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-B
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-B

Appearances:

Appear on page two

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 Mr. Eugene A. Lundergan, Mr. Donald C. Bettine and Mr. 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.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,
SETTING ASIDE IN PART AND REVERSING IN
PART EXAMINER'S CONCLUSIONS OF LAW,
AND AFFIRMING EXAMINER'S ORDER

On February 25, 1991, Commission Examiner Richard B. McLaughlin issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matters wherein he concluded that none of the named Respondents were an "employer" within the meaning of Sec. 111.02(7), Stats., and therefore that the Wisconsin Employment Relations Commission lacked jurisdiction to determine whether any of the acts alleged in the complaints constituted unfair labor practices under the Wisconsin Employment Peace Act. Given his conclusion, the Examiner dismissed the complaints.

On March 18, 1991, the Complainants filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Sec. 111.07(5), Stats. The parties thereafter filed written argument and submitted supplemental authority, the last of which was received January 8, 1992.

Having reviewed the record, the Examiner's decision, and the parties' argument, the Commission makes and issues the following

ORDER 1/

A. The Examiner's Findings of Fact are affirmed.

1/ Footnote 1/ found on pages 3 and 4.

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

1/ continued

> (b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.
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> . . .
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> (c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

B. The Examiner's Conclusion of Law 1 is reversed to read as follows:

1. A religious school is an "employer" within the meaning of Sec. 111.02(7), Stats.

C. The Examiner's Conclusion of Law 2 is set aside.

D. The Examiner's Order dismissing the complaints is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 18th day of June, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

I concur as to Conclusion of Law 1 as to the Order dismissing the complaint.

A. Henry Hempe, Chairperson

I concur as to Conclusion of Law 1 but dissent from from the Order dismissing the complaint.

Herman Torosian, Commissioner

I dissent from Conclusion of Law 1 but concur as to the Order dismissing the complaint.

William K. Strycker, Commissioner

PREMONTRE EDUCATION ASSOCIATION

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, SETTING ASIDE IN PART AND REVERSING IN PART EXAMINER'S CONCLUSIONS OF LAW, AND AFFIRMING EXAMINER'S ORDER

The Pleadings

The complaints allege that the entities operating Premontre High School engaged in unfair labor practices within the meaning of Sec. 111.06(1)(a), (b), (c), (f), (h) and (k), Stats., by allegedly closing the High School at the conclusion of the 1989-90 school year, terminating the employes, and reopening the High School as Notre Dame Academy. The Respondents filed Motions to Dismiss with the Examiner asserting that the First Amendment to the U.S. Constitution and Article I, Section 18 of the Wisconsin Constitution would be violated if the Commission were to exercise jurisdiction over the complaints. The Motions were ultimately refined to include a threshold statutory assertion that the Legislature did not intend the Wisconsin Employment Peace Act to apply to religious schools. For the purposes of the Motion to Dismiss, the parties stipulated that each Respondent was a "religious (non-secular) entity affiliated with the Roman Catholic Church."

The Examiner's Decision

The Examiner initially acknowledged some uncertainty as to whether the Commission had definitively determined whether a religious school falls within the statutory definition of an "employer" set forth in Sec. 111.02(7) of the Wisconsin Employment Peace Act. In this regard, the Examiner noted that in St. Alberts School, Dec. No. 24781-B (WERC, 3/88) a majority of the Commission concluded that religious schools were covered by the Peace Act. However, because the Commission's conclusion in this regard was reversed in Milwaukee County Circuit Court and the Commission did not appeal that decision, the Examiner concluded that the law relevant to his case was unsettled. Thus, the Examiner determined that St. Alberts School should be treated as persuasive, not mandatory, authority.

Turning to an analysis of the statutory question before him, the Examiner determined that the Respondents fit within the "letter of" Sec. 111.02(7), Stats. However, relying upon WERB v. Evangelical Deaconess Society 242 Wis. 78 (1943) the Examiner determined that the critical question was whether "there is any clear basis for saying that" religious entities operating religious schools "are not within the purview of the statute." The Examiner reasoned that an examination of legislative intent was critical to making this determination.

When examining the question of legislative intent, the Examiner acknowledged that none of the legislative history to the Wisconsin Employment Peace Act indicates that the Legislature specifically considered whether a religious entity operating a religious school was an "employer." However, contrary to the Commission's analysis in St. Alberts, the Examiner determined that there was instructive legislative history to be gleaned from the historical context in which the Wisconsin Employment Peace Act was enacted as well as the specific exclusion of "the state or any political subdivision thereof" from the definition of an "employer" under the Peace Act. Reviewing these factors, the Examiner concluded that the Legislature did not address church/state educational issues when enacting the Peace Act because those issues were beyond the range of applications intended by the Legislature. The Examiner held that the Commission's decision in St. Alberts :

> 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.

From the foregoing, the Examiner concluded that extension of Peace Act coverage to religious schools functioning as employers extends the Commission's jurisdiction into an area the Legislature chose not to consider. Thus, the Examiner concluded that the Peace Act did not cover the Respondents herein and dismissed the complaint.

Positions of the Parties on Review

Complainants urge the Commission to reverse the Examiner and conclude that the Respondents are employers within the meaning of Sec. 111.02(7), Stats. Although Complainants acknowledge that the Commission's decision in St. Alberts School was reversed in Circuit Court, Complainants assert that the decision of the United States Supreme Court in Employment Division, Department of Human Resources at Oregon, et al. v. Alfred R. Smith et al., 494 U.S. 108 (1990) drastically changed the test for the application of secular laws to parochial entities. Complainants argue in this regard that under the holding of the Smith case, laws generally applicable shall be enforced against parochial entities unless it is shown that such laws are in some manner unconstitutionally intrusive. Therefore, Complainants argue that the Commission should reaffirm its holding in St. Alberts School and reverse the Examiner.

Respondents collectively urge the Commission to affirm the Examiner's dismissal of the complaints. Respondents contend that dismissal of these complaints for lack of jurisdiction does not preclude Complainants from seeking a remedy in an appropriate forum. Respondents assert that the issue of enforcement or interpretation of the collective bargaining agreement is a matter of contract law, and that the proper forum would be either arbitration or a circuit court action, depending upon who such a claim would be directed against. Respondents urge the Commission to reject the Complainants' unwarranted attempts to enforce the asserted contractual rights under a wide-ranging state statutory scheme, which neither the Legislature nor the church intended to apply.

As to the Complainants' reliance upon the Smith case, Respondents assert that Complainants are giving Smith a far broader reading than is appropriate and that Smith does not warrant reversal of the Examiner's decision.

DISSENT AND CONCURRENCE

I disagree with my colleagues' conclusion that religious schools are covered under the Wisconsin Employment Peace Act (WEPA). Section 111.02(7) defines "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.

While this is obviously a very broad definition, there is no legislative history to indicate that religious schools were intended to be specifically included or excluded. WEPA was enacted several years after Congress created the National Labor Relations Act (NLRA). Both laws are similar in scope, with similar purposes and have similar definitions of an "employer." Both laws are intended to promote labor peace through the reduction of strikes and disruptions. Likely, the State Legislature was more concerned about patterning WEPA after the NLRA rather than struggling with church/state educational issues. Clearly, neither the Congress nor the state legislature affirmatively addressed the coverage of religious schools in either law.

In NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), the Supreme Court concluded that the NLRA did not apply to religious schools. As noted above the NLRA contained a broad employer definition, similar to 111.02(7) Wis. Stats., which neither specifically included or excluded religious schools. The court concluded (5-4) that there was no affirmative intention by Congress to include religious schools under the NLRA. They also concluded that the Act should be interpreted in a manner that reduces the potential for constitutional conflicts. Consequently, without an affirmative intention to include religious schools, the Court held that the NLRA did not apply to religious schools.

The dissenters were very critical of the majority's conclusion that congress needed to identify affirmatively that religious schools were to be covered under the NLRA. While the dissenter's arguments regarding statutory construction are not without merit, I agree with the Supreme Court majority's conclusion that because of the potential for constitutional conflicts an affirmative intention of coverage by congress is needed.

Because serious constitutional questions/problems would exist under WEPA, it is highly unlikely that the legislature intended WEPA to apply to religious schools. The first amendment to the United States Constitution states in part:

> . . . Congress should make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

The Wisconsin Constitution Article I, Section 18 states

> The right of every person to worship almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect, or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishment or modes of worship. . . .

Wisconsin courts have held that statutes should be interpreted in a fashion to avoid constitutional disputes.

> One of the most fundamental rules of statutory construction requires the court to not only construe a statute to avoid a construction that renders the statute unconstitutional, but also to construe the statute to dispel any serious doubts concerning its constitution-ality. Wipperfurth v. U-Haul Co. of Western Wisconsin, 98 Wis.2d 516, 522 (CirCt, 1980), aff'd 101 Wis.2d 586 (1981).

WEPA coverage could restrict the respondents in many areas including the ability to evaluate and assign staff, the ability to determine reasonable qualifications for staff such as possessing religious certification, the ability to utilize religious faculty in place of lay faculty and the ability to subcontract with religious entities for services. The uniqueness of religious schools in first amendment situations was noted by Wisconsin Court of Appeals in Black v. St. Bernadette Congregation, 121 Wis.2d 560 (Ct. App., 1984). Citing Catholic Bishop the court said:

> Because religious authority necessarily pervades a church operated school, personnel decisions affecting the school may involve the ecclesiastical issues as much as decisions affecting other church employees. See NLRB v. Catholic Bishop, 440 U.S. 490, 502 (1979).

In summary, WEPA does not specifically reference religious schools, and there is no record of an affirmative intention by the legislature to include religious schools under its provisions. Further, since there is significant potential for constitutional rights to be compromised, I conclude that WEPA is not applicable to religious schools.

In Archdiocese of Milwaukee and St. Albert School v. WERC, Case No.007-640 (CirCt. Milw. 9/88) the court adopted this rationale. Judge Gerlach stated:

> . . . I believe the statutory construction employed by the United States Supreme Court in Catholic Bishop would be adopted by the Wisconsin appellate courts in determining whether or not Sec. 111.02(7) applies to religious organizations.
>
> Because of the decision in Catholic Bishop I conclude that there must be an affirmative intention clearly expressed by the Wisconsin Legislature that religious organizations, such as the plaintiff, be covered under WEPA. Because there has been no showing of an affirmative intention by the Wisconsin Legislature to include church operated schools within the WEPA definition of "employer" the plaintiffs are exempt from WEPA and, accordingly, the WERC has no jurisdiction in this matter.

I concur with Judge Gerlach's analysis which I believe is also appropriate in this matter.

Even if an appellate court would adopt the reasoning of the Supreme Court minority, I believe that coverage under WEPA would unconstitutionally infringe on the constitutional rights of the respondents. This issue was considered by the Seventh Circuit Court of Appeals. See Catholic Bishop of Chicago v. NLRB, 559 F.2d 112 (7th Cir. 1977). The Court stated that coverage under the NLRA would provide a reasonable possibility for governmental intrusion. The court, therefore, concluded that National Labor Relations Board (NLRB) jurisdiction was unconstitutional.

Coverage under WEPA could lead to shared decision making with a labor organization and is likely to result in the infringement on constitutional rights. The formal collective bargaining/labor relations environment could lead to an intrusion on religious authority and could hinder the accomplishment of the religious mission. This may include limiting the ability to substitute religious faculty for lay faculty, the ability to control curriculum content, the ability to promote religious precepts, and the ability to evaluate faculty. The Seventh Circuit in Catholic Bishop cited the following in addressing this concern:

> Once the bargaining agent has the weight of statutory certification behind it, a familiar process comes into play. First, the matter of salaries is linked to the matter of workload, workload is then related directly to class size, class size to range of offerings, and range of offerings to cirricular (sic) policies. This transmutation of academic policy into employment terms is not inevitable, but it is quite likely to occur (quoting from Brown, Collective Bargaining in Higher Education, 67 Mich. Law Review 1067, 1075 (1969). Catholic Bishop, 559 F.2d at 1123.

Just as the Seventh Circuit concluded that NLRB jurisdiction would have a reasonable possibility of intruding on constitutional rights, I conclude that WERC jurisdiction would have the same potential.

I disagree with my colleagues' opinion that WEPA could be administered so as to avoid constitutional conflicts. In Archdiocese of Milwaukee and St. Albert School, supra the Court stated:

> I do not agree with the argument of the WERC that in cases where an administrative agency could determine whether an asserted religious-based reason was in fact the reason for a discharge, it could protect First Amendment rights where the discharge was in part based on religion by "accommodation" in fashioning remedial orders which would exclude reinstatement of the employe. See Catholic High School Association v. Culvert, 753 F.2d 1161 (2nd Cir., 1985).

The Court continued by identifying that the Seventh Circuit had rejected the accommodation argument as follows:

> We fail to comprehend the real possibility of accommodation in the present context without someone's constitutional right being violated which in turn would

> seem to preclude the possibility of accommodation as an answer to the obviation of the religious entanglement problem. Catholic Bishop, 559 F.2d at 1130.

I agree with the courts and believe that even "well intentioned" accommodation would inevitably lead to excessive governmental intrusion.

Contrary to the Complainants' argument, I don't believe that the Smith case changes the analysis appropriate for this case.

For the reasons stated, I conclude that the respondents are not covered by the provisions of the Wisconsin Employment Peace Act.

Dated at Madison, Wisconsin this 18th day of June, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
William K. Strycker, Commissioner

CONCURRENCE

I concur with the result reached by Commissioner Strycker, though not all of his reasoning. I concur with Commissioner Torosian's reasoning as to proper statutory construction. Specifically, with Commission Torosian, I find no necessity to locate affirmative evidence that the legislature intended that the Wisconsin Employment Peace Act (WEPA) apply to religious employers as well as secular ones before asserting jurisdiction over the former. To hold otherwise is to give credence to an aberrant doctrine of statutory construction contrived in 1979 by a 5 to 4 Supreme Court majority, 2/ used only once, and now moldering from disuse by its own inventors.

A sounder doctrine, in my view, was articulated by an earlier United States Supreme Court in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). It has been consistently applied by the Court, 3/ which appears to give it additional strength.

The Lemon Court posted three time-tested standards which legislation must meet in order to avoid violating the Religion Clauses of the First Amendment:

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. Board of Education v. Allen, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive entanglement with religion.' Walz v. Tax Commission 397 U.S. 664, 668 (1970). Id., 612-13.

In the instant matter, there can be little doubt that WEPA has a secular legislative purpose. There is nothing in its legislative history which indicates otherwise. Similarly, it is difficult to maintain plausibly that its primary effect either advances or inhibits religion.

It is the third criterion on which the facts of this case appear to founder. To sort through them to determine whether the Premonstratensian Fathers committed an unfair labor practice in their efforts to advance Catholic religious education by consolidating existing educational institutions in the Green Bay area seems to fairly shriek of "excessive entanglement." 4/

2/ NLRB v. Catholic Bishops of Chicago, 440 U.S. 490, 99 S.Ct. 131-3, 59 L.Ed.2d 533 (1979).

3/ Freedom From Religion Foundation, Inc. v. Tommy G. Thompson, Governor, et. al., 164 Wis.2d 736, 742, 476 N.W.2d 318 (Ct.App. 1991).

4/ This was not the case in Teamsters "General" Local Union 200 and Cynthia Labucki v. Archdiocese of Milwaukee and St. Albert School, Dec. No.

I thus join Commissioner Strycker in ordering this matter dismissed.

Dated at Madison, Wisconsin this 18th day of June, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairperson

24781-B (WERC, 3/88). The facts of that case involved a teacher whose non-renewal notice listed only secular, not religious, reasons. In the instant matter, however, respondents claim their conduct was motivated by legitimate religious considerations of providing a Catholic education to Green Bay area youth. Moreover, it was never factually established that the St. Albert School was an educational institution whose purpose is, at least in part, the promotion of a particular religious faith. But in the instant matter, the parties stipulated that "(e)ach respondent is a religious (non-secular) entity affiliated with the Roman Catholic Church."

CONCURRENCE AND DISSENT

In Archdiocese of Milwaukee, Dec. No. 24781-B (WERC, 3/88) rev'd Case No. 007-640 (CirCt Milw., 9/88), a Commission majority of which I was a part concluded: (1) that religious schools fell within the definition of "employer" in Section 111.02(7) of the Wisconsin Employment Peace Act; and (2) that the Peace Act could be applied in a constitutionally appropriate manner to religious schools. Nothing in Commissioner Strycker's opinion, the Examiner's decision or Respondents' briefs persuades me that different conclusions should now be reached.

As to the issue of whether religious schools fall within the Peace Act's definition of "employer," we applied the following analysis in Archdiocese:

> 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) (sic) of the Peace Act and commented at pp. 79-80 that:
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> > 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 determin-ation 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 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 there-fore reversed the Examiner's conclusion to the contrary. (footnotes omitted)

As reflected in the above-quoted portion of Archdiocese, when we applied the holding of Evangelical Deaconess to the dispute before us, we found that: (1) the language of Sec. 111.02(7), Stats., was broad enough to cover religious schools; and (2) in the absence of any instructive legislative history, there was no clear basis for concluding that religious schools should be excluded.

The Examiner reached a different conclusion when he applied the holding of Evangelical Deaconess. Although he agreed with the Commission's earlier conclusion that the language of Sec. 111.02(7), Stats., is broad enough to cover religious schools, he disagreed with our conclusion that there was no instructive legislative history. His analysis of the general legislative history surrounding the Peace Act's enactment persuaded him that the Legislature never considered the issue at hand. Thus, he concluded that the Legislature did not intend to have the Peace Act apply to religious schools. Therefore, he concluded that religious schools are not covered by the Peace Act.

I find the Examiner's application of Evangelical Deaconess to be flawed. In effect, the Examiner turned Evangelical Deaconess on its head. Instead of determining "whether there is any clear basis" for saying that religious schools are not covered, the Examiner determined that the test should be "whether there is any clear basis" for finding that religious schools are covered. While the inferences the Examiner draws from legislative history are interesting, they fall far short of establishing a "clear basis" for concluding the language should be given something other than its plain meaning.

The Examiner's analysis of "legislative history" essentially consists of his views on the inferences to be drawn from the explicit exclusion of the public employers from Peace Act coverage. He concludes that it was unlikely that the Legislature would exclude most (the public schools) but not all (religious or private schools) of the educational system from Peace Act coverage. The Examiner cites no evidence to support this conclusion. His conclusion ultimately rests on his supposition that the Legislature did not want to become involved with church/state issues.

I do not find the Examiner's suppositions persuasive. Indeed, the clear exclusion of public schools from Peace Act coverage provides support for the conclusion that those schools not excluded are covered. Suffice it to say that given the plain meaning of the language chosen by the Legislature and absent any specific evidence that the Legislature rejected coverage for religious schools, application of Evangelical Deaconess produces a conclusion that the

Peace Act covers religious schools when acting in their capacity as an employer.

In Archdiocese, we also addressed the issue of whether the Peace Act could be constitutionally applied to religious schools. We held:

> 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 Respondent's asserted basis for the nonrenewal is largely if not 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 (sic) 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 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/

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 Manage-ment 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 (sic) 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, 92 Wis.2d 145 (1979).

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 the 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 other, 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 . . (sic) 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.

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 con-strue its own statutory mandate in light of federal constitutional principles.

I continue to find the above-quoted analysis persuasive and in particular reaffirm the Lemon analysis contained in footnote 8 above.

Lastly, I think it necessary to comment on the premise which seemingly underlies the opinions of those who would exclude religious schools from Peace Act coverage (i.e. that collective bargaining will inevitably create serious constitutional problems). Here, the parties have had an apparently uneventful collective bargaining relationship for at least nine years. Until this dispute arose involving significant matters of school closure and loss of jobs, the specter of constitutional problems did not intrude into the parties' relationship. Thus, I am satisfied that those who find collective bargaining to be inevitably incompatible with the exercise of constitutional freedoms are mistaken. As indicated in Archdiocese, I am persuaded that where constitutional issues arise, the Peace Act can be administered in a way which does not diminish constitutional rights.

Based on the above, I would reverse the Examiner and remand the matter to him for hearing and decision. Unlike my colleague Chairperson Hempe, I cannot decide the issue of excessive entanglement without a hearing.

Dated at Madison, Wisconsin this 18th day of June, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Commissioner