

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

**SAINT MARTIN'S UNIVERSITY**

**Employer**

**and**

**Case 19-RC-173933**

**SERVICE EMPLOYEES INTERNATIONAL UNION,  
LOCAL 925**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

Petitioner seeks to represent a unit of all full-time and regular part-time contingent faculty employed by the Employer at its Lacey, Washington, campus and its satellite and extension campuses ("Unit").<sup>1</sup> Saint Martin's University ("University" or "Employer") makes numerous arguments why I should not order an immediate election. First, the Employer argues that, as a religiously operated institution, it is exempt from the Board's jurisdiction under *Pacific Lutheran University*, 361 NLRB No. 157 (2014). Second, it argues it is exempt from exercise of jurisdiction herein under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 200bb-1(a)-(b) (2000). Third, it argues that the Hearing Officer's refusal to allow the Employer to introduce certain evidence into the record was prejudicial error. Finally, the Employer argues that, if I nevertheless order an election, any election should be held after the commencement of the fall 2016 term. Two other arguments raised by the Employer I reject summarily, as I am bound by Board precedent. The Employer argues that the *Pacific Lutheran* standard is unconstitutional and that the Board's election rules violate the National Labor Relations Act ("Act"). Any arguments regarding the lawfulness of the underlying representation case procedures and the constitutionality of the *Pacific Lutheran* standard are more appropriately addressed to the Board.

A hearing officer of the Board held a hearing in this matter and the parties subsequently filed briefs with me. Based on the record and relevant Board law and for the reasons set forth below, I find that the Employer has not met its burden of demonstrating that petitioned-for faculty are held out as performing specific religious functions, nor its burden of establishing that

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<sup>1</sup> The parties stipulated to this unit description. However, the parties did not agree as to whether members of the Order of Saint Benedict (that is, monks of Saint Martin's Abbey) who are employed as contingent faculty should be included in the Unit. There appear to be between zero and three otherwise-eligible faculty who are monks. I therefore ruled before the hearing that evidence on this issue would not be admitted at hearing and instead any such faculty would be allowed to vote subject to challenge and the issue reserved for post-hearing proceedings. For this reason, I will not address the issue herein.

exercise of Board jurisdiction herein would violate RFRA. I also find that the University does not operate seasonally under Board law and that ordering an immediate election is appropriate.

## **I. RELIGIOUS NATURE OF THE UNIVERSITY**

### **A. Facts**

The University is a non-profit, Catholic Benedictine university with a main campus in Lacey, Washington, an extended learning division at nearby Joint Base Lewis-McChord, and programs at Tacoma and Centralia Community Colleges.<sup>2</sup> It was founded in 1895 by monks from the Order of Saint Benedict, who came from Minnesota to establish a monastery and school under the patronage of Saint Martin of Tours. The University occupies land owned by Saint Martin's Abbey ("Abbey"), and operates the school under a license agreement with the Abbey.

The University has a student body of about 1,500 graduate and undergraduate students. The University's chancellor (who is also the abbot of Saint Martin's Abbey) testified that about 40 percent of the student body is Catholic (although there was no evidence how he ascertained this). The University offers 23 undergraduate majors and 7 graduate programs. It employs tenure-track and tenured faculty, as well as the petitioned-for contingent faculty.

#### **1. University leadership**

Under the University's bylaws, the abbot of the Abbey is the chancellor of the University and monks who have taken their final vows to the Abbey are the University corporation's voting members. The University's Board of Trustees consists of the chancellor, the president, and other trustees elected by the Board from among a list provided by the Members. The bylaws provide for there to be between 11 and 40 trustees.

The members appoint the University's president. The Abbot appoints the treasurer. The president appoints the provost, chief financial officer, chief communications officer, chief development officer, chief student affairs officer, chief enrollment officer, chief institutional effectiveness officer, chief technology officer, and chief human resources officer, all of whom report to the president. The provost appoints a chief international officer and academic deans. Unit faculty are appointed by deans and department chairs, with approval from the provost.

#### **2. University mission**

Under the license agreement between the Abbey and the University, the Abbey may revoke the license at any time if the University fails to operate the school as a Catholic Benedictine institution of higher learning. The agreement also provides that the University must give qualified Benedictine monks first preference in hiring; abide by the norms of the Catholic Church and *Ex Corde Ecclesiae*, a papal document regarding Catholic higher education; require University employees to support the Catholic Benedictine mission; and require each

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<sup>2</sup> There was testimony that the University is phasing out its program at Tacoma Community College.

undergraduate student to complete a 3-credit course in theology or religious studies. The agreement requires the president of the University to be a practicing Roman Catholic.

The University's mission, contained in its academic catalogs, website, bylaws, strategic plan, accreditation report, and on the backs of folders used in university offices, states:

Saint Martin's University is a Catholic Benedictine institution of higher education that empowers students to pursue a lifetime of learning and accomplishment in all arenas of human endeavor.

Saint Martin's students learn to make a positive difference in their lives and in the lives of others through the interaction of faith, reason, and service.

The University honors both the sacredness of the individual and the significance of community in the ongoing journey of becoming.

The University also spells out the following Benedictine values in a number of places, including its website, academic catalogs, and guide for families of admitted students: Awareness of God, Community Living, Dignity of Work, Hospitality, Justice, Listening, Moderation, Peace, Respect for Persons, Stability, and Stewardship. After each value, both a brief modern gloss and the original statement from the Rule of Benedict is provided. The Rule of Benedict, written sometime before St. Benedict's death in the year 547 AD, provides the rules Benedictine monks live by. The provost testified that the University intends to provide copies of the Rule to all faculty, but evidence was lacking confirming that contingent faculty consistently receive copies. All classrooms at the University contain crucifixes.

The University's strategic plan includes a pledge to "forge a distinctive Catholic, Benedictine experience inside and outside the classroom that embodies the values we embrace and is intentionally transformative."

Within the last few years, the University created a Benedictine Institute to promulgate its Benedictine identity to faculty, staff, and students. According to the provost, the Institute "will" hold orientation sessions for all new employees, including faculty. However, there is no evidence in the record of any petitioned-for contingent faculty's being actually offered any such orientation.

In a letter to prospective students, a professor of religious studies writes that "classes are designed not only to prepare you well for your chosen career, but also to enable you to live freely: free from fear, from gullibility, from narrow-mindedness, free from ignorance and prejudice." Included in the guide for families is a letter from the University's president, which welcomes them to "a community founded on the 1,500-year-old Benedictine tradition of hospitality, respect, service and stewardship. Driven by these values, the faculty and staff of Saint Martin's are dedicated to the success of each student, both inside and outside the classroom" (the guide also includes the University's mission statement).

### 3. Funding

While the majority of the University's funding comes from student tuition, including federal student aid, the Abbey provides significant funding to the University. For the period January 2001 through July 2015, the Abbey provided almost \$7 million in gifts to the University. In addition, the University receives the free use of the Abbey's land, a gift whose worth an appraiser estimated at \$2.1 to \$2.6 million a year.

### 4. Contingent faculty

There was no evidence that the University requires any of its faculty, including those teaching theology or religion, to be Catholic. However, under *Ex Corde Ecclesiae*, with which the University must comply under its license with the Abbey, a Catholic person who teaches theology must have a *mandatum* granted by the local bishop. A *mandatum* is a private agreement between the bishop and the theologian that the theologian will teach authentic Catholic doctrine and not teach anything contrary to Catholic doctrine. The record includes *mandata* for three contingent faculty, all of whom are monks, and the record appears to indicate that these instructors were the only theology instructors as of the time the *mandata* were signed, in 2009; there is no evidence as to whether that circumstance has changed since. There was no evidence as to what, if any, consequences would result if a Catholic theology teacher failed to get a *mandatum*.

#### a. Hiring

The University's employment handbook contains a statement that it does not discriminate on the basis of sex, sexual orientation, race, color, marital status, national or ethnic origin, military or veteran status, age, disability, or "religion (except as a bona fide occupational qualification for certain select positions as outlined in the St. Martin's Abbey & Saint Martin's University Licensing Agreement)." This exception apparently refers to the hiring preference given to qualified monks. Similarly, the undergraduate and graduate academic catalogs state that the University is an equal opportunity institution.

Three of the four contingent faculty job advertisements in the record make no reference to the University's Catholic Benedictine mission. The fourth requires that applicants submit a brief statement highlighting how the applicant's "work experience, and background will contribute to the Catholic Benedictine philosophy of education," and the provost testified that current policy is to require a mission statement from all faculty applicants. The evidence indicates that this policy is not applied, or applied inconsistently, as none of the faculty who testified recalled submitting such a statement, although recent contingent faculty contracts in the record (which are unsigned and sent to faculty after they start teaching for the term) provide that a mission statement, among other documents, must be on file with the provost before the first day of the semester. The contingent faculty contracts in the record state that the faculty member "agrees to support the University's Catholic Benedictine mission."

The contingent faculty witnesses testified that they were never informed at hire (or at any point) that any religious role was required of them as part of their employment. Nor were they asked about their qualification or willingness to perform a religious role.

**b. Evaluation and job responsibilities**

Contingent faculty witnesses indicated that they were evaluated regularly by students, but that evaluation of their work by the University happened infrequently and irregularly. The witnesses testified that evaluations, either by students or the University, contained no religious criteria. The record contains only a single evaluation, which is in the form of a narrative assessment of a contingent faculty member's classroom instruction on a single day (the faculty member happens to be a monk). That evaluation contains no mention of God, Benedictine values, or Catholicism.

The contingent faculty witnesses testified that they had never received any indication that they were expected to proselytize or provide any religious advising to students. Nor was there any evidence in the record that contingent faculty are required to participate in or attend any religious services or events. One contingent faculty witness, who described himself as "interested in Buddhism," participated in campus interfaith discussions and guest lectured on Buddhism in a colleague's class, but this was purely voluntary. Another contingent faculty member participated in a campus panel on encounters with other faiths; his participation was also voluntary.

Contingent faculty teach the first-year seminar required of all entering freshman. It is designed to provide university-level time-management and study skills and introduce students to academic study. The president indicated that interfaith dialogue had been a focus of the course, and a contingent faculty member, who is a monk and former director of the University's Benedictine institute, testified that a purpose of the first-year seminar was to convey Benedictine spirituality and history. However, another contingent faculty member who had taught and for a time co-directed the first-year seminar testified that instructors are free to select the themes of their seminars and that inclusion of instruction on Benedictine values in the course is voluntary. The same contingent faculty member testified that he used the Rule of Benedict in a first-year seminar he taught, but he did so voluntarily. Similarly, he also chose to use in a business law class a book called *Doing Business with Benedict*, about a businessman's relationship with the pope.

Although the University president testified that the chair of the religious studies department must be a Catholic, there was no information on whether rank-and-file instructors in the department are required to be Catholic. As noted above, the record seems to indicate that the three instructors with *mandata*, all monks, were as of 2009 the only theology instructors at the University; there is no evidence in the record as to whether that remains the case and whether any other Unit members teach religious studies.<sup>3</sup> Other than the titles and catalog descriptions of the religious studies courses, there is no information in the record about the content of these

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<sup>3</sup> The lists of contingent faculty in the record specify only which school or college each faculty member teaches in, but not what department. Religious studies is within the College of Arts and Sciences.

courses or any strictures placed on faculty teaching them (other than, as described above, the *mandata*).

**c. Employment rules, discipline, and discharge**

The record includes an employee handbook, faculty handbook and bylaws, and contingent faculty guide. All four are posted on the University's website.<sup>4</sup> Although the Employer does not provide contingent faculty with physical copies of the handbooks, contingent faculty contracts refer to them: "Faculty appointments are made by the University in accordance with the Employee and Faculty Handbooks and Bylaws, as amended." The first page of the Employee Handbook states that it covers policies and procedures applicable to faculty and staff. The web page on which the handbook is posted and page 11 of the employee handbook states that in the event of conflict between the Employee and Faculty Handbooks regarding "faculty selection, ranking, advancement or dismissal process" the faculty handbook takes precedence.

The only mention in the faculty handbook and bylaws of Catholicism or Benedictine values is in the section on academic freedom: "As members of a Catholic institution of higher education, faculty members are expected to respect the teachings of the Catholic Church, even though they need not accept these teachings as their personal religious creeds." The faculty handbook and bylaws largely cover matters applicable to tenured and tenure-track faculty and not to contingent faculty, but do specify procedures for appointing contingent faculty. There is no mention of religion in that section.

There is no mention of religion in the contingent faculty guide section on faculty responsibilities or anywhere else in the contingent faculty guide.

The employee handbook section on workplace conduct provides that "Employees are expected to uphold and support the mission of Saint Martin's University and to respect the teachings of the Catholic Church even though they may not accept these teachings as their personal religious belief." It also states that "All employees of the University shall commit themselves to support the University's Catholic Benedictine mission." Further on in the handbook, at page 78, the section on standards of conduct contains a list of conduct that could result in corrective action up to and including termination. That list includes the following: "Using the employee's position at Saint Martin's University to publicly advocate for a position contrary to the tenets of the Catholic Church."

The provost testified that this passage means that an employee may take a position, even publicly, contrary to Catholic Church doctrine, but when doing so must make clear that the employee is not speaking for the University. This includes speaking in the classroom. The provost testified that she believed it was not appropriate for an instructor to advocate for any particular view in the classroom, as distinct from accurately conveying what a view is. She testified that accurately conveying a view is an appropriate part of an instructor's job but advocating for a view is inappropriate, whether the view was contrary to Catholic doctrine or

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<sup>4</sup> The faculty bylaws constitute the second half of the faculty guide, in that although they appear to be separate documents their pages are consecutively numbered and they were admitted to the record as a single exhibit. It is unclear how they are posted on the website.

otherwise. However, she also testified that she would treat classroom advocacy differently depending on whether the views were or were not in conflict with those of the Catholic Church, because the University has a policy covering advocacy of views in conflict with the Catholic Church's tenets but none covering advocacy of views not in conflict with them. However, there was no evidence in the record providing any examples of this distinction in practice, nor of any instance when any employee was accused of or disciplined for violating the policy.

In response to questions about the employee handbook policy, the University chancellor and abbot stated that he would "weigh in" on the issue of faculty advocacy of positions contrary to Catholic Church tenets, although how was not clear. He stated, as a hypothetical example of weighing in on this policy, that if someone were to hand out condoms (he did not specify whether in the classroom, on campus, or elsewhere), "we're not going to condone that. "

#### **d. Academic freedom**

The faculty handbook commits the University to academic freedom in both teaching and research, stating that the University "seeks to advance the common good and holds to the tenet that the common good depends upon the free search for truth and its free expression." It quotes from a U.S. Supreme Court opinion that describes academic freedom as a "transcendent value."

The faculty handbook approvingly quotes from the American Association of University Professors ("AAUP") Statement of Principles on Academic Principles on Academic Freedom and Tenure and Statement on Professional Ethics, which are included in the handbook as appendices. Both statements also note repeatedly that "When [faculty] speak or act as private persons, they avoid creating the impression of speaking or acting for their college or university." The statement on academic freedom says, "College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institution censorship or discipline, but their special position in the community imposes special obligations. Hence they should at all times make every effort to indicate that they are not speaking for the institution." Similarly, contingent faculty contracts state that the faculty member will not issue any statement on behalf of the University without written consent of the president.

#### **5. Religious beliefs of the Benedictine Order and the Catholic Church on collective bargaining**

There is no evidence in the record of any tenet of the Benedictine Order or of the Catholic Church regarding unions or collective bargaining. The provost testified that she was not aware of any tenet of the Catholic Church on collective bargaining.

A monk who is also a contingent faculty member testified that he took a vow of obedience to the abbot and that his religious beliefs would be burdened by union representation of the faculty because "having somebody else who had jurisdiction over my abbot is unacceptable." Similarly, the abbot testified that the presence of an "outside agent" in the form of a union would be "diametrically opposed to our Benedictine presence, our sense of hospitality and respect and all those things. " He was also concerned about the potential for a union to

interfere with his authority: “[I]f it bumped up against me and my authority I—they would have a fat, big battle on their hands because I would not put up with it.”

The faculty handbook includes the AAUP’s Statement on Government of Colleges and Universities as an appendix. That statement concludes with a note that the AAUP “regards collective bargaining, properly used, as another means of achieving sound academic government.”

## **B. Analysis**

### **1. Board jurisdiction under *Pacific Lutheran***

The Employer contends that it is a religious institution and exempt from the Board’s jurisdiction under *Pacific Lutheran*.

#### **a. The legal standard**

The Board recently established a new standard to assess whether exercise of the Board’s jurisdiction over a university that claims religious affiliation presents a significant risk of infringing the First Amendment. *Pacific Lutheran*, 361 NLRB No. 157. The Board will not decline to exercise jurisdiction over faculty members at a university that claims to be a religious institution unless the university demonstrates that 1) it holds itself out as providing a religious educational environment, and 2) the university holds the petitioned-for faculty out as performing a specific role in creating or maintaining the university’s religious educational environment. *Id.*, slip op. at 6–8.

Step one is a threshold showing that is “minimal” and “does not impose a heavy burden.” *Id.*, slip op. at 7. To be exempt from the Board’s jurisdiction, the institution must be organized as a nonprofit. *Id.*, slip op. at 7. See also *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). The Board will give more weight to contemporary self-presentation than to founding and historical documents. *Pacific Lutheran*, 361 NLRB No. 157, slip op. at 7. Documents demonstrating this self-presentation include “handbooks, mission statement, corporate documents, course catalogs, and documents published on a school’s website.” *Id.*, slip op. at 6.

Step two focuses on the petitioned-for faculty, rather than the university as a whole. Again, the focus is on how the university *holds out* these faculty, avoiding an intrusive inquiry into the nature of the religious tenets of the institution or how effective the university is at inculcating them. *Id.*, slip op. at 8. Nor will the Board look behind publicly available documents to assess the university’s actual practice or investigate any individual teacher’s specific actions. *Id.*, slip op. at 9. The Board will look at the school’s own statements, both oral and in the form of written statements on its website, in handbooks, employment contracts, job descriptions, and similar documents. *Id.*

The inquiry is nevertheless demanding; the faculty must be held out as performing a specific religious function and “[g]eneralized statements that faculty members are expected to,



for example, support the goals or mission of the university are not alone sufficient.” *Id.*, slip op. at 8. When the Board applied its new standard to the facts of *Pacific Lutheran*, it examined the statement in the faculty constitution that a faculty member “becomes a member of a community of scholars who respect and uphold the principles of Lutheran Higher Education.” *Id.*, slip op. at 12 n.22. The Board found this statement to be merely aspirational and that it did not demonstrate that faculty members were required to perform any specific religious role. *Id.*

Conversely, evidence showing that faculty members are required to integrate the institution’s religious tenets into coursework, serve as religious advisors to students, propagate those tenets, engage in religious training, or conform to the tenets in a manner specifically linked to their job duties is sufficient to exempt an institution from Board jurisdiction. *Id.*, slip op. at 9. Such evidence will be found in the school’s statements to students, faculty, and the public, including on its website and in its handbooks, employment contracts, and job descriptions. *Id.*, slip op. at 10. The issue boils down to “whether a reasonable prospective applicant would conclude that performance of their faculty responsibilities would require furtherance of the college or university’s religious mission.” *Id.*, slip op. at 9.

The Board noted, in a footnote, that the inquiry does not focus on the personal beliefs or values of faculty. *Id.*, slip op. at 9 n.14. Furthermore, showing that “faculty members are held out as being required to proselytize or to indoctrinate students” is not necessary to showing they are held out as performing a specific religious function, but “there must be a connection between the performance of a religious role and faculty members’ employment requirements.” *Id.* It also found a relevant question to be “the extent to which the college or university holds itself out as respecting or promoting faculty independence and academic freedom, versus focusing on religious identification and sectarian influence.” *Id.*, slip op. at 9 n.15.

In another footnote, the Board said that it “will decline jurisdiction so long as the university’s public representations make it clear that faculty members are subject to employment-related decisions that are based on religious considerations.” *Id.*, slip op. at 10 n.19. As an example, the Board stated that “if faculty members are subject to dismissal for teaching a doctrine at odds with the religious faith of the institution, [its] new test would lead the Board to decline jurisdiction over disputes about those dismissals so long as the university’s public representations indicated that faculty members were expected to comply with (or at least not openly contravene) certain tenets of a religion as a term and condition of employment.” *Id.* The Board did not clarify whether by “teaching a doctrine at odds with the religious faith of the institution” it meant advocating for the correctness of such a doctrine or merely conveying what the doctrine is. Given that a prohibition on conveying what a doctrine is would amount to a gag order barring faculty from teaching the full subject matter of many courses, a stricture that only the most extreme religious institutions would enforce, it seems more plausible that the Board meant advocating for the correctness of a doctrine.

#### **b. Application**

The parties stipulated, and I find, that the University holds itself out as providing a religious educational environment, and thus it meets the first prong of *Pacific Lutheran*.

The second prong is a closer question. The University does not generally hold out the Unit faculty as performing a specific religious function. It does not include religious requirements in its job advertisements for Unit positions. Contingent faculty witnesses testified that the University does not mention any religious requirements during the hiring process. The unenforced or inconsistently enforced policy that applicants provide a statement explaining how their work will contribute to the mission and values of the University is too vague to constitute a specific religious requirement. Similarly, the statement in faculty contracts and the employee handbook that “The faculty member agrees to support the University’s Catholic Benedictine values” is the sort of vague, aspirational remark that the Board in *Pacific Lutheran* found inadequate to constitute a requirement that faculty members are required to perform a specific religious role. Faculty are not required to attend or participate in any religious activities or events, nor are contingent faculty required to serve as religious advisors to students, propagate religious tenets, or engage in religious training of students.

The sole religious employment requirement on contingent faculty is the following, among a list of behavior which would result in corrective action, up to and including termination: “Using the employee’s position at Saint Martin’s University to publicly advocate for a position contrary to the tenets of the Catholic Church.” The Employer likens this provision to the one on which I based my decision to decline jurisdiction in *Carroll College*, Case No. 19-RC-165133 (Jan. 19, 2016). In that case, the school’s faculty handbook enumerated four grounds for termination and dismissal for serious cause: professional incompetence, conviction of a felony, “continued serious disrespect or disregard for the Catholic character or mission” of the College, or causing “notorious and public scandal.” These amount to blanket reservation clauses; “disrespect or disregard for the Catholic character or mission” and “notorious and public scandal” include both action and speech, and they are broad enough to embrace whatever action or speech a college administrator might regard as offensive to her notion of religious values.

In contrast, the employee handbook provision here is limited in three ways that do not implicate religious concepts.<sup>5</sup> First, “using the employee’s position,” second, “publicly,” and, three, “advocate.” These three limitations make the provision narrower than that in *Carroll College*. At the same time, its meaning is far from clear. It is not clear on its face whether it forbids “openly contraven[ing] certain tenets of a religion as a term and condition of employment.” *Pacific Lutheran*, 361 NLRB No. 157, slip. op. at 10 n.19.

While the *Pacific Lutheran* decision directs me not to look behind publicly available documents to assess the University’s actual practice, it also emphasizes that prong two boils down to whether a reasonable prospective applicant would conclude that performance of faculty responsibilities required furtherance of a specific religious mission. One of the ways that a reasonable applicant would interpret the ambiguous employee handbook provision here would be by assessing its context. Where an institution maintained a similarly unclear employment rule but consistently and openly applied it to discipline or dismiss faculty for allegedly violating religious strictures, a reasonable applicant would be on notice that faculty members were subject to religious criteria. Lack of evidence of enforcement of such a provision leaves the ambiguity unresolved. Furthermore, in this case, lack of examples of enforcement would suggest to a

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<sup>5</sup> As *Pacific Lutheran* directs me not to engage in an intrusive inquiry into the institution’s religious tenets, for my purposes here “the tenets of the Catholic Church” are whatever the abbot says they are.

reasonable applicant that it bars only prosectizing against Church tenets while purporting to speak for the University. The University provost interprets the provision in the same way.

Further heightening the ambiguity is the fact that the provision appears not in the faculty handbook but in the employee handbook. While contingent faculty are put on notice of the employee handbook's existence and applicability to them through their contracts, the handbook specifies that the faculty handbook trumps the employee handbook in the area of "dismissal process," a category in which the provision in question falls. While the provision may not outright conflict with anything in the faculty handbook, the faculty handbook suggests ways of resolving the provision's ambiguity. The faculty handbook grants faculty academic freedom, a fact that the Board has held to weigh against an employer's meeting prong two. *Pacific Lutheran*, 361 NLRB No. 157, slip op. at 9 n.15. Furthermore, the faculty handbook's repeated statements that faculty have full freedom to speak as citizens but should make clear when they are not speaking for the University suggest that the employee handbook provision on using a University position for advocacy merely makes the same point.

Thus, a reasonable applicant for a contingent faculty job who took the time to read not only the faculty handbook but also the employee handbook, and made it all the way to page 78, might be puzzled by the provision on public advocacy, but would not, in the context in which Saint Martin's University otherwise holds its faculty out, conclude that furthering a specific religious mission is a faculty job requirement.

Therefore I find that the Employer has not met its burden, under *Pacific Lutheran*, of demonstrating that it holds out its contingent faculty as performing a specific religious function and therefore that declining exercise of Board jurisdiction over the contingent faculty of Saint Martin's University is not warranted.

## **2. Religious Freedom Restoration Act**

### **a. Legal standard**

RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)–(b) (2000).

"To establish a *prima facie* case under the RFRA's substantial burden/compelling interest/least restrictive means framework, a claimant must show that application of the Act will substantially burden its ability to exercise its sincere religious beliefs." *Carroll College, Inc.*, 345 NLRB 2547, 257 (2005).<sup>6</sup> "Only if the claimant carries this burden, will the Board, under the RFRA, have to establish that the Act serves a compelling governmental interest and that application of the Act is the least restrictive means of accomplishing that interest." *Id.*

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<sup>6</sup> This institution is distinct from the college in the Region 19 *Carroll College* case and the cases are unrelated.

The Board, interpreting applicable Supreme Court jurisprudence, has found that “a substantial burden exists when the Government’s regulation puts ‘substantial pressure on an adherent to modify his behavior and violate his beliefs.’” *Carroll College*, 345 NLRB at 258 (quoting *Thomas v. Review Board of Indiana Employment Section Division*, 450 U.S. 707, 717–718 (1981)). Under this standard, “the religious adherent has the obligation to prove that a governmental regulatory mechanism burdens the adherent’s practice of his or her religion by pressuring the adherent to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates.” *Ukiah Adventist Hosp.*, 332 NLRB 602, 603 (2000) (citing *Hobbie v. Unemployment Appeals Comm’n of Florida*, 480 U.S. 136, 140–41 (1987); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). “This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.” *Ukiah Adventist Hosp.*, 332 NLRB at 603 (citing *Thomas v. Review Bd.*, 450 U.S. 707 (1981)). The Board has made clear that the “substantial burden” inquiry under the RFRA is “plainly different” from an inquiry “under which the Board must determine whether an entity is altogether exempt from the Board’s jurisdiction,” such as under the *Pacific Lutheran* standard. *Carroll College*, 345 NLRB at 258.

Two Board cases highlight the application of the RFRA to the Board’s jurisdiction. Based on the first prong of the RFRA, substantial burden, the Board rejected an employer’s argument under the RFRA in *Carroll College*, 345 NLRB 254. The Board highlighted that “should the petitioner become certified as the collective-bargaining representative of the employer’s faculty, the employer will be legally obligated to bargain with the petitioner in good faith or risk legal sanctions under the Act.” *Id.* at 258. However, the Board disagreed with the employer’s contention that requiring it to bargain with the union would substantially burden its free exercise of religion because it would interfere with its right to decide autonomously whether faculty members are satisfactorily conforming to the Protestant theological tradition. *Id.* The Board noted that nothing in the record indicated that the employer used any religious criteria in its hiring process or decisions or that faculty members must agree to any particular statements of faith and that the employer specifically prohibited discrimination in employment decisions based on religion. *Id.* Similarly, the Board found that there was no evidence that a faculty member was ever disciplined, dismissed, or denied tenure, a promotion, or a merit-based salary increase for engaging in conduct contrary to the teaching of the Protestant Church. *Id.* at 259.

More importantly, the Board focused on the fact that the union in that case was not yet certified as the faculty’s collective-bargaining representative, and “consequently, no specific religion-based conflicts have emerged.” *Id.* The Board noted that “hypothetical transgressions advanced by the employer or the mere potential for transgression is not enough to satisfy RFRA’s substantial burden component.” *Id.* Rather, “the burden must be a ‘demonstrable reality,’ not merely a speculative possibility.” *Id.* (citing *Beck v. Washington*, 369 U.S. 541, 558 (1962)). The Board likened the employer to any other employer subject to collective-bargaining obligations, in that “the collective-bargaining process will undoubtedly result in some impact on the employer’s operation [but] does not, however, in and of itself, substantially burden the employer’s free exercise of religion.” *Id.*

Under the second prong of RFRA, the Board in *Ukiah Adventist Hosp.*, 332 NLRB 602, found that assertion of jurisdiction did not violate RFRA or the First Amendment. The Board

considered arguments raised by a hospital operated by the Seventh Day Adventist Church, a church which, according to the hospital, prohibits its members from participating in labor unions, paying dues to labor unions, or operating with the presence of labor unions. *Id.* at 603. For the purposes of its decision, the Board assumed that asserting jurisdiction over the hospital created a substantial burden on the free exercise of religion within the meaning of the RFRA. *Id.*

However, in analyzing whether the assertion of jurisdiction was the least restrictive means of furthering a compelling governmental interest, the Board found that asserting jurisdiction over the hospital was not precluded by the RFRA. “The Board and the courts have found that the government has a compelling interest in preventing labor strife and in protecting the rights of employees to organize and bargain collectively with their employers over terms and conditions of employment.” *Id.* As the Board noted, the “right of employees to self-organize is constitutionally protected; it is a fundamental right implicit in the First Amendment’s free assembly language.” *Id.* (citing *Shelton v. Tucker*, 364 U.S. 479, 485-487 (1960)). The Board found that “applying the Act to the [hospital] is the least restrictive means of furthering the government’s compelling interest of preventing labor strife and protecting the employees’ ability to exercise their rights under Section 7 of the Act.” *Ukiah Adventist Hosp.*, 332 NLRB at 605. The Board was “mindful that Congress and the courts have been sensitive to the needs flowing from the Free Exercise clause, but every person cannot be shielded from all burdens incident to exercising every aspect of their right to practice religious beliefs.” *Id.* “Religious beliefs can be accommodated, but there is a point at which accommodation would radically restrict the operating latitude of the legislature, and that to maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good.” *Id.* (quoting *United States v. Lee*, 455 U.S. 252, 259 (1982)). “Granting an exemption” to the employer “would defeat Congress’ intent in enacting the National Labor Relations Act, by denying many thousands of employees the opportunity to self-organize and choose bargaining representation.” *Ukiah Adventist Hosp.*, 332 NLRB at 605.

#### **b. Application**

I find that the Employer has not met its burden of establishing that exercise of jurisdiction would violate RFRA.

The Employer has not established the existence of a “substantial burden” within the meaning of RFRA, in that it has failed to show substantial pressure on it as an adherent to modify its behavior and violate its beliefs or any specific interference with a tenet or belief that is central to the University’s religious doctrine. The University raises several primary arguments with respect to the “substantial burden” prong of analysis under RFRA, which I reject.

The Employer contends that ordering an election would burden the University’s sincerely held religious beliefs in running a institution of higher education controlled by a Catholic Benedictine monastery, employing and giving hiring preference to Benedictine monks, and creating a community where all members listen and interact openly, freely, and respectfully without restriction. However, the University did not provide any evidence that these beliefs and practices have been actually substantially burdened, nor even, assuming a number of events yet to occur, that they definitely would be burdened. *If* an election were to be held and *if* the Union

were to win that election, bargaining would take place, but how that bargaining would burden any of the identified beliefs and practices is speculative. Assuming further facts, *if* monks were included in the bargaining unit, the hiring preference might be raised in bargaining, but nothing would constrain the University to agree to any changes in that preference.<sup>7</sup> The Employer did not present any evidence of any tenets of the Catholic Church or Benedictine Order barring members from belonging to a union or engaging in collective bargaining or even any tenets addressing collective bargaining at all. The only non-speculative burden the University has established is that the abbot and Father Nguyen dislike the Union's presence. This is all far too tenuous to meet the substantial burden prong of RFRA.

Even assuming *arguendo* that the College did meet the "substantial burden" prong of the analysis under the RFRA, its RFRA claim would nevertheless fail. In *Ukiah Adventist Hospital*, the very tenets of the religion in question opposed unionization, yet the Board nevertheless found that asserting jurisdiction was the least restrictive means of furthering the compelling governmental interest in preventing labor strife and protecting employees' right to engage in self-organization, the same interest at issue here. Therefore, even assuming contrary to fact that the University could establish substantial burden, RFRA would still not preclude assertion of Board jurisdiction here.

## **II. HEARING OFFICER'S RULINGS**

Prior to hearing, the parties stipulated that the University satisfied prong one of the *Pacific Lutheran* standard, namely the University holds itself out as providing a religious educational environment. Therefore the Hearing Officer did not allow into the record evidence relevant to establishing *Pacific Lutheran* prong one. The Hearing Officer found the appraised value of the University campus to be irrelevant to any issue before me and therefore sustained the Union objection to testimony on this topic. The Hearing Officer also refused to admit in evidence Employer Exhibits 36 (a brochure for prospective students on the University's values), 38 (student handbook), 40 (an earlier version of the guide for family of incoming students), and 42 (another brochure for prospective students). The Hearing Officer allowed testimony from a real estate appraiser on the value to the University of the Abbey's land only as a proffer and the parties reached a stipulation as to the range of this value. Because each of these was relevant only to *Pacific Lutheran* prong one, and not to prong two, the specific role of the Unit faculty, and furthermore in the case of the land value the University succeeded in getting the value into the record, I find the Hearing Officer's rulings to be correct and without prejudice to the Employer.

## **III. TIMING OF THE ELECTION**

### **A. Facts**

The University operates year-round, although like most universities it operates in a reduced fashion in the summer. It offers summer classes and most offices and dormitories remain open over the summer.

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<sup>7</sup> The Employer also seems to be under the mistaken impression that were the monks to be excluded from the bargaining unit they would be prevented from working as faculty at the University.

The last day of classes for the spring 2016 semester ended April 28, 2016, with exams held May 2 through May 5, 2016. Grades were due May 9, 2016. The last pay date for this semester is May 31, 2016. The summer sessions begin May 16, 2016, with classes ending August 5, 2016, and grades due August 8, 2016. The fall semester begins August 29, 2016.

Eligible to vote in the election herein are faculty who taught at least one course in the 2014–15 academic year and at least one course in the 2015–16 academic year, about 125 to 150 people.<sup>8</sup> Because significantly more classes are offered during the fall and spring semesters than in the summer sessions, significantly more contingent faculty teachers teach during the fall and spring than in summer. One hundred twenty contingent faculty taught in the fall of 2015 and 131 taught in the spring of 2016, while 53 are contracted to teach this summer (plus 5 who are maybes). Of the 53, 46 would be eligible to vote. All but five of these were also employed in the fall 2015 or spring 2016 semester. The list of contingent faculty for 2014–16 shows three classifications: adjunct (in which category most of the faculty fall), instructor, and visiting.<sup>9</sup> Faculty in the adjunct and visiting classifications are scheduled to teach in the summer of 2016. There is no evidence in the record on the number contracted to teach in the fall of 2016, but the provost testified that the majority of those teaching this year will be returning next year.

Contingent faculty receive University email addresses, access to University computer systems, the library, and offices and continue to have access to these facilities over the summer unless the faculty member has definitively ended employment with the University. There was no evidence in the record that large numbers of faculty depart from the area over the summer.

## **B. Analysis**

Board policy is to direct elections involving seasonal employees at as near the peak of season as possible to give as many voters as possible an opportunity to vote. *Libby, McNeil, & Libby*, 90 NLRB 279, 281 (1950). However, merely having cyclical variation in numbers of employees does not make an operation seasonal; if the employer operates year-round or virtually so and the number of employees employed throughout the year is substantial, postponing an election to the peak of employment is not warranted. *Baugh Chemical Co.*, 150 NLRB 1034 (1965); *Aspen Skiing Corp.*, 143 NLRB 707 (1963). In general, the Board finds an existing complement of employees to be substantial and representative when approximately 30 percent of the eventual employee complement is employed in 50 percent of the anticipated job classifications. *Yellowstone Int'l Mailing, Inc.*, 332 NLRB 386 (N.L.R.B. 2000) (citing *Custom Deliveries*, 315 NLRB 1018, 1019 n.8 (1994)).

As the Employer here operates year-round and more than 30 percent of the Unit workforce will be employed at all times of the year, it is not a seasonal operation under Board

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<sup>8</sup> The parties stipulated to this eligibility formula, but disagreed on the accurate number in that group.

<sup>9</sup> These classifications, shown in Petitioner Exhibit 7, are different from those listed in the parties' stipulated Unit description and in the faculty handbook. Several of the contingent faculty listed in Petitioner Exhibit 7 teach in the ESL program or in the College of Education, which suggests they might fall within the English as a Second Language Instructor, Educational Supervisor, or Education Laboratory Instructor classifications listed in the stipulated Unit description.

law and directing an immediate election is appropriate.<sup>10</sup> Furthermore, the concern in the caselaw for maximum enfranchisement is far less of an issue where, as here, the parties have stipulated to a mail ballot election, rather than in-person voting. Finally, the last payday for those teaching in the spring semester is not until May 31, 2016. Although as noted there is no evidence in the record about numbers of faculty who leave the area, should *arguendo* some members of the Unit be leaving the area over the summer, they will have the opportunity to vote if the election begins by May 31, 2016.

In arguing that the election should not be scheduled until the fall, the Employer cites to the Board's old representation case rules, which required in most cases a 25-day-waiting period between the day the regional director directs election and the election. This provision existed in order to provide the Board with an opportunity to rule on any request for review. 29 CFR § 101.21(d) (2010); *see also* Representation Case Handling Manual § 11302.1. However, the requirement was eliminated by the new representation case rules adopted December 15, 2014. 79 Fed. Reg. 74,476 & 74,485 (to be codified at 29 CFR § 101 Subpart C & §102.67(h)); *see also* discussion at 79 Fed. Reg. 74,409–10.

For the above reasons, I will order an immediate election.

#### IV. CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude that the University is subject to the Board's jurisdiction under *Pacific Lutheran* and that exercising jurisdiction does not violate RFRA. I will order an immediate election, as the University is not a seasonal employer, a substantial complement will be employed during the summer session, and the election will be by mail.

Additionally, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act.<sup>11</sup>
3. The Petitioner is a labor organization within the meaning of § 2(5) of the Act and claims to represent certain employees of the Employer.

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<sup>10</sup> Because of the discrepancies between the classifications listed in the stipulated Unit description and those shown in Petitioner Exhibit 7 and the faculty handbook, it is difficult to establish what fraction of Unit classifications are employed throughout the year.

<sup>11</sup> The parties stipulated and I find that the Employer is a State of Washington non-profit corporation with an office and place of business in Lacey, Washington. During the last twelve months, a representative period of time, the Employer received gross revenues in excess of \$1,000,000 and purchased and received at its facilities within the State of Washington goods valued in excess of \$5,000 directly from suppliers outside the State of Washington.



4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of § 9(c)(1) and §§ 2(6) and (7) of the Act.

## **V. ORDER**

The parties have stipulated and I have determined that a mail ballot election will be held.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At **4:45 PM Pacific Daylight Time on Friday, May 27, 2016**, ballots will be mailed to voters from the National Labor Relations Board, Region 19, 915 2nd Ave, Suite 2948, Seattle, WA 98174-1006. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Friday, June 3, 2016, should communicate immediately with the National Labor Relations Board by either calling the regional office at 206-220-6301 or our national toll-free line at 866-667-NLRB (866-667-6572).

All ballots will be commingled and counted at the Region 19 office on **Friday, June 17, 2016, at 2:00 PM**. In order to be valid and counted, the returned ballots must be received in the regional office prior to the counting of the ballots.

### **B. Voting Eligibility**

Eligible to vote are those in the Unit who taught at least one credit-bearing lab or class (including online classes) or one ESL class during the 2015–16 academic year (Fall 2015, Spring 2016, and Summer 2016) and who also taught at least one credit-bearing lab or class (including online classes) or one ESL class during the 2014–15 academic year (Fall 2014, Spring 2015, and Summer 2015).

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Unit employees in the military services of the United States may vote by mail as described above.

Also eligible to vote using the Board's challenged ballot procedure are members of the Order of Saint Martin's employed in the Unit, whose eligibility remains unresolved as specified above and in the Notice of Election.

### C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters. The Employer must also include in a separate section of that list the same information for those individuals who, according to this direction of election, will be permitted to vote subject to challenge.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Wednesday, May 18, 2016**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

### D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be

posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.


## **VI. RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlrb.gov](http://www.nlrb.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: This 16<sup>th</sup> day of May 2016.



Ronald K. Hooks, Regional Director  
National Labor Relations Board  
Region 19  
2948 Jackson Federal Building  
915 2<sup>nd</sup> Avenue  
Seattle, Washington 98174