SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1972-15T4

DOREEN L. SIMON,

Appellant,

v.

BOARD OF REVIEW, DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, and SHALOM TORAH CENTERS,

Respondents.

Submitted May 9, 2017 – Decided December 14, 2017

Before Judges Ostrer and Leone.

On appeal from the Board of Review, Department of Labor and Workforce Development, Docket No. 056653.

Doreen L. Simon, appellant pro se.

Christopher S. Porrino, Attorney General, attorney for respondent Board of Review (Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Elizabeth A. Davies, Deputy Attorney General, on the brief).

Respondent Shalom Torah Centers has not filed a brief.

The opinion of the court was delivered by

OSTRER, J.A.D.

In this unemployment compensation appeal, the parties dispute whether the employer satisfies the exemption for certain religious schools. N.J.S.A. 43:21-19(i)(1)(D)(i)(II). New Jersey's unemployment law excludes from the definition of "employment" — and thereby exempts from unemployment compensation coverage — work for a school that satisfies two requirements: (1) it "is operated primarily for religious purposes" and (2) it "is operated, supervised, controlled or principally supported by a church or convention or association of churches." Ibid.[1] Petitioner was a computer teacher at Shalom Torah Academy until she was terminated in 2014. She appealed the initial denial of unemployment benefits. The Board of Review ultimately adopted the Appeal Tribunal's holding that the school was exempt. On appeal, petitioner contends the Board erred because the school failed to meet either of the two prerequisites for the exemption. As we are not satisfied the Tribunal or the Board made sufficient findings, we vacate and remand.

The facts pertaining to petitioner's employment were undisputed. For almost six years, she was a computer teacher and

[1] The Board does not contend that the school satisfies a separate exemption, for "services performed . . . [i]n the employ of . . . a church or convention or association of churches." N.J.S.A. 43:21-19(i)(1)(D)(i)(I). See n. 5 infra.

lab manager at Shalom Torah Academy, a K-through-8 school in the Morganville section of Marlboro Township. Initially, the school and its employees contributed to the unemployment compensation system. In 2013, the school reversed course and opted out.[2] There was no dispute that but for the school's claimed statutory exemption, petitioner was eligible for unemployment benefits.

Turning to the first prong of the exemption, petitioner asserted at the Tribunal hearing that the school was operated primarily for secular, as opposed to religious, purposes. The school's Facebook page, which she introduced into evidence, stated, "The goal of Shalom Torah Academy is to provide the next generation of American Jews with an outstanding secular education complemented by an appreciation for the Jewish heritage and a love for Torah, mitzvoth, mankind and the Land of Israel."[3]

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[2] According to the Tribunal, the Division of Unemployment Compensation established the school as an exempt employer. However, no documentation of that decision is in the record. Confusingly, the Tribunal stated, "Division records designate the above named employer with statute N.J.S.A. 43:21-8(c)(2)," which pertains to an otherwise exempt employer's participation in the system. Notably, petitioner was not offered an opportunity to participate in, or appeal the school's decision to opt out. She testified that she asked the Department if she could pay into the system on her own, and was told she could not. The Board concedes petitioner was not precluded from challenging the school's status in the current proceeding.

[3] The school's website repeated this statement, substituting "General Studies" for "secular."

Although religious education was a significant part of the curriculum, and petitioner was unaware of any non-Jewish students at the school, she testified that the coursework was "heavily slanted toward secular studies." Based on class schedules introduced into evidence, she stated the majority of class hours were in secular subjects. The school's witness, its bookkeeper, was unfamiliar with the breakdown of classes; but noted that prayers were recited during the school day. Petitioner stated no religious services were conducted at the school building.

Regarding the school's management, petitioner maintained that the school was controlled by an independent board of directors. She cited a 2009 news article that reported the school had financial troubles, had not paid teachers, and replaced its board of directors of parents and educators "with people who have financial backgrounds." She also introduced a 2010 article reporting the school filed for bankruptcy protection.

Her most recent annual employment contract was with "Shalom Torah Academy of Western Monmouth County." "Shalom Torah Academy" was the drawer on her paychecks. She acknowledged there was a second Shalom Torah Academy in East Windsor. Nearby that location is a synagogue, Congregation Toras Emes, but she maintained it was a distinct organization.

Without support of any formational or corporate documents, or the bankruptcy filings, the school's bookkeeper testified, sometimes inconsistently, about the school's organization. She asserted that the school was operated as a division of a separately incorporated entity known as Shalom Torah Centers. That corporation established as divisions the East Windsor school, Congregation Toras Emes in East Windsor, and Shalom Heritage Center, which she said was focused on adult education. Yet she also testified that Shalom Torah Centers was "incorporated as a synagogue" and the "schools are run under the synagogue." She denied that Shalom Torah Academy has its own board of directors, insisting it was "part of Shalom Torah Centers," and was not separately incorporated. She stated that it "was probably just a mistake" to identify Shalom Torah Academy as the drawer of the paychecks.

In rebuttal, petitioner pointed out that the congregation's website did not mention it was a division of Shalom Torah Centers. Notably, Shalom Torah Academy's website stated that it "is part of Shalom Heritage" which was led by a rabbi whose email address was "shalomheritagecenter.org."

The Tribunal found that Shalom Torah Centers was petitioner's employer; it was a "religious school for students of the Jewish religion," although secular and non-secular subjects were taught;

and it was exempt from the unemployment compensation system. The Tribunal concluded that the proportion of secular classes the students took was both "immaterial" and "d[id] not, on its own, establish whether a school is operated 'primarily for religious purposes.'" The Tribunal found: "[C]learly the school is for Jewish students only and Judaism is incorporated in the students' experience at the school on a daily basis." The Tribunal did not address the second requirement for exemption: that the school was "operated, supervised, controlled or principally supported by a church or convention or association of churches . . . ." N.J.S.A. 43:21-19(i)(D)(i)(II).

Apparently relying on the Division's prior treatment of the school, the Tribunal concluded: "Nevertheless, the eminent fact on which the Tribunal relies to arrive at its conclusion that the claimant was in exempt employment and not in covered employment is that the above named employer had the option, as opposed to the obligation, to cover its employees for unemployment insurance." The Tribunal added, "The fact that the employer was not obligated by FUTA [Federal Unemployment Tax Act] to contribute to the unemployment insurance fund establishes that the claimant worked for an exempt employer." The Board of Review adopted the Tribunal's decision without elaboration.

We defer to the Board's decision unless it is arbitrary, capricious, or unreasonable, or is unsupported by substantial credible evidence. Brady v. Bd. of Review, 152 N.J. 197, 210 (1997). However, we are not bound by the Board's statutory interpretation. See, e.g. McClain v. Bd. of Review, 451 N.J. Super. 461, 467 (App. Div. 2017). Nor are we obliged to defer to an agency's conclusory decision that lacks essential fact-finding. Blackwell v. Dept. of Corrs., 348 N.J. Super. 117, 122-23 (App. Div. 2002).

> It is axiomatic in this State by this time that an administrative agency acting quasi-judicially must set forth basic findings of fact, supported by the evidence and supporting the ultimate conclusions and final determination, for the salutary purpose of informing the interested parties and any reviewing tribunal of the basis on which the final decision was reached so that it may be readily determined whether the result is sufficiently and soundly grounded or derives from arbitrary, capricious or extra-legal considerations.
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> [In re Howard Sav. Inst., 32 N.J. 29, 52 (1960).]

"When an administrative agency's decision is not accompanied by the requisite findings of fact and conclusions of law, the usual remedy is to remand the matter to the agency to correct this deficiency." Dimaria v. Bd. of Trs. of Pub. Employees' Ret. Sys., 225 N.J. Super. 341, 347 (App. Div. 1988).

We are constrained to remand here. We focus on the Tribunal's decision, because the Board adopted it as its own. Although an employee generally bears the burden to establish a right to benefits, Brady, 152 N.J. at 218, the party seeking an exemption from the law's coverage — here, the school — should bear the burden to show that it qualifies. See Philadelphia Newspapers, Inc. v. Bd. of Review, 397 N.J. Super. 309, 319 (App. Div. 2007) (stating employer had burden to establish that services did not qualify as employment), certif. denied, 195 N.J. 429 (2008); see also Marx v. Friendly Ice Cream Corp., 380 N.J. Super. 302, 310 (App. Div. 2005) (employer bears burden to prove right to exemption under minimum wage law).

As for the first requirement — the Tribunal did not expressly find that the school was "operated primarily for religious purposes," notwithstanding its observation that the school was "for Jewish students only,"[4] and Judaism was incorporated in the curriculum. Those findings are evidential, but not conclusive as to whether religious purposes were the school's primary aim. The proportion of secular course offerings was also evidential, as was the school's own statements of its goals.

[4] We interpret that statement to be a factual finding that only Jewish students actually attended the school. If the Tribunal meant that the school excluded non-Jewish students, such a finding would lack evidential support in the record.

Other jurisdictions have reached varying results as to whether a school met the "primary purpose" test. Compare Baltimore Lutheran High School Ass'n v. Emp't Sec. Adm., 490 A.2d 701, 705-06 (Md. 1985) (reviewing factors to be considered in assessing whether a school was operated primarily for religious purposes, and affirming agency decision that the Baltimore Lutheran High School was not), and Mid Vermont Christian School v. Dept. of Emp't & Training, 885 A.2d 1210, 1213-14 (Vt. 2005) (noting agency's finding that "although the school's Bible's instruction, inculcation of Christian values and glorification of God were integral parts of the educational mission, the primary purpose is to provide a thorough education, combining traditional and modern subjects to prepare the majority of graduates for college"), with Community Lutheran School v. Iowa Dept. of Job Serv., 326 N.W.2d 286, 290-91 (Iowa 1982) (holding that Lutheran school was operated primarily for religious purposes). See also Samaritan Inst. v. Prince-Walker, 883 P.2d 3, 7 (Colo. 1994) (stating, regarding a non-educational organization, that "[t]he activities of an organization, and not the motivation behind those activities" determine whether it is operated primarily for religious purposes). It was incumbent upon the agency to make a finding as to the first statutory requirement.

The Tribunal also did not address the second prong of the test — whether the school was "operated, supervised, controlled or principally supported by a church or convention or association of churches." The Board agrees that a synagogue is treated similarly to a church under the statute. Although the Board on appeal apparently relies on the bookkeeper's statement that the school "was run under the synagogue," neither the Tribunal nor the Board in its decision below, reached that conclusion.[5]

Furthermore, the bookkeeper's statement was at odds with her other statement that the synagogue was a division of Shalom Torah Centers, as was the school. If so, the school was an affiliate of a synagogue, not a subsidiary. The bookkeeper's testimony also

[5] Indeed, if it were established that the school lacked a legal existence separate from a "church" — here, the synagogue — then it would be exempt under N.J.S.A. 43:21-19(i)(D)(i)(I), which excludes "services performed . . . in the employ of . . . a church or convention or association of churches . . . ." The United States Supreme Court held, in St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 784 (1981), that 26 U.S.C. § 3309(b)(1)(A) — which contains language identical to N.J.S.A. 43:21-19(i)(D)(i)(I) — "was meant to apply to schools . . . that have no separate legal existence from a church, or . . . from a 'convention or association of churches.'" See also id. at 782 n.12 ("To establish exemption from FUTA, a separately incorporated church school . . . must satisfy the requirements of § 3309(b)(1)(B): (1) that the organization 'is 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.'") (emphasis added).

conflicted with petitioner's testimony that an independent board of directors governed the school.

We recognize that hearsay is admissible in unemployment hearings. N.J.A.C. 1:12-15.1(a)(b). But, the residuum rule still applies. DeBartolomeis v. Bd. of Review, 341 N.J. Super. 80, 85 (App. Div. 2001). "Notwithstanding the admissibility of hearsay evidence, the decision as rendered must be supported by sufficiently substantial and legally competent evidence to provide assurance of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:12-15.1(b). Notably, the bookkeeper did not provide a foundation — for example, she did not say she ever read Shalom Torah Center's corporate documents — for her hearsay statements regarding the documents' substance. Particularly given the inconsistency in the bookkeeper's testimony, the Board may deem it appropriate to reopen the record to require the school to present admissible documents to establish the relationship between the Marlboro school, the East Windsor synagogue, and any corporate entity or entities. See N.J.S.A. 43:21-6(e) (stating the Board may "direct the taking of additional evidence").[6]

[6] In a case involving an independent Jewish day school, the Massachusetts Supreme Judicial Court held that the notion of support in the phrase "principally supported" was not limited to

Finally, the Board does not seek affirmance based on the Tribunal's reasoning that since the school had the option to join the unemployment compensation system, it must be deemed exempt. Nor does the Board rely on the Tribunal's rationale "that the employer was not obligated by FUTA to contribute to the unemployment insurance fund . . . ." Therefore, we need not address these points. However, we note that New Jersey law does not mirror FUTA, compare 26 U.S.C. § 3309(b) with N.J.S.A. 43:21-19(i)(1)(D), and New Jersey is free to adopt a narrower exemption than permitted by FUTA. See Special Care of N.J., Inc. v. Bd. of Review, 327 N.J. Super. 197, 208 (App. Div. 2000) (stating that the "existence of an exemption under FUTA does not mandate the same exemption under state law." (citing Standard Dredging Corp. v. Murphy, 319 U.S. 306, 310 (1943))).

The order of the Board is vacated, and the matter is remanded for additional findings of fact. We do not retain jurisdiction.

financial support and included other forms of support from area synagogues and Jewish organizations. Bleich v. Maimonides School, 849 N.E.2d 185, 191-92 (Mass. 2006). As the parties have not addressed the case, we leave it to the Board in the first instance to address that issue.