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AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY; UNITARIAN UNIVERSALIST LEGISLATIVE MINISTRY OF NJ; GLORIA SCHOR ANDERSEN; PENNY POSTEL; and WILLIAM FLYNN *Plaintiffs,* *v.* **ROCHELLE HENDRICKS, Secretary of Higher Education for the State of New Jersey, in her official capacity; and ANDREW P. SIDAMON-ERISTOFF, State Treasurer, State of New Jersey, in his official capacity,** *Defendants.*	**CIVIL ACTION** **SUPERIOR COURT OF NEW JERSEY** **CHANCERY DIVISION, GENERAL EQUITY PART, MERCER COUNTY** **No.: C-82-13** **PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS OR TRANSFER**

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PRELIMINARY STATEMENT

Plaintiffs' Amended Complaint challenges final legislative action, not final agency action. It seeks to enjoin the Treasurer for the State of New Jersey from disbursing funds the Legislature has authorized to be spent. Accordingly, this case was properly filed in the trial court rather than before the Appellate Division.

The final decision to approve applications for funding under the Building Our Future Bond Act ("Bond Act") and the Higher Education Technology Infrastructure Act ("HETIA") rests with the New Jersey Legislature, and not the Secretary of Higher Education. The Secretary merely proposes a list of recipients and funding levels for legislative review. At that point, pursuant to the relevant statutes and regulations, each recipient of HETIA funds must be approved or rejected by the Legislature's Joint Budget Oversight Committee, and the list of recipients of Building Our Future Bond Act funds must be approved or rejected by the full Legislature. It is from those legislative acts that Plaintiffs seek relief.

STATEMENT OF PROCEDURE AND FACTS

On April 29, 2013, the Office of the Governor announced that the Secretary of Higher Education (Defendant Hendricks) had submitted to the Legislature a proposed list of various public and private New Jersey higher education institutions to receive higher education construction project grants. *See* Exhibit 1 to Verified Complaint. The list included grants awarded under five separate grant programs: (1) the $750 million General Obligation construction bond authorization (also referred to as the "Building Our Future Bond Act," hereinafter referred to as the "Bond Act"); (2) the Higher Education Facilities Trust Fund; (3) the Higher Education Capital Improvement Fund; (4) the Higher Education Technology Infrastructure Fund; and (5) the Higher Education Equipment Leasing Fund. *Id.*

On that list of grants were proposed awards to 15 private institutions, including two sectarian institutions whose primary functions are to provide sectarian religious education and to train students for ministry pursuant to tenets of their respective faiths. *Id.* Specifically, the list included (1) an award of $10,635,747 in Bond Act funds for Beth Medrash Govoha yeshiva and (2) an award of $645,323 in Higher Education Technology Infrastructure Act funds for Princeton Theological Seminary. *Id.*

Pursuant to the Bond Act and *N.J.A.C.* 9A:18-1.7, the Legislature has the final say on the approval or rejection of the list of Bond Act funding projects. The Secretary of Higher Education provides to the presiding officers of each house of the State Legislature a proposed list of institutions eligible for funding (and the suggested funding amounts). *Id.* The Legislature then has 60 days to accept or reject the list. *Id.* To reject the list, the Legislature must pass a concurrent resolution disapproving the list. *Id.* Although the Legislature can, by operation of law, approve the list by merely choosing not to reject it, *id.*, the Legislature in this instance affirmatively passed a bill (signed by Governor Christie) authorizing Bond Act funds to be issued to the institutions on the proposed list and at the proposed funding levels. *See* Exhibit 1 to Rosmarin Certification.

Likewise, the Legislature – not the Secretary of Higher Education – has the final say on which institutions receive funding pursuant to the Higher Education Technology Infrastructure Act ("HETIA"), *N.J.S.A.* 18A:72A-59 *et seq*. Pursuant to *N.J.S.A.* 18A:72A-64.1, the Secretary of Higher Education "shall not provide grant funding without the review and approval of the Joint Budget Oversight Committee. The Joint Budget Oversight Committee shall approve or disapprove each grant within 10 working days of receipt of the grant information or the grant shall be deemed approved." *Id.* Thus, for HETIA funds to be authorized to Princeton

Theological Seminary, the Joint Budget Oversight Committee was required to approve that grant of funds (through either an affirmative vote or inaction). In this case, the proposed HETIA fund recipients and amounts were presented to the Committee on June 28, 2013, and were deemed approved by the Committee as of July 8, 2013. *See* Exhibit 2 (excerpted) to Rosmarin Cert.

Plaintiffs filed suit on June 24, 2013, seeking to enjoin the Treasurer for the State of New Jersey (Defendant Sidamon-Eristoff) from issuing funding to Beth Medrash Govoha and the Princeton Theological Seminary. Plaintiffs also sought a declaratory judgment. Plaintiffs raised constitutional challenges under Article I, Paragraphs 3 and 4, as well as under Article VIII, Section 3, Paragraph 3, of the New Jersey Constitution; and raised statutory claims under the Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*

On or about July 15, 2013, the parties entered into a Consent Order. The Consent Order requires Defendants to provide Plaintiffs with 14 days' notice prior to the disbursement of funds to Beth Medrash Govoha or the Princeton Theological Seminary, so that Plaintiffs have time to return to court to seek restraints. Also pursuant to the Order, Defendants reserved their right to move to transfer the case to the Appellate Division.

On December 23, 2013, Plaintiffs filed an Amended Complaint, seeking the same relief as was sought in the initial complaint, and generally raising the same constitutional and statutory claims.

On March 4, 2014, Defendants filed the instant motion to dismiss the amended complaint or to transfer it to the Appellate Division. Upon Plaintiffs' request and with Defendants' consent, the hearing date was adjourned to April 11, 2014. Plaintiffs submit this brief in response to Defendants' motion.

ARGUMENT

I. AS THE LEGISLATURE, NOT THE SECRETARY OF HIGHER EDUCATION, MADE THE FINAL DECISIONS TO APPROVE THE DISPUTED GRANTS TO THE PROPOSED FUNDING RECIPIENTS, THE PRESENT CASE PROPERLY BELONGS AT THE TRIAL COURT LEVEL.

Plaintiffs filed suit to enjoin the Treasurer for the State of New Jersey from issuing public funds to two religious institutions, Beth Medrash Govoha (a yeshiva) and the Princeton Theological Seminary. Beth Medrash Govoha is slated to receive funding made available under the Building Our Future Bond Act (P.L. 2012, Chapter 41, approved August 7, 2012), and Princeton Theological Seminary is slated to receive funding made available under the Higher Education Technology Infrastructure Act ("HETIA"), *N.J.S.A.* 18A:72A-59 *et seq.*

For both funding streams, the Secretary of Higher Education is not the final decision-maker. Pursuant to the Building Our Future Bond Act and the resulting regulations (*N.J.A.C.* 9A:18-1.7), the Secretary of Higher Education submits a proposed list of funding recipients to the Legislature, but the Legislature then has the ultimate authority to reject or approve that proposed list. *Id.* The Legislature could have chosen, within 60 days of receipt of the list, to reject it. *Id.* However, the Legislature chose not to do so. Indeed, while the Legislature could have authorized the funding by operation of law through inaction, *id.*, in this instance the Legislature passed a bill, signed by the Governor, that expressly approved the proposed list of Bond Act funding recipients (which included the disputed funds to Beth Medrash Govoha). *See* Exhibit 1 to Rosmarin Certification.

Likewise, pursuant to *N.J.S.A.* 18A:72A-64.1, the Joint Budget Oversight Committee must approve or reject *each recipient* proposed by the Secretary of Higher Education to receive

HETIA funds.[1] Thus, in this instance, the Joint Budget Oversight Committee was given the opportunity to specifically accept or reject funding to Princeton Theological Seminary. The Joint Budget Oversight Committee chose to approve that grant. Specifically, by choosing not to act (within ten days of notice) to reject the proposed grant of funds to Princeton Theological Seminary, the Committee approved the grant by operation of law.

Plaintiffs in the present matter are therefore not appealing from final *agency* actions. Rather, in both funding actions in dispute, the *Legislature* was the final decision-maker and the ultimate gatekeeper, and Plaintiffs' challenge is to the Legislative decisions to permit two religious institutions to receive the funds.

As the legislative approval process described above is complete, the Treasurer is now authorized to distribute the disputed funds. This lawsuit seeks to enjoin the Treasurer from so doing.[2]

Plaintiffs do not deny that the subjective reasons behind the Secretary of Higher Education's selection of Beth Medrash Govoha and Princeton Theological Seminary as

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[1] Plaintiffs did not cite to this statutory requirement in their Amended Complaint; nor did Plaintiffs cite to the fact that the Legislature passed a bill approving the proposed list of Bond Act recipients (as opposed to merely providing authorization by operation of law through a failure to reject the list within 60 days) or that the Joint Budget Oversight Committee received the list of proposed HETIA funding recipients and approved all recipients based on its failure to reject the proposed recipients within 10 days. However, these are legislative facts of which the Court can take judicial notice. Further, Plaintiffs believe that the complaint provides sufficient notice of their claims, and state officials should in any event be deemed aware of the content of statutes and legislative acts. If however the Court believes that these facts should be included in the complaint, Plaintiffs would respectfully request leave to file a Second Amended Complaint.

[2] Because Plaintiffs primarily seek injunctive relief, Plaintiffs filed this matter in the Chancery Division. If the court believes the declaratory relief sought dominates or that this matter should be considered in effect a prerogative writ action, the court can transfer the matter to the Law Division. Regardless, "[t]he jurisdiction of the Chancery Division to adjudicate all controversies brought before it and render both legal and equitable remedies is co-extensive with that of the Law Division." *Boardwalk Props., Inc. v. BPHC Acquisition, Inc.*, 253 *N.J. Super.* 515, 526 (App. Div. 1991).

institutions she proposed to receive funding may very well be pertinent to one or more of Plaintiffs' claims. Indeed, her decision to propose that those two schools (among others) receive funding was obviously a significant part of the process that resulted in the present lawsuit. Yet that does not alter the fact that the *Legislature's* approvals of those proposed funding decisions are the ultimate actions from which Plaintiffs require relief.

In short, the agency at issue here did not have final authority to approve the disputed funds. Had the Joint Budget Committee rejected the proposed funding for Princeton Theological Seminary and had the Legislature rejected the proposed list of recipients that included funds for Beth Medrash Govoha, the Treasurer would not be able to release the funds and Plaintiffs would not need relief. It is precisely because of legislative action that Plaintiffs have a viable cause of action to prevent the disbursement of the funding and seek relief from the Court.

II. IF THIS COURT DETERMINES THAT THIS MATTER IS AN APPEAL OF AN AGENCY ACTION, THE CASE SHOULD BE TRANSFERRED TO THE APPELLATE DIVISION.

A. The Prudent Course of Action Is to Transfer an Appeal of an Agency Action to the Appellate Division, Even if Fact-Finding Is Required.

As explained above, this is an appeal from legislative action, not from final agency action. However, should the Court hold otherwise, the most prudent course of action is to transfer the case to the Appellate Division, without prejudice to a motion for remand for further fact development.

The Appellate Division has exclusive jurisdiction in New Jersey over most appeals of final agency action. *R.* 2:2-3(a)(2). There is a limited exception to that principle: When fact-finding is required and there was no opportunity to create a sufficient record in front of the agency, the case can proceed in either the Law Division or Chancery Division rather than the

Appellate Division. *See, e.g., State Farm Mutual Automobile Insurance Company v. State of New Jersey, et al.*, 227 *N.J. Super.* 99, 132-33, *aff'd*, 118 N.J. 336 (1990) ("Where the disposition of a state agency action calls for the exercise of the gathering of evidence, the finding of facts and applications of legal conclusions, the matter may proceed in the trial court if there is no agency record amenable to appellate review"); *Cohen v. Board of Trustees of University of Medicine and Dentistry of New Jersey*, 240 *N.J. Super.* 188, 198 (Ch. Div. 1989) (an "exception to the requirements of *R.* 2:2-3(a)(2) mandate[s] trial level jurisdiction when the proposed administrative action has not been preceded by the creation of some agency record amenable to appellate review").

In *Township of Montclair v. Hughey*, 222 *N.J. Super.* 441, 448 (App. Div. 1987), the Appellate Division explained that *R.* 2:2-3(a)(2) contemplated matters wherein the parties of concern are given an opportunity to be heard and to create a record for the Appellate Division to review. The Court held:

> This case...was brought to halt an alleged threatened breach of public and private rights, not to review an administrative proceeding. Disposition thereof calls for the exercise of trial court functions such as the gathering of evidence, finding of fact and the application of legal conclusions. These are not the proper concern of the appellate court, and hence, we conclude that the matters in controversy were properly instituted in the Law and Chancery Division.

Id.

However, the New Jersey Supreme Court has emphasized the limited nature of this exception, and has indicated that the best course of action in most circumstances is to first bring (or transfer) the case to the Appellate Division. *Infinity Broadcasting Corp. v. New Jersey Meadowlands Commission*, 187 *N.J.* 212, 227 (2006) (limiting the exceptions to the rule requiring Appellate Division jurisdiction over state agency action). At that point, pursuant to *R.* 2:2-5(b), the Appellate Division can remand the case to the lower court for fact-finding if it holds

that the development of additional facts beyond that contained in the agency record is required. *Id.* at 227 ("We also reaffirm the principle that...the Appellate Division retains the discretion, in an appropriate case, to retain jurisdiction in appeal from the action of a state agency, but to refer the matter to the Law Division or to the agency for such additional fact-finding as it deems necessary to a just outcome"); *Mutschler v. New Jersey Department of Environmental Protection*, 337 *N.J. Super.* 1, 9 (App. Div.), *certif. denied*, 168 N.J. 292 (2001) ("In the unusual situation where it is not feasible or appropriate for the Appellate Division to hear all claims asserted in an appeal from state administrative agency action, we may transfer such claims to the Law Division or Chancery Division").

Accordingly, if this Court holds that this matter is an appeal of a final agency action (rather than a legislative action as suggested by Plaintiffs), then the prudent course of action would be to transfer the case to the Appellate Division. However, as fact-finding (that did not occur at the agency) will help inform some of Plaintiffs' claims,[3] Plaintiffs will thereafter move to have the case remanded to the Chancery Division or Law Division for development of the record.

B. The Proper Remedy When an Appeal of an Agency Action Is Filed in the Lower Court Is Transfer to the Appellate Division, Not Dismissal.

Defendants suggest the court should consider dismissing the case (rather than transferring it) if it finds the case was filed in the wrong division of the Superior Court. However, if an appeal of an agency action was improperly filed in the lower court, the remedy is to transfer the

[3] Most notably, Plaintiffs will be seeking information: (1) to determine how the Secretary of Higher Education engaged in her decision-making and assessed the relative value of the applicants (and specifically, how she reached her determination that Beth Medrash Govoha and the Princeton Theological Seminary were worthy applicants), and (2) to obtain and provide the court with further evidence of the religious nature and exclusionary policies of Beth Medrash Govoha, the religious nature of the Princeton Theological Seminary, and how the proposed grants would advance the two institutions' religious missions.

case to the Appellate Division rather than to grant dismissal. *See, e.g., Mutschler v. New Jersey Department of Environmental Protection*, 337 *N.J. Super.* at 10 ("If a challenge to the action or inaction of a state administrative agency is brought in a trial court, that court has the responsibility to transfer the matter to this court...."); *Allstate Insurance Co. v. Fortunado*, 248 *N.J. Super.* 153, 159 (App. Div. 1991) (noting that the fact that an appeal of an agency action first proceeded in the Chancery Division is a "possible procedural fault of no consequence"). *R.* 1:13-4(a) explains what action a court should take when it has such a matter over which it does not have jurisdiction. The rule does not list dismissal as an option; rather, the court "shall, on motion or on its own initiative, order the action, with the record and all papers on file, transferred to the proper court...." *Id.* Indeed, in *Mutschler v. New Jersey Department of Environmental Protection*, 337 *N.J. Super.* at 10, even where the matter was not properly transferred and the case went to the Appellate Division only after final adjudication in the trial court, the Appellate Division explained that it would still exercise its jurisdiction and review the underlying claims as if the case was properly transferred. *Id.*

Beyond the specific mandate to transfer such a case rather than dismiss it, there is a more general reason recognized by the courts, which is applicable to the present case, that would preclude dismissal. Both the state Supreme Court and the Appellate Division have explained that, in matters raising constitutional issues and significant questions of public interest, procedural defects should not, and do not, warrant dismissal. *See, e.g., Township of Franklin v. Board of Education of the North Hunterdon Regional High School*, 74 *N.J.* 345, 347-48 (1977), *certif. denied, Commissioner of Education of New Jersey v. Board of Education of the North Hunterdon Regional High School, Township of Franklin*, 435 U.S. 950 (1978) (holding that procedural defects, including failure to exhaust remedies and failure to file an appeal within 45

days, should not preclude review on the merits where "the issues presented are of public importance and involve substantial constitutional questions"); *Vas v. Roberts*, 418 *N.J. Super.* 509, 515 (App. Div. 2011) ("we have been reluctant to impose the time bar of *R.* 2:4-1(b) where the issues raised involve significant questions of public interest"); *Rumana v. County of Passaic*, 397 *N.J. Super.* 157, 171 (App. Div. 2007) (same); *id.* at 172 ("the issues before us involve significant matters of public interest that would merit review even beyond the thirty day period [for extention of time to appeal]"); *In re Six Month Extension of N.J.A.C. 5:91-1 et seq*, 372 *N.J. Super.* 61, 87 (App. Div. 2004) (holding that time limit on administrative appeals "does not apply to challenges to the validity of agency regulations, especially where challenges raise constitutional questions or involve important questions implicating the public interest").

The Appellate Division explained that principle in *Hirth v. Hoboken*, 337 *N.J. Super.* 149, 161 (App. Div. 2001): "In view of the constitutional foundation of the right to judicial review of administrative action, our courts are reluctant to foreclose such review on procedural grounds....One reason for this reluctance is that judicial review of administrative action may serve not only the private interests of the appellant but also broader public interests." *Id.*

Simply put, New Jersey courts do not put form over substance when it comes to addressing significant matters of public concern. Indeed, in a case wherein an appeal of an agency action filed in the Chancery Division was transferred to the Appellate Division, and the agency then made a motion to dismiss on the grounds that the matter was time-barred, the New Jersey Supreme Court held: "[I]n view of the importance of the public question involved, the Appellate Division felt there should be a decision on the merits. Consequently the motion was denied. This Court likewise is of the view that the meritorious issue should be resolved." *Jacobs v. New Jersey State Highway Authority*, 54 *N.J.* 393, 396 (1969).

Given that the issues raised in the present case "are of public importance and involve substantial constitutional questions" (specifically, implicating government funding of religious institutions and ministries, as well as government funding of an institution that discriminates in the provision of services and hiring), the principle explained above clearly applies. For that reason, among others presented herein, if this court determines that this case should have been filed in the Appellate Division, the proper action is for this court to transfer the case, not dismiss it.

CONCLUSION

Because the instant lawsuit was properly filed before this court, Defendants' motion should be denied.

Date: April 1, 2014

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