

FEB 28 2018

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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DUQUESNE UNIVERSITY OF THE  
HOLY SPIRT,

Petitioner,

v.

NATIONAL LABOR RELATIONS  
BOARD,

Respondent.

No. 18-1063

**PETITION FOR REVIEW OF A DECISION AND ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD**

Pursuant to 29 U.S.C. § 160(f) and Rule 15(a) of the Federal Rules of Appellate Procedure, Duquesne University of the Holy Spirit (the "University"), a Catholic and Spiritan university, hereby petitions this Court for review of the Decision and Order issued by the National Labor Relations Board ("NLRB") in the case captioned as Duquesne University of the Holy Spirit and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, Case 06-CA-197492 ("Order"), and entered on February 28, 2018. A copy of the public version of this Order is attached as Exhibit A to this petition.

The Order concludes that the NLRB has jurisdiction over the University in a matter involving a unit of faculty employed by the Catholic, Spiritan University,

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and that the University committed an unfair labor practice under Subsections 8(a)(1) and 8(a)(5) of the National Labor Relations Act for refusing to bargain with the union on jurisdictional grounds. 29 U.S.C. § 160(f) grants the University the right to obtain review of the Order “in the United States Court of Appeals for the District of Columbia.” This Court should set aside the Order because the Board lacks jurisdiction under the Supreme Court’s ruling in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and this Court’s rulings in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), and *Carroll College, Inc. v. NLRB*, 555 F.3d 568 (D.C. Cir. 2009). The Order should also be set aside because it violates the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1.

Respectfully submitted,

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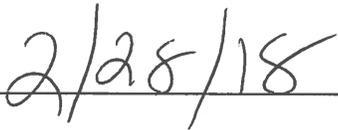
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Dated: \_\_\_\_\_



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FOR DISTRICT OF COLUMBIA CIRCUIT

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Duquesne University of the Holy Spirit (the "University") hereby submits the following Corporate Disclosure Statement.

The University is organized under the Pennsylvania Nonprofit Corporation Law of 1988, as amended and is exempt from federal income taxation under § 501(c)(3) of the Internal Revenue Code of 1986, as amended. The University has no parent corporation, and no publicly held corporation owns 10% or more of its stock. The University's Amended and Restated Articles of Incorporation provide that in addition to a Board of Directors, the University has Members, which include the Provincial Superior, the Provincial Councillors, and such other vowed members of the Congregation of the Holy Spirit Province of the United States as are appointed by the Provincial Superior with the consent of the

Provincial Council so that at all times there are six (6) Members and not more than ten (10) Members. The Members have the following full and exclusive reserved powers: (i) to determine or change the mission, the philosophy, objectives or purpose of the University; (ii) to elect and to remove, with or without cause, any individual to or from the Board of Directors; (iii) to amend, alter, modify, or repeal the Articles of Incorporation or the Bylaws; (iv) to approve the sale, purchase or encumbrance of real property as set forth in the Bylaws; (v) to approve any merger, consolidation or acquisition or creation of a subsidiary organization with respect to the University; (vi) to liquidate and dissolve the University and to determine the distribution of its assets upon dissolution; (vii) to approve any new indebtedness incurred by the Corporation as set forth in the Bylaws; (viii) to issue to the Board, from time to time, a statement of policy concerning the philosophy and mission of the University; (ix) to request information from and receive an annual financial report from the Board; (x) to confirm the Board's election and appointment of the Officers of the University and Officers of the Board, and to approve any written employment contract between any of the aforesaid Officers and the University; and (xi) to approve legal actions taken in the name of or on behalf of the University other than routine legal actions such as the collection of outstanding accounts receivable and actions taken in defense of claims brought against the University.

Respectfully submitted,



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*Of Counsel*

*Counsel for Duquesne University of  
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Dated: 2/28/18

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, true and correct copies of the foregoing Petition for Review and Corporate Disclosure Statement were sent by Federal Express, to the following:

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Dated: 2/28/18

# EXHIBIT A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**Duquesne University of the Holy Spirit and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO, CLC**  
Case 06-CA-197492

February 28, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE  
AND EMANUEL

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on April 24, 2017 by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO, CLC (the Union), on May 8, 2017, the General Counsel issued the complaint alleging that Duquesne University of the Holy Spirit (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain following the Union's certification in Case 06-RC-080933. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer and an amended answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On May 26, 2017, the General Counsel filed a Motion for Summary Judgment. On May 31, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Regional Director for Region 6's certification of the Union on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the Board lacks jurisdiction over the Respondent, a Catholic university, pursuant to *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and that the Board's test for asserting its jurisdiction, as set forth in *Pacific Lutheran University*, 361 NLRB 1404 (2014), constitutes an unconstitutional intrusion into the Respondent's religious liberty.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.<sup>1</sup>

On the entire record, the Board makes the following Findings of Fact

I. JURISDICTION

At all material times, the Respondent has been a Pennsylvania corporation engaged in the operation of a private, nonprofit university of higher education.<sup>2</sup>

During the 12-month period ending March 31, 2017, in conducting its operations described above, the Respondent derived gross revenues in excess of \$1 million, and purchased and received at the Respondent's facility, products, goods, and materials valued in excess of \$50,000 directly from points located outside the Commonwealth of Pennsylvania.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7), and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the representation election held by mail ballot between June 22, 2012 and July 9, 2012, in which a majority of the employees voted for the Union, the Regional Director for Region 6 certified the Union<sup>3</sup> on

<sup>1</sup> Chairman Kaplan and Member Emanuel did not participate in the underlying representation proceeding. They express no opinion on the merits of the Board's decision in that proceeding or on whether *Pacific Lutheran University*, 361 NLRB 1404 (2014), was correctly decided. Nonetheless, they agree that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

<sup>2</sup> In its amended answer, the Respondent denies the complaint allegation that it has been, at all material times, "a Pennsylvania corporation with its sole facility in Pittsburgh, Pennsylvania [and] has been operating a private nonprofit university of higher education." However, in its amended answer, it admits that "it is organized as a Pennsylvania Membership Corporation, maintains its sole facility in Pittsburgh, Pennsylvania, and operates a private, Catholic nonprofit university of higher education."

<sup>3</sup> By unpublished Order dated April 10, 2017, the Board issued an Order excluding part-time adjunct faculty in the department of theology

April 19, 2017, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All part-time adjunct faculty employed by the Employer in the McAnulty College and Graduate School of Liberal Arts located in Pittsburgh, Pennsylvania; excluding all Department of Theology part-time adjunct faculty, all full-time faculty, graduate students, staff and administrators, office clerical employees and guards, other professional employees and supervisors as defined in the Act, and all other employees.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

#### *B. Refusal to Bargain*

By letter dated April 19, 2017, the Union requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit employees. Since about April 21, 2017, the Respondent has failed and refused to do so.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSION OF LAW

By failing and refusing, since April 21, 2017, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785, 787 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226,

from the unit found appropriate and denied the Respondent's request for review in all other aspects. *Duquesne University of the Holy Spirit*, 06-RC-080933, 2017 WL 1330294.

229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

#### ORDER

The National Labor Relations Board orders that the Respondent, Duquesne University of the Holy Spirit, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO, CLC (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All part-time adjunct faculty employed by the Employer in the McAnulty College and Graduate School of Liberal Arts located in Pittsburgh, Pennsylvania; excluding all Department of Theology part-time adjunct faculty, all full-time faculty, graduate students, staff and administrators, office clerical employees and guards, other professional employees and supervisors as defined in the Act, and all other employees.

(b) Within 14 days after service by the Region, post at its facility in Pittsburgh, Pennsylvania, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

DUQUESNE UNIVERSITY OF THE HOLY SPIRIT

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means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 21, 2017.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February, 28, 2018

Marvin E. Kaplan, Chairman

Mark Gaston Pearce, Member

William J. Emanuel, Member

the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

All part-time adjunct faculty employed by us in the McNulty College and Graduate School of Liberal Arts located in Pittsburgh, Pennsylvania; excluding all Department of Theology part-time adjunct faculty, all full-time faculty, graduate students, staff and administrators, office clerical employees and guards, other professional employees and supervisors as defined in the Act, and all other employees.

DUQUESNE UNIVERSITY OF THE HOLY SPIRIT

The Board's decision can be found at <https://www.nlr.gov/case/06-CA-197492> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

(SEAL) NATIONAL LABOR RELATIONS BOARD  
APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO, CLC (the Union) as

