STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Christopher Gorski, **Complainant**	**:**	**OPH/WBR No. 2007-061**
v.	**:**	
Department of Environmental Protection, et al., **Respondents**	**:**	**March 13, 2009**

DECISION
Re: Request for Reconsideration

Preliminary Statement

On February 17, 2009, the complainant filed a request for reconsideration of the final decision (reconsideration request) issued on January 23, 2009.[1] The complainant argues that the final decision should be reversed because this tribunal committed errors of fact, good cause has been shown, and new evidence exists as bases for his reconsideration request. The respondents filed an objection to the complainant's reconsideration request (objection to request) on February 20, 2009. On February 24, 2009, the complainant also filed an objection to the respondents' objection to request (complainant's objection) and filed a motion to amend his reconsideration request (motion to amend). In the complainant's motion to amend, he posited that he was prejudiced by the ineffective assistance of his counsel.[2] The respondents did not file a response to the complainant's motion to amend.

[1] The complainant filed a notice on February 3, 2009 informing the tribunal that he had received the final decision on February 3, 2009 due to a U.S. Postal Service delay and was planning to file a reconsideration request on or before February 18, 2009. The respondent did not object to the untimely filing of his reconsideration request. This tribunal accepted the complainant's reconsideration request as timely filed.

[2]The complainant filed a pro se appearance on February 3, 2009. The complainant's attorney, Kevin M. Smith, of the Law Offices of Norman A. Pattis withdrew his appearance on February 5, 2009.

The complainant's reconsideration request and the motion to amend are hereby granted. The granting of the reconsideration request and the motion to amend do not constitute a reversal or modification of the final decision. The granting of the motion to amend and the reconsideration request merely allows this tribunal to reconsider the final decision. Hence, after reconsideration and a complete review of the record in this case, the final decision is hereby affirmed for the following reasons:

Discussion

In the final decision, this tribunal dismissed the complaint because the complainant had not proven that the respondents retaliated against him in violation of General Statutes § 4-61dd (b) for his disclosure of information (whistleblowing).

General Statutes § 4-181a (a) (1) states a party may file a petition for reconsideration of a final decision on the ground that:

(A) An error of fact or law should be corrected;

(B) new evidence has been discovered which materially affects the merits of the case and which for good reasons, was not presented in the agency proceeding; or

(C) other good cause for reconsideration has been shown.

The complainant raises four arguments in support of his reconsideration request. First, the complainant argues that the findings of fact are "flawed" because the pertinent law was not included in the findings of fact and the respondents' witnesses contradicted themselves, specifically Mr. Fish whose testimony should not be believed. He also argues that this tribunal committed errors of fact because it does not have the

specialized knowledge of the subject matter pursuant to General Statutes § 4-178 (6) and (8).

Second, the complainant argues that the tribunal should not have relied exclusively on the evidence at trial but should have taken judicial notice of various documents that would have supported his case. He argues that the various publications he submitted with his reconsideration request are "judicially cognizable facts" pursuant to § 4-178 (6) and (8). Third, the complainant continues to argue, using existing and additional evidence for support, that the respondents wronged him. Lastly, the complainant argues that he was prejudiced by the ineffective assistance of his counsel.

In regard to the complainant's first basis, he argues that the findings of fact (FF) numbered FF 3, FF 4, FF 6, FF 7, FF 9, FF 10, FF 12, FF 13, FF 14, FF 15, FF 17, FF 18 and FF 20 are misleading and/or false. For example, he states that in regards to FF 3 his job duties were minimized because this tribunal did not consider the job description for his position under Connecticut regulatory law. He argues that his interpretation of his job responsibilities was consistent with the job description published by the department of administrative services and with the "Enterprise Systems Management Architecture" published by the department of information technologies. The complainant attached both of these documents to his reconsideration request as new evidence. He argues that because these documents are published regulations and written policies they are judicially cognizable and should be examined in order to fulfill the tribunal's duty to have a thorough investigation of the complaint and to determine the facts prior to a final decision. However, it is not the role of this tribunal to investigate the complaint allegations. As provided for in General Statutes § 4-61dd (b) (3) (A), the

role of the human rights referee is to conduct a hearing, issue a decision based on the evidence presented at the hearing and, if liability is found, award damages. In order to determine the findings of fact, the tribunal makes credibility determinations based on the evidence presented at the public hearing. These above-mentioned documents were not introduced at the public hearing and the complainant did not provide a good reason for not introducing them during the public hearing.

Additionally, the complainant is mistaken as to his understanding of the provisions of §§ 4-178 (6) and (8) by arguing that this tribunal does not have jurisdiction to hear complaints outside of its expertise. This tribunal has jurisdiction of whistleblower retaliation cases involving state agencies under § 4-61dd regardless of the specific respondent state agency's function. Actually, §§ 4-178 (6) and (8) allow a tribunal to take judicial notice of technical or scientific facts within the tribunal's knowledge and it may use its own experience, technical competence and specialized knowledge to evaluate the evidence. This tribunal did not use any other information outside the evidence submitted at the public hearing to evaluate the evidence in this matter. It was the responsibility of the complainant to provide this tribunal with all relevant evidence in order for this tribunal to have the requisite knowledge in evaluating the evidence. The complainant has not shown that this tribunal committed errors of fact.

In addressing the complainant's second basis, "[c]ourts may take judicial notice of matters which come to the knowledge of men generally in the course of the ordinary experience of life, and are therefore in the mind of the trier, or they may be matters which are generally accepted by mankind as true and are capable of ready and unquestionable demonstration . . . ." (Internal quotation marks omitted; citations

omitted.) *Town of West Hartford v. Freedom of Information Commission*, 218 Conn. 256, 264 (1991). "The trial court must give the parties an opportunity to be heard prior to taking such notice." *State v. Zayas*, 195 Conn. 611, 615 (1985). The evidence that the complainant argues the tribunal should take notice of was not presented at the public hearing in order to give the respondents an opportunity to be heard. The complainant has introduced evidence after the record has closed and he has not provided a good reason for doing so.

As his third basis, the complainant continues to argue his case-in-chief by using existing and new evidence for support that the respondents treated him unfairly. Specifically, he argues that the tribunal was wrong in crediting the testimony about the mistakes he made with the printer installation of approximately twenty-five printers. He attempts to further respond to the evidence presented at the public hearing regarding the printer installation with new evidence (State of Connecticut Property Control Manual). In addition, he argues the respondents deprived him of due process because they did not comply with the progressive discipline policy as stated in the Department of Environmental Protection Handbook for Supervisors published by the DEP human resources, which he submitted with his request as new evidence.

Also, the complainant expounds on the existing evidence to support his contention that the respondents' evidence supporting their proffered legitimate business reason was not credible and that their reason should not be believed. He has provided additional evidence in his reconsideration request to rebut the respondents' evidence and try to convince this tribunal to give more weight to his evidence. For example, he

states that he was not told to not deploy air cards without permission, contrary to respondents' position that he was.

The complainant also provided additional evidence regarding FF 17 and FF 21. FF 17 states that he spent 50% of his work hours on the internet for non-work related issues. The complainant argues that this is incorrect because when he testified about his time using the internet for non-work related searches, he meant that of the time he used the internet, not his entire work day, he spent 50% of his time on the internet for non-work related issues. Although he testified to this on direct examination, his testimony on cross-examination referred to "50% of the time [he] was on the internet." Tr. 186. The complainant did not provide clarification on re-direct examination by his attorney, which would have been the time to do so. Also, FF 21 states that Ron Tapanes was another employee terminated for high internet usage of non-work related websites. The complainant argues that Ron Tapanes was a contractual employee, but this was never substantiated and the complainant never rebutted Tapanes' employment status by examination at the public hearing or by filing a reply brief on the issue.

The complainant tries to explain his actions and provide more evidence in an attempt, after the public hearing adjourned and record closed to rebut that which was not rebutted at trial. For example, he argues that this tribunal should not have made findings of his job capabilities based on only one employee's (Kim Czapla) version of his job performance. However, although the complainant named employees that could attest to his job performance, he never called them as witnesses. More importantly, the complainant did not conduct any cross-examination of Kim Czapla, who complained about the complainant's job performance. Most if not all of complainant's testimony was

not substantiated. He now attempts to prove his case with additional evidence. The complainant has not provided a good reason why this new evidence was not presented at the public hearing or prior to the issuance of the final decision.

The last basis for his request is that his attorney was ineffective. In particular, he argues his counsel was unprepared at the pre-trial conference, provided a post hearing brief without specific references or proposed findings of fact and failed to reply to the respondents' post hearing brief. However, there is no Sixth Amendment right to effective counsel in civil cases. See *Unites States v. Coven*, 662 F.2d 162, 176 (2d Cir. 1981). The complainant's complaints about his attorney's representation do not provide for a basis for reversing the final decision. A party is bound by the acts of his attorney. See *Jensen v. AT&T Corporation*, United States District Court, Docket No. 3:05 CV1295 (D.Conn, October 23, 2007) (2007 WL 3124721, 3).

Conclusion

The complainant has not shown an error of fact or law should be corrected, has not provided a good reason why his new evidence was not presented at the public hearing, and has not shown other good cause to reverse or modify the final decision. Therefore, the final decision is affirmed.

It is so ORDERED.

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Donna Maria Wilkerson Brillant
Presiding Human Rights Referee

c. Assistant Attorney General Antoria Howard
Mr. Christopher Gorski