

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

SAINT XAVIER UNIVERSITY¹

Employer

and

Case 13-RC-22025

**ST. XAVIER UNIVERSITY ADJUNCT FACULTY
ORGANIZATION, IEA-NEA**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held before a hearing officer of the National Labor Relations Board to determine whether it is appropriate to conduct an election in light of the issues raised by the parties.²

I. Issues and Parties' Positions

The St. Xavier Adjunct Faculty Organization, IEA-NEA (herein "Petitioner" or "Union") seeks a unit of all part-time faculty at the University's Chicago Campus or Orland Park Campus who teach at least 3 credit hours per semester; but excluding deans, nonprofessional employees, guards and supervisors as defined in the Act.³

¹ The names of the parties appear as amended at the hearing.

² Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and the only issue as stated herein is whether the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) precludes the exercise of jurisdiction.
- c. The labor organization involved claims to represent certain employees of the University.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections (2)(6) and (7) of the Act.

³ The Petitioner introduced evidence that Saint Xavier University has had a certified collective bargaining representative for full-time and "portion of full-time" faculty since 1979, the Faculty Affairs Committee. This evidence is of limited relevance to the jurisdictional argument being raised by the University because jurisdiction can be raised at anytime by any party, including the NLRB or courts.

Saint Xavier University (herein “Employer” or “University”) asserts that the Board lacks jurisdiction⁴ because it is a religiously operated institution that is not subject to the Act according to the principles of *University of Great Falls*, 331 NLRB 1663 (2000), enf. denied 278 F.3d 1335 (D.C. Cir. 2002) and *Carroll College*, 345 NLRB 254 (2005), enf. denied 558 F.3d 568 (D.C. Cir. 2009).⁵

II. Decision

Based on the entire record of this proceeding and for the reasons as set forth below, I find that the University is not a church-operated institution within the meaning of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and, therefore, conclude that the Board may properly assert jurisdiction over the University in this case.

Accordingly, IT IS HEREBY ORDERED that an election be conducted under the direction of the undersigned in the following appropriate unit, as stipulated by the parties:

All part-time faculty employed by the Employer at its campuses presently located at 3700 West 103rd Street, Chicago, Illinois and 18230 Orland Parkway, Orland Park, Illinois, who teach at least three credit hours per semester; but, excluding all part-time faculty members in School of Nursing, all music tutors, all student supervisors in the School of Education, independent contractors, confidential employees and managers, office clerical employees and guards, professional employees and supervisors as defined in the Act.

III. Statement of Facts

A. University Governance

In 1846, at the request of William Quarter, the first Bishop of Chicago, Mother Mary Francis Warde, RSM, founded Saint Xavier Academy for Women. The school was chartered by the State of Illinois on February 27, 1847, making it the oldest chartered Roman Catholic educational institution in Chicago and the oldest Mercy university in the world. It opened Saint Xavier College for Women in 1915 and expanded its course offerings to the graduate level in 1953. Following a campus move in 1953, the College and Academy were separated, becoming an institution of higher education and high school, respectively. By 1969, the College had become coeducational with the acceptance of men as undergraduate students, and, in 1992, the title of Saint Xavier University was adopted.

⁴ The Employer also raises a Religious Freedom Restoration Act issue in its post-hearing brief. However, “the Board has no obligation to demonstrate the value of applying the Act to the Employer, unless and until the Employer demonstrates that such application constitutes a substantial burden.” *Carroll College*, 345 NLRB 254, 258 fn. 18 (2005) and since “the Petitioner is not yet certified as the faculty’s collective-bargaining representative ... no specific religion-based conflicts have emerged.” *Id.* at 259.

⁵ The Board uses the “substantial religious character” test it developed from the Supreme Court’s decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and has never adopted the tripartite test set forth by the D.C. Circuit in *Great Falls* and *Carroll College*.

The University is an institution of higher learning, offering undergraduate and graduate degrees with a main campus in Chicago, Illinois and an auxiliary campus in Orland Park, Illinois. It consists of four schools and one college: the College of Arts and Sciences, the School of Education, the Graham School of Management, the School of Nursing, and the School for Continuing and Professional Studies. It has a President, Provost, two Assistant Provosts and five Deans, one for each of the schools. University Provost Durante testified “the chief academic officer ... [who] oversee[s] the entire academic enterprise at the institution ... all of the curriculum, all that accrues to our students ... [in] their academic lives [and t]he faculty is subsumed under all of that, all instruction, all academic activity.”

During the last full academic year (2010-2011), the University had a total enrollment of 4,852 students across its 43 undergraduate degree and 11 graduate degree programs, and employed 187 full-time, 10 “portion of full-time”, and 237 adjunct faculty. It is recognized as a Catholic institution located within the Archdiocese of Chicago according to the Official Catholic Directory (2010), which lists it as having two priests and five sisters.

The University is organized as a not-for-profit corporation for education purposes and granted federal tax exemption pursuant to Section 501(c)(3) of the Internal Revenue Code. As a not-for-profit corporation, its only corporate member is the corporate arm of the Institute of the Sisters of Mercy of the Americas (herein, “Sisters of Mercy”) known as the Council for Mercy Higher Education (herein, “CMHE”). Sister Susan Sanders described CMHE as “the body that’s constituted both canonically, in canon law, and civilly, that holds the responsibilities and the reserve powers for the governance of the university ... [it is] the corporate member who links the University to the Church and makes it an officially recognized member of the Church.”

The current bylaws of Saint Xavier University, most recently amended May 13, 2009 and current articles of incorporation of Saint Xavier University provide that the University shall be managed by an independent Board of Trustees numbering no less than 25 and no more than 30, consisting of the President of the University and at least four members of the Sisters of Mercy. Sister Susan Sanders, Vice President of the Office for University Mission and Secretary of the corporation, testified that there are currently 24 voting trustees. Five trustees are Sisters of Mercy and at least 15 are Catholic. The remainder were not identified with any particular religious affiliation.

According to the bylaws, CMHE has “the responsibility to ensure that [the University] continues its educational and religious mission and purposes, especially its Catholic-Mercy character ...” and reserves the power⁶ to approve: amendments to the articles, changes or restatements of the corporate mission or purpose, an individual’s first election as trustee, appointment of the president of the University, sale, lease or exchange of land in excess of \$10 million, assumption of debt greater than \$10 million, and merger,

⁶ See Article 3, Section 3.2 (a) through (i) of the bylaws for a list of the reserved powers needing CMHE approval.

consolidation or dissolution of the University. While CMHE’s approval is necessary and required with regard to the above, it does not appear it can unilaterally accomplish any without initiation by the Trustees. However, the ability to change certain portions⁷ of the bylaws, including the first stated responsibility of the Trustees to “[s]afeguard and advance the University’s educational and religious mission and purposes, especially its Catholic-Mercy character,” a responsibility that also extends to individual trustees, is within the power of CMHE.

The bylaws require that “[t]he University actively seeks trustees who represent diverse races, cultures, and religious traditions. In each case, trustees must be committed to the practical implications of the University’s Catholic identity and, to the extent possible, the majority of the Board should be Catholics committed to the Church ... Except as herein expressly provided, there shall be no other disqualification either by reason of belief, creed, race, gender or residence from eligibility to serve as trustee.” Trustees other than the University’s President serve three-year terms and can serve no more than three consecutive terms without a minimum break of one year. Trustees do not sign any affirmation of their commitment to the University’s Catholic identity.

B. Catholic Identity and Mercy Heritage

The University provides various public programs that are related to or inspired by, its Catholic identity and Mercy heritage. These include the Catholic colloquium series, Squeaky Weal lecture series and God Matters radio show, all of which are advertised throughout campus and the local community via colorful posters. While attendance at either of the series can help fulfill students’ one credit Transitions requirement, it is not mandatory and students may elect to complete the requirement by attending non-Catholic events. Neither faculty nor adjuncts are required to attend any of these events.

The University also holds three annual celebrations of its Catholic identity and Mercy heritage that are open to students, faculty, and the public: Mercy Day on September 24th to celebrate the Feast of Our Lady of Mercy, Founders Day on December 3rd, which is the Peace of Saint Francis Xavier, and Mission Day in March, where a faculty member and student are honored for their service to the University community. All three contain speeches with Founders Day including a liturgy and speech by a Sister of Mercy to “celebrate the identity of the University in terms of ... three things: its Mercy, Catholic, and liberal arts heritage.” Mission Day’s speeches are by the Provost Durante, who speaks of the Catholic identity and Mercy heritage in terms of academics, and Sister Sanders, who speaks of it in terms of ethos and culture. Attendance at these events is not mandatory for students or faculty.

Other annual events are the Medallion Ceremony, where new student induction takes place. As part of the Medallion Ceremony, students are given a medallion with the University’s motto and a prayer book. The medallion features the University seal on one side and the quote “We strive to witness to Mercy when we reverence the dignity of each

⁷ Specifically, Article XV of the bylaws reserve the powers of Article 3, Article 4 §2 ¶a & §3 ¶a, Article 4.3 (second sentence), Article 4.4, Article 6 §1.1 (first sentence) & §2.2, and Article 15 §1.

person” from the Constitutions of the Sisters of Mercy on the reverse. While the prayer book is primarily Catholic, it does feature several prayers based in other faiths such as Buddhism, Islam, and Judaism. Neither students, nor faculty, are required to attend the Medallion Ceremony. Graduation is the only mandatory faculty event, however, it is only mandatory for full-time and “portion of full-time” faculty, not adjuncts. A Catholic mass is held the day prior to graduation, but neither faculty nor students are required to attend. Attendance at the commencement is required for faculty, but not adjuncts, and the ceremony opens and closes with prayer.

Provost Durante testified that the University was guided (as opposed to “governed”) by the *Ex Corde Ecclesiae*, the Apostolic Constitution of the Supreme Pontiff John Paul II on Catholic Universities. She explained her view of how the *Ex Corde* sets forth the expectations of the Roman Catholic Church with regard to Catholic universities and how “the principles, the ideals of the Church inform the curriculum in how it is built[,]” but also encourages diversity among the faiths represented by University faculty to foster “dialogue ... that continually examines that intersection of faith and reason in terms of how we can consider human dignity and social concern.” Provost Durante admitted she was unsure if she was mandated to use *Ex Corde* in her role as Provost, but in her experience with Catholic institutions there was “an expectation that this document be considered seriously, vibrantly used, [and] attended to.” Another expectation under *Ex Corde* is for faculty teaching Catholic theology receive a mandatum from the local ordinary of the Church. According to Sister Sanders the two Catholic studies professors have requested and received mandatum.

The University recently submitted a report to CMHE that detailed how the University expresses and realizes its Catholic identity. The report was the first time CMHE had requested the information in this form, but the University provides CMHE with some of the information annually in some form as “an accountability mechanism to [CMHE].” There is also a Collegium, a colloquy on faith and intellectual life that includes faculty from sectarian and secular schools. Attendance at Collegium is not required of faculty or students.

C. Stated Purpose of the University

The current articles of incorporation of Saint Xavier University, most recently amended on June 11, 1993, state the object of the University is a mission of higher education. This object does not contain any reference to religion, God, Catholicism, Sisters of Mercy, or CMHE; instead it speaks only to the purpose of education.

The University’s mission statement⁸, as listed on its public website and in its student handbook and faculty resource manual, reads:

Saint Xavier University, a Catholic institution inspired by the heritage of the Sisters of Mercy, educates men and women to search for truth, to think critically,

⁸ The current iteration was revised starting in 2002 with approval coming from the Trustees and CMHE in 2005.

to communicate effectively, and to serve wisely and compassionately in support of human dignity and the common good.

In addition, the University's philosophy statement⁹ references its heritage with the Sisters of Mercy and their Catholic faith, and:

The enduring fellowship of alumni, emeriti faculty, Sisters of Mercy sponsors, trustees, and other friends and contributors in the community at large [that] demonstrates their continuing faith in the central mission of Saint Xavier through various acts of giving, prayer and support. Infusing this community of shared concern are the distinctive qualities and values of Saint Xavier University, including the belief that faith and reason can interact in mutually fruitful ways. Therefore, the University membership encourages a full search for truth, including religious truth, while respecting freedom of personal expression. It also promotes a vigorous and compassionate dialogue among the various faith traditions, and between them and the academic disciplines. At its foundation, teaching and learning at Saint Xavier are premised upon and committed to the fundamental dignity and unique worth of each human person.

D. Funding¹⁰

Approximately 93%-94% of the University's revenue comes from tuition with secondary sources of fundraising and donor contributions. The University currently has approximately \$51-\$52 million in outstanding debt to financial institutions, and an additional \$5 million as a loan from the Sisters of Mercy. The Employer also operates a saloon as part of its main Chicago campus.

E. Faculty and Student Requirements

The University does not investigate the religious beliefs of its students, faculty, or trustees. In fact, the articles explicitly state:

No religious, racial, color or ethnic test or particular religious profession shall ever be held as a requisite for admission to said colleges or university or to any department belonging thereto ... or for election to any professorship, or any place of honor or emolument in ... any of its departments or institutions of learning.

Moreover, the University has no requirement for faculty, including adjuncts, to espouse or emphasize Catholicism in their teachings or imbue students with the tenets of the Catholic faith. As noted above, discussion of various faiths and viewpoints is encouraged as part of *Ex Corde*, including those faculty who may be atheist. Neither the University,

⁹ Accepted by Faculty Senate and approved by the Trustees and CMHE in 2006.

¹⁰ The Petitioner, after the close of the hearing, submitted a written request to reopen the record to admit certain tax records. The document records in question were available during the hearing, but were not admitted into evidence by the Petitioner. Accordingly, I do not find the documents meet the requirements of being newly discovered or previously unavailable to justify reopening the record.

nor the Church, reviews or approves the texts chosen and used by faculty in the classroom.

As part of the University's core requirements, students must take two courses in religious studies, which is on par with the credit requirements in other disciplines (e.g., science, history, and arts and humanities), and may fulfill this requirement by taking courses of any religion. It is not mandatory for students to take a course in Catholicism.

F. Adjunct Faculty¹¹

Two current adjunct professors, Robert Tapia and James Kollros, and one recently retired adjunct professor, James Andreou, testified to the hiring practices of the University. Tapia and Andreou were recruited via emails disseminated through their then-current universities, DePaul University and University of Illinois at Chicago, respectively, whereas Kollros responded to a newspaper advertisement. Each submitted their curriculum vitae, or in the case of Andreou, a copy of his academic transcript, and then interviewed with either multiple full-time professors within the department the applicant was seeking employment, or the chair of the hiring department and the dean of the associated school. Following the interview, an adjunct applicant may receive an oral or written offer of employment, followed by a written contract and sometimes a formal application. Neither the offer, nor the contract, mention the Sisters of Mercy, Catholicism, God or religion.¹² Andreou stated that he raised his observance of Greek Orthodoxy (or Orthodox Catholicism, as opposed to Roman Catholicism) as a possible concern during his application interview, but the department chairperson said that it did not matter.

Unlike full-time and "portion of full-time" faculty¹³ who receive a thorough third year review and are regularly evaluated by their department chair and dean, the performance of an adjunct is based primarily on their students' evaluations, which contain no reference to the Sisters of Mercy, Catholicism, or religion. Provost Durante testified that department chairs will also occasionally evaluate adjuncts every couple of years, but the chairperson or program director will often delegate this to another faculty member. The adjunct witnesses stated that they were never instructed to disseminate the Catholic faith, nor was any aspect of religion addressed in their evaluations. Adjunct faculty cannot be dismissed for conduct contrary to the Church, nor can they be dismissed by the Sisters of Mercy or Church officials.

¹¹ On December 24, 2009, in Case 13-RC-21897, the University and Petitioner signed a stipulated election agreement for its part-time faculty in a unit similar to the instant petitioned-for unit. An election was held via mail ballot and this Region certified the results on March 3, 2010 that a majority of valid votes had not been cast for the Petitioner.

¹² Adjunct positions in the Department of Religious Studies may contain such references; however, no evidence was put on the record with regard to religious studies.

¹³ Pursuant to a petition and Board election, the Faculty Affairs Committee was certified as the collective bargaining representative of all full-time and portion of full-time faculty in 1979, and has negotiated multiple collective bargaining agreements with the University over the past three decades.

IV. Analysis

The Petitioner contends that the Board clearly has jurisdiction over the Employer because it operates strictly as a secular educational institution. On the other hand, the Employer contends that it is a religious institution and that the Board's exercise of jurisdiction would violate the First Amendment to the United States Constitution, and that it would also substantially burden the Employer's exercise of religion in violation of the Religious Freedom Restoration Act of 1993.¹⁴

In *NLRB v. Catholic Bishop of Chicago*, the Supreme Court overturned the Board's policy to "to decline jurisdiction over religiously sponsored organizations 'only when they are completely religious, not just religiously associated.'" 440 U.S. 490, 492 (1979) citing *Roman Catholic Archdiocese of Baltimore*, 216 NLRB 249, 250 (1975). Instead, the Court stated that the Act must be construed to exclude church-operated because to do otherwise "will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Catholic Bishop*, 440 U.S. at 502 The Board's engagement in such inquiry would violate the First Amendment. "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *Id.* Although it invoked the doctrine of constitutional avoidance, the Court nevertheless posited the nature of church-operated schools that would give rise to the issue of entanglement. Citing Justice Douglas' concurring opinion in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court posited, "'parochial schools involve substantial religious activity and purpose. ... The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid'" *Catholic Bishop*, *supra* at 502, citing *Lemon*, *supra* at 616, and the "'admitted and obvious fact that the *raison d'être* of parochial schools is the propagation of a religious faith.'" *Id.* (Douglas, J., concurring) at 503 citing *Lemon*, *supra* at 628.

Although the Board at one time held that *Catholic Bishop* applied only to parochial schools, 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). More specifically, the Board has developed a "substantial religious character" test, which considers in each case "all aspects of a religious school's

¹⁴ As noted by the Employer, the D.C. Circuit has refused to enforce Board cases asserting jurisdiction based on the Board's "substantial religious character" test. The Circuit instead applies a tripartite test that it describes as "drawn partially from Judge Breyer's controlling opinion in [*Universidad Central de Bayamon*] v. *NLRB*, 793 F.2d 383 (1st Cir.1985) (en banc) that exempts an institution 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. *University of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (2002) (internal citations omitted). In a more recent decision, the Court elaborated that it wished to avoid the intrusive inquiry adopted by the Board in favor of the three prong test set out in *Great Falls* which "... created a 'bright line' rule for determining jurisdiction 'without delving into matters of religious doctrine or motive.'" *Carroll College Inc.*, 588 F.3d 568 (D.C. Cir., 2009) citing *University of Great Falls*, *supra* at 1345. The Board has not adopted the tripartite D.C. Circuit test.

organization and function that may be relevant to the ‘inquiry whether the Board’s jurisdiction presents a significant risk that the first amendment will be infringed.’” Id. at 68, fn. 10 (citing *Catholic Bishop*, supra at 502).

Historically, the Board has considered a multitude of factors in its 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 unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction.” *University of Great Falls*, 331 NLRB 1663, 1664-65 (2000). For example, the purpose of the institution as typically revealed in its mission statement, whether or not its curriculum requirements emphasize the associated faith, requirements that faculty teach doctrinal faith or somehow support the associated faith and its teachings, requirements that students complete courses in the faith associated with the institution, significant funding by the religious organization, governance by a religious organization or the requirement that an institution be governed according to principles of faith, and requirements for (or preference given to) administrators, faculty, or students who are members of the faith associated with the institution. *University of Great Falls*, 331 NLRB 1663, 1664-65 (2000); *Ecclesiastical Maintenance Services*, 325 NLRB 629 (1998).

The Board has determined that the exercise of jurisdiction over colleges and universities would not create the risk contemplated by *Catholic Bishop*. In *Livingston College*, 286 NLRB 1308 (1987), the Board concluded that the church was not involved in the administration of the college “in a manner that creates a significant risk of constitutional infringement.” The Board based this conclusion on the fact 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 faculty nor students were required to engage in worship. Thus, despite the fact that the church owned the college’s property, appointed one-half of the board of trustees, and provided financial support to the college, the Board asserted jurisdiction.

Applying the Board’s “substantial religious character” test to the instant case, the evidence establishes that the Employer functions as a secular educational institution or university. In making this finding I have considered the Employer’s affiliation with the Sisters of Mercy through the Conference for Mercy Higher Education and CMHE’s role as the religious sponsor for 16 universities and colleges in the United States, including the Employer. However, CMHE is not involved in the administration of the University in a manner that creates a significant risk of constitutional infringement.

One factor supporting my finding that the exercise of jurisdiction is appropriate in this case is the Employer’s adherence to the doctrine that encourages the University’s faculty to function free of any religious requirements or constraints. The Employer follows *Ex Corde*, which is the Catholic Church’s guiding document for universities to promote academic freedom. Under this document, faculty are left unfettered with regard to imbuing or inculcating

students and curriculum with Church doctrine or religion. *Livingstone College* at 1308-1310 (1987) (jurisdiction proper where faculty not required to conform to church doctrine and neither students nor faculty required to engage in worship); *St. Joseph's College*, supra at 68 (declining to exercise jurisdiction where faculty required to promote Church objectives and prohibited from inculcating positions contrary to those of the Church and Bishop had authority to terminate faculty deemed unharmonious with Church). Compare to *Nazareth Regional High School*, 283 NLRB 763, 765 (1987)(where the Board declined jurisdiction over a school, noting applicants were asked if they were willing to teach and impart Catholic doctrine in all classes). Similarly, there is no evidence that the University would discipline or fire faculty if they did not hold to Catholic values. A faculty member's religious values, or lack thereof, play no role in their hiring or retention at the University and are not a subject of their evaluations or suitability for promotion.

The Employer's articles of incorporation, mission statement, and the various publications and events sponsored by the University reflect the Employer's history as a Catholic institution established by the Sisters of Mercy and its continued affiliation with that religious order through CMHE. However, the mission and purpose of the University is to educate men and women irrespective of their religious beliefs. Although the University requires students to take two courses from its Department of Religious Studies as part of its core curriculum, there is no requirement for students to take courses that involve the study of the Catholic faith. There are also no other religious requirements imposed by the Employer on either faculty or students.

CMHE has the sole power to amend the articles of incorporation; to amend certain bylaws; to approve changes to the employer's mission statement; to approve nominees to the board of trustees; to approve finalists for the position of president, to sell, lease or dispose of property worth over 10 million dollars; and to merge, consolidate or dissolve the University. However, the Employer's day-to-day operations are governed by its board of trustees in conjunction with the University's president. At least four members of this board must be Sisters of Mercy and the majority of the board's members should be Catholic. Unlike the Mercy institute in *St. Joseph's*, there is no requirement that the remaining trustees must be members of the Sisters of Mercy. Compare *Jewish Day School of Greater Washington, Inc.*, 283 NLRB 757 (1987)(where entire board of governors was Jewish and required to be "active in community affairs, including the United Jewish Appeal and the Board of Jewish Education").

The Employer is not dependent on the Sisters of Mercy or CMHE for its funding. More than 90% of the Employer's revenue is derived from student tuition revenue and housing payments. The remainder of the Employer's funding is derived from a saloon it owns, fundraising activity, and donations. The Employer recently received a \$5 million loan from the Sisters of Mercy. The Order also agreed to temporarily defer interest payments on that loan and to

permit the Employer to tap into its endowment fund to meet its current financial obligations. This loan and the release of the endowment fund money was in response to an emergency situation, so that the Employer could meet its payroll and forestall some of the banks it uses from calling in their lines of credit. The Order's response to the Employer's financial emergency falls short of establishing that the Employer is dependent on the Order for its funding. This finding is buttressed by the fact that the Employer obtains traditional sources of credit to cover its expenses and that it currently owes \$51 to \$52 million dollars to its banks.

V. Conclusion

Based on the foregoing and the entire record herein, I have found that the petitioned-for unit is an appropriate unit and it is appropriate to assert jurisdiction and conduct an election therein.

VI. Direction of Election

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by St. Xavier University Adjunct Faculty Organization, IEA-NEA. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an 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. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure 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, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **June 2, 2011**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlr.gov,¹⁵ by mail, or by facsimile transmission at 312-886-1341. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 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 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

¹⁵ To file the eligibility list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

VII. Right to Request Review

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 Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **June 9, 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.

DATED at Chicago, Illinois this 26th day of May, 2011.

Joseph A. Barker

Joseph A. Barker, Regional Director
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CATS – First Amendment – Jurisdiction, Faculty in Religious Affiliated University.
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