STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 6145-09
DCR DOCKET NO. PN34XB-03008

Harriet Bernstein, Luisa Paster, and the Director of the New Jersey Division on Civil Rights, Complainants, v. Ocean Grove Camp Meeting Association, Respondent.	Administrative Action **FINDINGS, DETERMINATION, AND ORDER**

Lawrence S. Lustberg, Esq. (Gibbons, P.C., attorneys), and *Jean LoCicero, Esq.* (American Civil Liberties Union of New Jersey Foundation), for Complainants Harriet Bernstein and Luisa Paster.

Michael P. Laffey, Esq. (Messina Law Firm, P.C., attorneys) and *Brian W. Raum, Esq.,* member of the New York Bar admitted pro hac vice, (Alliance Defense Fund) and *James A. Campbell, Esq.,* member of the Arizona Bar admitted pro hac vice, (Alliance Defense Fund) for Respondent.

BY THE DIRECTOR:

This matter comes before the New Jersey Division on Civil Rights (DCR) from a complaint filed by Harriet Bernstein and Luisa Paster (Complainants), alleging that the Ocean Grove Camp Meeting Association (Respondent) discriminated against them based on civil union status, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On January 12, 2012, Administrative Law Judge (ALJ) Solomon A. Metzger issued an initial decision concluding that Respondent violated the LAD. After evaluating the record, the DCR Director adopts the ALJ's decision and issues this determination to address the exceptions raised by Respondent.

On June 19, 2007, Complainants filed a verified complaint with the DCR alleging that Respondent rejected their application to use its Boardwalk Pavilion for a civil union ceremony, while permitting the Pavilion to be used for weddings and other secular functions. Respondent filed a motion to dismiss, which was denied in a January 7, 2008, written decision. The DCR completed

its investigation and issued a finding of probable cause on December 29, 2008.[1] On June 11, 2009, the matter was transmitted to the OAL for a hearing.

In July 2010, the parties cross-moved for summary decision. In September 2011, the matter was reassigned to ALJ Metzger, who issued a decision on January 12, 2012. Respondent filed exceptions and Complainants filed a reply. The time for issuing this final order was extended to October 22, 2012.

The ALJ's factual findings are as follows. Respondent, a non-profit organization closely associated with the United Methodist Church, owns a square mile of real estate in Neptune Township known as Ocean Grove. Respondent operates a number of religious institutions on the property but also engages in a number of secular commercial transactions; it owns all of the land in the community and leases much of it to homeowners and businesses. (ID2-3.)[2] One of Respondent's facilities, the Boardwalk Pavilion, is an open-air wood-framed structure on the boardwalk facing the Atlantic Ocean. (ID2.)

In July 1989, Respondent applied to the NJ Department of Environmental Protection (DEP) for a Green Acres tax exemption for some of its property, including the Pavilion and the adjacent boardwalk/beach area. Respondent described the area in its application as public in nature. (ID3.) Neptune Township opposed the application because it was concerned that Respondent might impose religious restrictions that would limit public access. (Ibid.) However, Respondent assured State officials and the public during a DEP hearing in September 1989, that it would make the Pavilion available for public use without reservation. (Ibid.) DEP ultimately granted the tax exemption on certain conditions, requiring that the property be "open for public use on an equal basis" as per N.J.S.A. 54:4-3.66 and N.J.A.C. 7:35- 1.4(a)(2) (Ibid.) Respondent renewed its application for the property tax exemption every three years. (Ibid.)

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1 At that time, the DCR Director was added as an additional complainant. However, for purposes of this determination and order, "Complainants" will refer only to Bernstein and Paster.

2 "ID" refers to the ALJ's initial decision. "C Exh." and "R Exh." refers to the exhibits admitted into evidence at the OAL hearing by the Complainant and Respondent, respectively. "RFEX" and "RLEX" refers to Respondent's factual and legal exceptions to the ID. "CR" refers to Complainants' reply to same.

Respondent used the Pavilion for religious programming as well as community and charitable events. It also rented the space for weddings for a $250 fee. (ID2.) When unoccupied, the Pavilion serves as a seating area for pedestrians. (Ibid.) Respondent maintained a website called, "An Ocean Grove Wedding," soliciting business for the Pavilion as a wedding venue. (ID3, 5.) The website was silent on Respondent's views on marriage. (ID3.) The Pavilion rental application did not inquire into religious affiliation and was primarily used to record bookings and determine availability. (ID2.) Respondent's staff typically asked applicants no questions about religious affiliation. Ibid.

In March 2007, Respondent denied Complainants' request to use the Pavilion for a civil union ceremony because the concept of civil unions conflicted with its beliefs on homosexuality. (ID2-3.) It was the first time in anyone's memory that use of the Pavilion was denied for any reason other than availability. (ID3.) The next time Respondent applied to renew its Green Acres tax exemption, DEP denied the portion of the exemption applicable to the Pavilion based on Respondent's refusal to make it available to the public on an equal basis. Ibid. Currently, Respondent has ceased renting out the Pavilion and uses it only for events it sponsors. Ibid.

As a threshold issue, the ALJ found that the Pavilion was a place of public accommodation for purposes of the LAD based on, among other things, its "ties with government." (ID4.) He noted:

> [The] 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).

(ID4.) The ALJ found that Respondent gave express assurances, in exchange for annual financial benefits, that the Pavilion would be open to the public and not governed by religious restrictions, and renewed those assurances every three years. (ID3.) The ALJ noted:

> Respondent accepted a particular form of tax exemption that required it to keep the Pavilion open to the public 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.

(ID5.) The ALJ also found it significant that Respondent solicited the public to rent the Pavilion and "presented itself to the public at large as a wedding venue without any mention of preconditions along doctrinal lines." (ID5.)

The ALJ rejected Respondent's claim that allowing a civil union ceremony in the Pavilion would violate Respondent's First Amendment rights because the Pavilion was used as part of a claimed "wedding ministry." The ALJ found no support for the "bald" assertion that such a ministry existed, noting that there was no evidence of any such wedding ministry prior to the filing of the DCR complaint. (ID6.) He wrote, "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." (Ibid.)

Respondent took exception to seventeen statements in the ALJ's factual findings, nine statements in the ALJ's legal conclusions, and contends that the ALJ failed to address two legal issues. Complainants replied to each of the exceptions. To avoid unnecessary repetition, the substance of the exceptions and replies will be addressed to the extent that they are relevant and material to the issues in dispute.[3]

THE DIRECTOR'S DECISION

Summary judgment is appropriate where there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5 (b). The moving party has the burden of "produc[ing] evidence showing the absence of a genuine issue

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[3] Respondent also took exception to the ALJ's omission of "many" factual findings included in Respondent's Statement of Facts and Response to Complainants' Statement of Facts. (RFEX 18.) Respondent argues that the omitted facts are material to its defenses and legal arguments but asserts that they are too numerous to delineate. Respondent did not cite specific sections of its factual statements or briefs but cited to the entire statement of facts in its summary decision briefs. Without detail as to what material facts were allegedly omitted, the Director cannot directly address that exception. That being said, the Director considered all relevant submissions and made supplemental factual findings where appropriate based on the undisputed aspects of the record.

of material fact" or that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 242, 248 (1986). In this case, the parties do not contend that there are material facts in dispute. Rather, each argues that the undisputed facts support summary decision in its favor. The Director agrees that summary decision is appropriate and, for the reasons discussed below, affirms the ALJ's determination that the undisputed material facts support the conclusion that Respondent violated the public accommodation provisions of the LAD.

Except as noted in this decision, the Director concludes that the relevant and material facts relied upon by the ALJ are supported by the record and adopts them as his own. Based on the undisputed aspects of the documents comprising the record, the Director makes the following supplemental and clarified findings of fact.

- Respondent pre-approved all community, charitable, or religious events held in the Pavilion. (RFEX 1, Certification of Scott Rasmussen in Support of Respondent's Motion for Summary Decision ¶54.)

- On some occasions, Respondent accepted less than the full $250 rental fee or waived the fee entirely. (ID2, RFEX 2, Rasmussen cert. ¶82, 83.)

- Regarding the ALJ's statement, "The form was used primarily to record bookings and determine availability" (ID2), the Director clarifies that "Regarding weddings, the Facilities Use Request form was used primarily to record bookings and determine availability." (RFEX 3, C Exh. 13.)

- To clarify the ALJ's statement that "[w]hen not in use by some organization, the Pavilion was open to passers-by along the boardwalk to sit and take in the scene," (ID2), the Director finds as fact: "When not in use for Respondent's programs or events, or for weddings or other events that Respondent pre-approved, the Pavilion was open to passers-by along the boardwalk to sit and take in the scene." (RFEX 4, Rasmussen cert. at ¶54, 57.)

- To clarify the ALJ's statement that "[t]his was the first time in anyone's memory that a denial was based on a reason other than availability," (ID3), the Director finds as fact: "Respondent generally approved all applications to use the Pavilion for weddings unless the Pavilion was not available for a requested date." (RFEX 5, C Exh. 13.)

- To clarify the ALJ's statement that Respondent refused to "conduct" a civil union ceremony for Complainants (ID7), the Director finds as fact that Respondent refused to permit Complainants to reserve and use the Pavilion for a civil union ceremony.

- Based on the record, the Director finds that in addition to a claim of discrimination based on "civil union status," Complainants articulated a claim of discrimination based on "sexual orientation" in violation of N.J.S.A. 10:5-12(f).

A. The Pavilion is a Place of Public Accommodation.

The LAD makes it unlawful for any "owner . . . of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof" on the basis of civil union status or sexual orientation. N.J.S.A. 10:5-12(f).

The LAD defines "place of public accommodation" by providing a non-exhaustive list of examples. N.J.S.A. 10:5-5(l). The definition excludes "any institution, bona fide club, or place of accommodation, which is in its nature distinctly private" and "any educational facility operated or maintained by a bona fide religious or sectarian institution." Ibid. Because the LAD is remedial legislation, it must be liberally construed to advance its beneficial purposes. Nini v. Mercer County Comm. College, 202 N.J. 98, 115 (2010) ("Indeed, this Court has been scrupulous in its insistence that the [LAD] be applied to the full extent of its facial coverage."). Conversely, exceptions in remedial legislation must be narrowly construed. Ibid. (citing Prado v. State, 186 N.J. 413, 426-27 (2006)) ("[W]here a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions.").

Guided by those settled rules of statutory construction, courts seeking to determine whether a facility qualifies as a "place of public accommodation" look to whether the facility: (1) solicited the general public, (2) maintains close relationships with the government or other public accommodations, or (3) is similar to enumerated or other previously recognized public accommodations. Ellison v. Creative Learning Ctr., 383 N.J. Super. 581, 588-89 (App. Div. 2006). All three factors support a finding that the Pavilion was a place of public accommodation.

1. Respondent Invited the General Public to Use the Pavilion

Broad public solicitation has "consistently been a principal characteristic of public accommodation." Id. at 589 (quotations omitted). In Evans v. Ross, 57 N.J. Super. 223 (App. Div. 1959), cert. den'd 31 N.J. 293 (1959), the court noted:

> [A]n establishment which caters to the public, and by advertising and other forms of invitation induces patronage generally, cannot refuse to deal with members of the public who have accepted the invitation, because of their [LAD-protected characteristic]. The law is designed to insure that all citizens of this State shall have equal rights as members of the public and not be subjected to the embarrassment and humiliation of being invited to an establishment, only to find its doors barred to them. [Id. at 231.]

Respondent invited the public to use the Pavilion as a wedding venue through a web page entitled, "An Ocean Grove Wedding." (ID5, C Exh. 21.) That solicitation offered use of the Pavilion as a wedding location without any mention of Respondent's religious views on weddings or alerting patrons that use of the Pavilion was part of a "wedding ministry." Instead, it spoke of the attributes of the facility, for which Respondent generally accepted a $250 fee for its reservation and use. The Director finds no support in the record for Respondent's exceptions attempting to limit the nature of the solicitation.[4] Rather, Respondent's web page and public representations demonstrate that Respondent solicited the public at large to use the Pavilion and did not screen applicants except for availability of the facility. This factor alone is sufficient to support a finding that the Pavilion was a place of public accommodation because it is settled that "[o]nce a proprietor extends his invitation to the public, he must treat all members of the public alike." Evans, supra, 57 N.J. Super. at 231; Ellison, supra, 383 N.J.Super. at 588-89.

2. The Pavilion had Close Ties with the Government

New Jersey courts have held that entities "that benefit from relationships with the government . . . are themselves places of public accommodation within the meaning of the LAD." Dale v. Boy Scouts of America, 160 N.J. 562, 591 (1999), rev'd on other grounds, 530 U.S. 640 (2000) (citing Frank v. Ivy Club, 120 N.J. 73, 79 (1990), cert. den'd, 498 U.S. 1073 (1991)); see,

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[4] Aside from the web page, the only writing in evidence regarding Respondent's wedding program is the wedding committee's column in Respondent's fall 2006 newsletter. It makes no reference to ministry, religion, or any religious aspects of marriage or wedding ceremonies. Instead, it reports the number of weddings that season and the income derived from those weddings. The newsletter also notes that despite the deteriorated condition of the Pavilion, "couples choose it for the view of the ocean, and we can all agree that [the] view is priceless." (R Exh. 21.) Contrary to Respondent's assertions (RFEX 15-17), it provides no basis to conclude that Respondent's wedding facilities program was religious in nature at the time.

e.g., Ellison, supra, 383 N.J. Super. 581, 588-89 (finding that a privately owned pre-school was a place of public accommodation because of its "close ties to government as the result of its licensing and regulation" and it functioned in a similar manner to public schools).

Respondent received direct governmental support of the Pavilion through its many years of Green Acres property tax exemptions. (ID4-5.) The Legislature enacted the Green Acres program to encourage property owners to dedicate suitable property to public enjoyment. N.J.S.A. 54:4-3.63. To receive a Green Acres tax exemption, owners must agree to keep the subject property "open to all on an equal basis," N.J.S.A. 54:4-3.66, and operate same "for the benefit of the public . . ." N.J.A.C. 7:35-1.4(a)(2). A Green Acres property owner steps in to carry out a governmental function--i.e., making its open space available to all for public use and enjoyment--and must therefore keep the exempted property available for public use on a non-discriminatory basis. It was reasonable for the ALJ to conclude that Respondent's eighteen years of enjoying public subsidies based on its repeated representations in support of its Green Acres applications (including its unsuccessful attempt to retain the tax exemption in 2007) was evidence that the Pavilion was a place of public accommodation for LAD analysis.[5]

3. The Pavilion is Similar to Enumerated Public Accommodations

A facility is a place of public accommodation if it is "similar to enumerated or other previously recognized public accommodations." Ellison, supra, 383 N.J. Super. at 589. Because

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[5] Respondent argues that DEP "mistakenly" granted Green Acres status based on a misunderstanding about its uses for the Pavilion, and revoked the tax exemption when it learned of the mistake. (RLEX 2.) That position is not supported by the record. The determination letter states that DEP was revoking the exemption because Respondent did not make the Pavilion available for public use on an equal basis in 2007, i.e., a change in use. (C Exh. 30.) There is no indication that the initial certification or re-certifications were mistakenly granted or that any of the functions that Respondent permitted for almost two decades were inconsistent with the Green Acres program. Respondent also argues that the fact that the Monmouth County Board of Taxation did not impose rollback taxes after the exemption was revoked is somehow dispositive. (RLEX 2, R Exh. 31.) The Green Acres program imposes rollback taxes when tax-exempt property has been used for a purpose other than conservation or recreation. N.J.S.A. 54:4-3.69. Here, the ruling indicated only that the rollback tax complaint alleged a "use other than conservation or recreation," and that the request was denied. (R Exh. 31.) The ruling does not suggest that the initial Green Acres approval was mistakenly granted. Rather, it suggests that Respondent's use of the Pavilion conformed to the Green Acres' conservation or recreation requirement for almost twenty years, but then changed.

the LAD specifically lists boardwalks, seashore accommodations, auditoriums, and meeting places as examples of public accommodations, N.J.S.A. 10:5-5(l), the ALJ found that Respondent's Boardwalk Pavilion had the "look of a place of public accommodation." (ID4.)

Respondent contends that at the relevant time, the Pavilion was more akin to a chapel or other place of worship. (ID4, RLEX 1.) That assertion is not supported by the record. Respondent treated the Pavilion differently than its chapels and other places of worship during the relevant time. Although Respondent applied for and received religious tax exemptions for other buildings (see C Exh. 26), it did not seek a religious tax exemption for the Pavilion until 2008, i.e., a year after Respondent changed the Pavilion's uses in response to Complainants' application. (R Exh. 33, C Exh. 23.)[6] Respondent certainly knew how to obtain tax exemptions for its places of worship since it did so for other structures. The fact that Respondent did not seek a religious exemption until 2008 suggests that up to that point, Respondent did not consider the Pavilion to be one of its religious structures. Moreover, the record shows that from 2002 to 2007, the Pavilion was used for a variety of public programs including Civil War re-enactments and events sponsored by radio stations, environmental and educational organizations, (C Exh.14) and that when not reserved for programs or events, it functioned as a public boardwalk facility where the general public could "avoid the rain or sun." (Rasmussen cert. ¶57.)

There is also no merit to Respondent's claim that this matter is controlled by Wazeerud-Din v. Goodwill Home and Missions, Inc., 325 N.J. Super. 3, 12 (App. Div. 1999), certif. den'd, 163 N.J. 13 (2000). There, the issue was whether an addiction program called the "Discipleship Program," was a public accommodation under the LAD. 325 N.J. Super. 3, 6. The court noted that the "essential premise" of the program was that "participants can free themselves from addiction by turning to Jesus Christ as their personal savior, redeemer and Lord who breaks the power of sin."

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[6] There is no evidence that before receiving its Green Acres exemption in 1989, the Pavilion received a tax exemption on any other basis. Even if Respondent had previously obtained a religious tax exemption for the Pavilion, a decision to give up such an exemption in favor of a Green Acres exemption would prospectively treat the Pavilion differently than its places of worship.

Id. at 7. The court noted:

> The core of the program is religious instruction, which includes Bible classes four days per week and supervised individual Bible study five days per week, and attendance at religious services, which includes at least six morning and four evening devotional services per week.

Id. at 6. The overtly religious nature of the program in Wazeerud-Din contrasts sharply with the Pavilion's patently secular uses where Respondent permitted the Pavilion to be used without scrutiny of applicants' religious convictions or affiliation. Respondent's status as a religious organization does not automatically remove all of its activities from judicial or administrative scrutiny. See McKelvey v. Pierce, 173 N.J. 26, 45-46 (2002); Welter v. Seton Hall Univ., 128 N.J. 279, 293 (1992).

In view of Respondent's invitation to the general public to use the Pavilion, the fact that Respondent affirmatively sought and received from the government a Green Acres tax exemption for the Pavilion, the Pavilion's similarity to other public accommodations enumerated in the LAD, and the long-standing directive that exceptions to remedial legislation must be narrowly construed, the Director finds that the Pavilion was a public accommodation subject to the LAD.

B. Respondent Discriminated Against Complainants in Violation of the LAD

Respondent argues that refusing to rent the Pavilion to a couple planning a civil union ceremony does not amount to "civil union status" discrimination as envisioned by N.J.S.A. 10:5-12f (RLEX 4), because at the time the application was denied, Complainants "had yet to obtain that legal status." (R's Summary Decision Brf., 29.) As such, Respondent argues, the current matter "rests on a misapprehension of the meaning of civil-union-status discrimination." (Id. at 27.) Respondent contends that civil union discrimination means treating one homosexual couple less favorably than another homosexual couple because of their respective civil union status. (Id. at 27-30.) Such an interpretation ignores case law and legislative enactments aimed at creating equality between homosexual couples and heterosexual couples.

In Lewis v. Harris, 188 N.J. 415, 448 (2006), the Court called on the Legislature to amend

marriage statutes to "include same-sex couples or create a parallel statutory structure, which will provide for, on equal terms, the rights and benefit enjoyed and burdens and obligations borne by married couples." The Legislature, in turn, passed the Civil Union Act, P.L. 2006, c. 103, which affirmed a commitment to "insuring equality under the laws for all New Jersey citizens by providing same-sex couples with the same rights and benefits as heterosexual couples." N.J.S.A. 37:1-28(f). That included adding LAD protections. N.J.S.A. 10:5-12; N.J.S.A. 10:5-5ss. Here, Respondent's decision to deny Complainants the same opportunity to rent the Pavilion as it offered to heterosexual couples, amounted to discrimination based on civil union status.

Even if Respondent's definition of civil union discrimination could be accepted, the same conduct would constitute discrimination based on "sexual orientation." An organization's decision to deny persons the advantages, facilities, and privileges of a place of public accommodation based on their sexual orientation, violates the LAD. N.J.S.A. 10:5-12(f).

C. Compliance with the LAD Does Not Violate Respondent's First Amendment Rights.

Respondent argues that application of the LAD to its Pavilion rentals would violate its First Amendment Rights for expressive association and free exercise of religion. The Director agrees with the ALJ that those arguments are unavailing.

Relying on Boy Scouts of America v. Dale, 530 U.S. 640 (2000) and Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995), Respondent argues that its right to expressive association would be violated. However, those cases are distinguishable from the instant case. In Boy Scouts, the Court found that forcing the Boy Scouts to place Dale, who was openly gay, in a leadership role in its organization would run afoul of the Scouts' freedom of expressive association because it would "significantly affect the Boys Scouts' ability to advocate public or private view points." Boy Scouts, supra, 530 U.S. at 650. In Hurley, the Court found that organizers of a privately operated St. Patrick's Day parade could not be required to allow an organization with its own message to march in its parade. In examining the constitutional issues, the Court stated that parades are inherently expressive activities and a "requirement to admit a

parade contingent expressing a message not of the private organizers' own choosing" would infringe upon the fundamental rule that a "speaker has the autonomy to choose the content of his own message." Hurley, supra, 515 U.S. at 566 & 573.

In this case, the element of forced inclusion or forced speech that characterize associational rights cases is simply not present. Respondent is not being compelled to accept an unwanted candidate as a leader, or even a member, in its organization. Nor are Respondent's members being forced to associate with Complainants on any level. Respondent is not being forced to include or adopt any message of the Complainants. Unlike the parade in Hurley, there is nothing inherently expressive in the secular business activity of renting a boardwalk pavilion, particularly where, as here, Respondent ordinarily approved all applications without questioning whether the use would conform to Respondent's religious tenets. As the ALJ found, the mere act of renting the Pavilion to the public for secular and non-secular weddings when Respondent "did not inquire into religious beliefs or practice because it did not sponsor, or otherwise control, these weddings," was an "activity largely detached from associational expression or speech." (ID6).

Instead, the Director finds that the circumstances of this case are more in line with Rumsfeld v. Forum for Academic & Inst. Rights, 547 U.S. 47 (2006) and Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1080). In Rumsfeld, a group of law schools challenged a statute requiring schools to host military recruiters as a condition of receiving federal aid. They argued that same violated their rights to free speech and expressive association since the recruiters' presence on campus would suggest that the schools supported the military's policy toward homosexuals. The Court rejected that argument, finding that the schools were not speaking when they host recruitment activities, and that the decision to allow recruiters on campus was not inherently expressive, contrasting it with a parade organizer's choice of parade contingents. Rumsfeld, supra, 547 U.S. at 64. The Court also found it important that the recruiters were not part of the law school but "outsiders who come onto campus for the limited purpose of trying to hire students--not to become members of the school's expressive association." Id. at 69. Noting that the schools were

free to voice their disapproval of the military's message, the Court found that requiring schools to provide access to military recruiters would not violate the Constitution. Id. at 70.

In Pruneyard, supra, 447 U.S. 74, the owner of a shopping center was found in violation of state law when it ejected students who set up a table and distributed pamphlets in the shopping center to solicit support for their opposition to a United Nations resolution. In upholding the law, the Court found that there was little likelihood that the views of those engaging in expressive activities would be identified with the owner, that the owner was not being forced to affirm a belief in a governmentally prescribed position, and that the owner was free to publicly disassociate from any views of any speakers or handbillers. Id. at 88.

In this case, Respondent stands in the same shoes as the law schools in Rumsfeld and the shopping center owner in Pruneyard. Like the military recruiters and students, Complainants were outsiders merely seeking to use a venue that Respondent made available to the public. Because there was no message inherent in renting the Pavilion, there was no credible threat to Respondent's ability to express its views. To the extent that the Pavilion could somehow have been characterized as a receptacle or conduit of speech, it was a passive one where any views expressed by the public were not likely to be identified with those of the structure's owner. Here, the Director concurs with the ALJ's observations that the absence of evidence of the "wedding ministry" (ID6) and the "arm's length nature of the transactions gave Respondent a comfortable distance from notions incompatible with its own beliefs." (Ibid.) For these reasons, the Director concludes that being required to rent the Pavilion to Complainants would not have interfered with Respondent's expressive association or free speech rights.

Similarly, the Director rejects Respondent's argument that applying the LAD in this case would violate its free exercise right. Initially, the Director agrees with the ALJ that this matter is not judged by a "strict scrutiny" standard. In addressing the constitutional protection for freedom for free exercise of religion, the United States Supreme Court established the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental

interest, even if the law has the incidental effect of burdening a particular religious practice. Employment Div. v. Smith, 494 U.S. 872, 879 (1990). The Court has emphasized that the First Amendment "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." Ibid. It is only where the regulation is not neutral or directed at particular religions or religious practices that strict scrutiny applies. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993).

Anti-discrimination laws like the LAD are neutral as to both content and viewpoint. Roberts, supra, 468 U.S. 609, 623-24 (1984); Gallo v. Salesian Soc'y, 290 N.J. Super. 616, 644 (App. Div. 1996) (noting "there is no question that the [LAD] has a secular purpose and that its effect neither advances nor inhibits religion"). As the ALJ found, the LAD is a "neutral law of general application designed to uncover and eradicate discrimination; it is not focused on or hostile to religion." (ID7). Rather than inhibit Respondent's free exercise of religion, enforcing the LAD here would only regulate "the secular activity of a religious organization in renting Pavilion space." (ID7, n2).

Since the LAD does not target religions or religious conduct, it may be enforced even if there is an incidental burden on a religious organization. Employment Div., supra, 494 U.S. at 879. Such is the case here. The LAD's requirement that places of public accommodation make their facilities available without discrimination based on civil union status or sexual orientation applies generally to all public accommodations in the State and may be enforced consistent with the Free Exercise clause even if religious organizations that operate public accommodations feel burdened by the requirement. In seeking an exemption from the generally applicable requirement, Respondent "seeks preferential, not equal treatment; it therefore cannot moor its request to the Free Exercise clause." Christian Legal Soc'y v. Martinez, supra, 130 S.Ct. 2971, 2995, n. 27 (2010). Such an exemption is not required under the facts of this case.

Respondent, a sophisticated property owner with extensive secular interactions as a New Jersey landlord, specifically elected to distinguish the Pavilion from its chapels and other religious

buildings. It sought and received public subsidies for nearly two decades in exchange for its promise to keep the Pavilion open to the public on an equal basis. Under these specific factual circumstances, as the ALJ found, Respondent was not "free to promise equal access, to rent wedding space to heterosexual couples irrespective of their religion, and then except" the Complainants when such action clearly violates the settled laws of this State. (ID7.)

D. Remedies

Complainants did not request monetary damages or file exceptions to the ALJ's determination regarding remedies. (Ibid.) Accordingly, the Director makes no award of damages. The LAD also allows for the imposition of penalties payable to the State Treasury against a respondent who violates the statute. N.J.S.A. 10:5-14.1a. The ALJ considered imposing a nominal penalty but concluded that the finding of wrongdoing was adequate redress. (ID7.) After reviewing the record, the Director concurs.

ORDER

For the reasons discussed above, the Director concludes that Respondent discriminated against Complainants based on civil union status and sexual orientation in violation of the LAD when it refused to rent the Pavilion to them for their civil union ceremony. The Director orders that Respondent and its agents, employees, and assigns, shall cease and desist from doing any act prohibited by the LAD.

DATE: 10-22-12

CRAIG SASHIHARA, DIRECTOR
NJ DIVISION ON CIVIL RIGHTS