

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MANHATTAN COLLEGE
Employer

and

Case 02-RC-023543

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

DECISION ON REVIEW AND ORDER

The Employer's Request for Review of the Regional Director's Supplemental Decision and Order is granted solely with regard to Regional Director's inclusion of the Department of Religious Studies faculty within the unit of adjunct faculty found appropriate. Applying the Board's recent decisions in *Seattle University*, 364 NLRB No. 84 (2016) and *Saint Xavier University*, 364 NLRB No. 85 (2016), we find that the College holds out adjunct faculty in the Department of Religious Studies as performing a specific role in maintaining the University's religious educational environment.¹ As in those cases, a reasonable prospective applicant for an adjunct position in the College's Department of Religious Studies would expect that the performance of their responsibilities would require furtherance of the College's religious mission. The record shows that faculty in the College's Department of Religious Studies teach courses presented as having religious content; undergraduates may take those courses to fulfill core academic requirements; and faculty in the department have an expertise in Lasallian theology, other faith-based traditions, or other aspects of the religious experience. *Id.*, slip op. at in each decision. Accordingly, adjunct faculty in the Department of Religious Studies are excluded from the unit, and the College's Request for Review is denied in all other respects.²

¹ Our colleague advances arguments similar to those he made in his dissents in *Seattle University* and *St. Xavier University*. For the reasons given in those decisions, we are not persuaded by those arguments. In particular, we disagree with his view that *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), forbids the Board from making a distinction between faculty who teach religious and secular courses because this type of inquiry alone raises First Amendment concerns. To the contrary, excluding adjunct faculty in the Department of Religious Studies does not mean that we have assessed the religious content of the courses they teach or otherwise compared the content of those courses to those taught by faculty in other departments. Rather, we have assessed only the College's presentation of those courses to the faculty, students, and public at large. *Seattle University*, 364 NLRB No. 84 (2016), slip op. at 2-3, n. 4-6; and *Saint Xavier University*, 364 NLRB No. 85 (2016), slip op. at 2-3, n. 3-5.

Although Member Pearce did not participate in *Seattle University* and *Saint Xavier University* and expresses no view as to whether they were correctly decided, he agrees to apply them as precedent in this case.

² The Regional Director correctly found that the ballots may be opened and counted, but, for the reasons stated here, the ballots of unit faculty in the Department of Religious Studies may not be counted. If those ballots have been commingled with other ballots, the Petitioner cannot be certified unless the Regional Director determines that it achieved a majority of countable ballots.

ORDER

This case is remanded to the Regional Director for further appropriate action.

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

Acting Chairman Miscimarra, dissenting.

Contrary to my colleagues, I would grant in its entirety Manhattan College's Request for Review of the Regional Director's Supplemental Decision and Order, in which the Regional Director asserted jurisdiction over the College and directed an election in a unit of "[a]ll 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)." My colleagues deny review of the Regional Director's finding that the Board should exercise jurisdiction over most of the petitioned-for unit faculty; however, they grant review in part and reverse the Regional Director's assertion of jurisdiction over faculty in the College's Department of Religious Studies. For three reasons, I believe there is a substantial issue regarding whether the Board lacks jurisdiction over the entire petitioned-for unit.

First, as I explained in my dissenting opinions in *Seattle University*, 364 NLRB No. 84, slip op. at 3–5 (2016) (Member Miscimarra, dissenting), and *Saint Xavier University*, 364 NLRB No. 85, slip op. at 3–5 (2016) (Member Miscimarra, dissenting), the distinction my colleagues draw between faculty who teach courses with "religious content" (who my colleagues find are exempt from the Board's jurisdiction) and the other petitioned-for unit faculty (who my colleagues find are subject to the Board's jurisdiction, presumably on the basis that those faculty teach courses with exclusively "secular" content) is forbidden by the main teaching of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Supreme Court emphasized that the "very process of inquiry" associated with this type of evaluation raises First Amendment concerns. *Id.* at 502.¹

Second, as explained in my separate opinion in *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 26–27 (2014) (Member Miscimarra, concurring in part and dissenting in part), when determining whether a religious school or university is exempt from the Act's coverage based on First Amendment considerations, I believe the Board should apply the three-part test articulated by the Court of Appeals for the District of Columbia Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). Under that test, the Board has no jurisdiction over faculty members at a school that (1) holds itself out to students, faculty and

¹ My colleagues say that they have not assessed the religious content of the courses taught by faculty in the College's Department of Religious Studies, but "only the College's presentation of those courses to the faculty, students, and public at large." However, whether the content of a course is examined by looking at a syllabus distributed only to students taking the course or at publicly available documents is beside the point. Either way, it is the content of the course that is being evaluated. Assessing the College's "presentation" of a course means assessing the course's content as set forth in that presentation. See *Seattle University*, above, at 5 fns. 16-17 (Member Miscimarra, dissenting); *Saint Xavier University*, above, at 5 fns. 17-18 (Member Miscimarra, dissenting).

community as providing a religious educational environment; (2) is organized as a nonprofit; and (3) 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. *Id.* at 1343. In my view, Manhattan College has clearly raised a substantial issue regarding whether it is exempt from the Act's coverage under that three-part test. It is undisputed that the College holds itself out to the public as providing a religious educational environment. Additionally, the College is organized as a nonprofit. Further, the College, which was founded by the De La Salle Christian Brothers, is affiliated with the Catholic Church, is a member of the Lasallian Association of Colleges and Universities, and is subject to guidelines that the Catholic Church has issued for universities. Accordingly, I would grant the College's request for review because substantial questions exist regarding (i) whether the Board lacks jurisdiction over the College as a religiously affiliated educational institution, and (ii) whether the *Pacific Lutheran* standard is unconstitutional under the First Amendment. I would consider these jurisdictional and constitutional issues on the merits.

Third, even if one applies *Pacific Lutheran*'s two-pronged test, I would grant review. As stated above, it is undisputed that Manhattan College holds itself out as providing a religious educational environment. Further, I believe that the College has raised a substantial issue regarding whether individuals in the petitioned-for unit play a specific role in creating or maintaining the College's religious educational environment. Specifically, I believe substantial questions exist with respect to the specific role played by part-time faculty, regardless of department, in furthering the College's religious mission, including by systematically promoting the emphasis on the interplay of faith and reason and by encouraging dialogue with other traditions to help accomplish the Catholic Church's intellectual work, which the College asserts is an important aspect of a Lasallian Catholic education. See *Great Falls*, supra, 278 F.3d at 1346 ("That a secular university might share some goals and practices with a Catholic or other religious institution cannot render the actions of the latter any less religious."); *Pacific Lutheran University*, supra, slip op. at 31 (Member Johnson, dissenting) ("The majority also errs fundamentally here by assuming a false dichotomy between 'religious' and 'secular' instruction.").

For these reasons, I believe the Board should grant review of the Regional Director's decision that the Board has jurisdiction over the petitioned-for part-time faculty members. Accordingly, I respectfully dissent.

Dated, Washington, D.C., April 20, 2017.

PHILIP A. MISCIMARRA, ACTING CHAIRMAN