STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CHRISTIAN BROTHERS INSTITUTE OF MICHIGAN,
D/B/A BROTHER RICE HIGH SCHOOL,
Employer,

Case No. R03 E-88

-and-

MICHIGAN EDUCATION ASSOCIATION,
Petitioner - Labor Organization.
_____/

APPEARANCES:

Clark Hill, P.L.C., by William A. Moore, Esq., for the Employer

White, Schneider, Young & Chiodini, P.C., by William F. Young, Esq., for the Petitioner - Labor Organization

DECISION AND DIRECTION OF ELECTION

Pursuant to Section 27 of the Michigan Labor Relations and Mediation Act (LMA) 1939 PA 176, as amended, MCL 423.27, this matter was heard on July 22, 2003, before Shlomo Sperka, acting as an Administrative Law Judge for the Michigan Employment Relations Commission. Pursuant to LMA Sections 28 and 29, MCL 423.28 and 423.29, and based upon the entire record, including the transcript of the hearing and briefs filed by the parties on or before September 25, 2003, the Commission makes the following findings and issues the following Decision and Direction of Election:

The Petition and Background:

The Petition in this matter was filed by the Michigan Education Association (Petitioner), seeking an election in a unit described as "All full-time and part-time teachers employed by Christian Brothers Institute of Michigan, d/b/a Brother Rice High School," (Employer). At the hearing, the parties agreed that the bargaining unit sought in the Petition is appropriate and would include department heads, but would exclude administrators who teach part-time, as well as supervisors, confidential employees, and all other employees.

The principal issue presented in this case is the Employer's objection on statutory, jurisdictional, and constitutional grounds to the exercise by this Commission of any jurisdiction

over this Employer. The evidence presented on the record dealt solely with the Employer's objections to our jurisdiction based on the nature of the School, its program and educational mission.

Findings of Fact:

Founded and operated by the Congregation of Christian Brothers, a Catholic religious order, Brother Rice High School is a four-year boy's Catholic high school located in a suburb of the City of Detroit. Members of the Christian Brothers are not members of the priesthood, but take vows of poverty, chastity and obedience.

The testimony on the record was presented through two witnesses called by the Employer, both administrators of the school. One was Brother George Bremley, principal of the school from 1986 through 1996. He is a member of the "Province Leadership Team of the Christian Brothers," and as such, a member of the Board of Directors of the school. The second was Edward M. Kowalchik, current Head of School, a layperson, not a member of the Order, whose position includes both an academic role as principal and fundraising responsibilities. He had held this position for one year at the time of the hearing.

The School is affiliated with the Roman Catholic Church. Although there are differences in the application of canon law and civil law, ultimately the Catholic Church physically and financially owns the School. Title to the School under civil law is in the Brotherhood, but under canon law, the Church is the ultimate owner. However, the local Catholic diocese neither provides financing to the School, nor appoints the members of the board or the principal. The relationship of the School to the diocese historically is that the diocese invited the Congregation of Christian Brothers to open a school in the area.

The School was founded, as described by a witness, "to be a Christian, Catholic school" and to "follow the principles of Jesus Christ through the Gospel teachings." The School is currently guided by a document entitled "The Essential Elements of a Christian Brother Education," drafted in 1999 and 2000 by a committee of teachers from several schools operated by the Congregation of Christian Brothers. The purpose was to summarize and encapsulate the mission of the School. The Order has three "provinces," one in Canada and two in the United States. Teachers from schools in all three provinces met and drafted the document, which embodies the principles guiding the School. An Employer witness testified that the teacher has an essential role in the educational process and is expected to "hopefully embody in himself or herself, the document as presented." However, teachers are not required to teach religion.

Under the former principal, teachers were evaluated based on how they presented the curriculum, but were not formally evaluated with respect to their practice of religious tenets or their responsibility to be examples for the students. That principal testified that he judged whether a teacher was living by the tenets of a "good Christian person" by looking at how the teacher operated during the school day or if "they were involved in extra-curricular activities after school." Teachers were expected to "reflect good Christian attitudes, if they are Christian or Catholic" which would be seen by all the students. However, teaching staff members are not required to be Catholics or Christians, nor are all students Catholic.

The School is subject to a variety of external controls. Statutory controls include federal and state wage and hour and minimum wage laws. The School must comply with the federal Family and Medical Leave Act, as well as the Consolidated Omnibus Budget Reconciliation Act (COBRA) with regard to health insurance. Federal anti-discrimination laws apply, as do applicable workers' compensation and occupational safety and health statutes and regulations. There are also external academic controls. The School is accredited by the North Central Association, a secular institution that accredits high schools for purposes of college applications of students. When the North Central Association evaluated the curriculum, the theology class was treated separately. The curriculum otherwise consists of the topics and subject matter found in a secular college preparatory high school. The basic guides for the Employer's curriculum are the Scholastic Aptitude Test and American College Test (SAT/ACT), college admission exams taken by secular college preparatory high school students throughout the country in public and private schools.

All students, including those who are not Catholic, are required to attend religion and theology classes in which Catholic teachings are studied. All students must attend the all-school Mass, which takes place at least once a year. Non-Catholics attending the Mass are neither required nor expected to participate. All students must also attend student retreats. The School conducts student assemblies, athletic pep rallies, and other student and faculty-wide activities which all students and faculty are required to attend. Students must attend for security reasons and may not be left behind in the school. Teachers are required to attend both because they should be interested in all activities and to supervise the students.

The teaching staff of approximately 50 persons includes three brothers who are members of religious orders and one religious sister. Membership in the Order or in the clergy is not required for faculty. Several members of the Board of Directors are members of the Christian Brothers.

All teachers are expected to follow the same tenets, rules and mission statement. Teachers are expected to find ways to integrate the content of the Essential Elements in their classes or activities, whether academic, athletic or social. Examples include a physics teacher who used a simile or metaphor of a lever related to the concept of balance in Christian life, and others who used teachings of Edmund Rice in "word problems" or in dealing with current topics. As another example, one faculty member organized a Mass in several languages. The theology department is currently working to find ways to integrate more of the Essential Elements into the curriculum. Each class begins with a prayer, usually selected by a student or the teacher, and ends with a statement from the teaching of Brother Rice. This latter practice was implemented only a few years ago.

The campus chaplain is not an employee of the School but a priest from the area. The School also has a "campus minister," who is a faculty member and not a clergyman or a member of the Christian Brothers, but a layperson. He is responsible for the theology department and all religious services for students and faculty, and teaches the theology classes.

Several years ago, the School entered into a contract with the Lay Faculty Association, an organization of lay teachers. This contract called for an employment at will relationship, governed working conditions, and defined the benefits and compensation of the teachers. The agreement was negotiated by representatives of the Association and the administration of the School.

The contract contained a termination procedure and a termination appeal procedure ending in binding arbitration. The agreement provided that all disputes over interpretation were to be submitted to binding arbitration. Other provisions included a lay-off procedure, a management's rights clause, a salary schedule, teaching load limitations, a definition of the school year, sabbatical leave provisions, leave of absence provisions, and benefits including health insurance, life insurance, long term disability and a pension plan. The contract contains language designed to comply with the federal Family and Medical Leave Act on maternity leave and child care leave.

Nowhere in its arguments or brief does the Employer contend that participating in collective bargaining is contrary to Catholic doctrine. Nevertheless, on the record, the Petitioner elicited testimony from Employer witnesses that expressions of Church teachings permit, if not encourage, collective bargaining between the Church and its employees. Testimony described 1986 pastoral letters by the Catholic Bishops of the United States and one Papal Encyclical to this effect.

Post-Hearing Exhibits Issue:

A procedural issue was raised relating to the Employer's post-hearing brief. The Employer attached to the brief two exhibits, which had not been admitted on the record at the hearing. The Petitioner then wrote to the Commission "to register the objections of Petitioner… to Respondent's inclusion of two exhibits in their post-hearing brief, as well as any reference in said brief to these two improper exhibits." The letter concludes, "We believe a Motion to Strike would be appropriate. . . . however, Petitioner is not interested in any further delay in the proceedings and wishes only to note its Objection on the record in order to expedite the resolution of this matter."

The Employer responded with a letter arguing that, "There is nothing in the rules of the Commission that would prohibit the filing of appropriate additional exhibits." The Employer argues that the Administrative Law Judge has both the authority and duty to inquire fully into the facts and may reopen the hearing if necessary to receive additional evidence. The letter further asserts that one exhibit was furnished to rebut arguments placed on the record by opposing counsel and the second exhibit came into existence after the close of the hearing. The Employer did not file a formal motion to reopen the record, nor did the Petitioner file a formal motion to strike. Petitioner merely registered its objections to receiving this evidence.

A Motion to Reopen the Record is governed by our Rule 166(1), R423.166(1), which states:

> (1) A party to a proceeding may move for reopening of the record following the close of a hearing conducted under Part 7 of these rules. A motion for

reopening of the record will be granted only upon a showing of all of the following:

(a) The additional evidence could not with reasonable diligence have been discovered and produced at the original hearing.
(b) The additional evidence itself, and not merely its materiality, is newly discovered.
(c) The additional evidence, if adduced and credited, would require a different result.

These two documents were written by faculty and staff members. One is entitled, "A Lenten Reflection on the Stations of the Cross and the Essential Elements of the Christian Brothers Education." It is dated March 7, 2003, and it reads on its title page "Brother Rice Faculty and Staff." There is, obviously, no testimony as to who actually drafted the document. The second is a letter or petition dated September 18, 2003, from school faculty objecting to the removal of a religious mosaic from the entrance of the school building. In connection with the first document, the brief adds that "personal writings of faculty members as to how they intend to include the Essential Elements into their respective lesson plans, are available upon request."

Having considered the posture of the pleadings, the Commission concludes that these exhibits should not be received. Our rules provide a process by which the Employer could have requested reopening of the record. We do not agree that our rules may be read to mean that there is no limitation on the filing of additional exhibits absent the appropriate motion. Although the Employer's brief indicates that additional evidence is "available upon request," a motion to reopen the record is the appropriate means for offering additional evidence. This Commission has held in *Police Officers Ass'n of Mich*, 2003 MERC Lab Op ___ (Case Nos. CU03 C-018 & R03 A-16, decided September 23, 2003): "Under Rule 166, reopening of the record can only be granted upon a showing that the additional evidence Charging Party seeks to offer, if adduced and credited, would require a different result." We decline to permit or encourage parties to submit additional evidence after the close of the hearing without the filing of a formal motion. Moreover, we note that were we to treat this as a motion, we would find that the March document could have been discovered and produced prior to the hearing. The second document, dated later, is a request by the faculty to retain within the school building a particular religious mosaic or "icon" as the Employer refers to it. We do not believe that these documents, if adduced and credited, would require a different result in our decision.

Discussion and Conclusions:

The parties raise no significant issues within the scope of the Labor Relations and Mediation Act itself. The Employer is an employer under the LMA, and the members of the proposed unit are employees within the meaning of that Act. The unit description is not in dispute. The parties agreed to exclude supervisors, who have no bargaining rights under the LMA. The parties stipulated that the unit shall include all teachers, excluding administrators. We note that throughout its brief, the Union refers to "lay faculty." However, in the petition and by express stipulation on the record, both parties agreed that the unit is to be described as "all

teachers." Therefore, we understand the Union to intend to include all teachers in the unit, as stipulated on the record.

The issue before this Commission is whether we are free to apply the Labor Relations and Mediation Act to this Employer. The Employer argues that under both the Michigan and U.S. Constitutions this Commission may not exercise, and indeed lacks, jurisdiction over this Employer. The Employer invokes both the free exercise and the establishment clauses of the respective Constitutions. Both parties cite to decisions arising in other states, as well as to Supreme Court cases construing the Constitutional provisions.

Jurisdictional Issue:

We will first consider precedent within our own decided cases. The Employer asserts that this is a case of first impression before this Commission. The Petitioner looks to several cases decided by the Michigan Labor Mediation Board, the precursor to this Commission, which dealt with similar employers. In none of our prior cases was jurisdiction expressly contested; therefore, there is no express finding on the issue. In *Our Lady Queen of Angels Church*, 1966 MERC Lab Op 227, although jurisdiction was not contested, it was not conceded, so that the Labor Mediation Board made a finding. In *Combined Hebrew/Yiddish Cultural Schs*, 1969 MERC Lab Op 486, and *St Scholastica Parish Bd of Educ*, 1973 MERC Lab Op 296, jurisdiction was assumed; in the latter case, a remedial order was issued. While the Employer argues that these cases were decided before the U.S. Supreme Court decision in *NLRB v Catholic Bishop of Chicago*, 440 US 490 (1979), this is not relevant, since, as will be discussed below, we do not find that *Catholic Bishop* is determinative.

The Employer asserts that this Commission has no jurisdiction over religious educational institutions. It makes its assertion based on the U.S. Supreme Court decision in *Catholic Bishop.* The Employer further argues that since the Michigan Act is patterned after the federal act, decisions construing the National Labor Relations Act (NLRA) must be followed in interpreting our own statute.

Catholic Bishop involves an employer similar to the Employer herein. The labor organization sought to represent teachers employed by that employer, which raised similar defenses based on allegations that assertion of jurisdiction would violate the U.S. Constitution. The Court found that asserting jurisdiction would "implicate" constitutional provisions. Therefore, the Court was reluctant to find that Congress intended to apply the NLRA to an employer where such issues would be raised, unless Congress showed express intent to apply its legislation. Finding no such express intent in the NLRA, the Court concluded that there was no congressional intent to apply the Act to such employers. Because of this finding, the Court was not required to determine whether its exercise of jurisdiction would result in conflicts with constitutional protections.

In its decision, the U.S. Supreme Court made no constitutional finding. It did not decide whether the application of labor law to the religious institution would violate the Constitution. Instead, it found that since there was a lack of jurisdiction under the NLRA, there was no need to make a constitutional finding. The crucial factor in applying this analysis is that in interpreting

the LMA (or the Public Employment Relations Act (PERA), MCL 423.201-217), this Commission is not bound by interpretations of the NLRA. Although the courts have directed this Commission to look for guidance from "constructions placed on the analogous provisions of the NLRA by the National Labor Relations Board (NLRB) and the federal courts," we are not bound by those interpretations of the federal act. *Rockwell v Bd of Educ*, 393 Mich 616, 636 (1975).

The U.S. Supreme Court in *Catholic Bishop* found no constitutional impediment to the exercise of jurisdiction by the federal agency, but only a lack of statutory intent. We do not believe that this Commission must seek a legislative expression of specific intent to assert jurisdiction over a particular type of employer. To the contrary, the Michigan Supreme Court suggests a broader and more inclusive approach in determining jurisdiction. In an early case under the LMA, the Michigan Supreme Court decided *Local Union No 876, Int'l Brotherhood of Elec Workers (IBEW) v State of Michigan Labor Mediation Bd*, 294 Mich 629, 634 (1940) and found that the intent of the statute was not restrictive, but was to be "broad and all inclusive." Section 19 of the LMA, MCL 423.19, states that the Act shall be "liberally construed." Relying on this provision, the Supreme Court found the legislative intent was to have the Act apply to all labor disputes. *Id.* We, therefore, conclude that there is no legislative intent to exclude this Employer from the jurisdiction of the Commission and the application of the Act. The Michigan Supreme Court has also held, with regard to PERA, that because PERA is modeled after the NLRA, the Court will look "to federal precedent developed under the NLRA for guidance in our interpretation of the PERA." *Gibraltar Sch Dist v Gibraltar MESPA-Transp*, 443 Mich 326, 335 (1993). However, these federal precedents are not controlling. *Id*. The issue is therefore, whether exercise of our jurisdiction over this Employer will conflict with Constitutional protections.

Constitutional Issues:

The Employer argues that any jurisdiction exercised by MERC to enforce the LMA would violate the religion clauses of the United States and Michigan Constitutions. The First Amendment to the U.S. Constitution states, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . " US Const, Am I. This Amendment contains two relevant clauses, the free exercise clause and the establishment clause. The U.S. Supreme Court has held that the First Amendment is applicable to the states through the Fourteenth Amendment. *Cantwell v State of Connecticut*, 310 US 296, 303 (1940). As noted above, the principal U.S. Supreme Court holding in this area is the *Catholic Bishop* case.[1] However, the Supreme Court decided that case solely as a jurisdictional question.

The Michigan Constitution, which also contains religion clauses, states:

> Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher

1 In *Catholic Bishop*, 559 F2d 1112, 1131 (1977), the Seventh Circuit noted that "there has been some blurring of the sharply honed differentiations" between the free exercise and establishment clauses.

> of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief. Const 1963, art 1, § 4.

Describing the relationship between the First Amendment of the U.S. Constitution and the language of the Michigan Constitution, the Michigan Supreme Court stated, "Taken together, these sentences are an expanded and more explicit statement of the establishment and free exercise clauses of the First Amendment of the United States Constitution, the first and fourth sentences constituting the free exercise clause, and the second and third sentences constituting the establishment clause." *Advisory Opinion Re: Constitutionality of PA 1970, No 100*, 384 Mich 82, 105 (1970).

Free Exercise Clauses:

In his article, *The Church, the State, and the National Labor Relations Act: Collective Bargaining in the Parochial Schools*, 20 Wm & Mary L Rev 33, 49-50 (1978), Kenneth J. Kryvoruka described the nature of the free exercise clause in the U.S. Constitution:

> Free exercise litigation has been concerned primarily with the protection of individual rights. The purpose of the clause is to preserve the notion of "voluntarism," or freedom of conscience in beliefs and ideas. It is in this context that one must view any infringement upon the free exercise of religion in the parochial schools. Controversies involving the free exercise clause follow two distinct patterns to which the same analysis may be applied. A governmental regulation may require an individual to perform an act that his religion prohibits. Alternatively, a governmental regulation may prohibit an action by an individual which he claims his religious beliefs require him to perform.

In *Employment Div v Smith*, 494 US 872, 878 (1990), the Supreme Court stated that the U.S. Constitution's free exercise clause is not violated if "prohibiting the exercise of religion . . . is not the object of the . . . [regulation] but merely the incidental effect of a generally applicable and otherwise valid provision." More specifically, in *Smith*, the state of Oregon denied the respondents unemployment benefits because their employment was terminated for "misconduct." *Id.* at 874. In fact, the respondents were discharged for using peyote, a criminal offense under Oregon law. The respondents argued that this denial of benefits amounted to a violation of their free exercise of religion because they ingested peyote strictly for religious purposes. *Id*. at 878. The Supreme Court found that Oregon properly withheld benefits even though the regulation significantly interfered with the respondents' ability to practice their religion. The Court noted that it has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate." *Id.* at 878-879.

The Michigan Supreme Court acknowledged the *Smith* standard in determining federal free exercise issues. *People v DeJonge*, 442 Mich 226, 280 (1993). However, whether the *Smith* test also applies to the free exercise clause in the Michigan Constitution is unclear. The court

stated, "we may certainly interpret the Michigan Constitution as affording additional protection to the free exercise of religion." *Id.* at 280. Yet, the court declined to articulate a specific standard for the free exercise clause under the Michigan Constitution. Nonetheless, the court alluded to the fact that U.S. and Michigan Constitutional protections of the free exercise of religion are indeed similar. The court stated that the "Michigan Constitution is at least as protective of religious liberty as the United States Constitution." *Id.* at 273. Other Michigan courts have read *DeJonge* to mean that the *Smith* test is the appropriate standard in determining free exercise issues under the Michigan Constitution. *Jocham v Tuscola Co*, 239 F Supp 2d 714, 724 (ED Mich, 2003); *Kubik v Brown*, 979 F Supp 539, 557 (WD Mich, 1997). Therefore, we also will apply the *Smith* standard to both the U.S. and Michigan Constitution's free exercise clauses.

Applying the *Smith* standard, we agree with Petitioner that MERC's exercise of jurisdiction over the Employer does not violate the free exercise clauses. The LMA is a facially neutral statute that generally applies to all employers under MERC's jurisdiction, whether religious or secular. Clearly, the Michigan legislature did not enact the LMA with the purpose of interfering with the School's religious practices. The LMA's purpose is to promote harmony between employers and employees through collective bargaining. MCL 423.1. If there is any effect on the Employer's exercise of religion, it is incidental. Therefore, MERC's exercise of jurisdiction over the Employer does not violate the U.S. or Michigan Constitutions' free exercise clause. We now turn our attention to the establishment clauses.

Establishment Clauses:

In his article, Kryvoruka also explained the meaning of the U.S. Constitution's establishment clause:

> The essential purpose of the establishment clause is to assure government neutrality in matters of religion. The types of governmental intrusion excluded by the neutrality requirement were stated succinctly by Justice Black in *Everson v Board of Education:*
>
> > The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will nor force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment

> of religion by law was intended to erect "a wall of separation between church and State." Kryvoruka, at 58.

In *Lemon v Kurtzman*, 403 US 602, 612 (1971), the U.S. Supreme Court stated the applicable test to determine whether a state regulation violates the establishment clause of the U.S. Constitution: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" (Citation omitted.) Whether this test also applies to the Michigan Constitution's establishment clause is unresolved. The Michigan Supreme Court has never squarely ruled on the issue, but it has stated that the U.S. and Michigan Constitutions are "subject to similar interpretation." *Advisory Opinion Re: Constitutionality of PA 1970, No 100*, at 105. Other Michigan courts have also applied the *Lemon* test to determine whether a state regulation violates the establishment clause of the Michigan Constitution. *People v Van Tubbergen*, 249 Mich App 354 (2002); *Daugherty v Vanguard Charter Sch Academy*, 116 F Supp 2d 897, 904 (WD Mich, 2000); *Kubik v Brown*, at 557. Accordingly, we will also apply the *Lemon* test to the establishment clauses of both the U.S. and Michigan Constitutions.

After reviewing the record, we find that MERC's exercise of jurisdiction over the Employer would not violate the establishment clauses. First, the LMA has a secular legislative purpose. The Michigan legislature stated the purpose of the LMA:

> It is hereby declared as the public policy of this state that the best interests of the people of this state are served by the prevention or prompt settlement of labor disputes; that strikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected and protected; and that the voluntary mediation of such disputes under the guidance and supervision of a governmental agency will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the state. MCL 423.1

As noted, the Michigan legislature enacted the LMA to avoid conflict between employers and employees by fostering collective bargaining and to protect consumers within the state. This is clearly a secular purpose. Nowhere does the policy behind the LMA mention religion, and we have no reason to believe that the legislature intended anything else than this stated policy.

The second prong of the *Lemon* test, i.e., whether the regulation has the primary effect of advancing or inhibiting religion, is very similar to the third prong, i.e., whether the regulation fosters excessive government entanglement with religion. If the LMA will effectively inhibit the Employer from its religious self-determination, as it contends, then the LMA will also be excessively entangled with religion. The U.S. Supreme Court has also noted this similarity between the two prongs in *Agnosti v Felton*, 521 US 203 (1997), wherein, the Court stated: "the…[analysis] we use to assess whether an entanglement is "excessive"…[is] similar to the factors we use to examine 'effect.'" *Id.* at 232. The Court further observed, "it is simplest to

recognize why entanglement is significant and to treat it . . . as an aspect of the inquiry into a statute's effect." *Id.* at 233. Therefore, we will consider these two prongs simultaneously.

The primary effect of the LMA neither advances, nor inhibits, religion. In *Santa Fe Independent Sch Dist v Doe*, 530 US 290 (2000), the Supreme Court found that the state action advanced religion because it endorsed a particular viewpoint. More specifically, the Court struck down a scheme whereby the school district allowed students to vote on whether or not they wished to pray before football games. *Id.* at 297-298. The Court stated, "the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion." *Id.* at 305. The LMA clearly does not advance or have the primary effect of advancing religion because it does not endorse any particular religious viewpoint.

As a basis for its claim that this entanglement would inhibit its ability to exercise religion, the Employer lists situations which, it contends, could lead to excessive and inappropriate regulation of teacher conduct and school practices. All of these, the Employer contends, have a significant religious component and message.

To the extent that such potential exists, the tests established in judicial opinions which governmental action must pass become all the more significant. Having reviewed the Employer's arguments, we are not persuaded that this entanglement must necessarily follow or is inevitable. Much of what the Employer sketches is speculative, at best. We note, at the outset, that the Employer for several years entered into and was party to a binding collective bargaining agreement with an independent association representing its faculty. While, as the Employer's brief points out, this recognition was entered into voluntarily and not as a result of any government certification of the bargaining agent, the resulting collective bargaining agreement has the same status and binding power as a collective bargaining agreement negotiated by a certified bargaining agent or one affiliated with other labor organizations. *The Whyte Goose Inn*, 1981 MERC Lab Op 342, 343.

The Lay Faculty Association contract was to renew periodically, but the record is not clear as to the status of that agreement or that organization. It appears that it is no longer functioning, because its role was not asserted in any way during the hearing. Nevertheless, the fact that this contract was entered into and followed for several years is consistent with the opinions of several courts that bargaining by this type of Employer on traditional working conditions need not necessarily conflict with constitutional constraints. We are in agreement with language found in the decision of the New York Court of Appeals in the matter of *New York State Empl Relations Bd v Christ the King Regional High Sch*, 90 NY2d 244, 682 NE2d 960 (1997). Referring to the New York state statute, which is comparable to the Michigan statute, and citing the U.S. Supreme Court's decision in *Smith*, the New York Court of Appeals observed that:

> The school would exempt itself at the very threshold of the Act's application on the ground that even the generally applicable employer–employee bargaining responsibility and neutral labor–management issues constitute excessive entanglement of government into the religious sphere of the School's interests and operations. We disagree with the School's theory that the mere potentiality for

> transgression is enough. It believes that State involvement in fostering the terms and conditions of employment of its lay teachers necessarily implicates and intrudes upon religious concerns and rights of the school. This is not so and does not follow from the operation of the regulatory regimen. *Christ the King*, at 252.

Much of the Employer's concern is based upon the general religious mission of the School. The Employer's brief stresses the role of the teacher in conveying the message and fulfilling the mission of the School. The Seventh Circuit Court of Appeals commented on this type of claim in *Catholic High Sch Ass'n v Culvert*, 753 F2d 1161, 1167-1168 (CA 2, 1985), citing *EEOC v Mississippi College*, 626 F2d 477 (CA 5, 1980) when it stated, "That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern." The New York State Appellate Division relied on the same language in *New York Empl Relations Bd v Christian Bros Academy*, 238 AD2d 28, 31 (NY App Div, 1998) when it stated, "We are wholly unpersuaded that a contrary result is warranted by virtue of Respondent's generalized charge to its faculty, including lay members represented by the union, that they instill 'Christian values' or 'aid in the formation of a 'Christian character' in their students."

In dealing with specific working conditions, the Employer fears that the State will be unable to limit itself to the secular sphere and will intrude upon matters within the protection of the constitutional penumbra. In other areas, this Commission has respected limitations that place matters outside of its jurisdiction and area of regulation. Under *Central Michigan Univ Faculty Ass'n v Central Michigan Univ*, 404 Mich 268 (1978), and *Regents of the Univ of Michigan v Employment Relations Comm*, 389 Mich 96, 109 (1973), the Commission stated that it must respect the autonomy of certain educational institutions in the area of "their decision-making within the educational sphere." Where a particular matter or issue does not clearly and obviously fall within one or the other of these categories, the Commission may be required to consider whether its jurisdiction applies. Such decisions are, moreover, subject to judicial review.

More recently, for example, PERA was amended in 1994 to declare certain topics to be non-bargainable. This Commission has had to make inquiries and determine whether particular management decisions fall within the scope of those amendments. *St Clair Co Intermediate Sch Dist*, 2001 MERC Lab Op 218; *Coldwater Community Schs*, 2000 MERC Lab Op 244.

The process of making these inquiries involves examination and delving into conduct that has constitutional protection. Nevertheless, this Commission will discover in each case the line we may not cross without excessive entanglement in the conduct that we cannot regulate. The potential need to evaluate conduct, values, and the unique demands that a religious institution may make on individuals may also arise. Agencies and courts have struggled with the equally powerful obligations to protect individual rights and scrupulously respect constitutional restraints. *Ohio Civil Rights Comm v Dayton Christian Schs, Inc*, 477 US 619 (1986); *Mississippi College*, 626 F2d 477. We will consider these issues as the need arises.

Other courts have also reached the conclusion that the religion clauses are not violated when the state asserts jurisdiction over collective bargaining in religious schools. The first court

of appeals case on this issue subsequent to *Catholic Bishop* was *Catholic High Sch Ass'n*, 753 F2d 1161. In that case, the court of appeals held that application of the New York State Labor Relations Act to lay teachers in church operated schools does not violate the First Amendment. *Id.* at 1171. On the issue of whether the establishment clause is implicated, the Second Circuit stated:

> It is a fundamental tenet of the regulation of collective bargaining that government brings private parties to the bargaining table and then leaves them alone to work through their problems. The government cannot compel the parties to agree on specific terms. All it can do is order an employer who refuses to bargain in good faith to return and bargain on mandatory bargaining subjects, all of which are secular. *Id.* at 1167.

Minnesota and New Jersey agreed with New York's holding in *Hill-Murray Federation of Teachers v Hill-Murray High Sch*, 487 NW2d 857 (Minn, 1992) and *South Jersey Catholic Sch Teachers Org v St Teresa of the Infant Jesus Church Elementary Sch*, 696 A2d 709 (NJ, 1997), respectively. In finding that the state would not infringe on the employer's ability to govern the educational process, the Supreme Court of New Jersey noted that the primary effect of the regulation was "not to inhibit religion, but rather to require a private employer to enter into collective bargaining with the elected representatives of its employees." *Id*. at 589. Similarly, the Minnesota Supreme Court stated, "The obligation imposed upon . . . [the employer] by the application of the . . . [statute] is the duty to bargain about hours, wages, and working conditions. We decline to categorize this minimal responsibility as excessive entanglement." *Hill-Murray*, at 864. Although we recognize that there are constitutional and statutory language differences between Michigan and these states, we agree with the findings of these courts.

Finally, we note that the Employer in our case, as the employer in *Catholic High Sch Ass'n*, "does not contend that collective bargaining is contrary to the beliefs of the Catholic Church." 753 F2d at 1170. Indeed, the Second Circuit Court of Appeals found that "Encyclicals and other Papal Messages make clear that the Catholic Church has for nearly a century been one of the staunchest supporters of the rights of employees to organize and engage in collective bargaining." *Id.* [2]

In sum, we find that this Commission possesses the requisite authority to regulate religious educational institutions for the purposes of collective bargaining. Although the U.S. Supreme Court declined to extend such jurisdiction to the NLRB, we are not limited by the jurisdictional limitations of the NLRB. To the contrary, the Michigan Supreme Court has stated that the LMA grants this Commission broad jurisdiction and is to be liberally construed. Furthermore, we hold that our exercise of jurisdiction over the Employer does not violate the free exercise and establishment clauses of the United States Constitution. Similarly, our decision is

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2 In the record of this matter, the two Employer witnesses spoke to this issue. One did not believe that the collective bargaining agreement which had been entered into by the Employer infringed on, or conflicted with, any religious belief. The other thought it did, but could not identify any specific provision. In its brief, the Employer asserted that this danger is great, and cited as an example the fact that during the hearing, the Administrative Law Judge asked whether collective bargaining conflicts with Church doctrine. We note, only to correct the record, that the question cited in the Employer's brief was placed before a witness by counsel and not by the Administrative Law Judge.

entirely consistent with the Michigan Supreme Court's interpretations of the religion clauses of the Michigan Constitution. We finally note that our exercise of jurisdiction in this matter is in agreement with the decisions of several other states.

ORDER DIRECTING ELECTION

We find that a question concerning representation exists under Section 27 of LMA. We direct an election in the following unit, which we find appropriate under Section 28 of LMA:

> All full-time and part-time teachers, including teacher/department heads, employed by Christian Brothers Institute of Michigan, d/b/a Brother Rice High School, but excluding administrators, supervisors, confidential employees and all other employees.

Pursuant to the attached Direction of Election, the aforesaid employees will vote on whether or not they wish to be represented for the purposes of collective bargaining by the Michigan Education Association.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

_____
Harry W. Bishop, Commissioner

_____
Maris Stella Swift, Commissioner

Dated: _____