STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Herbert Mitchell, Jr.,	**:**	**OPH/WBR No. 2012-181**
Complainant	**:**	
v.		
State of CT, Department of		
Veterans' Affairs, et al.,	**:**	**August 1, 2012**
Respondent		

ARTICULATION OF RULING ON RESPONDENT'S MOTION TO DISMISS

PRELIMINARY STATEMENT

The complainant, Herbert L. Mitchell is a former employee of the Connecticut Department of Veterans Affairs. Complainant alleged he was terminated for his allegations of Medicaid fraud against his employer. Complainant was formally terminated on January 31, 2012. He filed a complaint with the Office of Public Hearings on February, 29, 2012, pursuant to General Statutes § 4-611dd for retaliatory termination. The respondents filed a Motion to Dismiss on May 4, 2012, attacking the complaint on three grounds: 1. the complaint is untimely; 2. the complainant also filed a union grievance; and 3. that General Statute §4-61dd does not allow for individual liability. The complainant and the CHRO, who intervened in this case pursuant to Public Act 11-237, filed objections to the Motion to Dismiss. This tribunal sustained the objection to the Motion to Dismiss without comment. Based on the Complainant's objection, the respondent should have been aware that their arguments were made in reliance on an out of date statute and that case law which was cited is no longer controlling on this issue. The following sets forth this tribunal's reasoning for Denial of the Respondent's Motion to Dismiss.

STANDARD

A motion to dismiss is an appropriate means to challenge a tribunal's jurisdiction to hear an action. *Jolly, Inc. v. Zoning Board of Appeals,* 237 Conn. 184 (1996); *Upson*

v. State, 190 Conn. 622 (1983). In considering a motion to dismiss, facts are to be construed in the light most favorable to the non-moving party, in this case, the Complainant. Every reasonable inference is to be drawn in the Complainant's favor. *New England Savings Bank v. Bedford Realty Corp.,* 246 Conn. 594, 608 (1998); *Pamela B. v. Ment*, 244 Conn. 296, 308 (1998). The moving party bears a substantial burden to sustain a motion to dismiss.

DISSCUSSION

Statute of Limitations

The respondent's cite an out of date General Statute, stating that 4-61dd(b)(3)(A) mandates that a Complainant file a complaint with the Chief Human Rights Referee no later than, "thirty days of learning of the specific incident giving rise to a claim that a personnel action has been threatened **or** occurred..." (Emphasis added) The cited statute was replaced by General Statute 4-61dd (b)(**2**)(A) (emphasis added), which provides for a ninety (90) day filing period. Pursuant to Public Act 11-48.

Further, respondents argue that that the complaint was untimely filed because the complainant learned in May of 2011, that he maybe terminated even though complainant was not actually terminated until January 31, 2012. The relevant time limit is actually 90 days not "30" as cited. The respondent uses non-controlling law to proffer the argument that an employer can tell an employee that he may be terminated, and if the employer waits until the Office of Public Hearing filing period expires before actually terminating him, that the employer may escape liability. That interpretation would yield absurd and unworkable results and is counter to the plain meaning of the General Statute General Statute 4-61dd (b)(**2**)(A). The common use of the word or indicates an alternative. It provides the complainant with a choice not exclusion. The respondent's statute of limitations argument completely fails.

The complainant union's grievance

Once again the respondent does not use valid precedent to support its contention that the filing of a union grievance bars the filing of a complaint with the Office of Public Hearings because the remedies are mutually exclusive. "The statutory language of § 4-61dd when viewed in its entirely, its legislative history and the grievance process … reveal, however, that § 4-61dd does not require a state employee to abandon the grievance of non-whistleblower claims, even if those claims evolve from the same personnel action giving rise to his whistleblower retaliation claim." *Saeedi v. Connecticut Dep't of Mental Health and Addiction Services,* OPH/WBR 2008-090. This is especially true if the collective bargaining agreement does not provide a provision for addressing retaliation claims, as the complainant alleges here. *Connecticut Dep't of*

Mental Health and Addiction Services, v Saeedi, CV 1060043333, 2011 WL 1168499 (Conn. Super. Ct. February 25, 2011) (affirmed, 135 Conn. App. 563 (2012).

Viewing the allegations in their most favorable light, this tribunal must assume that the collective bargaining agreement contains no provisions for retaliation. The only indication that this tribunal can glean from the record, is that at one time the complainant filed a union grievance for "dismissal." Further, is nothing in the record regarding what allegations were stated in the grievance, and if in fact a grievance is still being pursued. This fact coupled with the above reasoning makes any dismissal at this point improper.

No individual Liability

The respondent's argument that pursuant to General Statutes §4-61dd individuals cannot be sued in their individual capacity therefore, this complaint must be dismissed, is unavailing. This tribunal finds that individuals named in this complainant were sued in their official capacity and no individual labiality attaches absent a showing of wanton, reckless or malicious act or omission pursuant to General Statute §5-141d. Even assuming that the respondents were named individually, outside their official capacities, the proper relief would be to allow for an amended complaint, not a dismissal. *See Andover Ltd. Partnership v. Board of Tax Review of West Hartford,* 232 Conn. 392, 400-01 (1995) No amended is necessary in this instance.

For these articulated reasons, the respondent's Motion to Dismiss, was and is hereby ordered DENIED**.**

It is so ordered this 2nd day of August 2012.

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Michele C. Mount,
Presiding Referee

cc.

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