

MICHAEL BERGIN,
Petitioner,

v.

**NEW JERSEY DEPARTMENT OF
LABOR AND WORKFORCE
DEVELOPMENT,**
Respondent,

and

EQUITY NATIONAL CAPITAL, LLC,
Petitioner,

v.

**NEW JERSEY DEPARTMENT OF
LABOR AND WORKFORCE
DEVELOPMENT,**
Respondent,

**OAL DKT. NO. LID 12322-13
AGENCY DKT. NO. DOL 13-016
(CONSOLIDATED)**

**OAL DKT. NO. LID 12323-13
AGENCY DKT. NO. DOL 13-015**

**DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT**

**FINAL ADMINISTRATIVE ACTION
of the
COMMISSIONER**

Issued: December 16, 2021

Pursuant to N.J.S.A. 43:21-14(c), the New Jersey Department of Labor and Workforce Development (Department or respondent) issued separate assessments against Michael Bergin, a licensed securities broker, and Equity National Capital, LLC, a single-member LLC with Michael Bergin as its sole member (respectively, Bergin and ENC; collectively, petitioners), for unpaid contributions to the unemployment compensation and State disability benefits funds for the period from 2007 through 2011 (the audit period). Bergin and ENC requested hearings with regard to the Department's assessments. The matters were transmitted to the Office of Administrative law (OAL), where they were consolidated and scheduled for a hearing before Administrative Law Judge (ALJ) Lisa James-Beavers. ALJ James-Beavers conducted a hearing of the consolidated matters, after which, pursuant to N.J.A.C. 1:1-14.13(b), OAL Deputy Director and Administrative Law Assignment Judge (ALAJ), Edward J. Delanoy, Jr., was assigned to issue an initial decision as if he had presided over the hearing from its commencement.¹ In his initial decision, the ALAJ concluded that petitioners had failed to

¹ The transfer of the consolidated matters to ALAJ Delanoy was necessitated by the appointment of ALJ James-Beavers to the Superior Court bench.

present sufficient proofs to establish that the individuals who had performed securities brokerage services for Bergin during the audit period were exempt from coverage under N.J.S.A. 43:21-1 et seq., the New Jersey Unemployment Compensation Law (UCL). The ALAJ also concluded that Bergin, not ENC, should be liable for all of the unpaid contributions. Consequently, the ALAJ affirmed the Department's assessment against Bergin and reversed the assessment against ENC, dismissing Bergin's appeal and granting the appeal of ENC. Petitioner Bergin filed exceptions.

The issue to be decided is whether the securities brokers who performed services for Bergin were employees of Bergin and, therefore, whether Bergin was responsible under N.J.S.A. 43:21-7 for making contributions to the unemployment compensation fund and the State disability benefits fund with respect to the securities brokers (referred to hereafter as "Registered Securities Representatives, for reasons described in footnote #2, below).² Under the UCL, the term "employment" is defined broadly to include any service performed for remuneration or under any contract of hire, written or oral, express or implied. N.J.S.A. 43:21-19(1)(A). Once it is established that a service has been performed for remuneration, that service is deemed to be employment subject to the UCL, unless and until it is shown to the satisfaction of the Department either that the service is exempt from UCL coverage under N.J.S.A. 43:21-19(i)(7), (i)9 or (i)10, which contain 27 separate specialized exemptions from UCL coverage, including one at N.J.S.A. 43:21-19(i)(7)(J) for "[s]ervices performed by agents of mutual fund brokers or dealers in the sale of mutual funds or other securities, by agents of insurance companies, exclusive of industrial agents or by agents of investment companies, if the compensation to such agents for such services is wholly on a commission basis,"³ or that the service and the individual performing the service

² At all relevant times, Bergin was a licensed securities broker, who had entered into an agreement (Exhibit P-13, Attachment 1) with securities broker-dealer, J.P. Turner & Co., LLC (JPT), through which JPT licensed and appointed Bergin to open, manage and operate a general securities business and engage "Registered Securities Representatives" to work out of Bergin's Red Bank, New Jersey office. The agreement between JPT and Bergin states that all persons engaged by Bergin as employees or agents are Bergin's responsibility alone. Under the agreement with JPT, Bergin's duties as licensee include "hiring, supervising and terminating, as appropriate, all persons [who] work at, conduct business for, or [are] associated with the Office [that is, Bergin's Red Bank, NJ office], including Registered [Securities] Representatives." The agreement between JPT and Bergin also states that Bergin bears complete financial responsibility for the operation of the Red Bank, NJ office, including all costs, fees, debts, collections, indemnities, and insurance. For its part, JPT agreed to provide to Bergin and his office, broker-dealer services, such as arranging for the carrying of accounts for approved securities transactions, clearing approved transactions, and providing customer statements and confirmations. Bergin created ENC, a Limited Liability Company (LLC) with Bergin as its sole member, for the purpose of processing and tracking payments to the Registered Securities Representatives who worked out of Bergin's Red Bank, NJ office.

³ Under the UCL, in order to successfully assert any of the 27 separate specialized exemptions set forth at N.J.S.A. 43:21-19(i)(7), (i)9, and (i)10, including the exemption at N.J.S.A. 43:21-19(i)(7)(J), a putative employer must establish not only that the services are covered under the terms of the particular UCL exemption, but also that those services are exempt under the Federal Unemployment Tax Act (FUTA), or that contributions with respect to the services are not

meet the statutory test for independent contractor status found at N.J.S.A. 43:21-19(i)(6)(A), (B) and (C), commonly referred to as the “ABC test.” Under the ABC test, a putative employer who seeks to assert exemption from UCL coverage for the services of an individual who it claims to be an independent contractor, has the burden to establish the following with regard to the services and the individual performing those services:

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

N.J.S.A. 43:21-19(i)(6).

The ABC test is written in the conjunctive. Therefore, where a putative employer fails to meet any one of the three criteria listed above with regard to an individual who has performed a service for remuneration, that individual is considered to be an employee and the service performed is considered to be employment subject to the requirements of the UCL; in particular, subject to N.J.S.A. 43:21-7, which requires an employer to make contributions to the unemployment compensation fund and the State disability benefits fund with respect to its employees.

Relative to the exemption from UCL coverage at N.J.S.A. 43:21-19(i)(7)(J) for services performed by those engaged in the sale of securities where the compensation to such individuals is wholly on a commission basis, the ALAJ found that petitioners were not entitled to assert this exemption from UCL coverage for the services at issue, because the Registered Securities Representatives were not paid wholly on a commission basis. That is, the ALAJ found that the Registered Securities Representatives were paid partially through commissions and partially through monies given them in promissory notes characterized by petitioners as “forgivable loans.”⁴

Relative to Prong “A” of the ABC test, the ALAJ found the following:

required to be paid into a state unemployment fund as a condition for a tax offset credit against the tax imposed by FUTA.

⁴ The ALAJ also found that “no corresponding and requisite federal exemption under FUTA [had been] demonstrated” by petitioners with regard to the services performed for Bergin by the Registered Securities Representatives.

(1) When hired, the brokers are constrained in the first instance by the varying covenants in the agreement of hire between themselves, Bergin as licensee and JPT. The net amount of commission for their securities sales is imposed on each individual broker by petitioners through their percentage of draw. This condition is inversely related to performance, but dependent on it nonetheless. Monitoring and rewarding performance is an intrinsic element of employment. Moreover, the scheduled repayment of monies with conditioned forgiveness dependent on continued employment (Exhibit P-13, Section 2, at 29) suggests employment.

(2) Petitioner contends that the monies derived from brokers' securities transactions went directly from JPT to the brokers. The 1099 forms which Bergin issued to each broker leaves an official record which is otherwise persuasive.

(3) Bergin argues that the funds to brokers were not distributed by him. He issued the 1099 forms to accommodate the pressuring insistence of JPT. Further, his accountant, Gee, had assured him the process was simply an acceptable accounting device. However, without testimony from Gee or any corroboration by the brokers, and considering the "clear conferral of responsibility for commission disbursement on Bergin" under the agreement between JPT and Bergin, this argument must fail.

(4) Under the terms of hire, the various covenants of the agreement affect brokers' behavior and income. These include monitored compliance with all securities regulations, subject to penalty; maintenance of such records as JPT and Bergin direct; and compelled attainment of a minimum monthly number of securities sales.

Based on the foregoing, the ALAJ concluded that, "[i]t is more likely than not that the [Registered Securities Representatives] were not free from control or direction over the performance of their services, both by contract and in fact."

Relative to Prong "B" of the ABC test, the ALAJ found that the Registered Securities Representatives had been present on the premises and under the aegis of the Red Bank branch office when performing their services. The ALAJ also found that, "[a]gainst the backdrop of those reasons outlined above [for petitioners having failed to meet their burden under Prong "A" of the ABC test], finding that the [Registered Securities Representatives] had direction and control by Bergin, the evidence preponderates that the [Registered Securities Representatives] were employed in the Branch Office selling securities on behalf of Bergin and JPT, in the usual course of business."

Relative to Prong "C" of the ABC test, the ALAJ found the following:

Bergin highlighted the lack of dress code and freedom of movement accorded the [Registered Securities Representatives] in the branch office. He contended that each [Registered Securities Representative] could operate independently as an entity if he or she chose, and the technology was such that a [Registered

Securities Representative] also could conduct trades from home. Yet Bergin did not identify any separate business entities in existence among the [Registered Securities Representatives], and the office environment he attested to was not supported by corroborative personal affirmation from any [Registered Securities Representative] on this record. There were no other witnesses beyond Bergin to suggest that the boundary-less environment in the branch office rose to the level of independent operation. It is most likely, and the evidence preponderates, that it did not.

Finally, as to the issue of petitioners' liability, the ALAJ found the following:

(1) Bergin reported payments to the Registered Securities Representatives on his personal income tax returns and issued 1099 forms to them using his own social security number;

(2) The findings of fact contained in the ALAJ's initial decision relative to Prong "A" of the ABC test, "rest the power of direction and control as envisioned by the [UCL] on Bergin individually;"

(3) The central function of ENC emerges through the testimony and the Memorandum of Understanding (Exhibit P-13) as providing JPT with an accounting report of commissions due the individual Registered Securities Representatives, adding "[a]s a legal entity, it [ENC] did not perform any functions to which the ABC test of N.J.S.A. 43:21-19(i)(6) could be applied;"

(4) ENC, unregistered with either the Securities and Exchange Commission (SEC) or the Financial Industry Regulatory Authority (FINRA), could not perform the functions of an employer relative to those engaging in securities brokerage services;

Based on the foregoing, the ALAJ concluded, as noted earlier, that Bergin, not ENC, should be liable for all of the unpaid contributions.

In his exceptions, Bergin makes the following arguments:

(1) Under "UCL §19(g)," JPT should be considered the employer of the Registered Securities Representatives, not Bergin⁵;

(2) Under "the LLC Act, N.J.S.A. 42:2C," Bergin, as the sole member of ENC, could not be liable individually for any employment taxes owing under the UCL for Registered Securities Representatives working out of "the Red Bank branch office of J.P. Turner during the audit period;

⁵ N.J.S.A. 43:21-19(g) contains the UCL definition for the term "employing unit." Bergin asserts that JPT should be considered the "employing unit" relative to the services performed by the Registered Securities Representatives out of Bergin's Red Bank office.

(3) Any employment of the Registered Securities Representatives working out of “the Red Bank branch office of J.P. Turner” during the audit period was exempt from UCL coverage under N.J.S.A. 43:21-19(i)(7)(J) and N.J.S.A. 43:21-19(i)(8);⁶

(4) Bergin was not an employer under “the threshold test of UCL §19(i)(6),” because the Registered Securities Representatives performed no services for petitioners, and received no remuneration from petitioners; and

(5) Bergin “was not an employer under the ABC Test of UCL §19(i)(6).⁷

Upon *de novo* review of the record, and after consideration of the ALAJ’s initial decision, as well as the exceptions filed by petitioner Bergin, I hereby accept and adopt the findings of fact, conclusions and recommendation contained in the ALAJ’s initial decision

ORDER

Therefore, it is hereby ordered that the Department’s assessment against petitioner ENC is dismissed and that the Department’s assessment against petitioner Bergin is affirmed. Moreover, petitioner Bergin is hereby ordered to immediately remit to the Department the entire amount assessed against him for unpaid unemployment and temporary disability contributions for the years 2007 through 2011 totaling \$110,401.36, along with applicable interest and penalties.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

⁶ N.J.S.A. 43:21-19(i)(8) states the following: “If one-half or more of the services in any pay period performed by an individual for an employing unit constitutes employment, all the services of such individual shall be deemed to be employment; but if more than one-half of the service in any pay period performed by an individual for an employing unit does not constitute employment, then none of the service of such individual shall be deemed to be employment.”

⁷ Bergin maintains relative to Prong “A” of the ABC test that JPT, not Bergin, exercised control or direction over the Registered Securities Representatives working out of Bergin’s Red Bank office. Relative to Prong “B” of the ABC test, Bergin asserts that he and his LLC, ENC, are in the “landlord business,” involving the leasing of office space, equipment and related services; whereas the Registered Securities Representatives working out of his Red Bank office are in the “quite distinct business” of providing financial information and advice to their clients, and JPT is in the “quite distinct business” of broker-dealer, i.e., effecting securities transactions on behalf of brokers and their clients. Bergin maintains that Prong “C” of the ABC test has been satisfied, because the Registered Securities Representatives “had their own portable clientele that would customarily follow the [Registered Securities Representatives] to an alternative platform for conducting their business if the [Registered Securities Representative’s] relationship with petitioners terminated.”

DECISION RENDERED BY
THE COMMISSIONER, DEPARTMENT
OF LABOR AND WORKFORCE DEVELOPMENT



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