

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CATHEDRAL ARTS PROJECT,
INC.,

Appellant,

v.

DEPARTMENT OF ECONOMIC
OPPORTUNITY,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D11-5064

Opinion filed August 20, 2012.

An appeal from an order of the Department of Economic Opportunity.
Tom Clendenning, Director.

Stephen D. Busey and John F. MacLennan of Smith Hulsey & Busey, Jacksonville,
for Appellant.

Peter Penrod, Assistant General Counsel, Office of General Counsel, Tallahassee,
for Appellee.

DAVIS, J.

Appellant, Cathedral Arts Project, Inc., seeks review of an order of the
Agency for Workforce Innovation (now the Department of Economic

Opportunity), which dismissed for lack of jurisdiction a portion of Appellant's appeal from a Department of Revenue tax ruling and which adopted the special deputy's determination that Appellant is liable for the payment of unemployment compensation tax. Appellant contends that the dismissal was erroneous and that it is exempt from unemployment taxation pursuant to section 443.1216(4)(a)2., Florida Statutes (2009), because it is operated primarily for religious purposes and is controlled by St. John's Cathedral of Jacksonville. Finding no error in the dismissal of a portion of Appellant's tax appeal and concluding that competent, substantial evidence supports the special deputy's determination that Appellant is not operated primarily for religious purposes, we affirm.

As found by the special deputy, Appellant is a nonprofit corporation that was formed in 2000 to promote and support the arts in Jacksonville, Florida by providing instruction in public schools and in after-school programs. Appellant was incorporated by the Chancellor of St. John's Cathedral. Appellant's general purposes, as set forth in its Articles of Incorporation, are to exist and operate solely for scientific, educational, and charitable purposes within the meaning of Section 501(c)(3) of the IRS Code and to create spiritual enrichment and personal growth through the promotion and support of the arts in Jacksonville and its surrounding communities. In a 2003 memorandum, Kimberly Hyatt, Appellant's Executive Director, explained that Appellant was created in response to cutbacks in

performing and visual arts instruction in Duval County's public elementary schools. Appellant's Board of Directors consists of up to twenty-four lay members and one clergy member. The initial lay directors were elected by the Incorporator, and all subsequent lay directors are to be nominated by the Board of Directors and elected by Appellant's Members, who are those persons holding the offices of the Rector, Wardens, and Vestry of St. John's Cathedral.

On July 5, 2008, the Department of Revenue ("Department") mailed an Independent Contractor Determination to Appellant, informing it that the individuals named therein constituted employees for purposes of unemployment compensation and that it was still required to submit quarterly reports to include the workers and to pay tax on the wages. On July 8, 2008, the Department sent a Special Liability Notice to Appellant, informing it that it had met the liability requirements for unemployment tax and that it was required to file an employer's quarterly report. Both documents notified Appellant that the determinations would become conclusive and binding within twenty days unless it filed a written protest. According to Stephen D. Busey, Appellant's incorporator and St. John's Cathedral's Chancellor, the address to which both determinations were mailed was Appellant's attorney's address. Appellant did not protest either determination.

In a June 7, 2010, Notice of Determination, the Department, after having completed an audit, informed Appellant that it owed \$20,209.80 in unemployment

tax for the period between January 1, 2006, and December 31, 2009. Appellant filed a protest letter in response to this determination, arguing that it was exempt from taxation because it operated primarily for religious purposes and was supervised, controlled, or principally supported by St. John's Cathedral.

During the hearing before the special deputy, Mr. Busey testified that Appellant, which has a different physical location than the Cathedral, "performs spiritual enrichment and personal growth to underprivileged children" in Jacksonville through the arts, which includes dance and music. He further testified that Appellant derives its funding primarily from individuals who either give directly or through the Cathedral and that Appellant's instruction occurs in the public schools. When asked what he observed with respect to what the instructors do, he replied, "Teachers giving instructions in the arts." When asked if Appellant is operated primarily for religious purposes, he replied, "It is." When asked what type of spiritual instruction the instructors provide, he replied, "They associate the arts that they teach with the Gospel of Jesus Christ." When asked if the instructors taught only in association with Christianity or in other religions as well, he replied, "I don't think that it is – the teaching is denomination specific." When asked if the public school system would allow the teaching to be denomination specific, he replied, "I don't know what the public school system will allow and not allow."

When asked whether the music that is taught is religious or not, Busey explained that “all forms” of music are taught.

In the recommended order, the special deputy determined that although the testimony provided at the hearing revealed that Appellant was created to be an outreach ministry, it was not shown that Appellant is operated primarily for religious purposes. According to the special deputy, Appellant’s primary purpose is to promote and support the arts in Jacksonville and surrounding communities by providing instruction to students in public schools and in after-school programs. The special deputy also found that it had not been shown that Appellant was operated, supervised, or controlled by a church or that it was principally supported by a church. The deputy concluded that Appellant was not statutorily exempt from unemployment taxation and recommended that Appellant’s appeal for the period of time prior to July 29, 2008, be dismissed for lack of jurisdiction and that the Notice of Proposed Assessment be affirmed for the period of time beginning July 29, 2008.

Appellant filed exceptions to the recommended order. The Agency for Workforce Innovation (“Agency”) rejected the exceptions and accepted the special deputy’s recommendations, determining that the deputy’s findings were supported by competent, substantial evidence and that the conclusions of law reflected a reasonable application of the law to the facts. It dismissed Appellant’s appeal for

the period of time prior to July 29, 2008, for lack of jurisdiction and affirmed the Notice of Proposed Assessment for the period of time after that date. This appeal followed.

Appellant contends that the Agency erred in dismissing its appeal for the period of time prior to July 29, 2008, for lack of jurisdiction. We reject this argument as both the 2008 Independent Contractor Determination and Special Liability Notice informed Appellant of its liability to pay unemployment tax. Yet, Appellant failed to file a written protest in the statutorily prescribed protest period. As a result, both determinations became final and binding. See Fla. Admin. Code R. 73B-10.035(5)(a)1. As such, the Agency did not err in dismissing Appellant's appeal in part for lack of jurisdiction.

Appellant also contends on appeal that it is exempt from paying unemployment tax under section 443.1216(4)(a)2., which provides that the employment subject to chapter 443 does not apply to service performed in the employ of an organization that is operated primarily for religious purposes and that is operated, supervised, controlled, or principally supported by a church or a convention or association of churches. Our standard of review as to this issue is whether the special deputy's findings are supported by competent, substantial evidence. See His Kids Daycare v. Fla. Unemployment Appeals Comm'n, 904 So. 2d 477, 480 (Fla. 1st DCA 2005). We agree that no competent, substantial

evidence supports the special deputy's finding that Appellant is not controlled by a church. As Appellant's Articles of Incorporation provide, Appellant's Board of Directors is elected by its Members, who are those persons holding the offices of the Rector, Wardens, and Vestry of St. John's Cathedral.

With that said, however, we reject Appellant's argument that the special deputy's finding regarding its primary purpose in operating is not supported by competent, substantial evidence. Not only did Kimberly Hyatt's memorandum state that Appellant was formed in response to cutbacks in performing and visual arts instruction in Duval County's public elementary schools, Mr. Busey testified that Appellant's teachers give instruction in the arts to underprivileged children. Although Mr. Busey testified that the instructors associate the arts they teach with the Gospel of Jesus Christ, and although Appellant's Articles of Incorporation provide that one of its general purposes is to create spiritual enrichment and personal growth, the statute at issue addresses an entity's *primary* purpose in operating. While Appellant's motivation may be religious in nature, its primary purpose in operating, as found by the special deputy and as supported by the evidence, is to give art instruction to underprivileged children.

Contrary to the dissent's assertion, our analysis of this case is not focused solely upon the service delivered by Appellant. Our focus is on whether competent, substantial evidence supports the special deputy's finding that

Appellant's primary purpose is to promote and support the arts in Jacksonville and surrounding communities by providing instruction to students in public schools and in after-school programs. Rather than focusing on the question before us, the dissent focuses on Appellant's motivation. In doing so, it fails to recognize that the Legislature, had it wished to exempt all religious outreach ministries from unemployment taxation, could have easily done so by expressly providing that any outreach ministry, any organization that is operated for religious purposes, or any organization having a religious motivation is exempt. Moreover, even if, as the dissent contends, the question under the statute's language is "why" the organization provides a service, the evidence in this case supports the special deputy's finding that Appellant's primary purpose in providing instruction to students is to promote and support the arts.

While the dissent also reaches the conclusion that control is the "channel marker" for purpose in this case, the exemption at issue looks at two separate and distinct elements: an entity's primary purpose in operating *and* its relationship to a church. Thus, contrary to the dissent's characterization of this case, the fact that Appellant may be controlled by St. John's Cathedral has no bearing on our determination that competent, substantial evidence supports the special deputy's finding that Appellant does not operate primarily for religious purposes.

In reaching our conclusion, we reject Appellant's assertion that our opinion in His Kids Daycare supports reversal in this case. Not only are the facts in that case distinguishable from the facts in this case, given that the daycare at issue was operated out of a church-owned building containing pictures of Jesus and having religious phrases on the wall, we rejected the Unemployment Appeals Commission's argument in that case that the issue of whether the daycare was operated for religious purposes was a legal conclusion. 904 So. 2d at 480. Appellant's reliance upon the Fourth District's opinion in Peace Lutheran Church v. State, Unemployment Appeals Commission, 906 So. 2d 1197 (Fla. 4th DCA 2005), is similarly misplaced. Not only did the employee policy in that case indicate that religious purposes pervaded all aspects of the school/daycare center, a fact not present in the case before us, the Fourth District found the record devoid of any competent, substantial evidence to support the finding that the center did not operate primarily for religious purposes. Here, as stated, the special deputy's finding on that point is supported by competent, substantial evidence.¹

¹ Not only is this case factually distinguishable from Peace Lutheran Church, we also note that the Fourth District in that case cited St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981), in support of its conclusion that the evidence was undisputed that the child care center operated primarily for religious purposes. Yet, in that case, the Supreme Court addressed section 3309(b)(1)(A) of the Federal Unemployment Tax Act, which provides a tax exemption for "a church or convention or association of churches," not the tax exemption provided for in section 3309(b)(1)(B) for an organization which is operated primarily for religious purposes. 451 U.S. at 784. It should also be noted that while the Fourth District in Peace Lutheran Church cited St. Martin a second time for the proposition that the Federal Unemployment Tax Act is framed entirely in terms of the nature of the employer and not in

Our opinion today should not be taken to mean that all organizations throughout Florida that provide both religious and secular services are liable for unemployment taxation. It should instead serve as a reminder that organizations claiming a tax exemption under section 443.1216(4)(a)2. have the burden to prove that they operate primarily for religious purposes. Although the dissent concludes that spiritual enrichment is Appellant's primary purpose, the special deputy, as the finder of fact, found the evidence of such lacking and found instead that Appellant's primary purpose is secular in nature. Whether or not we would have found differently should have no bearing on our decision in this case.

Accordingly, we AFFIRM.

WETHERELL, J., CONCURS; SWANSON, J., DISSENTS IN PART AND DISSENTS FROM THE JUDGMENT WITH OPINION.

terms of the work performed or the place at which the employee works, the Supreme Court in that case stated such in relation to section 3309(b)(1)(A). *Id.* at 783; see also *Bach v. Steinbacher*, 609 N.E.2d 607, 608-09 (Ohio Ct. App. 1992) (holding that the appellant's reliance upon *St. Martin* in arguing about whether the employer operated primarily for religious purposes was misplaced given that the Supreme Court analyzed section 3309(b)(1)(A), not section 3309(b)(1)(B)).

SWANSON, J., dissenting in part, and dissenting from the judgment.

I respectfully dissent.

The facts of this case are simple. The outcome is troublesome.

Cathedral Arts Project (hereinafter “Cathedral Arts”) is a Florida not-for-profit corporation. It was incorporated in 2000 by St. John’s Episcopal Church in Jacksonville, Florida, as an outreach ministry of the Church. According to the incorporator, “[i]t performs spiritual enrichment and provides personal growth to underprivileged children in Jacksonville, Florida, through the arts.” This ministry provides an arts program within the public schools for youngsters who would otherwise be deprived of those educational opportunities.

The issue in this appeal is whether Cathedral Arts is exempt from the Florida Unemployment Compensation Tax pursuant to a statutory exception for religious organizations. Section 443.1216(4)(a)2., Florida Statutes (2009), contains only two requirements for qualifying corporations to be exempt from paying unemployment compensation taxes: “[a]n organization that is [1] operated primarily for religious purposes and that is [2] operated, supervised, controlled, or principally supported by a church or a convention or association of churches.” Cathedral Arts operates primarily for religious purposes and is controlled by St. John’s Episcopal Church, thus meeting both requirements.

The majority agrees that Cathedral Arts meets the second part of the

statutory test because it is controlled by the Church. The majority misinterprets the plain meaning of the first part of the statute, however, which specifically focuses only upon the “primary purpose” of the organization. Rather than focus on the “primary purpose” of the organization, the majority takes a non-textual approach in focusing solely upon the service delivered. The statute is neutral as to the type of service an organization provides; it speaks only in terms of the purpose of the organization. The legal question under the statute’s language is “why” the organization provides the service (i.e., its purpose) and not “what” the organization provides (i.e., arts instruction, food bank, etc.).

Spiritual enrichment is not simply one of Cathedral Arts’ purposes, it is its *primary* purpose. Cathedral Arts’ goal, objective, and end are to provide opportunities for underprivileged children, through the arts, to achieve spiritual enrichment. Instruction in dance, music, and the arts constitutes the means by which Cathedral Arts seeks to promote that spiritual enrichment and personal growth in the lives of these children.

Spiritual enrichment is not a secular concept. To the contrary, it is, in this instance, a manifestation of a religious mission. Cathedral Arts’ teachers “associate the arts that they teach with [faith and spirituality]” and “instruct students in dance and music as being expressions of the beauty of the world that is

brought to us by [faith and spirituality].”²

The Department of Economic Opportunity minimizes Cathedral Arts as an outreach ministry of the Church and concludes the ministry is not operated primarily for religious purposes. What other primary purpose, goal, objective, or end can an outreach ministry of a church have?

The outcome in this case creates an intolerable “Catch-22” for Cathedral Arts and all other ministries that reach out in support of the underprivileged in our public schools or other public institutions. On the one hand, the majority opinion concludes Cathedral Arts’ purpose is not religious enough to qualify for the statutory exemption. On the other hand, if Cathedral Arts was overly zealous and religious in the service provided (for example, if their stated purpose was to proselytize or advance a particular theological doctrine), it would no doubt be declared unconstitutional for it to provide this program for disadvantaged students in the public schools altogether. Catch-22.³ Interpretive action taken by the Department of Economic Opportunity in this case constructs a secular road block to a faith based outreach ministry that is inconsistent with a plain reading of the statute. This result is also inconsistent with a statewide tradition of tax exempt faith based initiatives designed to help the disadvantaged.

While spiritual enrichment is Cathedral Arts’ primary purpose, it recorded

² See Transcript of the telephonic hearing held on May 9, 2011, page 47.

³ Joseph Heller, Catch 22 (Simon and Schuster 1961).

other purposes in its Articles of Incorporation in order to mirror requirements contained in the Internal Revenue Code. That effort to qualify for certain federal tax exemptions does not detract from the primary purpose.

The majority acknowledges Cathedral Arts' "motivation may be religious in nature." The motivation or driving force of an organization can be synonymous with its primary purpose. In this case, Cathedral Arts' motivation is religious. Similarly, its primary purpose is religious.

The majority concedes, and I agree, there is church control over Cathedral Arts. Cathedral Arts' Articles of Incorporation provide the organization's Board of Directors be elected by its "members." Those "members" are "the Rector, Wardens and Vestry of St. John's Parish at Jacksonville, Florida," and comprise the governing body of St. John's Episcopal Church. The governing body of the Church has the power to elect the board of directors for Cathedral Arts. While the "members" might not control the day-to-day operations of Cathedral Arts and may not dictate how directors vote on issues, it is clear they possess overall control.

The majority opinion is inconsistent in finding the Church controls Cathedral Arts, but that Cathedral Arts does not operate with a primarily religious purpose. Control is the channel marker for purpose. Cathedral Arts, as an outreach ministry, is an arm of the Church with a purpose that is no less religious than that of the Church itself.

Finally, the majority opinion is in direct and clear conflict with Peace Lutheran Church v. State, Unemployment Appeals Commission, 906 So. 2d 1197 (Fla. 4th DCA 2005), where the Fourth District found the evidence undisputed with respect to primarily religious purpose, and that “the function of the child care center was to take care of children **and** provide an outreach for the church.” Id. at 1199 (emphasis added). That type of outreach is the primary purpose in this case, as Cathedral Arts is an outreach ministry controlled by the Church. It operates with the same overall motivation or purpose as the church controlling it. Finding church control supports the conclusion that Cathedral Arts’ primary purpose is religious.

I conclude Cathedral Arts should be exempt from the Florida Unemployment Compensation Tax, pursuant to the statutory exception for religious organizations under section 443.1216(4)(a)2.