

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

PACIFIC LUTHERAN UNIVERSITY,

Employer,

and

SEIU LOCAL 925,

Petitioner.

CASE 19-RC-102521

UNION'S BRIEF ON REVIEW

SEIU Local 925 files this brief in support of the Regional Director's Decision and Direction of Election finding it appropriate to assert jurisdiction over the Employer, Pacific Lutheran University (PLU), and to include all contingent faculty in the appropriate bargaining unit.

**I. The Regional Director Correctly Asserted Jurisdiction over PLU.**

Based on a careful review of all record evidence, the Regional Director correctly found that PLU is not a church-operated institution within the meaning of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) and properly asserted jurisdiction over PLU. Moreover, the Regional Director found that even under the D.C. Circuit's jurisdictional standard, Board assertion of jurisdiction would be appropriate. Therefore, based on the record evidence, and under the reasoning of *Catholic Social Services, Diocese of Belleville*, 355 NLRB 929 (2010), the Regional Director's Decision should be affirmed.

As clearly enunciated in the Regional Director’s Decision, the exercise of jurisdiction over PLU will not create “serious constitutional questions” of the type the Supreme Court sought to avoid in *Catholic Bishop*. The Supreme Court was concerned in *Catholic Bishop* with the Board’s assertion of jurisdiction over religious schools given the central role of education in propagating and sustaining religious faith. The Court specifically observed, “parochial schools involve substantial religious activity and purpose.” 440 U.S. at 503. Here, as found by the Regional Director, PLU’s mission and curriculum plainly establish that PLU operates for the purpose of providing secular higher education opportunities, and not to propagate religious faith. The stated mission of PLU is “to educate students for lives of thoughtful inquiry, service, leadership and care—for other people, for their communities, and for the earth.” As noted by the Regional Director, even PLU’s witness acknowledged that this mission statement contains no religious references whatsoever, and mirrors the objectives of secular universities such as University of Washington, Washington State University, Central Washington University, and Western Washington University. P Ex 18 and DD&E pg 3. In fulfilling this mission, PLU offers a range of bachelor’s degrees, master’s degrees, and certificates across its college of arts and sciences and its professional schools for arts and communication, business, nursing, and education and movement studies. P Ex 5, 51, 298.

As found by the Regional Director, PLU does not investigate the religious beliefs of its students, faculty, or regents. In fact, only approximately 20 to 25 percent of the student body is Lutheran, and Lutherans receive no preference for admission. DD&E pg 4. Moreover, PLU students in the General Education Program are only required to take two religion courses, or eight semester credits out of 128 necessary to graduate. As noted by the Regional Director, only one of these must be a course on Christianity; the other may be on any religion. Moreover, it is

not mandatory for students to take a course on Lutheranism. P Ex 5, 12-15. Critically, as cited by the Regional Director, this requirement is intended “to ask students to engage in the academic study of religion, not in religious indoctrination.” P Ex 20 and DD&E pg 4.

The one required course on Christian traditions simply “examines diverse forms of Christianity within their historical, cultural and political contexts.” The fact that the other course must cover global religious traditions “highlights PLU’s commitment to local-global education through analysis of diverse religions, both here and abroad.” P Ex 7 (“Department of Religion”). Courses that would meet these requirements include “American Church History,” “Medieval Christianity,” “The Religions of Korea and Japan,” and “Sociology of Religion.” P Ex 5, 33-34. Significantly, faculty members in the religion department are not required to be members of the Lutheran Church. P Ex 20 (“Because of their advanced studies and teaching experience, PLU religion professors recognize that there are diverse and sometimes conflicting viewpoints on any given issue. Their purpose is not to take one side but to help you understand why people, in the past or the present, hold different religious convictions that shape their views of human life on this earth.”) Thus, the Regional Director appropriately found “no significant risk of constitutional infringement from exercising jurisdiction over the University”.

The Regional Director also correctly held that even if the D.C. Circuit’s standard articulated in *University of Great Falls v. NLRB*, 278 F.3rd 1335 (D.C. Cir. 2002), was applied in this case, Board jurisdiction over PLU would be proper.

In *University of Great Falls*, the court of appeals held that the Board should decline to assert jurisdiction over an educational institution if it (1) “holds itself out to students, faculty and 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. . . .” 278 F. 3d at 1343 (citations and internal quotations omitted).

PLU does not meet the first prong of the *Great Falls* test because it does not hold itself out as providing a religious educational environment. As the Board stated in *Catholic Social Services, Diocese of Belleville*:

[We] do not believe the [D.C. Circuit] court would find the first prong of its test satisfied absent communications to the public clearly stating that the Employer provides religious education of some form. Here, however, the Employer can point to nothing like the statement in the University of Great Falls’ mission statement ‘offer[ing] students a foundation for actively implementing Gospel values and the teachings of Jesus within the Catholic tradition.’ 278 F.3d at 1345. Rather, the Employer and our dissenting colleague would have us comb through the employees’ position descriptions and other nonpublic documents and make assumptions not supported by any direct evidence about how portions of those documents inform the care provided at the residence. But such inquiry, going beyond an examination of the Employer’s public self-description, is inconsistent with the *Great Falls* court’s intent to avoid ‘intrusive inquiries.’ 278 F.3d at 1342.

*Catholic Social Services, Diocese of Belleville*, 355 NLRB at 929.

It is clear from all the record evidence that the professed purpose of PLU and the function of the non-tenure-eligible contingent faculty is a secular one—to provide secular higher education, not a religious education. The Regional Director, relying on the record evidence, clearly articulated that PLU emphasizes academic excellence and acceptance of all faiths (and of atheism) and explicitly de-emphasizes any specific Lutheran dogma, criteria, or symbolism in its public communications.<sup>1</sup>

The rationale for the D.C. Circuit’s requirement that a school hold itself out as providing a religious educational environment is grounded in the theory that public representations will act as a “market check” on institutions that may not truly offer a religious educational environment.

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<sup>1</sup> For example, pursuant to its branding guidelines, PLU does not use the PLU rose window logo for the web or for admission material “due to reproduction and religious messaging.” P Ex 9.

In *Carroll College*, 558 F.3d 568 (D.C. Cir. 2009), the court noted that the school’s mission statement expressly stated that the school will “demonstrate Christian values by . . . example.” 558 F.3d at 572. The board of trustees in *Carroll College* had adopted a “Statement of Christian Purpose” which declared that the college’s mission is to “provide a learning environment . . . congenial to Christian witness.” *Id.* Here, PLU’s stated mission is wholly secular and there is no evidence of such a religious statement issued by the Board of Regents. On widely accessible materials, such as its webpages and the course catalogue, PLU characterizes “Lutheran higher education” in terms of secular values and a historical tradition. PLU’s webpage for prospective students makes clear that PLU’s curriculum is secular, it is committed to academic freedom, and there are no religious expectations of students attending PLU. While PLU makes resources available on campus for Lutherans, such as chapel and a campus ministry, it also provides spaces for students of different faiths to practice their religion. P Ex 13.

PLU has also represented itself in court and to the PLU community as a non-sectarian institution. In a 1999 lawsuit challenging the constitutionality of Washington State funds that were being granted to students who attended religiously-affiliated schools, PLU’s then-President Anderson testified about PLU’s non-sectarian qualities. Anderson testified that PLU does not impose particular religious views on its students or faculty, and that PLU seeks a “widely diverse student body” and “intellectually free and unfettered” learning. TR 318-20. In contrast, PLU now asserts that it provides a religious educational environment for the purpose of being exempt from Board jurisdiction. The “market check” theory does not permit PLU to have it both ways: it cannot be a non-sectarian institution on a Monday when it is seeking state funds and then a sectarian institution on Tuesday when it is attempting to avoid Board jurisdiction.

The record evidence clearly establishes that PLU does not hold itself out to students, faculty, and the public as a Lutheran religious institution. Therefore, even if the D.C. Circuit standard were applied, the Regional Director's Decision should be affirmed.

## **II. The Regional Director Correctly Found that Full-Time Contingent Faculty Are Not Managerial Employees.**

Citing *Montefiore Hosp. & Medical Center*, 261 NLRB 569, 572 n.17 (1982) the Regional Director properly held that PLU had the burden of establishing the managerial status of any full-time contingent faculty employee, and that PLU failed to do so. As clearly enunciated by the Regional Director, the record evidence establishes that full-time contingent faculty do not, in practice, possess the managerial authority described by the Supreme Court in *NLRB v. Yeshiva*, 444 U.S. 672 (1980).

In *Yeshiva* the Supreme Court held that faculty were managerial employees excluded from coverage under the NLRA. The Court defined managerial employees as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” 444 U.S. at 682, quoting *NLRB v. Bell Aerospace*, 416 U.S. 267 (1974). Managerial employees “must exercise discretion within, or even independently of, established employer policy and must be aligned with management,” and they must represent “management interests by taking or recommending discretionary actions that effectively control or implement employer policy”. *Id.* at 683.

The Court cautioned that in finding the Yeshiva faculty managerial, it was “not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress’ expressed intent to protect them.” *Id.* at 690. It noted:

[O]ther factors not present here may enter into the analysis in other contexts. It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own

research. . . . There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit. It may be that a rational line could be drawn between tenured and untenured faculty members, depending upon how a faculty is structured and operates.

Id. at 690 n.31.

The controlling consideration is whether the faculty “exercise authority which in any other context unquestionably would have been managerial.” Id. at 686. The Court in *Yeshiva* relied on the faculty’s extensive authority over academic matters, effectively determining course offerings, courses schedules, teaching methods, grading policies, admission and matriculation standards, as well as student-specific decisions regarding admission, retention, and graduation. Id. The Court also noted that the faculty had occasional input into the size of the student body, tuition, and the location of the school, and had a predominant role in faculty hiring, tenure, sabbaticals, termination, and promotion.

As noted above, in applying *Yeshiva*, the Board has required the party seeking to exclude faculty as managerial to come forward with evidence establishing that the employees in fact make or recommend actions that effectively control or implement employer policy. *See e.g.*, *Montefiore Hosp. & Med. Ctr.*, 261 NLRB 569, 572 n.17 (1982); *University of Great Falls*, 325 NLRB 83, 93 (1997). The Board emphasized the effective control that faculty have over academic areas, as opposed to nonacademic areas, when considering the *Yeshiva* factors in *Lewis & Clark College*, 300 NLRB 155, 161 (1990). The Board also considers the role of faculty decision-making by evaluating how academic policy decisions are made “individually, by department consensus, through committees, or in meetings of the whole.” Id. Significantly however, “[d]ecisions or recommendations made by committees only a minority of whose members consist of faculty representatives cannot be said to be faculty decisions or recommendations.” *Univ. of Great Falls*, 325 NLRB 83, 95 (1997), *aff’d*. 331 NLRB 1663

(2000), reversed on other grounds, 278 F.3d 1335 (D.C. Cir. 2002). Furthermore, a finding that faculty determine the course content of their own classes, evaluate their own students, and supervise their own research does not render faculty managerial. *Marymount College*, 280 NLRB 486, 487 (1986).

In light of the above, and as found by the Regional Director, it is clear that full-time contingent faculty at PLU are not managerial employees within the definition of *Yeshiva* because they do not exercise effective control or authority over academic or nonacademic matters. The record established that PLU maintains a clear institutional divide between contingent and regular faculty— whether full-time or part-time—that precludes full-time contingent faculty from acting as managerial employees. This institutional divide is made explicit in the faculty handbook, which classifies most teaching faculty into “regular,” and therefore tenured or on a tenure track, or “contingent.” ER Ex 1, 32. The different responsibilities of faculty who are either within or without the system of tenure creates tiered expectations of faculty participation in PLU governance. ER 1, 25, 32. Even where full-time contingent faculty are permitted to vote in the faculty assembly, they represent a small minority of voting members of that body.

The faculty constitution grants PLU’s faculty, collectively, substantial rights and duties to be exercised through its own faculty governance system. ER 1, 9. However, contingent faculty do not have equal access or participatory rights within that faculty governance system. No contingent faculty are permitted to serve on any of the faculty standing committees; full-time contingent faculty who are otherwise allowed to vote at the faculty assembly cannot vote on any personnel-related matters; and full-time contingent faculty will by definition always constitute a small, discrete minority (with lesser rights) of the voting population. ER Ex 1, 34.

As found by the Regional Director, the faculty standing committees play a powerful role in faculty governance, and contingent faculty are not permitted to serve on faculty standing committees. The eight faculty standing committees together retain jurisdiction covering all areas over which faculty have authority and input. TR 65-66. Issues, however they arise, are funneled to the appropriate committee(s) charged with developing the faculty response or recommendation. TR 37. For example, the faculty constitution allows faculty to have a role in determining the degrees offered, formulating the courses of study, and enacting educational policies. ER Ex 1, 9. Specific curriculum changes arising from the departments, divisions, or schools are brought to the educational policies committee, which then reviews and modifies the proposals before bringing the final recommendation to the faculty assembly for a vote. TR 85-88. As a matter of course, the faculty members on the faculty standing committees do significant groundwork with the provost and the relevant parties to work out potential issues before the proposals ever get to the faculty assembly for a vote. TR 46, 68-70, 85-88. Thus, recommendations by the faculty standing committees are not often rejected by the faculty assembly. TR 69-70. If there are objections, the proposals will frequently go back to the committees where they will be revised in a way to ensure passage. TR 69.

Moreover, although full-time contingent faculty are able to vote in the faculty assembly, this right to vote is diluted by the way faculty governance works in practice. First, the “politics” of crafting successful faculty proposals happens at the committee-level, from which the full-time contingent faculty are completely barred. TR 86-87. Second, contingent faculty are never permitted to vote on personnel-related matters. TR 56-57. While this may seem like a straightforward distinction at first blush, many academic or educational policies are in fact closely tied to department personnel decisions. For example, the provost’s testimony indicates

that department course curriculum changes would likely be tied to the creation or elimination of tenured positions within departments, and those determinations would be personnel matters. See e.g. TR 189 (noting the religion department's ongoing debate over the creation of another tenure line position which would be tied to a particular specialization). As noted by the Regional Director, PLU failed to show how or who decides whether an issue is "personnel-related" for the purpose of determining whether full-time contingent faculty can vote, nor how frequently contingent faculty votes are permitted to vote on substantive academic matters.

Third, even if full-time contingent faculty are actually permitted to vote, theirs will always constitute a small minority among the voting faculty. Although contingent faculty comprise nearly half of the teaching faculty at PLU, the provost testified that the overwhelmingly majority, 80 percent, of those who actually attend the faculty assembly are regular faculty. TR 58-60. The remaining 20 percent are some mix of administrative faculty and contingent faculty. *Id.* No evidence was introduced as to how many contingent faculty attend assembly meetings, how many of those are full-time contingent faculty, and how many full-time contingent faculty actually vote.

Fourth, the tenure system ensures that regular faculty have a stake in participating in faculty governance in a way that contingent faculty do not. Regular faculty who seek to obtain tenure are very clearly put on notice that they will be evaluated in part on their service and contributions to faculty governance, both at the University-wide level as well as within their own departments. ER Ex 1, 24-25. In contrast, PLU does not appear to communicate any consistent expectation to full-time contingent faculty regarding service. TR 191-92 (provost's testimony that service expectations for contingent faculty can vary over the course of the year depending on the department needs and is not memorialized anywhere); TR 193 (provost's testimony noting

that evaluations on service expectations are made on the annual evaluation forms); TR 439-40 (provost's testimony noting that under a third of all contingent faculty are reviewed).

The fact that contingent faculty are not barred from participating in University committees and ad hoc committees is not controlling. TR 405. The University committees, which have mixed memberships that include students and administrators, are purely advisory unlike their counterpart faculty standing committees. TR 84. Furthermore, the majority of the University committees appear to deal primarily with nonacademic issues facing the University such as budget and retirement funds. ER Ex 1, 42-48. PLU also failed to show that any full-time contingent faculty actually participate on University committees or ad hoc committees.

The provost's testimony noted that certain academic decisions—such as specific course offerings, course credit determinations, scheduling, and hiring—are made by department chairs at the department level. Although PLU makes the conclusory assertion that full-time contingent faculty “typically” participate in such meetings [TR 517], the record fails to show that full-time contingent faculty as a whole, across the divisions and schools, are invited to participate in those department-level decisions. Although PLU has shown that one division, the division of humanities, recently created a policy permitting all contingent faculty in their division to vote on department-level decisions (except for matters that relate to personnel) effective in March 2013, the provost could not testify as to any other department, division, or school policies regarding contingent faculty involvement, or what are their actual practices. ER EX 14; TR 162-65, 193-194 (provost's testimony that “the department chair [sic] will get input from anybody and everybody they want to”); TR 22 (provost's testimony that he works mostly with the deans and does not often get involved at the department level).

The fact that full-time contingent faculty at PLU have the right to choose their own teaching materials, draft their syllabi, and grade their own students is not determinative of managerial status. *Marymount College, supra*. See also, *Lemoyne-Owen College*, 345 NLRB 1123, 1128 (2005) (noting that “professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research”) (citing *Yeshiva*, 444 U.S. 672, 690 n.31 (1980)). All contingent faculty retain authority over such class-specific decisions. TR 48.

Based on all of the record evidence, the Regional Director correctly found that PLU failed to show that full-time contingent faculty have authority over anything other than the content of their courses and the evaluation of their students. Thus, the Regional Director’s determination that full-time contingent faculty are properly included in the bargaining unit is appropriate under extant Board law and should be affirmed.

### III. Conclusion.

The Regional Director’s Decision should be upheld in all respects. The Decision carefully and accurately articulates the record evidence and appropriately concludes that jurisdiction is proper over PLU under *Catholic Bishop* (and even under *Catholic Social Services, Diocese of Belleville*) and that full-time contingent faculty are not managerial employees under *Yeshiva* and its progeny.

DATED this 22<sup>nd</sup> day of October, 2013.

**DOUGLAS DRACHLER  
MCKEE & GILBROUGH LLP**

By   
Martha Barron, WSBA #15100  
Paul Drachler, WSBA #8416

**CERTIFICATE OF SERVICE**

I certify that on the 22<sup>nd</sup> day of October, 2013, I electronically filed with the NLRB via e-file the Union's Brief on Review and served the document as follows:

Warren E. Martin  
Gordon Thomas Honeywell LLP  
1201 Pacific Avenue, Suite 2100  
PO Box 1157  
Tacoma, WA 98401-1157  
Via U.S. Mail and  
Email: [wmartin@gth-law.com](mailto:wmartin@gth-law.com)

Dated this 22<sup>nd</sup> day of October, 2013.

A handwritten signature in black ink, appearing to read "Warren E. Martin". The signature is written in a cursive style with a horizontal line underneath.