



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

WITHDRAWAL

OAL DKT. NO. OHE 07720-21

AGENCY DKT. OHE 2021-1

IN THE MATTER OF
BETH MEDRASH GOVOHA
(ACLU of NEW JERSEY et al
v. ROCHELLE HENDRICKS)

Jeanne LoCicero, Esq., Karen Thompson, Esq., Elyla Huertas, Esq., and Frank Corrado, Esq.; and Alex Luchenitser, Esq., admitted pro hac vice, attorneys appearing for petitioners, American Civil Liberties Union of New Jersey Foundation; Barry, Corrado, Grassi, PC; and Americans United for Separation of Church and State.

Avi Schick, Esq., admitted pro hac vice, appearing for respondent Beth Medrash Govoha (Troutman Sanders, LLP, attorneys)

Record Closed: December 21, 2021

Decided: December 22, 2021

BEFORE **SUSAN M. SCAROLA**, ALJ (Ret., on recall):

STATEMENT OF THE CASE AND PROCEDURAL HISTORY¹

The underlying issue is whether the Secretary of the Department of Higher Education (Secretary) may award grants to Beth Medrash Gehova (BMG) (respondent) as part of a state program to subsidize facility and infrastructure projects for higher education institutions in New Jersey. BMG applied for and received grants to fund the construction of a new library and research center and a three-story academic center. The ACLU of New Jersey, joined by similarly-interested parties (collectively, the petitioners or ACLU) challenged the awarded grants in the Superior Court, Appellate Division, as violating three provisions of the State Constitution: the Religious Aid Clause as set forth in Article I, Paragraph 3; the Establishment Clause as set forth in Article I, Paragraph 4; and the Donation Clause as set forth in Article VIII, Section 3, Paragraph 3. The ACLU also contended that the grants violated the New Jersey Law Against Discrimination.

The Appellate Division invalidated the grants, holding that they violated the Religious Aid Clause of the State Constitution.

On certification to the Supreme Court under the caption ACLU v. Hendricks, 233 N.J. 181 (2019), the Court issued a decision on May 2, 2018, that determined that the record, consisting of grant applications submitted by BMG to the Secretary, was incomplete and “that an informed administrative decision could not have been made without the benefit of [a proper] record.” 233 N.J. at 185. More specifically, it found that the record did not reveal enough about “the nature of the educational training and curriculum offered by the Yeshiva . . . and how it is delivered, nor does the record present sufficient detail about how the grant fund projects will be put to use in the institution[’s setting].”² Id. at 200.

In order to discern these facts, the Court felt it “imperative that those issues be more fully developed below, through the crucible of an adversarial process, before the

¹ The statement of the case and the procedural history are drawn from the memorandum of the New Jersey Office of Higher Education Notice of Case Transmittal dated August 14, 2021.

constitutional questions raised in this matter are addressed.” Thus, the Court remanded the matter to the Secretary for the development of a proper record with fact-finding “prior to the ultimate administrative decision of the Secretary concerning the challenged grant[.]” Id. at 185.

Consistent with the Court’s directive, on July 15, 2019, the Secretary transmitted the matter to the Office of Administrative Law (OAL) as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The Secretary sought fact-finding on the following issues as directed by the Court:

1. Whether BMG is inherently sectarian in nature;
2. Whether, in the setting of BMG’s curriculum and training programs, the grant funds will necessarily be used in the “maintenance of any minister or ministry.”;
3. Whether the promised restrictions, or other curbs, against sectarian use of the grant proceeds at present and into the future are adequate;
4. The nature of the educational training and curriculum offered by BMG and how it is delivered; and
5. How the grant fund projects will be put to use at BMG.

[Hendricks, 235 at 201.]

On January 10, 2020, following disagreement by the parties regarding the procedural posture and scope of the hearing, BMG withdrew “its pursuit of these grant funds through any State processes” and the matter was returned to the Secretary and closed.

On June 14, 2021, BMG submitted a written request to the Secretary to have the matter reopened and to continue in the process. According, the Secretary re-transmitted the matter to the OAL as a contested case, “consistent with the Supreme Court’s finding that, ‘the remaining factual disputes require resolution before the

² The Supreme Court case had also included the Princeton Theological Seminary which withdrew its

Secretary can make a properly informed decision on BMG's grant application." The case was filed with the OAL on September 16, 2021, and a conference call was scheduled for December 14, 2021.

On December 13, 2021, a copy of a letter dated December 10, 2021, from Yitzchok Shraga Kotler, Senior VP, Administration & Campus, BMG, directed to Secretary Brian K. Bridges, was received at the OAL. The letter indicated that "BMG has therefore elected not to continue to pursue these grants through this process, and is hereby withdrawing from the grant . . ." See attached Exhibit A.

On December 14, 2021, the conference call was held with counsel for the parties participating. Counsel for BMG indicated that he would be submitting a formal withdrawal by December 17, 2021, but later requested an extension to December 20, 2021, which was granted.³

On December 21, 2021, a memorandum was sent to me from Kurt Schwartz, OAL Deputy Clerk, enclosing a letter directed to him from Eric Taylor, Director, Office of Licensure, and dated December 17, 2021, indicating the "the Secretary was notified via the attached letter [Exhibit A] that [BMG] has elected to withdraw its consideration for the grants funds at issue," and requesting the return of the file. See attached Exhibit B.

LEGAL ANALYSIS AND CONCLUSION

No facts are in dispute as to the circumstances surrounding the requested withdrawal. Pursuant to N.J.A.C. 1:1-19.2 (Withdrawals):

(a) A party may withdraw a request for a hearing, or a defense raised by notifying the judge and all parties. Upon receipt of such notification, the judge shall discontinue all proceedings and return the case file to the Clerk. If the judge deems it advisable to state the circumstances of the withdrawal on the record, the judge may enter an initial decision memorializing the withdrawal and returning the matter to the transmitting agency for appropriate disposition.

grant application prior to the transmittal to the OAL.

³ No formal withdrawal has yet been received from counsel.

(b) When a party withdraws, the Clerk shall return the matter to the agency which transmitted the case to the Office of Administrative Law for appropriate disposition.

(c) After the Clerk has returned the matter, a party shall address to the transmitting agency head any motion to reopen a withdrawn case.

This is a matter that was transmitted to the OAL as the result of a decision by the Court remanding it to the Office of Higher Education for transmittal to the OAL to conduct a fact-finding hearing concerning the nature of the educational training and curriculum offered by BMG, how it is delivered, and how the grant fund projects will be put to use. The Secretary properly transmitted the matter to the OAL in July 2019, only to have BMG withdraw it in January 2020.

In June 2021, more than a year and a half later, BMG requested that the Secretary again transmit the matter to the OAL for a fact-finding hearing which request was granted by the Secretary. But before the matter could then be scheduled for a hearing, BMG again requested from the Secretary that the matter be withdrawn as it had "elected to withdraw its consideration for the grants funds at issue." BMG has thus determined that it will no longer be pursuing the grants at issue, and this determination of BMG should be considered the final disposition of this matter.

Accordingly, the matter shall be considered withdrawn without the necessity of the fact-finding hearing required by Hendricks. The file shall be returned to the Office of Higher Education.

ORDER

The fact-finding hearing required by the New Jersey Supreme Court in ACLU v Hendricks, 233 N.J. 181 (2019), no long being necessary as Beth Medrash Gehova has elected to not pursue the higher education grants at issue, this matter is hereby concluded and withdrawn, and the file is returned to the Secretary of the Office of Higher Education.

I hereby **FILE** this initial decision with the **SECRETARY OF THE OFFICE OF HIGHER EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **SECRETARY OF THE OFFICE OF HIGHER EDUCATION** for consideration, who by law is authorized to make a final decision in this matter. If the **SECRETARY OF THE OFFICE OF HIGHER EDUCATION** 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 **SECRETARY OF THE OFFICE OF HIGHER EDUCATION**, 1 John Fitch Plaza 10th Floor, P.O. Box 542, Trenton, NJ 08625-0542, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 22, 2021

DATE



SUSAN M. SCAROLA, ALJ (Ret., on recall)

Date Received at Agency:

December 22, 2021 (emailed)

Date Mailed to Parties:

12/23/2021

SMS/mel

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

OAL Exhibits

- A. Letter dated December 10, 2021, from Yitzchok Shraga Kotler, Senior VP, Administration & Campus, BMG, directed to Secretary Brian K. Bridges, Office of Higher Education.
- B. Memo from OAL Deputy Clerk enclosing a letter directed to him from Eric Taylor, Director, Office of Licensure, Office of Higher Education.

For petitioner:

None

For respondent:

Letter