State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CRT 6145-09

AGENCY DKT. NO. PN34XB-03008

HARRIET BERNSTEIN, LUISA PASTER,
AND J. FRANK VESPA-PAPALEO, DIRECTOR,
NEW JERSEY DIVISION ON CIVIL RIGHTS,

Petitioners,

v.

OCEAN GROVE CAMP MEETING ASSOCIATION,

Respondent.

Lawrence Lustberg, Esq., for petitioners Harriet Bernstein and Luisa Paster (Gibbons, P.C., attorneys)

Jean LoCicero, Esq., co-counsel for petitioners Harriet Bernstein and Luisa Paster

James A. Campbell, Esq., member of the Arizona Bar, admitted pro hac vice, for respondent. Attorney of Record: Michael P. Laffey, Esq. (Messina Law Firm, P.C., attorneys)

Record Closed: December 30, 2011 Decided: January 12, 2012

BEFORE **SOLOMON A. METZGER**, ALJ t/a:

This matter arises out of a decision in March 2007 by respondent, the Ocean Grove Camp Meeting Association, to deny petitioners Harriet Bernstein and Luisa Paster the use of its Boardwalk Pavilion for their civil-union ceremony. Petitioners filed a complaint with the Division on Civil Rights, which in December 2008 found probable cause to credit their claim under the Law Against Discrimination (LAD), N.J.S.A. 10:5-5 et seq. In July 2009 the matter was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 to -23, and the Division was added as a complainant. After discovery and the adjournment of scheduled hearing dates, the parties agreed to proceed by way of cross-motions for summary decision, N.J.A.C. 1:1-12.5; Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

The relevant facts for purposes of the cross-motions are substantially undisputed. Petitioners Bernstein and Paster are residents of Ocean Grove, a square mile of real estate owned by respondent, a non-profit organization. Respondent is closely associated with the United Methodist Church; the voting members of the Board of Trustees must either be clergy of or hold membership in the church. Respondent operates a number of religious institutions over which it maintains close control and also leases much of its property for business and residential purposes.

The Boardwalk Pavilion is an open-air wood-framed seating area along the boardwalk facing the Atlantic Ocean. At the time of denial in March 2007, the Pavilion was used primarily as a venue for religious programming, but respondent also hosted community and charitable events and rented the space for weddings. The fee for a wedding was $250. The form used by respondent to rent the Pavilion did not inquire into religious affiliation and staff typically asked no questions along these lines. The form was used primarily to record bookings and determine availability. When not in use by some organization, the Pavilion is open to passers-by along the boardwalk to sit and take in the scene.

Petitioners completed the appropriate form and paid the required deposit. Their application was denied soon thereafter and their deposit was returned. Petitioners sought an explanation and were informed that the notion of civil union conflicted with

scriptural teaching regarding homosexuality and that respondent could not condone such a ceremony at the Pavilion. This was the first time in anyone's memory that a denial was based on a reason other than availability. During this period respondent maintained a web page called "An Ocean Grove Wedding," which advertised the Pavilion as a wedding venue. The page was silent regarding respondent's views on marriage. After the incident that gave rise to this proceeding, respondent stopped renting the Pavilion and currently uses it exclusively for programming that it sponsors, or co-sponsors.

In July 1989 respondent applied for a Green Acres real-estate tax exemption for Lot 1, Block 1.01, which includes the Pavilion and the adjacent boardwalk and beach area. The application describes the area as public in nature. The Green Acres program is designed to preserve open space and the statutory scheme authorizes a tax exemption for non-profit corporations utilizing property for conservation or recreational purposes. One condition of the exemption is that the property be "open for public use on an equal basis," N.J.S.A. 54:4-3.66; N.J.A.C. 7:35-1.4(a)(2).

Neptune Township, the municipality within which respondent is located, opposed the application on grounds that respondent is governed by religious restrictions that make equal-access doubtful. At a public hearing conducted by the Department of Environmental Protection in September 1989, respondent represented that the Pavilion was available for public use without reservation. Following the hearing the Department approved the tax exemption on certain conditions, one of which required the property to be open for public use on an equal basis. Respondent renewed this application every three years as required, and the tax exemption was continued through the period in question here with the same condition for equal access. Following the events that led to this proceeding, respondent applied once again to renew its real-estate tax exemption. The Department denied that portion of the exemption relating to the Pavilion, concluding that the Pavilion was not available on an equal basis. This is the substance of the record.

The LAD makes it unlawful for the owner of "any place of public accommodation" to refuse its use on the basis of sexual orientation or civil-union status, N.J.S.A. 10:5-

12(f). Our courts have evolved tests for assessing whether a location is one of public accommodation.[1] We look first to the statute. The LAD broadly defines public accommodation to include any "boardwalk, or seashore accommodation; any auditorium, meeting place, or hall," N.J.S.A. 10:5-5(l). The Boardwalk Pavilion as a structure falls within or near these examples and thus has the look of a place of public accommodation. Searching further we inquire as to ties with government, Ellison v. Creative Learning Ctr., 383 N.J. Super. 581 (App. Div. 2006). Respondent's Green Acres tax exemption is particularly relevant here. One condition of that exemption was that the entire lot, which includes the Pavilion, remains open to the public on an equal basis. That was the promise respondent made to the State of New Jersey. The State understood that promise to encompass activities within the Pavilion, including wedding ceremonies. The DEP Commissioner's view on the meaning of a statute within the Department's orbit is entitled to deference, see Reilly v. AAA Mid-Atlantic Ins. Co. of N.J., 194 N.J. 474 (2008).

When respondent first applied for a Green Acres tax exemption in 1989, civil unions were not yet legal in New Jersey, and thus whether the Pavilion was thereby a place of public accommodation may have been a matter of indifference. Respondent is unconcerned that same-gender couples take in the sea air at the Pavilion, or participate in a Pavilion activity. In late 2006, the New Jersey Supreme Court decided Lewis v. Harris, 188 N.J. 415 (2006), granting same-sex couples equal rights under the New Jersey Constitution. This was quickly incorporated into legislation, N.J.S.A. 37:1-28. Thus, once civil unions became lawful and the subject of anti-discrimination law, weddings at the Boardwalk Pavilion were vulnerable to attack.

Respondent argues that it didn't need a Green Acres tax exemption for the Pavilion; it could at any time have obtained the same benefit by applying for a tax exemption as a religious organization. Indeed, after these events that is exactly what it did. We are, however, bound by the facts that were, not those that might have been, or that came to pass in the aftermath of petitioners' application. Respondent accepted a particular form of tax exemption that required it to keep the Pavilion open to the public

[1] The term "place" can extend beyond fixed locations, but that discussion is unnecessary here.

on an equal basis, N.J.S.A. 54:4-3.64; N.J.A.C. 7:35-1.4. Neptune Township was skeptical that this could be achieved, but respondent persuaded the DEP and renewed that promise every three years. Thus, it not only interacted with government, it acknowledged the very thing that the interaction test seeks to assess.

Respondent also solicited business for the Pavilion in a web page that advertised "An Ocean Grove Wedding." There it presented itself to the public at large as a wedding venue without any mention of preconditions along doctrinal lines. This too is a factor in assessing whether a location is a public accommodation, see Clover Hill Swimming Club, Inc. v. Goldsboro, 47 N.J. 25 (1966).

The inquiry does not end with a determination that the Boardwalk Pavilion was, in March 2007, a place of public accommodation. As a religious organization that deems same-gender unions sinful, respondent is loath to be associated with such ceremonies and maintains that compelling this through the LAD violates its right of expressive association, free speech and free exercise of religion, see, e.g., Boy Scouts of Am. v. Dale, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000); Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). I disagree.

There is no question that respondent is fundamentally a religious organization, free to frame its mission without governmental oversight or intrusion, State v. Celmer, 80 N.J. 405 (1979). The certification of its president maintains that the Pavilion was used as part of its "wedding ministry," a cause inherently religious, see Wazeerud-Din v. Goodwill Home and Missions, Inc., 325 N.J. Super. 3 (App. Div. 1999). Any wedding of heterosexual couples at the Pavilion, whether of its own denomination, other denominations within Christianity, or non-Christian religions, or even secular weddings, nonetheless promoted marriage between a man and a woman. This element of its ministry runs through all of the weddings it permitted and is not undermined by outreach to other traditions, as "every marital union between a man and a woman represents the union of Jesus Christ and his Church." That it had never before declined a wedding, other than for scheduling conflicts, only means that it had never before been asked to permit a same-gender service.

While a motion for summary decision is not the place for fact finding, neither may an opponent of the motion blunt summary decision with bald oppositional statements, Brill, supra, 142 N.J. 520. Respondent filed a certification repeatedly referring to a "Wedding Ministry." Yet, respondent's interrogatory answers concede that it created no writing on the subject before March 2007, though weddings at this location had been conducted for at least ten years. There is no indication that couples, particularly those that chose secular vows, or that were of other faiths, were ever told that they were participating in a ministry. As respondent would know better than most, passions around such questions can run high, and the absence of disclosure is curious. Respondent has a lovely venue for weddings and is an organization that undoubtedly supports the idea of weddings. It does not follow, however, that it had a "wedding ministry," a transformative phrase that evokes religious mission. The doctrinal foundations for a trans-denominational wedding ministry limited to heterosexual couples might well be found in the biblical citations to which respondent refers, as well as in its Book of Discipline. We do not here debate theology or question beliefs. My point simply is that if such a ministry had existed at the time in question, we would expect to find some trace of it.

From this record it appears respondent was renting space at the Pavilion for weddings, an activity largely detached from associational expression or speech, Pruneyard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980). Respondent did not inquire into religious beliefs or practice because it did not sponsor, or otherwise control, these weddings. Some volunteers may have been around to observe or be helpful, but no more. These ceremonies might have been devoid of references to Christian doctrine, might have contained language or symbolism antithetical to Christian doctrine, and any passerby could stop to listen. The arm's length nature of the transactions gave respondent a comfortable distance from notions incompatible with its own beliefs. That same distance pertained to civil unions.

As to "free exercise," the LAD is a neutral law of general application designed to uncover and eradicate discrimination; it is not focused on or hostile to religion.[2] To the contrary, it carves away exceptions on behalf of religious organizations, N.J.S.A. 10:5-5(l), (n). I do not believe that the facts pose a true question of religious freedom, but were they to, the matter would not be governed by the high bar of "strict scrutiny," but by a much lower standard that tolerates some intrusion into religious freedom to balance other important societal goals, see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993); Employment Div., Dep't of Human Resources of Ore. v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990). Respondent can rearrange Pavilion operations, as it has done, to avoid this clash with the LAD. It was not, however, free to promise equal access, to rent wedding space to heterosexual couples irrespective of their tradition, and then except these petitioners.

Based on the foregoing, I **CONCLUDE** that respondent violated the LAD when it refused to conduct a civil-union ceremony for Ms. Bernstein and Ms. Paster. Thus, petitioners' motion is **GRANTED**; respondent's motion is **DENIED**.

Petitioners have not sought to establish damages and appear fundamentally to be seeking the finding that they were wronged and that respondent was not free to exclude same-sex unions under the conditions that then existed. It does not appear that respondent acted with ill motive. Respondent opposes same-sex unions as a matter of religious belief, and in 2007 found itself on the wrong side of recent changes in the law. I have considered the possibility of a nominal penalty, but conclude that this would serve little. The finding of wrongdoing should be an adequate redress.

I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION ON CIVIL RIGHTS** for consideration.

[2] Although the Division has acknowledged that it does not pursue religious organizations for conduct that might otherwise be discriminatory, the instant matter involves the secular activity of a religious organization in renting pavilion space.

This recommended decision may be adopted, modified or rejected by **DIRECTOR OF THE DIVISION ON CIVIL RIGHTS,** who by law is authorized to make a final decision in this matter. If the Director of the Division on Civil Rights does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **ASSISTANT DIRECTOR, BUREAU OF POLICY, DIVISION ON CIVIL RIGHTS, 140 E. Front Street, PO Box 089, Trenton, New Jersey 08625-0089,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 12, 2012
DATE

SOLOMON A. METZGER, ALJ t/a

Date Received at Agency: January 12, 2012

Date Mailed to Parties: January 12, 2012

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