

DOCKET NO. HHB-CV-176041080 : SUPERIOR COURT
DOCKET NO. HHB-CV-176041081
DOCKET NO. HHB-CV-176041082
DOCKET NO. HHB-CV-176041275

MARISSA LOWTHERT : JUDICIAL DISTRICT

V. : AT NEW BRITAIN

FREEDOM OF INFORMATION
COMMISSION : JUNE 11, 2019

MEMORANDUM OF DECISION

Factual and Procedural Background

The plaintiff, Marissa Lowther, has brought 4 cases to the Freedom of Information ("FOI") Commission in which she seeks information and relief from various groups related to the Wilton, Connecticut public schools. After the FOI Commission declined to give Marissa Lowther a hearing in those cases, the plaintiff appealed to this court: HHB-CV-176041081, an appeal from #FIC 2016-0787: *Marissa Lowther v. Caroline Corrigan, Chairman, Wilton Parent Advisory Board and Wilton Parent Advisory Board*; HHB-CV-176041082, an appeal from #FIC 2016-0803: *Marissa Lowther v. Bruce Likly, Chairman, Business Operations Committee, Board of Education, Wilton Public Schools and Board of Education Wilton Public Schools*; HHB-CV-176041080, an appeal from #FIC 2016-0804: *Marissa Lowther v. Burce Likly, Chairman Policy Communications*

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Judicial District of New Britain
SUPERIOR COURT
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ASSISTANT CLERK

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Alignment Committee, Wilton Board of Education and Policy Communications Alignment Committee, Wilton Board of Education; and HHB-CV-176041275, an appeal from #FIC 2016-0812: *Marissa Lowthert and Marianne Gustafson, v. Laura Schwemm, as Member, Teaching and Learning Committee, Board of Education, Wilton Public Schools; Lory Rothstein, as Member, Teaching and Learning Committee, Board of Education, Wilton Public Schools; Kevin Smith, As Member, Teaching and Learning Committee, Board of Education, Wilton Public Schools; Ann Paul, As Member, Teaching and Learning Committee, Board of Education, Wilton Public Schools; and Teaching and Learning Committee, Board of Education, Wilton Public Schools.*

HHB-CV-176041081, an appeal from #FIC 2016-0787

On November 4, 2016, the plaintiff filed a forty page complaint with the Commission against the Wilton Parent Advisory Board (“PAB”), alleging 55 violations of the FOI Act, including the failure to post notice for various meetings from October, 2016 going back to January, 2015, failing to be specific on the agendas for various meetings, conducting business at various meetings that was not on the agenda, conducting the meeting of September 14, 2016 in a closed session and failing to timely post votes taken at various meetings.

The plaintiff requested the following remedies: that the FOI Commission nullify all PAB votes and decisions taken at improperly noticed meetings, that the FOI Commission issue civil penalties against the PAB members and that the Commission conduct a training session for PAB, the Wilton Board of Education and it staff.

On September 8, 2017 the Executive Director of the Commission issued to the parties a Notice of Decision Not to Schedule a Hearing in Docket # FIC 2016-0787 pursuant to Connecticut General Statutes § 1-206(b)(2)(A)(B) and (C).

HHB-CV-176041082, an appeal from #FIC 2016-0803

On November 14, 2016, ten days after the filing of the complaint in #FIC 2016-0787, referenced above, the plaintiff filed a 205 page complaint with the Commission alleging 43 violations against the Business Operations Committee("BOC"), a subcommittee of the Wilton Board of Education, which was docketed as Docket #FIC 2016-0803. The plaintiff's allegations included: the BOC failed to unlock the door for a meeting which began at 7:35am October 13, 2016 until 7:45 am; the BOC failed to publicly post notices for 19 meetings dating from August 18, 2014 through June 21, 2016; the BOC failed to make minutes available for inspection of 23 meetings dating from August 18, 2014 through July 22, 2016. The plaintiff requested as remedies the finding of violations, the imposition of civil penalties against the members of the BOC and FOI training.

On September 8, 2017, the Executive Director of the Commission issued to the parties a Notice of Decision Not to Schedule a Hearing in Docket # FIC 2016-0803 pursuant to Connecticut General Statutes § 1-206(b)(2)(A)(B) and (C). The Notice, which was similar in substance to the notices in the other three cases provided:

The Executive Director is not seeking to schedule a hearing in this matter, but rather is asking the Commission to affirm her decision not to schedule a hearing. The Executive Director's decision not to schedule wa based on the following factors pursuant to § 1-206(b)(3) of the Connecticut General Statutes:

A. The Commission's resources are diminished due to budget cuts and consolidation with other state agencies, while its caseload has increased dramatically. It is impossible for the Commission to schedule a hearing for every case that is filed.

B. The complainant has filed forty-four complaints against various public agencies, frequently the Wilton Board of Education, over the last three years. The Superior Court has concluded that the filing of a multitude of complaints with the Commission in a limited time period constitutes an abuse of the Commission's administrative process. Memorandum of Decision, Bradshaw Smith v. Freedom of Information Commission, CV 16-5017349S (Schuman, J.)(July 19, 2016)(filing

multiple complaints constitutes abuse of the Commission's administrative process).

C. The Commission has already expended an inordinate amount of time and resources adjudicating and mediating a multitude of previous cases filed by the complainant. Moreover, the complainant's practice of filing copious motions, postponement requests, and other pleadings, often insinuating that the Commission has acted unfairly or unprofessionally with regard to her, is tantamount to harassment and clearly an abuse of the Commission's administrative process. . .

D. The Commission's caseload has been running at a record pace, and hundreds of complainants other than Ms. Lowthert, who have not yet been before the Commission, await hearings.

E. The complaint contains allegations regarding 40 meetings over a two year period, almost all of which are time-barred. The complainant alleges she received notice in fact of such allegations within thirty days prior to the filing of the complaint. However, under Public Act 17-86, An Act Concerning Appeals Under the Freedom of Information Act Involving Notice of Meetings, effective October 1, 2017, the term "notice in fact" in § 1-206-(b)(1), G.S. is eliminated. The new language provides:

Any person denied the right to inspect or copy records under section 1-210 or wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the Freedom of Information Act may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial, except in the case of an unnoticed or secret meeting, *in which case the appeal shall be filed not later than thirty days after the person filing the appeal receives actual or constructive notice that such meeting was held.* [emphasis added]

F. It is not feasible to adjudicate allegations related to 40 meetings in the context of one contested case. Moreover, the practical problems would be aggravated by the length of time that has passed, which may well involve change of staff and/or membership of the respondent committee, as well as inevitable loss of recollection over such issues as agenda items and timely availability of votes.

G. As remedy, the complainant seeks the nullification of all votes taken at the meetings of the respondents since 2014, in addition to the imposition of maximum civil penalties, among other requests.

Based on the factors set forth in paragraphs A through G, above, the

Executive Director of the Commission has reason to believe that scheduling a hearing in the above-captioned appeal “presents a claim beyond the Commission’s jurisdiction”, pursuant to § 1-206(b)(2)(A) of the Connecticut General Statutes, would “perpetrate an injustice” pursuant to § 1-206(b)(2)(B) of the Connecticut General Statutes, and would “constitute and abuse of the Commission’s administrative process,” pursuant to § 1-206(b)(2)(C) of the Connecticut General Statutes. Proceeding would be a waste of the scarce resources of the Commission, would needlessly delay the hearings of hundreds of other complainants, and would unreasonably summon the respondents to Hartford to attend a hearing. Therefore the Executive Director shall not schedule the appeal for hearing under that provision.

HHB-CV-176041080, an appeal from #FIC 2016-0804

On November 14, 2016, ten days after the filing of the complaint in #FIC 2016-0787, referenced above, and the same day she filed the complaint in #FIC 2016-0803 referenced above, the plaintiff filed 192 page complaint with the Commission against the Policy Communications Alignment Committee(“PCAC”), a subcommittee of the Wilton Board of Education, alleging 80 violations including: the PCAC failed to promptly unlock to door for a meeting on October 18, 2016 to which the plaintiff was subsequently admitted; the PCAC failed to publicly post notice of 33 meetings for dates ranging from September 24, 2014 through May 3, 2016; the PCAC failed to adequately describe business transaction in four meetings ranging in dates from October 15, 2014 thorough February 10, 2015; the PCAC failed to publicly post meeting minutes for 38 meetings ranging in date from September 24, 2014 though August 24, 2016; the PCAC failed to post the votes of the meetings of April 22, 2015, June 3, 2015 and September 27, 2016.

The plaintiff also alleged that the Wilton Board of Education violated the FOI Act by failing to comply with her record request for the minutes of *all* of its subcommittees *within four days*.

The plaintiff requested the following remedies: the nullification of all PCAC actions taken at the many meetings described in her complaint; the revision of all past agendas to provide more

specificity; FOI training, and; the imposition of civil penalties against the members of the PCAC.

On September 8, 2017, the Executive Director of the Commission issued to the parties a Notice of Decision Not to Schedule a Hearing in Docket # FIC2016-0804 pursuant to Connecticut General Statutes § 1-206(b)(2)(A)(B) and (C).

HHB-CV-176041275, an appeal from #FIC 2016-0812

On November 14, 2016, ten days after the filing of the complaint in #FIC 2016-0787, referenced above, and the same day she filed the complaint in #FIC 2016-0803 and #FIC2016-0804, referenced above, the plaintiff filed a 219 page complaint, alleging 72 violations against the Teaching and Learning Committee("TLC"), a subcommittee of the Wilton Board of Education. The plaintiff alleged that: the TLC failed to notice 26 meetings for dates ranging from August 26, 2014 through October 13, 2016; the TLC failed to adequately describe business to be transacted in twelve meetings ranging in dates from October 21, 2014 through October 20, 2016; the TLC failed to publicly post 26 meetings ranging in dates from August 26, 2014 through October 13, 2016; the TLC failed to timely make available for inspection the votes of meetings for February 19, 2015, May 14, 2015 and December 8, 2015; the TLC conducted business not on the agendas for four meetings ranging in dates from January 15, 2015 through April 19, 2016.

The plaintiff also alleged that the Wilton Board of Education violation the FOI Act by not providing her with *all minutes of all Board of Education subcommittees within four days*.

The plaintiff requested as remedies: the nullification of all TLC actions taken at all meetings referenced in her complaint; the revision of past agendas described above to provide more specificity; FOI training; and the imposition of maximum civil penalties against members of the TLC.

On September 8, 2017, the Executive Director of the Commission issued to the parties a Notice of Decision Not to Schedule a Hearing in Docket # FIC 2016-0812 pursuant to Connecticut General Statutes § 1-206(b)(2)(A)(B) and (C).

Proceedings before the FOI Commission

On September 21, 2017, the plaintiff filed a written argument in opposition to the Executive Director's four Notices. The argument numbers over 122 paragraphs, accuses the Executive Director of misapplying the law, talks about the plaintiff's successes in other litigation and many other matters unrelated to the merits of the plaintiff's complaints.

Under Connecticut General Statutes § 1-206(b)(2) the plaintiff could have submitted an affidavit and written arguments to explain why the aforementioned complaints should be heard, why and how her rights were violated, how the interests of her children were impacted, how the interests of the public were impacted, and why every action taken by the subcommittees over several years should be vacated. Her lengthy "argument" contained none of the foregoing.

At its regular meeting on September 27, 2017, the FOI Commissioners unanimously voted to affirm the Executive Director's decision to not schedule hearings in ##FIC 2016-0787, 2016-0803 and 2016-0804, based upon the records before the Commission. At its regular meeting on October 11, 2017, the Commissioners voted 5-0 to affirm the Executive Director's decision to not schedule a hearing in #FIC 2017-0812. Thereafter, the plaintiff filed these four appeals.

Discussion of the Law and Ruling

Connecticut General Statutes § 1-206(b)(2) provides in pertinent part:

...If the executive director of the commission has reason to believe an appeal under subdivision (1) of this subsection or subsection (c) of this section (A) presents a claim beyond the commission's jurisdiction; (B) would perpetrate an injustice; or (C)

would constitute an abuse of the commission's administrative process, the executive director shall not schedule the appeal for hearing without first seeking and obtaining leave of the commission. The commission shall provide due notice to the parties and review affidavits and written argument that the parties may submit and grant or deny such leave summarily at its next regular meeting. The commission shall grant such leave unless it finds that the appeal: (i) Does not present a claim within the commission's jurisdiction; (ii) would perpetrate an injustice; or (iii) would constitute an abuse of the commission's administrative process. Any party aggrieved by the commission's denial of such leave may apply to the superior court for the judicial district of Hartford, within fifteen days of the commission meeting at which such leave was denied, for an order requiring the commission to hear such appeal.

The three bases for not scheduling a hearing set forth above are listed in the disjunctive.

Therefore, a hearing is not required even if the facts support only one of the criteria.

Connecticut General Statutes § 1-206(b)(3) provides in pertinent part:

(3) In making the findings and determination under subdivision (2) of this subsection the commission shall consider the nature of any injustice or abuse of administrative process, including but not limited to: (A) The nature, content, language or subject matter of the request or the appeal, including, among other factors, whether the request or appeal is repetitious or cumulative; (B) the nature, content, language or subject matter of prior or contemporaneous requests or appeals by the person making the request or taking the appeal; (C) the nature, content, language or subject matter of other verbal and written communications to any agency or any official of any agency from the person making the request or taking the appeal.

A judge of the Superior Court has held that a hearing is not required in every administrative appeal. *David Godbout v. Freedom of Information Commission*, CV-14-5016057, 2015 WL 4380266 at *3 (Judicial District of New Britain, June 18, 2015, Schuman, J.).

Connecticut General Statutes § 1-206(b)(4) provides:

(4) Notwithstanding any provision of this subsection to the contrary, in the case of an appeal to the commission of a denial by a public agency, the commission may, upon motion of such agency, confirm the action of the agency and dismiss the appeal without a hearing if it finds, after examining the notice of appeal and construing all allegations most favorably to the appellant, that (A) the agency has not violated the Freedom of Information Act, or (B) the agency has committed a technical violation of the Freedom of Information Act that constitutes a harmless error that does not

infringe the appellant's rights under said act.

The Commission argues that the record supports its conclusion that the Executive Director's decision not to grant a hearing in these four matters was supported by Connecticut General Statutes § § 1-206(b)(2)(A), 1-206(b)(2)(B), and 1-206(b)(2)(C). The court agrees.

The four complaints at issue contain over 250 allegations. They seek to invalidate meetings going back to 2014. A hearing officer assigned to the complaints would be occupied for a lengthy period of time while each allegations was addressed with respect to jurisdiction. Then, witnesses with knowledge of the subcommittee and board meetings must be called, sworn and examined.

The hearings on the complaints will involve many days, and will remove Commission staff and Commissioners from other business. The Commission will have to locate staff members and subcommittee members from PAB, BOC, PCAC and TLC and require them to travel to Hartford for hearings, which will certainly prevent their time being devoted to public education work.

The Commission has only one hearing room, which would be occupied for many days with the testimony of Wilton public school staff and parent/volunteers. Other complainants before the Commission would be unable to obtain hearings on their requests.

In *Godbout, supra*, the court found that the filing of eleven separate complaints pertaining to eleven different meetings in one day constituted an abuse of the Commission's administrative process. The plaintiff here has filed 250 allegations in the space of ten days involving more than 80 meetings, many of which occurred several years ago. Scheduling and hearing the plaintiff's complaints would be an abuse of the Commission's administrative process.

Conducting hearings in the underlying complaints would also perpetrate an injustice within the meaning of Connecticut General Statutes § 1-206(b)(2)(B). The plaintiff has already filed 44

complaints with the Commission in just three years. The Executive Director concluded and the Commission agreed that the Commission had already expended an inordinate amount of time and resources adjudicating and mediating the plaintiff's previously filed cases. She also concluded that the Commission's caseload has been running at a record pace, and hundreds of complainants other than Ms. Lowthert, who have not yet been before the Commission, await hearings. Scheduling hearings on the plaintiff's complaints would result in injustice to all these other complainants.

Although the parties disagree on the issues with respect to the Commission's jurisdiction over many of the plaintiff's allegations, it is clear that there are legitimate issues as to jurisdiction. It is not clear whether PAB, the subject of one of the complaints, is a public agency subject to the Commission's jurisdiction. The Commission would have to conduct a "Woodstock" test with respect to the PAB to determine if it is a "public agency" within the meaning of Connecticut General Statutes § 1-200(1)(B). *See Board of Trustees of Woodstock Academy v. FOI Commission*, 181 Conn. 544, 554, 436 A.2d 266 (1980).

There is also an issue as to whether the plaintiff's claims with respect to almost all of the meetings at issue in her complaints are time barred. In 2016 Connecticut General Statutes § 1-206(b)(1) provided:

[a]ny person denied the right to inspect or copy records under section 1-210 or wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the Freedom of Information Act may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial, except in the case of an unnoticed or secret meeting, in which case the appeal shall be filed not later than thirty days after the person filing the appeal receives *notice in fact* that such meeting was held.

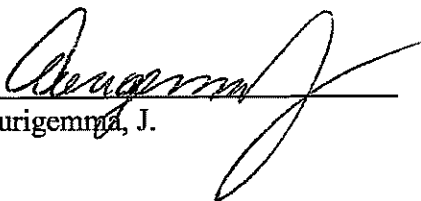
Emphasis added.

The Commission had a longstanding policy of interpreting “notice in fact” in 1-206(b)(1) to include actual and constructive notice. However, in *Lowthert v. Freedom of Information Commission et al*, HHB-CV-15-6030425, 2017 WL 950990(January 17, 2017, Huddleston, J.), the court overturned that interpretation. On June 27, 2017 the Legislature passed Public Act 17-86, which deleted the phrase “notice in fact” and substituted the phrase “actual or constructive notice.”

The Commission has taken the position that Public Act 17-86 is remedial in nature and intended to clarify the Commission’s long-standing interpretation of the statute, and, therefore applies retroactively. Thus, the Commission has argued that most of the plaintiff’s allegations are time barred because she did not file her complaints timely. There is a legitimate question as to whether the Commission has jurisdiction over the vast majority of the plaintiff’s allegations.

As set forth above, the Executive Director’s Notices set forth valid, nonpretextual reasons for not scheduling these cases for hearings. It appears to the court that the Commission and the Executive Director have acted properly and in good faith, and have not acted arbitrarily or capriciously, nor abused their discretion. This court concurs with their decision not to schedule hearings in these complaints. Therefore, such hearings will not be ordered by this court.

By the court,


Aurigemma, J.