



NO. HHB-CV-13-5015785-S : SUPERIOR COURT
 ROGER EMERICK : JUDICIAL DISTRICT OF NEW BRITAIN
 V. : AT NEW BRITAIN
 FREEDOM OF INFORMATION :
 COMMISSION ET AL. : JULY 10, 2013

MEMORANDUM OF DECISION

Pursuant to the Uniform Administrative Procedure Act, Conn. Gen. Stat. § 4-166 et seq., the plaintiff, Roger Emerick, has appealed from a decision of the defendant, Freedom Information Commission (Commission), dismissing the plaintiffs freedom of information complaint brought against the Commissioner of Public Health and the Department of Public Health (hereinafter collectively referred to as "the Department") after concluding that the Department did not violate the provisions of the Freedom of Information Act (FOIA). The defendants move to dismiss the plaintiffs administrative appeal on the ground that the plaintiffs administrative appeal was filed and served beyond the statutory time parameters contained in General Statutes § 4-183©, thereby depriving this Court of subject matter jurisdiction.

SUPERIOR COURT

2013 JUL 15 A 9 39

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FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff filed a complaint with the Commission on January 3, 2012, claiming that the Department violated the provisions of the FOIA by denying the plaintiff access to public records. While the Department provided the plaintiff with copies of certain records, the Department withheld documents under the provisions of the Freedom of Information Act, claiming these documents were protected from disclosure pursuant to the attorney-client privilege and exemption pertaining to strategy and negotiations with respect to pending claims or litigation. A contested case hearing was held on June 12, 2012, before Hearing Officer Victor Perpetua, Esq., who issued a proposed decision on October 25, 2012. In the proposed decision, the hearing officer concluded that the documents in question were properly withheld from disclosure as said documents were protected under General Statutes §§ 1-210(b)(4) and 1-210(b)(10). Accordingly, the hearing officer concluded the Department did not violate the provisions of the FOIA by withholding these documents from disclosure and thus, dismissed the plaintiff's complaint.

On November 2, 2012, the plaintiff filed a brief and/or exceptions to the hearing officer's proposed decision. After hearing oral argument by the parties, the Commission adopted the hearing officer's proposed decision as its final decision at its meeting on November 14, 2012. Due to technical difficulties with the recording device, the

Commission's November 14, 2012 meeting, including the oral argument of the parties on the proposed decision, was not recorded.

On November 20, 2012, the plaintiff filed a request for reconsideration-reargument based solely on the lack of a recording of the November 14, 2012 Commission meeting. He argued that the trial court should have a transcript of the oral argument for purposes of judicial review of the Commission's decision. In response thereto, the Department filed an objection on December 7, 2012. On December 11, 2012, the plaintiff filed a reply brief in response to the Department's objection, seeking to present additional evidence to the Commission regarding issues not previously raised in his initial request for reconsideration.

At its meeting on December 12, 2012, the Commission granted the plaintiff's request for reconsideration-reargument limited to the relief sought in his request dated November 20, 2012. The Commission precluded the plaintiff from offering the additional evidence he sought to provide in his reply brief. Thereafter, the Commission heard oral argument by the parties on the final decision, after which the Commission affirmed the final decision.

On December 13, 2012, the plaintiff again filed a request for reconsideration-reargument of the Commission's final decision made after reconsideration, seeking to present "newly discovered evidence" under General Statutes § 4-181a(1)(B).

to which the Department filed an objection. The parties were notified in writing by the Commission that the Commission would consider the plaintiffs motion for reconsideration at 2 p.m. on Wednesday, January 9, 2013. At the Commission's January 9, 2013 meeting, the Commission denied the plaintiffs request for reconsideration. As reflected in the plaintiffs complaint, the plaintiff was present at the Commission's meeting on January 9, 2012 when the Commission denied his motion. On January 17, 2013, the Commission mailed to the parties notice of its denial of the plaintiff's motion for reconsideration. On February 27, 2013, the plaintiff filed this administrative appeal with the Court and served, via certified mail, return receipt requested, copies of his appeal upon the defendants.

This date is well beyond the time parameters prescribed by General Statutes 4-183(c)(2), which requires that an administrative appeal be filed with the Superior Court and served upon the Commission within forty-five days from the denial of the petition for reconsideration. This court must dismiss the plaintiff's appeal for lack of subject matter jurisdiction.

A motion to dismiss shall be used to assert lack of jurisdiction over the subject matter. Practice Book § 10-31; *Sadloski v. Manchester*, 235 Conn. 637, 645-46 n.13, 668 A.2d 1314 (1995). Subject matter jurisdiction is the power of the court to hear and determine cases of the general class to which the proceedings in question belong. *Cannata v. Dept. of Environmental Protection*, 239 Conn. 124, 144 n.17, 680 A.2d 1329

(1996). Subject matter jurisdiction can be raised at any time by the parties or by the Court. Id. Once the question of the Court's subject matter jurisdiction is raised, it must be disposed of fully before the Court can precede. Id. If the Court finds that it lacks subject matter jurisdiction, the Court is bound to dismiss the case. *Concerned Citizens of Sterling v. Sterling*, 204 Conn. 551, 557, 529 A.2d 666 (1987).

"Appeals to courts from administrative agencies exist only under strict statutory authority. . . . A statutory right to appeal may be taken advantage of only by strict compliance with the statutory provisions by which it is created. . . . Such provisions are mandatory, and, if not complied with, the appeal is subject to dismissal." *Hefi v. Commission on Human Rights and Opportunities*, 61 Conn. App. 270, 273, 763 A.2d 688, cert. denied, 255 Conn. 948, 769 A.2d 62 (2001).

The plaintiffs administrative appeal to the Superior Court is governed by the Uniform Administrative Procedure Act, General Statutes § 4-166 et. seq. Pertinent to this appeal, General Statutes § 4-183 (c)(2) provides "within forty-five days after the agency denies a petition for reconsideration of the final decision pursuant to subdivision (1) of subsection (a) of section of section 4181a . . . a person appealing as provided in this section shall serve a copy of the appeal on the agency that rendered the final decision at its office or at the office of the Attorney General in Hartford and file the appeal with the

clerk of the court of the superior court for the judicial district of New Britain or for the judicial district wherein the person appealing resides. . ."

The failure to file and serve an appeal, as required by General Statutes § 4-183 (c), is a fatal jurisdictional defect mandating dismissal. *Glastonbury Volunteer Ambulance Assn. v. Freedom of Information Commission*, 227 Conn. 848, 852, 633 A.2d 305 (1993).

The mandatory nature of the forty-five day filing and service requirements have been reviewed and reaffirmed by our Supreme and Appellate Courts on numerous occasions. See *Ann Howard's Apricots Restaurant, Inc. v. Commission on Human Rights & Opportunities*, 237 Conn. 209, 219-20 (1996); *Commission on Human Rights & Opportunities v. Windsor Hall Rest Home*, 232 Conn. 181, 185 (1995); *Glastonbury Volunteer Ambulance Assn. v. Freedom of Information Commission*, 227 Conn. 852-54; *Crest Pontiac Cadillac, Inc. v. Hadley*, 239 Conn. 437, 443 n.9 (1996); *Hefti v. Commission on Human Rights & Opportunities*, 61 Conn. App. 273; *Taylor v. State Board of Mediation & Arbitration*, 54 Conn. App. 550, 555 (1999), cert denied, 252 Conn. 925, cert. denied, 530 U.S. 1266, 120 S. Ct. 2729, 147 L. Ed. 2d 992 (2000).

The language of General Statutes § 4-183(c)(2) clearly and plainly mandates that the statutory appeal period for filing and serving an administrative appeal commences from the denial of the reconsideration, not from the date of mailing by the agency of such denial. The legislature in enacting § 4-183(c)(2) of General Statutes omitted from this

subsection the language "after mailing," which language the legislature included in subsections (c)(1) and (c)(3) of § 4-183 of the General Statutes for commencing the statutory appeal period for final decisions or final decisions made after reconsideration, respectively. Had the legislature intended that appeal period to commence after the date of mailing of the denial of a motion for reconsideration, the legislature would have included such language in § 4-183(c)(2). "It is a principle of statutory construction that a court must construe a statute as written... Courts may not by construction supply omissions or add exceptions merely because it appears that good reasons exist for adding them . . . The intent of the legislature, as [our Supreme Court] has repeatedly observed, is to be found not in what the legislature meant to say, but in the meaning of what it did say. . . . It is axiomatic that the court cannot rewrite a statute to accomplish a particular result. That is the function of the legislature. . . . In construing statutes, [the court] presumes that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous." (Citations omitted; internal quotation marks omitted.) *Doe v. Norwich Roman Catholic Diocesan Corp.*, 279 Conn. 207, 216-17 (2006).

In the present case, the Commission denied the plaintiffs motion for reconsideration on January 9, 2013 at its meeting at which the plaintiff was present. The plaintiff had until February 23, 2013 to serve his appeal on the Commission and until February 25, 2013 to file his appeal in the Superior Court. The plaintiffs appeal was

served on the Commission and filed with the Court on February 27, 2013, four days day late for service and two days late for filing.

CONCLUSION

The plaintiff has failed to file and serve his administrative appeal within the forty-five day period mandated by General Statutes § 4-183©. There is controlling Supreme Court authority mandating dismissal when the time parameters of General Statutes § 4-183 (c) are not complied with. *Glastonbury Volunteer Ambulance Assoc., Inc. v. Freedom of Information Commission*, supra, 227 Conn. 852, 854-55. The Court is without jurisdiction and dismisses the plaintiffs administrative appeal.



OWENS, J.T.R.