DOCKET NO. HHB-CV-15-5017072 S : SUPERIOR COURT

MICHAEL ARONOW, M.D. : JUDICIAL DISTRICT

v. : OF NEW BRITAIN

FREEDOM OF INFORMATION
COMMISSION : JANUARY 5, 2018

MEMORANDUM OF DECISION ON APPEAL

PROCEDURAL HISTORY:

The plaintiff, Michael Aronow, M.D. has brought this administrative appeal of a final decision of the defendant Freedom of Information Commission [FOIC] in the matter of *Aronow* v. *Freedom of Information Officer, State of Connecticut, University of Connecticut Health Center, et al.,* Docket No. FIC-2015-127. The respondents in that proceeding, University of Connecticut Health Center [Health Center] and its freedom of information officer, Dr. Scott Wetstone, are not defendants in this appeal.

The defendant filed a motion to dismiss and the plaintiff filed a request to amend his appeal. The court, Huddleston, J., issued a memorandum of decision (135.00), leaving the following issues to be resolved in the decision on the appeal:

(1) Whether the defendant erred in allowing the respondents nine months' time to respond to the defendant's order of compliance with the plaintiff's Freedom of Information Act request;

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1) Dr. Aranow
2) K. Ross
3) Official Reporter of Judicial Decisions
by A. Jordanopoulos, Ct officer on 1/5/18.

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(2) Whether the defendant erred in restricting the plaintiff's request for documents; and

(3) Whether the plaintiff has exhausted his administrative remedies concerning his claim that the defendant erred in failing to establish a procedure for in camera inspection of documents claimed to be exempt from disclosure.

The court has reviewed the briefs of the parties. Argument was presented on October 19, 2017. For the reasons stated below, the plaintiff's appeal is denied.[1]

STANDARD OF REVIEW:

This appeal is brought pursuant to the Uniform Administrative Procedure Act, General Statutes § 4-183.[2] Judicial review of the commission's action is very restricted. *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the Supreme Court] nor the trial court may retry the case or substitute its own judgment for that of the administrative agency

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[1] There was a fourth claim of the plaintiff which survived the defendant's motion to dismiss. The claim is that the commission erred in dismissing FIC-2014-156. This claim is addressed in part IV of this memorandum of decision.

[2] General Statutes § 4-183 (j) provides in relevant part: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings."

on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) Id.; see also *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 561, 964 A.2d 1213 (2009). "The substantial evidence rule governs judicial review of administrative fact-finding under UAPA. . . . Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . This substantial evidence standard is highly deferential . . . . The burden is on the [plaintiff] to demonstrate that the [agency's] factual conclusions were not supported by the weight of substantial evidence on the whole record." (Citation omitted; internal quotation marks omitted.) *Palomba-Bourke* v. *Commissioner of Social Services*, 312 Conn. 196, 202, 92 A.3d 932 (2014).

"Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts . . . Ordinarily, this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes." (Internal quotation marks omitted.) Id., 203.

ANALYSIS OF CLAIMS ON APPEAL:

I. Order of nine months' compliance time

The plaintiff alleges that the decision of the FOIC to allow ninth months' time to provide documents was an abuse of discretion because the documents had been previously requested on August 19, 2013. He had been unhappy with the Health Center's compliance to that request and filed a complaint with the FOIC, Docket No. FIC-2014-156. The complaint was dismissed for lack of subject matter jurisdiction.

The timing of provision of records is within the discretion of the FOIC. The record reflects evidence before the FOIC hearing officer that, due to financial constraints of the Health Center, Wetstone was taking on ever increasing additional duties in addition to his role as information officer; that he was the sole information officer; that there were a large number of information requests pending; that the plaintiff was the requesting party for a substantial number of those pending requests;[3] and that the plaintiff had received a number of the documents requested through discovery in a prior action against the Health Center. Thus, the FOIC had substantial evidence upon which to base its decision to order a rolling out of information over a nine month period of time. The plaintiff has failed to establish, based on the entirety of the record, that the FOIC abused its discretion in setting forth a nine month time period for disclosure of the information. This claim is dismissed.

II. Restriction of request

Paragraph 11 of the final decision states:

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[3] The plaintiff filed twenty-seven FOI requests of the Health Center within three years, ten of which were filed between January 1 and June 30, 2015. In addition to the volume of requests, the record reflects a lack of clarity of the information sought by the plaintiff in the requests. According to an affidavit on behalf of the Health Center, the plaintiff's February 4, 2015 request alone required production of approximately 824,000 pages of records. The plaintiff disputes this number, although he does not provide a number of his own.

It is found that, on June 30, 2014, the complainant asked Wetstone to release "whatever material you have collected to date as well as the subset of documents that meet the following search criteria . . . between July 1, 2010 and August 14, 2012." It is found that the complainant listed as search criteria his name and variations of his name, the words FOI and variations, and "HCAC," or "Grievance" or "Appeals Committee," and also excluded emails sent to his own email at the health center.

The plaintiff alleges that the commission erred in finding that he had agreed to narrow the scope of his request to those items outlined in Paragraph 11 of the final decision. He asserts that he also sought documents claimed in Paragraph 10, which states:

> In particular, the Commission found in Docket #FIC2014-156 that "by email dated December 13, 2013, Dr. Scott Wetstone ('Wetstone') of the respondent Health Center, suggested to the complainant that, in light of the complainant's other FOIA requests, a narrowed request would expedite disclosure [of the records requested on August 19, 2013]." Consequently, the complainant agreed to exclude "broadcast emails, journal articles, and research data." Docket #FIC 2014-156, paragraph 4.

Although the plaintiff claims that the restrictions of the commission in Paragraph 11 are "clearly erroneous" and "an arbitrary and clearly unwarranted exercise of discretion," he states that the commission correctly noted that he agreed to exclude "broadcast emails, journal articles, and research data." He also states, "The contents of paragraph 11 are factually correct." It is difficult to ascertain the plaintiff's claim of aggrievement.

If the plaintiff is claiming that he did not restrict search terms or exclude emails sent to his own email address at the Health Center, as set forth in Paragraph 11, the record reflects

differently. The plaintiff agreed to the email exclusion in an email to Wetstone dated June 30, 2014. R., p. 123. He also testified at his hearing that he was willing to limit the search. R., p. 67.[4]

If the plaintiff is claiming that he did not agree that he was "permanently narrowing his request," in other words, that he agreed to narrow his request but never stated that it was to be a permanent restriction of scope, he never stated that the agreed upon restriction was of limited duration. A failure of the commission to divine the plaintiff's unstated intent does not render its admittedly correct statement clearly erroneous nor does it evidence an arbitrary or unwarranted exercise of discretion.

In his appeal and again in his reply brief, the plaintiff asserts that FIC-2015-127 was based on an FOI request that was identical to the request upon which FIC-2014-156 was based. Plaintiff limited the scope of his request in FIC-2014-156. If identical, he similarly limited the scope of FIC-2015-127.

Regardless of which claim the plaintiff is asserting, there is no evidence of abuse of discretion and there is ample basis for the findings of the commission. Thus, the plaintiff's claim fails and is dismissed.

III. Exhaustion of remedies re in camera inspection

"It is a settled principle of administrative law that if an adequate administrative remedy exists, it must be exhausted before the Superior Court will obtain jurisdiction to act in the matter.

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[4] The following is an excerpt from the July 1, 2015 hearing:
"The Hearing Officer: Are you still willing to reduce the amount that you have in here, to limit the search (unintelligible)?
[Dr. Aronow]: Yeah. As you will go on where you gave something on the minimal to use." R., p. 67.

. . . [B]ecause the exhaustion doctrine implicates subject matter jurisdiction, we must decide as a threshold matter whether that doctrine requires dismissal of the plaintiff['s] claim." (Citations omitted; internal quotation marks omitted.) *Stepney, LLC* v. *Fairfield*, 263 Conn. 558, 563, 821 A.2d 725 (2003).

The plaintiff asserts that the commission did not provide any mechanism for an in camera review of documents which the respondents claimed were exempt from disclosure. The plaintiff has been ordered to show that he exhausted administrative remedies with respect to this claim.

The plaintiff has not established that he raised this issue before the commission voted on the final decision. There is nothing in the evidentiary record as to this claim, nor did the plaintiff move to open the record to introduce the preliminary privilege log prior to the commission's adoption of the final decision. As the commission did not have the opportunity to consider whether there should have been an in camera review of the proposed privileged documents, the plaintiff did not exhaust his administrative remedies and this court is precluded from consideration of the merits of this claim. See *Dragan* v. *Connecticut Medical Examining Board*, 223 Conn. 618, 632, 613 A.2d 739 (1992) ("A party to an administrative proceeding cannot be allowed to participate fully at hearings and then, on appeal, raise claims that were not asserted before the board"). This claim is dismissed.

IV. Improper dismissal of FIC-2014-156

A fourth claim of the plaintiff survived the defendant's motion to dismiss, that the commission erred in dismissing FIC-2014-156. Judge Huddleston found that the defendant did not adequately brief this issue in its motion to dismiss and left the parties to brief the issue for

resolution following the hearing on this appeal. The issue has now been briefed by the parties. Therefore, the court will address it.

The plaintiff made an FOI Act request for documents on August 19, 2013. Dissatisfied with the response, the plaintiff filed a complaint with the defendant commission on March 17, 2014, which was assigned Docket No. FIC-2014-156. On June 5, 2014, the defendant informed the plaintiff that he had not timely filed his complaint within thirty days and that the complaint was dismissed. The plaintiff sought reconsideration and a preliminary hearing was scheduled by the defendant which ultimately took place on December 16, 2014. On that date, the defendant's hearing officer concluded that the complaint was not timely filed, depriving the defendant of jurisdiction. On February 4, 2015, the defendant adopted the final decision in this matter as well as another complaint, FIC-2015-157, dismissing both complaints. The plaintiff appealed the decision to this court on March 17, 2015. The appeal was filed as Docket No. HHB CV 15-5016347 S, *Aronow* v. *Freedom of Information Officer, State of Connecticut, University of Connecticut Health Center, et al.* That action was the subject of a motion to dismiss filed by the defendant and deemed moot as the same issues were to be adjudicated in the above referenced FIC-2015-127. As a result, that action was dismissed on June 18, 2015 (Schuman, J.). No appeal was taken by the plaintiff.

Although it is difficult to ascertain the plaintiff's exact claim, it appears that he asserts that he relied on representations made by defendant's counsel in her argument in support of the defendant's motion to dismiss in HHB-CV-15-5016347-S, that his FIC-2014-156 claims would be considered in the hearing on complaint FIC-2015-127. Therefore, in reliance on counsel's

representation, he did not file an appeal of Judge Schuman's dismissal of that action. He now asserts that the issues of FIC-2014-156 were not addressed by FIC-2015-127, so he seeks redress as part of this appeal of FIC-2015-127. The record reflects that the issues which were the subject of FIC-2014-156 were litigated by the hearing officer in FIC-2015-127. R., pp. 22-36, 40-41, 64-73, 75,[5] 78-79[6] and 108-132.[7] The commission adopted the hearing officer's decision on October 28, 2015, finding in favor of the plaintiff.

The plaintiff claims that he is aggrieved because the hearing officer considered evidence of a delay in records provision of only eight and one-half months, rather than considering the original request date of August 19, 2013 from which the FIC-2014-156 complaint arose, a delay of twenty-six months. As stated in the reply brief, "[W]hat plaintiff wants is for the court to decide the issues of this appeal using the date plaintiff initially requested the records, August 19, 2013, as when respondent health center's obligations to comply with plaintiff's record request began as opposed to the February 4, 2015 date defendant used." It is not the role of the court to substitute its judgment for that of the commission as to the weight of the evidence on questions of fact. General Statutes § 4-183 (j). There is no evidence that choosing the lesser time period was an abuse of discretion. Moreover, there is no evidence in the record that the officer's

[5] "Dr. Aronow: So those 153 documents that Dr. Wetstone obtained pertinent to my request back in August of 2014, which you still have on February 4th, 2015, which have not been provided to me." R., p. 75.
[6] "Dr. Aronow: I will argue that not giving me documents that were in his [Dr. Wetstone] possession in August of 2014 is unduly delaying things." R., p. 79.
[7] The plaintiff submitted various exhibits at the July 1, 2015 hearing, which included numerous e-mail communications between him and Dr. Wetstone in 2013 and 2014, regarding requests made during that time. See e.g., R., pp. 108, 117-30. The complaint he filed on March 17, 2014, regarding requests he made in 2013 that had not been fulfilled was also included as an exhibit. R., p. 109.

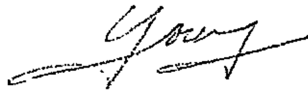
decision, adopted by the commission, would have led to a different result had the longer delay period been utilized.

The plaintiff's claim that his FIC-2014-156 complaint was not fully addressed in the hearing for FIC-2015-127 is without merit. The issues which were the basis for FIC-2014-156 were heard. Although the plaintiff was not satisfied with the scope or timing of the ordered production, he did receive a successful outcome. A party who prevails below is generally not aggrieved. See *Seymour* v. *Seymour*, 262 Conn. 107, 110-11, 809 A.2d 1114 (2002); see also *Blue Cross/Blue Shield of Connecticut, Inc.* v. *Gurski*, 47 Conn. App. 478, 481, 705 A.2d 566 (1998). The plaintiff prevailed and the commission found that the respondents had violated the FOIC. See *University of Connecticut* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-09-4021320-S (April 21, 2010, *Vacchelli, J.*) (49 Conn. L. Rptr. 856, 860) ("it has been held that when the FOIC finds that a governmental agency violated the Freedom of Information Act, the agency is aggrieved for purposes of appeal"). Finally, the plaintiff has shown no abuse of discretion. Therefore, his claim is dismissed.

ORDER:

The plaintiff's appeal is dismissed. No costs are awarded to any party.

The Court,



Robert E. Young, Judge