

H.E. NO. 94-14

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OCEAN COUNTY ECONOMIC ACTION
NOW, INC.,

Respondent,

-and-

Docket Nos. CO-H-93-116
CO-H-93-377

OCEAN INC. EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends the Commission find that the Ocean County Economic Action Now, Inc. did not commit an unfair practice within the meaning of the Act when it withdrew from negotiations with the OCEAN Inc. Education Association. It was found that the employer is not a public employer within the meaning of the Act and accordingly, this Commission has no jurisdiction over the employer. It was recommended that the Complaint be dismissed.

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Appearances:

For the Respondent,
Gerald L. Dorf, attorney

For the Charging Party,
Klausner, Hunter, Cige & Seid, attorneys
(Stephen B. Hunter, of counsel)

HEARING EXAMINER'S DECISION ON A
MOTION TO DISMISS

On September 28, 1992, OCEAN Inc. Education Association filed an unfair practice charge against the Ocean County Economic Action Now, Inc. (OCEAN Inc.) alleging that Ocean Inc. changed insurance benefits unilaterally without negotiating this change with the Association. It was alleged that the union was certified by P.E.R.C. after an election in January 1992. The parties were negotiating an initial contract when on August 11, 1992 the Board of Trustees of OCEAN Inc. voted to change the existing insurance coverage in such a way that employees would now have to contribute for part of their coverage. Prior to the change, employees did not

have to make contributions for either their health insurance or their life insurance.

On April 20, 1993, the Association filed a second unfair practice charge against OCEAN, Inc. alleging that, "between the period of May 15, 1992 and February 25, 1993 the parties had ten negotiations sessions and steady progress was made with regard to the execution of a first collective bargaining agreement between the parties. In a letter dated March 23, 1993, the employer through its labor counsel, notified the Association that no further negotiations would be conducted by the employer purportedly because the employer insisted that it was not a public employer and the Association effectively had no standing to bargain on behalf of the affected employees subsumed the within negotiations unit." It was further alleged that "although the employer had sufficient opportunity to do so, the employer did not contest its public employer status under the New Jersey Employer-Employee Relations Act, when a representation petition was filed on behalf of the employees subsumed within the unit represented by the Association. During the course of these negotiations, the employer never disputed its public employer status."

A Complaint and Notice of Hearing was issued on September 17, 1993 and on November 29, 1993 OCEAN, Inc. filed a Motion to Dismiss the unfair practice charge. It further seeks to have the Association decertified as the exclusive majority representative for collective negotiations on behalf of any employees of OCEAN, Inc.

and formally declares that OCEAN, Inc. is not a public employer within the meaning of the Act. The respondent, OCEAN, Inc., also filed a brief and supporting certifications. The Association opposed the Motion and filed a brief and certification in support of its position. The facts in the opposing certifications are not materially in dispute.

The Certification of Joan Williams, the Acting Executive Director of OCEAN, Inc., was submitted by OCEAN, Inc. Williams states in her certification that OCEAN, Inc. was incorporated as a private not for profit organization under the laws of the State of New Jersey on or about January 9, 1967. The principle purpose of OCEAN, Inc. is to service low-income families and individuals in all areas of Ocean County, New Jersey so that they obtain and secure the skills and opportunities needed to reach self-sufficiency. The specific programs and services provided by OCEAN, Inc. include: the operation of four community development centers providing information and services to low-income and disabled persons throughout the County; a program providing disadvantaged persons with cost-effective home weatherization measures at no cost; homeless services including transportation for participants in Ocean County Transitional Housing Program; the provision of home ownership counseling and advice to existing and potential housing consumers at no cost; the JCP & L Helping Hand Project, an annual emergency assistance program for income eligible households unable to pay their utility bill due to a hardship or circumstances beyond their

control; and the Head Start Program, a comprehensive preschool program for income eligible and disabled children with component areas including health, nutrition, education and social services.

OCEAN, Inc. receives approximately 70% of its funding from the Federal Government; approximately 25% of its funding from the State of New Jersey; approximately 2% of its funding from Ocean County Governmental sources; and approximately 3% of its funding from private sources. The Corporation does not receive public funds automatically. It must obtain such funds through the grant application process.

Williams certifies that all decisions regarding the formulation and implementation of OCEAN, Inc.'s policies, programs and procedures are made exclusively by the Corporation's management including the Executive Director, members of the OCEAN, Inc. Coordinating Staff, the Board of Trustees and, where appropriate, the OCEAN, Inc. Head Start Policy Council. Decisions regarding the composition of and appointments to these managerial positions are made from within OCEAN, Inc., pursuant to its policies, procedures, Constitution and By-Laws. No governmental actor or agent has any involvement in appointing or determining who will work in these positions or in formulating or implementing OCEAN, Inc.'s policies, programs or procedures. No member of management is a governmental official.

The control, direction and development of all labor relations matters of OCEAN, Inc. is handled exclusively through the

Corporation's management, without any governmental involvement. Thus, management makes all decisions with regard to issues including: hiring of employees, firing of employees, discipline of employees, supervision of employees, promotion of employees, sick-time policy, hours and conditions of work and vacation policy.

Disciplinary decisions typically are made by an in-house administrator subject to the Executive Director's input and approval. The Executive Director is ultimately responsible for decisions regarding the hiring and firing of employees, with input from the Personnel Committee and, where appropriate, the Head Start Policy Council. Specific personnel policies and procedures are set forth in detail in the Personnel Policies and Procedures Handbook annexed hereto.

OCEAN, Inc. employees are covered by a group insurance plan. 90% of the plan payments are made by OCEAN, Inc. and 10% of the payments are made by employees.

There exists no supervisor or employee interchange between OCEAN, Inc. and any public entity.

Employees of OCEAN, Inc. are paid by the Corporation through its own payroll account. The Corporation's employment records are maintained at the Corporation's own fiscal office.

The Corporation's expenditures of federal and State government grant funds are monitored through periodic audits and reviews. The United States Department of Health and Human Services, which funds the Head Start Program, the Corporation's largest

program, reviews these grant expenditures every three years and maintains authority to conduct a review at any time. Other expenditures of federal and state funds are monitored on a yearly or quarterly basis. Other than the determinations that these expenditures are made in accordance with applicable governmental rules and regulations, the Corporation fully controls all decisions regarding how to spend such funds and carry out the programs. Labor relations matters regarding OCEAN, Inc. employees working in such grant-funded programs, such as the Head Start Program, are made solely by OCEAN, Inc.'s management with no governmental involvement.

The affidavit of Jane Wilkinson, an NJEA negotiations consultant, was submitted by the Association. She states by way of her certification that a petition to represent the employees in question was filed on behalf of the Education Association with the Commission on or about December 2, 1991. In a letter dated January 6, 1992, the then attorney for the employer agreed to the approval of the previously executed Agreement for Consent Election; however, he stated in his letter that the employer did not want to concede the question of whether OCEAN, Inc. was a public or private employer. In a letter dated January 13, 1992, the Director of Representation advised the Board's attorney that by the agreement to the Consent Election Agreement, the employer had specifically waived its right to assert any jurisdictional objections to the conduct of the election. However, the Director gave the employer the opportunity to rescind its agreement prior to the election. The

employer did not seek to rescind its agreement to the election and an election was conducted among the employees of OCEAN, Inc. and ultimately the Association was certified as majority representative of these employees on February 3, 1992.

Wilkinson further certifies that between May 15, 1992 and February 25, 1993, ten negotiation sessions were held between the Association and the employer. At no time during the course of negotiations were there any discussions on the part of the employer regarding the jurisdiction of the Commission nor did the employer maintain that it was a private employer and not a public employer. Wilkinson further certifies that one-third of the members of OCEAN, Inc.'s board are public members. At its meetings, OCEAN, Inc. reads the Open Public Meetings Act. Wilkinson points to a letter from the United States Department of Health and Human Services to the Chairperson of the Board of Trustees of OCEAN, Inc. which states that OCEAN, Inc. is on a high-risk probationary status and restricts new sources of revenue for OCEAN, Inc. because of documented inefficiencies and deficiencies within the programs offered by OCEAN, Inc. The letter states that "removal from high-risk status and continuous funding will be contingent upon our evaluation of OCEAN, Inc.'s progress in resolving noncompliance issues." As a result, all aspects of the employer's personnel and labor relations policies are being reviewed by the U.S. Department of Health and Human Services. Wilkinson also certifies that Health and Human Services has developed guidelines to be followed by grantees,

including OCEAN, Inc. regarding a minimum cost of living increase to all personnel. Wilkinson also attached a copy of a Head Start policy manual and Head Start program performance standards which Wilkinson claims require certain minimal standards be met as a precondition for the continued certification of funding of local Head Start programs.

On December 23, 1993, OCEAN, Inc. filed a supplemental certification of Joan Williams, in which she responds to certain issues raised in the Wilkinson certification. Williams responds that the Head Start guidelines provided for all staff in Head Start programs to receive a cost of living increase of at least 3% in accordance with the 1993 Federal Funds allocated for this purpose. Grantees may propose to award different cost-of-living increases to their staff provided that they explain the reasons for so doing in their funding applications. Williams points out that these instructions apply only to cost-of-living increases for employees working in the Head Start program and to none of the other OCEAN, Inc. employees. There is no other reference to labor relations matters contained in the application for Head Start grants. Moreover, the 1993 Head Start review report for OCEAN, Inc. is admittedly highly critical of OCEAN, Inc. However, this federal report does not address and is not related to any of the Corporation's labor relations matters. The deficiencies are in areas such as education, nutrition and health services. The Head Start policy manual in the federal regulations regarding Head Start

program performance standards has no provision addressing any labor relations matters.

The Commission has declined jurisdiction over private non-profit corporations providing social services pursuant to governmental contracts. Bergen Cty. CETA, Inc, D.R. No. 82-2, 7 NJPER 422 (¶12187 1981); Bonnie Bray Child Care Counselors Ass'n, D.U.P. No. 80-7, 5 NJPER 457 (¶10231 1979); Newark Housing Development and Rehabilitation Corp., D.R. No. 80-2, 5 NJPER 328 (¶10175 1979); Cape May Cty. Guidance Center, D.R. No. 78-19, 3 NJPER 350 (1977). A non-profit corporation that controls such employment conditions as hiring, assigning, scheduling, supervising, evaluating, promoting, transferring, disciplining, and discharging employees is a private employer instead of a public employer under the New Jersey Employer-Employee Relations Act. It does not become a public employer simply because it is funded by the government or because the NLRB has declined to exercise its jurisdiction.

Association of Retarded Citizens, Hudson County Unit and Federation of Hudson ARC Employees, NJSFT, AFT/AFL-CIO, P.E.R.C. No. 94-57, _____ NJPER _____ (¶_____ 1993); Bergen Cty. CETA; Bonnie Bray; Newark Housing Development; see also New Jersey Racing Commission, D.R. No. 91-35, 7 NJPER 357 (¶22165 1991); Mercer Cty. Superintendent of Elections, D.R. No. 78-37, 4 NJPER 147 (¶4069 1978); Passaic Cty., D.R. No. 78-29, 4 NJPER 8 (¶4006 1977); ARA Services, Inc., E.D. No. 76-31, 2 NJPER 112 (1976).

N.J.S.A. 34:13A-3(c) defines public employer to mean:

... (the) State of New Jersey, or the several counties and municipalities thereof, or any other political subdivision of the State, or a school district, or any special district, or any authority, commission, or board, or any branch or agency of the public service.

There is nothing in the record before me which would indicate that OCEAN, Inc. is a public employer within the meaning of the Act. Although three members of the governing board are drawn from the public sector, a majority of the board members are from the private sector. Accordingly, neither the State nor its subdivisions can control the functioning of OCEAN, Inc.

Significantly, the Association seeks to have the Commission assert jurisdiction on the basis of the regulations of the Department of Health and Human Services, a Federal agency. Even if the authority of the Department of Human Services confers employer status on that Department, that would still not give the Commission jurisdiction. We have no jurisdiction over Federal employers.

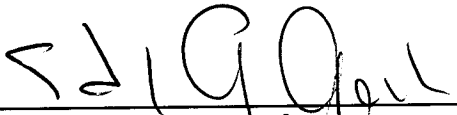
I do not believe that the initial willingness of OCEAN, Inc. to submit to the jurisdiction of the Commission was an effective waiver of its right to contest this Agency's jurisdiction. Subject matter jurisdiction cannot be waived.

See, Cafe Gallery, Inc. v. Alcohol Beverage Control Division, 186 N.J. Super. 189 (Law Division 1982). See also, City of Jersey City v. Roosevelt Stadium Marina, Inc. 210 N.J. Super 315 (App. Div 1986). Here, the fact that OCEAN, Inc. may have consented to the jurisdiction of the Commission does not confer actual jurisdiction on the Commission.

There are no material facts in issue here. Granting every inference in favor of the petitioner, I am compelled to find that OCEAN, Inc. is not a public employer within the meaning of the Act and dismiss the Complaint and the Association's unfair practice charges.

The respondent also moved to have the petitioner decertified as a majority representative on the basis of the lack of jurisdiction. It is noted that the Rules of the Commission do not contemplate such action. However, since the Commission has no jurisdiction over OCEAN, Inc., it follows that the Certification issued in 1992 has no legal consequences.

Accordingly, the Motion to Dismiss the Complaint is granted.



Edmund G. Gerber
Hearing Examiner

DATED: January 21, 1994
Trenton, New Jersey