STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS "GENERAL" LOCAL UNION 200 and CYNTHIA LABUCKI, Complainants, vs. ARCHDIOCESE OF MILWAUKEE and ST. ALBERT SCHOOL, Respondents.	Case 4 No. 38745 Ce-2061 Decision No. 24781-A

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. Frederick Perillo, 788 North Jefferson Street, P. O. Box 92099, Milwaukee, Wisconsin, 53202, appearing on behalf of the Complainants.

Quarles & Brady, Attorneys at Law, by Mr. David B. Kern, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4497, appearing on behalf of the Respondents.

ORDER GRANTING MOTION TO DISMISS COMPLAINT

Teamsters "General" Local Union No. 200, and Cynthia Labucki having, on May 5, 1987, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Archdiocese of Milwaukee and St. Albert School had committed unfair labor practices in violation of Sec. 111.06(1)(a) and (c)(1), of the Wisconsin Employment Peace Act, herein WEPA, by refusing to renew her employment contract in retaliation and discrimination against her on account of her engaging in concerted protected activity; and Respondents, Archdiocese of Milwaukee and St. Albert School, having, on May 18, 1987, filed an answer to said complaint wherein, among other defenses, it was asserted that the Commission lacked jurisdiction over Respondents; and Respondents having, on June 8, 1987, filed a Motion to Dismiss the complaint on the grounds that the Commission lacks jurisdiction over Respondents as neither is an "employer" as defined in Sec. 111.02(7), Stats.; and Complainants having, on July 3, 1987, filed a brief in response and opposition to Respondents' Motion to Dismiss; and Respondents having, on July 27, 1987, filed a Reply Brief in response to Complainants' Brief; and the Commission having, on August 18, 1987, appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.; and the Examiner having considered the positions and arguments of the parties and being satisfied that said Respondents are not within the coverage of the Wisconsin Employment Peace Act;

NOW, THEREFORE, it is

ORDERED 1/

That the complaint filed herein be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 31st day of August, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

(Footnote 1 Continued on Page 2)

(Footnote 1 Continued)

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

ARCHDIOCESE OF MILWAUKEE AND ST. ALBERT SCHOOL

MEMORANDUM ACCOMPANYING
ORDER GRANTING MOTION TO DISMISS COMPLAINT

BACKGROUND

In its complaint initiating these proceedings, the Complainants alleged that Respondents committed unfair labor practices by non-renewing Complainant Labucki's teaching contract for the 1987-88 school year because of her engaging in protected concerted activities on behalf of Complainant Teamsters "General" Local Union 200. Respondents denied committing any unfair labor practices and moved the Commission to dismiss the complaint on the grounds that the Commission lacks jurisdiction over Respondents because the exercise of jurisdiction would be unconstitutional, the Respondents are not "employers" as provided in WEPA and Complainant Teamsters lacks standing to bring this complaint.

RESPONDENT'S POSITION

The Respondent contends that the Wisconsin Employment Peace Act does not apply to religious schools. It submits that the exercise of Commission jurisdiction over the Respondents will result in excessive entanglement such that the free exercise of religion will be seriously inhibited. It argues that where constitutional concerns exists, a statute must be examined to determine whether it can be interpreted in a manner so as to avoid the constitutional question. It cites NLRB v. Catholic Bishop of Chicago, 2/ as requiring a determination of whether there is an affirmative intention to apply the statute to a given situation before reaching the constitutional issue. It claims that Wisconsin courts follow this approach and WEPA's legislative history of the definition of "employer" fails to establish any intent to affirmatively include religious schools or organizations. It asks the Commission to conclude that WEPA does not apply to religious schools, and thus the Commission has no jurisdiction over Respondents.

Respondents allege that if the Commission determines that WEPA does apply to religious schools, the complaint must still be dismissed because the protected religious rights of Respondents under the United States and Wisconsin Constitutions would be violated. It maintains that the exercise of Commission jurisdiction over Respondents would result in a significant risk of infringement on their First Amendment rights and Article I, Section 18 rights of the Wisconsin Constitution. It submits that a non-renewal based on religious reasons which is the subject of an unfair labor practice complaint would result in the reasonable likelihood of entanglement of government in religion so as to infringe constitutional rights. It submits that the guarantee of freedom of religion under Article 1, Section 18 is more restrictive than the First Amendment, and in a non-renewal case, probing into parish and pastorial concerns prompting the decision to non-renew would result in excessive entanglement by government with religion. It argues that under these circumstances, the Commission should decline jurisdiction and dismiss the complaint. Alternatively, the Respondent argues that the Archdiocese of Milwaukee should be dismissed as a Respondent because it had no control, direct or indirect, over Labucki's employment or her non-renewal and for that reason is not an "employer" as defined in WEPA. It insists that Teamsters "General" Local Union 200 lacks standing to pursue the complaint. It submits that Local 200 does not represent any of Respondents' employes and thus is not a party in interest in this dispute and should not be permitted to maintain the complaint. It asks the Commission to dismiss the complaint.

COMPLAINANTS' POSITION

The Complainants contend that the Commission does not have the authority to rule on the constitutional applicability of WEPA to religious institutions. It submits that an administrative agency cannot rule on the constitutionality of the

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2/ 440 U.S. 490 (1979).

statute under which it operates and cannot determine that a statute is unconstitutional as applied to a particular situation. It argues that Respondents must proceed before the Commission and can raise their constitutional claims in a judicial review of the Commission's decision.

It asserts that the Respondents' reliance on Catholic Bishop, supra, is misplaced as the holding in that case involved a statutory and not a constitutional interpretation. It notes that while the Seventh Circuit decision was based on constitutional issues, the Supreme Court rejected this reasoning and affirmed on an entirely different ground and left open the issue whether state labor boards could exercise jurisdiction over parochial schools. It submits that the Second Circuit 3/ has reviewed the constitutional questions and determined that a state labor relations board may properly exercise jurisdiction over a parochial school without infringing on constitutionally protected interests. It admits that the court articulated a principled accommodation of interests by limiting "dual motive" discharge cases to factual findings on whether asserted religious reasons for termination are pretextual or not but it insists that this does not apply to the instant case as no religious reasons are relied on for Labucki's termination. It claims that even if a religious based reason is now asserted, jurisdiction would be asserted to determine whether the alleged religious based reason was the actual reason in fact. It argues that the eleventh hour raising of a religious reason could be weighed by the Commission to conclude that the newly asserted reasons are pretextual. It concludes that all aspects of this case are purely secular and the fact that the schools are Catholic is entirely coincidental and there is no merit to the argument of a constitutional prohibition of jurisdiction.

The Complainants contend that there is no implied exclusion of religious organizations from the definition of "employer" in Sec. 111.02(7), Stats. It submits that this broad definition contains only two express exceptions; the state and its political subdivisions and labor organizations not acting as employers. It submits that there is no express exemption for religious schools and none can be inferred. It maintains that the Commission has never indicated it does not have jurisdiction over employes of religious institutions. It points out that the Commission has previously applied traditional community of interest factors to exclude members of religious orders from coverage of WEPA instead of a wholesale exclusion of all employes of a religious employer from the Act.

The Complainants contend that the assertion that Local 200 has no standing must be rejected because it was engaged in an organizational campaign and thus has standing to bring a complaint on a traditional unfair labor practice.

It further contends that the Respondents' argument that the Archdiocese of Milwaukee is not an "employer" involves a factual determination which cannot be made absent a full hearing on the matter. It argues that extensive discovery is necessary for Complainants to demonstrate that both Respondents are joint employers and a full hearing is the Commission's normal practice rather than permitting discovery.

The Complainants insist that the motion to dismiss be denied, and if the motion concerning joint employer status is considered, Complainant's motion to take depositions should be granted.

RESPONDENT'S REPLY

Respondents allege that Complainants have misperceived its arguments. It insists that it is not asking the Commission to declare WEPA unconstitutional but is seeking the conclusion that WEPA does not apply to religious schools, or alternatively, that the Commission should decline jurisdiction because of the potential infringement of Respondents' constitutional rights. It submits that administrative agencies have authority to determine their jurisdiction in the first instance. It claims that Complainants are insisting that the Commission has no power to dismiss any proceeding for lack of jurisdiction, a clearly erroneous position. Respondents claim that the instant case is closely analogous to Catholic Bishop, supra, and contrary to the Complainants' assertion, the Seventh

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3/ Catholic High School v. Culvert, 735 F.2d 1161 (2nd Cir., 1985); Christ the King v. Culvert, 815 F2d 219 (Cir., 1987).

Circuit decision has not lost any of its vitality but is law of the Seventh Circuit. It points out that the Second Circuit cases cited by Complainants were based on a New York statute which was recently amended to include religious entities. It also asks rejection of the case-by-case approach to asserting jurisdiction over religious schools espoused by Complainants. It requests that the complaint be dismissed.

DISCUSSION

First, as pointed out by the Complainants, the determination of whether or not the Commission's exercise of jurisdiction pursuant to the Wisconsin Employment Peace Act (WEPA) over religious schools is unconstitutional, is beyond the scope of the Commission's authority to determine. Thus, the constitutional issue will not be determined here but must be determined by the courts. Secondly, the issue with respect to whether the Archdiocese of Milwaukee should be dismissed as a Respondent in this matter presents a contested case which raises questions of fact and law which are best resolved in an evidentiary hearing, and hence the motion to dismiss the Archdiocese as a Respondent is premature. In light of this conclusion, Complainant's Motion For Leave To Take Depositions For Good Cause is denied. Likewise, whether Local 200 has standing also presents a contested case which raises questions of fact and law which are best resolved in an evidentiary hearing and raising this issue is also premature. 4/

The remaining issue presented by the Motion to Dismiss is whether the Wisconsin Employment Peace Act applies to parochial schools. An administrative agency can determine the question of its jurisdiction granted by statute. The undersigned finds that WEPA does not apply to parochial schools and has granted the Motion to Dismiss on that basis.

Section 111.02(7), Stats. defines an "employer" as "a person who engages the services of an employe, and includes any person acting on behalf of an employer within the scope of his authority, express or implied, but shall not include the state or any political subdivision thereof, or any labor organization or anyone acting on behalf of such organization other than when it is acting as an employer in fact." Complainant argues that religious schools are not listed as an exemption and therefore should be included. In American National Red Cross, 5/ the Commission concluded that while instrumentalities of the federal government were not expressly excluded as an "employer" in WEPA, there is an implied exemption to that effect. Thus, it is concluded that not all exemptions under WEPA are expressly stated. While not expressly stated, religious schools are also an implied exemption under Sec. 111.02(7) Stats. In Catholic Bishop 6/, the U.S. Supreme Court held that the National Labor Relations Act, as amended, was not intended to apply to church operated schools. It noted that the church-teacher relationship in a church-operated school differed from the employment relationship in a public or non-religious school and the exercise of jurisdiction by the NLRB would raise serious First Amendment questions. A school setting is different from a church run non-profit or for profit enterprise. In Black v. St. Bernadette Congregation, 7/ the court stated:

> Because religious authority necessarily pervades a church operated school, personnel decisions affecting the school may involve ecclesiastical issues as much as decision affecting other church employees. See NLRB v. Catholic Bishop, 440 U.S. 490, 502 (1979). Decisions affecting church school employees are not necessarily secular therefore, but must be considered as we would consider other chuch personnel decisions."

4/ See City of Port Washington, Dec. No. 20076-A (Roberts 11/82); Madison School District, Dec. No. 18682-A (Pieroni, 5/81); Waukesha County (Northview Home and Hospital), Dec. No. 18402-A (Mukamal, 2/81).

5/ Dec. No. 9875 (WERC, 8/70).

6/ NLRB v. Catholic Bishop of Chicago, 100 LRRM 2913 (1979).

7/ 121 Wis.2d 560 (CtApp, 1984).

The Supreme Court held that absent an affirmative expression by Congress that church affiliated schools were covered by the Act, it concluded that Congress did not intend the NLRA to include an employer whose inclusion would violate the constitution. The NLRA definition of an "employer" is quite similar to the definition of an employer under WEPA. The Supreme Court's rational under the NLRA, as amended, is analogous to the WEPA. It would follow that the interpretation of each should also be the same.

The Complainants' reliance on decisions of the Second Circuit as establishing Commission jurisdiction under WEPA over religious schools is misplaced. In Catholic High School Assn. v. Culvert 8/, the Court noted that the New York State Labor Relations Act was amended in 1968 to bring employes of religious associations within its scope and the Union had been certified in 1969, yet the jurisdiction of the state board was not challenged until 1980. The Second Circuit upheld the State Board's exercise jurisdiction but with an accommodation in termination cases. The Court held that in a discharge case, the State Board was prohibited by the First Amendment from inquiring into an asserted religious motive to determine whether it is pretextual. It held that this limitation did not preclude the State Board's exercise of jurisdiction but this limitation could be accommodated. It allowed the State Board to use a dual motive analysis to determine whether the religious motive was in fact the cause of the discharge. But this same accommodation was rejected by the Seventh Circuit in Catholic Bishop of Chicago v. NLRB 9/ as dual motivation was not applicable. There the Court stated: "(T)he rule is well established that although ample valid grounds may exist for the discharge of an employee, that discharge will violate Sec. 8(a)(3) if it was in fact motivated, even partially, by the employee's union activity." The Court noted on the other hand that where a religious question was presented for the discharge, it would somehow override anti-union reasons. The Court then concluded: "We fail to comprehend the real possibility of accommodation in the present context without someone's constitutional rights being violated, which in turn would seem to preclude the possibility of accommodation as an answer to the obviation of the religious entanglement problem."

The Commission has rejected the dual motivation approach in discharge cases. In West Side Community Center, Inc. 10/ the Commission citing Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 11/ reiterated its acceptance of the in-part approach that an employe may not be fired when one of the motivating factors is his/her union activity, no matter how many other valid reasons exist for firing him/her. 12/ Clearly, the dual motivation accommodation runs counter to the Commission's longstanding application of its in-part test. Thus, it must be concluded that the approach followed in the Second Circuit cases would be inapplicable to WEPA. Both the Second Circuit and the Seventh Circuit agree that the in-part test would result in constitutional problems. In Catholic Bishop, supra, the U.S. Supreme Court determined that since it is a settled rule of statutory construction that an unconstitutional interpretation of a statute will not be inferred by silence, a statute must be construed in such a manner so as to avoid a violation of the constitution. This tenet of statutory construction is equally applicable to WEPA and it is thus interpreted to exclude any employer whose inclusion would violate the constitution.

The Complainants have asserted that the facts of the instant case involve no religious reasons for the non-renewal and so the Commission has jurisdiction. This argument misses the point. The statute does not apply to religious schools because it must be interpreted in the manner that no cases would run afoul of the constitution and this interpretation would not change because of the facts of a particular case. Jurisdiction is not established where a particular case does not

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8/ 118 LRRM 2257 (2nd Cir. 1985).

9/ 95 LRRM 3324 (7th Cir. 1977).

10/ Dec. No. 19212-B (WERC, 3/84).

11/ 35 Wis.2d 540 (1967).

12/ Citing St. Joseph's Hospital v. WERB, 264, Wis. 396 (1953).

raise any constitutional issues. Jurisdiction is an all or nothing proposition, and where there is no jurisdiction, this applies to all cases whether religious reasons are present for a discharge or not.

It should also be noted that neither party has cited any case where the Commission has certified a labor organization to represent lay teachers of a religious school. Additionally, neither party has cited any decision by the Commission holding that a religious school committed an unfair labor practice. Given the fact that WEPA has been in existence for around 50 years, the absence of any citations makes it evident that the statute must have been interpreted as excluding religious schools.

In conclusion, given the similarity of definitions of "employer" under WEPA and the NLRA, the Seventh-Circuit and U.S. Supreme Court's interpretations and the Commission's "in-part" test for discharge case, the undersigned finds that the Wisconsin Employment Peace Act must be interpreted as the U.S. Supreme Court has interpreted the NLRA. The undersigned therefore concludes that religious schools are an implied exemption to the definition of "employer" as set forth in Sec. 111.02(7), Stats. Therefore, Respondents are not subject to the jurisdiction of the Commission and the Motion to Dismiss the complaint has been granted.

Dated at Madison, Wisconsin this 31st day of August, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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