

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: November 3, 2015

TO: Jonathan B. Kreisberg, Regional Director
Region 1

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Nativity Preparatory School
01-CA-144463

111-5000
177-2484-0150
260-6710
280-8210
280-8660

This case was submitted for advice as to whether the Board should assert jurisdiction over faculty and social workers at a religiously-affiliated Catholic middle school that allegedly fired a social worker for protected concerted activity. We conclude that applying *Pacific Lutheran University*¹ and *Catholic Bishop of Chicago*,² the Board should not assert jurisdiction because the Employer “holds itself out as providing a religious educational environment,” and holds out its employees, including the Charging Party, “as performing a specific role in creating or maintaining [the school’s] religious educational environment.”³ Thus, asserting

¹ 361 NLRB No. 157 (2014).

² 440 U.S. 490 (1979).

³ We agree with the Region that it is appropriate to analyze this jurisdictional issue under *Pacific Lutheran*. Although the Board limited its holding to “units of faculty members at colleges and universities,” *id.*, slip op. 8 n. 11, it also stated that it was overruling prior Board decisions such as *Jewish Day School*, 283 NLRB 757 (1987) and *Nazareth Regional High School*, 283 NLRB 763 (1987), respectively primary and secondary schools, to the extent that they were inconsistent with its decision or suggested that an analysis of the nature of faculty members’ roles was not necessary in deciding whether the Board should assert jurisdiction. *Id.* at 11. Further, on February 26, 2015, the Board remanded *Islamic Saudi Academy*, 05-RC-080474, a

jurisdiction in this case would require the Board to engage in the type of inquiry the Supreme Court stated in *Catholic Bishop*⁴ would violate rights guaranteed by the Religion Clauses of the First Amendment. Accordingly, the charge should be dismissed, absent withdrawal.⁵

FACTS

Nativity Preparatory School (the Employer) is a Catholic, Jesuit-sponsored middle school, founded by a Society of Jesus (Jesuit) priest in 1990, which provides a Jesuit education to boys from low income families. It is funded by the Jesuits and by private donations. Its executive director/president is a Jesuit priest, who receives no salary, and lives in housing provided by Boston College, another Jesuit institution; he is the only religious figure at the school. Nativity employs approximately nine teachers, two school counselors, one administrative assistant, and nine administrators/staff.⁶ Nativity also has six Teaching Fellows for the 2014-2015 academic year, who are paid a small monthly stipend (approximately \$500), take classes free of charge at Boston College, and have the option of living at Burton House, a residence owned by the school, with free room and board.

Public website

Nativity's public website identifies itself as a Catholic school that provides religious education in a Catholic/Jesuit tradition. Nativity's Mission Statement, posted on its website, includes a "Welcome" letter from the school president, stating:

case involving whether the Board should assert jurisdiction over a petitioned-for unit of teacher and non-teacher employees in an elementary and secondary school, for further action consistent with *Pacific Lutheran*.

⁴ *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

⁵ Therefore, it is unnecessary for us to reach the merits of the Charging Party's claim that she was discharged for protected concerted activity (email to staff complaining about Nativity's new health plan), as opposed to her objection to the directive that all staff must discuss God with students and pray with them during the day.

⁶ The list of administrators/staff on Nativity's website include: the President, Principal, Vice Principal, Director of Admissions, Assistant Director of Graduate Support, Vice President of Advancement and External Relations, two employees listed as "Advancement," and one employee in the business office.

Each day at Nativity brings new experiences that challenge us to pay attention to the presence of God in all things. . . . The world is filled with God's grandeur, and at Nativity Prep we celebrate God's gracious presence with our minds, our hearts, and our hands. . . . We are proud of our Jesuit heritage. Any visitor to our school or our website will see references to the many Jesuit saints and scholars who serve as role models for our students, faculty, and staff All Jesuits, and all students at Jesuit schools, are given the opportunity to discover and explore the river of living water that flows from the side of Christ. . . .

Self-Study and Sustaining Declaration

Nativity Preparatory School is a declared apostolic work of The New England Province of the Society of Jesus (the Province). In order for the school to maintain that status, it must undergo an assessment every 5 years. The assessment involves a Self-Study, followed by a review and inspection visit by the Province. If the school passes its assessment, a Sustaining Declaration is executed to continue the sponsorship for another five years. Nativity conducted its most recent Self-Study in 2012; during that Self-Study, all faculty and staff reviewed the ten criteria laid out in a Jesuit document entitled *What Makes a Jesuit School Jesuit?* and provided input on how Nativity was meeting those criteria. Based on their input, the Self-Study concluded, in part:

All members of the Nativity community are therefore encouraged to become contemplatives in action, inspired by Ignatius' challenge in the *Spiritual Exercises*.

All students and faculty/staff are given the opportunity to lead prayer, participate in the school's liturgies and celebrations through service at the altar, lecturing, preaching, and singing.

Serving the Mission of the Church: A Jesuit school publicly declares its Catholic character and seeks 'to incorporate itself more and more vigorously and creatively into the life of the Church.' Like the Society of Jesus itself, the Jesuit school acts 'in the service of the worldwide mission of the Church.' Above all, board members, faculty, staff, and administrators in their work for students constantly seek to teach them to 'learn in the Church, with the Church, and for the Church how to live our faith.'

Consistent with these recommendations, the current school president brought more Jesuit practices into the school, such as replacing a general prayer before lunch

with the Daily Examen, a prayer of self-reflection.⁷ The students are led in the Daily Examen by whichever faculty or staff person is on lunch duty.⁸

The Province, together with Nativity, executed the current Sustaining Declaration on January 9, 2014. It provides, in part: that “Those involved in Jesuit education, both Lay and Jesuit, are committed partners contributing to and sacrificing for the mission of the school and the greater glory of God,” and that “The principles of Jesuit education as expressed in documents such as ‘What makes a Jesuit School Jesuit. . . The Characteristics of Jesuit Education. . .’ are fully embraced by the province and the school.”

The “Characteristics of a Jesuit Education,” a 53-page document incorporated by reference in the Sustaining Declaration, describes the role that the laity employed at Nativity play in the Jesuit’s religious mission. Examples include:

(34) Since every program in the school can be a means to discover God, all teachers share a responsibility for the religious dimension of the school. . . . Religious and spiritual formation is integral to Jesuit education; it is not added to, or separate from, the educational process.

(35) In all classes, in the climate of the school every attempt is made to present the possibility of a faith response to God as something truly human and not opposed to reason as well as to develop those values which are able to resist the secularism of modern life. A Jesuit school does everything it can to respond to the mission given to the Society of Jesus ‘to resist atheism vigorously with united forces.’

(43). . . Teachers and administrators, both Jesuit and lay, are more than academic guides. They are involved in the lives of the students, taking personal interest in the intellectual, affective, moral and spiritual development of every student.

(56) Teachers and administrators assist students in . . . being ready to challenge them, helping students to reflect on personal experiences so that they can understand their own experience of God.

⁷ The Daily Examen comes out of the *Spiritual Exercises*, the writings of St. Ignatius Loyola, founder of the Jesuit Order. All Jesuit priests are required do the Examen meditation twice a day.

⁸ Although the Charging Party never led the Daily Examen, she would have been required to if she were the only staff on lunch duty.

(61) Members of various faiths and cultures are a part of the educational community in Jesuit schools today; to all, whatever their beliefs, Christ is proposed as the model of human life

(63) Pastoral care....enables the seeds of religious faith and religious commitment to grow in each individual by enabling each one to recognize and respond to the message of divine love; seeing God at work in his or her life, in the lives of others, and in all creation.

(93) Jesuit schools are a part of the apostolic mission of the church in building the Kingdom of God. . . . Teaching in a Jesuit school, therefore, is a ministry.

Job postings

Job openings for teachers are posted on the website. The first item for the three faculty postings states: "As a school leader, the [teacher] will: Provide an example of leadership and professionalism which insures that the Jesuit mission and Ignatian vision are observed in all aspects of the . . . Program." All teacher postings also list "Passion for the mission of Nativity Prep" as the first qualification. A posting seeking Teaching Fellow applicants asks: "Why are you interested in faith-based education?" All the teacher postings also refer to the website for further information about the school.⁹

As to social worker job postings, when the Charging Party was hired over 10 years ago, there was no job posting and she was not given a job description for her position. She did, however, assist the school principal in drafting the job posting for a second part-time clinical social worker, which stated that Nativity was a Jesuit middle school and "while we serve students of all faiths, and employees from all walks of life, we are a Catholic school in the Jesuit tradition."¹⁰

⁹ As mentioned above, the Mission Statement is on the website.

¹⁰ The social worker posting contained no other reference to religious job duties or responsibilities.

Faculty Handbook

The Faculty Handbook Mission Statement provides: “in the Jesuit tradition the school promotes the academic, spiritual, social, and athletic growth of our students to develop their whole character. . . .” The Statement of Philosophy provides: “. . . the example of Jesus remains our highest standard.”

The Handbook states that faculty are required to attend morning assembly, where prayers are said, and to attend Jesuit retreats twice a year. The Handbook also states that faculty are required to present a professional growth portfolio to the Principal each year, which may include how the faculty member “contributed to the spiritual well being of the school community this year, through your own spiritual development, sharing of reflections, or through other spiritual experiences (morning assembly, mass, reflections, Jesuit readings, service and retreats.)”¹¹

School Practices

Religion classes are taught twice a week and are mandatory for all students, regardless of their religious affiliation. These classes study world religions, Hebrew Scriptures, the New Testament, Catholicism, and “[m]aking moral decisions.”

Nativity also requires all students, faculty, and staff to attend a Catholic mass at school once a month.¹² In anticipation of each monthly mass, a volunteer teacher meets with a group of students, by grade, to plan students' participation, which includes religious readings, carrying the wafer and wine to the Priest, and sharing personal statements of their beliefs.

Nativity also requires students, faculty and staff to attend a daily morning assembly, where staff share inspirational stories ("morning wisdom"), and the school president presents a short teaching about a Catholic practice related to the day (e.g. the significance of a particular Saint) and offers a prayer of gratitude for the benefactors of the school, the teachers, and parents. The assembly concludes with the Ignatian prayer, named for the founder of the Jesuits, St. Ignatius Loyola.

¹¹ Faculty Handbook, pp. 1, 6, 19 and 20.

¹² When the Charging Party missed a monthly mass, the current school president reminded her that she must attend mass.

Additionally, twice a year, faculty and staff are required to attend a religious retreat, which follows the Jesuit practice of self-reflection. These retreats are typically led by the school president, a Jesuit priest.¹³

At the faculty/staff orientation program for school year 2014/2015, the school president announced that, starting with the 2014/15 academic year, every staff member was required to discuss God throughout the day with students, and to pray with them, because “this is who we are as a school.” The Charging Party publicly protested this mandate.

The charge alleges that the Employer discharged the Charging Party, a social worker, because of her protected concerted activity of sending an email to colleagues protesting announced increased health insurance costs and seeking their support. The Respondent asserts that it discharged the Charging Party because her rejection of the school’s Catholic, Jesuit mission rendered her unfit for further service at the parochial school.

ACTION

We conclude that applying *Catholic Bishop of Chicago*¹⁴ and *Pacific Lutheran University*,¹⁵ and the Board should not assert jurisdiction because the Employer holds itself out as providing a religious educational environment, and holds out its employees, including the Charging Party, as performing a specific role in creating or maintaining the school’s religious educational environment.

I. Legal Principles

In *Catholic Bishop*, the Supreme Court found that Board jurisdiction over labor disputes between church-operated schools and their teaching employees would present “a significant risk that the First Amendment will be infringed.”¹⁶ The Court declined to construe the NLRA in a manner that would require resolution of such difficult First Amendment issues and therefore held that the Act did not grant the

¹³ As noted, the requirement to attend morning assembly and retreats is also spelled out in the Faculty Handbook.

¹⁴ 440 U.S. 490.

¹⁵ 361 NLRB No. 157.

¹⁶ 440 U.S. at 502-504.

Board jurisdiction over lay teachers in church-operated schools.¹⁷ The Court's decision in *Catholic Bishop* rested in substantial part upon "the critical and unique role of the teacher in fulfilling the mission of a church-operated school."¹⁸

Following the Supreme Court's decision in *Catholic Bishop*, the Board continued on a case-by-case basis to decide whether a self-identified religious school had a "substantial religious character" such that exercise of the Board's jurisdiction would present a significant risk of infringing on that employer's First Amendment religious rights.¹⁹ In *Jewish Day School of Greater Washington*,²⁰ the Board declined jurisdiction where articles of incorporation stated that one of its central aims was to teach religious subjects "in accordance with the principles of the Jewish faith," students spent 40 percent of their school day in Judaic studies courses in a school-established synagogue, Judaic studies were integrated with general studies, and mandatory prayer services were held each day. The Board concluded that *Catholic Bishop* precluded its exercise of jurisdiction over teachers "in a school whose purpose and function in substantial part are to propagate a religious faith." In that case, the Board expressly did not decide, and thereby reserved for a future date, the question of whether an exercise of jurisdiction "with respect to other employee classifications in such institutions" would raise constitutional issues.²¹

In *Pacific Lutheran*, the Board reexamined its standard for determining, in accordance with *Catholic Bishop*, when it should decline to exercise jurisdiction over faculty members at self-identified religious colleges and universities.²² The Board adopted a new two-part test; designed to be faithful to the holding of *Catholic Bishop* and to avoid the potential for unconstitutional entanglement while, to the extent constitutionally permissible, vindicating the rights of employees to engage in collective bargaining.²³ The first step is to determine whether First Amendment

¹⁷ *Id.* at 506-507.

¹⁸ *Id.* at 501.

¹⁹ *Pacific Lutheran*, 361 NLRB No. 157, slip op. at 5. See, e.g., *St. Joseph's College*, 282 NLRB 65, 68 (1986) (dismissing petition to represent faculty at church-operated college).

²⁰ 283 NLRB 757, 761-762 (1987) (footnotes omitted).

²¹ *Id.* at 761, fn. 48.

²² *Pacific Lutheran University*, 361 NLRB No. 157 (2014).

²³ *Id.*, slip op. at 5.

religious rights concerns are even implicated. Thus, to avoid an impermissible inquiry into the good faith of the university's position or examination of how the university implements its religious mission, the Board will first examine, as a threshold requirement, whether the university shows that it holds itself to students, faculty, and the community as providing a religious educational environment. The Board noted that "it is appropriate to require a minimal showing at this stage."²⁴ The Board explained that appropriate evidence of how the university holds itself out as providing a religious educational environment would include, but not be limited to:

handbooks, mission statements, corporate documents, course catalogs, and documents published on a school's website. Press releases or other public statements by university officials could also be relevant.

The Board also noted that a university's contemporary presentation of itself is likely to be more probative than its founding documents and historical tradition.²⁵

If the institution meets that threshold showing, thus raising concerns under the Religion Clauses of the First Amendment, the Board then examines whether the religious institution holds out the petitioned-for faculty members as performing a specific role in creating or maintaining the university's religious educational environment.²⁶ The Board explained that in determining "whether there is a 'significant risk' of infringement under *Catholic Bishop*," the focus "must be on the faculty members themselves, rather than on the nature of the university as a whole."²⁷ There must be a "*connection* between the performance of a religious role and faculty members' employment requirements."²⁸

If the institution holds out its faculty members, in communications to current or potential students and faculty members, and the community at large, as performing a specific role in creating or maintaining the school's religious purpose or mission, the Board will decline jurisdiction. Thus, generalized statements that faculty members are expected to support the goals or missions of the university are

²⁴ *Id.*, slip op. at 7.

²⁵ *Id.*, slip op. at 4.

²⁶ *Id.*

²⁷ *Id.*, slip op. at 7.

²⁸ *Id.*, slip op. at 9, n. 14.

not alone sufficient; they give no indication that faculty members are expected to incorporate religion into their teaching or research, that faculty members will have any religious requirements imposed on them, or that the religious nature of the university will have any impact at all on their employment.²⁹ However, if the evidence shows that faculty members are held out as serving a religious function, such as integrating the institution's religious teachings into coursework, serving as religious advisors to students, propagating religious tenets, or engaging in religious indoctrination or religious training, the Board will decline to assert jurisdiction.³⁰

Applying that test to the facts in *Pacific Lutheran*, the Board found that the University had met the threshold requirement that it held itself out as creating a religious educational environment.³¹ However, it failed to establish the second requirement, i.e., that it held its petitioned-for unit of contingent faculty members out as performing a religious function.³² In so finding, the Board explained that there was nothing in the school's governing documents, faculty handbook, website pages, or other material, that would suggest to existing or prospective faculty, students, or the community, that its contingent faculty members performed any religious function.³³ Thus, the Board asserted jurisdiction over the unit.³⁴

As explained above, on February 26, 2015, the Board remanded *Islamic Saudi Academy*, 05-RC-080474, a case involving whether the Board should assert

²⁹ *Id.*, slip op. at 8.

³⁰ *Id.*

³¹ The Board relied on the school's bylaws, articles of incorporation, website, and the religion department's web page.

³² *Id.*, slip op. at 13-14.

³³ The Board noted that the bylaws, faculty handbook, and Principles and Best Practices Relating to Contingent faculty were silent with respect to their role in fostering the Lutheran heritage; neither its website nor its job postings mentioned any contingent faculty role in advancing the Lutheran religion; and Lutheranism was not considered in hiring, promotion, tenure, or evaluation decisions. Further, contingent faculty members testified without rebuttal that there was no discussion about religion during their interviews, no requirement that course material have a religious component, and no requirement that they perform any function in support of a religious educational environment. *Id.*, slip op. at 13-14.

³⁴ *Id.*, slip op. at 12-14.

jurisdiction over a petitioned-for unit of teacher and non-teacher employees in an elementary and secondary school, for further action consistent with *Pacific Lutheran*.³⁵

II. The Board Should Not Assert Jurisdiction.

Applying the above principles, we conclude that the Board should not assert jurisdiction here because Nativity holds itself out as providing a religious educational environment, and holds out its employees, including the Charging Party, as performing a specific role in creating and maintaining a religious educational environment.³⁶

A. Nativity Holds Itself Out to Students, Faculty and the Community as a Religious Educational Institution.

The Board only requires a “minimal showing” that an employer holds itself out as a religious educational institution.³⁷ As noted earlier, in making this determination, the Board looks at documents published on a school’s website, mission statements, course catalogs, press releases or other public statements by school officials, handbooks, and corporate documents. In concluding that Nativity holds itself out to students, faculty and the community as a religious educational institution, the evidence includes the following:

First, Nativity’s public website clearly identifies itself as a Catholic school that provides religious education in a Catholic/Jesuit tradition. Nativity’s Mission Statement, posted on its website, includes a “Welcome” letter from the school president, emphasizes Nativity’s religious mission and its Jesuit heritage, the

³⁵ On September 1, 2015, the Regional Director issued a supplemental decision in *Islamic Saudi Academy*, 05-RC-080474, Supplemental Decision, 2015 BL 283780. Applying the standards announced in *Pacific Lutheran*, the Regional Director denied jurisdiction over the teachers at the facility, but asserted jurisdiction over the non-teachers because they were not required to perform any religious function that created or maintained the religious educational environment. On September 29, the Employer filed a petition with the Board for review of the DD&E.

³⁶ Were the Board to assert jurisdiction in this case, the nine faculty, two counselors, and one administrative assistant would arguably be considered Section 2(3) statutory employees. It is not clear whether the six teaching fellows would be statutory employees.

³⁷ *Pacific Lutheran*, 361 NLRB No. 157, slip op. at 7.

presence of God in “our minds, hearts and hands,” and states that Jesuit saints and scholars “serve as role models for [] students, faculty and staff.”

Second, the job postings for teachers and social workers publicize the religious character of Nativity and that the Jesuit mission and Ignatian vision are observed in all aspects of the school. For example, a posting seeking Teaching Fellow applicants asks: “Why are you interested in faith-based education?” And the most recent social worker job posting stated that Nativity was a Jesuit middle school and that “while we serve students of all faiths, and employees from all walks of life, we are a Catholic school in the Jesuit tradition.”

Third, Nativity’s 2012 Self-Study relied on various religious practices and obligations of its faculty and staff in affirming its status as an apostolic work of the Jesuits. Notably, as part of the Self-Study, all faculty and staff reviewed the ten criteria laid out in a Jesuit documents entitled “*What Makes a Jesuit School Jesuit*” and provided input on how Nativity was meeting those criteria. Based on their analysis and recommendations, the Self-Study referenced the practice that all students and faculty/staff are given the opportunity to lead prayer, participate in the school’s liturgies and celebrations through service at the altar, lecturing, preaching, and singing.

Fourth, the Sustaining Declaration between Nativity and the Jesuits incorporates by reference a document entitled “Characteristics of a Jesuit Education,” which emphasizes the religious mission of a Jesuit school, notably that teaching is a ministry and that in all classes and in the climate of the school, “every attempt is made to present the possibility of a faith response to God.”

Fifth, the Faculty Handbook clearly emphasizes Nativity’s religious mission, stating that the “example of Jesus remains our highest standard,” and that faculty are required to attend morning assemblies, which include prayers, and Jesuit retreats twice a year.

Finally, Nativity’s president announced to all faculty and staff at the 2014 faculty/staff retreat that, as Nativity’s employees, they are required to discuss God with students and to pray with them every day, “because that is who we are as a school.”

Based on all of the above, Nativity has clearly met the “minimal” showing that it holds itself out to students, faculty, and the community as providing a religious educational environment. Therefore, as in *Pacific Lutheran* and *Catholic Bishop*, First Amendment rights under the Religion clauses are implicated.

B. Nativity Holds Out its Faculty and Staff As Performing a Religious Function in Furtherance of its Religious Mission.

Having determined that Nativity has met the threshold showing of holding itself out as a religious educational institution, we further conclude that Nativity holds out its employees, both faculty and social workers, as performing a specific role in creating or maintaining its religious educational environment.³⁸ In determining whether an employer holds out its faculty as performing a religious function in furtherance of its religious mission, the Board will look to statements to prospective and current faculty and students, job descriptions, employment contracts, faculty handbooks, and statements to accrediting bodies.³⁹ The Board will decline to assert jurisdiction “[i]f the evidence shows that faculty members are required to serve a religious function, such as integrating the institution’s religious teachings into coursework, serving as religious advisors to students, propagating religious tenets, or engaging in religious indoctrination or religious training . . . [or] if the [institution] holds itself out as requiring its faculty to conform to its religious doctrine or to particular religious tenets or beliefs in a manner that is specifically linked to their duties as a faculty member.”⁴⁰ The Board will rely on the institution’s “own statements about whether its teachers are obligated to perform a religious function, without questioning the institution’s good faith or otherwise second-guessing those statements.”⁴¹

Applying those factors here, we conclude that Nativity holds out its faculty and staff, including its social workers, as performing a religious function in furtherance of its Catholic/Jesuit mission.

³⁸ We are aware that *Catholic Bishop* and its progeny specifically applied to faculty members. As mentioned above, on February 26, 2015, the Board remanded *Islamic Saudi Academy*, involving whether the Board should assert jurisdiction over a unit of teacher and non-teacher employees, for further action consistent with *Pacific Lutheran*. We find that where the religious educational institution meets both prongs of the *Pacific Lutheran* test as to its non-teacher employees (i.e., it holds itself out as providing a religious educational environment, *and* holds out those non-teacher employees as performing a specific role in creating or maintaining the school’s religious educational environment), then *ipso facto*, applying the rationale laid out in *Pacific Lutheran*, assertion of jurisdiction over those employees would raise the same “significant risk” that First Amendment religious rights would be infringed.

³⁹ *Pacific Lutheran*, 361 NLRB No. 157, slip op. at 9.

⁴⁰ *Id.*

⁴¹ *Id.*

Both the 2012 Self-Study document and the 2014 Sustaining Declaration between the Society of Jesus and Nativity are replete with references to the responsibilities of faculty and staff to guide students in the Catholic/Jesuit Nativity tradition. The 2012 Self-Study (the required quinquennial assessment for retaining Jesuit sponsorship) encourages faculty and staff to follow St. Ignatius' contemplative "*Spiritual Exercises*:" to lead prayer; participate in the school's liturgies and celebrations through service at the altar, lecturing, preaching, and singing. It also provides that "above all, board members, faculty, staff and administrators constantly seek to teach [students] to 'learn in the Church, with the Church and for the Church how to live the [Catholic] faith.'" Thus, the 2012 Self-Study explicitly ties the responsibilities of the employees (both faculty and staff) to the school's religious teachings and tenets.

The 2014 Sustaining Declaration (documenting successful culmination of the assessment and five more years of Province sponsorship) also specifically integrates the school's Catholic/Jesuit teachings into employees' job functions. Thus, it describes both lay staff and Jesuits as "committed partners contributing to and sacrificing for the mission of the school and the greater glory of God." And the "Characteristics of a Jesuit Education" document, incorporated by reference in the Sustaining Declaration, states that "all teachers share a responsibility for the religious dimension of the school;" that teaching in a Jesuit school is a ministry; that teachers and administrators take personal interest in, among other things, the "spiritual development of every student;" and that "in all classes, in the climate of the school . . . every attempt is made to present the possibility of a faith response to God." Thus, both the Self-Study and the Sustaining Declaration - the two documents which together set out the school's guiding principles - explicitly hold out the staff members as performing the function of promulgating Jesuit teachings.⁴²

Other written documents also hold out Nativity's faculty as performing a religious function. Thus, the Faculty Handbook's Mission Statement states that the school promotes the growth of its students to develop their whole character "in the Jesuit tradition;" the Statement of Philosophy provides that "the example of Jesus remains our highest standard;" and the Handbook specifically requires faculty to, inter alia, attend morning assembly where prayers are said; attend Jesuit retreats twice a year; and present the Principal an annual professional growth portfolio that includes how faculty members "contributed to the spiritual well being of the school community this year, through [their] own spiritual development, sharing of

⁴² Cf. *Id.*, slip op. at 13 (the section of the bylaws governing the faculty is silent with respect to their role in fostering that heritage, and throughout its substantial website, PLU does not indicate that its contingent faculty members play a role in advancing the Lutheran religion).

reflections, or through other spiritual experiences (morning assembly, mass, reflections, Jesuit readings, service and retreats).”

Nativity’s job announcements, which are posted on the website, also hold its teachers out as performing a specific role in maintaining its religious environment. Thus, teacher job postings state that the teacher will provide an example of leadership which insures that the Jesuit mission and Ignatian vision are observed in all aspects of the Program; and a posting seeking teaching fellows asks why the applicant is interested in faith-based education.⁴³

The school president’s public statements to faculty and staff regarding their religious responsibilities provide further evidence that the school holds them out as performing a religious function. Specifically, at the faculty/staff orientation program for school year 2014/2015, the president announced that every staff member was required to discuss God throughout the day with students, and to pray with them, because “this is who we are as a school.” Thus, be it teachers in their coursework, or social workers in their counseling sessions, staff are expected to incorporate Jesuit teachings into their work. Indeed, the president later specifically described this directive to the Charging Party as a job requirement, after she protested and stated that she did not believe that Jesus was the son of God.

Finally, the evidence shows that the religious functions and requirements that the school sets out for its staff in its formal documents (e.g. the Self-Study, the Sustaining Declaration, and the Faculty Handbook) are clearly manifested in practice.⁴⁴ All faculty and staff must attend morning assembly, lunchtime prayers, monthly Catholic mass, and religious retreats. As to morning assembly, staff shares inspirational stories (“morning wisdom”), and the school president presents a teaching about a Catholic practice related to the day, e.g. the significance of a particular Saint, and offers a prayer of gratitude for the benefactors of the school, the teachers, and

⁴³ On the other hand, the social worker job posting (which describes Nativity as a Catholic middle school in the Jesuit tradition but does not indicate that the social worker’s responsibilities would involve furtherance of that Jesuit tradition), is neutral as a factor in denying jurisdiction. *See Pacific Lutheran*, slip op. at 9 (our inquiry in this regard focuses on whether a reasonable prospective applicant would conclude that performance of their responsibilities would require furtherance of the school’s religious mission).

⁴⁴ *Cf. Pacific Lutheran*, 361 NLRB No. 157, slip op. at 12 (neither students nor faculty are required to attend religious services or participate in any of the school’s faith-based activities and there is no evidence that faculty are required to perform any of functions in connection with them).

parents. The assembly concludes with the Ignatian prayer, named for the Jesuit founder, St. Ignatius Loyola.

As to monthly mass, Nativity requires all students, faculty, and staff to attend. Indeed, when the Charging Party missed one, the president reminded her that it was required. In anticipation of each monthly mass, a teacher meets with students to plan their participation, which includes religious readings, carrying the wafer and wine to the Priest, and sharing personal statements of their beliefs. And as to the religious retreats, all faculty and staff must attend two a year, which are typically led by the president, a Jesuit priest. These many religious obligations demonstrate the key role played by the staff in propagating the school's religious mission.

C. Conclusion

In all these circumstances, we conclude that the Board should not assert jurisdiction in this case. Not only does Nativity hold itself out to students, faculty and the community as a religious educational institution, but it also holds out its faculty and social workers as performing a religious function in furtherance of the school's religious mission. Therefore, to assert jurisdiction would require the Board to engage in the type of inquiry the Supreme Court stated in *Catholic Bishop* would violate rights guaranteed by the Religion Clauses of the First Amendment.⁴⁵

Accordingly, the charge should be dismissed, absent withdrawal.

/s/
B.J.K.

⁴⁵ Indeed, as the Employer asserts that it discharged the Charging Party because of her objection to discussing God with the students and her belief that Jesus was not the son of God, a fundamental principle of Catholicism, this case would threaten to place the Board on a collision course with the Religion Clauses of the First Amendment. *See, St. Joseph's College*, 282 NLRB 65, 68 (1986) ("In the present case, resolution of an unfair labor practice charge filed by a teacher alleging discharge for union activity would require the Board to assess the good faith of a clergy administrator who insisted that the teacher was terminated for failing to promote a particular tenet of the Order or conform to Catholic teachings.")