

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0846

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

SOLDIERS OF JESUS CHRIST, INC.,

PLAINTIFF-APPELLANT,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION,
DEPARTMENT OF WORKFORCE DEVELOPMENT
AND KENNETH H. KUBE,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for St. Croix County:
C. A. RICHARDS, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., Peterson, J.

¶1 PER CURIAM. Both the circuit court and the Labor and Industry Review Commission determined that Soldiers of Jesus Christ, Inc., is not exempt from paying unemployment compensation. Soldiers now appeals the circuit court

judgment. We also conclude that Soldiers is not exempt from paying unemployment compensation under § 108.02(15)(h), STATS., either as: (1) a church; or (2) an organization operated primarily for religious purposes and principally supported by an association of churches. We therefore affirm the judgment.

FACTS

¶2 The facts are mainly undisputed. Kenneth Sortedahl has directed Soldiers since it was incorporated in 1971. Sortedahl testified that Soldiers runs a boarding school called Peniel Christian School. Soldier's purpose, according to its amended articles of incorporation, "is to operate and maintain a Christian children's boarding school and church."

¶3 Peniel focuses on students with behavioral problems, such as children who have been in trouble with the law or in their homes. Students generally stay at Peniel for a year, living and working on school property. Peniel is funded primarily by donations and is supported by churches of various denominations. It does charge tuition, but students are not always required to pay the entire amount.

¶4 Peniel uses a "Christian curriculum," but does not preach any particular doctrine. Students are accepted from any denomination or no denomination at all. Christian services are held at Peniel twice a day in the meal area after the tables are cleared. Peniel has baptism services on its grounds and is open to having visitors come to services. Sortedahl is a Lutheran pastor, but he does not preach Lutheran doctrine at Peniel.

¶5 Kenneth Kube worked for Soldiers from November of 1993, until August of 1994, performing telemarketing, fund-raising and construction work. After leaving Soldiers, Kube applied for unemployment compensation benefits. A deputy of the Department of Workforce Development¹ issued an initial determination finding that Soldiers was exempt from paying unemployment compensation. Kube appealed, and an administrative law judge reversed. Soldiers appealed to the commission, which affirmed the administrative law judge's conclusion while modifying the findings. Soldiers appealed, the circuit court affirmed and this appeal ensued.

STANDARD OF REVIEW

¶6 We review the commission's decision, rather than the decision of the circuit court. *See Knight v. LIRC*, 220 Wis.2d 137, 147, 582 N.W.2d 448, 453 (Ct. App. 1998). Soldiers does not dispute any particular factual findings and LIRC does not dispute that our review involves a question of law. Soldiers contends that we should review the commission's decision de novo because it involves the application of law that is one of first impression. *See id.* The commission claims that its determination is entitled to "great weight" deference because its factual findings and legal conclusions are closely intertwined. *See Barron Elec. Coop. v. PSC*, 212 Wis.2d 752, 761, 569 N.W.2d 726, 731 (Ct. App. 1997).

¶7 There are three levels of review for commission decisions: (1) great weight deference, (2) due weight deference, and (3) de novo review. *See UFE v.*

¹ The Department of Industry, Labor and Human Relations was renamed the Department of Workforce Development effective July 1, 1996.

LIRC, 201 Wis.2d 274, 285, 548 N.W.2d 57, 61 (1996). A de novo standard is only applicable when the issue is one of first impression to the commission, *see id.* at 285, 548 N.W.2d at 62, or when the commission's position on an issue has been so inconsistent so as to provide no real guidance. *See Marten Transp. Ltd. v DILHR*, 176 Wis.2d 1012, 1018-19, 501 N.W.2d 391, 394 (1993). This is not the first time the commission has interpreted § 108.02(15)(h), STATS. *See MHS, Inc.*, UC Hearing No. 8852 (July 12, 1991). Soldiers does not claim that the commission's interpretation of § 108.02(15)(h), STATS., has been inconsistent. Therefore, it would be inappropriate to apply a de novo standard of review in this case.

¶8 In order for us to grant an agency interpretation great weight deference, as urged by the commission, all four of the following requirements must be met:

- (1) the agency was charged by the legislature with the duty of administering the statute; (2) that the interpretation of the agency is one of long-standing; (3) that the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) that the agency's interpretation will provide uniformity and consistency in the application of the statute.

Harnischfeger Corp. v. LIRC, 196 Wis.2d 650, 660, 539 N.W.2d 98, 102 (1995). The commission's experience with § 108.02(15)(h), STATS., does not satisfy the second requirement of the **Harnischfeger** test. The commission has cited only one other decision involving a similar issue and its interpretation of § 108.02(15)(h).

¶9 The middle level of agency review is due weight deference. We apply due weight deference when:

the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court. The deference allowed an administrative agency under due weight is not so much based upon its knowledge or skill as it is on the fact that the legislature has charged the agency with the enforcement of the statute in question.

UFE, 201 Wis.2d at 286, 548 N.W.2d at 62. This is the situation here. We therefore accord the commission's interpretation in this case due weight deference. We will not overturn a reasonable decision if it furthers the purpose of the statute, unless we determine that there is a more reasonable interpretation under the facts. *See id.* at 286-87, 548 N.W.2d at 62.

ANALYSIS

¶10 Wisconsin's unemployment compensation law exempts employers from paying unemployment compensation for services:

1. In the employ of a church or convention or association of churches; [or]
2. In the employ of an organization operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church or convention or association of churches

Section 108.02(15)(h), STATS.

I. CHURCH

¶11 Soldiers contends it is exempt as a church under subd. 1 of § 108.02(15)(h), STATS. It urges a broad definition of "church,"² claiming it

² We construe the statute broadly to avoid raising doubts of its constitutionality. *See St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 (1981).

qualifies based on its Christian curriculum, its religious services, its leadership by a Lutheran minister, and its description of itself as both a church and school in its amended articles of incorporation.

¶12 Soldiers correctly observes that a church is not confined to the existence of a physical house of worship. In *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981), the United States Supreme Court analyzed the federal counterpart to § 108.02(15)(h)1, STATS.,³ and held that the religious schools in that case were exempt because: (1) the schools were not separately incorporated from the churches which operated them; and (2) the churches directly controlled, supervised and financed the schools' operations. *See id.* at 788. The Court held that "church" is not "synonymous solely with a physical building that is a house of worship" *Id.* at 784. Rather, the word "church" must be construed "to refer to the congregation or the hierarchy itself, that is, the church authorities who conduct the business of hiring, discharging, and directing church employees." *Id.* Therefore, a church, as an employer, must exist before an organization it directly controls is exempt under § 108.02(15)(h)1, STATS.

¶13 Neither Peniel nor its employees are directly operated, controlled or employed by any branch of the Lutheran Church, of which Sortedahl is a pastor, or of any other church of any other denomination. Soldiers argues that it is a church within the broader Christian sense, but just because it provides a Christian environment and calls itself a church in its articles of incorporation does not make it a church.

³ The federal counterpart to § 108.02(15)(h), STATS., is the Federal Unemployment Tax Act (FUTA), 26 U.S.C. § 3309(b).

¶14 We note that Soldiers has cited no case in which a school was *defined* as a church without being directly operated and controlled by a recognized church, as were the schools in *St. Martin*. In fact, in a case Soldiers relies on in its alternative argument, the Idaho Supreme Court concluded that even a school with a primary religious purpose could not be separately *defined* as a church. *See Nampa Christian Schs. Found. v. Idaho Dep’t of Employment*, 719 P.2d 1178 (Idaho 1986).⁴

¶15 The commission found that the “lack of evidence in this case of the role of religion in the employer’s existence … is striking.” The commission concluded that Peniel has no ecclesiastical government. Although Peniel holds Christian services twice a day in the meal area, the commission also found that Peniel does not follow any particular doctrine. In fact, there was a void of

⁴ In *Nampa Christian Schs. Found. v. Idaho Dep’t of Employment*, 719 P.2d 1178 (Idaho 1986), the commission relied on a list of fourteen factors the IRS has developed which it applies to individual organizations when determining whether an organization is a church. These factors are:

- (1) A distinct legal existence;
- (2) a recognized creed and form of worship;
- (3) a definite and distinct ecclesiastical government;
- (4) a formal code of doctrine and discipline;
- (5) a distinct religious history;
- (6) a membership not associated with any other church or denomination;
- (7) an organization of ordained ministers;
- (8) ordained ministers selected after completing prescribed studies;
- (9) a literature of its own;
- (10) established places of worship;
- (11) regular congregations;
- (12) regular religious services;
- (13) Sunday schools for religious instruction of the young; and
- (14) schools for the preparation of ministers.

While we do not necessarily disagree with these criteria, we do not adopt them on this appeal.

evidence describing what exactly constituted Christian services at Peniel, and this void rendered the significance of the services hollow. Although testimony established that Peniel is open to having visitors at its services, the commission noted that no evidence established that visitors actually attended or even were aware of the services.

¶16 We determine that there is no other application of § 108.02(15)(h)1, STATS., to the commission’s factual findings that would be more reasonable than the commission’s. Soldiers does not challenge the commission’s factual findings and, given the striking lack of evidence necessary to show that Peniel was a church, we conclude that Soldiers is not exempt under § 108.02(15)(h)1, STATS.

II. ORGANIZATION OPERATED PRIMARILY FOR RELIGIOUS PURPOSES

¶17 Soldiers also argues that it is exempt under § 108.02(15)(h)2, STATS., because it is operated primarily for religious purposes and is principally supported by an association of churches. We are satisfied the record demonstrates that Soldiers is not operated primarily for religious purposes. As a result, it is not necessary for us to decide whether it is principally supported by an association of churches.

¶18 The word “primarily” has been construed by other jurisdictions interpreting similar statutes to mean “of first importance,” “essentially” or “fundamentally” as opposed to “secondarily” or “merely incidental.” *See Prince-Walker v. Industrial Claim Appeals Office*, 870 P.2d 588, 591 (Colo. Ct. App. 1993). Here, the commission concluded that “the primary objective of [Soldiers] is keeping kids out of trouble while providing an education and room and board.”

¶19 At its root, Soldiers' argument on this issue involves a dispute over the weight of the evidence before the commission. First it cites the commission's statement that the school is "religious in nature."⁵ Then it highlights specific evidence, including religious services being held twice a day, the Bible being preached, use of a Christian curriculum, holding of baptismal services, its self-description as a "Christian School," and its leadership by a Lutheran minister.

¶20 Nevertheless, we agree with the commission's conclusion. Peniel is first and foremost a school. The evidence does not establish that religion is of first importance or fundamental to the operation of the school. As the commission observed:

[T]here is a lack of testimony about the precise role of religion in the school's curriculum. The lack of testimony establishing that religion pervades the operation of the school makes it difficult to find that the school operates **primarily** for religious purposes.

¶21 For example, Sortedahl testified that the school uses a "Christian curriculum." The commission noted, however, that it "simply does not know what constitutes a 'Christian' curriculum." There is no evidence in the record explaining what Peniel considers a Christian curriculum and there is no evidence detailing the actual meaning religion plays in its education.

¶22 The school accepts children of all denominations. Sortedahl testified that if he attempted to advance any particular creed or doctrine, "Jewish people would not send their children because [Peniel] would make Christians out of

⁵ Although the commission conceded that Soldiers is religious in nature, it did so in its conclusion that Peniel was not "operated, supervised, controlled, or principally supported by a church or a convention or association of churches." Section 108.02, STATS.

them.” There is a conspicuous absence of any dedication to advancing a particular faith or religion. *Cf. Nampa*, 719 P.2d at 1178 (teachers were required to have beliefs consistent with the school’s Statement of Faith, be heavily involved in local churches and integrate the school’s religious position into the instruction in nondenominational school “organized by a group of parents interested in providing a ‘Christian’ education for high school students”). Peniel simply does not hold itself out as a school with a primary purpose of advancing religion.

¶23 Soldiers explicitly states that it does not challenge the commission’s factual findings. We conclude that there was no other interpretation of § 108.02(15)(h)2, STATS., or application to the commission’s factual findings that would be more reasonable than the commission’s. Because the record shows that the school is not operated primarily for religious purposes, we need not decide whether the school is principally supported by any church or convention or association of churches. *See Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (if a decision on one point disposes of an appeal, the court will not decide other issues raised).

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.