

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SUBREGION 17

BETHANY COLLEGE	)		
	)		
and	)	Case No.	14-CA-201546
	)	and	14-CA-210584
THOMAS JORSCH, an Individual	)		
	)		
and	)		
	)		
LISA GUINN, an Individual	)		

**RESPONDENT BETHANY COLLEGE’S REPLY MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS THE CONSOLIDATED COMPLAINT OR, IN THE  
ALTERNATIVE, FOR SUMMARY JUDGMENT**

Dismissal, or in the alternative summary judgement, of the Consolidated Complaint is appropriate where as a matter of law the Board lacks jurisdiction over both Bethany College and the managerial employee whose complaints are at issue. As Counsel for the Acting General Counsel points out in its response, “the Board has the duty of determining in the first instance (the jurisdiction) of the National Labor Relations Board and that the Board’s determination must be accepted by reviewing courts if it has a reasonable basis in the evidence and *is not inconsistent with the law.*” NLRB v. E.C. Atkins & Co., 331 U.S. 398, 403 (1947) (emphasis added). Here, the Board’s assertion of jurisdiction over this matter is directly at odds with the law set forth by the Supreme Court in its rulings in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) and N.L.R.B. v. Yeshiva University, 444 U.S. 672, 682 (1980), and their progeny. There is no genuine issue of material fact as to the basic facts which clearly establish that Bethany College is a religious educational institution exempt from the Act, and that Mr. Jorsch is a managerial employee exempt from the Act. Thus, dismissal and/or a grant of summary judgment in favor of Respondent is appropriate for lack of jurisdiction.

## LEGAL ARGUMENTS & AUTHORITIES

### **I. The NLRB cannot overcome binding Supreme Court precedent which dictates that it is without jurisdiction over Bethany College as a religious educational institution.**

There is no doubt that the Supreme Court's ruling in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) determined that Congress did not intend for the NLRB's jurisdiction to include religious educational institutions and their faculty. The facts establishing Bethany College's status as such are without a doubt and not subject to any genuine dispute. The arguments of Counsel for the Acting General Counsel to the contrary are merely an attempt to avoid the inevitable and inescapable conclusion that the NLRB is without jurisdiction over this matter.

President William Jones of Bethany College has presented an affidavit swearing to the veracity of the documents and records which demonstrate the College's status as an entity which (a) holds itself out to the public as a religious institution; (b) is nonprofit; (c) is religiously affiliated. University of Great Falls v. NLRB, 278 F.3d 1335, 1347 (2002); Exhibit 1, Jones Affidavit. The Student Handbook, College website and College's Amended and Restated Bylaws all demonstrate the College clearly holds itself out to the public as providing a religious educational environment. See Exhibits B, C, D & E to Jones Affidavit. Furthermore, the College's Certificate of Amendment and Restatement of Articles of Incorporation dated June 16, 2010 (Exhibit A to Jones Affidavit) describe the College as a not-for-profit corporation with its goals to "establish and maintain a Christian institution of higher education . . . to serve Jesus Christ and His church by training men and women who seek a liberal arts education under Christian auspices; and to acquaint these students with the cultural, intellectual and religious forces in the field of higher education." Finally, those same Articles demonstrate that the College

is a college of the Evangelical Lutheran Church of America, “approved by the Central States and Arkansas-Oklahoma Synods of the Evangelical Lutheran Church in America.”

Counsel for the Acting General Counsel’s response suggests that the test for exclusion is something that is fact intensive and requires findings of fact. The response goes on to describe the NLRB’s Pacific Lutheran jurisdictional test for a religiously-affiliated higher education institution. See Response, pp. 2-4. The response fails to challenge, question, or otherwise dispute any of the facts set forth through Mr. Jones’ affidavit and the accompanying records of the College set forth with Respondent’s Motion to Dismiss. See generally Response. The response further fails to specify what additional testimony and evidence related to the jurisdictional inquiry set forth by the NLRB and the test in Catholic Bishop would be necessary beyond what has already been provided in order to make this determination. Finally, the response does not present any facts contrary to the documentary evidence attached and incorporated to the Motion to Dismiss or in the Alternative for Summary Judgment sufficient to create any genuine issue of material fact. The response fails to even question any fact from Respondent’s Motion. The facts here demonstrate without any doubt that Bethany College is entity which (a) holds itself out to the public as a religious institution; (b) is nonprofit; (c) is religiously affiliated. University of Great Falls, 278 F.3d at 1347. Any further inquiry, through which Counsel for Acting General Counsel will not be able to present any evidence to the contrary, would result in exactly the type of inquiry held unconstitutional by the Supreme Court in Catholic Bishop. The Board is without jurisdiction over the College and the charges herein should be dismissed in their entirety.

**II. The NLRB cannot overcome binding Supreme Court precedent which dictates that it is without jurisdiction over the Consolidated Complaint where Mr. Jorsch is a managerial employee.**

Even assuming for a moment that the Board does have jurisdiction over Respondent contrary to binding U.S. Supreme Court precedent, it still does not have any jurisdiction over the Consolidated Complaint where Mr. Jorsch is a managerial employee. In response, Counsel for the Acting General Counsel similarly asserts that the managerial employee test is a factual one, as set forth in N.L.R.B. v. Yeshiva University, 444 U.S. 672, 682 (1980) and “refined” by the Board in Pac. Lutheran Univ. & Serv. Employees Int'l Union, Local 925, 361 NLRB No. 157 (Dec. 16, 2014). Despite the asserting that this test involves genuine issues of material fact, the Response of Counsel for the Acting General Counsel fails to specify any single fact which is in dispute. Through its Motion to Dismiss or in the Alternative Summary Judgement Respondent has demonstrated that either Yeshiva or the Board’s attempted refinement of that standard, Thomas Jorsch, as a tenure-track professor, was an employee and faculty member with sufficient depth and breadth of authority to fall under the Act’s exception for managerial employees.

Faculty at Bethany College have the power to attend and vote at regular faculty meetings, enforce and determine academic standards, suspend and expel students, and establish academic policies and procedures. Handbook, Exhibit F to Jones Affidavit. The Employee Handbook expressly states in its Constitution for Faculty Governance that faculty, through the Faculty Senate, have “direct participation in the process of decision-making affecting the life of Bethany College.” Exhibit F to Jones Affidavit, p. 42. The Handbook demonstrates that faculty “authority in academic matters is absolute.” Faculty decide “what courses will be offered, when they will be scheduled, and to whom they will be taught . . . teaching methods, grading policies, and matriculation standards” and “. . . effectively decide which students will be admitted, retained, and graduated.” Yeshiva, 444 U.S. at 686. Mr. Jorsch was involved the decision-making in all five of the areas set forth under Yeshiva and Pacific Lutheran as a faculty senate

member, Core Advisory Committee member, and Higher Learning Commission Study committee member. Exhibits G, H, I, J, K, L, M and N to Jones Affidavit. Counsel's response does not challenge or otherwise call into question any fact or evidence presented by Respondent sufficient to create any genuine issue of material fact. Indeed, the response does not even discuss any of the particular facts which would establish Mr. Jorsch as a managerial employee, because it is clear that they are not in dispute.

Mr. Jorsch, and other faculty of Respondent, clearly determined the product to be produce, terms upon which it is offered, and the customers who will be served as required under Yeshiva. Under the NLRB's breadth and depth tests set forth in Pacific Lutheran, Mr. Jorsch is clearly a managerial employee exempt from the Act, depriving the Board of jurisdiction and meriting dismissal.

### CONCLUSION

Respondent respectfully requests dismissal of all the charges, or in the alternative a grant of summary judgment in its favor dismissing all charges made against it in this matter. As a matter of law, the Board is without jurisdiction over Bethany College under Catholic Bishop as a religiously-affiliated educational institution—which Counsel for Acting General Counsel cannot present any argument or even evidence to overcome. Furthermore, Mr. Jorsch is clearly a managerial employee also exempt from the Act where he was able to act with sufficient breadth and depth of authority under Yeshiva and Pacific Lutheran. Counsel for Acting General Counsel does not challenge the authorities or the facts presented by Respondent. There is no genuine issue of material fact, and judgment as a matter of law is appropriate. Thus, Respondent respectfully request dismissal of all charges for a lack of jurisdiction over the College and Mr. Jorsch in all respects.

Respectfully submitted,

McANANY, VAN CLEAVE & PHILLIPS, P.A.  
10 E. Cambridge Circle Drive, Suite 300  
Kansas City, Kansas 66103  
Telephone: (913) 371-3838  
Facsimile: (913) 371-4722  
E-mail: [ggoheen@mvplaw.com](mailto:ggoheen@mvplaw.com)

By: /s/ Gregory P. Goheen  
GREGORY P. GOHEEN #16291

Attorneys for Respondent

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was filed using the National Labor Relations Board E-file system on this 20<sup>th</sup> day of November, 2017 and that I served the same upon the following representatives via electronic mail on the same date:

Mary G. Taves  
Officer-in-Charge  
National Labor Relations Board  
Subregion 17  
8600 Farley Street, Suite 100  
Overland Park, Ks 66212

Rebecca Proctor  
Field Attorney  
National Labor Relations Board  
Subregion 17  
8600 Farley Street, Suite 100  
Overland Park, Kansas 66212

and

Shawn Ford  
Lewis Brisbois Bisgaard & Smith  
1605 N. Waterfront Pkwy, Suite 150  
Wichita, KS 67206-1895  
Attorneys for Complainants

/s/ Gregory P. Goheen