STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

DECLARATORY RULING ON THE PETITION OF PRAXAIR, INC.

I. INTRODUCTION.

On August 12, 2004, the Commission on Human Rights and Opportunities (CHRO) received a properly filed petition for declaratory ruling from Praxair, Inc. (Praxair). The petition is an outgrowth of a complainant of discrimination filed against Praxair by Josephine Miller (Miller), CHRO No. 0320372. CONN. GEN. STAT. § 4-176 and Section 46a-54-122a of the REGULATIONS OF CONNECTICUT STATE AGENCIES authorize the filing of the petition. The CHRO received a memorandum from Miller opposing the petition on September 1, 2004.

At its regular meeting held on September 9, 2004, the CHRO's commissioners voted to issue a declaratory ruling. The parties were apprised of the agency's action in a letter dated September 10, 2004. By letter of September 14, 2004, the CHRO asked the parties to alert the agency by September 24, 2004, if there was an objection to suspending the investigation of Miller's complaint until the petition had been decided. By letter dated September 23, 2004, Miller objected to suspending the investigation. Nevertheless, the CHRO advised the parties by letter of October 10, 2004 that it would suspend processing Miller's complaint. The letter also informed the parties that the CHRO's current schedule was to issue a declaratory ruling on the petition at its regular meeting of December 9, 2004.

On October 8, 2004, the CHRO received a reply to Miller's memorandum opposing the petition for declaratory ruling from Praxair. Thereafter, Miller filed a

supplemental reply to Praxair's submission. By letter dated November 16, 2004, the CHRO advised Praxair and Miller that it was placing the matter on the agenda for discussion and possible action at the regular meeting of its Commissioners on December 9, 2004 and invited them to attend. Praxair attended the meeting, and was given until December 17, 2004 to file a final submission regarding its request.

II. QUESTION TO BE DECIDED.

Praxair seeks a declaratory ruling on the following question:

> Whether the Connecticut Commission on Human Rights and Opportunities ("commission") should be required to dismiss Case No. 0320372 and issue a right to sue [sic] letter to prevent disclosure of legally protected privileged and confidential communications and information that would have to be disclosed if the case were allowed to proceed in the commission.

See petition at 1.

III. FACTS PRESENTED.

Relatively few factual assertions can be gleaned from the petition. According to Praxair, Miller was formerly an in-house counsel for Praxair. Her CHRO complaint alleges "that she was discriminated against because of her race and for having allegedly opposed discriminatory treatment of other employees in the course of her employment as labor and employment counsel for the corporation." See petition at 4. Essentially, Miller claims that "in the course of providing legal advice...to the corporation she became aware of and opposed instances of what she believed to be discriminatory treatment of company employees. She further claims that because of the alleged instances of unfair, unwarranted, and/or unlawful actions by the company...she could no longer do her job and therefore resigned....The type of claims asserted in this attorney's case

against her former client rely directly on information she obtained in her role as counsel to the corporation, including alleged written and oral exchanges pertaining to internal personnel investigations and decisions." Id. at 4-5. Thus, Praxair claims that "[t]he present case involves significant issues of client confidences and the ethical duties of former in-house counsel." Id. at 3.

IV. PARTIES.

The parties to this declaratory proceeding are:

Praxair, Inc.
39 Old Ridgebury Road
Danbury, CT 06810

and

Josephine Miller
130 Deer Hill Ave.
Unit 13
Danbury, CT 06810.

V. THE CHRO HAS NO AUTHORITY TO ISSUE A RELEASE OF JURISDICTION UNDER THE FACTS PRESENTED.

Largely absent from the memoranda of Praxair and Miller is a discussion of the issue that is central to the resolution of this petition: whether the CHRO possesses the statutory authority to grant a release of jurisdiction under the circumstances presented. While both Praxair and Miller have devoted many pages of analysis to the question of attorney-client privilege, neither has grappled with the question of the CHRO's statutory authority to release Miller's complaint. Praxair assumes that because the CHRO is allegedly unfit to decide questions of confidentiality or professional conduct; see, e.g., petition at 15; and that these questions are more appropriately heard in a judicial forum, the

CHRO must "dismiss the Complaint." Id. at 17. Miller, on the other hand, argues that she is not prevented from disclosing facts to establish a claim of constructive discharge, and that the CHRO "is compelled to continue its processing of the Complaint filed by the Complainant and to issue a finding...." See opposition memorandum at 1.

As in other matters involving administrative agencies like the CHRO, the issue of statutory authority always is a threshold question. Long has it been the rule that administrative agencies like the CHRO possess only limited jurisdiction. "Administrative agencies are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the validity of the statutes vesting them with power and they cannot confer jurisdiction upon themselves." Castro v. Viera, 207 Conn. 420, 428 (1988). For this reason, "the jurisdiction of an administrative body is not to be presumed and must be established affirmatively...." Stern v. Medical Examining Board, 208 Conn. 492, 501 (1988); Trinkley v. Ella Grasso Regional Center, 220 Conn. 739, 744 (1993).

While the question of jurisdiction technically differs from the question of an agency's authority to act in a given instance, the two concepts are nevertheless related. Tele Tech of Connecticut, Inc. v. DPUC, 270 Conn. 778, 790 (2004); Southern New England Telephone Co. v. DPUC, 261 Conn. 1, 3 n.2 (2002). Thus, just as agencies have only limited jurisdiction, they are creatures of statute and must act strictly within the confines of their authorizing legislation. Figueroa v. C & S Ball Bearing, 237 Conn. 1, 4 (1996). An administrative agency "possesses no inherent power. Its authority is found in a legislative grant, beyond the terms and necessary implications of which it cannot lawfully function." Adam v. Connecticut Medical Board, 137 Conn. 535, 537-38 (1951); Del Toro v. Stamford, 270 Conn. 532, 541 (2004). An agency "cannot modify, abridge or other-

wise change the statutory provisions, under which it acquires authority unless the statutes expressly grant it that power." Waterbury v. CHRO, 160 Conn. 226, 230 (1971).

As framed by Praxair, the question is whether the CHRO should dismiss Miller's complaint and issue her a release of jurisdiction to prevent the disclosure of legally protected privileged and confidential communications and information that would have to be disclosed, if the CHRO were to proceed with an investigation. For this question to be answered in the affirmative, as Praxair urges, the general statutes would have to provide a sufficient legal foundation for the action requested. In other words, the general statutes would have to expressly or by necessary implication allow dismissals, and the issuance of a release, under the circumstances presented in the petition. They do not, however.

Praxair has not pointed to a statute that would allow the CHRO to dismiss Miller's complaint. The relevant provisions of the general statutes do not extend to the CHRO a broadband authority to dismiss complaints, but condition dismissal upon the existence of specific statutory criteria. For example, under CONN. GEN. STAT. § 46a-83(b), the CHRO may dismiss a complaint for failure to state a claim, for being frivolous on its face, because a respondent is exempt from the reach of the law or because there is no reasonable possibility that investigating the complaint will lead to a finding of reasonable cause. Under CONN. GEN. STAT. § 46a-83(c), the CHRO may dismiss a complaint, if the respondent has eliminated the discriminatory practice and has offered the complainant full relief.

The CHRO may also dismiss a complaint under CONN. GEN. STAT. § 46a-83(d) if there is no reasonable cause to believe that a respondent has been or is being com-

mitted, or under CONN. GEN. STAT. § 46a-86(e), if a presiding officer determines that a respondent has not engaged in a discriminatory practice. Missing from this recitation, however, is any indication that the legislature extended to the CHRO the ability to dismiss a complaint, because investigating it may result in the disclosure of confidential information. A dismissal "to prevent disclosure of legally protected privileged and confidential communications and information that would have to be disclosed if the case were allowed to proceed", as Praxair has requested, is simply not numbered among the specific categories of dismissals delineated in the general statutes. For that reason, the CHRO is unable to dismiss Miller's complaint on that basis.

Statutory authority proves similarly elusive to support the issuance of a release of jurisdiction to Miller. As provided in CONN. GEN. STAT. § 46a-101(b), a complainant and respondent may jointly request the CHRO to issue a release within 210 days from the date a complaint is filed. After 210 days, a complainant may request a release on his or her own. Praxair does not allege either that Miller has requested a release herself or that both Praxair and Miller have requested the CHRO to issue a release. If that were the case, issuance of a release would be essentially automatic, as CONN. GEN. STAT. § 46a-101(c) employs the phrase "shall grant a release", and use of the word "shall" should be understood to carry mandatory overtones. Although not absolute, "[d]efinitive words, such as 'must' or 'shall', ordinarily express legislative mandates of a nondirectory nature." Angelsea Productions, Inc. v. CHRO, 236 Conn. 681, 689 (1996).

But, as earlier stated, Miller objects to the issuance of a release. See opposition to petition at 1 (arguing CHRO "is compelled to continue its processing of the Complaint

filed by Complainant and to issue a finding"). The general statutes make it apparent that there are no provisions allowing the CHRO to issue a release at the request of a respondent. Put another way, the general statutes do not allow the CHRO to force an unwanted release of jurisdiction on an unwilling complainant in lieu of conducting an investigation pursuant to CONN. GEN. STAT. § 46a-83(c). The CHRO may not operate outside its statutory mandates. Waterbury v. CHRO, 160 Conn. 230; Haylett v. CHRO, 1990 Conn. Super. LEXIS 849, No. CV-86-0316872, J.D. of Hartford-New Britain at Hartford (O'Connor, J.)(August 8, 1990).

The statutes delineate only two instances where a release may be issued absent a request from a complainant. If a complaint is dismissed through the merit assessment review process set out in CONN. GEN. STAT. § 46a-83(b), or if a complaint is dismissed for failure to accept full relief under CONN. GEN. STAT. § 46a-83(c), and a complainant does not request reconsideration, the CHRO shall issue a release. See CONN. GEN. STAT. § 46a-83a(a). But Praxair does not allege that these conditions precedent to the issuance of a release have taken place. Indeed, the CHRO takes administrative notice that the complaint file shows that this matter was retained during the merit assessment review process and that no offer of full relief has been made. Consequently, there is no statutory authority for the CHRO to issue a release over the objection of a complainant or at the sole request of a respondent. In the absence of such authority, the CHRO must decline to issue a release.

In its most recent submission, Praxair urges the CHRO to find in Section 46a-54-66a of the REGULATIONS OF CONNECTICUT STATE AGENCIES the missing authority to issue a release to Miller. According to Praxair, since Section 46a-54-66a

"does not address (and therefore cannot apply to) a situation such as that presented by this case" and since Section 46a-54-66a "does not purport to set forth an exhaustive list of the circumstances in which an agency either must or may release jurisdiction, it clearly does not prohibit the [CHRO] from releasing jurisdiction in appropriate circumstances", such as to comply with this state's public policy of protecting attorney-client communication. See supplemental brief at 10. Praxair goes on to suggest that the CHRO should amend its regulations to allow for the issuance of a release, if that authority is not manifest from the clear or implicit language of Section 46a-54-66a. Id. at 12-13.

The difficulty with this assertion is twofold. In the first place, an agency can do no more in the regulatory area than a statute gives it room to do; a regulation in excess of statutory authority is void. Roy v. Centennial Ins. Co., 171 Conn. 463, 473 (1976); Aunt Hack Ridge Estates, Inc. v. Planning Commission, 160 Conn. 109, 115-16 (1970). As previously discussed, the general statutes do not confer on the CHRO the ability to issue a release under the situation described in the petition, and so no regulation may do that either. Second, under ordinary rules of statutory construction, the fact that both Section 46a-54-66a and CONN. GEN. STAT. §§ 46a-83a and 46a-101 expressly enumerate those instances when they CHRO may issue a release generally prevents the CHRO from issuing releases in circumstances not mentioned. "[T]the expression of one thing is the exclusion of another." Gay and Lesbian Law Students Association v. Univ. of CT School of Law, 236 Conn. 453, 476 (1996)(citations omitted). "Where express [instances] are [recited], the legal presumption is that the legislature did not intend to [include] other cases [in] the operation of the statute." Iovieno v.

Commissioner of Correction, 222 Conn. 254, 258 (1992)(citations omitted). Thus, Section 46a-54-66a furnishes no more a basis for issuing Miller a release than any of the statutory provisions discussed above.

Given this conclusion, it is unnecessary for the CHRO to address the parties' concerns with respect to allegedly confidential or privileged information. The CHRO does note, however, that while it has assumed for the purposes of this ruling that its refusal to dismiss Miller's complaint will result in the disclosure of legally protected privileged and confidential communications and information, that is not a foregone result. Without considering or deciding the question, the information may not be as privileged or confidential as Praxair asserts. See opposing memorandum at 1-9. Since Miller has elected to have her complaint remain with the CHRO and the CHRO has jurisdiction over it, she has a constitutionally protected right to avail herself of the CHRO's adjudicatory procedures. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-30 (1982). Conversely, Praxair has no protected interest in having Miller's complaint resolved in a court rather than the CHRO. Angelsea Productions, Inc. v. CHRO, 248 Conn. 392, 407 (1999).

Even if the information ultimately is found to be privileged and confidential, the mere fact that the CHRO has commenced an investigation does not lead to an automatic conclusion that confidential information will spill out of it and swim into the eyes and ears of a wider audience. The strong, anti-disclosure language of CONN. GEN. STAT. § 46a-83(g) prevents that from happening by limiting the flow of information about a complaint to a trickle. Once a case has been closed, the CHRO "may publish the facts in the case and any complaint which has been dismissed and the terms of

conciliation when a complaint has been adjusted." The CHRO's investigative files are not a book open for all to see. Green v. FOIC, 175 Conn. 178 Conn. 700 (1979)(CHRO not required to disclose complaints prior to disposition to third parties). Only Miller or her attorney will have access to the CHRO's investigative file.

Further, this case would not be the first in which the CHRO would possibly be handling confidential information divulged during the investigatory process. Confidential personal or medical information is frequently produced in cases involving physical or mental disabilities. Yet, the CHRO is not disqualified from investigating such cases because they may require the disclosure of private information.

On December 17, 2004, in response to an invitation from the agency's Commissioners, the CHRO received a supplemental brief from Praxair in support of its petition for a declaratory ruling. Throughout the brief runs a strong undercurrent noting the "long-standing law and...public policy in favor of protecting attorney-client communications" from intentional disclosure and cautioning lest the CHRO allow itself to "aid and abet the disclosure of privileged and confidential attorney-client communications". See Supplemental Brief at 1-2.

Although remaining sensitive to the need to protect the confidentiality of attorney-client communications, the CHRO notes that the rule prohibiting disclosure is not hard and fast, as Praxair suggests. Rule 1.6(d) of the Rules of Professional Conduct allows a lawyer such as Miller to "reveal such information to establish a claim...on behalf of the lawyer in a controversy between the lawyer and the client...or to respond to allegations in any proceeding concerning the lawyer's representation of the client." None of the submissions from Praxair, including the most recent one dated December 17, 2004,

discusses why this exception does not control and thereby remove at least a sizeable portion of Miller's discussions with Praxair from the category of attorney-client communication. A resolution of that question, however, is beyond the scope of this ruling.

In addition to the fact that the rules against disclosure of attorney-client communication are not absolute, as Rule 1.6(d) acknowledges, the public policy of this state is not so imbalanced that it tolerates the commission of discriminatory conduct more than the disclosure of arguably privileged communication. As our Supreme Court has written, Connecticut has expressed a "firm commitment...to do away with ...discrimination altogether" in this state's laws against discrimination. Evening Sentinel v. NOW, 168 Conn. 26, 34 (1975). Undoubtedly, as so often is the case when two important interests collide, an equilibrium can be found that gives due respect to each principle without losing sight of the other. For example, in the very limited circumstances presented by this case and upon appropriate request, the CHRO would agree to treat the contents of its investigative file, including the complaint and findings of fact, as falling within the exception enumerated in CONN. GEN. STAT. § 1-210(b)(10) for "communications privileged by the attorney-client relationship" and withhold its contents from public inspection. But to suggest, as Praxair has, that the CHRO is required to fold up its investigatory tent without exploring available alternatives to the quandary posed in the petition is a suggestion that the CHRO must respectfully decline to entertain or adopt.

VI. CONCLUSION.

Lacking statutory authority, the CHRO may not dismiss Miller's complaint and

issue her a release of jurisdiction in the circumstances presented.

ADOPTED BY A MAJORITY VOTE OF THE COMMISSIONERS PRESENT AND VOTING AT A COMMISSION MEETING HELD ON JANUARY 13, 2005 IN HARTFORD, CONNECTICUT.

Attest:_____
Amalia Vazquez Bzdyra, Chairperson
Or duly authorized commissioner

Date:_____