



Manhattan College
Riverdale
New York, 10471

President's Office

November 9, 2010

Dear Colleagues:

I am writing to update and expand upon the brief letter I sent on October 20th outlining the College's position with regard to the efforts of the New York State United Teachers (NYSUT) to organize adjunct faculty. I want to thank not only the many members of the Manhattan community who have responded with encouragement and support of the College's position, but also those who have responded critically or with reservations and questions. Both kinds of comments have suggested to me that a somewhat fuller explanation of the legal issues involved in this case might be helpful. In addition, as NYSUT has been publishing a number of statements characterizing our position, I thought that it would be good to present for the record a more detailed explanation of the College's stance.

As we begin a new era in the history of the College and as we work together to envision our future in our strategic planning process, nothing is more important than the continuance and deepening of our mission as a Catholic and Lasallian institution. This is our heritage and our identity. The hearings currently being conducted by the United States National Labor Relations Board (NLRB) at the request of NYSUT, however, raise serious questions about exactly how and by whom that identity is going to be defined.

These hearings are focused on the question of whether or not Manhattan College is "sufficiently Catholic" to be able to continue to operate free of the entanglement of a government agency inserting itself in the day to day operations of the College's relations with employees. Officials of the College have been testifying under oath in a federal government hearing room in lower Manhattan while a court reporter records their answers. Among the many questions being asked by representatives of the union and the NLRB are which Christian Brothers currently work at the College, what positions each of them holds and how many Christian Brothers continue to be part of the College staff. There also have been questions as to how many of the Christian Brothers in the Manhattan College Christian Brothers' community attend College events such as convocations and whether participation in Mass, prayer and similar liturgical events are mandatory for staff and students.

The College is being subjected to government scrutiny of its religious legitimacy because it has asked the NLRB to abide by a series of court decisions that have ruled that the NLRB may not direct collective bargaining at an institution which, like Manhattan College, is recognized by a religious group and holds itself out to the public as an educational community with a strong and distinct religious identity. Because the law that is the basis of this position has developed over the years in a series of decisions that are not easy to explain, I thought it would be useful to provide a summary:

- A consistent line of judicial decisions, referred to by the popular name *Catholic Bishop*, originates more than thirty years ago when the Supreme Court declined to allow the NLRB to extend jurisdiction to religiously operated schools. The reason for the decision was the Supreme Court's concern that allowing the NLRB to take control could involve the government in trying to resolve difficult and sensitive questions arising out of the Free Exercise Clause of the First Amendment to the United States Constitution.
- The Supreme Court had two important concerns. First, the Justices on the Supreme Court were wary of the potential entanglements between the government and religion that could emerge where the government tried to administer a labor relationship at an institution affiliated with a religious group. Second, the Court was equally sensitive to *the risks posed by the very process of inquiry that would be undertaken by the government in order to assess the legitimacy of the employer's assertion of the religious mission*. The Court, that is, recognized that such an intrusive process (in effect, the government's measuring whether an institution meets the government's test of religious identity) may in and of itself impinge on the rights guaranteed by the First Amendment. Shortly after the Supreme Court barred the NLRB from directing collective bargaining in Catholic schools in the Chicago area, the federal court in New York agreed with the decision and applied it to a Catholic school in New York. In its decision, the New York court wrote that it is a school's infusion of religious values which creates the conflict by the government with the Religion Clause of the Constitution—and not whether the school is actually owned or operated by an affiliated Church.
- The reach of *Catholic Bishop* was extended in 1986 when a federal court expanded the scope of the First Amendment protection to colleges, which the court recognized are more "secular" in their staff, student bodies and operations than a parochial high school. In that case (which involved a Catholic college), the court recognized that even though fewer than 10% of the college's faculty were members of the founding religious order, and many aspects of the college's operations were secular, there was a religious dimension sufficient to bring the college within the protection of the Supreme Court's *Catholic Bishop* decision. In particular, the federal court emphasized the constitutional concerns which arise from the process of intrusive inquiry by the government into how the Catholic religious mission was made part of the college. The court accordingly stopped the NLRB from ordering collective bargaining for faculty at the college.
- Following these cases, a federal appeals court in Washington D.C. decided, in a 2002 decision referred to as *Great Falls*, that the NLRB's approach to determining jurisdiction of a college under *Catholic Bishop* was flawed. In applying the Supreme Court's earlier analysis, the *Great Falls* court explained that the correct analysis should be whether the college (a) holds itself out to the public as a religious institution; (b) is nonprofit; and (c) is religiously-affiliated. Because the court found in *Great Falls* that the college met these objective criteria, it therefore was exempt from NLRB

jurisdiction under *Catholic Bishop* and the court refused to order the college to bargain with the union.

- In March of 2009, the federal appeals court in Washington D.C. again ruled on the NLRB's legal authority to direct collective bargaining for faculty at a religiously affiliated college. Again the court stated, in a decision known as *Carroll College*, that the three-part objective test it set down in *Great Falls* controlled: again, whether the college holds itself out to the public as a religious institution, whether it is nonprofit, and whether it is religiously affiliated. The court made it clear that these three criteria are the proper limit of the NLRB's inquiry, and that a college that meets them should not be subject to the oversight of the NLRB. This sensitive test recognizes that while an institution's claim of religious identity must be shown to be legitimate, it is not for the United States Government to approve Manhattan College (or any similar institution) as a Catholic (or Jewish, or Protestant, or Muslim) institution.

The NLRB officials conducting the Manhattan College case at this time obviously know about *Catholic Bishop* and the cases following it. The NLRB knows that its efforts to order collective bargaining at religiously affiliated schools and colleges have not been enforced by the courts. The union is also aware of this history. Despite the clear rulings of the courts, however, Manhattan College is being directed by the NLRB, at the urging of the union, to submit itself to a lengthy and intrusive inquiry as to whether we are Catholic enough to claim the Free Exercise protections of the First Amendment. The very entanglement the Supreme Court cautioned against is being played out right now at 26 Federal Plaza in Manhattan. The government and the union are trying to act as arbiters of Manhattan College's Lasallian Catholic identity.

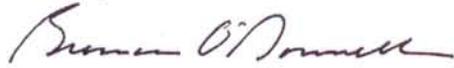
The line of questioning being pursued by the NLRB and the union unfortunately betrays a serious lack of understanding of the Catholic nature of the College. For example, the fact that we are a welcoming, pluralistic community is being presented as proof that we cannot be an authentic Catholic College. Questions about the number of Brothers in various roles imply that the work of lay faculty, staff, and administrators is negligible in forwarding our mission, and betrays a complete incomprehension of a full generation's hard and faithful work in passing forward the charism of religious orders to lay colleagues.

We believe that it is for the Manhattan College community to decide how it will provide an educational program that enables students to reflect on faith, values and ethics as a manifestation of our Catholic, Lasallian mission. The Constitution recognizes this. The federal courts recognize this. It is our hope that the NLRB will recognize this also. The Catholic, Lasallian identity and mission of the College has for over 150 years been a living, evolving reality, emerging from a dialogue and a process that belongs to the members of this community. Our identity is not a set of easy labels or sound bites, nor a rigid set of facts, figures, and practices to be quantified and judged by the government acting as some sort of religious licensing board.

In closing, let me reiterate what I said in my October 20th letter: the administration of the College is not taking this position out of opposition to employees or antipathy to the rights

of working people. We are taking this position because we believe that it would be irresponsible not to question vigorously the right of the government to insert itself into decisions that affect so directly the heart and soul of our institution. We are committed to working with colleagues to move forward with an exciting new plan for the future, grounded in the living tradition of our rich past. I look forward eagerly to continuing that work in collaboration with all members of our community.

Sincerely,

A handwritten signature in black ink, appearing to read "Brennan O'Donnell". The signature is fluid and cursive, with a prominent initial 'B' and a long, sweeping underline.

Brennan O'Donnell, Ph.D.

President