NO. CV 11 6009562S	:	SUPERIOR COURT
CONNECTICUT DEPARTMENT OF EDUCATION, ET AL.	:	JUDICIAL DISTRICT OF NEW BRITAIN
v.	:	
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	DECEMBER 29, 2011
NO. CV 11 6009584S	:	SUPERIOR COURT
MARTIN A. GOULD	:	JUDICIAL DISTRICT OF NEW BRITAIN
V.	:	
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	DECEMBER 29, 2011

MEMORANDUM OF DECISION

The plaintiffs, department of education (the department), Victor Schoen, and Martin Gould,[1] have appealed from a February 23, 2011 final decision of the defendant freedom of information commission (FOIC). The FOIC ordered that the plaintiffs open the evidentiary portion of certain arbitration hearings, held in accordance with the Teacher Negotiation Act, (TNA), General Statutes § 10-153 (f), to the defendants-

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1 Gould brought his case separately, but it is considered jointly with the administrative appeal of the other plaintiffs as there was only one final decision rendered. The plaintiffs are aggrieved for purposes of General Statutes § 4-183 (a) as they have been given orders adverse to their position.

complainants, Jim Moore and the Waterbury Republican American.

The FOIC's final decision, issued after a hearing and after approval of a proposed final decision, reads in part as follows:

1. The respondent Department of Education is a public agency within the meaning of § 1-200(1), G.S.

2. The respondent Contract Arbitration Panel maintains that it is not a public agency within the meaning of § 1-200(1), G.S.

* * *

7. It is found that the respondent Contract Arbitration Panel consists of three members, drawn from the pool of arbitrators maintained by the respondent Department of Education pursuant to § 10-153f(a) and (c), G.S. One member was selected by the employer, a second by the employees' collective bargaining unit, and the third by the first two arbitrators.

8. It is found that the respondent panel is a board of appointed individuals to whom the consideration and determination of contractual disputes between boards of education and teachers unions have been committed by the General Assembly.

9. It is concluded that the respondent arbitration panel is a committee of the State [Department] of Education, and therefore a public agency within the meaning of § 1-200(1), G.S.

10. [The claimant's analysis regarding quasi-public"functional equivalents" is not necessary as respondent arbitration panel is a committee of a public agency. Also the "functional equivalent" analysis" was satisfied.]

* * *

14. Since the respondent arbitration panel is a committee of the respondent Department of Education, it is concluded that the Department of Education is a proper party. If the Department of Education believes it has no interest in this dispute, it will not be affected by the decision, and its designation as a party cannot prejudice or harm it.

15. By letter of complaint filed March 1, 2010, the complainants appealed to the Commission, alleging that the respondents violated the open meetings provisions of the FOI Act when, on January 30, 2010, they convened privately to hear testimony from the Torrington Board of Education and the Torrington Education Association, as required by the Teacher Negotiation Act, following rejection, by the Torrington City Council on December 21, 2009, of a negotiated agreement between the Torrington Board of Education and the Torrington Education Association. The complainants "reserve[d] the right to seek imposition of civil penalties."

16. It is found that the respondent panel, after a request by the Torrington Education Association to exclude the Republican-American reporter from the hearing in its entirety, adjourned to what arbiter Foy described as an "executive session," without taking a vote to do so. . . .

* * *

19. The respondent Department of Education maintains that the January 30, 2010 hearing is not a "meeting" because the arbitrators are chosen by the parties, because the fees of the arbitrators are paid for by the parties to the arbitration; and because the arbitrators are not agents of the Department of Education.

20. However, it is concluded that the January 30, 2010 hearing

is a "hearing or other proceeding" of the respondent arbitration panel, and the fact that the panel has some independence from the Department of Education does not take its hearings outside of § 1-200(2), G.S.

21. Both respondents maintain that the January 30, 2010 hearing of the arbitration panel constitutes "strategy and negotiation with respect to collective bargaining," and therefore is an exception to the definition of "meeting" in § 1-200(2), G.S.

22. In Glastonbury Education Association v. FOIC, 234 Conn. 704 (1995), our Supreme Court construed the "strategy and negotiation with respect to collective bargaining" language in § 1-200(2), G.S., to exclude from the term "meeting" only those parts of collective bargaining sessions that relate specifically to "strategy or negotiation," rather than to collective bargaining proceedings in their entirety. Because the Commission in that case had concluded that the *entirety* of an arbitration hearing should have been open to the public, including those parts that related specifically to "strategy and negotiations," the Court "postpone[d] to another day questions concerning the validity of a more narrowly tailored FOIC order that requires open hearings only with respect to evidentiary presentations and permits executive sessions for discussion and argument about the contents of the parties' last best offers." Id. at 718.

23. The Glastonbury court did provide some guidance in distinguishing between discussion and argument about the last best offers, which it concluded constituted "strategy and negotiations," and the evidentiary portions of the proceedings, which it concluded did not fall within that meeting exclusion.

24. First, the Glastonbury court concluded that the actual presentation of last best offers by the parties sufficiently resembles negotiations, despite the fact that they occur

during a proceeding denominated as "arbitration," to be excluded from the "meeting" requirements of the FOI Act. Id. at 717.

25. Second, the Glastonbury court at 717-718 observed that the Teacher Negotiations Act "permits each party, in its presentations to the arbitral board, 'to submit all relevant evidence, to introduce relevant documents and written material, and argue on behalf of its last best offer.' [Citation omitted]. In aid of this *evidentiary process*, the arbitrators have the 'power to administer oaths and affirmations and to issue subpoenas requiring the attendance of witnesses.' [Citation omitted.] Thus, the arbitration hearing also provides an opportunity for the parties *to create an evidentiary record* on which the arbitrators can rely in making their final determination of any issues left unresolved." [Emphasis added.]

26. Third, the Glastonbury court noted that the TNA "specifically contemplates the presentation of certain financial data. General Statutes § 10-153fc(2) provides in relevant part: 'At the hearing a representative of the fiscal authority having budgetary responsibility or charged with making appropriations for the school district shall be heard regarding the financial capability of the school district, unless such opportunity to be heard is waived by the fiscal authority." Id., n. 9. This financial data would be contained in the evidentiary record.

27. Finally, the Commission is guided by the Glastonbury court's analysis of the policy underlying its conclusion that only the "strategy and negotiations" portions of an arbitration hearing fall within the statutory exclusion contained in § 1-200(2), G.S.:

> Inquiry into the scope of the statutory exclusion for collective bargaining contained in § 1-18a(b) [now §1-200(2)]

must commence with the recognition of the legislature's general commitment to open governmental proceedings. . . .

* * *

29. It is found that evidence was presented at the January 30 hearing as to all the statutory factors that the arbitrators are required to consider: the financial capability of the town; the history of the negotiations between the parties prior to arbitration, including the offers and the range of discussion of the issues; the interests and welfare of the employee group; changes in the cost of living; the existing conditions of employment of the employee group and similar groups; and the salaries, fringe benefits and other conditions of employment prevailing in the state labor market. See § 10-153f(c)(4)(A) through (E), G.S.

30. It is found that evidence in support of the statutory factors set forth in § 10-153f(c)(4), G.S., included tax collections, debt, capital improvement plans, state aid or grants received by the city, what the city was providing as salary increases if any to its municipal employees, what salary increases if any the board of education was presenting to other board of education employees, what was in the interest and welfare of the Torrington teachers in terms of the ability of the board of education to recruit and retain teachers, the cost of living, and what other settlements had been reached in other school districts.

31. It is found that the evidence presented at the January 30, 2010 hearing was recorded stenographically.

32. It is found that the parties at the arbitration hearing at issue in this case also presented several "last best offers," beginning with an "initial last best offer" and concluding with "final last best offers," and possibly with "interim last best offers" between the two.

33. It is found that the evidence described in paragraphs 30 and 31, above, was in support of the parties' "last best offers," but that the evidence was not itself a "last best offer."

34. It is also found that negotiation was conducted by the parties out of the presence of the panel chair or the panel as a whole, although each party "caucused" separately with its "own" arbitrator.

35. It is found that negotiations conducted by the parties out of the presence of the panel chair or the panel as a whole were not stenographically recorded.

36. It is concluded that the negotiations portion of the January 30, 2010 hearing, conducted off the record away from the panel, and the evidentiary portion of that hearing, conducted on the record in the presence of the panel, were separate.

37. It is concluded that the evidentiary portion of the January 30, 2010 hearing that was recorded stenographically was not "strategy or negotiations with respect to collective bargaining," and therefore was a "meeting" within the meaning of § 1-200(2), G.S., that was required to be open to the public.

38. It is therefore concluded that the respondents violated § 1-225(a), G.S., by conducting the evidentiary portion of its hearing in private.

* * *

The FOIC entered the following order:

1. Henceforth the respondents shall strictly comply with the requirements of §§ 1-225(a) and 1-200(2), G.S.

2. The respondents shall forthwith, at their own expense

> create a transcript of the stenographic record of the January 30, 2010 hearing, and provide it to the complainants, free of charge. (ROR, pp. 309-319).

This appeal followed. The court's review of the plaintiffs' claims is guided by well established principles as set forth by our Supreme Court. "[J]udicial review of the [FOIC's] action is governed by the Uniform Administrative Procedure Act [(UAPA), General Statutes §§ 4-166 through 4-189], and the scope of that review is very restricted. . . . [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 this 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.

"Cases that present pure questions of law, however, traditionally invoke a broader standard of review than ordinarily is involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that we will defer to an agency's interpretation of a statutory term only when that interpretation of the statute previously has been subjected to judicial scrutiny or to a governmental agency's time-tested

interpretation and is reasonable." (Citations omitted; internal quotation marks omitted.) *Board of Selectmen* v. *Freedom of Information Commission*, 294 Conn. 438, 446, 984 A.2d 748 (2010)

On interpretation of statutes, the court has stated: "[W]ell settled principles of statutory interpretation govern our review. . . . Because statutory interpretation is a question of law, our review is de novo. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles

governing the same general subject matter. . . ." (Citation omitted; internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 301 Conn. 323, 337, 21 A.3d 737 (2011).

The plaintiffs first argue that the contract arbitration panel is not a committee of the department[2], thus falling outside FOIC jurisdiction. While it is true that the panel sets its own schedule and convenes, after the first notice from the department, without being so directed by the department, the plain language of § 10-153f (a) places the panel "in" the department. The members of the panel (between 24 and 29 persons) are appointed by the governor with the advice and consent of the legislature. In this same statute, the department may assist the panel in both its selection and the substance of its hearings. A report of the panel is to be sent to the department on conclusion of its deliberations. See § 10-153f (b), (c) (4), (c) (5). Pursuant to § 10-153f (f), the state board of education has drafted regulations on selection of the panel. One regulation requires the department to conduct a thorough evaluation of all arbitrators. Regulation § 10-153f-10.

The record shows that the reason that the department was to supervise the arbitration panel was the legislature's intent that the state, not private arbitrators alone, have involvement in the negotiation process. This was a "delegation of authority"

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In § 1-200 (1) (A), a public agency is defined to include "any committee of . . . any [state department]."

concern for the legislature, resolved by its placing the panel within the department. (ROR, pp. 181-82).[3] Indeed, if the local board of education rejects the panel's award, the department is to arrange for a review of the award through another set of arbitrators. § 10-153f (c) (7). The court concludes that FOIC correctly interpreted § 1-200 (1) (A) and §§ 10-153a through 10-153f in holding that the arbitration panel is a "committee" of the department.

Moreover, the Supreme Court in *Elections Review Committee of the Eighth Utilities District* v. *FOIC*, 219 Conn. 685, 697, 595 A.2d 313 (1991) stated that "the legislature intended . . . that committees of public agencies that are subunits composed of members of the public agency [are] subject to the provisions of FOIA." In prior decisions, this court has held that a "committee of a public agency" is a public agency for purposes of access to meetings under FOIA, § 1-200 (1) (A). See, e.g. *Perez* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV 08 4019077 (June 3, 2009, *Cohn, J.*).

In *Perez*, this court held that a committee that consisted of officials of the city of Hartford and leaders of private corporations formed to discuss future management of the Hartford XL Center was a committee of a public agency, the city of Hartford. Its

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[3] The case of *Glastonbury Education Assn.* v. *Freedom of Information Commission*, 234 Conn. 704, 663 A.2d 349 (1995), discussed below, states that the parties agreed that the panel was a public agency under FOIA. See 234 Conn. 711, n.6.

meetings were therefore open to the public. See also *Winton Park Association, Inc.* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV 08 4019339 (October 7, 2009, *Cohn, J.*), where the court held that civic group formed to supervise drains in a subdivision was a public agency. In the course of that opinion, the court agreed with Finding 10 of the final decision in this administrative appeal that the "functional equivalent test" did not apply. The functional equivalent test only applied to private entities that also had public characteristics.[4]

To the contrary argument by the plaintiffs, the FOIC found that the panel members are not independent contractors. Finding of fact #20. The court agrees, based on § 10-153f as construed above and the FOIC's factual findings reviewed under the substantial evidence test.[5] An earlier FOIC case, *Williams* v. *State of Connecticut Office of Labor Relations*, Docket # 2004-178 (2005) is inapposite. There, the FOIC agreed with the state office of labor relations that a news reporter was properly excluded from a

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The court also agrees with FOIC Finding 10 that the arbitration panel is, if the analysis is made, the "functional equivalent" of a public agency: ". . . Little about the respondent arbitration panel is private, other than per diem pay being provided by collective bargaining unit. See § 10-153f(a) and (c), G.S. The Commission agrees with the complainants that the panel performs a governmental function, is a creature of statute, and is highly intertwined with the respondent Department of Education, which is at the core of the program. These facts would indeed satisfy the functional equivalent analysis required by § 1-200(1)(B) and *Woodstock Academy* v. *FOIC*, 181 Conn. 544 (1980)."

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The record supports the FOIC's findings of fact. (ROR, pp. 150-153).

grievance arbitration conducted by a single arbitrator under a provision of a collective bargaining agreement. Unlike here, no finding was made in *Williams* that the arbitrator was acting pursuant to a statute as a representative of the office of labor relations; rather the FOIC found that the arbitrator was an independent agent who entered into a contract with the office of labor relations and the union.

The plaintiffs further contend that the *Glastonbury* case, supra, note 3, has already resolved the issues of this administrative appeal. As here, a newspaper in *Glastonbury* received an order from the FOIC allowing access to an arbitration panel convened under § 10-153f. However, the FOIC order in *Glastonbury* required that the entire session be open to the public under FOIA. On appeal, the Supreme Court reversed because the presentation of last best offers before the panel by both the town and the teachers' union were equivalent to "strategy and negotiation" sessions, exempted from the open meeting provisions of FOIA.[6]

The Supreme Court "postpone[d] to another day questions concerning the validity of a more narrowly tailored FOIC order that requires open hearings only with respect to evidentiary presentations and permits executive sessions for discussion and argument about the contents of the parties' last best offers." Id., 718. As did the FOIC in its

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[6] Under FOIA, a meeting does not include "strategy or negotiations with respect to collective bargaining." § 1-200 (2).

findings in the present appeal, the Court in *Glastonbury*, noted that the evidentiary portions of the panel's proceedings are not, by the language of FOIA, subject to specific exclusion from the open meeting law. Findings 23-27; *Glastonbury* at 712-13. Justice Berdon dissented from the majority's "reservation" because he concluded that the public should be excluded from "such proceedings in their entirety." Id.

Then in *Waterbury Teachers Assn.* v. *Freedom of Information Commission*, 240 Conn. 835, 839, 694 A.2d 1241 (1997) while concluding that teacher grievance sessions were open under FOIA, the Supreme Court stated: "In *Glastonbury Education Assn.* v. *Freedom of Information Commission*, 234 Conn. 704, 711-13 . . . we recently construed [the FOIA] subsection to exclude from the term 'meeting' only those parts of collective bargaining sessions that relate specifically to 'strategy or negotiations," rather than to collective bargaining proceedings in their entirety." Two Superior Court cases have held that *Glastonbury* and *Waterbury Teachers* approve a result under FOIA "to allow public access to the presentation of evidence of the underlying facts but not to the negotiations or settlement discussions."[7] See *East Lyme Teachers Association* v. *Freedom of Information Commission*, Superior Court, judicial district of Hartford-New Britain,

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[7] Clearly, the arbitrators may exclude the public if the hearing turns from evidence to negotiations between the parties. See the discussion of this point in *Waterbury Firefighters Association* v. *Waterbury*, Superior Court, judicial district of Waterbury, Docket No. CV 01-166380 (September 26, 2001, *Holzberg, J.*)

Docket No. CV 97-0571973 (June 5, 1998, *DiPentima, J.*) and *Waterbury Firefighters Association*, Superior Court, judicial district of Waterbury, Docket No. 01- 166380 (September 26, 2011, *Holzberg, J.*) noting that the Supreme Court only affirmed denial of access because the FOIC order was "overly broad."

The FOIC in its final decision in this case clearly has backed away from its sweeping order that was overturned in *Glastonbury*. The FOIC's order here is not the same as the *Glastonbury* order when the FOIC's findings are read in conjunction with its order that the respondents comply with FOIA. Rather, the FOIC has now issued the more limited order envisioned by the majority in *Glastonbury*. This court concludes that the statutory construction of the FOIC finding that the evidentiary portion of the arbitration was a public meeting was correct.

The plaintiff Gould argues that the hearing officer predetermined the outcome of the hearing because he stated at first that he would not allow evidence on the "functional equivalent" test and then restricted the plaintiffs in giving an offer of proof. Our Supreme Court has ruled, however, that to establish such claims, the plaintiff must demonstrate actual bias, rather than mere potential bias, "unless the circumstances indicate a probability of such bias too high to be constitutionally tolerable." *O & G Industries, Inc.* v. *Planning & Zoning Commission*, 232 Conn. 419, 429-30, 655 A.2d 1121 (1995). A review of the record by the court establishes that the hearing officer was not predisposed,

but gave the plaintiffs a fair hearing. See *Cioffoletti* v. *Planning & Zoning Commission*, 209 Conn. 544, 554, 552 A.2d 796 (1989) (no predetermination even though chairman of agency hearing evidence made an "extraordinary effort" prior to the hearing to investigate circumstances of application).

The final matter is that the FOIC's order requires the "respondents" to furnish *at their own expense* a transcript of the evidentiary proceeding to the complainant newspaper reporter.[8] At the same time in Finding 39, the FOIC declined to consider imposition of a civil penalty, as "the issue decided in this case was specifically left open in *Glastonbury*." Since the individual arbitrators are respondents, have been ordered to expend funds to produce the transcript, and yet were excused from a civil penalty, the court modifies the FOIC order so that the department is solely responsible for the cost of the transcript.

The appeal is dismissed, subject to the modification of the order regarding the transcript.

Henry S. Cohn, Judge

[8] At the oral argument in this case, the parties agreed that the stenographic notes of the reporter had not been transcribed.