the Middle States Association of Colleges and Schools.”

The Letter is followed by a “Historical Note,” which describes the history of the College dating back to 1853. The Historical Note observes, “Over the years, an evolution has taken place in faculty representation. The predominantly Christian Brothers faculty has been replaced by predominantly lay teachers, and includes both men and women.” Next, the Trustees Report is reprinted in full. The Introduction Booklet then includes statements from College faculty reflecting on the mission and character of the College, as well a copy of the Sponsorship Covenant. Finally, the Booklet includes a perforated page to be signed and dated, stating, “I have read and respect the Lasallian culture of Manhattan College as reflected in this collection of documents.” The Human Resources office currently distributes the Booklet to individuals hired as adjunct faculty and collects the signed final page from them.

The Employer also offered into evidence a brochure used for recruiting new employees which was created since the 1999 Decision. The brochure includes certain religious references: an image of Saint John Baptist De La Salle fills most of the card, while a brief biography offers that De La Salle established the Institute of Brothers of the Christian Schools in 1680 in order to “assist with teaching the children of the poor and working class” and that he “[gave] up his wealth to live in solidarity with those with whom he served.” The opposite side of the Brochure lists the LaSallian Core Principles: including “Faith in the Presence of God,” as well as “Respect for all Persons,” “Quality Education,” Inclusive Community,” and “Concern for the Poor and Social Justice.”

The College currently uses a form Part-Time Faculty Salary Agreement as its contract with adjunct faculty. In addition to setting forth the employee’s salary, rank, and job duties, the Agreement also requires adjunct faculty to “fulfill the academic obligations of faculty members outlined in . . . the Mission Statement of the College as they apply to part-time faculty.”

Although there is evidence that College representatives discuss the College’s Catholic and Lasallian mission in interviews with prospective faculty hires, it is also clear that it is not a requirement that candidates be Catholic or have a belief in God in order to be hired. The primary criteria for hiring faculty are their academic qualifications, and in fact, the College has long had a non-discrimination policy with respect to its hiring.

ANALYSIS

In *National Labor Relations Board v. Catholic Bishop*, the Supreme Court considered the question of whether the Act authorized the Board to exercise jurisdiction in cases dealing with parochial school teachers. 440 U.S. 490 (1979). Applying the doctrine of constitutional avoidance, the Supreme Court held that the exercise of jurisdiction over church-operated schools

in such cases would raise serious constitutional questions arising out of the First Amendment Religion Clauses, and thus the Act must construed in a manner to avoid such questions. *Id.*, 440 U.S. at 504. Accordingly, the Court held that the Act did not authorize the Board to assert jurisdiction in such cases. *Id.*, 440 U.S. at 507.

In reaching this conclusion, the Supreme Court observed that its recent First Amendment jurisprudence involving aid to parochial schools had “recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school.” *Id.*, 440 U.S. at 501. The Court also cited the “admitted and obvious fact that the *raison d’être* of parochial schools is the propagation of a religious faith.” *Id.*, 440 U.S. at 503 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 628 (1971) (Douglas, J., concurring)). As described by the Second Circuit, the “entire focus of *Catholic Bishop* was upon the obligation of lay faculty to imbue and indoctrinate the student body with the tenets of a religious faith.” *N.L.R.B. v. Bishop Ford Central Catholic High School*, 623 F.2d 818, 822 (1980).

In these situations, the Supreme Court found that a risk of unconstitutional entanglement could result from enforcing mandatory collective bargaining in the context of “teacher[s] under religious control and discipline.” *Catholic Bishop*, 440 U.S. at 501-502 (internal citations omitted). In addition to the risk of entanglement in mandatory bargaining over rules and discipline related to teachers’ role in “fulfilling the mission of a church-operated school,” the Court also observed the risk that the Board’s adjudication of unfair labor practice charges would impinge on the First Amendment rights of church-operated schools. *Id.*, 440 U.S. at 502. In particular, when a school’s defense to an unfair labor practice charge is that “their challenged actions were mandated by their religious creeds,” the Board’s resolution “will necessarily involve inquiry into the good faith of the position asserted by clergy-administrators.” *Id.*

Although the Board at one time held that *Catholic Bishop* applied only to parochial schools and permitted the Board to exercise jurisdiction over colleges and universities, the Board now considers the application of *Catholic Bishop* to educational institutions of all levels “on a case-by-case basis.” *St. Joseph’s College*, 282 NLRB 65, 68 (1986). Specifically, the Board considers in each case “all aspects of a religious school’s organization and function that may be relevant to ‘the inquiry whether the exercise of the Board’s jurisdiction presents a significant risk that the First Amendment will be infringed.’” *Id.*, 282 NLRB at 68, n.10 (citing *Catholic Bishop*, *supra* at p. 502). In conducting this inquiry, “The Board has not relied solely on the employer’s affiliation with a religious organization, but rather has evaluated the purpose of the employer’s operations, the role of the unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction.” *Univ. of Great Falls*, 331 NLRB 1663, 1664-65 (2000), *enf. denied*, 278 F.3d 1335 (D.C. Cir. 2002).

The Board has held that the *Catholic Bishop* decision precluded it from exercising jurisdiction over a school “whose purpose and function in substantial part are to propagate a religious faith.” *Jewish Day School*, 283 NLRB 757, 761 (1987). In particular, the Board has declined to exercise jurisdiction in a Jewish primary and secondary school in which religious instruction was mandatory for all grade levels, students devoted forty percent of the day in specifically religious instruction and religious instruction was “interwoven” into the secular instruction, the school had mandatory prayer sessions, and the school adhered to Jewish dietary laws. *Id.*, 283 NLRB at 761-762. *See also Nazareth Regional High School*, 283 NLRB 763, 765 (1987) (declining to exercise jurisdiction because school’s “purpose and function . . . are to propagate a religious faith” based on evidence that stated school mission was to “to transmit the

teachings of Jesus Christ and His Church” and students were told that they “are expected to be a sign of the values which Jesus taught”).

In the context of institutions of higher education, the Board has declined to exercise jurisdiction over a religiously-affiliated college which was financially dependent on the Sisters of Mercy of Maine (the “Order”), all members of the Board of Trustees were required to be members of the Order, the Bishop of Portland was authorized to remove faculty members whose conduct was “not in harmony” with the Church, faculty members were required to “promote the objectives and goals” of the Order, and faculty members were prohibited from knowingly inculcating ideas which are contrary to the position of the Catholic Church. *St. Joseph’s College*, supra at p. 68.

More often, the Board has determined that the exercise of jurisdiction over colleges and universities would not create the sort of risk contemplated by *Catholic Bishop*. For example, in *Livingstone College* the Board concluded that the church was not involved with the college at issue in that case “in a manner that creates a significant risk of constitutional infringement.” 286 NLRB 1308, 1309 (1987). The Board based this conclusion on the factual findings that the college was not financially dependent on the church, the college’s stated mission was not religious, faculty members were not required to conform to church doctrine or promote church teachings, and neither students nor faculty were required to engage in worship. *Id.*, 286 NLRB at 1309-10. Thus, despite the facts that the AME Zion Church owned the college’s property, appointed one-half of the board of trustees, and provided financial support to the college, the Board found it proper to assert jurisdiction. *Id.* at p. 1310. Likewise, the Board concluded that a university was not church-operated within the meaning of *Catholic Bishop* where no religious entity was directly involved in day-to-day administration of the school, the university was not

financially dependent on the church, and “[m]ost significantly, . . . propagation of a religious faith is not the primary purpose of the [university], but rather [] the University’s purpose and function are primarily secular.” *Univ. of Great Falls*, 331 NLRB 1663.

Applying the Board’s test here, the evidence establishes that the purpose of the College is secular and not the “propagation of a religious faith.” *Id.* In the College’s own words, “the mission of the College within the Church is strikingly different from that of parochial schools and Catholic high schools where indoctrination in the faith and insistence on religious observance is seen as part of their mission.” Unlike parochial schools, the College asserts that it has “no intention” of imposing “Church affiliation and religious observance as a condition for hiring or admission, to set quotas based on religious affiliation, to require loyalty oaths, attendance at religious services, or courses in Catholic theology.” *See Livingstone College*, *supra* at p.1309-10 (jurisdiction proper where faculty not required to conform to church doctrine and neither students nor faculty required to engage in worship). *Cf. St. Joseph’s College*, *supra* at p. 68 (declining to exercise jurisdiction where faculty required to promote Church objectives and prohibited from inculcating positions contrary to those of Catholic Church).

In the Sponsorship Covenant, while the College affirms its commitment to a continued relationship with the Christian Brothers, this affirmation is tempered by the statement that the College also “affirms its commitment to academic freedom and responsibility, and to institutional autonomy.” Not only is there no evidence in the record that the Church or the Christian Brothers wield any control over the College, but the College’s public statements assert the lack of such control. The Trustees Report, distributed to all prospective hires, states that forty years ago “the Board of Trustees eliminated any structures of control by authorities of the Church or the Institute [of the Christian Brothers].” Such facts stand in stark contrast to the

power of religious orders wielded over educational institutions where the Board has declined to exercise jurisdiction. *See, e.g., St. Joseph's College*, supra at p. 68 (bishop authorized to fire faculty whose conduct was deemed unharmonious with Church).

Consistent with the College's secular purpose, the role of adjunct faculty in "effectuating that purpose" does not involve propagating religious faith in any way. *Univ. of Great Falls*, supra at p. 1665. Rather, the faculty is hired based on academic qualifications and their contract requires adjunct faculty to fulfill "academic obligations". Because adjunct faculty are not required to advance a religious mission in any way, exercising jurisdiction over the College will not have any "potential effects" leading to unconstitutional entanglement.

The Employer suggests that concluding that it is not a church-operated school within the meaning of *Catholic Bishop* based on the evidence that its religious activities are not compulsory and its education activities do not include indoctrination and proselytizing is a view of religion that "the Board cannot endorse without imposing its own definition of 'approved' faith in clear violation of the First Amendment." The Employer further contends that the Board's assertion of jurisdiction is based on the view that "religious belief must be authoritarian and hence inconsistent with academic freedom." I do not agree with that contention. The Board's inquiry into such factors is not an improper scrutiny of the school's asserted faith. Rather, it is an integral part of the *Catholic Bishop* analysis. The purpose of considering whether indoctrination, proselytizing, or in the Supreme Court's terminology, "propagation of a religious faith", is part of a school's purpose is because rules requiring faculty to propagate faith would require bargaining over such rules and their disciplinary consequences, and further, would require the Board to scrutinize an employer's defense to unfair labor practice charges based on asserted enforcement of faith-based rules. *See Catholic Bishop*, supra. at p. 501-502 (describing

consequences of enforcing Act for bargaining and unfair labor practice cases involving church-operated schools). Where, as in the instant case, a school's stated purpose does not involve the propagation of a religious faith, teachers are not required to adhere to or promote religious tenets, a religious order does not exercise control over hiring, firing, or day-to-day operations, and teachers are given academic freedom, this risk of entanglement is obviated.

The D.C. Circuit has refused to enforce Board cases asserting jurisdiction based on the Board's test. Instead, the D.C. Circuit has set forth a test in which an organization is exempted from the Act if it: (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. *Univ. of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1343 (2002) (internal citations omitted). The Board has not adopted the D.C. Circuit test, but it has applied that test for the purposes of particular cases. See *Salvation Army*, 345 NLRB 550 (2005); and *Catholic Social Services*, 355 NLRB No. 167 (2010). Even applying the D.C. Circuit test here, jurisdiction would still be proper.

As to the second factor, there is no dispute that the College is organized as a non-profit entity. As to the third factor, the College is not owned or controlled by the Church or the Christian Brothers. *Cf. Univ. of Great Falls*, 278 F.3d at 396 (finding third factor satisfied where college "is sponsored by, its campus is owned by, and control is ultimately reserved to, a recognized religious organization"). Nonetheless, the Employer could arguably satisfy the affiliation factor based upon the Catholic Church's recognition of the College as a Catholic institution.

However, the record evidence demonstrates that the Employer does not “hold[] itself out as providing a religious educational environment.” *Univ. of Great Falls*, 278 F.3d at 1344. As the D.C. Circuit observed, “such public representations serve as a market check . . . [acting] as a check on institutions that falsely identify themselves as religious merely to obtain exemption from the NLRA.” *Id.* Although the record demonstrates that the College indeed makes reference to its historical connection to the Church and consistently describes its educational model as based on that of St. John Baptist De La Salle, the College’s public representations signal that this connection is limited in such a way that the College’s educational environment is not religious.

The Employer asserts that “recent actions of the College to define [the] Catholic fabric of the College, and to lay out a blueprint for maintaining the relevancy of its Catholic identity” require a conclusion that the Board is precluded from exercising jurisdiction under *Catholic Bishop*. In particular, the Employer principally relies on the Trustees Report, the Sponsorship Covenant, and new Catholic Studies academic requirement. However, the record is clear that these “recent actions” strike a careful balance between maintaining the College’s “Catholic fabric” while emphasizing its independence, academic freedom, diversity, and secular mission.

The Trustees Report – distributed to prospective hires in two different forms – states that recent scholarship on De La Salle “has made it possible to disengage his educational achievement from its roots in the Catholic France of the 17th century” and therefore, to apply Lasallian educational principles in “religiously pluralistic contexts.” This public statement of the College belies its efforts in this case to construe its public references to De La Salle and Lasallian education as dispositive of its religious affiliation under *Catholic Bishop*. Documents providing a “market check”, such as the Admissions Brochure make reference to De La Salle

but not to the Church, religion, or Catholicism, and moreover, those limited references to De La Salle describe Lasallian education in purely secular terms. Similarly, the Mission Statement distributed to job applicants describes the tradition of Lasallian education as “excellence in teaching, respect for individual dignity, and commitment to social justice.” These “market check” public representations demonstrate that in the College’s public statements it is decidedly *not* holding itself out as a religious organization.

Additional public representations specifically refer to the College’s severing of its religious ties in order to reap the benefits available to secular school from the government. The Trustees Report, distributed to job applicants, explains that more than forty years ago the elimination of church control, various “adjustments” in compulsory religious activities, and the lack of a religious test for admission or employment “made the College eligible for aid from New York State under the Bundy Law.” Similarly, the Introduction Booklet distributed to potential hires states that the College is “neither controlled by the state or the Church . . . [and] is, as such, an accredited institution of higher learning in New York State.” These are the very sorts of “market checks” contemplated by the D.C. Circuit to “act as a check on institutions that falsely identify themselves as religious merely to obtain exemption from the NLRA” – while at the same time publically representing themselves as sufficiently independent of any religious control to allow for governmental benefits. While the College may well be affiliated with the Church and take pride in its historical relationship with the Church, the College’s public representations clearly demonstrate that it is not providing a “religious educational environment” and therefore, even under the D.C. Circuit test, the Board should exercise jurisdiction over the College.

3. The parties stipulated, and I find that Manhattan College Adjunct Faculty Union, New York State United Teachers, AFT/NEA/AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

5. The parties stipulated that the following unit is an appropriate unit within the meaning of Section 9(b) of the Act:

INCLUDED: All individuals employed as part-time faculty with an adjunct academic rank who teach a minimum of a three (3) credit college degree level course for a full semester (or the equivalent hours of a semester length course)

EXCLUDED: All other full and part-time employees, including visiting and full time faculty, regardless of teaching load, students who are employed by the College, and guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time⁴ and place set forth in the notice of election⁵ to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the units who were employed during the payroll period ending immediately preceding the notice of intent to conduct election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In addition, in an

⁴ Pursuant to Section 101.21 (d) of the Board's Statements of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25th and 30th day after the date of this decision.

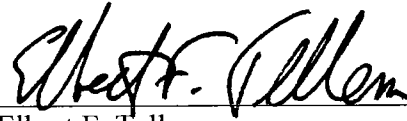
⁵ The Board has adopted a rule requiring that election notices be posted by an employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(a) of the Board's Rules. In addition, the Board has held that Section 103.20 (c) of the Board's Rules requires that an employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB No. 52 (1995).

economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁶ Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the Manhattan College Adjunct Faculty Union,

⁶ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **January 18, 2011**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NYSUT, AFT/NEA/AFL-CIO, or no labor organization.⁷

Dated at New York, New York,
January 10, 2011



Elbert F. Tellem
Acting Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

⁷ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by close of business on **January 24, 2011** at 5 p.m. Eastern Standard Time, unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically. If exceptions are filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than **11:59** p.m. Eastern Time on the due date. If submitted by mail or sent by a delivery service, it must be received by the close of business at **5:00** p.m. Eastern Time or be postmarked or given to the delivery service no later than January 21, 2011. In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlr.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.