STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PAUL F.X. SCHWARTZ,

Complainant,

vs.

REV. DANE RADECKI; PREMONTRE HIGH SCHOOL, INC.; NOTRE DAME de la BAIE ACADEMY, INC. and the PREMONSTRATENSIAN FATHERS,

Respondents.

Case 15
No. 48169 Ce-2132
Decision No. 27550-E

Appearances:

Paul F.X. Schwartz, Complainant, 2118 Lakeland Avenue, Madison, Wisconsin 53704, appearing pro se.

Liebmann, Conway, Olejniczak & Jerry, S.C., Attorneys, by Mr. Herbert C. Liebmann and Mr. Donald L. Romundson, 231 South Adams Street, P.O. Box 23200, Green Bay, Wisconsin 54305-3200, appearing on behalf of Respondents.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

On October 12, 1992, Paul F.X. Schwartz filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondents had violated Sections 111.06(1)(a),(b),(c), (f), (h) and (k) and 111.06(3) of the Wisconsin Employment Peace Act.

On November 3, 1992, Respondents filed a Motion to Dismiss the complaint, asserting among other matters that the Commission did not have jurisdiction over Respondents and that the complaint was, in any event, untimely filed. The parties thereafter briefed the timeliness issue raised by the Motion and on February 5, 1993, Examiner Christopher Honeyman issued an Order dismissing the complaint as untimely.

Complainant Schwartz filed a petition with the Wisconsin Employment Relations Commission on February 19, 1993, seeking review of the Examiner's decision pursuant to Sec. 111.07(5), Stats. The parties thereafter filed written argument, the last of which was received on April 2, 1993.

On August 17, 1993, the Wisconsin Employment Relations Commission issued an Order reversing the Examiner's dismissal of the complaint and remanded the matter to the Examiner for further proceedings.

By letter dated October 4, 1993, Respondents advised the Examiner as follows:

> Under the circumstances of this case, we would like to proceed directly to hearing. Although we had reserved the right to argue other issues subsequent to the determination on timeliness, we will be waiving those objections, including jurisdictional objections, for this case and this case only.

By letter dated October 8, 1993, Complainant Schwartz advised the Examiner that he objected to proceeding to hearing without having the jurisdictional issue resolved. By letter dated October 11, 1993, Respondents advised the Examiner as follows:

> Respondent (sic) is not attempting to "waive subject matter jurisdiction". Rather, what we have done is to waive or withdraw an objection to jurisdiction, for purposes of this case, an objection that had been grounded in constitutional and other grounds.
>
> The present posture of the record is this: the Complainant has filed a claim with your agency. Respondents initially objected on several grounds, including jurisdictional grounds, but now have withdrawn those objections. The W.E.R.C. could determine, sua sponte, that it lacks jurisdiction over this case, unless you are inclined to do that, the matter is ripe for conclusion, and should be concluded promptly.

By letter dated October 18, 1993, Complainant Schwartz advised the Examiner of his view that subject matter jurisdiction is not subject to waiver and that the issue of the Commission's jurisdiction over religious schools should be addressed prior to any further proceedings on his complaint.

By letter dated November 18, 1993, the Examiner advised the parties that he was proceeding to hearing. The Examiner stated in pertinent part:

> I find all of the cases cited by Complainant to be inapposite to this rather strange situation. These cases discuss "subject matter" jurisdiction, while a review of them, as well as that of the prior Premontre decision of the WERC, convinces me what has been raised in this context is more related to "personal" jurisdiction. . . .Furthermore, I find that the guiding rules are to be found in two practical criteria: the limited powers of an Examiner, and the well-known difficulty of proving a negative.
>
> Respondent has waived/withdrawn its original arguments as to jurisdiction for purposes of this case. Complainant's objection that this may not prevent Respondent from raising the same issue in the course of another case is, of course, correct on its face, but it raises an issue more appropriately for the subsequent trier of fact. Complainant's argument that the Respondent might not be precluded from withdrawing its waiver in court at some later appeal stage of the present case is more troubling. But in view of the role I play, I conclude that this possibility is outweighed by other considerations. First, I cannot issue any ruling in this matter that is not eventually subject to court review, though a court might decide that a withdrawal at that stage of so well-thought-out a waiver was the worst sort of "come lately" argument.
>
> But more particularly, a refusal on my part to allow Respondent to drop its jurisdiction objection would raise insuperable practical difficulties. I would be placed in the position of ordering someone to make an argument he does not care to make, an analogous situation to proving a negative. If the argument were cursory, would I then be asked to flesh it out on the Respondent's behalf? If evidence might be needed to make the argument intelligible, should I then unearth and demand the evidence?
>
> I recognize that Complainant has previously been involved in litigation with Respondent over WERC jurisdiction and that Respondent's current position may strike him somewhat strange. But, at bottom, my function is to dispose of arguments that are made, not to order their making.

On November 30, 1993, Complainant filed a Motion with the Commission asking the Commission to review the Examiner's decision to proceed to hearing. Following receipt of argument, the Commission issued an Order on January 31, 1994, in which it declined to exercise its discretionary power to entertain Complainant's motion for review of the Examiner's interlocutory

decision. The Commission held:

> Complainant's petition seeks Commission review of the Examiner's decision to proceed to hearing. The Examiner's decision is not a "final" disposition of the parties' dispute as to which a non-discretionary right to Commission review exists. 1/ As we decline to exercise our discretionary power to entertain the Complainant's motion for review of the Examiner's interlocutory decision, 2/ we have denied the motion. If the case is ultimately decided in a final manner which the Complainant believes to be incorrect, the Complainant is free to file a petition for review at that time raising whatever issues he deems appropriate.
>
> However, we do acknowledge that it may become inappropriate for the Commission or a court to ultimately address issues regarding subject matter jurisdiction over Respondents. Thus, in the proceedings before the Examiner, we ask the parties and the Examiner to develop any factual record necessary for resolution of any jurisdictional issue.
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> Dated at Madison, Wisconsin this 31st day of January, 1994.
>
> WISCONSIN EMPLOYMENT RELATIONS COMMISSION
>
> By A. Henry Hempe /s/
> A. Henry Hempe, Chairperson
>
> Herman Torosian /s/
> Herman Torosian, Commissioner
>
> Commissioner Strycker did not participate.

1/ G & H Products, Inc., Dec. No. 17630-B (WERC, 1/82); Jefferson Board of Education, Dec. No. 13648-B (WERC, 1/76).

2/ State of Wisconsin, Dec. No. 11457-C, D (WERC, 3/73), aff'd State of Wisconsin v. WERC, 65 Wis. 2d 624 (1974); Milwaukee County, Dec. No. 19545-D (WERC, 3/85),

Wisconsin Dells School District, Dec. No. 25997-A (WERC, 6/89); City of Beloit, Dec. No. 25917 (WERC, 10/89).

Complainant Schwartz then sought judicial review of the Commission's January 31, 1994 Order in Dane County Circuit Court. On March 31, 1994, Dane County Circuit Judge O'Brien issued an Order dismissing Complainant Schwartz's petition for review because the Commission's January 31, 1994 Order was not a decision which adversely affects any substantial interest of Schwartz and therefore was not a decision "subject to judicial review under ch. 227, Stats."

Hearing on the complaint was held before Examiner Honeyman in Green Bay, Wisconsin on May 23, 1994. Following receipt of post-hearing argument, the Examiner issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum on January 12, 1995 which dismissed the complaint based upon his determination that Complainant Schwartz had not established any violations of the Wisconsin Employment Peace Act.

On January 27, 1995, Complainant Schwartz 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 in support of and in opposition to the petition, the last of which was received March 10, 1995.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER 1/

(a) Examiner Finding of Fact 1 is modified to read as follows:

> Paul F.X. Schwartz, herein Complainant, is an individual residing at 2118 Lakeland Avenue, Madison, Wisconsin 53704.

(b) Examiner Findings of Fact 2-4 are affirmed.

(c) Examiner Findings of Fact 5-6 are set aside and the following Findings of Fact are made:

> 5. Complainant Schwartz was employed as an English teacher by Premontre High School from 1981-1988. From 1982-1988, Schwartz served as President of the Premontre Education Association, a union representing teachers at Premontre High School, and functioned as the Association's main spokesperson for bargaining and contract administration.

(Footnote 1/ appears on page 10.)

Father Dane Radecki, herein Respondent Radecki, was employed as a teacher by Premontre High School during the 1982-1983 school year, after which he left to pursue additional education. During the 1982-1983 school year, Radecki and Schwartz had a good relationship as fellow teachers. Radecki returned to Premontre High School to serve as Principal beginning with the 1987-1988 school year.

6. In their respective roles as Principal and Association President, Radecki and Schwartz interacted throughout the 1987-1988 school year whenever employment issues arose. They also interacted as colleagues. Schwartz made Radecki aware that Schwartz was considering entering law school or seeking employment as a school administrator. On February 1, 1988, Radecki filed the following open letter of recommendation on Schwartz's behalf:

> I am writing to recommend Paul Schwartz for your consideration. I have known Paul for about ten years as a colleague and feel that he is extremely dedicated to his profession. Paul and I served for a number of years as teachers at Our Lady of Premontre High School in Green Bay, Wisconsin. This is a Catholic high school with a focus on a college preparatory program of studies. The school does have a teacher union.
>
> Paul has exhibited his professionalism in an exemplary fashion. He has served as chairman of the school's curriculum committee and has been selected by his peers to represent them in contract negotiations. While Paul is a teacher of English, his devotion to issues of peace and justice has seen him involved in the Green Bay area as a spokesman and devoted Christian. His faith and values are consistent with Catholic Church teaching.
>
> I assumed the principalship of Premontre this past summer and now work with Paul as his chief administrator. His roles as English department chairman, teacher union representative, and teacher

> have brought us into frequent contact. My experience of Paul has been a positive one in which he has been a constructive individual. He volunteered his services to serve as a mentor teacher with a new teacher; he has approached me to handle union concerns in an open and trustworthy manner; he works closely with the other members of his department to evaluate and improve the English curriculum.
>
> I recommend Paul without reservation. His departure is a loss for us, but one that allows him to further his personal and professional goals. I endorse those goals for all of our teachers.

7. In March and April, 1988, Schwartz interviewed for a teaching job at Holy Name Seminary in Madison, Wisconsin. Respondent Radecki or another administrator at Premontre provided Fr. Peter Connolly of Holy Name with an excellent verbal reference as to Schwartz.

As the deadline for renewing his contract with Premontre approached, Schwartz sought and received from Radecki an open-ended extension of his contractual commitment to Premontre. On or about April 29, 1988, Schwartz was offered and accepted the Holy Name position and submitted the following April 29, 1988 letter of resignation:

> Rev. Dane Radecki, Principal
> Premontre High School
> Green Bay, Wisconsin
>
> Dear Dane:
>
> It is with some regret but with many fond memories of my years at Premontre High School that I submit to you my resignation. As you know, I have been attempting to get into law school. While I have not received word from the Madison Law School, an opportunity arose that guaranteed me employment in Madison for next school year at Holy Name Seminary. I have accepted a teaching position there

for next school year.

> Premontre has provided me with many opportunities to grow -- professionally and personally, for which I will be eternally grateful. I only hope that I have helped Premontre grow as well.
>
> Thank you for your understanding and patience over the past couple of weeks while I have been pursuing my options.

By letter dated May 10, 1988, Radecki responded as follows:

> Dear Paul,
>
> It is with regret that I accept your letter of resignation as a teacher and coach here at Our Lady of Premontre High School. You have served us well with your dedication. Your humor, however, has always been suspect!
>
> I wish you the best of luck in your new position and hope that your goal of law school is reached in due time.
>
> Please do not forget us as you will always be part of our school family.
>
> In Christ,
>
> Rev. Dane Radecki, O. Praem,
> Principal

Schwartz would not have received the Holy Name job offer if he had not received the excellent recommendation from Premontre.

Radecki attended a small going away party for Schwartz which was held at Radecki's secretary's home.

8. In January, 1988, a Premontre teacher elected to resign her position rather than be terminated by the school. During the spring of 1988, Schwartz represented the teacher on behalf of the Association in a grievance proceeding over the teacher's entitlement to unemployment compensation benefits. Schwartz's initial contacts over the grievance were with Radecki but when the matter proceeded to arbitration, Premontre was represented by Attorney Warpinski. At a June, 1988, hearing the parties settled the grievance with the assistance of WERC arbitrator Douglas V. Knudson. Radecki was not present at the arbitration hearing but Warpinski did seek and obtain Radecki's approval of the settlement.

During the summer of 1988, Schwartz bargained on behalf of the Association with Premontre High School.

9. In the summer of 1989, Schwartz applied for an assistant principal position with Beloit Catholic High School in Beloit, Wisconsin. On July 22, 1989, Schwartz was interviewed for the position by Beloit Catholic Principal Sr. Pat Bogenschuetz.

As part of the hiring process, Bogenschuetz called Fr. Connolly at Holy Name and Respondent Radecki. Connolly gave Bogenschuetz a positive recommendation regarding Schwartz, although he cautioned her that Schwartz was a strong-willed individual who might not work well with a supervisor who was not at least as strong-willed. Connolly indicated he personally would hire Schwartz for an assistant principal vacancy at Holy Name because he was confident he and Schwartz could work well together.

Radecki gave Bogenschuetz a positive recommendation as to Schwartz.

Schwartz was not offered the Beloit Catholic position.

In August, 1991, after learning he would not receive the Beloit Catholic position, Schwartz talked to Connolly and Radecki seeking insights into why he was not offered the position. During his conversation with Schwartz, Connolly advised Schwartz that he had told Bogenschuetz he would hire Schwartz for an administrative vacancy. During the conversation between Radecki and Schwartz, Radecki advised Schwartz that he should not be too hard on himself

for failing to get the job and that lack of administrative experience might have hurt Schwartz's chances.

In January, 1992, Schwartz called Bogenschuetz to seek her advice on how to maximize his chances to successfully pursue administrative positions in the future. During that conversation, Bogenschuetz did not tell Schwartz to avoid use of Radecki as a reference.

10. No Respondent engaged in any conduct which was motivated in whole or in part upon animus toward Schwartz's exercise of any rights he may possess in the Wisconsin Employment Peace Act.

(d) The Examiner's Conclusions of Law are set aside and the following Conclusion of Law is made:

1. The Findings of Fact do not reflect conduct by any of the named Respondents which would violate any provision of the Wisconsin Employment Peace Act.

(e) The Examiner's Order Dismissing Complaint is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 20th day of June, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

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.

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from the previous page.)

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.

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from the previous page.)

(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.

. . .

(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.

MEMORANDUM ACCOMPANYING ORDER MODIFYING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

The Examiner's Decision

The Examiner concluded that it was appropriate to assert the Commission's jurisdiction over the allegation that the Principal of Premontre High School committed an unfair labor practice by giving an unfavorable recommendation to Complainant based upon anti-union animus. He based his conclusion upon Respondent's willingness to submit to the Commission's jurisdiction for the purposes of this case and upon his analysis of prior Commission decisions regarding the exercise of jurisdiction over religious schools. He concluded that a majority of the Commission had determined that exercise of jurisdiction was appropriate where "excessive entanglement" with religious freedoms could be avoided. The Examiner determined that the facts of the case were sufficiently "secular" to make exercise of jurisdiction appropriate.

Turning to the merits of the dispute, the Examiner concluded that the circumstantial evidence presented by Complainant fell short of establishing a violation of the statute by a clear and satisfactory preponderance of the evidence. The Examiner compared that circumstantial evidence against what he found to be "the direct testimony to the contrary from a witness with no conspicuous reason not to tell the truth" and then concluded

> There is accordingly nothing at the heart of this case to justify any conclusion that the Complainant was even given an unfavorable reference at all by Radecki, let alone that anti-union animus on Radecki's part cost Complainant the Beloit Catholic job. The complaint is therefore dismissed in its entirety.

POSITIONS OF THE PARTIES

The Complainant

Complainant asks that the Commission reverse the Examiner's dismissal of his complaint. Complainant contends the Examiner failed to correctly apply the "clear and satisfactory preponderance of the evidence" standard to the facts in the record. Complainant states:

> This case turns on credibility. With that in mind, a close review of the entire record demonstrates that the petitioner has met his "clear and satisfactory preponderance of the evidence" standard.

The Hearing Examiner in reaching his decision ignored to the detriment of the petitioner key and compelling testimony and documentary evidence while he ignored testimony and documentary evidence harmful to the respondents.

The Hearing Examiner erred in concluding Bogenschuetz's testimony was consistent with Radecki's. Bogenschuetz qualified every answer she gave concerning the Radecki comment made during the pivotal January 10, 1992, phone call. She testified she could not remember what advice she gave Schwartz during this phone call. It is not reasonable for the Hearing Examiner to conclude that Bogenschuetz's and Radecki's testimony was consistent when she qualified all of her answers regarding the Radecki comment and testified she could not even remember what advice she gave Schwartz.

Additionally, Radecki lied three different times during the hearing, one lie discovered by the Hearing Examiner himself. Thus, if Bogenschuetz's testimony was consistent with Radecki's, it was his lies with which her testimony was consistent.

The Hearing Examiner erred in concluding there was no motivation for Bogenschuetz to lie about the Radecki comment. Clearly, there were several motivating factors for Bogenschuetz to lie, several surfacing during the hearing. Furthermore, the Hearing Examiner erred in concluding Bogenschuetz's lack of motivation was clearcut.

In addition to ignoring motivating factors that surfaced during the hearing, the Hearing Examiner ignored other testimony of Bogenschuetz's which demonstrated a lack of credibility and which should have been weighed against the Hearing Examiner's presumption that there was no motivation for her to lie.

In short, by ignoring so much evidence and by requiring a clearcut motivation to lie on Bogenschuetz's part, the Hearing Examiner held the petitioner to a much higher standard than a clear and satisfactory preponderance of the evidence.

The Respondents

Respondents urge the Commission to affirm the Examiner's dismissal of the complaint.

Respondents assert the Examiner correctly focused on the testimony of Sister Bogenschuetz as a primary basis for rejecting Complainant's allegations that a poor reference was even given. Further, Respondents argue that Complainant has failed to establish that Radecki was in any way hostile toward Complainant's union activity. Lastly, Respondents argue that Complainant failed to introduce any evidence whatsoever implicating any respondents other than Father Radecki.

Given all of the foregoing, Respondents urge affirmance of the Examiner.

DISCUSSION

As recited earlier in this decision, Respondents have elected to voluntarily submit themselves to our jurisdiction under the Wisconsin Employment Peace Act. Respondents' decision not to assert any statutory or constitutional defenses related to our jurisdiction provides us with a valid basis for proceeding to review Examiner Honeyman's disposition of the "merits" of Schwartz's complaint. However, our decision should not be viewed as any holding on our part as to whether we would have asserted jurisdiction over the allegations in Schwartz's complaint but for Respondent's decision not to raise any jurisdictional issues.

While Schwartz has alleged multiple violations of the Wisconsin Employment Peace Act, he admits on review that his entire case is premised upon acceptance of his contention that Sister Bogenschuetz advised him to "drop" Father Radecki as a reference. Because we find that no such statement was made, we have affirmed the Examiner's dismissal of Schwartz's complaint.

Schwartz correctly argues that there is evidence in the record which would support a finding that the statement in question was made. Schwartz testified that the statement occurred. Schwartz presented notes of his conversation with Bogenschuetz which are consistent with the comment in question. Schwartz presented two witnesses who testified that Schwartz told them that Bogenschuetz made the remark in question. Schwartz did "drop" Radecki as a reference in subsequent resumes. 2/

On the other hand, there is also evidence supportive of a conclusion that the remark was never made. Sister Bogenschuetz does not recall 3/ making the remark and affirmatively testified

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2/ It is noteworthy that Schwartz is the "source" of all of the corroborating evidence he presented.

3/ While Schwartz makes much of Bogenschuetz's imprecise recall, we find it enhances her

that Radecki provided Schwartz with a positive recommendation. Radecki testified that he provided Bogenschuetz with a positive verbal reference. Obviously, if a good verbal recommendation was provided, the alleged remark of Bogenschuetz to Schwartz to "drop Father Radecki as a reference" becomes implausible.

The record also contains indications that, at least from Radecki's perspective, his relationship with Schwartz was a positive one. For instance, as Schwartz's supervisor, Radecki provided Schwartz with a very positive written recommendation. He extended Schwartz the courtesy of additional time to pursue his employment with Holy Name. This evidence is also supportive of the existence of a positive recommendation which, in turn, makes Bogenschuetz's alleged remark implausible. Schwartz argues that this evidence should be discounted because of the alleged antagonistic relationship he had with Radecki due to his role as union president. However, our review of the record satisfies us that when viewed objectively, the relationship in question was anything but contentious. Instead, both Radecki and Schwartz appear to have conducted themselves in their respective labor relations roles with professionalism and respect. Like the Examiner, we find no persuasive evidence in the record of any hostility toward Schwartz by Radecki based upon their union/employer relationship.

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credibility. It is not unusual for individuals to have something less than precise recall of conversations which occurred more than two years prior to a witnesses' testimony at hearing.

When we review the competing evidence, we ultimately conclude that the remark in question was never made 4/ because: (1) Sister Bogenschuetz has less of an incentive than Schwartz to lie 5/; and (2) because the content of the remark is at odds with the known evidence as to the content of the reference which Radecki in fact provided.

Given all of the foregoing, we do not believe the record establishes any conduct by any Respondent which would violate the Wisconsin Employment Peace Act.

Dated at Madison, Wisconsin this 20th day of June, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

4/ It should also be noted that even if the remark was made, it certainly does not follow that any violation of the Wisconsin Employment Peace Act occurred. Such a remark could reflect no more than that Radecki's reference was less positive than that of other individuals or was perceived to be so by Bogenschuetz.

5/ In his brief, Schwartz contends Bogenschuetz and Radecki were "friends" and served on a "principal's committee" together. No transcript reference or exhibit number was provided to support these contentions and we find no evidence in the record to support same.