DEPARTMENT OF HUMAN RESOURCES
EMPLOYMENT SECURITY ADMINISTRATION
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201
383-5032



## DECISION

**IN THE MATTER OF THE APPEAL OF:**

Baltimore Lutheran High School Association, Incorporated

**Decision No.:** 5-EA-83

**Date:** February 17., 1983

**Exec. Determ. No.:** 2464

**Emp. Account No:**

**ISSUE:**

Whether or not services performed for Baltimore Lutheran High School are services in covered employment within the meaning of 26 U.S.C. § 3309(b)(1) and § 20(g) (7)(v)B of Article 95A, the Maryland Unemployment Insurance Law.

## NOTICE OF RIGHT OF APPEAL TO COURT

**YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAY BE TAKEN UNPERSON, THROUGH AN ATTORNEY, IN THE CIRCUIT COURT OF BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU DO BUSINESS.**

**THE PERIOD FOR FILING AN APPEAL TO COURT EXPIRES** March 19, 1983

## APPEARANCES

**For the Appellant:**

Paul Redmond - Attorney
Allan Schmidt - Principal of Lutheran High School

**For the Executive Director:**

John Zell - Legal Counsel

## INTRODUCTION

This case was remanded to the Board of Appeals from the Court of Appeals of Maryland. In Employment Security Administration v. Lutheran High School Association, Inc., et. al., 291 Md. 750 (1981), the Court of Appeals remanded The Board's previous decision (39-EA-79) which dealt with whether or not Baltimore Lutheran High School was exempt from unemployment insurance taxation. The question was whether the school was exempt from unemployment insurance taxes (and, as a corollary, whether the employees of that institution are covered by unemployment insurance) under § 20(g)(7) (v)B of Article 95A, the Maryland Unemployment Insurance Law, and 26 U.S.C. Section 3309(b)(1)(A) and (B), part of the Federal Unemployment Tax Act.

This case has been renumbered as Employer Account No. 659030-0 (L) as it deals only with the Baltimore Lutheran High School Association.

## FINDINGS OF FACT

With the exceptions listed below, the Board of Appeals adopts the findings of fact made by the Board originally in Decision No. 39-EA-79. These facts appear in the decision of the Court of Appeals. The Board makes the following changes in and additions to the findings of fact. The tuition range of the school is now $1,050 to $1,900. The Board also wishes to clarify that the daily classes consist of seven forty-five minute courses, one of which is specifically designated as a religious class.

Regarding the nature of the mandatory chapel *services,* 'the Board finds that these are worship services which are held once a week and are required of all students.

Regarding the nature of the religious courses taught, the Board finds as a fact that these courses are devoted to deepening the student's Christian faith from the viewpoint of the Lutheran Church. These courses are not designed as academic and dispassionate studies of various religious doctrines. They are taught by two teachers specifically recruited for religious instruction who specialize in this area and are not even accredited as teachers by the Maryland State Department of Education.

The Board finds as a fact that there is little or no religious impact on the content of the non-theological courses taught. Although the philosophy of education of the school (and that of the principal of the school), is that the Bible is the primary textbook used in all classes, the Petitioner was unable to demonstrate any concrete way in which the text of the Bible had an impact upon the content of any non-theological course.

The Board has carefully considered whether the fact that the school principal states that evolution is not taught at the school shows a biblical impact upon a non-theological course. The Board concludes, however, that it does not. The testimony on this aspect of the case was that, while the school does not "teach" evolution, it does impart to the students the knowledge of what the theory of evolution consists. The Board is unable to discern any difference, at the high school level , between teaching a scientific theory as a theory and letting the students know of what the theory consists. The other factor cited by the Petitioner, purportedly to show that there is no such thing as a non-theological course, is that each course is taught from or by a Christian teacher. For reasons which will be elaborated on below, the Board does not perceive that the fact that the teacher is a Christian has that great an effect on the substantive content of the courses taught.

The Board also discerns no significant religious impact on the instructional methods used in a non-theological courses. Beyond the bald statement that all methodology is subservient to Lutheran Christian doctrine, the testimony concerning the methods was extremely vague. The Board finds two factors significant in coming to the conclusion, as it does, that there is no significant religious impact on the content of the non-theological courses.

First, the only specific religious components of the non-theological courses noted were that these courses may be interrupted for prayer for someone who may have a relative who is sick and that the classes may be interrupted for the teacher to read a portion of the Bible to a student who is having difficulties. The significant fact in both of these areas is that both of these activities consist of interruptions. The Board will not find a significant impact on the substantive content of a non-theological high school course based on interruptions which may occur during the classes.

Second, the Petitioner's primary contention in regard to the non-theological courses is that the mere presence of Lutheran Christian teachers has an intangible effect on the students. The Petitioner states that their biggest task is to stay away from the interference with the workings of the Holy Spirit between the teachers and students. The Board is not doubting the sincerity of the Petitioner's witness, nor the efficacy of this method at all, but the Board is unwilling to adjudicate a case under the tax laws of Maryland based a difference in instructional methods which is wholly intangible. The Board notes that, were the mere presence of a Christian teacher sufficient to make a non-theological course into a theological course, any public school employing a Christian teacher would be promoting the establishment of religion in violation of the First Amendment. Surely, some more concrete effect on methodology must be proven in order to show that a particular class is religiously oriented.

## CONCLUSIONS OF LAW

As the Court of Appeals has stated, the Lutheran Association must show that the school satisfies the requirements of 26 U. S.C. $3309(b)(1)(B). In order to meet the requirements of that section, the school must show that it is (1)an organization operated primarily for religious purposes and (2)that it is operated, supervised, controlled or principally supported by a church or convention or association of churches.

The Board finds that the school is supervised and controlled by a church or convention or association of churches. The Board of Directors is chosen directly from the delegates from an association of Lutheran churches. Each Lutheran congregation sends four delegates to serve as voting members of the association.

The Board of Directors is chosen from these association delegates. The Board of Directors clearly has the ultimate control over the school. Since the Board of Directors is clearly controlled by the delegates of an association of churches, it is clear that the school does meet the second requirement listed above.

The Board concludes, however, that Baltimore Lutheran High school is not operated "primarily for religious purposes." The primary purpose of Lutheran High School is to operate a secondary school and impart a secondary education to its students. The formal religious classes constitute only one-seventh of the curriculum of the school. The Board perceives this to be the crucial fact. Coupled with the additional fact that the non-theological courses are not significantly affected by religion in either content or methodology, the conclusion is inescapable that the primary purpose of this religious school is schooling and not religion.

In the case of Georgetown Preparatory School, Decision No. 10-EA-82, the Board concluded "the primary purpose of the teaching a non-religious subject is not religious, despite the fact that the non-religious subject may be taught by a religious person, in the presence of religious symbols and even after a short introductory religious prayer." Although, in the Georgetown case, the Board had no difficulty whatsoever in perceiving that the primary purpose of that school was not religious, this case poses a closer question, because the composition of both the students and the faculty are different from that shown in the Georgetown case, because there is no establishment of any effort to guide the high school graduates toward prestigious secular colleges (as was evidenced in the Georgetown case), nor is there the pervasive evidence of non-religious and time-consuming extra-curricular activities.

This case, therefore, raises the difficult question of what precisely is the determining factor as to whether a school's primary purpose is religious or not. The Board has concluded that the fact that six of the seven courses taught per day are non-religious is the most important factor to be looked at in any of these cases. In the absence of evidence of religious impact on the non-theological courses, or other evidence showing an accomplished purpose of diverting students substantially from a secular life (such as would be found in a seminary or similar institution), the Board will hold that the percentage of time devoted to religious classes is the most important factor in this case.

The question arises as to whether the religious atmosphere of the school, together with any restrictions on academic freedom, so permeate the life of the institution that the entire purpose

of the school is primarily religious, despite the fact that six-sevenths of the classroom time is devoted to non-religious subjects. The Board concludes that it does not.

The Supreme Court, in cases dealing with statutes providing various types of public aid to private school operated by religious groups, has dealt with the concept of what is a primarily religious purpose. In Tilden v. Richardson, 403 U.S. 672 (1971), the Court intimated that all activities at primary and secondary religious schools are for the primary purpose of religion. In Board of Education v. Allen, 392 U.S. 236 (1968), however, the Court ruled that for a state to supply textbooks in secular subjects to religious schools is not an advancement of religion by the First Amendment, even where the secular textbooks were, in fact, chosen by the religious authorities. Secular textbooks, the "Court reasoned, are not instrumental to the teaching of religion in private religious schools.

Ruling an admittedly sparse record, the Court stated, in that case :

> . . .we cannot agree with appellants even that all teaching in a sectarian school is religious or that the processes of religious and secular training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental to the teaching of religion.
>
> Id. at 248

Since Tilden v. Richardson dealt with the question of state aid to sectarian colleges, the language intimating that all activities at primary and secondary sectarian schools is religious is essentially dicta. The Board of Education v. Allen case, directly ruling secular textbooks supplied to primary and secondary sectarian schools do not significantly advance religion, is more persuasive.

Since the secular textbooks used by Lutheran High School are not used primarily for religious purposes, and since no convincing evidence has been produced showing a significant religious component to secular courses, the Board must conclude that these courses are not significantly intertwined with religion.

Since the overwhelming percentage of time ( and, persumably, money and effort) is spent on non-religious affairs, and since whatever influence the religious ambiance may have on the whole life of the school is not sufficient to imbue the secular courses with a primarily religious character, we conclude that Lutheran High School is not "an organization which is operated primarily for religious purposes" within the meaning of 26 U.S.C. $3309(b)(1)(B) and $20(g) (7)(v)B of the Maryland Unemployment Insurance Law.

The Board is aware that a decision that the employees of Lutheran High School are covered by unemployment insurance raises the spectre of excessive governmental entanglement with religion. The Board concludes, however, that any entanglement would be minuscule.

In the case of Chrisitan School Association v. Commonwealth of Pennsylvania, 423 A2nd 1340 (1980), the Pennsylvania Commonwealth court listed various burdens and entanglements which unemployment insurance coverage may visit upon a religious body operating a school. The Board does not agree that any of these are substantial and will discuss each briefly.

First, it is not likely that the payment of the tax itself would be a substantial burden on any of the congregations who send delegates and support the Baltimore Lutheran High School Association, Inc. Most of the employees, of course, will be exempted from coverage under another section of the Law, §20(g)(7)(v)c, since, as the Board previously ruled, Christian teachers who are called to the teaching ministry are exempt from coverage. The records show that nineteen of twenty-eight teachers are in this category. In addition, the testimony is that, from the inception of the high school in 1965 until the first hearing on this case held in 1979, only one person employed by the high school ever even made a claim for unemployment insurance. Of course, there are other employees of the school besides teachers, but there has been no showing of a number which would make a substantial impact on the finances of any of the Lutheran congregations in Baltimore. Of course, the high "school would have the option of being either a contributor (paying a percentage of its payroll in taxes) or a reimburser (reimbursing only for actual benefits paid out). The Board does not believe that this will have a serious financial impact on any congregation of the Lutheran faith in Baltimore.

Second, the increase in record keeping is minuscule. The Employment Security Administration basically requires quarterly wage information identical, or nearly identical, to wage information required already by the Social Security Administration. The Agency also requires separation information on separated employees. This information consist of nothing more than a half piece of paper (form DHR/ESA 207) that can be filled out by anyone with access to the records in less than three minutes. The total record keeping burden is simply not that significant. It is important to note that the school has already agreed to independent annual auditing of its finances as one of the costs of being approved by the State Department of Education. See, COMAR 13A.09.04.11 A. and B.

The time spent attending hearings to determine a claimant's eligibility for unemployment benefits will also be insignificant. The record show only nine persons who would be covered by unemployment insurance. It is true that the janitorial and mainte-

nance staff would add to that number. Nevertheless, a relatively small number of employee are involved. Even those teachers who are not called or ordained (and who therefore will be covered by unemployment insurance) are screened for a deep belief in the Lutheran Christian education espoused by the school . The Board concludes that attendance at an unemployment insurance appeals hearing would be an extremely rare burden that would be placed on the school by coverage. The Board can perceive no burden at all that would be placed on the actual congregations of the Lutheran Church in Baltimore by these hearings.

The more substantial issue raised by the entanglement question is whether or not eligibility hearings may come about which would require state adjudicators to rule on the validity of any single person's religious belief or on the question of what is the correct belief of the Missouri synod of the Lutheran Christian Church. First of all, the Board notes that such an occasion would almost never occur, since the teachers' beliefs are identical to those of the school, according to the testimony.

An extremely rare case could occur, however, where a person whose beliefs, at first acceptable to the association, change so dramatically that he or she felt required by conscience to actively preach against these beliefs. If such a person were fired for this reason, his religious beliefs could become an issue. Even in such an extremely unlikely case, however, the conflict can be resolved without an examination of the precise details of the religious beliefs of either party. In fact, a detailed examination of a sincere and religious belief (or change of belief) would be prohibited.

In Thomas v. Review Board of the Indiana Employment Security Division 450 U.S. 707 (1981) , the Supreme Court held that a sincere religious belief prompting a voluntary quit of a job can be dealt with . in the unemployment insurance context without entanglement of the government in religious affairs and without any factfinding concerning the orthodoxy of religious beliefs. The sole governmental 'function is to find whether or not the asserted offending belief is sincere, a type of credibility determination made already in each and every unemployment insurance appeal case. No comparison of the individual's belief with the beliefs of the Lutheran Christian Church would be necessary, since the issue would be sincerity, not dogma.

The case of Ursiline Academy v. Director of Division of Employment Security, 420 N.E. 2d. 323 (Mass. 1981) does not persuade the Board differently. In Ursiline Academy, a school operated by a separately incorporated order of Roman Catholic nuns was held to meet the requirements of 26 U.S.C. Section 3309(b)(1) (B). The Massachusetts court,reasoned that the school was, to a great degree, supervised by and financed by the local Roman Catholic

bishop, thereby meeting one test of the statute. Without any extensive further reasoning or fact finding, the court simply stated that the school was operated primarily for religious purposes. By its action, the court was actually merging the two tests of 3309(b)(1)(B) into one test. The Board of Appeals does not agree with this approach at all, as a two-part test was clearly intended by Congress and the Maryland Legislature.

Services performed, however, by persons who are ordained or who are installed ministers of religious education are exempt from unemployment insurance coverage by § 20(g) (7)(v)C of the Maryland Unemployment Insurance Law. Since nineteen members of the Petitioner's faculty are installed ministers of religious education, they are exempt from unemployment insurance coverage within the meaning of that section of the Maryland law.

DECISION

Services performed for Baltimore Lutheran High School by installed ministers of religious education are exempt from Maryland Unemployment Insurance coverage by § 20(g) (7)(v)C of the Maryland Unemployment Insurance Law.

Services performed for Baltimore Lutheran High School by persons who are not ministers of religious education are engaged in covered employment within the meaning of § 20(g) (7)(v)B of the Maryland Unemployment Insurance Law and 26 U.S.C. Section 3309(b)(1)(B).

The determination of the Executive Director, and the previous decision of the Board, Decision No. 39-EA-79, 'are affirmed.

Thomas W. Keech
Chairman

Maurice E. Dill
Associate Member

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DATE OF HEARING: June 22, 1982.

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