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COLLECTIVE BARGAINING IN CATHOLIC SCHOOLS: WHAT DOES GOVERANCE HAVE TO DO WITH IT?

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This article outlines the significant legal decisions regarding collective bargaining in Catholic schools, identifies the governance structures employed in Catholic schools and the methods of translating these governance structures into documents required by civil law, and concludes with the citation of two recent court decisions that demonstrate the method of incorporation and the day-to-day governance practices utilized in Catholic schools that are of great importance to educational leaders.

INTRODUCTION

The Catholic Church has a long history in defending the right of workers to organize. The articulation of this right was formally pronounced in the 1891 papal encyclical, *Rerum Novarum* (Leo XIII, 1942), which placed the right of workers to organize within the broader construct of natural law and the social gospel. While the teaching was proclaimed in the 19th century, its implementation in Catholic schools did not emerge until the late 1950s and the early 1960s, following its rise in popularity among public schools (Russo & Gregory, 1999). Since that time, unionization grew at a fairly stable pace up through the early 1970s. In 1973, 25 of 145 responding dioceses reported the existence of unions (Russo & Gregory, 1999). In some cases the diocesan and school governance structures refused to recognize the unions or to bargain collectively with the unions. This reluctance set the stage for two significant showdowns in federal court and several decisions in state courts regarding collective bargaining in Catholic schools. The initial federal decisions yielded two conflicting opinions by the Seventh Circuit Court (*Catholic Bishop v. National Labor Relations Board [NLRB]*, 1977), affirmed on appeal to the United States Supreme Court (*NLRB v. Catholic Bishop*, 1979), and the Second Circuit Court (*Catholic High*

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School Association v. Culvert, 1985). The ensuing state court cases have coalesced around the opinion articulated by the Second Circuit that carved out a limited role for government that is not without some First Amendment concerns.

In much of the litigation, the courts have approached the Catholic Church and the Catholic schools involved in the litigation as a single entity without much concern for their nebulous, complex, and variegated governance structures. While casual observers might construe Catholic schools to be a single autonomous unit, they are often more appropriately understood as a loose group of autonomous institutions where principals exert significant authority (Gregory & Russo, 1999). The variance of governance, not only between dioceses, but also within the same diocese, creates confusion when the courts attempt to apply legal principles to these schools that are governed in accordance with the dictates of both canon and civil law. In many cases it is not immediately obvious who is the employer (e.g., pastor, school board, bishop, or diocese) and what group or groups constitute a "collective bargaining unit," defined as "all the employees of a single employer unless the employees of a particular department or division have voted otherwise" (*Black's Law Dictionary*, 1991, p. 181).

This article begins with a review of the United States Supreme Court decision, *Lemon v. Kurtzman* (1971), which provides the framework within which the issue of collective bargaining is adjudicated. It continues with a review of the most significant litigation over the last 25 years concerning collective bargaining in Catholic schools and addresses some of the First Amendment concerns that remain. Next the article outlines the dictates of canon law, civil law, and the general administrative practices present in Catholic schools. Finally, the article examines how the courts have applied the applicable legal principles, such as "collective bargaining unit" and "community of interest" to the various governance structures found in Catholic schools. In the final analysis, it becomes clear that diocesan legislation and diocesan policy is necessary to clarify the relationships between and among the functionaries within the diocese. It also becomes clear that the documents required by civil law, such as the articles of incorporation, need to reflect the best "translation" of both the dictates of canon law and the day-to-day practice of the particular Catholic school, knowing full well that a translation never adequately captures the totality of meaning.

FEDERAL COURT DECISIONS

LEMON V. KURTZMAN (1971)

While not dealing directly with collective bargaining, *Lemon v. Kurtzman* (1971) provides the framework within which the issue of collective bar-

gaining has been adjudicated. It is also frequently cited in most of the state and federal court decisions involving collective bargaining in Catholic schools.

The case involved legislation passed in the states of Rhode Island and Pennsylvania that provided money for teachers in non-public schools. The state of Rhode Island had passed legislation that enabled teachers who taught secular subjects in non-public schools to receive supplemental income up to 15% of their annual salary from the state. The law also required, among other things, that the teacher receiving the supplement not teach a course in religion and required the school to open its financial records for the state to audit. Similarly, the state of Pennsylvania had enacted legislation that provided state reimbursement to non-public schools for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. The Pennsylvania law, like the Rhode Island law, included some accountability provisions such as prohibiting reimbursement for any course that contained any religious teaching, prescribing certain accounting practices, and subjecting the school to a state audit. Both laws were challenged in court as a violation of the religion clauses of the First Amendment.

The United States District Court for the District of Rhode Island found the Rhode Island statute violated the Establishment Clause of the First Amendment, while the United States District Court for the Eastern District of Pennsylvania dismissed the complaint for failure to state a claim for relief, holding that the law did not violate the First Amendment.

On appeal the United States Supreme Court affirmed the Rhode Island District Court decision and reversed the Eastern District of Pennsylvania Court decision. The United States Supreme Court held that the cumulative effect of the laws was to foster excessive entanglement between government and religion, and was therefore unconstitutional. In its analysis of First Amendment jurisprudence, the court articulated three tests for determining if a law survives the Establishment Clause prohibition of the 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" (*Lemon v. Kurtzman*, 1971, pp. 612-613).

The Court found that the law failed the excessive entanglement prong of the tri-partite test. The Court stated, "It is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind" (*Lemon v. Kurtzman*, 1971, p. 635). The Court noted that the accountability portions of the law would necessitate "vast government suppression, surveillance, or meddling in church affairs….This problem looms large where the church controls the hiring and firing of teachers" (*Lemon v. Kurtzman*, 1971, pp. 634-635).

CATHOLIC BISHOP V. NLRB (1977)

In the summer of 1974, a group of faculty members at two Catholic high schools in the Archdiocese of Chicago, Quigley Seminary North and Quigley Seminary South, filed a representation petition with the National Labor Relations Board (NLRB) seeking recognition of their union, the Quigley Education Association, an affiliate of the Illinois Education Association. Similarly, the Community Alliance filed a petition with the NLRB seeking to represent lay faculty at five diocesan high schools located in the Fort Wayne/South Bend diocese. At the representation hearings, the employers contended that the NLRB should decline jurisdiction based on its own rules, and failing that, based on First Amendment prohibitions against governmental entanglement.

The NLRB, acting under the authority granted to it by the National Labor Relations Act of 1935 (Wagner Act), certified as collective bargaining units the unions in Illinois and Indiana representing lay teachers employed in Catholic schools. The NLRB rejected the jurisdictional arguments, citing its own rulings of *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools* (1975) and *Cardinal Timothy Manning, Roman Catholic Archdiocese of Los Angeles* (1976). *In Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools* (1975) the NLRB accepted jurisdiction over schools where the instruction was not limited to religious subjects, and in *Cardinal Timothy Manning, Roman Catholic Archdiocese of Los Angeles* (1976) the NLRB refined its understanding of its own jurisdiction in articulating:

> It has heretofore been the Board's policy to decline jurisdiction over institutions only when they are completely religious, not just religiously associated….The schools perform in part the secular function of educating children, and in part concern themselves with religious instruction. Therefore, we will not decline to assert jurisdiction over these schools on such a basis. (p. 1218)

The Seventh Circuit Court of Appeals ruled in favor of the Catholic Bishop of Chicago, arguing, "the dichotomous 'completely religious-merely religiously associated' standard provides no workable guide to the exercise of discretion" (*Catholic Bishop v. NLRB*, 1977, p. 1118). The Seventh Circuit found that the standard as articulated by the NLRB meant that as soon as a Catholic school offers a class other than religion it becomes a "merely-religiously associated" school incurring the oversight of the NLRB. The court seized upon the inimical double standard at work in light of the *Lemon v. Kurtzman* (1971) decision:

> The total inability of the employers to overcome what appears to be an irre-

> buttable presumption in practical operation makes more understandable the complaint of the employers that the Board is cruelly whip-sawing their schools by holding that institutions too religious to receive governmental assistance are not religious enough to be excluded from its regulation. (*Catholic Bishop v. NLRB*, 1977, p. 1119)

The court parenthetically mentioned that while the NLRB "purported to avoid an excursion into religiosity by the use of its simplistic test" (*Catholic Bishop v. NLRB*, 1977, p. 1120), the NLRB investigation in one case nevertheless digressed into an inquiry regarding the definition of liturgy.

The Seventh Circuit then turned from its discussion of the merely religiously associated rule, to the larger First Amendment issues. The court observed, "the very threshold act of certification of the union necessarily alters and impinges upon the religious character of all parochial schools" (*Catholic Bishop v. NLRB*, 1977, p. 1123). The court went on to note that, "the real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishop's control of the religious mission of the schools" (*Catholic Bishop v. NLRB*, 1977, p. 1124). It noted the difficulty the NLRB would face in investigating an unfair labor practice charge which "would necessarily have to concern itself with whether the real cause for discharge was that stated or whether this was merely a pretextual reason given to cover a discharge actually directed at union activity" (*Catholic Bishop v. NLRB*, 1977, p. 1125). The court concluded that the Board would need to assess the validity of the religious belief as part of the investigation, drawing the Board into discussions of church doctrine.

NLRB V. CATHOLIC BISHOP (1979)

The United States Supreme Court reviewed the case on appeal and utilized the precedent of *Murray v. The Charming Betsy* (1804) that Acts of Congress "ought not be construed to violate the Constitution if any other possible construction remains available" (*NLRB v. Catholic Bishop*, 1979, p. 500) to sidestep the First Amendment issues of the case. The Court then argued that since there was "no clear expression of affirmative intention of Congress that teachers in church-operated schools should be covered by the act" (*NLRB v. Catholic Bishop*, 1979, p. 504), the NLRB had no authority over religious schools.

The Court parenthetically addressed the First Amendment issues by focusing on whether or not the Board's jurisdiction presents a significant risk of infringement on the First Amendment. The Court cited its *Lemon v. Kurtzman* (1971) decision, noting the unique role of the teacher in a parochial school where "religious authority necessarily pervades the school

system" (*NLRB v. Catholic Bishop*, 1979, p. 501). The Court reasoned that the Board would be called upon to decide what are the terms and conditions of employment within a religious school where nearly everything that goes on in a school affects teachers, and could arguably be considered a condition of employment. The Court cited the Pennsylvania Supreme Court holding in *Pennsylvania Labor Relations Board v. State College Area School District* (1975), which held that the "introduction of a concept of mandatory collective bargaining, regardless of how narrowly the scope of negotiation is defined, necessarily represents an encroachment upon the former autonomous position of management" (*NLRB v. Catholic Bishop*, 1979, p. 503). The Court also concluded that "it is already clear that the Board's actions will go beyond resolving factual issues" (*NLRB v. Catholic Bishop*, 1979, p. 502) and that the very process of inquiry as well as the conclusions that the Board draws from such inquiries may impinge rights guaranteed by the First Amendment. Like the Seventh Circuit Court, the Supreme Court cited the dialogue between an NLRB hearing official and a priest regarding the definition of liturgy.

The *NLRB v. Catholic Bishop* (1979) decision ended federal involvement in the oversight of labor relations within Catholic schools by the NLRB, while at the same time sidestepped the thorny First Amendment issues at stake. The Court nevertheless raised three relevant concerns as they pertain to the First Amendment for religiously-run schools: (a) The Court recognized that mandatory collective bargaining for church-run schools necessarily represents an encroachment into management practices; (b) since virtually everything that goes on in a school impacts teachers, everything could be considered a condition of employment; (c) the effect of this encroachment in the process of investigating claims made by collective bargaining units within religious schools would necessarily draw the Board into questions of a religious nature and ultimately to decisions regarding sincerely held religious beliefs.

CATHOLIC HIGH SCHOOL ASSOCIATION V. CULVERT (1985)

The next significant judicial foray into Catholic school labor relations occurred between the Catholic High School Association of the Archdiocese of New York (Association) and Edward Culvert in his capacity as Chairman of the New York State Labor Relations Board (NYSLRB). The State of New York enacted legislation in 1937 analogous to the Wagner Act and amended the legislation in 1968 to include charitable, educational, and religious organizations. The next year the Lay Faculty Association (Union) petitioned the State Board for certification as the exclusive bargaining

agent for the teachers in the 11 archdiocesan high schools. Their petition was certified, and from 1969 until 1980 the Union and the archdiocesan schools (Association) engaged in collective bargaining agreements governing the "secular terms and conditions of lay teachers' employment" (*Catholic High School Association v. Culvert*, 1985, p. 1163). A rider to the agreement noted the existence of "certain areas of Canon Law, ecclesiastical decrees and religious obligations that cannot be the subject of negotiations" (*Catholic High School Association v. Culvert*, 1985, p. 1163) and provided an example that "if a teacher were to teach that there was no God," the teacher could be discharged and "the discharge would not be subject to the grievance procedures" (p. 1163).

In 1980, the Union claimed unfair labor practices when the Association suspended 226 teachers who had protested the schools' unilateral decision to implement a policy that would require teachers to cover the classes of absent teachers. The Union also alleged that the Association sent letters to individual teachers urging them to pressure the Union into accepting the Association's offers and announced other decisions that the Association would make unilaterally. The NYSLRB investigated the case and issued a formal complaint against the Association. The Association, in turn, filed a motion for summary judgment against the State Board in District Court. The District Court was forced to address the First Amendment issues because unlike the federal legislation, the state legislation contained a clear expression of affirmative intent to cover parochial schools. The district court followed the parenthetical First Amendment commentary in *Catholic Bishop* and argued, "There does not have to be an actual trial run to determine that entanglement has occurred, but that the likelihood of entanglement exists" (*Catholic High School Association v. Culvert*, 1985, p. 1165). It further reasoned that in the event of a discharge, the Board might have to weigh in on whether a purported religious reason was part of Church doctrine.

The United States Second Circuit Court of Appeals reversed and remanded the District Court ruling. The Appellate court ruled that the State Board's surveillance of collective bargaining activity is neither comprehensive nor continuous and survives the three-prong Lemon test in that: (a) the State Board can only be called upon when a dispute occurs between parties, which recent history indicates does not happen too often; (b) the unfair labor practices identified in State law serve a secular purpose; (c) the labor relations manager and the administrative law judge are limited in the scope of their inquiry to those unfair labor practices as stipulated in law; (d) an order by the State Board is not self-enforcing and can therefore be appealed on First Amendment grounds.

The Second Circuit Court of Appeals offered a scathing rebuttal to the Seventh Circuit's First Amendment analysis in the *Catholic Bishop* deci-

sion, declining to "follow the Seventh Circuit down this slippery slope" (*Catholic High School Association v. Culvert*, 1985, p. 1167) argument that government involvement in collective bargaining will lead to the transmutation of school policy into conditions of employment and hence governmental interference. It countered: "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" (*Catholic High School Association v. Culvert*, 1985, p. 1167).

Curiously, while the court ostensibly agreed with the Seventh Circuit Court of Appeals initial ruling in *Catholic Bishop* that "the First Amendment prohibits the State Board from inquiring into an asserted religious motive to determine whether it is pretextual" which would "inevitably…lead to the degradation of religion" (*Catholic High School Association v. Culvert*, 1985, p. 1168); in the next paragraph it adopts a "dual motive analysis" to determine "whether the religious motive was in fact the cause of discharge" (*Catholic High School Association v. Culvert*, 1985, p. 1168). The court empowers the State Board to employ a balancing test, weighing the legitimacy of the Church's motives to determine whether the teacher "would not have been discharged 'but for' the unlawful motivation" (*Catholic High School Association v. Culvert*, 1985, p. 1168) of the employer (e.g., the asserted reason was not a motivating cause because others had engaged in the same misconduct and had not been disciplined). Furthermore, the court rejected the "likelihood of entanglement" standard, in favor of one where the Church must show "the coercive effect of the enactment as it operates" (*Catholic High School Association v. Culvert*, 1985, p. 1168) in the practice of religion.

INTERIM CONCLUSIONS

Since the *Catholic Bishop* decision by the United States Supreme Court was rendered based on the limited scope of the NLRB legislation and not on First Amendment principles, the Second Circuit was free to explore the First Amendment issues at stake and to articulate a rebuttal to the analysis put forth by the Seventh Circuit.

The Second Circuit articulated its belief that the governmental role in collective bargaining is unobtrusive, limited, and therefore capable of steering clear of First Amendment entanglement issues. As a consequence, it rejected the "slippery slope" argument put forth by the Seventh Circuit Court that foresaw the "likelihood of entanglement" and instead adopted a "coercive effect" standard. While *Catholic Bishop* saw collective bargaining as an intrusion into management practice, *Culvert* saw this intrusion as negligible in comparison to the states' interest in protecting the rights of

workers. *Culvert*, unlike *Kurtzman* and *Catholic Bishop*, took a rather favorable view of the government's ability to steer clear of entanglement issues. The Second Circuit notes that the government merely brings parties together and then leaves them alone.

The *Culvert* decision also articulated a position that the secular aspects of the collective bargaining agreement can be separated from the religious elements. *Culvert* discerned a clear demarcation between the secular conditions of employment and religious doctrine. This stands in stark contrast to the assertion by the United States Supreme Court in the *Catholic Bishop* decision that since religion pervades the Catholic school, everything that transpires within the school could arguably be considered a condition of employment.

Culvert also broke with the *Catholic Bishop* decision in arguing that state involvement in collective bargaining and the inevitable investigation of claims will not necessitate inquiries into Church doctrine or policy. The *Culvert* decision rejected the underlying assumption of the Seventh Circuit Court that once the state plays a role in the collective bargaining process of religious schools it will be impossible to extricate itself from religious issues endemic to such an enterprise. *Culvert*, like *Catholic Bishop*, recognizes that the State should not engage in inquiries into asserted religious beliefs that would inevitably lead to the degradation of religion. Nevertheless, *Culvert* empowers the State Board to utilize a "dual-motive analysis" in order to determine if the religious belief was in fact the reason for termination.

The immediate impact of the *Culvert* decision was that it cleared away the perceived impenetrable First Amendment impediment to the extension of state regulatory board jurisdiction into religious schools. After *Culvert*, the scope and reach of the state regulatory board jurisdiction became a question for the individual states based on their own legislation and within the framework of existing First Amendment protections. In the decade following *Culvert*, three states found either a constitutional right for teachers in religious schools to bargain collectively or a statute granting the state labor relations board jurisdiction over religious schools.

STATE COURT DECISIONS

MINNESOTA

In 1989, the Hill-Murray Federation of Teachers petitioned the Minnesota Bureau of Mediation Services for determination of an appropriate bargaining unit and for certification as the exclusive representative of certain lay employees at Hill-Murray High School, a co-educational Catholic high school. The school moved to dismiss the petition, asserting that the

Bureau's jurisdiction would infringe upon the school's rights under the state and federal constitutions. The Bureau denied the petition, determined a bargaining unit exclusive of the theology teachers, and ordered an election. The teachers voted in favor of union representation and the Bureau certified the Federation of Teachers as the exclusive bargaining unit. The Court of Appeals reversed the Bureau's decision, and the Minnesota Supreme Court heard the case on appeal.

The Minnesota Supreme Court in *Hill-Murray Federation of Teachers v. Hill-Murray High School* (1992), relying on the standard articulated by the U.S. Supreme Court in *Department of Human Resources of Oregon v. Smith* (1990), held that the "free exercise of religion does not include the right to be free from neutral regulatory laws which regulate only secular activities within a church affiliated institution" (*Hill-Murray Federation of Teachers v. Hill-Murray High School*, 1992, p. 863). The Minnesota Supreme Court turned aside entanglement arguments by arguing that the state intervention was minimal and that "the First Amendment wall of separation between church and state does not prohibit limited governmental regulation of purely secular aspects of a church school's operation" (*Hill-Murray Federation of Teachers v. Hill-Murray High School*, 1992, p. 864). The court also dismissed claims that the application of the Minnesota Labor Relations Act would interfere with the school's religious autonomy and lead to negotiations about religion. It noted that the scope of the act excludes matters of inherent management policy and that Hill-Murray "retains the power to hire employees who meet their religious expectations, to require compliance with religious doctrine, and to remove any person who fails to follow the religious standards set forth" (*Hill-Murray Federation of Teachers v. Hill-Murray High School*, 1992, p. 866). It also dismissed the contention by Hill-Murray that the existing voluntary grievance procedure articulated in the faculty and staff handbook was a least restrictive alternative to mandatory good faith negotiations. The court seized upon the term "voluntary" and argued that the nature of collective bargaining is unique so that alternatives to it pale in comparison.

NEW YORK

Following the *Culvert* decision, the New York State Employment Relations Board (NYSERB) asked the court to enforce an order against Christ the King Regional High School compelling them to bargain in good faith with the Lay Faculty Association (Union) and to reinstate certain employees. The Supreme Court of New York granted the Board's petition and denied the school's motion to dismiss. The appellate division of the Supreme Court of New York affirmed this decision. The school appealed the appel-

late division's decision on First Amendment grounds to the Court of Appeals of New York.

The Court of Appeals of New York, in *NYSERB v. Christ the King Regional High School* (1997), found that the State Board did in fact have jurisdiction over religiously-run schools. Similar to the Minnesota *Hill-Murray* decision, the court applied the *Smith* standard and found that the state's labor-relations act did not violate the free exercise of religion clause of the First Amendment. Similarly, the Court of Appeals drew from the Second Circuit Court of Appeals' rationale in the *Culvert* decision in dealing with the Establishment Clause concerns. It argued that the Board's supervision over collective bargaining involved secular terms and conditions of employment that are neither comprehensive nor continuing. Furthermore, it adopted the *Culvert* standard that enabled the Board to protect teachers from unlawful discharge by limiting the Board's finding of a violation of the collective bargaining agreement to those cases in which the teacher would not have been discharged but for the unlawful motivation of the employer.

NEW JERSEY

The South Jersey Catholic School Teachers Organization (Union) sought to be recognized as the collective bargaining agent for the various Catholic grade schools operating within the Diocese of Camden, New Jersey. A Board of Pastors, representing the affected parish schools, informed the Union that it would be recognized only if it signed a document entitled "minimum standards," that among other things, vests the Board of Pastors with complete and final authority to dictate the outcome of any dispute; it also prohibited the Union from assessing dues or collecting agency fees from non-union members. The Union refused to accept the "minimum standards," claiming that to do so would have amounted to bargaining away a number of lay teacher rights. Since New Jersey does not have a state labor-relations board, the Union sought relief from the courts based on Article I, Paragraph 19 of the New Jersey Constitution. It states that persons in private employment have the right to organize, to bargain collectively, and to make known to the state their grievances through representatives of their choosing. The Trial Court dismissed the claim based on both the Free Exercise and Establishment Clauses of the First Amendment. The Appellate Court found only a Free Exercise claim rather than an Establishment Clause claim or both. It argued that the state had a compelling state interest in the preservation of industrial peace and a sound economic order and found no constitutionally-significant distinction between the religious indoctrination that occurs at the high school level and

that at the grade school level. The decision was appealed to the New Jersey Supreme Court.

The New Jersey Supreme Court in *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School et al.* (1997) examined both the free exercise and establishment claims. The court cited both *Hill-Murray* and *Culvert* in determining that the primary effect of the constitutional provision was not to inhibit the free exercise of religion. It noted that the diocese had long engaged in collective bargaining over the secular conditions of the contract with lay high school teachers. The court noted that the lay high school bargaining process has not infringed upon religious exercise nor has it resulted in litigation since the first agreement was executed in 1984. The court reasoned that there are some secular terms such as wages and benefits plans that the diocese can negotiate while preserving its complete and final authority over religious matters and that differences between high schools and grade schools are not constitutionally significant. The Court likewise held that since the constitutional provision requires only that the diocese recognize the union and negotiates the secular terms of the contract, the state's role is limited and survives the entanglement prong of the *Lemon* establishment standard. It noted further that the concerns of state entanglement were minimal in "the absence of a leviathan-like governmental regulatory board" (*South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School et al.*, 1997, p. 723). The New Jersey Supreme Court therefore held that the diocese must recognize the lay teacher's right to bargain collectively over wages, benefits, and any other terms and conditions required by the agreement with the lay high-school teachers.

INTERIM CONCLUSIONS

In Minnesota, New York, and New Jersey the courts found that the state has a compelling interest with regard to collective bargaining in religious schools either through the state labor relations act or the state constitution. The consensus that has emerged from the litigation in these three states is that Catholic schools can be compelled to engage in collective bargaining with lay teacher unions regarding the secular conditions of the contract such as salary, benefits, and quite possibly a narrow definition of work conditions that do not encroach upon the religious freedom of the school.

While *Culvert* and the ensuing cases found it incredulous that state involvement in the collective bargaining process when limited to the secular components of the contract would threaten the free exercise of religion; the rulings have, at the very least, opened up the door for just such an even-

tuality. No clear legal doctrine has enunciated unequivocally the demarcation between the secular components of the contract and issues of religious doctrine or policy. The United States Supreme Court has held that the government must take a neutral posture in the case of the former (*Lemon v. Kurtzman,* 1971), but must take a positively hands-off posture in the case of the latter (*Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 1976).

Furthermore, there does not exist a clear rendering of what constitutes legal lines of questioning by a state actor when an investigation approaches the secular components of the contract/religious doctrine and polity nexus. While *NLRB v. Catholic Bishop* (1979) noted that the very process of inquiry leading to findings and conclusions may impinge on rights guaranteed by the First Amendment, the United States Supreme Court in *Ohio Civil Rights Commission v. Dayton Christian Schools* (1986) found that merely investigating the circumstances of the teacher's discharge did not violate the First Amendment.

A final concern is in the area of the freedom of association. The New Jersey Supreme Court made no mention of this concern in its *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School et al*. (1997) decision, even though it was a central motivating issue behind the minimum standards document. The pastors wanted to maintain their rightful canonical authority and did not want to have to negotiate with an organization whose espoused political agenda might be contrary to that of the Church (e.g., the NEA on abortion); nor did they want their employees to be obligated to contribute funds to such an organization.

Tenenbaum (2000) argues that it is possible to reconcile the labor relations statutes and discrimination statutes with the case law regarding legal lines of inquiry. The inquiry should focus on the behavior of the employer in three areas taken from *DeMarco v. Holy Cross High School* (1993): (a) whether or not the behavior of the employer is consistent with its own policies and rules; (b) whether or not the reason for the action has been uniformly applied; and (c) whether or not the religious reason for the action surfaced after the plaintiff's claim of illegal behavior. Tenenbaum (2000) argues that such a behavioral approach does not necessitate an examination or inquiry into religious beliefs. While this is probably the most reasonable attempt at reconciling the law with the First Amendment issues related to permissible lines of inquiry, it is not without its perils for both the investigator and for the Catholic school administrator. Furthermore, this reconciliation does not resolve what constitutes a secular component of the contract nor does it resolve the freedom of association issues raised above.

An elaboration of a scenario envisioned by the Seventh Circuit Court

and cited in its *Catholic Bishop v. NLRB* (1977) decision will serve to illustrate the difficulty. Planned Parenthood has as one of its stated legislative agendas to initiate legislation in all 50 states that would require insurance carriers to cover birth control pills among its basic drug coverage. At least 20 states have enacted this legislation, and the legislation is pending in an additional 13 states (Planned Parenthood, 2003a, 2003b). In 9 of the 20 states, the legislation does not contain a religious exemption for churches and schools (Planned Parenthood, 2003b). The New York state law, which does not contain a religious exemption and took effect January 1, 2003, is being appealed before the State Supreme Court (Thibault, 2003). This present situation questions whether birth control pills represent a secular benefit that is recognized as a negotiable component of the collective bargaining process or whether it constitutes a religious issue that the employer might rightfully refuse to negotiate. What happens when a Catholic school teacher is fired who has vociferously challenged the school's position regarding birth control coverage as part of the collective bargaining process? The State Board would be empowered to engage in an investigation, because according to *Culvert*, the Board decision is not self-enforcing and can therefore be appealed on First Amendment grounds. Consistent with the *Culvert* decision, the State Board would need to employ a balancing test and a dual motive analysis in order to determine whether the religious motive was in fact the cause of the discharge. However, the *Culvert* decision concurred with *Catholic Bishop* that "the First Amendment prohibits the State Board from inquiring into an asserted religious motive" which would "inevitably…lead to the degradation of religion" (*Catholic High School Association v. Culvert*, 1985, p. 1168). In this case the State Board is caught on the horns of a dilemma: it is supposed to investigate the claim to see if the purported religious reason is a pretext for termination on the one hand, while at the same time it is barred from inquiring into an asserted religious motive. Is it possible to formulate a dual-motive determination without including a determination regarding the validity and force of the purported religious belief?

The behavioral approach dictates that the State Board must accept the veracity of the Church's position on birth-control and pose questions regarding the factual circumstances of the termination as to whether the school has behaved in a manner consistent with its professed beliefs including the uniform application of its rules. When the complainant cites a case of potentially differential treatment, the State Board is obligated to investigate. While *Culvert* is correct in asserting that the State Board's decision is not self-enforcing and any decision could be appealed on First Amendment grounds, the question remains as to how a State Board can safely navigate the deep waters of First Amendment issues without putting the belief on

trial leading to a degradation of religion. The questioning of the administrator by the investigator might proceed as follows:

> Are you aware of other employees that currently use birth control pills?
>
> What course of action (e.g., questioning, investigation) did you take when you overheard this other teacher say "we're quitting at two kids"?
>
> Why was the present teacher fired for her conduct and this other teacher's declaration did not even warrant an investigation?
>
> I'm sorry to revisit this point, but could you define for me what constitutes permissible birth control measures and what constitutes impermissible birth control measures?
>
> Could you explain to me how purpose and intentionality enters into the determination as to whether the use of birth control pills are permissible or impermissible?

Such a line of questioning is both a necessary line of inquiry into factual matters and an inquiry into the theological nuances of the Church's position that borders on degradation. Furthermore, close scrutiny of this hypothetical line of questioning is indistinguishable from the impermissible line of questioning specifically cited by the United States Supreme Court in the *Catholic Bishop* decision. Even if it is determined that such a line of questioning is legal under the behavioral approach and does not serve to degrade a religious belief, it certainly raises questions from an entanglement perspective if state officials must engage in such a protracted inquiry or if such inquiries become a regular occurrence.

GOVERNANCE ISSUES

One of the assumptions of the *Culvert* decision and the ensuing state court decisions was that religious organizations have structures that are readily identifiable into the categories of labor, management, and collective bargaining units. In the cases cited above, the courts were not forced to examine the intricacies of the Catholic school governance structures operative in Catholic schools. The governance structures that exist in Catholic grade schools, inter-parochial schools, religious-order schools, and diocesan high schools are far from uniform and, in most cases, are not connected to one another as a meaningful unit. The question arises as to what constitutes an appropriate collective bargaining unit. What constitutes a community of interest, a much more fluid term that includes an analysis of "such factors

as bargaining history, operational integration, geographic proximity, common supervision, similarity in job function and degree of employee interchange" (*Black's Law Dictionary*, 1991, p. 192)? Is it a geographical area such as a diocese, a collection of parishes, or an individual parish? Do the parish and the parish-school represent an integrated enterprise of a single employer or do their employees represent different communities of interest and therefore different collective bargaining units? Do diocesan high schools in the same diocese represent different bargaining units? There is no simple and straightforward answer to these questions due to the complex and variegated governance structures operative in Catholic schools. However an examination of canon law, the "translation" of canon law and governance practice into civil documents such as the articles of incorporation, and the limited rulings by state and federal courts provide some provisional answers.

CANON LAW

Canon law provides the framework for understanding jurisdiction as it is applied to educational governance in Catholic schools. Just as our civil law recognizes corporations as having the legal status of personhood, canon law recognizes certain entities as having the particular legal status of juridic persons. Dioceses, parishes, and religious congregations are all juridic persons. Canon law requires juridic persons to have administrators who are responsible for the care of all goods under their jurisdiction (Canon Law Society of America, 1983, #1281-1288). Accordingly, "where the school is part of an existing juridic person the responsibility of the canonical administrator must be respected as the ultimate authority" (O'Brien, 1987, p. 14). In light of canon law, it follows that all Catholic school boards, councils and committees are either consultative to the appropriate canonical administrator (bishop, bishop's delegate, pastor, religious congregation, vicar, superintendent), or are of limited jurisdiction as outlined in their constitution and by-laws that have been approved by the bishop or religious congregation.

While the bishop retains some jurisdiction over all Catholic schools within his diocese, the jurisdiction of school officials (e.g., superintendents, presidents, and principals) and school entities (e.g., boards or councils) is dependent upon to whom the bishop has delegated certain authority within his diocese; upon whether the Catholic school is parochial, interparochial, diocesan, or private; and upon the governance model utilized within the particular school type. According to canon law, no school can claim the title Catholic without supervision or written recognition by an ecclesiastical authority (Canon Law Society of America, 1983, #803).

Furthermore, it is the responsibility of the bishop to regulate and to be vigilant over the Catholic education within his diocese (#804). This vigilance includes approving those who are entrusted with teaching religion, and if necessary, to call for their removal for religious or moral reasons (#805). The bishop's responsibility of vigilance extends even to private schools run by religious orders operating within his diocese (#806). Since the bishop's legislative authority cannot be delegated (#466), the jurisdiction of all school officials and school entities are consultative in at least the areas cited above. Unlike the bishop's legislative power, his executive and judicial power can, and is, delegated among a number of functionaries including pastors, the superintendent of schools for the diocese, and other administrators within the diocese. Much of the day-to-day administration of the schools and parishes is left to the competent administrators and pastors, but the bishop still retains certain prerogatives that may not be delegated.

Parishes represent separate juridic persons over which pastors exercise authority as the proper shepherd (#515) and must be respected as the ultimate authority for church goods within the parish (#1281-1288). However, the authority of the pastor with regard to church goods is not absolute. Canon law further stipulates that the ownership of goods belongs to the juridic person that has acquired them (#1256). It also stipulates that offerings given to administrators of juridic persons are presumed to be given to that juridic person (#1267) and that these offerings should be applied only for that purpose (#1267). The bishop can intervene in the case of negligence (#1279) and can prohibit juridic persons from raising money (#1265) or from initiating lawsuits on behalf of the church (#1288). The bishop has the authority to tax the parish (#1263), must approve all actions that go beyond the limits of ordinary administration (#1281), and may transfer the pastor to a different parish (#1740). Furthermore, the pastor is obligated to govern with the cooperation of others including laypeople (#519) and to "observe meticulously the civil laws pertaining to labor and social policy according to Church principles in the employment of workers" (#1286).

CIVIL LAW

States require 501(c)(3) non-profit corporations such as churches and schools to have on file with the state their articles of incorporation. Typically the articles of incorporation or by-laws contain the objectives of the organization, the membership of the organization, and the role and authority of the officers. In the case of Catholic schools, a "translation" of canon law into civil law is necessary in the preparation of the articles of incorporation, constitution, and by-laws. Most, if not all, Catholic school by-laws contain the caveat that all activities of the organization must

conform to the dictates of canon and civil law. The articles of incorporation and by-laws are the best attempt by the school to translate the reality of the organization into a legal document, but as a translation, the document is not perfect and never adequately captures the total reality. Something as fundamental as the relationship between the pastor and the principal is not always entirely clear in either canon law or the specific documents required by civil law. The exhortation by Mallet on this point is particularly instructive: "I strongly suggest that diocesan legislation is necessary to clarify the relationship between the pastor and the parish school principals" (O'Brien, 1987, p. 12). This could also be said of many other relationships operative within the Catholic school governance structure.

PRACTICE

The bishop of a diocese typically delegates to the superintendent of schools the responsibility for the administration of all diocesan schools and the coordination of all parochial and inter-parochial schools. Pastors serve as the canonical administrator of parochial schools. In the case of inter-parochial schools, the bishop typically names a pastor from one of the sponsoring parishes as the canonical administrator. Diocesan, parochial, and inter-parochial schools also have principals (and in some larger high schools, presidents) that serve as site-based administrators of the school. Catholic schools sponsored by a religious community do not fall under the direct authority of the bishop except in those areas specifically identified in canon law. The religious congregations are juridic persons separate and distinct from the juridic person of the diocese and therefore the governance of their schools is aligned with the dictates of the religious orders' constitution and governance structure. Religious congregations typically have a member of their order serving as the canonical administrator for a school or schools.

The three most common ways in which a Catholic school is incorporated are the bishop-as-trustee model, the bishop-as-corporation-sole model, and the corporation-aggregate model (O'Brien, 1987). In the bishop-as-trustee model, the bishop holds title to the church property for the benefit of the school or parish. In this model, the bishop retains the right of supervision and the right to govern in accord with canon law, but can delegate the control of the property to an administrator or a pastor. In the bishop-as-corporation-sole model, the bishop holds absolute title to the property, and "can do anything he wishes with the property as long as it is in compliance with church law" (O'Brien, 1987, p. 15), that is until he dies or is replaced by another bishop who becomes the corporation sole. O'Brien (1987) identifies two ways in which property may be owned in the corporate aggregate method: In the first, legal title is vested in incorporated

trustees with equitable title vested in other interested parties such as the non-incorporated parish. Equitable title differs from legal title in that equitable title connotes, and is rooted in, the concepts of justice and equity, while the legal title is based upon the strictly formulated rules of common law. In the second method, "legal title is vested directly in the corporate officers of the parish who are elected and act as a board of directors or trustees" (O'Brien, 1987, p. 15). This second method is the typical form of incorporating private Catholic schools and is growing in its use among diocesan high schools (Sheehan, 1997). In a very limited number of dioceses, some schools are established as separate juridic persons apart from the diocese or a religious order and are incorporated as such (Sheehan, 1990). It is also possible that in some dioceses the schools are not incorporated at all and are merely real property owned by the bishop or the local pastor. Each of these models represents a "translation" of canon law into civil law, and as such, has its benefits and pitfalls. Since the articles of incorporation define and specify the role and authority of the agents of the corporation, this "translation" and articulation should not be taken lightly.

INTERIM CONCLUSIONS

Canon law and the typical governance practice utilized in parish schools make a compelling argument that each parish school represents a single community of interest and collective bargaining unit. Canon law identifies parishes as separate juridic persons in their own right governed by the pastor who serves as the proper steward of the parish except in those rare cases requiring the intervention of the bishop. Canon law further stipulates that the ownership of goods belongs to the juridic person that has acquired them (Canon Law Society of America, 1983, #1256), that offerings given to administrators of juridic persons are presumed to be given to that juridic person (#1267), and that these offerings should be applied only for that purpose (#1267). Each parish school typically has its own salary scale, working conditions, advisory boards, and local policies and regulations. Furthermore, the bulk of the income for the parish school comes from local tuition and local parish support.

The dictates of canon law are a little more nebulous when one encounters inter-parochial schools that represent a collective effort on the part of several parishes. In many cases the bishop appoints one of the pastors as the canonical administrator and parochial vicar of the school (#545-552). The situation may be further complicated if the bishop does not specify the role and authority of the parochial vicar with respect to his fellow pastors, the school administration, the school board, and the school teachers. Depending on the role of the bishop and the diocesan office in the gover-

nance of these schools, the inter-parochial schools may or may not be considered separate communities of interest and therefore separate collective bargaining units.

The issue is even more convoluted in those diocesan schools that are not governed directly from the diocesan office. In many cases they employ a hybrid governance structure that represents an amalgamation of direct diocesan office governance, inter-parochial governance, and a governance structure similar to those found in religious order schools representing a separate juridic person. Depending on the role of the bishop and the diocesan office in the governance of these schools, they may or may not be considered separate communities of interest and therefore separate collective bargaining units.

While the bishop-as-corporation-sole remains a common method of incorporating property (O'Brien, 1987), it clearly is the least consonant with the dictates of canon law and the everyday practice of school governance. The Holy See criticized this method of incorporation early in the 20th century based on the principles underlying canon law article 1256 (Laugesen, 2003). Laugesen also cites criticism of this method found in the *New Commentary on the Code of Canon Law* (Beal, Coriden, & Green, 2000). Nevertheless, this model and unincorporated ownership of property in the name of the bishop persists even to this day. The recent sexual abuse crisis and the resultant multi-million dollar judgments have heightened the importance placed on these governance issues. In the Diocese of Baker, Oregon, the bishop was prevented from moving the diocese from the bishop-as-sole-corporate structure to a separate incorporation of the various parishes within the diocese. The plaintiff's attorney in a $68.4 million lawsuit convinced the Deschutes County Circuit Judge Michael Adler to issue a temporary restraining order against the diocese pending a full investigation regarding the decision to incorporate the 50 parishes and missions (Lerten, 2003a). While the plaintiff's attorney alleged the move was an unprecedented shell game, the judge eventually removed the restraining order and allowed the diocese to proceed with its plans (Lerten, 2003b).

The more appropriate models for incorporating Catholic schools and Church property include the bishop-as-trustee and the corporation-aggregate method. These models, when crafted properly, more closely approximate both canon law and the reality of the governance practices in Catholic schools.

THE COURTS AND GOVERNANCE ISSUES

Two recent decisions provide some insight into how the judiciary has addressed the relevant governance issues cited above. In one case the court

found that individual diocesan high schools could present themselves as separate communities of interest and therefore separate collective bargaining units, and in another case the court declined to identify the parish church and parish school as an integrated enterprise of a single employer. In both cases the governance practices operative within the separate entities and the 501(c)(3) articles of incorporation played a significant role in the eventual decision.

SOUTH JERSEY CATHOLIC TEACHERS ORGANIZATION ET AL. V. DIOCESE OF CAMDEN (2000)

South Jersey Catholic Teachers Organization et al. v. Diocese of Camden et al. (2000) represents a dispute between rival unions within the Diocese of Camden. The South Jersey Catholic Teachers Organization (SJCTO) claimed that two rival unions were illegally created and then wrongfully recognized by the parishes and the Diocese of Camden. The SJCTO had acted as the exclusive bargaining representative for all of the lay teachers in the eight Catholic high schools that operate within the diocese. The diocese sets tuition, establishes wage limits and has the authority to hear appeals from teacher grievances, and selects the principal and vice-principal of each school. Although the diocese has approval power for all teaching applicants, the hiring and firing of faculty generally occurs at the local level. The court noted that while the diocese is actively involved in the foregoing activities, the individual school is responsible for its own funding and administers its own budget. Also each of the eight schools is a separate corporate entity either owned by the local parish or the diocese. Additionally, each of the eight schools is physically separate from one another. A 1981 tentative document, subject to the approval of the faculties at each of the eight schools, has been the source of SJCTO's claim as the exclusive bargaining unit. The document made no mention of duration, nor was any document submitted demonstrating certification as the exclusive bargaining unit.

Prior to 1997, many lay teachers in one of the schools were dissatisfied with the manner in which they were being represented by the SJCTO. SJCTO refused to recognize the site representative that they had chosen and at the SJCTO's reaction to the failure to reach a new contract at the expiration of the 1994-97 contract. Contrary to the wishes of the majority of the teachers at Glouster Catholic and St. Joseph's, the SJCTO decided to strike. Furthermore, many of the faculty at the two schools were opposed to the tactics employed by the SJCTO that included referring to the bishop as a "scum bag" and invoking the teamsters to use truck horns and bull horns to disrupt the classes being conducted by the teachers that had

chosen to cross the picket lines. As a result of these actions, several of the lay faculty at the two schools circulated petitions of their intent to hold elections on the formation of a new union. Those supporting SJCTO chose to boycott the election. The elections revealed that a majority of the teachers at the two schools supported the formation of a new union; Glouster Catholic Lay Teacher Organization at Glouster Catholic and South Jersey Lay Teachers Association for St. Joseph's. SJCTO also contended that the election process was flawed because it included quasi-administrators (a guidance counselor in one case and the activities director in the other), and that school leaders exercised undue influence in the election by providing organizers with the use of the school's public announcement system and allowing the counting of ballots to take place in the principal's office.

The court held that bargaining history is only one consideration in determining the legitimacy of new bargaining units, asserting that it is incorrect to suggest that the common interest of the eight schools necessitates that there be one collective bargaining unit. The court also examined the concept of "community of interest" and the factors that comprise its definition, concluding that while the majority of the factors favored the SJCTO's contention, the "community of interest" concept does not lend itself to a mechanical application. The court found that the very essence of collective bargaining is the freedom to choose one's bargaining agent. It asserted that it is improper to constitutionally-guarantee schools the right to choose their own representative, but then to invalidate their choice on the basis of certain common interests. The court also found that just because the schools share a community of interest, this interest does not bind every teacher in the diocese to the SJCTO, nor did it commit those same teachers to its exclusive representation for all time. The court found that the two individual high schools did represent separate communities of interest and appropriate bargaining units in virtue of the fact that they were geographically separate from the other schools in the diocese, the schools were smaller than the others in the diocese, and they were owned by their parishes (not the diocese).

The court then applied a balancing of equities test to the two competing claims finding that the position of the individual schools was further enhanced. The court held that SJCTO's loss of some of its strength does not outweigh the loss resulting in the disbanding of the individual schools' unions. Furthermore, the court found that the two schools were owned by different entities that for the most part do not interact, unlike the case law cited by the SJCTO that had to do with a multi-plant operation. It also correctly noted that the diocese was not the sole employer of these teachers. Both the diocese and the parishes employed the teachers in a dual employment arrangement. Finally, the court held that unless the alleged taint was

clear or the potential for taint was high, the election should not be overturned.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION V. SAINT FRANCIS XAVIER PAROCHIAL SCHOOL AND SAINT FRANCIS XAVIER CHURCH (1996).

Equal Employment Opportunity Commission (EEOC) v. Saint Francis Xavier Parochial School and Saint Francis Xavier Church (1996) involved a complaint by a disabled applicant that she was unlawfully excluded from an interview for a part-time music position because she has multiple sclerosis and uses a wheelchair. The EEOC filed suit against the parish, the school, and the parish day care asking the court to consider the three as an integrated enterprise employing more than 25 employees and therefore falling within the scope of ADA regulations. The court noted that under the single employer doctrine, superficially distinct entities that represent a single, integrated enterprise may be exposed to liability as a single employer. The EEOC contended that the Church operates the school and daycare; therefore the three entities should be considered one. The court employed a four-part test formulated by the NLRB and approved by the United States Supreme Court in *Radio Union v. Broadcast Service* (1965). The test assesses the degree of interrelation of operations (e.g., combined accounting records, bank accounts, payroll preparation, telephone numbers, and offices), common management, centralized control of labor relations, and common ownership and financial control. The court noted "although the absence or presence of any single factor is not conclusive, control over the elements of labor relations is a central concern" (*EEOC v. Saint Francis Xavier Parochial School and Saint Francis Xavier Church*, 1996, p. 33).

In regard to the level of inter-relatedness, the court found that the school had a separate budget, had independent hours of operation, had different staffs with its own administrators, had different buildings, and had different employment contracts and practices. The court also noted that since the school must negotiate directly with the archdiocese, "The Archdiocese, rather than the pastor, has ultimate control over the School's budget. Approval by the pastor of a school budget negotiated directly with the archdiocese does not make defendants a single employer" (*EEOC v. Saint Francis Xavier Parochial School and Saint Francis Xavier Church*, 1996, p. 34).

The court likewise dismissed the EEOC's contention regarding the common management prong by noting that there were indeed separate management structures for the church, day care, and school. The court asserted that it is a well-established point of law that control of labor rela-

tions means active control of day-to-day labor practices, not potential control. The court found that the three institutions had different administrators, employed different labor practices, and utilized distinct labor pools. The court in examining the common ownership and financial control prong of the four-prong integrated enterprise test, noted that both parties agree that there is some common ownership. The court observed that while the pastor must sign the school's budget and that the parish holds some intermediary supervisory power over the school, the parish is part of the Archdiocese of Washington, DC, which is the corporate entity that owns the property and buildings. While the Archdiocese of Washington, DC was not party to the suit, the court opined that even if it were, common ownership alone is not sufficient to establish that separate employers are an integrated enterprise. Consequently, the court declined to apply the integrated enterprise doctrine to consolidate the church and school as a single employer.

CONCLUSIONS

Collective bargaining is a concept with a long history of support within the teachings of the Catholic Church, but its manifestation within Catholic schools has been a particularly difficult process fraught with First Amendment issues. While federal oversight by the NLRB has been precluded by the *NLRB v. Catholic Bishop* (1979) decision, the emerging consensus among state courts is that state labor relations boards do have jurisdiction over labor disputes in Catholic schools regarding salary, benefits, and quite possibly a narrow definition of work conditions that do not encroach upon the religious freedom of the school. This formulation unfortunately does not clearly define the limits of the state regarding encroachment of First Amendment protections. Only time will tell whether this formulation will indeed protect the rights of employees and the religious freedom of schools.

Consequently, it is important for dioceses to give significant thought to how canon law is translated into civil law and actual practice. It is also critical that diocesan legislation make clear the relationship between religious authorities, school administrators, and school boards. The legislation must clearly address how church property is to be incorporated, and the circumstances under which certain entities may interdict. The most common methods of incorporation are the bishop-as-trustee, the bishop-as-corporation-sole, and corporation-aggregate (O'Brien, 1987). It is also possible that in some dioceses the schools are not incorporated at all and are merely real property owned by the bishop or the local parish. Each of these models represents a translation of canon law into civil law, and as such, has its benefits and pitfalls. Since the articles of incorporation help to define and

specify the role and authority of the agents of the corporation, this translation and articulation should not be taken lightly.

Furthermore, it is on the basis of this translation that courts will make significant decisions about who is the employer, what constitutes a community of interest and an appropriate collective bargaining unit. While the court held in *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School* (1996) that all the teachers were "employed by the Diocese of Camden" (p 581), in *South Jersey Catholic Teachers Organization et al. v. Diocese of Camden et al.* (2000), the court seized upon the ownership argument when it found that

> both of the schools are owned and operated by their parishes, not the Diocese. This factor is particularly significant given the strong interest that these teachers have in maintaining a harmonious working relationship with the community in which they work. (p. 315)

In *EEOC v. Saint Francis Xavier Parochial School and Saint Francis Xavier Church* the court declined to apply the integrated enterprise doctrine to consolidate the Church and school as a single employer based on its findings that while the archdiocese had ultimate control over the school's budget and held ownership to the buildings, each entity had its own budget, management, hours of operation, labor pools, and labor practices.

In all cases it is important for each diocese to resolve the nebulous governance issues through appropriate diocesan legislation and policy to ensure that the ownership of property, the articles of incorporation, and the relationships among the functionaries within the diocese represent a clear and conscientious attempt at translating the dictates of canon law and the actual practice of school governance into documents required by civil law with the full understanding that a translation never adequately captures the totality of meaning nor anticipates every eventuality.

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