UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SAINT XAVIER UNIVERSITY	)	
	)	
Employer	)	
	)	**Case No. 13-RC-092296**
	)	
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1	)	
	)	
Petitioner	)	

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1'S BRIEF IN SUPPORT OF THE REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION AND ORDER

BACKGROUND

On October 31, 2012, Service Employees International Union, Local 1, filed the instant petition, seeking an election in a proposed bargaining unit of all full-time and regular part-time housekeepers employed by Saint Xavier University ("University" or "Employer") at its Chicago, Illinois facility. On November 28, 2012, the Region issued a Decision and Direction of Election in the instant case, rejecting the claim by the University that, as a religious educational institution, it was not subject to the Board's jurisdiction. The University sought review of the Region's decision. An election was conducted on January 3, 2013; the ballots were impounded. On February 20, 2014, the Board granted the University's request for review. It then reversed its grant of review on February 12, 2015, and remanded the case to the Regional Director for further action consistent with its decision in *Pacific Lutheran University*, 361 NLRB No. 157 (2014), which specifically addressed the Board's standard for exercising jurisdiction over faculty members at self-identified religious colleges and universities.

On June 23, 2015, the Regional Director issued a Supplemental Decision and Order, in which he applied the two-part standard in *Pacific Lutheran* and concluded that it was appropriate to assert jurisdiction over the petitioned-for unit. The Employer sought review of the Supplemental Decision and Order on July 7, 2015. It contended that under the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and its progeny, all employees of religious educational institutions are exempt from the Board's jurisdiction, regardless of their job functions. The Board granted review on November 3, 2015.

FACTS

Local 1's petition seeking an election to represent the housekeepers at the University was the second representation petition involving this Employer to be the subject of a similar jurisdictional dispute. On May 26, 2011, the Region issued a Decision and Direction of Election in Case No. 13-RC-22025, which involved the University's adjunct faculty. The parties in the instant case stipulated to all of the underlying factual issues from the record in Case No. 13-RC-22025, including the transcripts, exhibits and post-hearing briefs.

A. The University

St. Xavier 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. The University is organized as a not-for-profit corporation for education purposes and is granted federal tax exempt status as an educational institution. P. Ex. 10 at 16. [1] The University is made up of four schools and one college: the School of Education, the Graham School of Management, the School of Nursing, the School for Continuing and Professional Studies and the College of

[1] All citations to the transcript, petitioner exhibits and employer exhibits refer to the record in Case 13-RC-22025.

Arts and Sciences. Tr. 98. It is overseen by a President, Provost, two Assistant Provosts and five Deans. P. Exs. 1, 4.

The University's Articles of Incorporation set forth the rules governing the organization. Er. Ex. 7. These Articles of Incorporation set forth the University's "object" and reveal a purely secular educational environment. *Id.* Specifically, the Articles establish the following object for the University:

> The object for which it is formed is: to provide and furnish opportunities for all branches of higher education; to establish, maintain and conduct one or more colleges and provide in all, collegiate studies; to establish, maintain and conduct a university in which may be taught all branches of higher learning and which may compromise and embrace separate departments for literature, pedagogy, commerce, music, the various branches of science, the cultivation of the fine arts, and all other branches of professional or technical education which may be included within the purposes and objects of a college or university; to provide and maintain courses of instruction in any and all of said college and university departments; to prescribe the courses of study and employ professors, instructors and teachers; to maintain and control the discipline in each of said several colleges and university departments; to fix the rates of tuition and the qualification for admission to the said colleges and university and to each of the institutions subordinate thereto; to receive, hold, invest and dispose all moneys and property or the income thereof which may be vested in or entrusted to the care of said corporation, whether by gift, grant, bequest, devise or otherwise, for educational purposes; to act as trustee for persons desiring to give or provide money or property or income thereof for any one or more of the colleges or for any educational purpose; and generally to pursue or promote all of any of the objects above named, and to do all and every one of the things necessary or pertaining to the accomplishments of said objects or any of them.

Er. Ex 7 at 5. Since 1912, the Articles of Incorporation have provided that "No religious test or particular religious provision shall ever be held as a requisite to said colleges or university or to any institution subordinate thereto." *Id.* at 50.

The University is governed by a Board of Trustees, pursuant to the terms of its Articles of Incorporation. Er. Ex. 7 at 5. This Board of Trustees is currently made up of 24 members, five of whom are members of the Sisters of Mercy of the Americas ("Sisters of Mercy"). The Sisters of

Mercy are a Catholic religious order founded in Ireland in 1831. Er. Ex. 14. The corporate arm of the Sisters of Mercy, the Council for Mercy Higher Education ("CMHE") is the corporate member that links the University to the Church and makes it an officially recognized member of the Church. Tr. at 49-50. Although the Board of Trustees includes some members of the Sisters of Mercy, as the University's Vice President of the Office for University Mission, and Secretary of the Corporation, Sister Susan Sanders testified, the Board is an independent body. Tr. at 50. In fact, despite the fact that the CMHE reserves the power to approve certain actions by the Board, Sanders was unable to think of a single instance in which a decision made by the Board of Trustees was ever rejected. Tr. at 203-204.

There is no requirement that a member of the Board of Trustees or any individual in a position of authority at the University be Catholic. Tr. at 213, 217-18, 466. Nor are Board members or employees, including administrators, required to sign any document affirming a commitment to Catholicism. Tr. at 340-41. Moreover, as is thoroughly discussed in the SXU Adjunct Faculty Organization, IEA-NEA's Brief in Support of Regional Director's Decision, filed in case 13-CA-22025, academic instructors at the University have no obligation to participate in any religious activities and have no obligation to impart directly or indirectly any part of the Catholic faith. Tr. at 492-93, 509, 515, 521, 525. Faculty members are never required to "instill a specific religious faith in the students" that they teach. *Id.*

B. The Housekeepers

As was noted by the Regional Director in his Supplemental Decision and Order, it is uncontested in this case that the University does not hold out its housekeepers as performing a specific religious function. RD's Supp. Dec., at p. 4. Moreover, the parties stipulated as follows: 1) offers of employment to housekeepers do not mention the Sisters of Mercy, Catholicism, God,

or religion; 2) there is no requirement that housekeepers be Catholic or adhere to any specific religion; 3) in the course of their duties, housekeepers are not required to abide by any specific tenets of the Sisters of Mercy, Catholicism, or any religion, but, as with all employees, are invited to attend and participate in any programs or activities that recognize or celebrate the Employer's Catholic and Mercy heritage; 4) the job evaluations of housekeepers contain no reference to the Sisters of Mercy, Catholicism, or religion; and 5) housekeepers have never been instructed to disseminate the Catholic faith.

The Job Classification Description for the University's housekeepers, to which the parties also stipulated, indicates that the employees' basic job responsibilities include "performing the full range of basic tasks in the cleaning and maintenance of buildings." Jt. Ex. 1. The "Essential Functions" of the job are entirely related to standard janitorial and housekeeping tasks and the employees' involvement with students is limited to the possibility of "overseeing work of students assigned to assist in custodial duties." *Id.* The job description is void of any reference to Catholicism or religion. In short, a housekeeper's job has absolutely nothing to do with Catholicism or religion at all, let alone any purported Catholic aspect of the University.

ARGUMENT

The University seeks to have the Board abandon its longstanding precedent of asserting jurisdiction over the secular, non-teaching employees of religiously affiliated organizations, and decline jurisdiction over all employees of religious educational institutions regardless of their job functions or role in fulfilling the institution's religious mission. This argument is predicated on the notion that the Board's assertion of jurisdiction over the housekeepers in this case would create an impermissible entanglement between government and religion prohibited by the

Establishment Clause. However, as discussed below, applying the Board's established precedent in this case would not foster such an entanglement.

I. The Board Should Apply *Hanna Boys Center* and Assert Jurisdiction Over the Secular, Non-teaching Employees of Religiously Affiliated Organizations

Consistent with existing and undisturbed precedent, jurisdiction should be exercised over the University's housekeepers, who play no educational role at the University. The Board has "traditionally asserted jurisdiction over those operations of religious and charitable organizations which are, in the generally accepted sense, commercial in nature." *See The Salvation Army, Inc.*, 225 NLRB 406, 406 (1976); *see also*, *The First Congregational Church*, 189 NLRB 911, 912 (1971) (Board asserted jurisdiction over cemetery providing services to the general public); *The First Church of Christ*, 194 NLRB 1006 (1972) (Board asserted jurisdiction over church's electricians and carpenters based on church's engagement in commercial publishing activities).[2]

To the extent that the U.S. Supreme Court's decision in *Catholic Bishop* altered that precedent, it did so only in its application to certain teachers at church-operated schools. As has been recognized in numerous Board and Appellate Court cases, the Court in *Catholic Bishop* addressed a narrow question: whether the Act gives the Board jurisdiction over teachers in church-operated schools. *NLRB v. World Evangelism, Inc.*, 656 F.2d 1349 (9th Cir. 1981).

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[2] By contrast, the Board has declined to exercise jurisdiction over the "secular employees of religious institutions, without whom the employers could not accomplish their religious missions." *See, e.g., St. Edmund's Roman Catholic Church*, 337 NLRB 1260, 1260 (2002); *Riverside Church*, 309 NLRB 806 (1992). Churches and similar institutions are exempt because of the Board's conclusion that they are not engaged in commercial activity. *Riverside Church*, 309 NLRB at 806 (Church revenue from commercial operations is de minimis, and petitioned-for employees did not spend substantial time in activities related to commercial activities). Such precedents have no application in the world of colleges and universities, which are unquestionably engaged in commerce on a large scale. *See Cornell University*, 183 NLRB 329, 334 (1970)(asserting jurisdiction over private colleges and universities "whose operations have a substantial effect on commerce").

Notably, in *NLRB v. Hanna Boys Center*, 940 F.2d 1295 (9th Cir. 1991), *cert. denied,* 504 U.S. 985 (1992), the Appellate Court affirmed the Board's decision to assert jurisdiction over lay child care workers, recreation assistants, cooks, cooks' helpers and maintenance workers of a Catholic residential facility for troubled youths. There, the employer had contended that, despite the fact that the unit petitioned for consisted solely of non-teaching employees, the *Catholic Bishop* exclusion applied. *Id.* at 1300. The Court rejected that argument. It explained that *Catholic Bishop* was confined to teachers based on their "critical and unique role . . . in fulfilling the mission of a church-operated school," and that the Court had expressly excluded other employees of parochial schools – whether professional or "blue collar – from its ruling. *Id.* at 1300-1302 (*quoting Catholic Bishop,* 440 U.S. at 501). As the Court noted, the Supreme Court in *Catholic Bishop* repeatedly discussed "the effect of board jurisdiction over teachers as teachers, not as proxies for other employees." *Id.* at fn.5. The Court concluded that the Board's exercise of jurisdiction over the employer's secular employees, who were not significantly involved in teaching, did not present the same "constitutional problems inherent in the relationship between teachers and church-operated schools." *Id.* at 1302. Thus, the *Catholic Bishop* exemption from Board jurisdiction applies only to certain teachers at church-operated schools. It does not, as the University claims in this case, exempt entire educational institutions from Board jurisdiction.

Indeed, the Board, with approval of the courts, has regularly limited the application of *Catholic Bishop's* exemption, and has exercised jurisdiction over non-teaching employees of non-profit religiously-affiliated organizations. *See e.g.*, *NLRB v. World Evangelism, Inc.*, 656 F.2d 1349 (9th Cir. 1981) (Board properly exercised jurisdiction over engineers at a building complex operated by a non-profit religious organization); *NLRB v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981) (Board's assertion of jurisdiction over childcare workers at an

emergency residential treatment center operated by a non-profit religious organization upheld); *Tressler Lutheran Home for Children v. NLRB*, 677 F.2d 302 (3rd Cir. 1982) (jurisdiction found over employees of a nursing home operated by a non-profit religious organization); *Catholic Social Services*, 355 NLRB 929 (2010) (asserting jurisdiction over day care workers employed by a non-profit religious organization); *Ecclesiastical Maintenance Services*, 325 NLRB 629, 630 (1998) (assertion of jurisdiction over cleaning and maintenance employees of a non-profit corporation formed by the Roman Catholic Archdiocese of New York).

The continuing validity of this precedent was acknowledged in *Pacific Lutheran University,* 361 NLRB No. 157 (2014). There, the Board limited its decision to units of faculty members at colleges and universities. *Pacific Lutheran University*, 361 NLRB No. 157, fn. 11. There was no need to discuss the application of the two-part test in that case to non-teachers, as the Board aptly noted that it "has long asserted jurisdiction over secular employees of nonprofit religious organizations other than schools, as well as over nonteaching employees at religious institutions that have an educational component as part of their mission." *Id.* Explaining the limitation of *Catholic Bishop* as it relates to teachers, the Board stated:

> According to the Court, if teachers play a "critical and unique role" in creating and sustaining a religious environment, the Board's assertion of jurisdiction over them could result in interference in management prerogatives and "open the door to conflicts between clergy-administrators and the Board." By contrast, where faculty members are not expected to play such a role in effectuating the university's religious mission and are not under religious control or discipline, the same sensitive First Amendment concerns of excessive entanglement raised by the Court are not implicated. In these circumstances, it is appropriate for the Board to assert jurisdiction for the same reasons that it is appropriate to assert jurisdiction over employees at other types of religious organizations, that is, because assertion of the Board's jurisdiction does not raise concerns under either the Free Exercise Clause or the Establishment Clause of the First Amendment.

Id. at *8 (*citing Catholic Social Services*, 355 NLRB at 929-930 and *Salvation Army*, 345 NLRB 550, 552 (2005)). The Board concluded that exercising jurisdiction over such employees would

not harm the university's religious mission and "does not impermissibly entangle the Board in any of the university's religious beliefs or practices." *Id.*

Asserting jurisdiction over the housekeepers in this case would not implicate the "same constitutional problems inherent in the relationship between teachers and church-operated schools." *See Hanna Boys Center*, 940 F.2d at 1302. The facts surrounding the relationship between the housekeepers and the University's religious principles are without dispute. The parties stipulated that religion plays no part in the hiring or retention of housekeepers. Housekeepers have not been instructed to disseminate religion as part of their employment and are not required to adhere to any specific religion. They perform standard janitorial and housekeeping tasks, are not required to be involved in any religious activities in their employment, and have limited or no involvement with the University's students. Jt. Ex. 1. Based on these facts, one cannot conclude that the Board's exercise of jurisdiction over the housekeepers would risk entanglement between government and religion. The University's housekeepers do not teach and are not relied upon in any way by the University to accomplish its purported religious mission. As is demonstrated by the parties' stipulations, they bear no relationship to the University's religious mission at all. As such, the Executive Director properly exercised jurisdiction over the housekeepers in this case. *See Hanna Boys Center*, 940 F.2d at 1302 (ultimately approving Board's exercise of jurisdiction over the employer's "secular employees who are not significantly involved in teaching"); *Ecclesiastical Maintenance Services, Inc.*, 325 NLRB at 630-631 (assertion of jurisdiction over employees of maintenance company engaged in providing cleaning services to facilities of the Archdiocese of New York).

II. The D.C. Circuit's *Great Falls* Decision Does Not Apply to Secular, Non-Teaching Employees.

In *University of Great Falls v. NLRB*, 278 F.3d 1335 (DC Cir. 2002), the D.C. Circuit reviewed a Board decision involving a petitioned-for unit of teaching faculty. In the underlying case, the Board followed the approach it had taken to faculty units since *Catholic Bishop*, deciding whether a religiously-affiliated school had a "substantial religious character." *University of Great Falls*, 331 NLRB 1663, 1664 (2000). The D.C. Circuit found that the Board's test implicated First Amendment concerns since it involved a potentially "intrusive inquiry" into the "religious mission" of the university. *University of Great Falls*, 278 F.3d at 1341.

Application of *Great Falls* to the instant case would require the Board to exclude church-operated schools, as entire units, from the coverage of the Act, a conclusion not required or supported by *Catholic Bishop*. *See Hanna Boys Center*, 284 NLRB at 1083 (1987). Indeed, the Board criticized such an approach in *Pacific Lutheran University*. There, the Board explained that *Great Falls'* sole focus on the institution's public representations of itself, while useful in avoiding an intrusive inquiry into the institution's religious beliefs, overreaches because it fails to consider whether the petitioned-for employees act in support of the institution's religious mission. *Pacific Lutheran University*, 361 NLRB No. 157 at *6. As the Board noted:

> The *Great Falls* test could deny the protections of the Act to faculty members who teach in completely nonreligious educational environments if the college or university is able to point to any statement suggesting the school's – but not faculty's – connection to religion, no matter how tenuous that connection may be. This approach goes too far in subordinating Section 7 rights and ignores federal labor policy as embodied by the Act.

Id. Pacific Lutheran University, like *Catholic Bishop*, involved a unit of teachers. In the instant case, it cannot be said that the housekeepers play a "critical and unique role . . . in fulfilling the mission of a church-operated school," that would serve as a basis for excluding them from the jurisdiction of the Act. *Catholic Bishop,* 440 U.S. at 501. Where, as here, a petition involves a group of non-teaching employees who admittedly have no role in disseminating the religious mission of the school, there is simply no need for any inquiry into the religious mission of the University. Thus, the *Great Falls* test is irrelevant.

III. Application of the Test Articulated in *Pacific Lutheran University* Would Also Result in the Board Exercising Jurisdiction over the Housekeepers

In *Pacific Lutheran University*, the Board reexamined its standard for when it should decline to exercise jurisdiction over faculty members at self-identified religious colleges and universities in light of *Catholic Bishop*. The Board developed a new standard for such cases, as follows:

> [W]e will not decline to exercise jurisdiction over faculty members at a college or university that claims to be a religious institution unless the college or university first demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment. Once that threshold requirement is met, the college or university must then show that it holds out the petitioned-for faculty members as performing a religious function. This requires a showing by the college or university that it holds out those faculty as performing a specific role in creating or maintaining the university's religious educational environment.

Pacific Lutheran University, 361 NLRB No. 157 at *1 [citations omitted].

Should the Board choose to apply this test in this case, it is without question that the Board must exercise jurisdiction over the housekeepers. Even assuming that the University has met the threshold requirement, that it hold itself out as providing a religious educational environment, the Region properly concluded – as the parties stipulated – that the University does

not hold out the petitioned-for employees as performing a religious function in furtherance of its religious mission. As is noted above, this test requires that the Board examine whether the faculty members are "held out as performing a *specific religious function*." *Pacific Lutheran University*, 361 NLRB No. 157, at *8 (emphasis in original). Here, it is clear that the housekeepers, whose essential functions are entirely related to standard janitorial and housekeeping tasks, perform no religious tasks. Further, the housekeepers' involvement with students is limited to the possibility of "overseeing work of students assigned to assist in custodial duties." Given these facts, the Board cannot conclude that the housekeepers are held out as performing a religious function for the University. As such, the Board is entitled to exercise jurisdiction in this case.

CONCLUSION

For the reasons discussed above, the Regional Director's Supplemental Decision and Order should be affirmed.

Respectfully submitted,

s/ Michele Cotrupe
Michele Cotrupe
Counsel for Petitioner SEIU Local 1

Service Employees International
Union, Local 1
111 E. Wacker Dr. Suite 2500
Chicago, IL 60601
Phone: (312) 233-8719
Fax: (312) 233-8848
cotrupem@seiu1.org

CERTIFICATE OF SERVICE

The undersigned attorney certifies that she cause a copy of the foregoing **SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1'S BRIEF IN SUPPORT OF THE REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION AND ORDER** to be served upon the following individuals via electronic filing and e-mail this 25th day of November, 2015:

Executive Secretary
NLRB
1099 14th Street N.W.
Washington, D.C. 20570-0001

Amy Moor Gaylord (amg@franczek.com)
Franczek Radelet P.C.
300 S. Wacker Dr., Suite 3400
Chicago, IL 60606

Mr. Peter Sung Ohr (peter.ohr@nlrb.gov)
Regional Director
NLRB Region 13
209 S. LaSalle St., Ste. 900
Chicago, IL 60606

By: s/ Michele Cotrupe
Michele Cotrupe

Michele Cotrupe
Associate Counsel
SEIU Local 1
111 E. Wacker Dr., Ste. 2500
Chicago, IL 60601
(312) 233-8719