STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PREMONTRE EDUCATION ASSOCIATION, an unincorporated association, Complainant, vs. THE PREMONSTRATENSIAN ORDER, a religious organization, THE PREMONSTRATENSIAN FATHERS, INC., a Wisconsin corporation, PREMONTRE HIGH SCHOOL, INC., a Wisconsin corporation & NOTRE DAME de la BAIE, INC., a Wisconsin corporation, Respondents.	Case 12 No. 44069 Ce-2102 Decision No. 26762-A
PREMONTRE EDUCATION ASSOCIATION, an unincorporated association, and EUGENE A. LUNDERGAN, DONALD C. BETTINE, and JOHN J. JAUQUET, officers of the PREMONTRE EDUCATION ASSOCIATION, Complainants, vs. THE PREMONSTRATENSIAN ORDER, a religious organization, THE PREMONSTRATENSIAN FATHERS, INC., a Wisconsin corporation, PREMONTRE HIGH SCHOOL, INC., a Wisconsin corporation & NOTRE DAME de la BAIE, INC., a Wisconsin corporation, Respondents.	Case 13 No. 44097 Ce-2103 Decision No. 26763-A

Appearances:

Mr. Thomas J. Parins, Attorney at Law, Jefferson Court Building, 125 South Jefferson Street, P.O. Box 1038, Green Bay, Wisconsin 54305, appearing on behalf of Premontre Education Association and, for purposes of the motions posed here, for Eugene A. Lundergan, Donald C. Bettine, and John J. Jauquet.

Mr. Herbert C. Liebmann III, with Mr. Donald L. Romundson on the brief, Liebmann, Conway, Olejniczak & Jerry, S.C., Attorneys at Law, 231 South Adams Street, P.O. Box 1241, Green Bay, Wisconsin 54305, appearing on behalf of the Premonstratensian Order and the Premonstratensian Fathers.

Mr. Dennis W. Rader, Godfrey & Kahn, S.C., Attorneys at Law, 333 Main Street, Suite 600, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, appearing on behalf of Notre Dame de la Baie Academy, Inc.

Mr. Mark A. Warpinski, Warpinski & Vande Castle, S.C., Attorneys at Law, 303 South Jefferson Street, P.O. Box 993, Green Bay, Wisconsin 54305, appearing on behalf of Premontre High School, Inc.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 23, 1990, the Premontre Education Association filed with the Wisconsin Employment Relations Commission (Commission) a complaint of unfair labor practice which alleged that "THE PREMONSTRATENSIAN ORDER, a Religious organization, THE PREMONSTRATENSIAN FATHERS, INC., a Wisconsin corporation, PREMONTRE HIGH SCHOOL, INC., a Wisconsin corporation & NOTRE DAME de la BAIE, INC., a Wisconsin corporation" had violated the terms of a collective bargaining agreement to which the Premontre Education Association was a party. The Commission captioned this complaint as Case 12, No. 44069, Ce-2102.

On June 4, 1990, the Premontre Education Association "and Eugene Lundergan, Donald C. Bettine, and John J. Jauquet, officers of the Premontre Education Association", filed with the Commission a complaint of unfair labor practice which alleged that "THE PREMONSTRATENSIAN ORDER, a religious organization, THE PREMONSTRATENSIAN FATHERS, INC., a Wisconsin corporation, PREMONTRE HIGH SCHOOL, INC., a Wisconsin corporation, NOTRE DAME de la BAIE, INC., a Wisconsin corporation & Rev. Dane Radecki, Principal of Premontre High School and Notre Dame de la Baie Academy", had violated "Sections 111.06a, 111.06b, 111.06c, 111.06f, 111.06h, 111.06k of the Wisconsin Employment Peace Act." The Commission captioned this complaint as Case 13, No. 44097, Ce-2103.

In documents filed with the Commission on June 1, 1990, the Premonstratensian Fathers noted their objection to the exercise of Commission jurisdiction over Case 12, and challenged the accuracy of the reference, in that complaint, to The Premonstratensian Order and The Premonstratensian Fathers, Inc. On June 4, 1990, the Premonstratensian Fathers filed an answer to the complaint captioned as Case 12. On June 4, 1990, Notre Dame de la Baie Academy, Inc., filed its answer to the complaint captioned as Case 12. On June 14, 1990, Notre Dame de la Baie Academy, Inc., requested from the Commission documentation concerning "eleven prior cases involving Premontre High School and the Premontre Education Association handled by the WERC." On June 14, 1990, the Premonstratensian Fathers filed an answer to the complaint captioned as Case 13. On June 15, 1990, Notre Dame de la Baie Academy, Inc., filed an answer to that complaint. On June 19, 1990, the Commission issued a letter to counsel for Notre Dame de la Baie Academy, Inc., which included "copies of the docket sheets for eleven prior cases" involving Premontre Education Association. On June 19, 1990, Premontre High School Inc., and the Rev. Dane Radecki filed an answer to each complaint. Each of the answers noted above challenged the exercise of Commission jurisdiction over the complaints.

On June 26, 1990, the Commission informally assigned me to act as Examiner in each case. In a letter dated July 24, 1990, to each appearing party in both cases, I stated:

> I have been unable to reach each party to the above noted matters, by phone, and thus write to determine your positions on the following questions:
>
> 1. Can the jurisdictional issues posed in the answers to the complaints be resolved though the submission of written briefs?
>
> 2. Must those jurisdictional issues be resolved before evidentiary hearing on the merits of the complaints is conducted?
>
> 3. Can the two complaints noted above be consolidated?
>
> . . .

The Premontre Education Association, and the individual complainants responded in a letter filed by Thomas Parins with the Commission on July 30, 1990. That letter reads thus:

> . . .
>
> In answer to paragraph 1, we believe that the jurisdictional issues can be resolved through the submission of written briefs. Essentially the jurisdictional issues have to do with church and state and we believe that such is settled law.
>
> In answer to paragraph 2, we do not believe that these jurisdictional issues must be resolved before an evidentiary hearing on the merits in that the examiner will be able to make a legal conclusion prior to the hearing and no factual questions are involved.
>
> In answer to paragraph 3, the complainants in both complaints agree that the two complaints can be consolidated on the basis that both essentially derive from the same underlying fact situation and that separate hearings would not be in the interest of judicial economy.

Mark Warpinski responded in a letter filed with the Commission on August 1, 1990, which reads thus:

> . . .
>
> In response to your inquiries, please be advised that it is my position that the jurisdictional issues should be resolved before an evidentiary hearing on the merits of the complaint is conducted. I also believe that the jurisdictional issues posed may be resolved through the submission of written briefs. Finally, I think that the cases at this point could be consolidated for purposes of resolving the jurisdictional issues.

The Premonstratensian Fathers responded in a letter filed with the Commission on August 1, 1990, which reads thus:

. . .

> 1. The jurisdictional issues undoubtedly pose questions of law, but there are significant differences in the factual allegations set forth in the pleadings. The case filed by Attorney Parins makes specific allegations against my client, and recites allegations that are factually erroneous. As to that case, if Mr. Parins would care to stipulate to the facts set forth in my answer, I believe that the matter could be briefed and resolved on briefs. If Mr. Parins wishes to maintain the recitations of his complaint, then it seems to me that you will need to schedule an evidentiary hearing to focus on the facts directly related to the jurisdictional questions.
>
> No such issue arises in the case filed by Messrs. Lundergan, Bettine and Jauquet, since that complaint makes no allegations against Abbot Mackin or The Premonstratensian Fathers except that they exist and that the complainants would like relief. On that set of facts, and on that case, the allegations of the answer will stand unchallenged it seems to me, and accordingly the matter could be determined on briefs.
>
> 2. The jurisdictional issues must be resolved before evidentiary hearing on the merits of the complaints. The issues raised are very important issues related to the Constitutions of the United States of America and the State of Wisconsin. There is no more significant legal doctrine in this country than the doctrine of separation of church and state, and my clients simply must have those issues resolved first. We believe that the WERC and, in fact, the Courts, have no authority to even conduct evidentiary hearings on the merits of these complaints, and it is necessary that I hold firm to that position. We respectfully request that you approach the jurisdictional questions first.
>
> 3. As to my clients, I do not believe that the two complaints can be consolidated. I believe that the allegations in the two cases directed to my clients are significantly different . . .

Each of the written responses noted above addressed both complaints.

In a letter dated September 4, 1990, to the parties in each complaint, I stated:

> I am again having difficulty reaching each of you by phone in a timely manner. I write this letter to summarize the status of the above-noted matters, and to establish a procedure for addressing the pending issues.
>
> It is my understanding that each advocate would be willing to address the church/state jurisdictional issues through written briefs. Mr. Liebmann's letter . . . does, however, pose a threshold issue of fact to the establishment of a briefing schedule.
>
> That letter raises the possibility that those factual issues can be resolved "if Mr. Parins would care to stipulate to the facts set forth in my answer . . . " If Mr. Parins is willing to so stipulate or is willing to so stipulate for the limited purpose of posing the church/state jurisdictional issues, then a briefing schedule can be established. I would ask Mr. Parins to state his position on these points as soon as he can.
>
> Mr. Liebmann's . . . letter also assumes that "the allegations of the answer . . . stand unchallenged" with respect to Case 13 . . . I would ask Messrs. Lundergan, Bettine and Jauquet to advise me, as soon as they can, if they agree with the above-noted assumption.
>
> I will also note that Messrs. Parins, Lundergan,

> Bettine and Jauquet, unlike the remaining parties, do not believe the jurisdictional issues must be resolved prior to the conduct of an evidentiary hearing on the merits.
>
> Before ruling on whether the jurisdictional issues must be resolved prior to an evidentiary hearing, I would like to know if evidentiary hearing on the jurisdictional issue is necessary. Thus, I will await the responses of Messrs. Parins, Lundergan, Bettine and Jauquet before ruling on whether the hearing will be bifurcated to separately address the jurisdictional issues.
>
> Whether it is necessary to bifurcate the hearing or not, I am holding . . . September 26, 1990 open for an informal pre-hearing conference on the procedural and substantive issues posed by the cases captioned above. If that date is not available for any of you, please advise me as soon as you can.

In a letter dated September 14, 1990, to the parties in each complaint, I stated:

> I have received no response to my September 4, 1990 letter. I will take up the issues posed in that letter and any others you may wish to raise regarding the above noted matters at an informal pre-hearing conference to be held on . . . September 26, 1990 . . .

In a letter dated September 28, 1990, to the parties in each complaint, I stated:

> I write to summarize the pre-hearing conference held on September 26, 1990 . . .
>
> It is my understanding the parties will attempt to reach a stipulation of fact sufficient to pose the church/state jurisdictional issues. If a stipulation is reached, the church/state jurisdictional issue will be posed by the submission of briefs . . .
>
> In the event that it is impossible to reach a stipulation, hearing on both matters has been set for . . . November 15, 1990 . . . I have already ruled that hearing will be limited to the submission of evidence and argument on the church/state jurisdictional issue.
>
> Potential issues on the consolidation of Case 12 and Case 13 were touched upon. I have indicated to you that it is my opinion that consolidation of the two cases can come only by a Commission order. Issues on consolidation have been set to the side so that the jurisdictional issue underlying each case can be addressed.
>
> I informed the Complainants in Case 13 that the allegations of Paragraph 9 need to be clarified. If the issue posed by that paragraph is that the three named complainants were terminated for "secular" reasons, the complaint should be clarified to say so. If this is not the issue posed by that paragraph, it should be clarified to state what the issue is.
>
> Finally, I noted to you that while I have not fully researched the issues potentially posed by the complaints, I have looked to the series of decisions in Archdiocese of Milwaukee and St. Albert School, for guidance on the procedural points discussed mat the pre-hearing conference . . . If you wish a copy of any of these decisions, please advise me. More to the point here, I pointed out that Footnote 2/ at Page 6 of the Commission's decision, and, the discussion at pages 2-3 and 4 of the Circuit Court's decision state what I feel is the factual basis necessary to pose the church/state jurisdictional issue.
>
> . . .

On October 12, 1990, the Premontre Education Association filed an amendment to the complaint captioned as Case 12. On October 16, 1990, the Premonstratensian Fathers supplied the Commission "a fully executed Stipulation." On October 24, 1990, Premontre High School, Inc., filed an

answer to the amended complaint in Case 12. On October 29, 1990, Donald Bettine filed with the Commission an amendment to the complaint captioned as Case 13. On November 16, 1990, the Premonstratensian Fathers filed an answer to the amended complaint of Case 13.

The parties filed briefs and reply briefs, or a waiver of the right to file a brief or reply brief, by December 19, 1990. The Commission formally appointed me to act as Examiner in an Order Appointing Examiner dated January 25, 1991.

FINDINGS OF FACT

1. On May 23, 1990, the Premontre Education Association, referred to below as the PEA, filed a complaint of unfair labor practice with the Commission. Included in the allegations of that complaint are the following:

. . .

> 1. The Complainant, the Premontre Education Association, is an unincorporated association, being a bargaining unit under Wisconsin law duly recognized by the respondents, to represent all of the persons actively engaged in educational work at Premontre High School 610 Maryhill Drive, Green Bay, Wisconsin, on behalf of which Complainant has entered into a binding Labor Agreement with the respondents for the school years 1989-90 and 1990-91. The Complainant is represented by Parins Law Office, S.C., 125 South Jefferson Street, Green Bay, Wisconsin 54301 . . .
>
> . . .
>
> 13. In February of 1989, the respondents, through respondent, Premontre High School, Inc., did terminate the employment of all the members of the Complainant, Premontre Education Association. These terminations meant that all of the teachers at Premontre High School, Inc., were, in fact, fired.
>
> 14. The above described firings were done by respondents under the ruse and fiction that Premontre High School was being closed, and because of such closure, no longer needed teachers.
>
> 15. In truth and in fact, the educational facility now known as Premontre High School will not close at the end of the 1989-90 school year, but rather will continue in business and will open for the 1990-91 school year. The only changes that are contemplated is that the school will have a change of name . . .
>
> . . .
>
> 18. The above said firings are all contrary to the terms and conditions of the Labor Agreement now in effect between the parties as described above.
>
> 19. The Complainant, Premontre Education Association, maintains that the above described labor agreement continues in effect and is binding upon, the respondents, and each of them, during its term . . .
>
> 20. The relief sought hereby is for an order from the commission requiring the respondents, and each of them, to honor all of the terms and conditions of the labor agreement between them, and each of them, and the Complainant, Premontre Education Association, during the entire term of said agreement.
>
> . . .

The Commission captioned this matter as Case 12, No. 44069, Ce-2102.

2. On June 4, 1990, the PEA "and Eugene A. Lundergan, Donald C. Bettine and John J. Jauquet, officers of the Premontre Education Association" filed a complaint of unfair labor practice with the Commission. This complaint was amended on October 29, 1990. Included in the allegations of that complaint, as amended, are the following:

. . .

> 1. The Complainants, Eugene Lundergan, John Jauquet and Donald Bettine are all representatives

> of Complainant Premontre Education Association, being a bargaining unit under Wisconsin law duly recognized by the respondents, to represent all of the persons actively engaged in educational work at Premontre High School, 610 Maryhill Drive, Green Bay, Wisconsin, on behalf of which Complainant has entered into a binding Labor Agreement with the respondents for the school years 1989-90 and 1990-91.
>
> . . .
>
> 9. In February of 1990, the respondents, through respondent, Premontre High School, Inc., did terminate the employment of the three aforementioned complainants. These terminations meant that all of the teachers at Premontre High School were, in fact, fired, such being a secular action.
>
> 10. Additionally, the respondents . . . denied employment to the three complainants for the 1990-91 school year.
>
> 11. Complainants contend that respondents are engaging in an Unfair Labor Practice(s) both as termination and as failure to employ on part of the respondents violate Sections 111.06a, 111.06b, 111.06c, 111.06f, 111.06h, 111.06k of the Wisconsin Employment Peace Act.
>
> 12. The relief sought hereby is for an order from the commission a) requiring the respondents to offer employment to the complainants at Notre Dame de la Baie Academy for the 1990-91 school year commensurate with their 1989-90 duties b) a cease and desist order preventing the said respondents from engaging in any further discriminatory acts toward union representatives c) requiring the respondents to issue a public apology in a conspicuous place at Notre Dame de la Baie Academy indicating the respondents have committed an Unfair Labor Practice and that they agree to cease and desist from further Unfair Labor Practices d) for such and further relief as the commission deems reasonable.
>
> . . .

The Commission captioned this matter as Case 13, No. 44097, Ce-2103.

3. The Premonstratensian Fathers, referred to below as the Fathers, is a Wisconsin non-stock, non-profit corporation, whose Articles of Incorporation include the following provisions:

> ARTICLE ONE
> NAME AND OFFICE
>
> Section 1. The name of the Corporation shall be The Premonstratensian Fathers. The address of the principal office of the Corporation is 1016 North Broadway, De Pere, Brown County, Wisconsin 54115.
>
> . . .
>
> ARTICLE FOUR
> OBJECTS AND PURPOSES
>
> The objects and purposes of this Corporation shall be the operation and management of the affairs, property, business and activities of religious and educational facilities and as such shall be duly benevolent, beneficial, educational, charitable, religious and scientific. This Corporation shall be operated in a manner consistent with the theology, philosophy, other teachings and doctrines of the Roman Catholic Church and with the objectives and philosophy of The Order of Canons Regular of Premontre, a religious order of the Roman Catholic Church.
>
> . . .
>
> ARTICLE FIVE
> POWERS
>
> This Corporation, in order to carry out its

objects and purposes, shall have the powers necessary or convenient to effect any or all of the purposes for which the Corporation is organized, as set out in Section 181.04, Wis. Stats., and, generally, Chapter 181, Wis. Stats., including the powers as set forth herein:

Section 1. To own, acquire, hold, manage or direct Corporations which are organized for the purpose of operating or conducting religious and educational facilities of every kind and character.

. . .

The Fathers' written by-laws include the following provisions:

ARTICLE I
OBJECTS AND PURPOSES

Section 1. Precepts. The Corporation shall exist and function pursuant to the precepts of civil law, the norms of the Roman Catholic Church and the philosophy of the Order of Canons Regular of Premontre. The Corporation and its affiliated corporations shall be managed and directed according to the doctrines, disciplines, laws, rules and regulations of the Roman Catholic Church.

Section 2. Purposes. The purposes of the Corporation shall be the operation and management of the affairs, property, business and activities of religious and educational facilities, and as such shall be duly benevolent, beneficial, educational, charitable, religious, or scientific . . .

. . .

The Order of Canons Regular of Premontre is the correct Canon Law name for an organization informally known as the Premonstratensian Order. The Premonstratensian Order has no existence under Wisconsin law but operates, for purposes of Wisconsin law, by and through the Fathers.

4. Premontre High School, Inc., referred to below as Premontre, is incorporated under Chapter 181 of the Wisconsin Statutes as a non-profit corporation. The articles of incorporation for Premontre include the following provisions:

ARTICLE I

NAME AND OFFICE

The name of the Corporation shall be Premontre High School, Inc. The address of the principal office of the Corporation is 610 Maryhill Drive, Green Bay, Wisconsin, 54303 . . .

ARTICLE IV

OBJECTS AND PURPOSES

The objects and purposes of this Corporation shall be the operation and management of the affairs, property, business and activities of Premontre High School, Inc. and as such shall be duly benevolent, beneficial, educational charitable, religious and scientific. Its operation shall be conducted within the context of the theology, philosophy, other teachings and doctrines of the Roman Catholic Church and shall be in compliance with the objectives and philosophy of the Order of Canons Regular of Premontre, a religious order of the Roman Catholic Church. Within these stated purposes, Premontre High School, Inc. shall be committed to the moral, personal, and intellectual development of its students; the maintenance of an environment in which such development may take place; and the presentation of a value oriented academic program and campus ministry which best utilizes the school's human and financial resources.

. . .

ARTICLE VI

MEMBERSHIP

The membership of this Corporation shall be the non-profit corporation organized and existing pursuant to the laws of the State of Wisconsin under the name THE PREMONSTRATENSIAN FATHERS . . .

Premontre's written by-laws include the following provisions:

ARTICLE I

OBJECTS AND PURPOSES

Section 1. Precepts. Premontre High School, Inc. shall exist and function pursuant to the precepts of civil law, the norms of the Roman Catholic Church and philosophy of the Order of Canons Regular of Premontre. This Corporation shall be managed and directed according to the doctrines, disciplines, laws, rules and regulations of the Roman Catholic Church.

Section 2. Purposes. The purposes of this Corporation shall be the operation and management of the affairs, property, business and activities of Premontre High School, Inc. and as such shall be duly benevolent, beneficial, educational charitable, religious or scientific. Its operation shall be conducted within the context of the theology, philosophy, other teachings and doctrines of the Roman Catholic church and shall be in compliance with the objectives and philosophy of the Order of Canons Regular of Premontre, a religious order of the Roman Catholic Church. Within these stated purposes, Premontre High School, Inc. shall be committed to the moral, personal, and intellectual development of its students; the maintenance of an environment in which such development may take place; and the presentation of a value oriented academic program and campus ministry which best utilizes the school's human and financial resources.

. . .

ARTICLE III

MEMBERSHIP

Section 1. Membership. The sole member of this Corporation shall be the non-profit corporation organized and existing pursuant to the laws of Wisconsin under the name THE PREMONSTRATENSIAN FATHERS, which corporate member shall act through its appropriate officers and directors, pursuant to its Articles of Incorporation and By-Laws.

Section 2. Powers, Duties and Rights. The business and property of Premontre High School, Inc. shall be under the jurisdiction and control of its member except where delegated to its Board of Education. The powers, duties and rights reserved to the member shall be, but not be limited to, the following:

(a) To assure that the philosophy and mission of Premontre High School, Inc. is in agreement with the philosophy of the Order of Canons Regular of Premontre, and to do any and all things necessary to implement this assurance.

. . .

5. Notre Dame de la Baie Academy, Inc., referred to below as Notre Dame, was originally named Catholic High School, Inc., and is a non-stock, non-profit corporation incorporated under Chapter 181 of the Wisconsin Statutes. Notre Dame's articles of incorporation include the following provisions:

ARTICLE I

NAME, PRINCIPAL OFFICE AND REGISTERED AGENT

Section 1. Name. The name of the Corporation shall be Catholic High School, Inc. Its principal place of business shall be 610 Maryhill Drive, Green Bay, Brown County, Wisconsin 54304.

. . .

ARTICLE IV

OBJECTS AND PURPOSES

The objects and purposes of this Corporation shall be the operation and management of the affairs, property, business and activities of Catholic High School, Inc. and as such shall be duly beneficial, educational, charitable, religious and scientific. Its primary purpose shall be the provision and operation of a full curriculum and academic program for high school students from Green Bay and its environs. Its operation shall be conducted within the context of the theology, philosophy, other teachings and doctrines of the Roman Catholic Church. Within these stated purposes, Catholic High School, Inc. shall be committed to the moral, personal, and intellectual development of its students; the maintenance of an environment in which such development may take place; and the presentation of a value oriented academic program and campus ministry which best utilizes the school's human and financial resources.

. . .

ARTICLE VI

MEMBERSHIP

The membership provisions of this corporation shall be set forth in the By-Laws . . .

Notre Dame's written by-laws include the following provisions:

ARTICLE I

OBJECTS AND PURPOSES

Section 1. Precepts. Notre Dame de la Baie Academy, Inc. shall exist and function pursuant to the precepts of civil law and the norms of the Roman Catholic Church. This Corporation shall be managed and directed according to the doctrines, disciplines, laws, rules and regulations of the Roman Catholic Church.

Section 2. Purposes. The purposes of this Corporation shall be the operation and management of the affairs, property, business and activities of Notre Dame de la Baie Academy, Inc. and as such shall be duly benevolent, beneficial, educational, charitable, religious or scientific. Its primary purpose shall be the provision and operation of a full curriculum and academic program for high school students from Green BAy and its environs. Its operation shall be conducted within the context of the theology, philosophy, other teachings and doctrines of the Roman Catholic Church. Within these stated purposes, Notre Dame de la Baie Academy, Inc. shall be committed to the moral, personal, and intellectual development of its students; the maintenance of an environment in which such development may take place; and the presentation of a value oriented academic program and campus ministry which best utilizes the school's human and financial resources.

ARTICLE III

MEMBERSHIP

Section 1. Membership. The membership of this corporation shall be seven (7) natural persons, selected as follows:

Class A Members: There shall be two (2) Class A members, each appointed by the Bishop of the Roman Catholic Diocese of Green Bay. . .

Class B Members: There shall be four (4) Class B members, each appointed by the President of The Premonstratensian Fathers. . .

Class C Members: There shall be one (1) Class C member appointed by the Provincial of The Sisters of St. Joseph of Carondelet, St. Louis, Missouri. . .

Section 2. Reserved Powers, Duties, and Rights. The business and property of the Corporation shall be generally managed by the Board of Education. However, the members reserve the following rights:

(a) To assure that the philosophy, mission, policies, goals and objectives of Notre Dame de la Baie Academy, Inc. are in agreement with the theology, philosophy, and other teachings and doctrines of the Roman Catholic Church, and to do any and all things necessary to implement this assurance.

6. The parties identified above submitted the following "STIPULATION" to the Commission on October 16, 1990:

. . .

The above-named parties hereby stipulate to the following recitation of facts, which is to be used only as the basis for briefing and decision on the Church/State jurisdictional issues in this case:

1. The correct names and organizational formats of the respondents are those set forth in the Answer filed on behalf of the Premonstratensian Fathers by Herbert C. Liebmann, III under date of June 1, 1990.

2. Each respondent is a religious (non-secular) entity affiliated with the Roman Catholic Church.

3. Attached hereto and incorporated herein are copies of the Articles of Incorporation and the Bylaws for:

(a) The Premonstratensian Fathers;

(b) Premontre High School, Inc.; and

(c) Notre Dame de la Baie Academy, Inc.

4. Based upon the above factual recitation, the parties have agreed that the jurisdictional and constitutional issues raised in the Answers of the respondents shall be determined upon briefs. . .

7. The Commission has, excluding the two cases at issue here, processed twelve cases involving Premontre High School. According to Commission Docket sheets and relevant Orders, one of those cases (Case 1, No. 31529, R-5867) was a request by the PEA for a referendum; two were requests for unit clarification, one of which was filed by the PEA (Case 2, No. 31904, E-3018), the other of which was filed by Premontre (Case 8, No. 34531, E(u/c)-1); one was a complaint of unfair labor practice filed by the Premontre Board of Education against Paul Schwartz and the PEA (Case 3, No. 32199, Ce-359); one was a request for mediation filed by the PEA (Case 5, No. 32432, M-3753); six were requests for grievance arbitration filed by the PEA (Case 4, No. 32253, A-3485; Case 6, No. 34452, A-3688; Case 7, No. 34493, A-3694; Case 9, No. 39525, A-4184; Case 10, No. 39526, A-4185; Case 11, No. 40400, A-4259); and one was a request for arbitration filed jointly by the PEA and Premontre (Case 14, No. 44510, A-4686).

CONCLUSIONS OF LAW

1. Neither the Fathers, Notre Dame, nor Premontre is an "employer" within the meaning of Sec. 111.02(7), Stats.

2. The Commission lacks jurisdiction to determine any of the acts of unfair labor practices alleged in Case 12 or Case 13.

ORDER 1/

The complaints captioned by the Commission as Case 12, No. 44069, Ce-2102, and Case 13, No. 44097, Ce-2103, are each dismissed.

Dated at Madison, Wisconsin this 25th day of February, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, 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.

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.

PREMONTRE HIGH SCHOOL and
PREMONTRE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The procedural background to the two complaints has been set forth in detail above. The Stipulation which forms the basis of the bulk of the Findings of Fact was captioned as Case 12. The parties have, however, mutually recognized that the jurisdictional issues posed here underlie both complaints.

THE PARTIES' POSITIONS

The Complainants' Initial Brief 2/

After a review of the factual background to the complaints, the Complainants argue that the litigation surrounding Archdiocese of Milwaukee and St. Albert School, 3/ does not control the pending complaints because "of a significant change in constitutional law since the issuance of that decision." More specifically, the Complainants contend that the decision of the Circuit Court in St. Albert to enjoin the assertion of Commission jurisdiction was based on NLRB v. Catholic Bishop of Chicago 4/. That case, according to the Complainants, was one of a series of divergent cases which established that the "State had to have 'compelling interest' in establishing secular laws regarding religious organizations in order to pass the constitutional litmus test."

This changed, according to the Complainants, with the Supreme Court's decision in Employment Division, Department of Human Resources of Oregon et. al. v. Alfred L. Smith et. al. 5/. The Complainants assert that the Court, in Smith "effectively overruled the 'compelling interest' standard." The Complainants contend the applicable analysis for the present complaints, in light of Smith, can be stated thus:

> (I)f a law is applied to a religious organization, and is a law that is applicable and enforced even handedly against all citizens, it is applicable to religious organizations as well.

It follows, according to the Complainants, that "instead of the State having to show a "compelling interest", the onus is now on the religious organization to show that the law or regulation in question is not an across the board, even handed, secular one." No such argument, the Complainants conclude, can be made here.

Even if the assertion of Commission jurisdiction in these cases could be considered to infringe upon the Respondents' first amendment rights, the Complainants argue that those rights have been waived. More specifically, the Complainants assert that by entering into a collective bargaining agreement with the PEA, and by availing itself of Commission jurisdiction in the past, the Respondents, through the Fathers, have waived the constitutional rights they seek to assert here.

It follows, the Complainants conclude, that the Commission must exercise its jurisdiction under the Peace Act over the two complaints.

The Fathers' Initial Brief 6/

The Fathers assert two fundamental grounds to preclude the exercise of Commission jurisdiction over the two complaints:

> (1) the legislature did not intend WEPA to apply to religious entities, and (2) exercise of jurisdiction by WERC would unconstitutionally infringe upon Respondents' rights guaranteed by the religion clauses of the First Amendment of the United States Constitution, and Article I, Sec. 18 of the Wisconsin

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2/ The individual complainants from Case 13 joined in the arguments asserted by counsel for the PEA in Case 12.

3/ Dec. No. 24781-A (Crowley, 8/87); rev'd, Dec. No. 24781-B (WERC, 3/88); rev'd (Milw. Co. Cir. Ct., 9/88).

4/ 440 US 490, 100 LRRM 2913 (1979).

5/ 494 US ___, 108 L.Ed.2d 876, 110 S.Ct. 1595 (1990).

6/ Premontre supported both the initial and the reply brief of the Fathers, and did not separately file any written argument.

Constitution.

Catholic Bishop, according to the Fathers, establishes that "the proper mode of analysis" threshold to determining the constitutionality of a legislative enactment consists of two elements. First, it is necessary to determine "whether the commission's exercise of its jurisdiction . . . 'would give rise to serious constitutional questions.'" If so, it is then, according to the Fathers, necessary to determine "whether the legislature clearly expressed an affirmative intent that WEPA extend" to religious entities. That serious constitutional questions would be posed by the exercise of Commission jurisdiction can not, according to the Fathers, be seriously doubted in light of the facts implicit in the parties' Stipulation. Due to the serious constitutional questions posed here, the Fathers contend that a finding that WEPA was intended to apply to religious entities must be based on a "demonstrated affirmative intention". At most, according to the Fathers, the applicability of the WEPA to the Respondents rests on the silence of Sec. 111.02(7), Stats. Noting that this definition has never been substantially changed, in contrast to Sec. 111.32(6), Stats., and that the Legislature failed to amend the definition after Catholic Bishop, the Fathers conclude that neither element of the requisite threshold analysis has been met, and that no basis exists for exercising Commission jurisdiction over the two complaints.

Beyond this, the Fathers contend that the assertion of Commission jurisdiction in the present matter would infringe upon the Respondents' constitutional rights. Those rights, in both the State and Federal Constitutions, flow, according to the Fathers, from the "Establishment" and the "Freedom" clauses. The Fathers contend that three criteria define an "establishment" analysis:

> (1) whether the statute has a secular legislative purpose, (2) whether the principal or primary effect of the statute is neither to advance nor inhibit religion, and (3) whether the statute fosters 'an excessive government entanglement with religion.'

The Fathers note that only the third element is at issue here, and conclude that a decision asserting Commission jurisdiction over the two complaints would necessarily involve excessive government entanglement with religion. Such entanglement would, according to the Fathers, involve actual Commission interference in the determination of religious educational policy, and an inevitable chilling effect on the assertion of religious considerations subject to secular administrative review. The Fathers conclude that these assertions are well supported by State and federal judicial and administrative precedent, including "the apparent highest authority in Wisconsin directly on point".

Beyond this, the Fathers contend that three criteria define the "free exercise clause" analysis:

> (1) the magnitude of the statute's impact upon the exercise of the religious belief; (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief, and (3) the extent to which recognition of an exemption would impede the objectives sought to be advanced by the state.

A review of relevant precedent establishes, according to the Fathers, that the impact of the WEPA on the exercise of a religious educational institution is "extremely burdensome in both scope and degree"; that state interest in eradicating unfair labor practices is significant, but "the right to exercise religious faith free of governmental interference is fundamental"; and that the exemption sought here would do no more than establish that religious schools, which must be financed without state aid, must be free to operate without state regulation.

It follows, according to the Fathers, that each complaint must be dismissed.

Notre Dame's Initial Brief

Noting that "there is no question" that Notre Dame is a religious school, and that the St. Albert litigation establishes that "religious schools are an implied exemption" to Sec. 111.02(7), Stats., Notre Dame concludes that there is no evidence of an affirmative legislative intention that WEPA be applied to religious entities.

Although noting that the Commission has, on occasion, interpreted WEPA "in a fashion different from the pattern of NLRB decisions", Notre Dame concludes that "such is far more the exception than the rule", and that the Commission should interpret the WEPA as the Supreme Court has interpreted the NLRA. Notre Dame underscores this point by contending the federal standard "upholds a right far more basic than any legislative right, a right founded in

the Constitution, the right to free exercise of religion."

Noting that the Commission has, in the past, recognized that certain classes of employers can constitute an implied exemption from WEPA, Notre Dame concludes that a similar recognition is necessary here. More specifically, Notre Dame contends that American National Red Cross, Dec. No. 9875 (WERC, 8/70), establishes that the interference implicit in state regulation can constitute a basis for denying the exercise of that regulation.

Beyond this, Notre Dame asserts that the Commission "should construe statutes in a fashion which (does) not raise constitutional ramifications." Those ramifications are implicit in a series of cases decided by Wisconsin courts, according to Notre Dame, as is the willingness of Wisconsin courts to "construe statutes so as to avoid constitutional objection."

Catholic Bishop states the rationale which, Notre Dame argues, should guide the analysis of the present complaints. That rationale, according to Notre Dame, demands "an affirmative expression of legislative intent to include religious schools" within a statutory definition of "employer". No such expression, according to Notre Dame, exists. Specifically, Notre Dame notes that the legislature has never acted specifically to amend Sec. 111.02(7), Stats., as it did regarding Sec. 111.32(6), Stats. Beyond this, Notre Dame posits that it is most unlikely that the Legislature, in creating the WEPA in 1935, considered anything beyond "remedial labor legislation" directed at secular enterprises. In addition to this, Notre Dame urges that Catholic Bishop establishes the restraint necessary to avoid burdening "religious schools with endless litigation over complicated constitutional issues generated from the mere attempt to run a religious school on a day-to-day basis." The potential intrusion by the Commission into the policies governing the management of a religious school can be inferred, according to Notre Dame, by viewing the application of the Municipal Employment Relations Act to public schools. Finally, Notre Dame urges that the reluctance of the Catholic Bishop court to reach constitutional issues left the NLRB in a position to "decide the issues without having to defer to a court's determination of constitutional issues." That the NLRB has, after Catholic Bishop, broadened the exemption of religious schools is, according to Notre Dame, a significant point.

Concluding that a decision to assert jurisdiction over the two complaints would lead the Commission into "a swamp of constitutional uncertainties", Notre Dame contends that each complaint must be dismissed "on the basis that the Wisconsin Legislature never intended to apply the Wisconsin Employment Peace Act to religious schools."

The Complainants' Reply Brief

Noting that the Respondents' briefs dwell in detail on Catholic Bishop and on St. Albert, the Complainants assert that "(u)nfortunately for respondents, this is not presently the law." Smith, according to the Complainants, governs the present cases, and establishes that: "Religious entities must comply with state laws regarding labor relations unless they can show some anti-religious animus or bias." That the WEPA does not expressly address the application of Sec. 111.02(7), Stats., to religious schools is not significant here, according to the Complainants, since all parties to this litigation acknowledge the validity of "the rule of statutory construction that silence within a remedial statute (denotes) inclusion rather than exclusion." The Complainants contrast their own, and Respondents', view of WEPA thus:

> The Wisconsin Employment Relations Commission does not need to show a legislative intent that, for example, canning factories be included under that section, nor manufacturing concerns, (etc.). Rather, it is assumed that they are included unless a strong showing is made to exclusion.

Beyond this, the Complainants urge that the Respondents' call for an affirmative demonstration of legislative intent to include religious schools within Sec. 111.02(7), Stats., admits that "if, in fact, the legislature intended application, such would apply."

Beyond this, the Complainants assert that the facts of the present matter distinguish it from St. Albert. Specifically, the Complainants urge that the presence of a labor agreement lessens the possibility of improper intrusion into religious matters. More specifically, the Complainants urge that Article VII of the agreement between the PEA and the Fathers precludes "discipline" for "religious or political activities of any teacher, or lack thereof". This provision establishes, according to the Complainants, that no issues of intrusion into religious issues can be considered to be posed by the two complaints.

The Fathers' Reply Brief

The Fathers initially argue that the Complainants have misrepresented the factual background to the complaints; have wrongly asserted that the Fathers are the sole party to the collective bargaining agreement cited by the

Complainants; and have refused "to address, or even attempt to distinguish, established law in obvious contravention of its position."

More specifically, the Fathers assert that the Complainants have ignored the threshold issue to each complaint: "Whether the legislature intended the statute to apply to religious organizations in the first instance." After reasserting its contention that any conclusion that Sec. 111.02(7), Stats., applies to the Fathers implies that "the Commission would become deeply entangled in the matters of intent and motive, and the good faith of the position asserted by (the Fathers), as well as its relationship to the Church's religious mission." This entanglement of secular and religious policies necessitates, the Fathers argue, close examination of whether the Legislature affirmatively intended that WEPA apply to religious schools. No such intention can, according to the Fathers, be established.

Beyond this, the Fathers dispute the Complainants assertion that Smith has overruled Catholic Bishop. Smith, according to the Fathers, "utilized the well-established statutory framework" employed in Catholic Bishop. The Fathers also contend that Smith can not be read to throw aside the "compelling interest" test. Smith, according to the Fathers, involved a "free exercise challenge" which did not implicate other constitutional protections. The present complaints, unlike Smith, involve hybrid situations implicating "the . . . rights of communication of religious beliefs, and the raising of one's children in those beliefs." As such, the Fathers conclude that the present complaints require strict scrutiny of the WEPA.

Beyond this, the Fathers contend that the assertion of Commission jurisdiction over the complaints "would foster excessive entanglement with religion." The three-pronged test cited in the Fathers' initial brief remains the applicable standard, the Fathers contend, noting that cases following Smith have continued to apply that test. A review of the law establishes, according to the Fathers, that the application of the three-pronged test advanced in its initial brief states the appropriate Establishment analysis.

Beyond this, the Fathers argue that neither Premontre nor the Fathers have waived any jurisdictional objection relevant to the two complaints. That a bargaining unit has been recognized does not, according to the Fathers, "equate with a willingness to submit decisions . . . to state agency review under WEPA, where church doctrine collides with statutory enforcement schemes." Regarding the Complainants' assertion that the complaints seek contract enforcement, the Fathers assert:

> (The Fathers) has never argued that the Complainant is precluded from seeking to enforce its rights under an existing contract, if such claim indeed exists. Yet, if a religious entity . . . enters into a contract with a bargaining unit, the remedy is presumably through enforcement by an action in circuit court, unless otherwise provided by the contract. In fact, the Complainant itself states . . . that the agreement "provides for an independent non-secular outside arbitrator where disputes may arise." That may be true, but that is an entirely different affair than seeking to enforce perceived contractual rights through an allegation of unfair labor practices under a state statutory scheme, seeking to enforce a wide-ranging scope of state powers which neither the church nor the legislature intended to apply.

While acknowledging that "constitutional error may be waived", the Fathers contend that "any waiver which may occur in one proceeding, for strategic purposes or otherwise, does not extend to subsequent proceedings." No such general waiver can be found on the present facts, according to the Fathers.

The Fathers conclude that the complaints must be dismissed because WEPA does not apply to religious schools, or, alternatively, because the assertion of Commission jurisdiction would "foster excessive entanglement with religion, and constitute an improper restriction upon the freedom of religion."

Notre Dame's Reply Brief

Notre Dame argues initially that the Commission's failure to appeal the Circuit Court's decision in St. Albert establishes "the applicable law by which this Commission is bound to follow." Beyond this, Notre Dame urges that Smith, unlike Catholic Bishop, is inapplicable to the present matter because Smith "does not involve subject matter jurisdiction", but "is limited to individual rights." Because Catholic Bishop does address subject matter jurisdiction, and because that case has not been overruled, Notre Dame concludes it constitutes the authority most appropriate to resolution of the complaints posed here.

Beyond this, Notre Dame contends that "subject matter jurisdiction is never waived." From this, Notre Dame concludes that the issue of subject matter jurisdiction is fundamental to the complaints, and must be ruled on

before the issue of waiver is addressed.

Even if it is determined that the Commission has subject matter jurisdiction over the complaints, Notre Dame contends that "the defenses have been raised in this case and therefore have not been waived."

In addition, Notre Dame notes that the parties have entered into a Stipulation, and that the Complainants have asserted facts not contained in that stipulation. It follows, according to Notre Dame, that "(t)he Commission must not use any of the facts used and argued by the Complainant in this matter, because to do so would be an abuse of discretion, reversible on appeal."

Regarding the Complainant's assertion that the complaints seek an enforcement of a labor agreement, Notre Dame contends: "This argument is factually faulty and legally unsound." Noting that no request for arbitration has been advanced, and that the Complainants "are requesting a remedy under state law", Notre Dame concludes that contract enforcement is not at issue. As Notre Dame puts it: "Enforcement of contract or interpreting a contract is not a violation of state law and would be dealt with in arbitration."

Based on the Stipulation and the Respondents' arguments, Notre Dame requests that the complaints be dismissed.

DISCUSSION

The rights asserted in each complaint are enforced by Sec. 111.06(1), Stats., which states the unfair labor practices an "employer" can commit. Sec. 111.02(7), Stats., defines "employer" thus:

> The term "employer" means a person who engages the services of an employe . . . but shall not include the state or any political subdivision thereof . . .

Under Sec. 111.02(10), Stats., "'person' includes . . . corporations'". Each corporate respondent is, then, a "person" under WEPA. While Sec. 111.02(7), Stats., does not clearly address religious entities such as the corporate respondents, it is broad enough to cover them.

This states only the background to the issues posed. The parties have stipulated that each of the respondents is a religious entity. The material included with the parties' stipulation establishes that each respondent is enmeshed in the operation of a school which is to be operated consistently with the tenets of the Roman Catholic Church. Thus, the jurisdictional issue is whether the respondents, as religious entities operating a religious school, can claim to be excepted from Sec. 111.02(7), Stats.

The issues posed are two-fold. The first is whether WEPA, by its terms, applies to the respondents. The second is whether applying WEPA to the respondents violates the Wisconsin, or the United States, Constitution. The second issue is posed only if WEPA applies to the Respondents.

The threshold point posed by the parties' statutory arguments is whether the unappealed Circuit Court decision in St. Albert controls the present litigation. The St. Albert Court issued a writ of prohibition enjoining the Commission from asserting jurisdiction over the Archdiocese of Milwaukee and St. Albert School concerning the non-renewal, "for no religious reasons", 7/ of a teacher.

The respondents forcefully argue that St. Albert controls the result here. Based on the Commission's action in West Bend, 8/ I believe that the Commission views St. Albert as persuasive, not mandatory, precedent. In West Bend, the Washington County Circuit Court overruled the Commission's conclusion that a staff reduction proposal was a permissive subject of bargaining. The Commission appealed the Court's decision, and continued to allow "municipal employers to litigate before it with declaratory ruling proceedings in matters involving the same proposal this Court in West Bend held to be a mandatory subject of bargaining". 9/ The Court accepted the Commission's "usual and customary dealing with the West Bend matter on a case-by-case basis" 10/, reasoning thus:

> An unreversed circuit court decision in this state

7/ Dec. No. 24781-B (Milw.Co.Cir.Ct., 9/88) at 13.

8/ Dec. No. 18512 (WERC, 5/81), rev'd in relevant part, Dec. No. 18512 (Wash. Co. Cir. Ct., 7/82).

9/ Dec. No. 18512 (Wash. Co. Cir. Ct., 4/83) at 3.

10/ Ibid.

> rules only the particular case in which it was rendered. Neither statute nor case law nor custom nor Supreme Court rule give it precedential value as to other cases; nor is the Commission required to follow such a decision in other matters particularly where, as here, it has been appealed from. 11/

Coupling the Commission's decision not to appeal the broad result of St. Albert with the language quoted above raises troublesome points. I am, however, convinced the approach taken by the Commission to the West Bend decision is the approach the Commission takes toward the St. Albert decision. If the Commission believed St. Albert excepted religious schools from WEPA, then there was no reason to appoint an Examiner for these complaints, unless a question of fact existed regarding whether respondents operate a religious school. More difficult to assess is whether the Commission believes its jurisdictional rationale survived St. Albert and binds me. However, it can be noted that the jurisdictional objections in this case were filed prior to my assignment as Examiner, and the Commission neither addressed those objections nor placed any limitations on my appointment as Examiner. From this it would appear the Commission views the law and facts relevant to this case to be unsettled. The parties have argued the jurisdictional points assuming the law is unsettled. With this as background, the series of decisions constituting the St. Albert litigation must be treated as persuasive, not mandatory, authority.

Contrary to the Commission's conclusion in St. Albert, Sec. 111.02(7), Stats., should not be considered to encompass religious entities operating a religious school. This conclusion is not based on an application of the Supreme Court's decision in Catholic Bishop, but on principles of Wisconsin law, as stated in W.E.R.B. v. Evangelical Deaconess Society 12/.

In Deaconess, the Wisconsin Supreme Court addressed the claim that charitable hospitals should be afforded an implied exception to the WEPA definition of "employer", then stated in Sec. 111.02(2), Stats. The Court stated the governing principles thus:

> Under certain circumstances "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers" . . . The determination of the question in this 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 statutes. 13/

While the Deaconess Court did not address the church/state issues posed here, the principles cited by the Court are applicable. The WEPA does not expressly state whether an "employer" can be a religious entity operating a religious school. The respondents do, however, fit within the "letter of" Sec. 111.02(7), Stats. Whether they fit within the spirit of the statute requires "a consideration of the legislative intent". The consideration "whether there is any clear basis for saying that" religious entities operating religious schools "are not within the purview of the statute" states well the reluctance appropriate for interpreting a statute in a fashion which unnecessarily poses constitutional problems. 14/

The Commission concluded that no such clear basis existed, and that the policies articulated in Dunphy Boat 15/ should be extended to the Archdiocese of Milwaukee and St. Albert School. The presence of the broad language of Sec. 111.02(7), Stats., coupled with the absence of "instructive legislative history" dictates this conclusion, according to the Commission.

Neither under Commission case law nor under Deaconess is the breadth of the language of Sec. 111.02(7), Stats., controlling. In Goodwill Industries of Wisconsin, Inc., Dec. No. 7446 (WERC, 1/66), the Commission detailed the implications of the broad language of Sec. 111.02(2), Stats., thus:

> In the Wisconsin Employment Peace Act there is no statutory provision authorizing this Board to grant

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11/ Ibid., at 4.

12/ W.E.R.B. v. Evangelical Deaconess Society of Wisconsin, 242 Wis. 78 (1943).

13/ Ibid., at 80.

14/ On this reluctance, both the majority and the dissent of the Catholic Bishop Court agree.

15/ Dunphy Boat Corp. v. WERC, 267 Wis. 316 (1954).

> exemptions to any employers (except those enumerated) from the coverage of the Act, and if we were to do so without any legislative mandate, such a result would administratively amend the statute. 16/

In American National Red Cross, Dec. No. 13411 (WERC, 8/70) the Commission stated:

> We . . . conclude that while instrumentalities of the federal government are not specifically expressed as being excluded as an "employer" in Section 111.02(2), there is an implied exemption to that effect. 17/

The Commission, in American National Red Cross, did not cite Goodwill. In Hope, Inc., Dec. No. 15411 (WERC, 12/72), the Commission, citing Goodwill, but without citing American National Red Cross, refused to imply an exception in Sec. 111.02(2), Stats., for "non-stock, non-profit, non-membership and charitable corporations", reasoning "(t)o do so without any legislative mandate, the Commission . . . would be administratively amending the statute. 18/

Similarly, that Sec. 111.02(6), Stats., does not authorize the Commission to imply exceptions to the definition of "employe" has not prevented the Commission from implying exceptions for "managerial employes and persons of a religious order", 19/ among others.

The Commission's selective citation of the breadth of the definitions involved does not diminish the fact that the definitions are broad. Similarly, that the Commission chose to imply exceptions in certain cases, but not in others, does not invalidate the conclusions reached. This does underscore, however, that the Commission's own case law does not dictate the conclusion that no exceptions can be created to the broad language of Sec. 111.02(7), Stats.

More significantly, under Deaconess the relevant inquiry is not whether the respondents fall within the "letter of the statute". Rather, the inquiry turns on "a consideration of the legislative intent." Thus, the Commission's citation of the breadth of the language of Sec. 111.02(7), Stats., can only preface the inquiry into whether "there is any clear basis for saying that" religious entities operating religious schools "are not within the purview of the statute."

This latter inquiry turns on a consideration of legislative intent, and the Commission, in St. Albert concluded that there was "no instructive legislative history" which would afford a "basis for concluding that the legislature intended to exclude religious schools from the purview of the (WEPA)."

While none of the legislative history to the WEPA indicates the Legislature specifically considered whether a religious entity operating a religious school was an "employer", this does not mean there is no instructive legislative history. WEPA was conceived and sponsored by the Wisconsin Council of Agriculture. The Act's declaration of policy mentions the impact of labor strife on farmers, and specifically notes the importance of the "uninterrupted production of goods and services". The various amendments to the act reflected differing proposals to ameliorate the conflict between employers and employes and between rival groups of employes. Ultimately, the Legislature, through WEPA, sought to substitute "processes of justice for the more primitive methods of trial by combat."

These general points serve as background to the fact that the definition of "employer" has, since the adoption of the WEPA, excluded "the state or any political subdivision thereof". This specifically excepts public school districts. In light of the general background sketched above, this specific exclusion can not be dismissed as insignificant. The Commission's citation of the policies articulated in Dunphy Boat to justify the extension of the WEPA to religious schools presumes that the Legislature which deliberately chose to except the largest part of the education system from the WEPA, and ultimately chose to separately enact labor laws governing public education, implicitly intended to permit the Commission to apply the WEPA to that fraction of the education system which mixes church and state. This conclusion is unpersuasive. The more probable explanation, in my opinion, is that the Legislature did not address church/state educational issues in enacting the

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16/ Dec. No. 7446 at 9.

17/ Dec. No. 9875 at 5.

18/ Dec. No. 11468 at 4.

19/ Holy Family Hospital, Dec. No. 11535 (WERC, 1/73).

WEPA because those issues were beyond the range of applications intended by it. Church/state issues were, in my opinion, clearly outside the purview of WEPA.

Whether the Legislature intended to specifically exclude public education from the services covered by WEPA or to generally exclude public employers and employes from the act is irrelevant to this conclusion. Nor does the possibility that the Commission can assert jurisdiction over private institutions of education 20/ affect this conclusion. The issue posed here is whether the Legislature drafted WEPA in such a way that the assertion of Commission jurisdiction over religious schools falls within the interpretive range of outcomes intended by it. The Commission's conclusion in St. Albert extends WEPA into an area the Legislature chose not to consider, and the Commission, as an administrative agency, can only act to the extent authorized by the Legislature. 21/

The Commission's contrary view of the legislative history implies that the Legislature granted the Commission a broad policy mandate and would have, or should have, reached the result advocated by the Commission in St. Albert, had it considered the point. The Commission may well have a broad policy mandate, but that mandate does not diminish the need for legislative consideration of the points posed here.

I do not believe it can be persuasively argued that the Commission rather than the Legislature should undertake the expansion of the general policies of the WEPA to religious entities operating religious schools. The extension of WEPA to religious schools will inevitably pose church/state constitutional issues since "religious authority necessarily pervades a church operated school". 22/ It is not necessary to imply the Commission should shrink from constitutional issues to state that the Commission is not the appropriate forum for the issues posed in this case. As noted above, the Legislature has not yet chosen to consider these issues and the Legislature is, by law, the appropriate forum. Even if this point is rejected, the Legislature is, by policy, the appropriate forum. The public debate surrounding proposed legislation stands in marked contrast to the deliberations of an administrative agency in considering the facts posed in a single contested case. The Legislature's amendment of the definition of "employer" in Sec. 111.32(6)(a) of the Fair Employment Act in 1982 to eliminate an exception for "a . . . religious association not organized for private profit" underscores both the factual and policy basis for this conclusion. That amendment, and a series of other changes, were subject to a lengthy amendment process which indicates, at a minimum, that church/state issues are not points left implicit by the Legislature. Beyond this, those amendments exemplify the winnowing process by which a proposal becomes a law. This stands in marked contrast to the deliberations of an administrative agency considering the result in a single contested case.

It is now necessary to address these general considerations more specifically to the parties' arguments and the remaining considerations voiced by the Commission in St. Albert.

The Commission, in St. Albert, distinguished between the Archdiocese as a religious entity and the operation of St. Albert School. Footnote 2/ of that decision states:

> 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. 23/

This implies that fundamental to a pre-hearing order of dismissal is a determination that a school operated by a religious entity is, at least in part, promoting a particular religious faith. This potentially poses constitutional issues regarding the intrusiveness of the initial determination.

These issues are, however, only potential in this case. The Commission has issued a pre-hearing motion to dismiss, 24/ and has, with judicial

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20/ I have been able to find only one WEPA case involving a unit of instructional employes of an educational institution: Layton School of Art and Design et. al., Dec. No. 12231-B (WERC, 5/75). No jurisdictional issues were raised in that proceeding.

21/ Browne v. Milwaukee Board of School Directors, 83 Wis. 2d. 316 (1978).

22/ Black v. St. Bernadette Congregation, 121 Wis 2d 560, 565 (Ct. App., 1984).

23/ Dec. No. 24781-B at 6.

24/ See Local Union No. 849, United Brotherhood of Carpenters and Joiners of

approval, authorized examiners to determine pre-hearing motions to dismiss. 25/ A pre-hearing motion to dismiss can be granted only if a complaint fails to raise a genuine issue of fact or law. The standard appropriate to determining the merit of a pre-hearing motion to dismiss has been stated thus:

> Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. 26/

In this case, the legal issues have been discussed and the issue is whether the complaints pose any question of fact regarding whether the school operated by respondents has not, at any time relevant to this matter, been operated, at least in part, to promote the Roman Catholic faith. The parties' stipulation and the related corporate documents, viewed in light of the pleadings, offer no basis to make any conclusion other than that Premontre High School and Notre Dame de la Baie Academy are to be operated, at least in part, to promote the Roman Catholic faith.

Beyond this, the Commission, in St. Albert, questioned whether, on the facts then posed, any constitutional issues were posed, since the discharge was "largely, if not totally secular in nature." This conclusion, in light of the pleadings here, is unavailable. The Complainants challenge, and the Respondents defend, the religious policy basis for the closing of Premontre High School and the opening of Notre Dame de la Baie Academy. To assert jurisdiction over the Respondents in this case requires analysis of the constitutional issues.

America and Fox River Valley District Council of United Brotherhood of Carpenters and Joiners of America, Dec. No. 5502 (WERC, 6/60).

25/ See County of Waukesha, Dec. No. 24110-A (Honeyman, 10/87), aff'd Dec. No. 24110-A (WERC, 3/88); and Moraine Park Technical College et. al., Dec. No. 25747-C (McLaughlin, 9/89), aff'd Dec. No. 25747-D (WERC, 1/90). For judicial approval, see Village of River Hills, Dec. No. 24570 (WERC, 6/87), aff'd Dec. No. 87-CV-3897 (Dane County Cir. Ct., 9/87), aff'd Dec. No. 87-1812 (CtApp, 3/88). The procedural history of the case is summarized in Village of River Hills, Dec. No. 24570-B (Greco, 4/88). All of the above cases arose under the Municipal Employment Relations Act, but that Act incorporates and applies the procedures of Sec. 111.07, see Sec. 111.70(4)(a), Stats. Both acts are subject to Chapter 227.

26/ Unified School District No. 1 of Racine County, Wisconsin, Dec. No. 15915-B (Hoornstra, with final authority for WERC, 12/77) at 3. The standard was approved in Moraine Park.

The Commission did analyze the constitutional issues potentially posed here, concluding: "We also believe the Peace Act can as a general matter be applied in a constitutionally appropriate manner to religious schools." 27/ This may well be true, but the analysis is inappropriate, since the Legislature has yet to authorize the Commission to address this matter.

Complainants have contended that because the Commission has handled a series of cases involving Premontre High School, it follows that Respondents have waived the jurisdictional objections posed here. Waiver is "an intentional relinquishment . . . of a known right or privilege." 28/ Even if it is assumed the handling of the prior cases constituted a knowing waiver of the objections, it would be improper to extend that waiver beyond the particular cases involved: "Courts indulge in every reasonable presumption against waiver of fundamental constitutional rights." 29/ Even if the asserted waiver focuses on the statutory objections asserted by the respondents, no waiver can be found in this case, for each respondent objected to the Commission's assertion of jurisdiction from their first pleading. In any event, any past waiver of the statutory objection can not supply the jurisdiction the Legislature has not yet created.

Complainants also contend that this matter involves no more than the enforcement of a collective bargaining agreement, a function routinely performed by the Commission. This ignores that if none of the Respondents is an "employer" within the meaning of WEPA, then the Commission lacks the jurisdiction to act. 30/ The definition of collective bargaining turns on the term "employer" as does each unfair labor practice prefaced by Sec. 111.06(1), Stats. This is not to say the collective bargaining agreement can not be enforced. That issue can not be addressed here. Rather, this says that if the agreement is to be enforced, it must be as a civil contract, enforceable through a court, not as a collective bargaining agreement enforceable through this administrative agency.

Dated at Madison, Wisconsin, this 25th day of February, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

27/ Dec. No. 24781-B at 7.

28/ State v. Haynes, 118 Wis. 2d 21, 25 (1983), citing "Johnson v. Zerbst, 304 U.S. 458, 464 (1938)".

29/ Ibid.

30/ Cf. to the unwillingness of Federal Courts to apply Section 301 to entities not within the definition of "employer" in the National Labor Relations Act: See Hospital Employees v. Ridgeway Hospital, 570 F.2d 167, 97 LRRM 2471 (7th Cir., 1978); Roberson v. Confederated Tribes, 103 LRRM 2749 (D.C. Ore., 1980); and Manfredi v. Hazelton City Authority, 122 LRRM 2958 (3d Cir., 1986).