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SUPERIOR COURT

DOCKET NO. HHB-CV-19-6054926 ^{2020 AUG 29 PM 4: 43} SUPERIOR COURT

WILLIAM J. COMERFORD	JUDICIAL DISTRICT OF NEW BRITAIN :	JUDICIAL DISTRICT OF NEW BRITAIN
VS.	:	ADMINISTRATIVE APPEALS SESSION
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	AUGUST 31, 2020

MEMORANDUM OF DECISION

INTRODUCTION:

This is an administrative appeal from a final decision of the Freedom of Information Commission (FOIC) by the plaintiff, William J. Comerford (plaintiff), seeking production of records from the Center Street Cemetery Association (CSCA) pursuant to the Freedom of Information Act (FOIA).

FACTS AND PROCEDURAL HISTORY:

On April 13, 2018, the plaintiff requested certain records from CSCA pursuant to FOIA. On May 16, 2018, not having received the requested records, the plaintiff filed a complaint with the FOIC asserting that CSCA violated FOIA. On May 17, 2018, CSCA responded to the plaintiff denying his records request on the ground that CSCA was not a public agency within the meaning of FOIA.

*electronic notice sent to all counsel of record.
mailed to Reporter of Judicial Decisions.
A. Jordanopoulos, Ct Officer 8/31/20*

On July 9, 2018, November 28, 2018, and January 15, 2019, the FOIC conducted a contested case hearing in this matter. The hearing officer issued her proposed decision finding that CSCA was not a public agency. The hearing officer also found that CSCA was not the functional equivalent of a public agency. In reaching this conclusion, the hearing officer considered the four factors set forth in our Supreme Court's decision in *Board of Trustees of Woodstock Academy v. Freedom of Information Commission*, 181 Conn. 544, 554, 436 A.2d 266 (1980). The hearing officer found that CSCA was created by the government and received government funding, however she also found that CSCA was not performing a government function and was not significantly controlled by government. Taking all of the relevant factors into consideration, the hearing officer found that CSCA was not the equivalent of a public agency, and therefore not required to comply with FOIA. The hearing officer therefore recommended that the complaint be dismissed. The FOIC considered the hearing officer's proposed decision at its March 27, 2019, and April 24, 2019 meetings. The FOIC unanimously adopted the proposed decision without amendment.

The record contains evidence of the following. The Center Street Cemetery is a free public burial ground in Wallingford where burials have occurred from 1683 through the present. Burials are free to any Wallingford resident. Prior to 1911, the board of selectmen of Wallingford operated the cemetery. On May 4, 1911, the town of Wallingford created CSCA "to care for, maintain and beautify" the cemetery. CSCA is a non-profit tax exempt entity. Upon its formation, CSCA entered into a contract with the town by which CSCA agreed to operate and

care for the cemetery, and the town agreed to pay CSCA a specified amount that ultimately changed over the years. The town retained ownership of the land and the responsibility to maintain the cemetery's outer wall. CSCA is governed by a board of directors who are elected by members of the association. The town does not appoint directors. All decisions concerning the operation of the cemetery are made by the CSCA board. An employee of CSCA carries out the necessary daily activities.

The plaintiff administratively appeals the final decision of the FOIC. The plaintiff is aggrieved because he has exhausted his administrative remedies, and appeals an adverse final decision of the FOIC dismissing his complaint and leaving him without a FOIA means of obtaining records from CSCA.

STANDARD OF REVIEW:

This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183.¹ Judicial review of an administrative decision in an appeal under the UAPA is limited. See *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757

¹ Section 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."

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 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.*, 343.

Although the courts ordinarily afford deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute’s purposes, “[c]ases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion.” (Internal quotation marks omitted.) *Dept. of Public Safety v. Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

ANALYSIS:

The issue decided by the FOIC in this matter was whether CSCA is a public agency or the equivalent thereof. The FOIC decided that it was not. The court reviews that final decision pursuant to the standard of review noted above. The plaintiff asserts on appeal that CSCA is the functional equivalent of a public agency.

General Statutes § 1-200 (1) defines a “public agency” for purposes of FOIA, in relevant part, as (A) any subdivision of the government of the state or any city or town, (B) any functional equivalent of a public agency, and (C) any implementing agency. This litigation focuses on (B), any functional equivalent as defined by law. Our Supreme Court in *Woodstock*, set forth the following four factors to consider when determining whether any entity is the functional equivalent of a public agency: (i) whether the entity performs a governmental function, (ii) the level of government funding, (iii) the extent of government involvement or regulation, and (iv) whether the entity was created by the government. *Board of Trustees of Woodstock Academy v. Freedom of Information Commission*, supra, 181 Conn. 554. Additionally, courts have noted in other cases that, in making a determination, the four factors should be weighed cumulatively, with no single factor being controlling². Thus the determination of whether or not an entity is the functional equivalent of a public agency requires a balanced case by case consideration of the above noted factors. See *Connecticut Humane Society v. Freedom of Information Commission*, 218 Conn. 757, 761, 591 A.2d 395 (1991); see also *Fromer v. Freedom of Information Commission*, 90 Conn. App. 101, 105, 875 A.2d 590 (2005).

² This analysis for determining whether or not an entity is the functional equivalent of a public agency has also been adopted by the federal courts in connection with the federal FOIA statute. See *Washington Research Project, Inc. v. Department of Health, Education & Welfare*, 504 F.2d 238, 245-46 (D.C. Cir. 1974), cert denied 421 U.S. 963 (1975).

Traditional governmental functions include the establishment and execution of laws and regulations, fire prevention, police protection, sanitation, public health and education, public transportation, provision and maintenance of parks and similar functions. The simple operation of a cemetery is not a classical government function. Further, the record evidence indicates that CSCA performs its function of operating the cemetery through a contractual relationship with Wallingford³. Thus, CSCA provides services, namely daily operation of a cemetery, which the town owns, in exchange for payment, in accordance with the terms of a contract. Even if operation of the cemetery amounted to provision of a government service, the provision of such a service through a contractual arrangement does not make the provider a public agency. See *Domestic Violence Services of Greater New Haven, Inc. v. Freedom of Information Commission*, 47 Conn. App. 466, 474-75, 704 A.2d 827 (1998). See also *Forsham v. Califano*, 587 F. 2d 1128, 1138 (D.C. Cir. 1978), aff'd 445 U.S. 169 (1980). Accordingly, the court concludes that the record contains substantial evidence supporting the hearing officer's finding that CSCA does not perform a governmental function, and the hearing officer's conclusion in this regard was not erroneous.

The hearing officer also found that the town does not have significant involvement or control over CSCA. The record contains evidence indicating that the town has no ability to

³ The CSCA does not create or promulgate regulations, although as with any cemetery it is subject to applicable regulations. The CSCA does however operate the Wallingford cemetery and provides rules for its orderly operation.

control CSCA's day to day activities. The CSCA is controlled by a board of directors, who are not appointed by the town. The daily activities of CSCA are carried out by a CSCA employee. There is no official reporting requirement for CSCA to regularly report matters to the town. The agreement between CSCA and the town indicates that the town will not interfere with the operation of the cemetery as long as CSCA conducts itself in accordance with the terms of the agreement. Thus, the record contains substantial evidence supporting the hearing officer's finding that the town is not significantly involved in, and does not control the activities of, CSCA. The hearing officer's conclusion in this regard is not erroneous.

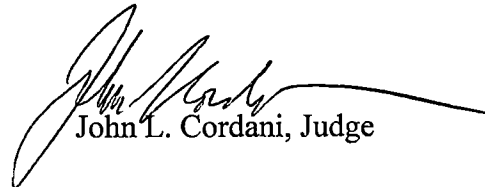
The parties stipulated that CSCA was formed by the town and receives substantial funding from the town⁴. Clearly CSCA was formed by the town. As for funding, CSCA receives funding from the town, however that funding is provided in accordance with the terms of the contract and is in payment for services. The fact that funding is received as a result of a contract and in payment for services renders this type of funding different from general appropriations made by a government to an agency. See *Lombardo v. Handler*, 397 F. Supp. 702, 802 (D.C. 1975), aff'd 546 F.2d 1043 (D.C. Cir. 1976); see also *Envirotest Systems Corp., v. Freedom of Information Commission*, 59 Conn. App. 753, 759, 757 A.2d 1202 (2000).

⁴ Recently, approximately 84% of the CSCA's income was provided by the town. However, the fact that an entity depends upon the government for a large portion of its income does not itself make the entity a functional equivalent of a public agency. See *Envirotest Systems Corp. v. Freedom of Information Commission, et al*, 59 Conn. App. 753, 757 A.2d 1202 (2000).

The hearing officer, and the FOIC, weighed the four factors of the *Woodstock* analysis and determined that CSCA was not the equivalent of a public agency. The court finds that substantial evidence in the record supports this finding and the finding is not erroneous. As a result, the court finds that on appeal, the plaintiff has failed to establish that FOIC's final decision was (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. See § 4-183 (j). Accordingly, the court respectfully dismisses the appeal.

ORDER:

The appeal is dismissed.


John L. Cordani, Judge