STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
OFFICE OF PUBLIC HEARINGS

VERNON HORN, *Complainant*	: :	OPH/WBR NO. 2011-156
V.	:	
DEPARTMENT OF CORRECTION, *et al* *Respondents*	: :	MARCH 27, 2012

RULING ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURSIDICTION

PROCEEDURAL HISTORY

On March 31, 2011, the complainant filed a whistleblower retaliation claim with the Chief Human Rights Referee pursuant to General Statute § 4-61dd.[1] Complainant alleges that he was retaliated against on February 23, 2011 after he gave a statement to his Warden, upon his Warden's request, which regarded the alleged illegal conduct of certain prison guards on February 21, 2011. Horn alleged that on the day following his statement, February 22, 2011, he was transferred to another correctional facility. On April 18, 2011, the Respondent, the Department of Correction (DOC), filed an answer and affirmative defenses without waiving its right to file a motion to dismiss, simultaneously with a motion to dismiss based on lack of subject matter jurisdiction. DOC argued that on the basis that General Statute § 4-61dd (whistleblower retaliation

[1] Sec. 4-61dd. Whistleblowing. Disclosure of information to Auditors of Public Accounts. Investigation by Attorney General. Proceedings are alleged retaliatory personnel actions. Report to General Assembly. Large state contractors.

statute) only pertains to active e*mployees* of the state, quasi-public agencies and large state contractors.[2] DOC argues that in light of the fact that complainant is an inmate, he is not qualified for protection under the whistleblower retaliation statute. Further, the DOC alleged that the complaint was untimely filed. On April 20, 2011, complainant (Complainant or Horn) filed a Motion to Object to the Respondents Motion to Dismiss and an accompanying Memorandum of Law. On May 5, 2011 Complainant also filed a "response to [Respondent's][3] answer and special defenses," in which Horn asserted that the court does have jurisdiction as an "U.S.C. Due Process Right," and that his complaint was not time-barred. Horn requested relief for return of private processions, a transfer to another correctional facility and a reprimand of the parties involved.

STANDARD

Section 4-61dd-15c (1) and (2) of the Regulations of Connecticut State Agencies provides in pertinent part.... "The presiding officer may, on his own or upon motion by a party, dismiss a complaint or a portion thereof if the complainant… fails to establish subject matter jurisdiction. "It is equally clear that an administrative agency should be given the opportunity to rule on its subject matter jurisdiction. *Greater Bridgeport Transit*

[2] 4-61dd(b) (1) No state officer or employee, as defined in section 4-141, no quasi-public agency officer or employee, no officer or employee of a large state contractor and no appointing authority shall take or threaten to take any personnel action against any state or quasi-public agency employee or any employee of a large state contractor in retaliation for such employee's or contractor's disclosure of information to (A) an employee of the Auditors of Public Accounts or the Attorney General under the provisions of subsection (a) of this section; (B) an employee of the state agency or quasi-public agency where such state officer or employee is employed; (C) an employee of a state agency pursuant to a mandated reporter statute; or (D) in the case of a large state contractor, an employee of the contracting state agency concerning information involving the large state contract.

[3] Throughout complainant's filings plaintiff and defendant are used as identification of the parties. In this opinion the terms were changed to "Complainant" and "Respondent" for consistency.

District v. Local Union 1336, 211 Conn. 436, 439 (1989) When the subject matter jurisdiction of the adjudicatory body is challenged, cognizance of it must be taken and the matter passed on before it can move one further step in the cause, as any movement is necessarily the exercise of jurisdiction. *Baldwin Piano & Organ Co. v. Blake, 186 Conn.* 295, 297. "The issue is not whether a [complainant] will ultimately prevail but whether the [complainant] is entitled to offer evidence to support the claims." *York v. Association of Bar of City of New York,* 286 F.3d 122, 125 (2nd Cir. 2002) (quoting *Schever v.Rhodes,* 416 U.S. 232, 236 (1974).

Horn is an inmate at the MacDougall-Walker Correctional Institution. (MCI) Prior to his incarceration at MCI he was an inmate at the Corrigan-Radgowski Correctional Center (CCC), where he was assigned to the prison laundry. The Complainant made allegations that a warden at CCC asked him to make a statement about corrupt activities of certain prison guards. The day after the complainant's alleged cooperation he was transferred to MCI. Horn alleged that he was called a rat and that an officer stated that, "he need [sic] to be killed," after his transfer to CCC. Additionally, Horn stated in his affidavit that he was given unsanitary bedding, personal belongings were stolen and that his family "was disrespected." The relief sought by the Complainant, according to his answer on #9 of Horn's original, "Whistleblower Retaliation Complaint Form," he requested the return of his personal property, a transfer from MCI and that the individuals involved be reprimanded.

DISCUSSION

Respondent moves to dismiss this complaint due to lack of subject matter jurisdiction arguing that an inmate in correctional institute is not an employee as contemplated by §C.G.S. 4-61dd and that the relief requested is not in the statutory purview of this tribunal to grant. The DOC bases its arguments on this agency's previous decisions, and analogous state and federal law. Respondent argues that this agency has previously ruled that inmates are not employees in the context envisioned by Connecticut's law. While the law with regard to whistleblower actions is not voluminous, there are numerous holdings in other areas of employment law, that are designed to protect a class of employee, that hold that inmates are not employees of correctional institutions. DOC further asserts that prisoners are not employees at all, pursuant to the definitions of the applicable Connecticut state statutes and regulations.

Connecticut's Whistleblower Statute General Statute §4-61(dd) (b)(1) states:

> (b) (1) No state officer or employee, as defined in section 4-141, no quasi-public agency officer or employee, no officer or employee of a large state contractor and no appointing authority shall take or threaten to take any personnel action against any state or quasi-public agency employee or any employee of a large state contractor in retaliation for such employee's or contractor's disclosure of information to (A) an employee of the Auditors of Public Accounts or the Attorney General under the provisions of subsection (a) of this section; (B) an employee of the state agency or quasi-public agency where such state officer or employee is employed; (C) an employee of a state agency pursuant to a mandated reporter statute or pursuant to subsection (b) of section 17a-28; or (D) in the case of a large state contractor, an employee of the contracting state agency concerning information involving the large state contract.

Further, the relevant portion of General Statute §4-61dd(3)(A) provides that if a violation of the statute is found then the human rights referee may, "[A]ward the

aggrieved employee reinstatement to the employee's former position, back pay and reestablishment of the employee's benefits…"

In the present case complainant is proceeding pro se. "[I]t is the established policy of the Connecticut courts to be solicitous of pro se litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the pro se party . . . The modern trend . . . is to construe pleadings broadly and realistically, rather than narrowly and technically."(Citation omitted; internal quotation marks omitted.) *Hill v. Williams,* 74 Conn.App. 654, 655-56, 813 A.2d 130*, cert. denied, 263 Conn. 918, 822* A.2d 242 (2003). Our Supreme Court observed that the rule of liberal construction of pro se pleadings has limits. "Although we allow pro se litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." *Oliphant v. Commissioner of Correction,* 274 Conn. 563, 569, 877 A.2d 761 (2005). "[W]hile courts should not construe pleadings narrowly and technically, courts also cannot contort pleadings in such a way so as to strain the bounds of rational comprehension." (Emphasis added; internal quotation marks omitted.) *Id.*

In *Taylor v. State of Connecticut*, DOC OPH/WBR No 2009-113 (January 29, 2010) a similar case involving an inmate complainant Referee Kerr found that, "The overwhelming weight of authority presented in the parties' filings leaves me no alternative but to conclude that the complaint is not an employee in the context envisioned by Connecticut's laws [designed] to protect (public) employees who are the victims of whistleblower retaliation." The Taylor complaint was dismissed for lack of subject matter jurisdiction. Kerr analyzed several federal court rulings in other types of

whistleblower cases for guidance in his determination. One case Kerr relied on was from the Ninth Circuit where the court dismissed a complaint of a prison inmate after an unwanted prison transfer for lack of subject matter jurisdiction under the whistleblower provisions of the Clean Air Act, 42 U.S.C § 7622 and the Toxic Substances Control Act, 15 U.S.C. §2622. *Coupar v. United States Dept. of Labor*, 105 F.3d 1263 (9th Cir. 1997). The *Coupar* Court concluded that a prisoner's work assignment was penological. *Id* at 1265. In *Coupar's* analysis whether the inmate was a protected employee, that court opined:

> "[O]ne of the difficulties of our enforcing the whistleblower provisions of the Acts in Coupar's context would be that judicial relief presumably would encompass ordering FPI to reinstate Coupar and ordering the prison authorities to permit him to work there. It also might involve undoing Coupar's transfer if it were found to be retaliatory. The potential for excessive interference in penological matters is considerable. Although we do not hinge our decision on the potential difficulties of affording relief, those difficulties do reinforce our conviction that the whistleblower protection provisions of the Acts are not intended to cover Coupar as an employee." [Internal quotation marks omitted]

Id at 1266.

Further, Horn cannot quit his job of his own accord, he is not entitled to pay[4] and is not entitled to protection under Title VII.[5]

Moreover, this tribunal, in *Ribeiro v. King and Osborn Correctional Institute*, OPH/WBR No. 2008-066 (April 7, 2008) Referee Thomas Austin, also concluded that

[4] Payment to inmates for prison work is granted more of a matter of grace and not an entitlement; there is no right to wages for work performed while incarcerated. *Connecticut v. Strickland*, 2002 Conn. Super; LEXIS 3714 (Conn. Super. CT Nov. 19, 2002

[5] *Williams v. Meese,* 926 F.2d 994, 997. (The Williams court held that the primary purpose of the association between an inmate and the correctional institution is incarceration not employment.) See also *Martin v. Central States Emblems, Inc.*, Case No. 03-3363-JTM, 2004 U.S. Dist. LEXIS 15081; *Pettis v. Danzig*, EEOC Dec. No.86-7, 1986 WL 38836 (EEOC Apr. 18, 1986.)

Ribeiro, an inmate was not an employee and did not qualify to bring a complaint under General Statutes § 4-61dd(b)(1) and therefore subject matter jurisdiction did not exist.

Administrative agencies of limited jurisdiction are dependent entirely upon the validity of the statutes vesting them with power and cannot confer upon themselves jurisdiction. Id. Furthermore, "[i]t is clear that an administrative body must act strictly within its statutory authority ... It cannot modify, abridge or otherwise change the statutory provisions ...." *Tele Tech of Connecticut Corp. v. Department of Public Utility Control,* 270 10 Conn. 778, 789 (2004). Complainant's own pleadings do not support his contention that he is entitled to relief under §4-61(dd). Horn did not allege that he was harmed in any employment capacity. Horn does not allege whether he is still currently assigned to any work duty in connection with his incarceration at his new correctional facility. Horn mainly objected to being transferred and missing some of personal items. Horn alleged no facts of any retaliation with regard to current employment, nor requested relief that involved employment or conditions of employment. Horn did not request a return to his original work assignment or for any type of back or front pay.[6] This complaint was not based on a personnel action as required by General Statutes § 4-61dd.

Reading the pleadings liberally and looking at the facts in the most positive light, there is simply no jurisdiction for this tribunal to hear this case. Complainant alleged facts and argued that there was violation of constitutional due process rather than for

[6] General Statutes 4-61(dd)(3)(A) "[I]f the human rights referee finds such a violation, the referee may award the aggrieved employee reinstatement to the employee's former position, back pay and reestablishment of any employee benefits for which the employee would otherwise have been eligible if such violation had not occurred…"

whistleblower employee retaliation. Complainant cited *Strauder v. West Virginia,* 100 U.S. 303; 25 L. Ed. 664; 1879 U.S. LEXIS 1830; to bolster his claim of due process. "[The] 14th Amendment of the United States Constitution ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws." Horn also referred to a Connecticut case to strengthen his due process claim. [7] This tribunal makes no finding that complainant would succeed on the merits of any other type of action.

The complainant does not allege any necessary facts, nor does he provide any relevant law to support his position that he is entitled to the protection under General Statues § 4-61(dd), "a position that could create administrative and financial mayhem in Connecticut's correctional facilities." *Taylor v. State of Connecticut, DOC* OPH/WBR No 2009-113 (January 29, 2010.) Complainant has failed to establish that he is a protected employee under the statute; he didn't request any relief that is in the power of this tribunal to grant. The tribunal lacks jurisdiction to decide any substantive matter in this case and makes no holding as to the merits of this case. The complainant is not left

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7 Horn named the case as "Maureen Allen v. Peter Murphy, the Defendant and Department of Correction." After a thorough search, there does not appear to be a case of that name, however, there are two cases involving a party named Maureen Murphy and the DOC. One case is *Vega v. Rell, 2011 U.S. Dist. LEXIS 65807* and the other *Crooker v. Allen, 2008 Conn. Super. LEXIS 2245.* Both cases have 42 U.S.C. §1983, as one of the basis for their cause of action for deprivation of due process.

That statute provides, in relevant part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ." 42 U.S.C. §1983.

without redress as he has the opportunity to file a claim in a court of competent jurisdiction.

Based on the foregoing, this complaint is dismissed on the basis of lack of subject matter jurisdiction; therefore the argument that Complainant's action is untimely filed is not addressed. The motion to dismiss is herewith GRANTED and the complaint is DISMISSED.

It is so ordered this 27th day of March 2012.

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Michele C. Mount,
Presiding Human Rights Referee

Vernon Horn #260554 – certified no. 7008 2810 0002 3670 2475
Leo Areone, Commissioner – certified no. 7008 2810 0002 3670 2482
Warden Peter Murphy – certified no. 7008 2810 0002 3670 2499
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