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-B

Appearances:

Ms. Cynthia Labucki, 3167 North 34th Street, Milwaukee, Wisconsin, 53216, appearing on her own behalf. 1/

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

ORDER REVERSING EXAMINER'S ORDER GRANTING MOTION TO DISMISS AND REMANDING TO EXAMINER FOR HEARING AND DECISION

Examiner Lionel L. Crowley having on August 31, 1987 issued an Order Granting Motion to Dismiss Complaint with Accompanying Memorandum in the above matter wherein he concluded that the above named Respondents were not "employers" under Sec. 111.02(7), Stats. and therefore that Respondents are not subject to the Wisconsin Employment Relations Commission jurisdiction under the Wisconsin Employment Peace Act; and Complainant Cynthia Labucki having on September 18, 1987 timely filed a petition with the Commission seeking review of the Examiner's Order pursuant to Sec. 111.07(5), Stats.; and Complainants having elected not to submit any written argument in support of her petition and Respondents having submitted written argument in opposition to the petition for review which was received on October 23, 1987; and the Commission having considered the matter and concluded that the Examiner erred when he dismissed the complaint;

NOW, THEREFORE, it is

ORDERED

1. That the Examiner's Order Granting Motion to Dismiss Complaint is hereby reversed and set aside.

1/ During proceedings before the Examiner, Ms. Labucki was represented by Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Milwaukee, Wisconsin.

2. That the complaint is hereby remanded to the Examiner for hearing and decision pursuant to Sec. 111.07, Stats.

Given under our hands and seal at the City of Madison, Wisconsin this 11th day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Commissioner

_____
A. Henry Hempe, Commissioner

_____
Stephen Schoenfeld, Chairman

I dissent

ARCHDIOCESE OF MILWAUKEE
and ST. ALBERT SCHOOL

MEMORANDUM ACCOMPANYING ORDER REVERSING EXAMINER'S ORDER GRANTING MOTION TO DISMISS AND REMANDING TO EXAMINER FOR HEARING AND DECISION

BACKGROUND

On May 5, 1987, the Teamsters "General" Local Union No. 200 and Cynthia Labucki filed a complaint with the Wisconsin Employment Relations Commission alleging that the St. Albert School and Archdiocese of Milwaukee committed unfair labor practices in violation of Sec. 111.06(1)(a) and (c)(1) of the Wisconsin Employment Peace Act (WEPA) when they failed to renew Labucki's employment contract in retaliation and discrimination against her for engaging in protected concerted activity. The complaint alleged that the St. Albert School and the Archdiocese of Milwaukee are joint employers, and that each employer is an employer within the meaning of Sec. 111.02(7), Stats. The complaint alleged that Labacki was an employe of these "joint employers", having been an elementary school teacher at St. Vincent De Paul School, St. Gregory the Great School and St. Albert School for approximately fourteen years, the last seven of which were at St. Albert School.

According to the complaint, in the latter half of 1986, the Teamsters "General" Local Union No. 200 began an organizing campaign among lay faculty in all of the schools in the Milwaukee Archdiocese, including St. Albert School. The complaint alleged that Labucki supported the Local, campaigned in support of its organization efforts, and engaged in other protected concerted activity, such as protests against the Archdiocese's policy concerning the non-renewal of contracts in 1986. The complaint further alleged that the Respondents were aware of Labucki's activities, that officials of the Archdiocese and of St. Albert School threatened to retaliate against teachers who supported the organizing efforts of the Local, and that, on February 11, 1987, in retaliation for her protected concerted activities, Labucki's contract was not renewed for the 1987-1988 school year.

On May 18, 1987, the Respondents filed an answer with affirmative defenses in which they admitted that Labucki was a supporter of the Teamsters Local, that she had engaged in certain protests, but denied that her contract was not renewed in retaliation and discrimination for her protected concerted activities. They alleged in affirmative defense that neither the Archdiocese nor St. Albert School is an "employer" within the meaning of the Wisconsin Employment Peace Act and thus that the Commission has no jurisdiction over the Archdiocese or St. Albert School. They further alleged that the Archdiocese is not a party to Labucki's employment contract and so should be dismissed, that the Teamsters Local lacks standing to bring the complaint, that Labucki's activities were not protected concerted activities within the meaning of WEPA, and that, as to certain alleged protected concerted activities, the complaint was barred by the statute of limitations. Finally, the Archdiocese and St. Albert School alleged that the exercise of jurisdiction by the Commission over the Archdiocese or St. Albert School would constitute an infringement of their constitutional rights under Article I, Section 18 of the Wisconsin Constitution and the First Amendment to the United States Constitution.

On June 8, 1987, the Archdiocese and St. Albert School moved to dismiss the complaint on the grounds that the Commission lacks jurisdiction over them, that the exercise of such jurisdiction would be unconstitutional, and that the Teamsters lack standing to bring the complaint. The Archdiocese also moved to dismiss itself from the action on the ground that it was not Labucki's employer.

In their brief to the Examiner in support of the Motion to Dismiss, the Respondents argued that the Commission's exercise of jurisdiction over them in this dispute would present "a serious risk of infringement of Respondent's rights under both the First Amendment to the United States Constitution and Article I, Section 18 of the Wisconsin Constitution." They argued that, because of the risk of such infringement, the Commission should decline jurisdiction over the dispute and dismiss Labucki's complaint. In support of its position, the Respondents

point to the lack of evidence in the legislative history of WEPA of an affirmative intent to apply the Act to "religious entities" such as the Archdiocese and St. Albert School. They argue that the case presented here is analogous to Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112 (7th Cir. 1977); aff'd on other grounds, 440 U.S. 490 (1979) (in which the Supreme Court concluded that the National Labor Relations Act (NLRA) did not apply to religious entities), and that the Commission should decline to exercise jurisdiction over religious entities just as the NLRB has under the NLRA in the aftermath of Catholic Bishop.

The Respondents further contended that, should the Commission decide that it has jurisdiction over religious entities under WEPA, the Commission should dismiss the complaint nonetheless because such jurisdiction would unconstitutionally infringe the employers' protected religious rights under the United States Constitution as articulated in Lemon v. Kurtzman, 403 U.S. 602 (1977) and Catholic Bishop, as well as the Wisconsin Constitution. The Respondents cited numerous examples of potential conflict between employes' rights under the NLRA or WEPA and church doctrine which would give rise to excessive entanglement of the State, here the Commission, with religion. More specifically, the Respondents argued that in a discharge case such as the one presented here, the Commission would be forced to probe into the reasons for the discharge which would result in the excessive entanglement by the State with religious affairs. The Commission would be forced to determine if Labucki's alleged disloyalty was a valid cause for non-renewal or merely pretextual, necessitating an inquiry into internal church matters.

The Complainants made several arguments in opposition to the Respondents' Motion to Dismiss. First, they argued that the Commission does not have the authority to rule on the constitutionality of the application of WEPA to religious institutions. They state that an administrative agency may not rule upon the constitutionality of the statutes which it has been commissioned by the legislature to enforce and that, in effect, the Respondents have asked the Commission to declare the WEPA unconstitutional and "to declare itself out of existence."

The Complainants next argued that there is no constitutional obstacle to the exercise of jurisdiction by the Commission over a religious school such as St. Albert School, stating that the Supreme Court in Catholic Bishop expressly left open the question whether state labor boards could properly exercise jurisdiction over religious schools. They pointed to two cases in the Second Circuit as support for that propositon. Catholic High School v. Culvert, 735 F.2d 1161 (2nd Cir. 1985); Christ the King v. Culvert, 815 F.2d 219 (2d Cir. 1987). They go on to argue that the fear of excessive entanglement raised by Respondents is unwarranted in this case as "the reason asserted for the termination of Labucki is entirely secular," and that the Commission can therefore avoid making any determinations as to religious motive for Labucki's dismissal.

The Complainants further argued that, contrary to the Respondents' assertion, there is neither an express nor implied exception for religious institutions in WEPA, and that it is the legislature's job, and not the Commission's, to create such an exception if it so chooses. Moreover, they argue that the Commission has not abstained from the exercise of jurisdiction over religious entities in other decisions, citing Holy Family Hospital, Dec. No. 11535 (WERC, 1/73).

In reply, the Respondents asserted that the Commission is not being asked to declare WEPA unconstitutional but rather to decide that WEPA does not apply to religious schools, or in the alternative, to simply decline to exercise jurisdiction on constitutional grounds. They also argued that the Complainants' reliance on the Second Circuit cases cited in their brief is misplaced. Those cases, Complainants' argued, are clearly distinguishable because they were based upon a New York statute that had been amended to specifically include religious entities within its scope.

Finally, the Respondents disputed the Complainants' assertion that Labucki's non-renewal involves purely secular issues. They stated that there are religious reasons in this situation for Labucki's non-renewal, and that even if there were not such religious reasons, the exercise of jurisdiction in this case would lay the groundwork for unconstitutional infringement and excessive entanglement in future cases when religion and religious motivation will be more directly implicated.

THE EXAMINER'S DECISION

In an August 31, 1987 decision, based upon the parties' briefs, the Examiner granted Respondents Motion to Dismiss and therefore dismissed the complaint.

The Examiner initially reasoned that as the Commission had previously carved out "implicit" exceptions to the definition of "employer" in WEPA, the fact that WEPA did not contain an express exception for religious schools did not preclude reaching such a result in this case. The Examiner then looked to Catholic Bishop and, finding the NLRA definition of "employer" involved in that case to be analogous to that in WEPA, decided that the Supreme Court's rationale should be followed in the application of WEPA. He therefore concluded that religious schools are an "implied exemption" to the definition of "employer" contained in Sec. 111.02(7), Stats.

The Examiner found the Complainants' reliance on Second Circuit Culvert decisions to be unpersuasive and misplaced. The Examiner noted that the statute applicable in those cases explicitly included employes of religious associations within its scope, and that the statute had been interpreted by the court in those cases to forbid that state labor board from inquiring into whether an asserted religious motive was pretextual while allowing the board to use a dual motive analysis to determine whether the religious motive was in fact the cause of the discharge. The Examiner noted that the dual motive analysis was rejected by the Seventh Circuit in Catholic Bishop, that the Commission has rejected the dual motive approach in discharge cases, and thus concluded that the Second Circuit's accommodation approach was inapplicable here. The Examiner also rejected Complainants argument that no constitutional issues are involved herein because no religious reasons were asserted for Labucki's non-renewal. The Examiner concluded that because the statute does not apply to religious schools, the facts of a particular case are irrelevant.

POSITIONS OF THE PARTIES ON REVIEW

On September 18, 1987, Complainant Labucki filed a petition for review of the Examiner's decision pursuant to Sec. 111.07(5), Stats. No written argument was submitted in support of the petition. Respondents filed a letter brief calling to the Commission's attention two recent decisions which they argue support the Examiner's reasoning and conclusion in this case: Jewish Day School, 283 NLRB No. 106 (April 29, 1987) and Hanna Boys Center, 284 NLRB No. 121 (July 17, 1987). Respondents urged the Commission to affirm Examiner Crowley's decision.

DISCUSSION

Sec. 111.02(7) of the Wisconsin Employment Peace Act 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 in behalf of such organization other than when it is acting as an employer in fact.

The Wisconsin Supreme Court has concluded that the Wisconsin Employment Peace Act "should be liberally construed to secure the objectives stated in the declaration of policy set forth in Sec. 111.01." Dunphy Boat Corp. v. WERC, 267 Wis 316 (1954) at 323-324. The promotion of "peace in employment relations" through the provision of "new methods of peacefully settling disputes" is the basic objective of the Wisconsin Employment Peace Act. WERB v. Evangelical Deaconess Soc., 242 Wis 78 (1943), at 80.

In Evangelical Deaconess, the Court was confronted with the question of whether a non-profit, charitable hospital corporation was subject to the Wisconsin Employment Peace Act. The Court ruled that such an employer was within the scope of Sec. 111.07(2) of the Peace Act and commented at pp. 79-80 that:

> The question to be decided in this case is whether appellant is subject to the provisions of the Employment Peace Act, ch. 111, Stats. It is conceded not to be within the named

> exceptions to the statute and that the words of the statute are broad enough to cover it. . . . The determination of the question in the case, then, rests upon a consideration of the legislative intent, of whether there is any clear basis for saying that charitable institutions are not within the purview of the statute.

Here, as in Evangelical Deaconess, the words of Sec. 111.02(7), Stats. are broad enough to cover religious schools 2/ and there is no specific exception for religious schools in the statute. As there is no instructive legislative history, we thus have no basis for concluding that the legislature intended to exclude religious schools from the purview of the Wisconsin Employment Peace Act. Given the foregoing and the Court's above quoted admonition in Dunphy Boat, we find that the definition of "employer" in Sec. 111.02(7), Stats. does include religious schools such as that which St. Albert's School is asserted to be. We have therefore reversed the Examiner's conclusion to the contrary. 3/

In reaching our conclusion, we are aware of NLRB v. Catholic Bishop of Chicago and the impact which that decision had upon the Examiner's determination. 4/ We are also aware of the need to honor the First Amendment of the United States Constitution and Article I, Section 18 of the Wisconsin Constitution when the Peace Act is applied. However, the specific factual allegations by the parties in this matter as to the basis for Complainant Labucki's nonrenewal do not appear to raise any particular constitutional issues. 5/ The Respondents' asserted basis for the nonrenewal is largely if not

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2/ We would note that although Respondents assert and Complainants apparently concede that St. Albert School is an educational institution whose purpose is, at least in part, the promotion of a particular religious faith, that fact has not been established because no hearing was held.

3/ While the Examiner correctly noted that in American National Red Cross, Dec. No. 9875 (WERC, 8/70) we found instrumentalities of the federal government to be implied exceptions to the definition of "employer" under the Wisconsin Employment Peace Act, we would note that said conclusion flowed from the general immunity of the federal government from state regulation. See J.P. Cullen & Son v. WERB, (CirCt. Dane, 11/49), 25 LRRM 2443.

4/ While it is true that the NLRA and WEPA contain similar definitions of "employer," that similarity does not produce any obligation on our part to interpret WEPA in a parallel manner. Indeed, we have always felt free to interpret the statutes we administer in a manner which may differ from results reached under the NLRA where we believe that to be appropriate to achieve labor peace in Wisconsin. Compare the "in-part" test in Muskego-Norway C.S.J.S.D. No. 9 v. WERB 35 Wis.2d 540 (1967); State of Wisconsin v. WERC 122 Wis.2d 132 (1985), and West Side Community Center, Dec. No. 19212-B (WERC, 3/84) aff'd (CirCt Milw., 5/86), with the "shifting burden" analysis of the NLRB approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). We would also note that had the NLRA been interpreted in a manner which covered "religious schools" as employers, we would have been preempted from exercising our WEPA jurisdiction. Thus, for instance, we would not exercise jurisdiction over the non-teaching employes of a religious school as to whom the NLRB will assert jurisdiction even after Catholic Bishop. See Hannah Boys Center, supra.

5/ Thus if we were to apply the Court's three step analysis in Catholic Bishop, we would conclude that the exercise of our jurisdiction does not present "a significant risk that the First Amendment will be infringed." We find the Article I, Section 18 of the Wisconsin Constitution to be coextensive with the First Amendment for the purposes of the issues raised herein. See State ex rel. Wisconsin Health Facilities Authority v. Lindner, 91 Wis.2d 145 (1979).

totally secular in nature 6/ and, if proven, would warrant dismissal of this complaint. On the other hand, if Labucki's nonrenewal were to be based exclusively on Respondents hostility toward Labucki's exercise of WEPA rights, as alleged by Complainants, then a violation of WEPA would be found and no impermissible intrusion into constitutional rights would be present even if a religious basis had been asserted. If it is concluded that Respondents were motivated in part by job performance concerns and in part by illegal animus, no constitutional concerns would be implicated because of the secular nature of Respondents' concerns with Labucki's performance. 7/

We also believe the Peace Act can as a general matter be applied in a constitutionally appropriate manner to religious schools. In this regard we find the Second Circuit Court of Appeals decisions in Culvert and the Fifth Circuit Court of Appeals decision in EEOC v. Mississippi College, 626 F.2d 478 (1980) to

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6/ The affidavit of Labucki's supervisor asserts the following as the basis for the nonrenewal:

> 5. I did not renew Mrs. Labucki's teaching contract for the 1987-88 school year for the following reasons: Mrs. Labucki had informed me on a number of occasions that one of her Kindergarten students had special needs which could not be met by her or by St. Albert School. She also told me that she had kept this child's parents informed of this situation. As a result, and after seeking the advice of Dr. Clark, Director of Pupil Services, I concluded that the child should be enrolled in a school that could meet his special needs. Thereafter, Mrs. Labucki spoke with the press and with the student's parents, among others, stating that she could provide the services needed by this child and criticizing my decision to discontinue the child's enrollment at St. Albert. I viewed Mrs. Labucki's complete change in position to be a deliberate attempt to undermine and publicly embarrass the school administration. Mrs. Labucki also misrepresented to others statements that I had made to her on this matter. Mrs. Labucki's conduct showed an unwillingness or inability to support the school administration; she created a morale problem among the faculty and divisiveness among parishioners; she has caused a loss of enrollment at St. Albert School. I do not trust her to work cooperatively with me.

Complainant Labucki has submitted affidavits which dispute the assertions contained in the affidavit of Labucki's supervisor.

7/ We reject the notion that constitutional rights are infringed by conduct of a hearing to determine whether the purported basis for a discharge or nonrenewal was in fact the basis for the employer's conduct. As noted by the United States Supreme Court in Ohio Civil Rights Commission v. Dayton Christian Schools Inc. 106 S.Ct 2718 (1986) at 2724-2725, even where the reason the employer asserts is a religious one, ". . . the Commission violates no constitutional rights by merely investigating the circumstances of . . discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge."

Even in the unlikely event that this case were to produce a situation in which it is found that Complainant Labucki's nonrenewal was based upon religious concerns and illegal animus, we believe that the "in-part test" is sufficiently flexible to accommodate both the labor peace interests of the Peace Act and the constitutional rights potentially at issue herein. As was noted by the Wisconsin Supreme Court in State of Wisconsin at 143, the Commission's remedial discretion is very broad. Thus, in an appropriate case, for instance, it might be that no reinstatement would be ordered even though a violation of the Peace Act was found.

be persuasive and instructive. 8/ While there may be specific instances where the constitutional mandates noted above will require that we reach results which may differ from those which our statutory obligation to pursue labor peace would otherwise produce, we do not find that possibility to be a basis for interpreting the Peace Act in a manner which excludes religious schools. 9/

In light of the foregoing, we have remanded this case to the Examiner for hearing and decision. We make no determination as to the issues of the standing of Complainant Teamsters and the employer status of the Archdiocese which confront the Examiner.

Dated at Madison, Wisconsin this 11th day of March, 1988.

By _____
Herman Torosian, Commissioner

_____
A. Henry Hempe, Commissioner

8/ An extensive analysis of all potential constitutional issues which could be implicated is unnecessary and premature herein. However, we would note that for the purposes of future analysis under the Free Exercise Clause, see Wisconsin v. Yoder, 406 U.S. 205 (1972) or Establishment Clause, see Lemon v. Kurtzman 403 U.S. 602 (1971), WEPA has a secular purpose unrelated to the advancement of religion; WEPA advances the compelling state interest of labor peace which is applicable to employes of religious schools; and that WEPA can be administered in a manner which avoids excessive entanglement with constitutional rights.

9/ In this regard, we note the general obligation to strive to interpret statutes in a constitutional manner. Borden Co. v. McDowell, 8 Wis.2d 246 (1959). Contrary to the Examiner's conclusions, we believe it is appropriate to determine whether we can constitutionally exercise our statutory jurisdiction. As noted by the Court in Dayton Christian Schools, Inc., at 2724:

> But even if Ohio law is such that the Commission may not consider the constitutionality of the statute under which it operates, it would seem an unusual doctrine, and one not supported by the cited cases, to say that the Commission would not construe its own statutory mandate in light of federal constitutional principles.

Dissenting Opinion of Chairman Stephen Schoenfeld

I agree with the Examiner's conclusion that the Wisconsin Employment Peace Act (WEPA) does not apply to parochial schools. WEPA's legislative history of the definition of "employers" fails to establish intent to affirmatively include religious schools or organizations. While Complainant contends that religious schools are not listed as an exemption and therefore should be included, the Commission has previously indicated in American National Red Cross, Dec. No. 9875 (WERC 8/70) that not all exemptions under WEPA are expressly stated. The Examiner was correct when he concluded that religious schools are an implied exemption under Sec. 111.02(7), Stats.

In NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) the U.S. Supreme Court held that the National Labor Relations Act, as amended, was not intended to apply to religious schools. The Court pointed out that the church-teacher relationship in a church-operated school differed from the employment relationship in a public or non-religious school because part of the school's function is to promote a particular religious faith and that the assertion of jurisdiction by the NLRB would therefore raise serious First Amendment questions. The Court indicated that absent an affirmative expression by Congress that religious schools were covered by the Act, Congress did not intend the National Labor Relations Act (NLRA) to cover an employer whose inclusion would raise such serious constitutional issues. Inasmuch as the NLRA definition of an employer is analogous to the definition of an employer as set forth under WEPA, I agree with the Examiner's conclusions that the Supreme Court's rationale and decision should be followed in the application of WEPA. The Commission should decline jurisdiction over religious entities just as the NLRB has under the NLRA in the aftermath of Catholic Bishop. See Jewish Day School, 283 NLRB 106 (4/87).

Since I have concluded that WEPA does not apply to parochial schools, it is immaterial whether the facts of the case at bar involve no religious reasons for the non-renewal. I concur with the Examiner's order granting the motion to dismiss the complaint.

Dated at Madison, Wisconsin this 11th day of March, 1988.

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman