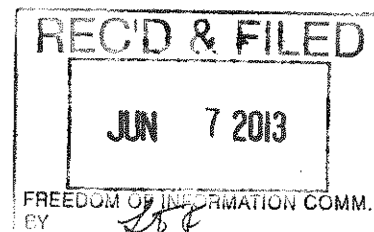


FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by
Lynelle Jones, Complainant

Docket Number FIC 2012-543

against
Office of Tax Assessor, City of Norwalk
and
City of Norwalk, Respondents

June 6, 2013

Petition for Reconsideration

Pursuant to Connecticut General Statutes Section 4-181a, the Respondents, in the above-referenced matter hereby file this Petition for Reconsideration of the final decision rendered by the Freedom of Information Commission dated May 24, 2013 (the Final Decision). The Final Decision, a copy of which is attached hereto as Exhibit A, was adopted by the Freedom of Information Commission at its regular meeting of May 22, 2013 and mailed to the Respondents' offices on May 29, 2013.

Respondents' petition is based on the grounds that errors of both fact and law were made in connection with the Commission's rendering of the Final Decision , under §4-181a (a) (1) (A) and the existence of other good cause for reconsideration exist, under §4-181a (a) (1) (C). In support of the foregoing the Respondents assert the following:

I. The Factual Conclusion Set Out In Paragraph 15 Was Not Supported By The Weight Of Substantial Evidence Taken On The Whole Record In This Matter.

The conclusion of fact stated in paragraph numbered 15 of the Final Decision is clearly erroneous in view of the evidence presented in this case and relied on as the basis for the factual conclusion. Specifically, paragraph numbered 15 states the following:

> "*It is found that the complainant was present when the appraiser took pictures both inside and outside of her residential property. It is further found that, on May 3, 2012,*

the city approved the $1,500 payment to Sheehy Associates LLC for the appraisal. It is therefore found that the Sheehy appraisal does exist."

This conclusion by the hearing officer that a written appraisal report existed and should be produced was based solely on the testimony of the Complainant that pictures were taken of her residence and a copy of an invoice for appraisal services. However, neither the Complainant's testimony nor the invoice mentioned confirm that the written report exists or ever did exist. While the respondents admit that an appraiser was hired and, as part of his services, took pictures and performed an inspection of Complainant's residence, this does not support the conclusion that a written report was actually produced as part or as a result of such inspection and services. Nor was it reasonable to conclude that a report or other written document must have been created based on these circumstances alone.

In fact, the Respondents provided evidence of the fact that no such written report exists or was ever created. Following the initial proposed decision, the Respondents sent to the Complainant and the hearing officer an affidavit, sworn to by the respondent, Tax Assessor, Michael Stewart, stating specifically, that "[t]he Office of the Tax Assessor *does not have, and has never had an appraisal* from Sheehy Associates, LLC regarding 10 Point Road, Norwalk CT." (emphasis added). A copy of that Affidavit is attached hereto as Exhibit B.

Paragraph 4 of the Proposed Order states "[h]owever, in the event that the respondents no longer maintain the appraisal...," thereby assuming that an appraisal, in document form, does or at least did at one time exist. This assumption ignores, and, in fact is directly contrary to Michael Stewart's sworn, written statement, set out in his affidavit. Yet the hearing officer provides no reason or evidence to support discrediting or impeaching his statements. Because

Respondents have never had a written appraisal it is impossible for them to comply with the order .

For the reasons stated above, the conclusion of fact, that an appraisal "does exist," is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record," See The Commission on Human Rights and Opportunities v. City of Hartford, 138 Conn. App. 141 (2012). Further, an administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. Bancroft v Commissioner of Motor Vehicles, 48 Conn App 391, at 400 (1998); citing Huck v. Inland Wetlands &Watercourses Agency, 203 Conn 525, at 541 (1987).

II. In Reliance on this Erroneous Conclusion of Fact the Final Decision Ordered the Respondents to Obtain Documents and Information that were not within the Custody or Control of the Public Agency - which Documents are not Subject to Disclosure Under the Freedom of Information Act and Provide Copies of the Same.

By instructing the Respondents to "arrange to obtain a copy" of "the appraisal, or documents and photographs related to the appraisal" from a third party the Commission is overreaching its authority under Connecticut General Statutes § 1-210(a) which states that "[e]xcept as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency...shall be public records," to which every person shall have a right to inspect, copy or receive a copy of such records. This mandate does not extend to documents that are not "maintained or kept on file by" a public agency. Nor does the statute require the Respondents, as a public agency, to obtain copies of documents or information that has never been within its files from a third party, as was attested to in the Affidavit from Mr. Stewart.

Additionally, the order should be stricken as being "void for vagueness" because it is so obscure that a reasonable person could not determine from a reading what the Commission purports to command.

III. The Hearing Officer's Proposed, Final Decision was not Served on the Parties in Compliance with the Requirements of Connecticut General Statutes §4-179 and §1-21j-40 (a) of the Regulations of Connecticut State Agencies.

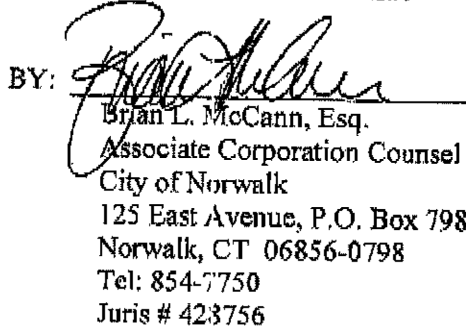
Pursuant to §1-21j-40 (a) of the Regulations of Connecticut State Agencies "[a] final decision shall not be adopted...until a proposed final decision is served upon all of the parties, and until an opportunity has been afforded to each party adversely affected by the final decision to file exceptions, to present briefs, and to make oral argument before the commission at a commission meeting." The provisions of Connecticut General Statutes §4-179 are substantially similar. While the present case does not involve a complete failure to issue a proposed decision, it does involve the Commission's failure to provide an opportunity to brief this new requirement and take exception thereto after the hearing officer revised her recommendations for disposition. A proposed final decision was sent to the parties prior to the date of the Commission hearing . Subsequently, after the meeting was convened and was in progress, the hearing officer presented Respondents' counsel with revisions to her proposed decision which substantially changes the recommendation for relief by imposing an additional requirement on the Respondents. The new requirement obligates the Respondents to seek to obtain documents outside of their custody and, if they exist at all, within the confidential files of a third party. By doing so the Final Decision undermines the purpose of the statutory and regulatory right to a prior opportunity to comment on the revision and take exception to it.

The Superior Court, in the case of New England Rehabilitation Hospital of Hartford, Inc., et al v. Commission On Hospitals And Health Care et al, WL No 506106, July 20, 1992, has stated that the question of "[w]hether an additional opportunity for briefs and exceptions is required" following the issuance of corrections or revisions to a proposed decision "depends on whether the changes to the original proposed decision are such that they substantially or materially change the proposed decision or introduce a new subject matter as to which the applicant had not prior opportunity to comment. See, New England Rehabilitation Hospital of Hartford, Inc., et al v. Commission On Hospitals And Health Care et al, supra, at 1072. Given the fact that the proposed substantive revision adversely impacts the Respondents, the Respondents should have received prior notice of the Hearing Officer's proposed decision in this regard. Certainly such notice should have been given before the Commission's meeting began. And, in any event the Respondents should have been afforded a reasonable opportunity to review the proposed additional requirement and to take exception to it. Discussing the application of the Administrative Procedure Act, which contains a similar provision regarding prior notice of a decision and an opportunity to respond to proposed changes, the New Jersey Appellate Court has firmly declared the purpose of this opportunity to comment. "The law is firmly settled where a final decision is made by one who did not hear the evidence but who relies in part upon a report of a hearing officer, there is a risk that the ultimate decision may be based upon findings not supported by the evidence. To secure essential fair play and to minimize the risk of fundamental error it is necessary that...prior to its submission to the deciding officer the hearer's report be made available to the parties and...they then be given an opportunity to correct any mistakes that may appear in the report. This simple requirement, while imposing no hardship on the agency,

does protect the individual against the strong possibility of a miscarriage of justice or the suspicion thereof. (Mazza v. Cavicchia, 15 N.J. 498 at 523-524 (1954)).

WHEREFORE, the Respondents respectfully request that the Commission grant this Petition and reconsider the Final Decision rendered in this matter; and, in so doing, delete the conclusion stated in paragraph 15 and the order recommended in paragraph 4, that the Respondents "shall forthwith communicate with Sheehy Associates LLC and arrange to obtain a copy of the appraisal, or documents and photographs related to the appraisal."

THE RESPONDENTS
OFFICE OF TAX ASSESSOR
AND THE CITY OF NORWALK

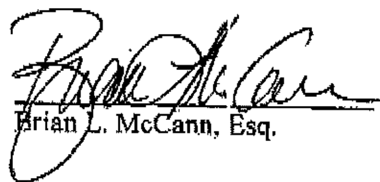


BY: ______________________
Brian L. McCann, Esq.
Associate Corporation Counsel
City of Norwalk
125 East Avenue, P.O. Box 798
Norwalk, CT 06856-0798
Tel: 854-7750
Juris # 423756

CERTIFICATION

I certify that a copy of the foregoing was served via first class mail, postage prepaid, on this date hereof to:

Lynelle Jones
10 Point Road
Norwalk, CT 06854



Brian L. McCann, Esq.