DOCKET NO. HHB-CV-18-6042319-S : SUPERIOR COURT

ERIC DESMOND : JUDICIAL DISTRICT OF NEW BRITAIN

VS. :

FREEDOM OF INFORMATION COMMISSION AND YALE NEW HAVEN HOSPITAL : JULY 1, 2019

MEMORANDUM OF DECISION

The plaintiff, Eric Desmond, appeals from the decision of the defendant Freedom of Information Commission (commission), which held that the defendant Yale New Haven Hospital (hospital) is not a public agency or the functional equivalent of a public agency and therefore not subject to the Freedom of Information Act (act or FOIA). The plaintiff contends that the commission misapplied the functional equivalence test first articulated in *Board of Trustees* v. *Freedom of Information Commission*, 181 Conn. 544, 436 A.2d 266 (1980). The plaintiff further argues that the hospital performs a governmental function to the extent that it has chosen to operate a self-insured, self-administered medical care plan to meet its obligations under the Workers' Compensation Act. The commission and the hospital argue that the commission properly applied the functional equivalence test with respect to the hospital as a whole and with respect to the medical care plan. Having reviewed the entire record and the parties' briefs and arguments, the court agrees with the defendants. Accordingly, the plaintiff's appeal is dismissed.

Electronic notice sent to all counsel of record.
Mailed to Official Reports of Judicial decisions.
A. Jordanopoulos, Tax Session, 7-1-19

PROCEDURAL HISTORY

On May 10, 2017, the plaintiff requested copies of certain records allegedly maintained by the hospital.[1] On May 12, 2017, the hospital denied the request, asserting that it is not a public agency within the meaning of General Statutes § 1-200 (1). On June 12, 2017, the plaintiff complained to the commission, alleging that the hospital violated the act by failing to provide the requested records. A contested case hearing was held on October 17, 2017. On November 28, 2017, the commission issued the report of the hearing officer as its proposed final decision. The proposed decision was considered at the commission's meeting of December 13, 2017, with certain amendments proposed by the hearing officer, and unanimously approved.

THE COMMISSION'S FINDINGS AND CONCLUSIONS

The commission determined that the threshold issue is whether the hospital is the functional equivalent of a public agency within the meaning of General Statutes § 1-201 (1) (B). In determining whether an entity is the functional equivalent of a private agency, four factors must be considered: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by government. See *Board of Trustees* v. *Freedom of Information*

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[1] The three-page request, with twenty-five single-spaced bullet points, sought a wide range of documents. These encompassed, inter alia, all communications between the hospital and any state agency over a thirteen-year period, all documents reflecting any state or municipal tax abatements or exemptions over the same period, all documents relating to the hospital's workers' compensation medical care plan generally, and all documents relating to a workers' compensation claim made by the plaintiff's wife against the hospital. The plaintiff's wife's claim is the subject of ongoing litigation.

Commission, supra, 181 Conn. 554. "All relevant factors are to be considered cumulatively, with no single factor being essential or conclusive." (Internal quotation marks omitted.) *Connecticut Humane Society* v. *Freedom of Information Commission*, 218 Conn. 757, 761, 591 A.2d 395 (1991).

As to the first factor and fourth factors, whether the hospital performs a governmental function and whether it was created by the government, the commission found that the legislature created a "State Hospital" for the purpose of "establishing and maintaining a general hospital in the city of New Haven" in 1826. In the same enactment, the legislature created a "general Hospital Society of Connecticut," which was given the authority to govern the hospital. The governor of Connecticut and two commissioners appointed by the legislature were assigned the duty to "superintend the general concerns of [said] Hospital." Considering the facts surrounding its creation, including some state funding of the first hospital building, the commission found that it appeared that the legislature intended to create the hospital as a public institution. The commission further found, however, that in 1931, the Supreme Court held that the act "created a private corporation dedicated to the purpose of general and public charity." *Cohen* v. *General Hospital Society of Connecticut*, 113 Conn. 188, 191, 154 A. 435 (1931). By 1965, the hospital had become affiliated with the Yale School of Medicine, a private institution. As Yale New Haven Hospital, the hospital is administered and operates today as a private nonprofit acute care teaching hospital. The commission found that twenty-six of Connecticut's twenty-seven acute

care hospitals are private nonprofit corporations and concluded that the operation of an acute care hospital is not commonly a governmental function in Connecticut. The commission also found that the hospital is not required by statute to provide acute hospital care.

The commission also addressed and rejected the plaintiff's argument that the hospital performs a governmental function with respect to an aspect of its administration of its workers' compensation benefits plan. The hospital, like many other large employers, is self-insured and has established a medical care plan for providing workers' compensation benefits. If the hospital did not self-insure, it would be required to contract with a private insurance company for workers' compensation insurance. The plaintiff focused on the utilization review and dispute resolution aspect of the hospital's medical care plan, arguing that the dispute resolution process in particular supplants the initial fact-finding role of a workers' compensation commissioner. The commission agreed, however, with the hospital's argument that if it were insured, utilization review could be performed by a private insurer with a medical care plan. The commission further found that even if the workers' compensation utilization review and dispute resolution process is a governmental function, it is a very small part of the hospital's workers' compensation program and an even smaller part of the hospital's operation as a whole.

As to the second factor, the level of government funding, the commission found that the hospital's 2016 budget was approximately $2.66 billion, of which $2.5 billion came from patient revenues. Approximately 40 percent of the patient revenues is provided by Medicare and

Medicaid for patient care. Direct government funding amounts to less than 1 percent of the hospital's operating budget. Citing *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, 47 Conn. App. 466, 475, 704 A.2d 827 (1998), and *Envirotest Systems Corp.* v. *Freedom of Information Commission*, 59 Conn. App. 753, 757 A.2d 1202, cert. denied, 254 Conn. 951, 762 A.2d 900 (2000), the commission concluded that the governmental funding factor was not satisfied because the amount of governmental money received reflects the amount of business the hospital does with government.

As to the third factor, the extent of government involvement or regulation, the commission found that the hospital is subject to significant governmental regulatory control both by the state Department of Public Health and as a participant in the federal Medicare and Medicaid programs, and its employees must meet certain professional standards. It also found, however, that the hospital's employees are not government employees. Neither the hospital's actual delivery of medical care nor its teaching activities are directed by government. The commission found that the government does not exert "direct, pervasive or continuous regulatory control" over the hospital's core operations, nor does the government have "day-to-day involvement" in the hospital's activities, as required by *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, supra, 47 Conn. App. 477.

Considering all four factors together, the commission concluded that the hospital is not the functional equivalent of a public agency. This appeal followed.

SCOPE OF REVIEW

This appeal is reviewed pursuant to General Statutes § 4-183 of the Uniform Administrative Procedure Act (UAPA).[2] Under the UAPA, "it is [not] the function of . . . this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, the 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." (Citation omitted; internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*, 310 Conn. 276, 281, 77 A.3d 121 (2013).

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). "[A]n

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[2] General Statutes § 4-183 (j) establishes the scope of review. It 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."

agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable." (Internal quotation marks omitted.) Id., 717.

Because determining whether a private entity is a "public agency" for purposes of the act requires an interpretation of General Statutes § 1-200, that determination is a matter of law. See *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, supra, 47 Conn. App. 471. "The interpretation of statutes presents a question of law. . . . Although the factual and discretionary determinations of administrative agencies are to be given considerable weight by the courts . . . it is for the courts, and not for administrative agencies, to expound and apply governing principles of law." (Internal quotation marks omitted.) *Connecticut Humane Society* v. *Freedom of Information Commission*, supra, 218 Conn. 761-62. When construing a statute, the court's fundamental objective is to "ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Commissioner of Public Safety v. Freedom of Information Commission,* 301 Conn. 323, 338, 21 A.3d 737 (2011).

DISCUSSION

The Functional Equivalence Test

In 1980, the Supreme Court construed the term "public agency" as used in the act to encompass a private entity if that entity is the functional equivalent of a public agency. *Board of*

Trustees v. *Freedom of Information Commission*, supra, 181 Conn. 554.[3] The private entity at issue in *Board of Trustees* was Woodstock Academy (academy). The legislature established the academy by a special corporate charter in 1802. The academy's charter, as amended by special act in 1933, provides that the academy's sole purpose is to operate a school for the inhabitants of the town and the vicinity. The board of education for the town of Woodstock does not maintain a public high school. It annually designates the academy as the facility to provide educational services for the town's secondary students pursuant to General Statutes § 10-33.[4] Pursuant to General Statutes § 10-34,[5] it pays the tuition for the students of the town. See *Board of Trustees*

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[3] In 1980, when the Supreme Court decided *Board of Trustees* v. *Freedom of Information Commission*, supra, 218 Conn. 544, General Statutes § 1-200 was numbered § 1-18a and did not contain a reference to functional equivalence. Section 1-200 (1) was amended in 2001 to provide in relevant part as follows:

> "(1) 'Public agency' or 'agency' means:
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> "(A) Any executive, administrative or legislative office of the state or any political subdivision of the state and any state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision of the state, including any committee of, or created by, any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official, and . . . .
>
> "(B) Any person to the extent such person is deemed to be the functional equivalent of a public agency pursuant to law . . . ."

[4] General Statutes § 10-33 provides: "Any local board of education which does not maintain a high school shall designate a high school approved by the State Board of Education as the school which any child may attend who has completed an elementary school course, and such board of education shall pay the tuition of such child residing with a parent or guardian in such school district and attending such high school."

[5] General Statutes § 10-34 provides: "The State Board of Education may examine any incorporated or endowed high school or academy in this state and, if it appears that such school or

v. *Freedom of Information Commission*, supra, 181 Conn. 546-47.

In determining that the academy, although a private school, was the functional equivalent of a public agency, the Supreme Court drew upon decisions construing the federal Freedom of Information Act to articulate the four-factor test set out above. The court recognized, as federal courts had stated, that "[a]ny general definition [of any agency] can be of only limited utility to a court confronted with one of the myriad organizational arrangements for getting the business of government done. . . . The unavoidable fact is that each new arrangement must be examined anew and in its own context." (Internal quotation marks omitted.) Id., 554, quoting *Washington Research Project, Inc.* v. *Dept. of Health, Education & Welfare,* 504 F.2d 238 (D.C. Cir.1974), cert. denied, 421 U.S. 963, 95 S. Ct. 1951, 44 L. Ed. 2d 450 (1975). The Supreme Court recognized, however, that the legislature had not intended the term "public agency" to include private entities that merely interact with the government. "A case by case application of the factors noted above is best suited to ensure that the general rule of disclosure underlying this state's FOIA is not undermined by nominal appellations which obscure functional realities. . . . On the other hand, the criteria we have utilized should also ensure that a truly private entity would not be subject to disclosures which were unintended by our FOIA." *Board of Trustees* v. *Freedom of Information Commission*, supra, 181 Conn. 555-56.

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academy meets the requirements of the State Board of Education for the approval of public high schools, said board may approve such school or academy under the provisions of this part, and any town in which a high school is not maintained shall pay the whole of the tuition fees of pupils attending such school or academy, except if it is a school under ecclesiastical control."

In the nearly forty years since *Board of Trustees* was decided, the courts have explored and explained the limits of the functional equivalence test. As the courts have made clear, the functional equivalence test was not intended to expand the scope of the Freedom of Information Act, but to ensure that nominally private entities do not avoid the obligations of the act if they effectively take the place of a public agency. See, e.g., *Meri-Weather, Inc.* v. *Freedom of Information Commission*, 47 Conn. Supp. 113, 116-22, 778 A.2d 1038 (2000), affirmed, 63 Conn. App. 695, 778 A.2d 1006 (2001) (nonprofit entity created and controlled by municipal agency subject to the act); *Cos Cob Volunteer Fire Co., No. 1, Inc.* v. *Freedom of Information Commission*, 212 Conn. 100, 561 A.2d 429 (1989), and *Yantic Volunteer Fire Co.* v. *Freedom of Information Commission*, 44 Conn. Supp. 230, 682 A.2d 156 (1995), affirmed, 42 Conn. App. 519, 679 A.2d 989 (1996) (volunteer fire company serving municipality found to be functional equivalent of public agency); *Board of Trustees* v. *Freedom of Information Commission*, supra, 181 Conn. 554, and *Norwich Free Academy* v. *Freedom of Information Commission,* Superior Court, Judicial District of Hartford – New Britain at Hartford, Docket No. CV-91-0702042, 4 Conn. L. Rptr. 748, 1991 WL 158223 (August 13, 1991, *O'Neill, J.*) (private school that served as public high school found to be functional equivalent of public agency).

On the other hand, the courts have made clear certain limits on the use of the functional equivalence test. In *Connecticut Humane Society* v. *Freedom of Information Commission*, supra, 218 Conn. 757, the Supreme Court considered and rejected the commission's conclusion that a

nonprofit society was the functional equivalent of a public agency. The society had been chartered by the General Assembly in 1881, but, as the Supreme Court observed, "at that time it was common practice for the General Assembly to incorporate private institutions. . . . The mere presence of a government charter, therefore, does not compel the conclusion that the society is a public agency." Id., 763. The court also considered the fact that the society had statutory authorization to prevent cruel treatment of animals, detain abandoned or cruelly treated animals, collect fees for the cost of detention from the owners of the animals, and kill animals under special circumstances. Id., 764. The commissioner of public safety is authorized to appoint agents of the society as special police officers with the authority to arrest persons for violating statutes concerning cruelty to animals. Id. The court recognized that the society performs a governmental function to the extent that it engages in law enforcement activities authorized by statute. Id. Despite this fact, the court concluded that the society is not the functional equivalent of a public agency because it was not required by statute to undertake any of the authorized activities; the state did not regulate or control the society; and the society is self-directed and its employees are not government employees. Id., 765.

Three Appellate Court decisions further explain the proper application of the functional equivalence test. In *Hallas* v. *Freedom of Information Commission*, 18 Conn. App. 291, 557 A.2d 568, cert. denied, 212 Conn. 804, 561 A.2d 945 (1989), disapproved on other grounds,

Connecticut Humane Society v. *Freedom of Information Commission*, supra, 218 Conn 761,[6] the court rejected a claim that a law firm serving as bond counsel to a municipality was the functional equivalent of a public agency. It concluded that the mere regulation of a profession or a particular function did not meet the high level of government involvement needed to satisfy the requirement of government regulation. "[T]he regulation prong of the test does not pertain to the general regulation of a profession but rather applies to specific government regulation of the function of the agency. . . . Because bond counsel do not operate under direct, pervasive or continuous regulatory control, they do not constitute the functional equivalent of a public agency." Id., 295-96.

In *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, supra, 47 Conn. App. 466, the court further explained the functional equivalence test. The plaintiff in that case was a nonprofit organization that provided advocacy services and temporary shelter to victims of domestic violence. Approximately 66 percent of its funding came from federal, state and local governments. Id., 471. The Appellate Court observed that "[t]raditionally, state and local governments have provided fire prevention, police protection, sanitation, public health and parks and recreation in discharging their dual functions of administering the public law and furnishing public services." (Internal quotation marks omitted.)

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[6] Although the Supreme Court denied certification in *Hallas*, two years later it rejected the *Hallas* court's conclusion that the absence of a single factor was fatal to a determination that a private entity was the functional equivalent of a public agency. See *Connecticut Humane Society* v. *Freedom of Information Commission*, supra, 218 Conn. 761 (no single factor essential or dispositive).

Id., 474. The court concluded that various statutes enacted by the legislature indicated its intent to "make the prevention and treatment of family violence a governmental function." Id. It concluded, nevertheless, that the governmental function factor of the functional equivalence test was not satisfied because the plaintiff was not required by statute to perform the services authorized by statute. It further held that "entities that are the functional equivalent of a public agency have the power to govern or to regulate or to make decisions. . . . The plaintiff here has no power to govern, to regulate or to make decisions affecting government . . . ." Id., 475.

The court also concluded that the governmental funding factor was not satisfied even though the plaintiff received 66 percent of its funding from governmental bodies. It held: "The amount of money an entity receives from government . . . is not solely determinative of whether the entity is the functional equivalent of government. . . . The amount of government money the plaintiff receives reflects the amount of business it does with government." *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, supra, 47 Conn. App. 475-76.

Similarly, the court rejected the commission's conclusion that the governmental regulation factor was satisfied by state certification and confidentiality requirements. Observing that domestic violence advocates "have no decision-making authority," the court concluded that "the professional standards and government regulations that the advocates are required to follow do not make the plaintiff the functional equivalent of government." Id., 477. Finally, the court

concluded that the state's right to audit the plaintiff did not constitute government regulation. "The purpose of such government activity is to evaluate, not to control, the plaintiff's daily activity." Id.

In *Envirotest Systems Corp.* v. *Freedom of Information Commission*, supra, 59 Conn. App. 753, the court applied the analysis in the foregoing cases to conclude that a for-profit corporation that received approximately $25 million a year for providing automobile emissions inspections was not the functional equivalent of a public agency. It observed that the corporation was a private, for-profit national corporation that administered environmental programs nationwide. The court acknowledged that automobile emissions inspections were a governmental function, but noted that the plaintiff was not required by statute to undertake that activity. "Therefore, while the plaintiff may perform a governmental function, it does so pursuant to its contractual relationship with the state and otherwise would have no obligation to provide emissions inspections." Id., 759. It concluded that the governmental funding factor was not satisfied, despite the $25 million received from the state, because the funds were payment for the services it provided. See id., 760. It concluded that the governmental regulation factor was not satisfied by governmental site visits that were conducted periodically to ensure compliance with state regulations. The government did not exert "direct, pervasive or continuous regulatory control" over the plaintiff's business or exercise control over the plaintiff's detailed physical performance. Finally, the plaintiff's employees were not government employees. Id., 760-61.

Application of the Functional Equivalence Test to the Hospital

At the commission and in his brief on appeal, the plaintiff argued that (1) the provision of health care is a governmental function and (2) the hospital's establishment of a medical care plan for injured workers, and more particularly its utilization review and dispute resolution process, assumes the function of initial fact-finding that would otherwise be performed by a workers' compensation commissioner. At oral argument, the plaintiff disavowed a claim that all acute care hospitals perform a governmental function and attempted to focus instead on the argument concerning the utilization review and dispute resolution process in the hospital's workers' compensation medical care plan. That attempt was unpersuasive because the plaintiff's arguments concerning the hospital's creation, funding, and regulation all relate to its function as a health care provider, not to its workers' compensation dispute resolution process.

The plaintiff argues that the commission improperly relied on *Cohen* v. *General Hospital Society*, supra, 113 Conn. 188, for its governmental function determination because that case concerned whether the hospital was entitled to assert sovereign immunity as a special defense to a tort claim. The basis of the hospital's alleged special defense, however, was that it was "a State institution performing public governmental functions . . . ." Id., 190. The Supreme Court rejected that claim. It held that the special act of 1826, which chartered the General Hospital Society charged with governing the hospital, "created a private corporation dedicated to the purpose of general and public charity. The defendant is a public charity in the popular significance of the term; the benefits it bestows are public, but its organization and management are private. . . .

Though it receives aid from the State in the way of exemption from taxation, and by State appropriation toward its support, it is not a State institution, and in its operation is not acting as an agency of the sovereign." Id., 191. Given the differences in the purposes underlying the doctrine of sovereign immunity and the Freedom of Information Act, the opinion in *Cohen* may not be dispositive of the functional equivalence test, but the commission certainly did not err in considering it in relation to the governmental function factor.

The commission properly rejected the plaintiff's claim that general acute care hospitals perform a governmental function because the evidence established that twenty-six of the twenty-seven general acute care hospitals in Connecticut are private entities.[7] In arguing that health care generally is a governmental function, the plaintiff relied on the statement in *Domestic Violence Services* that traditional governmental functions include "fire prevention, police protection, sanitation, public health, and parks and recreation." From this statement, he concludes that the operation of a general hospital is a governmental "public health" function – despite the fact that most Connecticut hospitals are not operated by the government. The court is not persuaded. The common definition of "public health" is "the art and science dealing with the protection and improvement of community health by organized community effort and including preventive medicine and sanitary and social science." Merriam-Webster's Collegiate Dictionary, 11th Ed., 2012. Nothing in *Domestic Violence Services* suggests that the court intended "public health,"

[7] The exception is UConn Health's John Dempsey Hospital, the teaching hospital affiliated with the University of Connecticut School of Medicine.

which concerns community well-being, to encompass hospital care for individuals.

The commission correctly concluded, moreover, that the hospital is not required by statute to provide acute hospital care, as the academy was required to provide education to students in the *Board of Trustees* case. The plaintiff argues that in *Board of Trustees*, it was the municipality, not the private academy, that was required by statute to pay the tuition of local students for the academy's services. The plaintiff argues that the academy could "choose to forego" providing education services to the town. The plaintiff's argument is incorrect. The academy's charter provided that "the academy's *sole purpose* is to operate a school for the inhabitants of the town and the vicinity." (Emphasis added.) Connecticut Special Act No. 236 (1933); see *Board of Trustees* v. *Freedom of Information Commission*, supra, 181 Conn. 546. The academy was not authorized by its charter to do anything other than operate a school for the benefit of the town and the vicinity. When designated by the town as the facility to educate the town's high school students pursuant to General Statutes § 10-33, the academy simply could not say no and still stay in operation. Subsequent cases have made it clear that the performance of a governmental function does not satisfy the governmental function factor if the private entity is not required by statute to perform the activity at issue. See *Connecticut Humane Society* v. *Freedom of Information Commission*, supra, 218 Conn. 765 (governmental function factor not satisfied because plaintiff not required to perform law enforcement activities authorized by statute); *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, supra, 47 Conn. App. 474 (governmental function factor not satisfied because plaintiff not required

to provide domestic violence advocacy services absent contract).

The plaintiff argues that the hospital's adoption of a medical care plan in the administration of its workers' compensation program is the performance of a governmental function for purposes of the functional equivalence test. He focuses specifically on the utilization review and dispute resolution process of the medical care plan. He argues that in the absence of a medical care plan, dispute resolution concerning workers' compensation claims is performed by workers' compensation commissioners, who conduct evidentiary hearings and make findings that are subject to review by the Compensation Review Board. The commission rejected this claim, concluding that the utilization review function is not a substitute for a governmental function but for a function that would be performed by a private insurer with a medical care plan if the hospital were not self-insured.

The commission's conclusion is supported by a consideration of the statutory and regulatory provisions that govern medical care plans. Any employer or insurance company may establish a medical care plan, pursuant to General Statutes § 31-279 (c) (1),[8] to provide medical

[8] General Statutes § 31-279 (c) provides: "(1) Any employer or any insurer acting on behalf of an employer, may establish a plan, subject to the approval of the chairman of the Workers' Compensation Commission under subsection (d) of this section, for the provision of medical care that the employer provides for treatment of any injury or illness under this chapter. Each plan shall contain such information as the chairman shall require, including, but not limited to:

"(A) A listing of all persons who will provide services under the plan, along with appropriate evidence that each person listed has met any licensing, certification or registration requirement necessary for the person to legally provide the service in this state;

"(B) A listing of all pharmacies that will provide services under the plan, to which the employer, any insurer acting on behalf of the employer, or any other entity acting on behalf of the employer or insurer shall make direct payments for any prescription drug prescribed by a physician participating in the plan;

care for workers who sustain injury or illness in the course of their employment. A medical care plan is essentially a panel of providers from whom an employee can seek treatment for a covered injury or illness; use of providers outside the plan suspends the employee's right to compensation, subject to the order of the Commissioner of Workers' Compensation. See General Statutes § 31-279 (c). Medical care plans are subject to extensive regulations issued by the Workers' Compensation Commission. Regs., Conn. State Agencies § 31-279-10 (a) through (k).

Pursuant to General Statutes § 31-279 (d) (4),[9] all medical care plans must include service

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"(C) A designation of the times, places and manners in which the services will be provided;

"(D) A description of how the quality and quantity of medical care will be managed; and

"(E) Such other provisions as the employer and the employees may agree to, subject to the approval of the chairman.

"(2) The election by an employee covered by a plan established under this subsection to obtain medical care and treatment from a provider of medical services who is not listed in the plan shall suspend the employee's right to compensation, subject to the order of the commissioner."

[9] General Statutes § 31-279 (d) provides: "Each plan established under subsection (c) of this section shall be submitted to the chairman for his approval at least one hundred twenty days before the proposed effective date of the plan and each approved plan, along with any proposed changes therein, shall be resubmitted to the chairman every two years thereafter for reapproval. The chairman shall approve or disapprove such plans on the basis of standards established by the chairman in consultation with a medical advisory panel appointed by the chairman. Such standards shall include, but not be limited to: (1) The ability of the plan to provide all medical and health care services that may be required under this chapter in a manner that is timely, effective and convenient for the employees; (2) the inclusion in the plan of all categories of medical service and of an adequate number of providers of each type of medical service in accessible locations to ensure that employees are given an adequate choice of providers; (3) the provision in the plan for appropriate financial incentives to reduce service costs and utilization without a reduction in the quality of service; (4) the inclusion in the plan of fee screening, peer review, service utilization review and dispute resolution procedures designed to prevent inappropriate or excessive treatment; and (5) the inclusion in the plan of a procedure by which information on medical and health care service costs and utilization will be reported to the chairman in order for him to determine the effectiveness of the plan."

utilization review and dispute resolution procedures "designed to prevent inappropriate or excessive treatment." The minimum elements of a service utilization review and dispute resolution process are set out in § 31-279-10 (e) and (h) of the regulations. The procedure must include a peer review process; § 31-279-10 (e) (5); a determination by the medical care plan's medical director; § 31-279-10 (e) (6); and an appeal to the medical care plan's chief executive officer for a final determination. Regs., Conn. State Agencies § 31-279-10 (e) (7). After the medical care plan's utilization review and dispute resolution review and appeal process has been exhausted, the decision of the chief executive officer can be appealed to the Workers' Compensation Commission, where it is subject to modification "only upon showing that it was unreasonable, arbitrary or capricious." Regs., Conn. State Agencies § 31-279-10 (f).

The plaintiff seizes upon the standard of review stated in § 31-279-10 (f) as the basis for his claim that the medical care plan essentially fills the role of initial finder of fact, a role that would be performed by a workers' compensation commissioner in the absence of a medical care plan. He cites *Baron* v. *Genlyte Thomas Group, LLC*, 132 Conn. App. 794, 798, 34 A.3d 423 (2012), *Figueroa* v. *Rockbestos Co.*, No. 4633, CRB 1-02-2 (July 20, 2004), and *Johnson* v. *State of Connecticut Judicial Department Juvenile Detention Center*, No. 6132, CRB-4-16-19 (August 21, 2017), in support of his claim. The sources the plaintiff cites generally support his claim that the role of a workers' compensation commissioner differs depending on whether or not a medical care plan is in place. If there is one, the commissioner reviews the plan's decision to determine whether it was unreasonable, arbitrary, or capricious; if there is not, the commissioner determines

the medical necessity and appropriateness of a proposed treatment after a hearing. This difference does not establish, however, that the finding of medical necessity and appropriateness for a proposed treatment is necessarily a governmental function; to the contrary, it establishes that the legislature has set up alternative systems, one in which such initial fact-finding is done by private actors, and one in which it is done by government officials.

Even if this fact-finding function is viewed as a governmental function, moreover, it would not satisfy the governmental function factor of the functional equivalence test because the hospital is not required by statute to perform such activities. The establishment of a medical care plan is an option offered to "any employer or any insurer acting on behalf of an employer" pursuant to General Statutes § 31-279 (c) (1); it is clearly not mandated by statute. Under the *Connecticut Humane Society*, *Domestic Violence Services,* and *Envirotest* decisions, performance of a governmental function that is authorized but not mandated by statute does not satisfy the governmental function factor of the functional equivalence test.

As the commission also found, the medical care plan's utilization review and dispute resolution process is a very small part of the hospital's workers' compensation program and an even smaller part of the hospital's operations as a whole. The plaintiff argues that the utilization review and dispute resolution process applies to 100 percent of the hospital's injured workers, and that its proportion to the hospital's operations as a whole is not relevant because a party of an entity can be subject to the act even if the whole is not.

As to the plaintiff's first point, the utilization review and dispute resolution process does

not automatically apply to every workers' compensation claim; the process must be initiated by the employee, the provider, the employer, or the medical care plan itself. See Regs., Conn. State Agencies § 31-279-10 (e) (1). If the parties agree on the appropriate medical treatment, the process need not be invoked. Indeed, in this case, the chief executive officer of the hospital's medical care plan testified that in the thirteen years he has served in that role, only two or three claims have been appealed to his level; most have been resolved at earlier stages in the process.

As to the plaintiff's second point, the commission may properly consider the proportion of an entity's allegedly governmental function to its entire operation. In *Domestic Violence Services*, the trial court expressly considered the proportion of the private entity's performance of a governmental function to its other activities. "To the extent the respondent performs a government function, it does so with only about 25 percent of its effort and only as a result of its contract. Its performance of a government function would appear to be little different under the facts before the court than a construction contractor who is building a sewer line as 25 percent of its workload." *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, Superior Court, Judicial District of New Haven, Docket No. CV 94-0367012-S (May 23, 1995, Booth, J.), affirmed, supra, 47 Conn. App. 466.

The commission's finding that the medical care plan's utilization review and dispute resolution process is a very small part of the hospital's overall operation is unquestionably supported by substantial evidence in the record. The hospital has more than 1,500 beds and had approximately 1.4 million patient encounters in 2016. It is the fifth or sixth largest hospital in the

country and provides comprehensive medical care in more than one hundred medical specialty areas. The commission correctly concluded that the governmental function factor was not satisfied.

As to the government funding factor, the commission found that approximately 40 percent of the hospital's patient revenues are received pursuant to the Medicare and Medicaid programs. The plaintiff argues that this is comparable to the government funding in the *Board of Trustees* case because, in that case, the tuition payments were payments for education services provided to each student, just as the Medicare and Medicaid payments are payments on behalf of patients. Contrary to the plaintiff's claim, however, this case is not like *Board of Trustees*. First, in *Board of Trustees*, the town's payments to the academy were mandated by General Statutes §§ 10-33 and 10-34 to fulfill the state constitutional obligation to provide free primary and secondary education. There is no comparable state constitutional obligation to provide free medical care. Second, decisions following *Board of Trustees* have established that the government funding factor is not satisfied when government funds are provided as consideration for services. See *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission,* supra, 47 Conn. App. 476; *Envirotest Systems Corp.* v. *Freedom of Information Commission*, supra, 59 Conn. App. 759-60. The payments at issue here are payments for medical care services provided to patients insured by Medicare or Medicaid.

The plaintiff also argues that the government funding factor is satisfied because the hospital receives certain "in-kind" benefits, including the tax exemption that applies to its real

property. The plaintiff relies on the commission's decision in *Perrotti* v. *Chief, Police Department, Yale University*, Freedom of Information Commission Docket #FIC 2007-370 (February 13, 2008), in support of this argument. In *Perrotti*, a public defender requested the personnel records of two Yale University police officers who had arrested her client. In concluding that the university police department was the functional equivalent of a public agency with respect to its law enforcement function, the commission relied primarily on a 1983 public act that required all Yale police officers to be appointed by the city of New Haven and conferred upon the Yale police officers all the powers conferred upon municipal police officers for the city. With respect to the issue of funding, the commission found that the Yale police department received minimal direct government funding, but it received significant in-kind law enforcement services from the city of New Haven and benefitted from "its property tax exempt status."

Relying on *Perrotti*, the plaintiff further contends that in-kind benefits, including tax exemptions, satisfy the governmental funding factor. *Perrotti* does not stand for the broad proposition that the plaintiff proposes. In other cases, including one other case involving the Yale police department, the commission has not given significant weight to an entity's tax exempt status. In *Simons* v. *Chief, Police Department, Yale University*, Freedom of Information Commission Docket #FIC-2009-469 (August 11, 2010), the commission evaluated a request for records of compensation paid to certain senior Yale police officers, including its chief, assistant chief, and certain others. The *Simons* complainants argued that "Yale University is subsidized by tax exemptions from the City of New Haven, which constitute government funding to [the police

department] by the city." Id., paragraph 16. The commission acknowledged that argument but rejected it. It found instead that Yale police employee "salaries and benefits are paid entirely through private funds of the university." Id., paragraph 17. The commission's decision in *Simons* was upheld by the Superior Court in *Simons* v. *Freedom of Information Commission,* Superior Court, judicial district of New Britain, Docket No. CV-10-6007012-S, 2011 WL 5304156 (October 17, 2011. *Cohn, J.*).

The hospital argues persuasively that reliance on an entity's tax exempt status to prove governmental funding would expand the functional equivalence doctrine far beyond anything expected or intended by the legislature. The court agrees. A vast array of private entities are afforded exemptions from property taxation, including, for instance, the property of "a corporation organized exclusively for scientific, education, literary, historical or charitable purposes"; General Statutes § 12-81 (7); "houses of religious worship" and the land upon which they stand; General Statutes § 12-81 (13); and nonprofit camps or recreational facilities used for charitable purposes; General Statutes § 12-81 (49). Indeed, General Statutes § 12-81 has seventy-nine subsections exempting particular types of real or personal property, or both, from taxation. Although tax exemptions must serve a "public purpose"; see *Snyder* v. *Newtown,* 147 Conn. 374, 381 and 386, 161 A.2d 770 (1960); a "public purpose" is not the same as a "governmental function." As the Supreme Court has stated, "[i]f the expenditure of public funds will promote the welfare of the community, it is for a public purpose." *Lyman* v. *Adorno,* 133 Conn. 511, 517, 52 A.2d 702 (1947). The legislature is free to create categories of tax exemptions that promote the welfare of

the community through private activity. That does not turn every tax exempt entity into a governmental agency.

As to the government regulation factor, the commission found that the hospital is subject to a significant amount of regulatory control by the Department of Public Health and as a participant in the Medicare and Medicaid programs. It found that the hospital and its employees are required to meet certain professional standards. It also found, however, that (1) the hospital's employees are not government employees, (2) neither the delivery of medical care nor the hospital's teaching activities are directed by government; (3) the government does not exert "direct, pervasive or continuous regulatory control" over the hospital's core operations, and (4) the government does not have "day-to-day involvement" in the hospital's ongoing activities. Based on those findings and the holding of *Domestic Violence Services*, supra, the commission concluded that the government regulation factor of the functional equivalence test was not met.

The plaintiff argues that the hospital is subject to regulation in precisely the same manner as the academy was in *Board of Trustees*. He argues that in *Board of Trustees*, the court "approvingly explained that '[u]nder virtually an identical analysis, the court in *Public Citizen Health Research Group* v. *Department of Health, Education and Welfare*, supra, found the National Capital Medical Foundation, Inc. [NCMF] . . . to be an agency within the meaning of the federal FOIA . . . [despite the fact that] there is no daily federal supervision of its activities.'" Plaintiff's Brief at 17, quoting *Board of Trustees* v. *Freedom of Information Commission*, supra, 181 Conn. 555, which was discussing a federal district court decision in *Public Citizen Health*

Research Group v. *Department of Health, Education and Welfare*, 449 F. Supp. 937 (D.D.C. 1978). There are several flaws in this argument.

First, the plaintiff stops his quotation too soon. In the sentence following the sentence quoted by the plaintiff, our Supreme Court continued: "The court held that NCMF was an agency in its capacity as a Professional Standards Review Organization, because in that capacity it 'is financed by the United States, it is a creature of statute, it performs an executive [decision-making] function [in the field of health care], and *it operates under direct, pervasive, continuous regulatory control* . . . .' " (Alterations in original; emphasis added.) *Board of Trustees* v. *Freedom of Information Commission,* supra, 181 Conn. 555. At best, this citation stands for the proposition that if daily supervision is not required, there must at least be "direct, pervasive, continuous regulatory control." No such control was shown here.

Second, the Supreme Court decided *Board of Trustees* in 1980. In 1981, a divided panel of the Circuit Court of Appeals for the District of Columbia Circuit reversed the district court's decision in *Public Citizen Health Research Group*, concluding that NCMF "is not an 'agency' for the purposes of the Freedom of Information Act . . . ." *Public Citizen Health Research Group* v. *Dept. of Health, Education & Welfare*, 668 F.2d 537, 538 (D.C. Cir. 1981). The Court of Appeals concluded that the district court had given too much weight to the facts that (1) the NCMF had decision-making authority, and (2) was subject to "day-to-day federal control." Id., 543. Referring to an earlier decision in *Washington Research Project, Inc.* v. *Dept. of Health, Education & Welfare*, supra, 504 F.2d 238, the court of appeals observed: "We held there that because the

organization in question had no authority to make decisions it was not a government agency, but the converse of that proposition may not always be true; that an organization makes decisions does not always mean that it is a government agency. As we have said, each arrangement must be examined in its own context." *Public Citizen Health Research Group* v. *Dept. of Health, Education & Welfare*, supra, 668 F.2d 543.[10]

Third, the plaintiff seeks to freeze the law of functional equivalence as it was stated in *Board of Trustees*. Since *Board of Trustees* was decided, however, both the Supreme Court and the Appellate Court have rendered decisions that further explain the functional equivalence test. See *Connecticut Humane Society* v. *Freedom of Information Commission*, supra, 218 Conn. 763 (fact that nonprofit corporation was chartered by the General Assembly "does not compel the conclusion that the society is a public agency"; see id., 765 (fact that entity is not required by statute to perform activities authorized by statute weighs against finding of functional equivalence); *Hallas* v. *Freedom of Information Commission*, supra, 18 Conn. App. 295-96 (general regulation of profession does not satisfy governmental regulation factor) (*Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, supra, 47 Conn. App. 474 (same); see id., 475 (amount of money received from government is not dispositive of functional equivalence test); *Envirotest Systems Corp.* v. *Freedom of Information Commission*, supra, 59 Conn. App. 760-61 (performance of governmental function, not required

[10] Our Supreme Court noted the reversal of the *Public Citizen* district court decision in *Maher* v. *Freedom of Information Commission*, 192 Conn. 310, 320, 472 A.2d 321 (1984).

by statute, does not satisfy governmental function factor). The commission properly applied the functional equivalence test as that test has been developed over forty years.

CONCLUSION

Although created by the legislature at a time when all corporations were created by legislative act, the hospital was created to be a private charity and functions as a privately operated hospital. The funds it receives from the government are compensation for medical care services it provides to individuals who are insured by Medicare or Medicaid, and its tax exempt status does not render it the functional equivalent of a public agency. It is not subject to direct, pervasive or continuous regulatory control and its employees are not government employees. For these reasons, and others discussed above, the commission correctly concluded that the hospital is not the functional equivalent of a public agency. The appeal is therefore dismissed.

BY THE COURT,

Sheila A. Huddleston

Sheila A. Huddleston, Judge