UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TOM JORSCH AND LISA GUINN,	)	
	)	
Petitioners,	)	Petition for Review
	)	
v.	)	Case No. 20-1385
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent.	)	

PETITION FOR REVIEW

Petitioners Tom Jorsch and Lisa Guinn hereby petition this Court for review of the Decision and Order of the National Labor Relations Board (369 NLRB No. 98, Cases 14–CA–201546 and 14–CA–201584), entered on June 10, 2020, dismissing all of the complaint allegations against Respondent Bethany College, including but not limited to the allegations that Petitioners Jorsch and Guinn were discharged in violation of the National Labor Relations Act. A copy of the Decision and Order is attached (Ex. A), along with a copy of the Corrected Order of the Board, entered on August 11, 2020, denying the Charging Parties' Motion for Reconsideration (Ex. B).

The Decision and Order is a final order of the Board within the meaning of Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f). Tom Jorsch and Lisa Guinn are parties aggrieved by the Decision and Order, and per Section 10(f) may obtain review of the Decision and Order in the United States

Court of Appeals for the District of Columbia. The Decision and Order, finding that the Board cannot exercise jurisdiction over faculty of the Respondent, is not supported by substantial evidence and does not have a reasonable basis in law and is contrary to law.

Tom Jorsch and Lisa Guinn pray that the Court set aside the Decision and Order in whole, find that the Board has jurisdiction, and order any further relief to which the Petitioners may be granted.

Respectfully submitted,

SCHUCHAT, COOK & WERNER

/s/: Christopher N. Grant

Christopher N. Grant (MO Bar #53507)
555 Washington Ave, Suite 520
St. Louis, Missouri 63101
(314) 621-2626
(314) 621-2378 (fax)
cng@scwattorney.com

Jim Coppess
American Federation of Labor and
Congress of Industrial Organizations
815 16th Street, NW
Washington, DC 20006
(202) 637-5337
(202) 637-5323 (fax)
jcoppess@aflcio.org

CERTIFICATE OF SERVICE

I certify on this 23rd day of September 2020, I caused the foregoing document to be served by US first-class mail on the following:

Peter B. Robb
General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570

William Cohen
Acting Regional Director
National Labor Relations Board,
Region 14
1222 Spruce Street, Room 8.302
St. Louis, Missouri 63103

Carla Coffman
Officer-in-Charge
National Labor Relations Board,
Subregional Office 17
8600 Farley Street, Suite 100
Overland Park, KS 66212

Rebecca Proctor
Field Attorney
National Labor Relations Board,
Subregional Office 17
8600 Farley Street, Suite 100
Overland Park, KS 66212

Gregory Goheen
McAnany, Van Cleave & Phillips, P.A.
10 E. Cambridge Circle Drive,
Suite 300
Kansas City, KS 66103

/s/: Christopher N. Grant
Christopher N. Grant

Dated: September 23, 2020

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.

Bethany College *and* Thomas Jorsch *and* Lisa Guinn.
Cases 14–CA–201546 and 14–CA–201584

June 10, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

The threshold and dispositive issue in this case is whether the Board can exercise jurisdiction over the faculty of the Respondent, a self-identified religious institution of higher education.[1] Applying *Pacific Lutheran University*, 361 NLRB 1404 (2014), the judge answered that jurisdictional question in the affirmative. With the case now before us on exceptions, the General Counsel has changed position and urges us to reverse the judge and dismiss the complaint by overruling *Pacific Lutheran* in relevant part and adopting the jurisdictional test announced by the United States Court of Appeals for the District of Columbia Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002).

We agree with the General Counsel. It is clear to us that the *Great Falls* decision correctly interpreted the Supreme Court's holding in *NLRB v. Catholic Bishop of Chicago*[2] and properly concluded that the exercise of Board jurisdiction over religious schools in matters involving faculty members will inevitably involve inquiry into the religious tenets of these institutions. We agree that such inquiry would impermissibly present a significant risk that the protections set forth in the Religion Clauses of the First Amendment of the Constitution would be infringed.[3] We also agree with the D.C. Circuit that the Board's *Pacific Lutheran* test fails to avoid that risk. *Duquesne University of the Holy Spirit v. NLRB*, 947 F.3d 824 (D.C. Cir. 2020), petition for en banc consideration filed No. 18-1063 (D.C. Cir. Feb. 25, 2020).

Accordingly, we have decided to overrule *Pacific Lutheran* in relevant part[4] and to adopt the D.C. Circuit's three-pronged standard announced in *Great Falls.*[5] Specifically, in determining whether to assert jurisdiction over the faculty of an educational institution claiming exemption under the principles set forth in *Catholic Bishop*, we will inquire only whether the institution (a) holds itself out to the public as a religious institution, (b) is nonprofit, and (c) is religiously affiliated. Applying the *Great Falls* test in this case, we reverse the judge's decision and dismiss the underlying unfair labor practice complaint.

I.

Catholic Bishop of Chicago

In 1975, the Board asserted jurisdiction over separate units of lay teachers at two groups of Catholic high schools, one controlled by the Bishop of Chicago and the other by the Diocese of Fort Wayne-South Bend in Indiana. In asserting jurisdiction over the schools, the Board relied on its extant policy of declining jurisdiction over religiously sponsored organizations only where they were "'completely religious, not just religiously associated.'" *Catholic Bishop of Chicago*, 220 NLRB 359, 359 (1975) (quoting *Roman Catholic Archdiocese of Baltimore*, 216 NLRB 249, 250 (1975)).

After the Seventh Circuit Court of Appeals denied enforcement of the Board's underlying decision,[6] the case was heard by the Supreme Court, which rejected the Board's decision to exercise jurisdiction. In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Court first concluded that if the National Labor Relations Act authorized Board jurisdiction over church-operated schools and their lay teachers, there would be a "significant risk that the First Amendment will be infringed," and the Court could be forced to "resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." Id. at 501–502, 507.

The Court emphasized the "critical and unique role of the teacher in fulfilling the mission of the school," irrespective of whether the teacher provides instruction in religious or secular subjects. Id. at 501. It also provided two specific examples of significant risk that the exercise of Board jurisdiction would infringe First Amendment rights under the Religion Clauses. First, the Court recognized that if the Board were to exercise jurisdiction over matters

[1] On October 31, 2018, Administrative Law Judge Christine E. Dibble issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Parties filed answering briefs, and the Charging Parties filed cross exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

[2] 440 U.S. 490 (1979).

[3] Specifically, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." This provision contains two clauses, the Establishment and Free Exercise Clauses, which are often collectively referred to as the "Religion Clauses" of the First Amendment, and we will use that designation here.

[4] We note that this case does not present the issue whether the standard for determining the managerial status of faculty set forth, and applied, in *Pacific Lutheran* is appropriate. See *Pacific Lutheran*, 361 NLRB at 1417–1428. In fact, the managerial status issue will be mooted in any case where a religiously affiliated school is deemed exempt from Board jurisdiction under the *Great Falls* standard we adopt today.

[5] 278 F.3d at 1347.

[6] 559 F.2d 1112 (7th Cir. 1977) (denying enforcement of *The Catholic Bishop of Chicago*, 224 NLRB 1221 (1976)).

involving teachers at a religious school, the resolution of certain unfair labor practice charges would "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." Id. at 502. Second, with respect to bargaining relationships subjected to the Board's jurisdiction, the Court observed that "[t]he Board will be called upon to decide what are 'terms and conditions of employment' and therefore mandatory subjects of bargaining" under Section 8(d) of the Act. Id. at 502–503. This would inevitably "implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions," giving "'rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.'" Id. at 503 (quoting *Lemon v. Kurtzman,* 403 U.S. 602, 616 (1971)). Accordingly, consistent with its "prudential policy" of constitutional avoidance, the Court "declin[ed] to construe the Act" to permit the Board's exercise of jurisdiction "in the absence of a clear expression of Congress' intent to bring teachers at church-operated schools within the jurisdiction of the Board." Id. at 501, 507.

II.

Judicial Rejection of the Board's Substantial Religious Character Test

Subsequent to the *Catholic Bishop* decision, the Board decided on a case-by-case basis whether a religiously affiliated school had a "substantial religious character," and, if that was not established, the Board would exercise jurisdiction over the school at issue. These attempts to test the limits of the *Catholic Bishop* decision, however, were consistently rejected by reviewing courts, even when applied to college-level education. See *Carroll College v. NLRB*, 558 NLRB 568 (D.C. Cir. 2009); *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002); *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1986) (en banc); *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980).

Bayamon involved the court's review of the Board's assertion of jurisdiction under the "substantial religious character" test over a private Roman Catholic university claiming exemption under *Catholic Bishop*. In an evenly divided en banc decision, the First Circuit denied enforcement of the Board's order in the underlying case. In an opinion written for the judge's finding that the Board lacked jurisdiction, then-Judge Breyer rejected the Board's finding that the university was not church-controlled, 793 F.2d 399–400, but found that the school could be properly described, in respect to its mission, as an institution "'with admittedly religious functions but whose predominant higher education mission is to provide . . . students with a secular education.'" Id. at 401 (quoting *Tilton v. Richardson*, 403 U.S. 672, 687 (1971)) (ellipsis in original). Finding that Board precedent reflected a conscious policy not to apply *Catholic Bishop* to an institution of higher education so described, then-Judge Breyer proceeded to detail reasons why this policy was legally mistaken.

"First, the language of *Catholic Bishop* itself does not distinguish colleges from primary and secondary schools." Id. at 401. Second, the assertion of Board jurisdiction over religiously affiliated colleges and universities would pose the same or greater specific risks of state/religion entanglement that the Supreme Court said would result at the secondary school level. Third, and perhaps most importantly, the failure to apply *Catholic Bishop* to religiously affiliated institutions of higher education "would undercut that opinion's basic rationale and purpose." Id. at 402. The Supreme Court there sought to minimize the extent to which the Board's inquiry into the nature of such institutions under the completely religious test—an inquiry that involves delving into matters of curriculum, teaching, and counseling—"would itself entangle the Board in religious affairs." The Board's failure to apply this rationale at all educational levels would necessarily entangle the Board and the courts in the development of a variety of new distinctions and controls over the Board's efforts to examine religious matters. "These ad hoc efforts, the application of which will themselves involve significant entanglement, are precisely what the Supreme Court in *Catholic Bishop* sought to avoid." Id. at 402–403.

The subsequent D.C. Circuit decision in *Great Falls* likewise involved judicial review of the Board's assertion of jurisdiction, under the "substantial religious character" test, over the faculty of a private Roman Catholic university claiming exemption under *Catholic Bishop*. In the underlying Board case, the regional director "issued a decision extensively exploring the evidence of religious faith, practice and mission at the University" and, thereafter, concluded that the Board should exercise jurisdiction because "'propagation of a religious faith is not the primary purpose of the [University], but rather . . . the University's purpose and function are primarily secular.'" 278 F.3d at 1338, 1340 (quoting *University of Great Falls*, 331 NLRB 1663, 1665 (2000)). The Board adopted the regional director's findings, agreeing that the University did not have a "substantial religious character" and that it was therefore distinguishable from the schools at issue in *Catholic*

Bishop. Id. at 1340 (citing *Great Falls*, 331 NLRB at 1665–1666).

Upon review, the D.C. Circuit found that the "substantial religious character" test involved the same "intrusive inquiry" and same "*exact* kind of questioning into religious matters which *Catholic Bishop* specifically sought to avoid," with "the NLRB trolling through the beliefs of the University, making determinations about its religious mission, and that mission's centrality to the 'primary purpose' of the University." 278 F.3d at 1341–1343 (emphasis in original); see also *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 343–344 (1987) (finding that the attempt to decide which activities in an organization are secular as opposed to religious improperly entangles the government in religious affairs and creates a risk of chilling religious activity).

After rejecting the Board's test, the court concluded that in order to properly determine when the *Catholic Bishop* exemption from Board jurisdiction over faculty members at an allegedly religiously affiliated school should apply, a "bright line" test based on objective facts was required. Drawing partially from Judge Breyer's opinion in *Bayamon,* the court promulgated a three-prong test, under which the Board "must decline to exercise jurisdiction" over an institution that (a) "holds itself out to students, faculty, and community as providing a religious educational environment"; (b) is "organized as a nonprofit"; and (c) is "affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion." *Great Falls*, 278 F.3d at 1343–1344, 1347 & fn. 2. As the court explained, this test would allow the Board "to determine whether it has jurisdiction without delving into matters of religious doctrine or motive, and without coercing an educational institution into altering its religious mission to meet regulatory demands." Id. at 1345. At the same time, the test "provides the Board and the courts with some assurance that the institutions availing themselves of the *Catholic Bishop* exemption are *bona fide* religious institutions." Id. at 1344.

The D.C. Circuit reaffirmed the *Great Falls* test 7 years later in *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009). Declining to enforce a Board order requiring that yet another Roman Catholic–affiliated college bargain with a union representing a faculty employee unit, the court stated that the Board "should have known immediately" that exercising jurisdiction in that matter violated the bright-line *Great Falls* test. Id. at 574. The court went on to explain that the only permissible inquiry relative to prong one of that test is limited to considering the school's "public representations as to its religious educational environment" and that, for constitutional reasons, any further inquiry is improper. Id. at 572–573.

III.

Pacific Lutheran University

In 2014, a Board majority attempted to craft still another approach testing the limits of *Catholic Bishop*'s jurisdictional holding. In *Pacific Lutheran University*, 361 NLRB at 1404, a union filed a petition to represent a unit of all nontenure-eligible contingent faculty members employed by the university. Despite finding that the university held itself out as "creating a religious educational environment," id. at 1415, ostensibly accepting the first prong of the *Great Falls* test, the majority nevertheless concluded that an additional "holding out" inquiry was required in order to determine whether the Board should assert jurisdiction. The majority held that a religious college or university seeking to establish that it was exempt from the Board's jurisdiction also has to show that "it holds out the petitioned-for faculty members *themselves* as performing a *specific role* in creating or maintaining the college or university's religious educational environment, as demonstrated by its representations to current or potential students and faculty members, and the community at large." Id. at 1414 (emphasis added).

This second-step inquiry into the specific role played by petitioned-for faculty members effectively became the focal point of the new jurisdictional test. The Board majority reasoned that "[f]aculty members who are not expected to perform a specific role in creating or maintaining the school's religious educational environment are indistinguishable from faculty at colleges and universities which do not identify themselves as religious institutions and which are indisputably subject to the Board's jurisdiction." Id. at 1411. The Board reasoned that it would be unfair to deny those faculty in a religious school the same rights under the Act as enjoyed by faculty in undisputedly secular schools. The majority claimed to avoid the risk of impermissible inquiry into religious beliefs by purportedly applying the same objective "holding out" standard to the examination of faculty roles that the *Great Falls* court applied to the school itself. However, the specific description of that standard belied this claim:

> Although we will not examine faculty members' actual performance of their duties, we shall require that they be held out as performing *a specific religious function.* Generalized statements that faculty members are expected to, for example, support the goals or mission of the university are not alone sufficient. These types of representations do not communicate the message that the religious nature of the university affects faculty members' job duties or requirements. 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.

Id. (italics in original).

Applying the new test, the Board found it appropriate to exercise jurisdiction over Pacific Lutheran University and the petitioned-for contingent faculty members, based on its conclusion that there was nothing in the University's "governing documents, faculty handbook, website pages, or other material" that would suggest to students, faculty, or the community that the faculty members at issue "perform any religious function." Id. at 1416.

Members Miscimarra and Johnson each dissented from the *Pacific Lutheran* majority's holding that the *Catholic Bishop* jurisdictional exemption for religious schools should only apply if faculty members are held out "as performing *a specific religious function*." Among numerous arguments made by the dissenters, Member Johnson observed that the specific religious function requirement of *Pacific Lutheran* "not only fails to avoid the First Amendment questions, it plows right into them at full tilt" by again calling on the Board "to judge the religiosity of the functions that the faculty perform." Id. at 1433–1434.

As mentioned above, the D.C. Circuit recently rejected the Board's *Pacific Lutheran* test in *Duquesne University*, 947 F.3d at 824. A panel majority there determined that the circuit's prior decisions in *Carroll College* and *Great Falls* were conclusive of the jurisdictional issue. It rejected the argument that the *Great Falls* "bright line" test permits the Board to assert jurisdiction over an educational institution that meets the three-part test based on the roles played by its faculty. As the court explained, "it makes no difference whether the adjuncts are faculty members *who play a role in Duquesne's religious educational environment*." Id. at 833 (emphasis in original). "The Board may not 'dig deeper' by examining whether faculty members play religious or non-religious roles, for '[d]oing so would only risk infringing upon the guarantees of the First Amendment's Religion Clauses.'" Id. (quoting *Carroll College v. NLRB*, 558 F.3d at 572). The court further explained that its "refusal [in *Great Falls*] to examine the roles played by various faculty members followed directly from *Catholic Bishop*," where "the Supreme Court did not differentiate between teachers who play religious roles and those who play secular roles, but rather held that the Board lacked jurisdiction over *all* teachers at church-operated schools." Id. at 834 (emphasis in original) (citing *Catholic Bishop*, 440 U.S. at 501).

The *Duquesne* court rejected the assertion in *Pacific Lutheran* that an inquiry into the way in which faculty members were held out to the public would not risk infringement on First Amendment rights. In support of its position, the *Pacific Lutheran* decision attempted to suggest types of conduct that would pass its test and types that would not. For example, the decision deemed "indoctrination" to be "sufficiently religious," but found that "supporting religious goals" was not. 947 F.3d at 835. The court concluded that such attempts at "line-drawing" or "second-guessing" are themselves an impermissible substitution of the Board's views about what constitutes religious activity for educational institutions' own views on the matter. As the court found, such attempts "minimize the legitimacy of the beliefs expressed by a religious entity" and present a risk of conflict with the Religion Clauses of the Constitution. Id. at 835–836 (citations omitted).

IV.

Pacific Lutheran is Overruled and the *Great Falls* Test is Adopted

For the reasons set forth in *Catholic Bishop*, in the court opinions applying the tenets of that decision, and in the dissenting opinions in *Pacific Lutheran*, we hold that *Pacific Lutheran* must be overruled as inherently inconsistent with the binding rationale of the Supreme Court in *Catholic Bishop*. Our analysis begins, as it must, with the clear mandate in the First Amendment of the Constitution that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Religion Clauses limit government involvement in the affairs of religious groups and also safeguard the freedom to practice religion, whether as an individual or as a part of a group. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181–190 (2012). As the Supreme Court has recognized, "[t]he values enshrined in the First Amendment plainly rank high on the scale of our national values." *Catholic Bishop*, 440 U.S. at 501.

We recognize that the Board has an important mission to protect employees' rights set forth in the National Labor Relations Act, but those rights are subordinate to those enshrined in the Constitution where there is a potential conflict between the two. The fundamental flaw in *Pacific Lutheran* was the majority's refusal to accept this reality. As Member Johnson stated in his *Pacific Lutheran* dissent, the majority in that case persisted in the fundamentally mistaken assumption that the Board may engage in a balancing of competing statutory and constitutional interests. We agree with Member Johnson's assertion that

> [t]here is no balancing test, because no federal statute commands the gravitas of the Constitution. Simply stated, while the Act is of paramount importance in almost every other scenario—it is dwarfed by the First Amendment's protection of religion. Instead of a balancing act of any kind, what *Catholic Bishop* and the doctrine of constitutional avoidance establish is a warning for us: "make absolutely sure the Act was intended to encompass religious universities, and that the Act mandates your test of jurisdiction for teachers at those universities" before we impose it on religious universities.

361 NLRB at 1432. As to that point, *Catholic Bishop* provides the answer: "There is no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act." 440 U.S. at 504. Accordingly, the Court effectively mandated that the Act be interpreted to avoid the substantial risk of infringement of the rights contained in the Religion Clauses that the exercise of Board jurisdiction over teachers at religious schools would pose. The *Catholic Bishop* Court could not have been clearer: "We see no escape," it said, "from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow." Id.

Despite this clear message, the Board, which has no expertise in matters of constitutional interpretation and is entitled to no judicial deference when interpreting Supreme Court precedent on such matters, has until now persisted in defying the risks of First Amendment infringement rather than avoiding them. In particular, the two-part *Pacific Lutheran* test is fatally flawed because its required analysis, at step two, of whether faculty members at religiously affiliated institutions of higher learning are held out as performing a specific religious function entails an impermissible inquiry into what does and what does not constitute a *religious function*. As detailed above, this approach has been soundly rejected by the courts as irreconcilable with the holding, rationale, and purpose of *Catholic Bishop*. See, e.g., *Duquesne University*, 947 F.3d at 834–835 (inquiry into whether faculty are held out as playing specific religious roles would "still require the Board to define what counts as a 'religious role' or a 'religious function'"); *Bayamon*, 793 F.2d at 402–403 (finding that the Board's attempt to create and administer distinctions between religious and secular instruction "would itself entangle the Board in religious affairs"); see also *Pacific Lutheran University*, 361 NLRB at 1434 (Member Johnson, dissenting) (finding that new test places the Board in the "untenable position of deciding what can, and what cannot, be deemed a *sufficiently* religious role or a sufficiently religious function") (emphasis in original).

Because the Supreme Court has clearly decided this matter, and because we find the rationale set forth in *Catholic Bishop* and in the circuit court decisions interpreting that seminal case to be persuasive, we now hold that the Board does not have jurisdiction over matters concerning teachers or faculty at *bona fide* religious educational institutions. We further hold that the test set forth in the D.C. Circuit's *Great Falls* case is the appropriate test to use when determining whether it is proper for the Board to exercise its jurisdiction in these cases. Under this bright-line test, the Board will leave the determination of what constitutes religious activity versus secular activity precisely where it has always belonged: with the religiously affiliated institutions themselves, as well as their affiliated churches and, where applicable, the relevant religious community. Applying the *Great Falls* test will remove any subjective judgments about the nature of the institutions' activities or those of its faculty members and limit the Board to making jurisdictional determinations based on objective evidence. It will prevent the type of intrusive inquiries that the Supreme Court prohibited in *Catholic Bishop* and has found problematic in other contexts.[7] Finally, and importantly, it will provide the Board with a mechanism for determining when self-identified religious schools are not, in fact, *bona fide* religious institutions, therefore protecting the rights of employees working for those institutions.

For all these reasons, we find that the *Pacific Lutheran* test cannot be squared with Supreme Court precedent and, accordingly, we reject it and adopt the *Great Falls* test in its place.

V.

Application of the *Great Falls* Test in this Case

The Respondent is a 501(c)(3) institution of higher learning in Lindsborg, Kansas. According to the Respondent's Bylaws, it is a ministry of the Evangelical Lutheran Church in America (ELCA) and is owned and operated by the Central States Synod and the

[7] See, e.g., *Town of Greece, New York v. Galloway*, 572 U.S. 565, 582 (2014) (noting that the very act of sifting "sectarian" from "nonsectarian" prayer would be futile and would unconstitutionally entangle the courts with religion); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) ("[I]nquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary, but offensive."); *Corp. of the Presiding Bishop v. Amos*, 483 U.S. at 326 (finding that it is a "significant burden" for a religious institution "to predict which of its activities a secular court will consider religious"); *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977) (Litigation between church and state "about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment.").

Arkansas/Oklahoma Synod of the ELCA. During the period of time at issue, the Respondent had a student body totaling about 643 students. Because the Respondent did not participate in the hearing, the record evidence pertaining to the jurisdictional issue presented is primarily limited to the Respondent's Handbook and testimony from Professor Thomas Jorsch, who was hired by the Respondent in August 2014.[8]

Applying the *Great Falls* test to the instant case, we find that the Respondent is exempt from the Board's jurisdiction and that, therefore, the complaint alleging unfair labor practices committed against specific faculty members must be dismissed.[9] To begin, we agree with the judge's finding that the Respondent meets the first prong of the *Great Falls* test by holding itself out to students, faculty, and the community as providing a religious educational environment. For example, the Respondent's Handbook states that the "object and purpose of this Corporation shall be to establish and maintain a Christian institution of higher education to be known as 'Bethany College'; 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." Further, various job postings entered into the record demonstrate that prospective faculty members and other employees were informed of the Respondent's religiously based nature. The job posting to which Charging Party Jorsch responded when applying to work for the Respondent specifically notes that the Respondent is a college of the ELCA with a mission "to educate, develop, and challenge individuals to reach for truth and excellence as they lead lives of faith, learning, and service."

The second prong of the *Great Falls* test is also met here; as mentioned above, the Respondent is established as a 501(c)(3) nonprofit institution. Finally, the third prong, that the institution must be "affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion," is easily met.[10] Again, as described above, the Respondent is owned and operated by the Central States Synod and the Arkansas/Oklahoma Synod of the ELCA.

Conclusion

The issue before us was decided for all intents and purposes by the Supreme Court in 1979. The Court rejected the Board's attempt to assert jurisdiction over church-controlled schools, finding that any inquiry that seeks to differentiate between "secular" and "religious" duties or activities of faculty members at these schools cannot be undertaken due to the inherent risk of conflict with the rights enshrined in the First Amendment's Religion Clauses. We see no reason any longer to question the scope and meaning of the Supreme Court's clear disposition of this issue. Further, we find that the D.C. Circuit's *Great Falls* test for determining Board jurisdiction in these matters constitutes a faithful application of the constitutional principles set forth in *Catholic Bishop*. Accordingly, we overrule *Pacific Lutheran University* in relevant part and fully adopt the *Great Falls* test for determining whether to exercise jurisdiction over the faculty of self-identified religious schools, including colleges and universities. Because the Respondent satisfies all three prongs of the *Great Falls* test, we find that the Board cannot exercise jurisdiction over it. Accordingly, we reverse the judge's findings, and we dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 10, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

[8] In her decision, the judge states that "the Respondent's refusal to, at minimum, present evidence showing it is exempt from the Act because of its religious affiliation leaves me with no choice but to find that the General Counsel has established jurisdiction." The judge, however, clearly misunderstood that the Respondent did not have the burden to establish that the Board lacked jurisdiction over it. The burden to establish Board jurisdiction clearly rests on the General Counsel. See, e.g., *Construction and General Laborers Local 1177*, 269 NLRB 746, 746 (1984) ("The burden of proof regarding jurisdiction, as with all other elements of a prima facie case, is on the General Counsel."). In fact, a court may reject a Board decision on jurisdictional grounds "even though the college never raised the jurisdictional issue before the Board." *Carroll College v. NLRB*, 558 F.3d at 547.

[9] In light of our finding herein, we need not pass on the Respondent's procedural exceptions, including its challenge to the judge's denial of its request for a stay in the proceedings and petition to revoke certain investigative subpoenas and the judge's reliance on adverse inferences.

[10] In *Great Falls*, the court expressed some concern about the breadth of this prong of the test but found it unnecessary to address that concern because the religious affiliation of the University of Great Falls was unquestionable. See 278 F.3d at 1343–1344. As in that case, the religious affiliation of Bethany College has been clearly established.

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Rebecca Proctor, Esq. and *Julie Covel, Esq.,* for the General Counsel.
Gregory P. Goheen, Esq., for the Respondent.

DECISION

I. STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Lindsborg, Kansas, on December 6, 2017. Thomas Jorsch (Jorsch) filed the charge in case 14–CA–201546 on June 19, 2017.[1] The first amended charge in case 14–CA–201546 was filed by Jorsch on August 28. The charge in case 14–CA–201584 was filed by Lisa Guinn (Guinn) on June 29, with an amended charge filed in the case on August 28. The Regional Director for Region 14, (the Region) of the National Labor Relations Board (NLRB/the Board) issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on August 30. On September 13, Bethany College (the Respondent/the College) filed a timely answer and affirmative defenses to the consolidated complaint denying all material allegations in the complaint.

The consolidated complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) when (1) since about December 29, 2016, the Respondent has unlawfully maintained an overly broad confidentiality rule; (2) about May 19, the Respondent, by William A. Jones (Jones), prohibited employees from engaging in concerted activities with other employees for the purposes of mutual aid and protection by asking them tosign an agreement not to disclose a proposed tenure plan; (3) about June 23, the Respondent, by Jones, through email prohibited employees from discussing terms and conditions of employment with each other; and (4) about June 26, the Respondent, by Jones, through a letter informed employees that they were being discharged for engaging in protected, concerted activities. The consolidated complaint also alleges that on about June 27, the Respondent discharged its employees Jorsch and Guinn in violation of Section 8(a)(1) and (3) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the posthearing brief filed by the General Counsel, I make the following findings of fact and conclusions of law

II. PRE AND POST-TRIAL MOTIONS

The General Counsel contends that because the Respondent refused to comply and produce the subpoenaed documents and witnesses, I should issue sanctions. Moreover, the General Counsel argues that as a result of the Respondent's refusal to participate in the administrative trial, the Respondent is unable to and has failed to establish lack of jurisdiction based on its religious affiliation.

A. Respondent's Motion to Dismiss or in the Alternative Motion for Summary Judgment

On November 8, the Respondent filed with the Board a motion to dismiss the consolidated complaint or in the alternative motion for summary judgment objecting to the proceedings on the basis of jurisdiction.[2] The Respondent's filing with the Board included attachments for its consideration. The General Counsel filed a response on November 13, opposing the motion to dismiss or in the alternative for summary judgment. Since the Board had not ruled on the motion prior to the opening of the administrative trial, I heard oral arguments on the Respondent's motion.

Shortly after the administrative trial adjourned, on December 6, the Board issued an order denying the Respondent's motion. In its order, the Board ruled that the Respondent failed to establish that there are no genuine issues of material fact warranting a hearing and that it is entitled to judgment as a matter of law. Consequently, the need for me to rule on the Respondent's motion to dismiss, or in the alternative motion for summary judgment is moot.

B. Respondent's Motion to Revoke the General Counsel's Subpoenas

On November 13, the General Counsel served the Respondent with a subpoena duces tecum. On the same date, the Respondent's supervisors and/or agents, Jones, Robert Carlson (Carlson), and Joyce Pigge (Pigge), were served with subpoenas ad testificandum. The Respondent filed a petition to revoke the subpoenas on November 20. The Respondent claims that the Board lacks jurisdiction over the Respondent because it is a higher education institution with religious affiliation; and thus the Board is unable to compel production of documents or the appearance of witnesses Jones, Pigge, and Carlson. Moreover, the Respondent argues that the Board lacks jurisdiction over Jorsch's complaint because he was a faculty member with managerial authority. Even assuming the Board properly has jurisdiction over the Respondent, the Respondent contends that the subpoenas seek to compel the production of documents that are overbroad, irrelevant as to subject matter and time, the requests are vague, some of the documents are equally available to the General Counsel, unduly burdensome, and improperly seeks attorney-client privileged records, attorney work product, and other confidential privileged records.

On November 24, the General Counsel filed a response in opposition to the Respondent's petition to revoke. By written order dated December 1, I denied the Respondent's petition. On December 5, the Respondent filed a motion to reconsider. During the administrative trial, I allowed the Respondent to present oral argument in support of the motion. The General Counsel presented a rebuttal. Following careful consideration of the parties' arguments, I denied the Respondent's motion. Nonetheless, despite my rulings ordering the Respondent to comply with the subpoenas requests, the Respondent refused. Consequently, the

[1] All dates are in 2017, unless otherwise indicated.

[2] The Respondent also filed a memorandum in support of its motion and a reply memorandum. (GC Exh. 1-T, 1-U, 1-V, and 1-W.)

counsel for the General Counsel moved for evidentiary sanctions against the Respondent.

I reject the Respondent's argument that because it is a higher education institution with religious affiliation it is exempt from the Act, and therefore neither I nor the Board can compel it to respond to the General Counsel's subpoena requests. Similarly, the Respondent's contention that the Board does not have jurisdiction over Jorsch's complaint because he was a faculty member with managerial authority is equally unpersuasive.

The Respondent's claims that it is exempt from the Act because of its religious affiliation; and that Jorsch is not an employee within the meaning of the Act are not grounds for revoking the subpoenas where Board jurisdiction is not plainly lacking. See *NLRB v. Chapa De Indian Health Program, Inc*., 316 F.3d 995, 1002 (9th Cir. 2003). The Respondent has the burden of proving that it is exempt from the Act because of its religious affiliation. *Pacific Lutheran*, 361 NLRB 1404 (2014). The General Counsel is correct in noting that the Respondent's mere assertions contesting the Board's jurisdiction is insufficient to meet the test for determining the validity of its arguments. I agree with the General Counsel that the Respondent's arguments require "the presentation and analysis of evidence and subsequent findings of fact." (GC Br. 4.) Likewise, the Board, in denying the Respondent's motion to dismiss or in the alternative Motion for Summary Judgment, found that there are genuine issues of material fact warranting a hearing on the issue of whether the Respondent's religious affiliation exempts it from the Act; and there are issues of material fact requiring a hearing on the underlying merits of the consolidated complaints. Consequently, the Respondent's refusal to, at minimum, present evidence showing it is exempt from the Act because of its religious affiliation leaves me with no choice but to find that the General Counsel has established jurisdiction, which will be discussed in more detail below.

Second, Respondent's argument that certain requests are irrelevant is not supported by law or facts. It is well settled law that subpoenaed information should be produced if it relates to any matter in question, or if it can provide background information or lead to other evidence potentially relevant to an allegation in the complaint. Board's Rules, Section 102.31(b) and *Perdue Farms*, 323 NLRB 345, 348 (1997). I find that the General Counsel's subpoena duces tecum meets this requirement.

Respondent also contends that the subpoena requests are unreasonably broad and unduly burdensome. The party seeking to avoid compliance with a subpoena bears the burden of demonstrating that it is unduly burdensome or oppressive. To satisfy that burden, a party must show that the production of the subpoenaed information would seriously disrupt its normal business operations. *Maryland Cup Corp*., 785 F.2d 471, 477 (4th Cir. 1986); *Carolina Food Processors, Inc*., 81 F.3d 507, 513 (4th Cir 1996). The Respondent has produced nothing more than assertions that the requests are unreasonably broad and unduly burdensome; and therefore, has not satisfied this burden. The Respondent also argues that paragraph 6 seeks confidential information that is unreasonably broad and irrelevant and is an invasion of privacy. I find the argument unpersuasive. The Respondent's objections are nonspecific and do not provide a clear explanation of the legal and factual bases for why the documents are confidential and legally exempt from discovery. Likewise, there is no clear explanation about why the documents are not relevant to the matters at issue.

Last, I again reject the Respondent's contention that is should not be required to respond to the General Counsel's document requests because it would require the production of privileged information. To the extent the subpoena requests may encompass documents the Respondent believes are privileged, it retains the right to withhold such documents. However, in that event, the Respondent, as the party asserting the privilege, must provide sufficient information to evaluate the asserted privilege. This includes submitting a privilege index log specifically identifying the documents it believes are covered by the privilege and supporting affidavits, if necessary. See, e.g., In re *Grand Jury Subpoena*, 274 F.3d 563, 576 (1st Cir. 2001); *Holifield v. U.S.*, 901 F.2d 201, 204 (7th Cir. 1990); and *Friends of Hope Valley v. Frederick Co*., 268 F.R.D. 643, 651–652 (E.D. Cal. 2010). If the Respondent fails to demonstrate sufficient grounds for protection, the privilege may be found to have been waived. In re *Grand Jury Subpoena*, above. As part of its petition to revoke, the Respondent has failed to provide the required information. Consequently, the Respondent has not established an attorney-client privilege or work product privilege, nor shown that compliance with the subpoena duces tecum would force it to violate those privileges if they existed.

C. Respondent's Motion to Re-Open the Hearing

As noted earlier in this decision, I heard oral arguments on the Respondent's motion to dismiss or, in the alternative, for summary judgment which was filed with the Board on November 8. During its oral argument, the Respondent moved to include the attachments that it filed with the Board as part of its November 8 motion. The Respondent marked the motion and attachments as Respondent's exhibit 1 (R. Exh. 1). (Tr. 95–96.) Since the Respondent's motion was pending before the Board, I agreed to rule on the motion and request to admit into evidence R. Exh. 1, only if the Board had not made a ruling prior to the issuance of my decision on the merits of the case. At the conclusion of the administrative trial, I informed the parties that I would hold the record open for the limited purpose of deciding whether to accept into the record R. Exh. 1.

Following the close of the administrative trial, on January 10, 2018, the Respondent filed its post-hearing brief and Motion to Re-Open the Hearing. The General Counsel filed a timely response in opposition to the motion. Further, the General Counsel requests that the preclusion rule be implemented because the Respondent's refusal to produce the subpoenaed documents and witnesses and attempt to preserve the right to supplement the record at a later date "constitute[] abuse of the Board subpoena process and is an attempt to disadvantage Counsel for the General Counsel." (GC Br. 10.)

After a careful review of the motion, response, and Board law, I find that the Respondent has failed to establish that the administrative trial should be re-opened. In addition, I find that the preclusion rule should be applied in this instance. *Perdue Farms Inc. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998) ("A party refusing to comply with a subpoena risks application of the preclusion rule.").

Under the Board's Rules and Regulations, a party may file a motion with the administrative law judge (ALJ) to reopen the record on the basis of "newly discovered" evidence. The motion to reopen must be filed after the trial closes but prior to the issuance of the ALJ's decision. Section 102.35(a)(8), 102.48(d)(1). Consequently, a motion to reopen the trial will only be granted if the moving party can show (1) the evidence is truly "newly discovered"; and (2) "demonstrated that the introduction of the [evidence in question] would require a different result than that reached by the judge." *Fitel/Lucent Technologies*, 326 NLRB 46, 46 fn. 1 (1998); *Planned Building Services, Inc*., 347 NLRB 670, 670 fn. 4 (2006). None of the documents contained in R. Exh. 1 is newly discovered evidence. Respondent Exhibit 1 consists of the College's student, employee, and faulty handbook (which has been admitted into evidence as GC Exh. 12), information about the College from its website, minutes from a few faulty and HLC meetings held in 2015 and 2017, and emails from 2015. All of this information was available before the opening of the administrative trial and several of the documents were part of the General Counsel's subpoena requests. Again, I must emphasize that the Respondent refused to comply with my orders to produce the information and witnesses requested in the General Counsel's subpoena duces tecum and subpoena testificandum. Moreover, there is nothing in the record or the Respondent's filings which demonstrate that I would reach a different result if I were to allow the reopening of the trial.

Although the Respondent refused to participate in any part of the NLRB process, including the administrative trial, the Respondent argues that it expressly reserved the right to present any evidence to challenge any witness, or otherwise argue the merits of its case if "a court of competent jurisdiction" decides that the Board has jurisdiction over this matter. The Board has consistently held that the Respondent has the burden of showing that it is exempt from the Board's jurisdiction because of its religious affiliation. See *Pacific Lutheran*, at 1404. Moreover, there is no case law which supports the Respondent's argument that it can ignore the administrative law judge's pretrial rulings on compliance with subpoenas, refuse to create an evidentiary record on jurisdiction, and not participate in the administrative trial in any manner, "until, and if such time, as a Court of competent jurisdiction determines that the NLRA applies to the College, and that the NLRB has jurisdiction over the College." (Tr. 28.) The General Counsel correctly notes that if the Respondent is allowed to proceed without sanction it "incentivizes employers to simply ignore Board subpoenas." (GC Br. 10.) I will not re-open the trial to allow the Respondent to flood the record with evidence that should have been produced at the trial to establish that it is exempt from the reach of the Act or in the alternative that it had legitimate nondiscriminatory bases for its actions. Again, as the party contesting jurisdiction, the Respondent had the burden of proof which it failed to establish. *Pacific Lutheran*, at 1404. The Respondent had ample opportunity to submit its evidence at the administrative trial but chose not to participate. The Respondent's decision to ignore my pretrial rulings and not create an evidentiary record on jurisdiction for fear of waiving its argument that as a religiously affiliated institution it is exempt from the Board's jurisdiction is specious reasoning. Participating in the administrative trial would not have waived that argument; and the Respondent failed to take part in the administrative trial at its peril.

III. JURISDICTION

The Respondent, a corporation with an office and place of business in Lindsborg, Kansas, has been engaged in the operation of a private non-profit college. During the fiscal year ending June 30, the Respondent admits, and I find that in conducting its business operations derived gross revenues available for operating expenses in excess of $1 million. During this same period, the Respondent admits, and I find that it purchased and received at its Lindsborg, Kansas facility products, goods, and materials valued in excess of $5000 directly from points outside of the State of Kansas. (GC Exhs. 1-S, 4A, 4B.)[3]

The Respondent denies that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and contests the Board's jurisdiction. The Respondent argues that because it is a "higher educational institution with religious affiliation, it is not subject" to the NLRA and, therefore, the Board lacks jurisdiction over this matter. (GC Exh. 1-U.) The Respondent did not participate in the Board proceedings and instead rested on its claim that the Board lacks jurisdiction over it. Consequently, the Respondent refused to comply with my order requiring the Respondent to produce subpoenaed documents and subpoenaed witnesses; and the Respondent refused to participate at the administrative trial. After making an appearance to argue a motion for reconsideration of my order denying the Respondent's petition to revoke; and arguing for a motion to dismiss or in the alternative for summary judgment, the Respondent's counsel became a mere observer for the remainder of the administrative trial. Moreover, subpoenaed witnesses Joyce Pigge (Pigge) and Robert Carlson (Carlson) appeared at the administrative trial, but the Respondent refused to allow them to testify in contravention of my order.

A. Test to Determine if the Respondent is Exempt from the Act based on its Religious Affiliation

(1) Facts

According to the College's Amended and Restated Bylaws (bylaws), Bethany College is a ministry of the Evangelical Lutheran Church in America (ELCA), owned and operated by the Central States Synod and the Arkansas/Oklahoma Synod of the ELCA. The Respondent's employee handbook (handbook) states that the object and purpose of "this Corporation shall be to establish and maintain a Christian institution of higher education to be known as 'Bethany College'; to serve Jesus Christ and His church by training men and women who seek a liberal arts education under Christian auspices. . . " (GC Exh. 12.)

According to the handbook, members of the faculty are "expected to share the sacred trust of safeguarding the defined

[3] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for Respondent's brief. Specific citations to the transcript, exhibits, and briefs are included where appropriate to aid in review, and are not necessarily exhaustive or exclusive.

objectives of the College . . .” and each faculty member “shall promote the purpose of the College and its ideals of scholarship, and assist in the realization of the Christian objectives of the College,” and each faculty member “shall be expected to conduct himself or herself at all times in a manner consistent with the standards of Christian men and women.” (GC Exh. 12 at p. 28.) Under the Faculty Code of Conduct and Ethics of the handbook, the faculty is bound, among other things, to advance the mission of the College. Id. at p. 52.

According to the handbook, the Respondent, in order to accomplish its mission, commits to the task of educating its students by striving to be a community of faith which fosters Christian faith, witness and worship by seeking to “stimulate the student’s desire to know and to understand personal relationships and relationships with God in light of the Gospel of Christ; provides a setting where regular worship is encouraged and where students, faculty and staff members may offer Christian witness through their lives and teaching.” (GC Exh. 12, p. 56.) The handbook continues by noting that the Respondent, through its faculty, offers a “total campus experience within which the student can grow into a philosophy of life that recognizes in selfless service to God and humanity . . . educates students who will contribute significantly toward the development of constructive Christian thought and expression in human life and society” and “assists the student in incorporating Christian values and service into chosen careers.” Id. In addition, the handbook contains a statement that the College faculty supports the church and “provides for the Church of Christ on earth dedicated and informed leadership to assist in the determination and implementation of its future goals; serves the Church through continuing education programs for laity and clergy and as a resource for congregations and the Church in the modern world.” Id.

Jorsch, who was employed with the Respondent from August 2014 to June 2017, applied for employment with the College through a job posting on the website HigherEdJobs.com showing that there was an opening for an assistant professor of history. The job description identified some of the duties for the position as teach history classes, participate in creative course development, and advise students. (GC Exh. 8; Tr. 54–55.) Identifying the school as an affiliate of the Evangelical church in America is the only mention of religion in the posting.[4] Once Jorsch submitted his application for employment, he was interviewed via Skype. Subsequently, he was invited to the College’s campus for a day-long interview with the search committee members: Pigge, Dr. Bruce Taylor (Taylor), Dr. Holly Crutch Thomas (Thomas), and two student representatives. At no time during his interviews, nor at any point in the hiring process was Jorsch told that: he would be responsible for maintaining the College’s religious environment; he would have to incorporate religious doctrine into his teachings; his position would have a religious requirement; or he would have to maintain a Christian lifestyle. Although Jorsch attended a chapel service on the day of his on-campus interview, he was never informed that attending chapel services would be a requirement for his position. Following his interviews, Jorsch was offered and accepted an appointment as an assistant professor of history with eligibility for tenure in fall 2017. Jorsch initial term of appointment ran from August 10, 2014 to May 19, 2015.[5] He was given a copy of the “Bethany College Handbook” soon after he was hired. Pigge was Jorsch’s direct supervisor and in that capacity, she led departmental meetings and observed his classroom instruction.

Although Jorsch attended the Faculty Senate meetings as a requirement for faculty members, he was not an eligible member of the Faculty Senate because he was not tenured. Decisional or policymaking authority is vested in the Faculty Senate. The Faculty Senate has primary authority over evaluations, promotions, tenure, appointment, reappointment, and the welfare of the faculty. (GC Exh. 12.)

(2) Analysis

In *Catholic Bishop*,[6] the Supreme Court stated that the Board’s jurisdiction over labor disputes between church-operated schools and their teaching employees would present “a significant risk that the First Amendment will be infringed” because the “substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the religious clauses sought to avoid.” Id. at 1320 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971), 91 S.Ct. 2105, 2113 (1971)). Therefore, the Supreme Court concluded that the Board should not exercise jurisdiction over schools with “substantial religious character.” Following the Supreme Court’s decision in *Catholic Bishop*, the Board in *University of Great Falls*, 331 NLRB 1663 (2000), set out several factors to consider on a case-by-case basis whether a school met the substantial religious character test set forth in *Catholic Bishop*. However, on appeal, the D.C. Circuit rejected the Board’s analysis and developed a different three-part test for when the Board may assert jurisdiction over a religious college or university. *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002) (hereinafter *Great Falls*). Under the test set forth in *Great Falls*, the Board may not assert jurisdiction where a university: (1) holds itself out to students, faculty, and the community as providing a religious environment; (2) is an organized non-profit; and (3) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity whose membership is determined at least in part based on religion. Id. at 1343.

In *Pacific Lutheran*, the Board reexamined its standard for exercising jurisdiction over faculty members at self-identified religious colleges and universities in accordance with *Catholic Bishop*. The Board opined that the *Great Falls* test “overreaches because it focuses solely on the nature of the institution, without considering whether the petitioned-for faculty members act in support of the school’s religious mission.” Id. at 1409. The exclusive reliance on the religious nature of an educational institution, without considering the petitioned-for employees’ role in

[4] Moreover, none of the current available positions at the College include a requirement that the successful candidate assist in maintaining the College’s religious environment or Christian lifestyle. (GC Exh. 9.)

[5] Jorsch received extensions of his appointment until his termination on about June 26, 2017. None of his faculty appointment letters contained requirements that he maintain a religious lifestyle or perform a religious role while employed by the Respondent.

[6] *NLRB v. Catholic Bishop of Chicago*, 99 S.Ct. 1313 (1979).

supporting the institution's religious mission, "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 . . . connection to religion, no matter how tenuous that connection may be." *Saint Xavier University,* 365 NLRB No. 54 (2017), citing 361 NLRB 1404, 1409. In *Pacific Lutheran*, the Board noted that it had endeavored to "be faithful to the holding of *Catholic Bishop*" and "avoid the potential for unconstitutional entanglement while, to the extent constitutionally permissible, vindicating the rights of employees to engage in collective bargaining." Id.

Consequently, in *Pacific Lutheran* the Board declined to follow the test established by the D.C. Circuit in *Great Falls*, and instead adopted a new two-part test to determine whether the Board has jurisdiction over a religiously affiliated college or university. *Pacific Lutheran*, 1409. Under the test, a college or university contesting jurisdiction on the basis of religious affiliation must first show that "it holds itself out as providing a religious educational environment." Id. In deciding whether the Respondent satisfies this requirement, relevant evidence to consider would include, but not limited to, "handbooks, mission statements, corporate documents, course catalogs, and documents published on a school's website" and possibly "[p]ress releases or other public statements by university officials." Id. Once that threshold requirement is met, the college or university "must then show that it holds out the petitioned-for faculty members themselves as performing a specific role in creating or maintaining the college or university's religious educational environment." Id. The college or university contesting jurisdiction on the grounds that it is religiously affiliated educational institution of higher learning has the burden of proof.

Under the Board's current test, I find that the threshold requirement has been met in this case.[7] Since the Respondent refused to participate in the administrative trial, there is miniscule amount of evidence showing that the Respondent holds itself out as providing a religious educational environment. Nonetheless, the Board requires only a minimal showing to meet the initial threshold requirement. In this case, the lone piece of evidence is the College's handbook which states its object and purpose is 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." (GC Exh. 12 at 13.) The handbook also describes the College as a college of the ELCA, "approved by the Central States and Arkansas-Oklahoma Synods of the ELCA." Moreover, a not-for-profit corporation, such as the College, could also be a relevant factor in concluding it is providing of religious education environment. *Pacific Lutheran* at 1410; *Great Falls* at 1344.

Accordingly, I find that the Respondent has satisfied the test that it holds itself out to students, faculty, and the community as providing a religious environment.

Next I turn to the question of whether the Respondent holds out its petitioned-for faculty members as performing a specific role in creating and maintaining that environment. The Board found that "the focus of our inquiry into whether there is a 'significant risk' of infringement under *Catholic Bishop*, 440 U.S. at 502, must be on the faculty members themselves, rather than on the nature of the university as a whole." 361 NLRB 1404. According to the Supreme 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." Id. "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." Id.

In the case at hand, the evidence is nonexistent that the faculty member(s) at issue perform a "specific role in creating or maintaining the university's religious educational environment." *Pacific Lutheran*, 1410–1411. Here, no specific duties relating to religion were stated in the faculty appointment letters that are in evidence for both faculty eligible for tenure and part-time faculties (not eligible for tenure). Jorsch and Guinn provided undisputed testimony that they were never told they were expected to perform a religious role or maintain the university's religious environment. Likewise, there is no evidence that any faculty was tasked with meeting this requirement. Moreover, mere generalizations, such as those cited in the College's handbook, are insufficient to meet the second prong of the test established in *Pacific Lutheran*. *Pacific Lutheran*, at 1413.

Although the Respondent has established that the Bethany College "holds itself out to students, faculty, and the community as providing a religious environment," it fails to establish that "it holds out the petitioned-for faculty members themselves as a performing a specific role in creating or maintaining the college or university's religious educational environment, as demonstrated by its representation to current or potential students and faculty members, and the community at large." Id.

Accordingly, I find, that at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Further, the General Counsel presented un-rebutted evidence that the American Association of University Professors – Collective Bargaining Congress (the Union/AAUP), at all material times, has been a labor organization within the meaning of Section 2(5) of the Act. (Tr. 40–54; GC Exhs. 6, 7.)

B. Whether Jorsch is a Supervisor and, or Agent as Defined by the Act

The General Counsel alleges that Jorsch is an employee of the Respondent. The Respondent, however, contests that designation and argues that Jorsch was employed in a managerial capacity; and therefore, he is excluded from the protections of the Act.

[7] Regardless of conflicting court of appeals' decisions, the administrative law judge must follow established Board precedent which neither the Board nor the Supreme Court has reversed. *Pathmark Stores, Inc*., 342 NLRB 378 fn. 1 (2004); *Waco, Inc*., 273 NLRB 746, 749 fn. 14 (1984).

The burden of establishing supervisory status is with the party alleging that status. The party asserting supervisory status must set forth specific facts which prove the existence of supervisory authority. *Commercial Movers, Inc*., 240 NLRB 288, 290 (1979); Under Section 2(11) of the Act, the status of supervisor is determined by the duties performed and not the title or job classification. Section 2(11) defines a supervisor as any person having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if . . . such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Based on the statutory language, an individual is a supervisor if: the individual has authority to take one of the actions listed in Section 2(11) or to effectively recommend such action; the individual exercises this authority in the interest of the employer; and the exercise of this authority is not merely routine or clerical in nature, but instead requires the individual to use independent judgment. *NLRB v. Kentucky River Community Care, Inc*., 121 S.Ct. 1861, 1864 (2001); *NLRB v. Health Care & Retirement Corp*., 511 U.S. 571, 573–574 (1994). Moreover, the Board has consistently held that the evidence must show that a presumed supervisor is accountable for a subordinate's work performance. *In re Oakwood Healthcare, Inc*., 348 NLRB 686, 691–692 (2006).

In *Yeshiva University*, the Supreme Court found that the university faculties were managerial employees excluded from the right to collective bargaining under the NLRA. *NLRB v. Yeshiva*, 444 U.S. at 674, 679 (1980). The Court defined managerial faculty as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." Id. at 682. Such managerial faculty "must exercise discretion within, or even independently of, established employer policy and must be aligned with management." Id. at 683. However, if faculty members' decision-making is "limited to the routine discharge of professional duties in projects to which they have been assigned," they would be covered by the NLRA, even if union membership "arguably may involve some divided loyalty." Id. at 690.

After *Yeshiva University*, the Board issued nearly two dozen decisions applying a "sweeping" breadth of factors to analyze the managerial status of faculty at universities, such as, academic programs, enrollment management policies, finances, academic policies, and personnel policies and decisions, and giving greater weight to the first three areas than the last two. 361 NLRB 1404, 1418. Since the *Yeshiva University* Court did not give a precise analytical framework to determine the managerial status of university faculty and left the Board to proceed on a case-by-case basis, the Board in *Pacific Lutheran* stated that it would now apply *Yeshiva University* to develop a "new approach" that is more "workable" and "predictable" to help guide employers, unions, and employees. Id., slip op. at 16. Under the new approach, the Board will examine "both the breadth and depth of the faculty's authority at the university," giving more weight to those areas of policy making that affect the university as a whole, and seeking to determine whether the faculty actually exercise control or make effective recommendations over those policy areas. Id., at 1419–1421. Specifically, the Board will examine the faculty's participation in decision-making concerning: academic programs, enrollment management policies, finances, academic policies, and personnel policies and decisions. Id., at 1418. The Board will put greater weight on the first three areas. Id.

In applying the new standard, the *Pacific Lutheran* Board concluded that the employer failed to prove that its full-time contingent faculty exercised sufficient managerial authority to justify their exclusion from the petitioned-for unit of contingent faculty because there was insufficient evidence that the faculty were substantially involved in decision-making affecting the key primary decision-making areas of academic programs, enrollment management policies, and finances. Id. Even in the secondary areas of academic policies and personnel policies, the Board majority found that the full-time contingent faculty members' authority was limited to their own classrooms or departments. Id. The Board concluded that their involvement in decision-making areas fell well short of actual control or effective recommendation, given the University's decisionmaking structure. Id.

The Act also provides that an individual who is an agent of the employer is, in effect, the employer for purposes of assessing responsibility in matters over which the Board has jurisdiction. The Board applies common-law principles to determine if an individual possesses apparent authority to act for an employer. In *Comau, Inc*., 358 NLRB 593, 595 (2012), the Board lists the principles as (1) an indication by the principal to a third party that creates a reasonable belief that the alleged agent has been authorized by the principal to act; and (2) the principal intended or should have realized that its conduct is likely to create the third party to believe the agent is authorized to act for the principal. See *Pan-Oston Co*., 336 NLRB 305, 305–306 (2001).

I again emphasize that because the Respondent is alleging supervisory status, it has the burden of proving it. Since the Respondent objected to and refused to participate in the proceedings, the record is devoid of evidence from the Respondent establishing that Jorsch was a supervisor and, or agent of the Respondent. There is nothing, therefore, to rebut the General Counsel's credible evidence showing that he was not a supervisor and, or agent. (GC Exhs. 9–9, 10–1, 10–2, 12, 15; Tr. 53–88.) I find, therefore, that the Respondent has failed to establish its burden of proof.

Accordingly, I find that Jorsch does not meet the statutory definition of supervisor and, or agent as defined by Section 2(11) and (13) of the Act.

IV. SANCTIONS

Based on the above and the entire record, I find that sanctions against the Respondent are appropriate. The General Counsel requests that I: (1) draw an adverse inference against the Respondent; (2) allow the General Counsel to present secondary evidence; and (3) strike portions of the pleadings. The General Counsel argues that an adverse inference should be drawn that the subpoenaed documents and subpoenaed witnesses "would have provided evidence damaging to Respondent's case" because "[a]ll witnesses and documents were within Respondent's control, and should have been easily produced." (GC Br. 9.) In addition, the General Counsel contends that allowing the General Counsel to present secondary evidence is appropriate because in

many instances the relevant documents can only be accessed by the Respondent; and moreover, the subpoenaed witnesses engaged in conversations with the Charging Parties that are important to the General Counsel's case. Last, the General Counsel asserts that multiple paragraphs from the Respondent's answer should be stricken because "Respondent did not comply with the subpoenas, and did not participate at all during hearing" and therefore, the "Respondent should not be allowed to use these unsupported statements and allegations as grounds for any future arguments." (GC Br. 12.) See *McAllister Towing & Transportation*, 341 NLRB 394, 396–397 (2004), enfd. 156 Fed.Appx. 386 (2d Cir. 2005); *San Luis Trucking,* 352 NLRB 211, 212–214 (2008); *Equipment Trucking Co*., 336 NLRB 277, 277 fn. 1 (2001); *Lenscraft Optical Corp*., 128 NLRB 807, 817 (1960).

After a careful consideration of procedural history, the parties' arguments and case law, I make the following rulings regarding the General Counsel's request for sanctions:

I decline to strike any portion of the Respondent's answer. Instead, I find it sufficient to weigh the strength of the Respondent's answer based on the record of evidence. Likewise, I find it unnecessary to rule on allowing the General Counsel to present secondary evidence. As I discuss later in the decision, the evidence the General Counsel produced is more than sufficient to prove its case.

As discussed earlier in this decision, I repeatedly rejected the Respondent's arguments that the subpoenaed documents and witness testimonies were overbroad, irrelevant, and improperly sought privileged records. I ordered the Respondent to comply with the subpoena requests, but it refused. Consequently, I find that the circumstances support me taking an adverse inference that the subpoenaed documents and subpoenaed witnesses "would have provided evidence damaging to Respondent's case." Id. Accordingly, I will apply this sanction where appropriate in this decision. *Metro-West Ambulance Service*, 360 NLRB 1029, 1030–1031 (2014) (adverse inference appropriate where respondent failed to produce accident reports); *Zapex Corp*., 235 NLRB, 1237, 1239–1240 (1978), enfd. 621 F.2d 328 (9th Cir. 1980) (ALJ should have drawn an adverse inference that respondent did not establish its burden of proof where respondent failed to produce subpoenaed documents relevant to the issue).

V. ALLEGED UNFAIR LABOR PRACTICES

Facts

A. Overview of Respondent's Operation

The Respondent is a 501(c)(3) institution of higher learning in Lindsborg, Kansas. During the period at issue, the College had a student body totaling about 643 students. Two hundred and ninety-four (294) of the students had no religious affiliation, about 341 were from the various denominations of Christianity, and a small number were of a non-Christian faith. (GC Exh. 11.) Robert Carlson (Carlson) is the provost and academic dean of the College; and Jones is its president.

B. Jorsch Denied Tenure and Terminated

The Respondent's policy on the tenure review process is set forth in its handbook. The Respondent's tenure process uses "a portfolio approach that enables development of goals and an assessment of the progress achieved" by the tenure candidate. (GC Exh. 12.) A faculty review committee is established to review the tenure candidate's portfolio "detailing teaching, scholarship, and service activities", and meet with the candidate if clarification of the candidate's portfolio is needed. Thereafter, the faculty review committee forwards a recommendation on tenure to the president of the College. If the College president concurs with the recommendation, the president will submit it to the board of director. However, in those instances where the president disagrees with the faculty review committee's decision, the College president will meet with the committee to discuss the recommendation. "The president may elect, after meeting with the committee, to concur with the committee's recommendation, in which event the recommendation will be submitted to the Board, or the president may elect to disagree with the recommendation, in which event the recommendation will be reported to the Board." (GC Exh. 12 at 110.) If a tenure candidate disagrees with the recommendation, the candidate may request a review of the decision through the faculty grievance procedure. Id.

In late November or early December, Jorsch was reviewed for tenure by the faculty review committee. Professors Laurenelle Lockyear (Lockyear), Dan Masterson (Masterson), and Gail Konzem (Konzem) served on his committee. After reviewing the required materials, the faculty review committee prepared a summary report, which was provided to Jorsch, recommending him for tenure. (GC Exh. 13.) The Provost Carlson also recommended Jorsch for tenure. The recommendation was forwarded to Jones with a request that he submit it the board of directors for final approval. On April 20, Jorsch met with Jones who told him that he was tabling his tenure pending completion of a "plan" that he would receive at a later date. Jorsch was surprised at this development because it was his understanding that the tenure review process did not require him to complete any type of plan before being granted tenure. His faculty appointment letter for the 2017–2018 academic year, which was signed and authorized by Carlson and Jones, notes that he is eligible for tenure promotion. Moreover, by letter dated February 28, he was informed that,

> As you know you are eligible for Tenure and Promotion pending Board Approval. The Faculty Review Committee and the Provost continue to support their positive recommendation for you. The Board has elected to make these decisions at their May 2017 meeting . . . Based on Board action in May, your contract for 2017–2018 will be revised accordingly.

(GC Exh. 15.) There was no mention in the cover letter or faculty appointment letter that Jorsch's ongoing employment with the Respondent was contingent on his signing or successfully completing a "plan."

Immediately after his April 20 meeting with Jones, Jorsch met with Faculty Chair and Associate Professor of English Dr. Kristin Van Tassel (Van Tassel) to tell her and express his "surprise" about what happened in his meeting with Jones. Subsequently, Van Tassel met with Jones for about an hour in an attempt to understand why he refused to submit to the board of directors the faculty review committee's recommendation of Jorsch for tenure. She also tried to change his mind about his decision. In

addition, on April 20, Jorsch telephoned Pigge to tell her about the events surrounding his tenure review and Jones' action blocking the committee's recommendation that he be given tenure. She expressed shock. Later, Jorsch had another conversation with Pigge where she told him that she had spoken about his situation with a colleague, Athletic Director and Dean of Students Dane Pavlovich (Pavlovich). Pavlovich, in turn, told Jones about their conversation. Consequently, Jones called Pigge into his office and berated her for discussing Jorsch's situation, and further warned Pigge that any attempt by her or Jorsch to rally the College faculty in support of Jorsch would "meet with consequences". I am taking an adverse inference that if the Respondent had complied with my order to compel Pigge to testify she would have corroborated Jorsch's version of their interactions and conversations.

On May 19, Jorsch and Jones met for Jones to give him a "Plan to Achieve Positive Tenure Recommendation" (the plan). (GC Exh. 14.) According to the plan, it was being issued because of concerns relating to Jorsch's alleged "anger/temper issues and collegiality issues . . ." (GC Exh. 14.) Williams and Carlson were the officials responsible for deciding whether Jorsch successfully completed the plan. The plan contained a confidentiality provision which prevented him from discussing the plan with anyone other than, presumably, Jones and Carlson. The plan stated in part,

> Additionally, by signing below, you are agreeing, committing, and contracting with Bethany College to keeping the contents of this plan confidential and not to discuss or to share any part of it with others. If any part of the agreement is shared on campus, with the public, or with others, you can face legal action.

(GC Exh. 14.)

Jorsch was concerned that the plan was too vague and ambiguous. He felt it did not contain standards or a specific set of criteria for him to meet, nor clearly explain why he was not considered "collegial". Jorsch was worried that the manner in which his tenure process was handled would become precedent for other tenure and promotion matters for faculty. Consequently, at the AAUP's annual meeting, he met with Professor Ronald Barrett (Barrett), AAUP president and co-committee chair for the State of Kansas Conference of the AAUP, about his concerns and to ask for the AAUP's assistance regarding the tenure and promotion process at the College. Jorsch expressed to Barrett that he was concerned not only with his personal situation but also the integrity of the entire tenure and promotion process at the College and its impact on current and future faculty.

AAUP conducted an investigation into Jorsch's complaints and found that he had been denied tenure in violation of AAUP's national, state, and local standards. As part of its investigation, AAUP interviewed at least five people at the College who confirmed Jorsch's version of events surrounding his tenure process. In addition, AAUP found fault with the tenure decision because of the reliance on "collegiality" as a basis for the denial. The AAUP agreed with Jorsch that determining "collegiality" is too subjective; and therefore, the College's reliance on it to deny Jorsch tenure and its handling of the tenure process was in opposition to the shared governance model followed by the AAUP and its members. Consequently, the AAUP met as a committee comprised of eight people from institutions across the state; and the committee decided to issue a letter, on behalf of Jorsch, to the Higher Learning Commission (HLC), which oversees accreditation of various institutions in their region. (GC Exh. 7.) In a letter addressed to the HLC's vice president for accreditation relations, Dr. Anthea Sweeney, the AAUP expressed its concern that "some extremely troubling dynamics have come to our attention involving the tenure process at Bethany that seem counter to national AAUP norms. We are concerned about what appears to be a fundamental lack of institutional integrity in the promotion and tenure process. Many faculty members at Bethany expressed fear of being capriciously dismissed . . ." Id. Subsequent to its investigation, AAUP provided Jorsch with a list of attorneys to consult.

On June 22, a day prior to the AAUP's letter to the HLC, Jorsch sent an open-letter to Jones via email, and copied the entire college faculty and the chair of the board of directors, because he felt that the manner in which his tenure process was handled had negative implications for all faculty members, particularly those in line for tenure. The letter stated in part,

> It is my wish that this letter opens a dialog on campus that helps define the relationship between faculty and administration, the importance of a fair and open tenure process. . .While I am hopeful you will change your mind, support my tenure and promotion, and send it to the Board of Directors for their approval, I am more concerned about the fair treatment of current and future faculty.

(GC Exh. 16.) Jones responded to Jorsch's email with his own email to the entire faculty. (GC Exh. 17.) He did not directly address Jorsch's concerns but instead noted that he did not want to discuss, through a "community-wide email conversation", the College's mission and core values as they relate to tenure. Approximately an hour after Jorsch sent the faculty-wide email, his email account at the College was terminated. Guinn, Jorsch's wife and adjunct history professor, also had her email account terminated later in the afternoon on June 22 by the Respondent.

By letter dated June 26, Jones issued Jorsch a letter of termination. (GC Exh. 18.) Jones wrote that Jorsch was being discharged because his open letter "was [a] blatant act of insubordination and was exacerbated by your choice to publicize the issues by sending copies of the letter to the Bethany College faculty and others. For that reason, I have determined that your employment with Bethany College is terminated immediately." Id. After receiving notification of his termination, Jorsch spoke briefly with Pigge about getting another faculty member to teach his classes. Although Guinn had not been terminated at this point, Pigge told Jorsch that the administration informed him Guinn would not be considered to cover his classes. I am taking an adverse inference that if the Respondent had complied with my order to compel Pigge to testify she would have corroborated Jorsch's version of their conversation.

C. Guinn's Tenure with the Respondent

Guinn and Jorsch negotiated a part-time assistant professorship for her when Jorsch was hired as a full-time tenure track professor. She was employed by the Respondent from August 2014 to May 2017 to teach history. As part of the hiring process,

Guinn spoke with the provost by telephone a couple of times. She was never told by anyone at the College that she was responsible for maintaining the College's religious environment; the College's religious affiliation and environment were never mentioned; and she was never told that she had to incorporate religious doctrine into her teaching nor told she was required to perform a religious role. Moreover, none of the aforementioned was ever mentioned or required of her after she was hired. Likewise, Guinn's employment contracts for 2014–2015 and 2016–2017 contained nothing about her having a responsibility to maintain a Christian lifestyle or perform a religious role.

Pigge was Guinn's immediate supervisor. Pigge was also responsible for obtaining approval for renewing all adjunct professors' employment contracts each year. In early or mid-April, Guinn passed Pigge in the hallway on campus and Pigge mentioned to her that she had submitted the requests for adjunct professor approvals for the fall semester. A few weeks after that encounter, Guinn received an email from Pigge asking her to pick the books for the history classes Guinn was teaching in the fall so that Pigge could order the books. In early May, Guinn received an email from Assistant Dean of Academic Affairs Professor Melody Steed (Steed) asking her to teach two freshman courses. Despite, however, it being implied by Pigge that the renewal of Guinn's employment contract had been submitted for approval, being asked to teach two classes in the fall, and asked to choose books to order for the history classes she was scheduled to teach, Pigge's teaching contract was not renewed. Jorsch told Guinn that Pigge stated Guinn would no longer be teaching history courses. Guinn believes she was terminated because of the email her husband sent to Jones and copied faculty-wide.

D. Respondent's Confidentiality Rule

Since about December 29, 2016, the Respondent has maintained the following rule:

> Bethany's policy is to ensure that its operations, activities, business affairs, and the files of alumni, faculty, employees, and students are kept confidential to the greatest possible extent. During the course of their employment, employees will acquire confidential or proprietary information about Bethany, employees and its students. Such information shall be kept in strict confidence and not discussed with anyone other than the appropriate Bethany employees. Employees also are responsible for the internal security of such information. Violation of this policy shall subject the employee to disciplinary action up to and including termination of employment.

(GC Exh. 12 at p. 125.)

VI. DISCUSSION AND ANALYSIS

A. Confidentiality Rule

The General Counsel argues that the Respondent's confidentiality rule is overly broad and, therefore, the Respondent has been interfering with, restraining, and coercing employees in the exercise of their Section 7 rights. Since the Respondent refused to participate in the proceedings, there was no counterargument presented.

Under *Boeing Co.*,[8] the Board has held that it will "no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee 'would reasonably construe' a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future."[9] Consequently, the Board established the following analytic framework:

> [W]hen evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule. We emphasize that *the Board* will conduct this evaluation, consistent with the Board's "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy," . . . focusing on the perspective of employees, which is consistent with Section 8(a)(1). . . . As the result of this balancing, . . . the Board will delineate three categories of employment policies, rules and handbook provisions (hereinafter referred to as "rules"):
>
> - *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are . . . the "harmonious interactions and 15 relationships" rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility . . ..
> - *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
> - *Category 3* will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

Boeing at slip op. 3–4. Analyzing the Respondent's confidentiality rule under category 1 of the Boeing test yields a finding that the Respondent's rule violates the Act. While I acknowledge that employers have a legitimate interest in safeguarding their confidential and proprietary information, read in context, this rule also encompasses the disclosure and discussion of employee wages, disciplinary actions, performance appraisals, personnel documents, and other terms and conditions of employment. The Board has consistently held that this type of broadly worded rule is inconsistent with the Act. *Hyundai America Shipping Agency*, 357 NLRB 860, (2011) (work rule unlawful that prohibited

[8] 365 NLRB No. 154 (2017).

[9] 365 NLRB No. 154, slip op. at 2.

"[a]ny unauthorized disclosure from any employee's personnel file"); *Battle's Transportation, Inc.*, 362 NLRB 125 (2015) (Board held unlawful employer's confidentiality agreement prohibiting employees from divulging "human resources related information" and "investigations by outside agencies"); *Flex Frac Logistics, LLC,* 358 NLRB 1131, slip op. at 1 (finding unlawful employer's rule prohibiting employees from disclosing "personnel information and documents" to nonemployees with the threat of "termination" or "legal action" for violating the rule). The provision is overbroad because its wording encompasses and precludes employees from revealing employee contact information without distinguishing "between information obtained in the normal course of work or information obtained from Respondent's files or even between information obtained by employees from contact with or discussion with other employees." *Costco Wholesale Club*, 358 NLRB 1100, 1116 (2012). See also *Anserphone of Michigan, Inc.,* 184 NLRB 305, 306 (1970) (employee obtained names and contact information of employees from office manager, who was lawfully in possession of the information). It is not only overly broad but also ambiguous because it leaves employees to guess what information is "confidential." Moreover, employees could interpret this provision as a prohibition against disclosing or discussing wages and salary, employee contact information, and other terms and conditions of employment.

Regardless whether the Respondent's confidentiality rule is analyzed under category 1, 2, or 3, the Respondent produced no evidence to show that there are justifications associated with the rule that outweigh the potential adverse impact on protected rights.

Accordingly, I find that the Respondent's rule is so broad as to restrict employees' right to engage in concerted protected activity and thus violates Section 8(a)(1) of the Act.

B. May 19, Employee Prohibited from Disclosing Terms of a Tenure Plan

The General Counsel argues that the provision in the tenure plan threatening Jorsch with legal action if he discloses its contents "on campus, with the public, or with others" is "an attempt to coerce, interfere, or restrain his exercise of those Section 7 rights and violates Section 8(a)(1) of the Act." (GC Br. 27.) Since the Respondent refused to participate in the administrative trial, it did not present an argument or evidence to refute this allegation.

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." See *Brighton Retail, Inc*., 354 NLRB 441, 441 (2009). The Board has established an objective test for determining if "the employer engaged in conduct which would reasonably have a tendency to interfere with the free exercise of employee rights under the Act." *Santa Barbara NewPress*, 357 NLRB 452, 476 (2011). This objective standard does not depend on whether the "employee in question was actually intimidated." *Multi-Ad Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). The mere threat of an unspecified reprisal is sufficient to support a finding that the employer has violated Section 8 (a)(1) of the Act. *Metro One Loss Prevention Services Group*, 356 NLRB 89, 89 (2010).

I find that the Respondent, through Jones, unlawfully precluded an employee from discussing his concerns about the College's tenure plan and his perception of its unfair and subjective nature with other employees. The facts establish that Jones met with Jorsch on May 19, to inform him that he would not concur with the Faculty Review Committee's recommendation of him for counsel until he successfully completed the plan. It is also undisputed that the plan contained a provision precluding Jorsch from discussing or sharing it with others or he could face legal action. See *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1131 (2012) (finding unlawful employer's rule prohibiting employees from disclosing "personal information and documents" to nonemployees with the threat of "termination" or "legal action" for violating the rule); *Taylor Made Transportation Services, Inc*., 358 NLRB 427, 434–435 (2012) (finding unlawful employer's issuance of a memorandum reminding employees of its unlawful policy prohibiting discussions about wages with threat of discipline up to and including termination). See *Kinder-Care Learning Centers*, supra. (employer rule prohibiting employees from discussing their terms and conditions of employment with parents of children enrolled in the school violates the Act); *Verizon Wireless*, 349 NLRB 640 (2007) (banning employees from discussing workplace concerns about discipline violates the Act). The Respondent produced no evidence to show why its action did not violate Section 7 of the Act; and I draw an adverse inference that if the Respondent had complied with my order to respond to the General Counsel's subpoena duces tecum and subpoena ad testificandum the evidence would have shown the Respondent could not prove that its action did not violate the Act.

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act when the Respondent threatened Jorsch with legal action for discussing terms and conditions of employment with "others", which would include coworkers.

C. June 23, Respondent Prohibited Employees from Discussing Terms and Conditions of Employment with Fellow Workers

The General Counsel argues that Jones' June 23 email response to Jorsch's open letter explicitly "expressly discourages any continued discussion of the issues raised in Dr. Jorsch's open letter" in "an attempt to coerce, interfere, or restrain his exercise of those Section 7 rights and violates Section 8(a)(1) of the Act." (GC Br. 27.) Since the Respondent refused to participate in the administrative trial, it did not present an argument or evidence to refute this allegation.

Employers cannot interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them in Section 7 of the Act. *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000). The evidence is irrefutable that in his response to Jorsch's open letter, Jones referred to the plan as "confidential" and noted he would not share any information from the plan. In addition, Jones specifically wrote he did not want the College faculty to discuss the issues raised in Jorsch's

open letter, nor discuss those issues related to the College's mission and core values and their relationship to tenure. (GC Exh. 17.) I find that Jones' statements coupled with the terminations of Jorsch because of his open-letter and Guinn because of her relationship to Jorsch are strong evidence of the Respondent's attempt to coerce, interfere or restrain employees in the exercise of their Section 7 rights.

Accordingly, I find that the Respondent, through Jones' June 23 email, prohibited employees from discussing terms and conditions of employment with each other in violation of Section 8(a)(1) of the Act.

D. June 26, Respondent Notified Employees of Termination for Engaging in Protected Concerted Activity

The General Counsel argues that the letter of termination Jones issued to Jorsch on June 26, violated the Act because it expressly informed Jorsch that he would be discharged because of his communication with other faculty about terms and conditions of their employment. Since the Respondent refused to participate in the administrative trial, it did not present an argument or evidence to refute this allegation.

The evidence is undisputed that in the June 22 email Jorsch sent to Jones and the entire College faculty, Jorsch raised concerns about the tenure process as it related to him and current and future faculty. The tenure process affects faculty members' terms and conditions of employment, and therefore, their discussions among themselves or with others about it is protected under the Act. The evidence establishes that in the termination letter issued to Jorsch, Jones wrote that the action was being taken specifically because of Jorsch's open letter to him and the College faculty in which he raised concerns about the tenure process. Jones wrote, "Your letter to me was [a] blatant act of insubordination and was exacerbated by your choice to publicize the issues by sending copies of the letter to the Bethany College faculty and others. For that reason, I have determined that your employment with Bethany College is terminated immediately." (GC Exh. 18.) Jones' letter can be no clearer evidence that the Respondent notified employees that they would be terminated for engaging in protected concerted activity.

Accordingly, I find that the Respondent, through Jones' June 26 letter of termination to Jorsch, informed employees that they were being terminated for engaging in protected, concerted activities in violation of Section 8(a)(1) of the Act.

E. Jorsch's Termination

The General Counsel argues that under a *Wright Line*[10] analysis the Respondent unlawfully discharged Jorsch because he engaged in protected concerted activity. In its answer to the complaint, the Respondent admits to discharging Jorsch but denies that it was done for unlawful reasons. (GC Exh. I-S.)

An employer violates Section 8(a)(1) of the Act if it disciplines or discharges an employee for engaging in activity that is "concerted" within the meaning of Section 7 of the Act. If it is determined that the activity is concerted, a violation of Section 8(a)(1) will be found if the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action was motivated by the employee's protected, concerted activity. *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB* 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Once the General Counsel establishes such an initial showing of discrimination, the employer may present evidence, as an affirmative defense, showing it would have taken the same action even in the absence of the protected activity. The General Counsel may offer evidence that the employer's articulated reasons are pretext or false. Id.

As with 8(a)(3) discrimination cases, the Board applies the *Wright Line*[11] analysis to 8(a)(1) concerted activity cases that involve disputes about an employer's motivation for taking an adverse employment action against employees. The burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer's decision to take adverse employment action against an employee was the employee's union or other protected activity. Under the *Wright Line* framework, as developed by the Board, the elements required for the General Counsel to show that protected activity was a motivating factor in an employer's adverse action are: (1) union or protected activity; (2) an employer's knowledge of that activity; and (3) discriminatory animus on the part of the employer. *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (2016); *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014); enf. 801 F.3d 767 (7th Cir. 2015). Once the General Counsel has met its initial showing that the protected conduct was a motivating or substantial reason in employer's decision to take the adverse action, the employer has the burden of production by presenting evidence the action would have occurred even absent the protected concerted activity. The General Counsel may offer proof that the employer's articulated reason is false or pretextual. *Iron Mountain Forge Corp.*, 278 NLRB 255, 263 (1986). Ultimately, the General Counsel retains the ultimate burden of proving discrimination. *Wright Line*, id. However, where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)). The *Wright Line* analysis is not applicable when there is no dispute that the employer took action against the employee because the employee engaged in protected concerted activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed.Appx. 524 (D.C. Cir. 2003).

i. Jorsch's Actions Constitute Protected Concerted and Union Activity and Respondent was aware of the protected concerted nature of his activities

In *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), the Board

[10] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

[11] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted if it is engaged in with the object of initiating or inducing group action. *Whittaker Corp.*, 289 NLRB 933 (1988); *MCPC, Inc.*, 360 NLRB 216 (2014).

Jorsch engaged in protected concerted and union activity when (1) he contacted AAUP with his concerns about the Respondent's actions involving his tenure review and its possible impact on current and future faculty; and (2) he wrote the email to Jones and copied the faculty detailing his fears that Jones had degraded the integrity of the tenure process for himself and current and future faculty. Jorsch specifically noted in his faculty-wide email to Jones that he wrote it to start an open dialogue among the faculty and management about the "breakdown" in the College's tenure process and restore integrity to the system for current and future tenure candidates. (GC Exh. 16.) Likewise, he sought assistance from AAUP in reaching out to the College to fix its tenure process so that it comports with the standards and criteria AAUP and HLC member institutions have committed to using in making decisions on tenure. See, *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014) (explaining the "mutual aid or protection" analysis focuses on whether there is a connection between the activity "and matters concerning the workplace or employees' interests as employees."); *Caesar's Palace*, 336 NLRB 271 (2001); *Verizon Wireless*, 349 NLRB 640, 658–659 (2007).

It is undisputed that the Respondent was aware of Jorsch's protected concerted activity because the day after Jorsch wrote the open letter Jones responded to it. Likewise, the evidence is undisputed the Respondent was that Jorsch contacted AAUP to advocate on behalf of him and current and future faculty members who are or will go through the tenure process.

ii. The Respondent's Motivation for Discharging Jorsch

In *KHRG Employer, LLC d/b/a Hotel Burnham & Atwood Cafe*, 366 NLRB No. 22 (2018), the Board wrote that "[w]hen, . . ., an employer defends a discharge based on employee misconduct that is a part of the res gestae of the employee's protected concerted activity, the employer's motive is not at issue. Instead, such discharges are considered unlawful unless the misconduct at issue was so egregious as to lose the protection of the Act. See, e.g., *Consumers Power Co.*, 282 NLRB 130, 132 (1986) ("[W]hen an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act . . .") (footnote omitted). To answer this question, the Board balances employees' right to engage in concerted activity, allowing some leeway for impulsive behavior, against employers' right to maintain order and respect. *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994); *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), enfg. 148 NLRB 1379 (1964). *KHRG* at slip op. at 2.

Based on the evidence, I find that the Respondent's motive for terminating Jorsch is not at issue because the Respondent admits that it discharged Jorsch solely because he sent Jones a letter complaining about Jones' deviation from the College's established tenure process and its effect on him and current and future tenure candidates. In the termination letter issued to Jorsch, Jones wrote that Jorsch's open letter "crossed a professional line" and it was the sole reason for his termination. Moreover, there is nothing in Jorsch's email to Jones and the faculty to show that the email violates any of the Respondent's lawful rules, regulations, or guidelines. Despite Jones' contention to the contrary, I also find nothing in the record to indicate that Jorsch's action "crossed a professional line." Consequently, I find that the Respondent did not established its burden of showing that Jorsch lost protection of the Act because of his action.

Accordingly, I find that the Respondent discharged Jorsch in violation of Section 8(a)(1) and (3) of the Act.

F. Guinn's Termination

The General Counsel argues that Guinn was discharged because of her husband's protected activity; and points to the timing of her termination as evidence of the Respondent's unlawful motivation. The Respondent outright denies discharging Guinn. Id.

The Board considers several factors in determining whether an inference of discriminatory animus can be sustained. The factors to consider are proffering false reasons in defense of taking the adverse action, disparate treatment of certain employees with similar work records or offenses, deviation from past practice, and the proximity in time of the discipline to the protected activity. *Embassy Vacation Resorts*, 340 NLRB 846, 847 (2003); *Austal USA, LLC*, 356 NLRB 363, 363 (2010); *Lucky Club Co*, 360 NLRB 271 (2014).

I find that the timing of the Respondent's decision to not to renew Guinn's appointment almost simultaneously to Jorsch's protected activity is strong evidence that the action was taken because of the Respondent's animus towards Jorsch's exercising his Section 7 rights. In early or mid-April, Guinn passed Pigge in the hallway on campus and Pigge mentioned to her that she had submitted the requests for adjunct professor approvals for the fall semester. A few weeks after that encounter, Guinn received an email from Pigge asking her to pick the books for the history classes Guinn was teaching in the fall so that Pigge could order the books. I am taking an adverse inference that if the Respondent had complied with my order to compel Pigge to testify she would have corroborated Guinn's version of their interactions and conversations. It is undisputed that in early May, Guinn received an email from Assistant Dean of Academic Affairs Professor Melody Steed (Steed) asking her to teach two freshman courses.

There is no evidence that from May until Jorsch sent his faculty-wide email on June 22 that the Respondent had changed its plan to renew Guinn's contract. However, the same day that Jorsch sent his open-letter, Guinn's College email account was terminated, Pigge informed Jorsch that Guinn would not be allowed to take over his classes, and Pigge told Jorsch that Guinn would no longer be allowed to teach history courses. Since she was appointed to teach history, it is obvious that Pigge was conveying to Jorsch that Guinn's contract would not be renewed. The Respondent proffered no reason for its decision to cancel

Guinn's email account, preclude her from teaching Jorsch's classes after his termination, and not renew her teaching contract. Likewise, there is no documentary evidence to support a legitimate non-discriminatory reason for the Respondent's refusal to renew Guinn's contract. The absence of evidence to show the Respondent had a legitimate non-discriminatory reason for its action which was not pretext for discrimination coupled with the timing of the Respondent's failure to renew Guinn's contract, leads me to a finding that the Respondent's action was taken because of discriminatory animus.

Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act when it discharged (or failed to renew the teaching appointment) Guinn.

Conclusions of Law

1. The Respondent, Bethany College, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated the Act by the following conduct:

(a) Discharging Thomas Jorsch and Lisa Guinn on June 27, 2017

(b) Since about December 29, 2016, promulgating and maintaining a rule prohibiting its employees from speaking about terms and conditions of employment with each other or others

(c) On about May 19, 2017, asked employees to sign an agreement not to disclose a proposed Tenure Plan

(d) On about June 23, 2017, prohibited employees from discussing terms and conditions of employment with each other or others

(e) On about June 26, 2017, informed employees that they were being discharged for engaging in protected concerted activities

3. The above violations are unfair labor practices that affects commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not violated the Act except as set forth above.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged its employees, Thomas Jorsch and Lisa Guinn, must offer Thomas Jorsch and Lisa Guinn reinstatement and make them whole for any loss of earnings and other benefits they suffered as a result of the discrimination against them from the date of the discrimination to the date of their reinstatement. Further, the Respondent must remove from its files (both official and unofficial) all references to the discharges of Thomas Jorsch and Lisa Guinn.

Backpay because of the discriminatory discharge shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as provided in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate Thomas Jorsch and Lisa Guinn for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

As I concluded that the Respondent's confidentiality provision is unlawful, the recommended order requires that the Respondent revise or rescind the unlawful rule, and advise its employees in writing that the said rule has been so revised and rescinded.

Further, the Respondent will be required to post and communicate by electronic post to employees the attached Appendix and notice that assures its employees that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Bethany College, Lindsborg, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against its employees in retaliation for their protected concerted activities.

(b) Promulgating and maintaining a confidentiality policy that requires its employees to refrain from discussing their terms and conditions of employment with each other or others.

(c) Asking employees to sign an agreement not to disclose the details of a proposed Tenure Plan.

(d) Prohibiting employees from discussing the terms and conditions of their employment with each other or others.

(e) Informing employees that they are being discharged for engaging in protected concerted activities.

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

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

(a) Within 14 days from the date of the Board's Order, offer Thomas Jorsch and Lisa Guinn full reinstatement to their former positions or, if those positions no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of the Board's Order, make Thomas Jorsch and Lisa Guinn whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Thomas Jorsch and Lisa Guinn, and within 3 days thereafter notify Thomas Jorsch and Lisa Guinn in writing that this has been completed and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Lindsborg, Kansas, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 14 (Sub-Region 17), 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 and members are customarily posted. In addition to physical posting of paper notices, the 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 means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility 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 December 29, 2016.

(f) Within 21 days after service by the Region, file with the Regional Director 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. October 31, 2018

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 do anything to prevent you from exercising the above rights.

WE WILL NOT ask you about your discussions with employees.

YOU HAVE THE RIGHT to terms and conditions of employment with other employees and WE WILL NOT do anything to interfere with your exercise of that right.

WE WILL NOT instruct you not to speak to each other about terms and conditions of employment.

WE WILL NOT threaten you with prosecution or legal action for talking to other employees, customers or the general public regarding your working conditions.

WE WILL NOT fire employees because they exercise their right to discuss terms and conditions of employment with other employees.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer Thomas Jorsch and Lisa Guinn their jobs back along with their seniority and all other rights or privileges.

WE WILL pay with interest Thomas Jorsch and Lisa Guinn for the wages and other benefits they lost because we fired them.

WE WILL compensate Thomas Jorsch and Lisa Guinn for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL remove from our files all references to the discharges of Thomas Jorsch and Lisa Guinn and WE WILL notify them in writing that this has been done and that the discharge will not be used against them in any way.

BETHANY COLLEGE

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/14-CA-201546 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.

[13] 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."

EXHIBIT B

RKE
Lindsborg, KS

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BETHANY COLLEGE

and

Case 14-CA-201546
14-CA-201584

THOMAS JORSCH

and

LISA GUINN

CORRECTED ORDER DENYING MOTION FOR RECONSIDERATION

The Charging Parties' Motion for Reconsideration of the Board's Decision and Order reported at 369 NLRB No. 98 (2020) is denied. The Charging Parties have not identified any material error or demonstrated extraordinary circumstances warranting reconsideration under Board Rules and Regulations Section 102.48(c)(1).

Dated August 11, 2020, Washington, D.C.,

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) **NATIONAL LABOR RELATIONS BOARD**