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State of Connecticut
Commission on Human Rights and Opportunities
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MEMORANDUM

To: All Counsel

From: Kimberly D. Morris, Secretary II, OPH



Re: OPH/WBR No. 2019-419 Andrea Lombard v. State of CT, DPH

Date: December 10, 2019

Enclosed is the Presiding Human Rights Referee's Ruling on Respondent's Motion to Dismiss.

cc.

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State of Connecticut
Commission on Human Rights and Opportunities
Office of Public Hearings

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DEC 10, 2019

Andrea Lombard,
Complainant

OPH/WBR 2019-419

v.

State of Connecticut Department of Public Health,
Respondent

December 10, 2019

Ruling and Order on Respondent's Motion to Dismiss

Currently pending before the tribunal is a motion to dismiss, filed on October 15, 2019, by the respondent, Department of Public Health, pursuant to the Regulations of Connecticut State Agencies § 4-61dd-15 (c) (1).¹ At the initial conference held in the matter on October 30, 2019, counsel for the complainant advised the tribunal and all parties that the complainant expressly waives and forfeits her right to file a response in opposition to the respondent's motion. Accordingly, the respondent's motion to dismiss is deemed unopposed. For the following reasons, the motion to dismiss is granted.

Preliminary Statement

On August 15, 2019, the complainant, Andrea Lombard, of 37 Meakin Drive, Windsor, Connecticut, who was then pro se, filed a complaint (complaint) with the Chief Human Rights Referee pursuant to General Statutes § 4-61dd, commonly known as the Connecticut Whistleblower Statute, alleging that her employer, the respondent herein, retaliated against her for reporting unethical practices, violation of laws, and abuse of authority to Attorney Mark at the Ethics Commission. The complainant alleges that she was retaliated against by the respondent for her disclosures when the respondent placed her on administrative leave and terminated her. The complainant further alleges in her whistleblower retaliation complaint that she filed three grievances regarding these personnel actions. Copies of the grievances are attached to the respondent's memorandum in support of its motion to dismiss as Exhibit A.

Discussion and Conclusion

The respondent moves to dismiss the complaint on the ground that the complainant's claim does not fall within the whistleblower statute's limited waiver of sovereign immunity, and therefore the tribunal lacks subject matter jurisdiction in the matter. In support of its motion to dismiss, the respondent relies on General Statutes § 4-61dd (e) (3) (A), which states in pertinent part:

As an alternative to the provisions of subdivision (2) of this subsection [i.e., a hearing before a Human Rights Referee at the Office of Public Hearings] ... A state or quasi-public agency

¹ Section 4-61dd-15 (c) of the Regulations 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: (1) Fails to establish subject matter jurisdiction or personal jurisdiction...."

employee who alleges that a personnel action has been threatened or taken may file an appeal not later than ninety days after learning of the specific incident giving rise to such claim with the Employees' Review Board under section 5-202, or, in the case of a state or quasi-public agency employee covered by a collective bargaining contract, **in accordance with the procedure provided by such contract ...** (emphasis added).

The statute therefore offers the complainant a clear choice of either filing a grievance or bringing the instant case, but not both. "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." General Statutes § 1-2z. Here, the statute is clear.

In *Matthews v. Commissioner John Danaher, et al*, 2008 WL 916969, *2 (OPH/WBR No. 2007-062 ((February 20, 2008) (Ruling on motion to dismiss), Presiding Human Rights Referee Jon P. Fitzgerald concluded, "[t]he statute is clear that an employee has an election of mutually exclusive alternative forums in which to challenge the consequences of a specific incident, regardless of the myriad of legal claims that may arise from the incident ... In the case of the complainant, a state employee who is covered by a collective bargaining agreement, his alternatives are filing a complaint with the human rights referee or filing a grievance in accordance with the procedure provided in his collective bargaining agreement..... Pursuant to the clear statutory language, the complainant cannot simultaneously pursue claims arising from this specific incident by both a grievance through his collective bargaining agreement and also a whistleblower retaliation complaint with the chief human rights referee." (Emphasis added.) See also, *Jones v. State of Connecticut Judicial Branch, et al.*, 2006 WL 4753477, *1 (OPH/WBR No. 2006-032 (November 9, 2006) (Ruling on motion to dismiss and motion to stay) (the language of the statute unquestionably establishes that the prior avenues of redress remain as mutually exclusive alternatives); *Teal v. Department of Public Health*, 2009 WL 910177, *4 (OPH/WBR No. 2008-097) (March 5, 2009 (Ruling on motion to dismiss) (same); *Torres v. Department of Environmental Protection*, 2009 WL 5207459, *2 (OPH/WBR No 008-87 (April 14, 2009) (Ruling on motion to dismiss) (same); *Wilson v. Judicial Department*, 2009 WL 3699105, *2 (OPH No. 2008-098) (October 16, 2009 (Ruling on motion to amend) (same).

By her own admission in her complaint, the complainant chose to address her retaliation claims through the grievance process. The respondent argues, and the complainant does not dispute, that pursuant to a collective bargaining agreement between the respondent and the complainant, the complainant filed three grievances, filed respectively on or about May 16, 2019, August 6, 2019, and August 14, 2019 (R's Exhibit A) in which the complainant seeks redress for the same claims raised in the present complaint. The statute offered the complainant mutually exclusive alternatives with respect to her claims. *Matthews v. Danaher, et al.*, supra. The complainant elected to resolve her dispute via union grievances, thus any whistleblower claims on this basis cannot be considered by this tribunal as they fall outside the purview of the statute and therefore deprive the Office of Public Hearings of subject matter jurisdiction over this claim.

For the reasons given, this tribunal lacks jurisdiction over the complaint and the matter is hereby dismissed.

It is so ordered this 10th day of December 2019.



Hon. Elissa T. Wright
Presiding Human Rights Referee

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