STATE OF CONNECTICUT

OFFICE OF PUBLIC HEARINGS

Jennifer Lynn Jones, Complainant	:	No. OPH/WBR-2006-032
v.	:	
State of Connecticut, Judicial Branch, et al., Respondents	:	November 9, 2006

RULING ON MOTION TO DISMISS
AND MOTION TO STAY

On August 30, 2006, the complainant, a state agency employee, filed a whistleblower retaliation complaint (complaint) with the chief human rights referee at the Office of Public Hearings pursuant to General Statutes § 4-61dd (b) (3) (A). On September 7, 2006, the respondents filed a motion to dismiss this action, claiming that the complainant previously filed the same claim in the form of a grievance pursuant to a collective bargaining agreement, and that she cannot now raise the same claim in this forum.

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, 193 (1996); *Upson v. State*, 190 Conn. 622, 624 (1983). The motion admits all facts well-pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts. *Malasky v. Metal Products Corp*., 44 Conn. App. 446, 451-52, cert. denied, 241 Conn. 906 (1997). In evaluating the motion, the complainant's allegations and evidence must be accepted as true and interpreted in a light most favorable to the complainant; every reasonable inference is to be drawn in her favor. *New England Savings Bank v. Bedford Realty Corp*., 246 Conn. 594, 608 (1998). After reviewing the

motion and subsequent responses, along with the complaint and other material comprising the extant record, I grant the motion for the reasons set forth below.

The complainant alleges that she was harassed and treated unfairly in retaliation for her disclosure of information ostensibly governed by § 4-61dd (a), and she seeks the relief afforded by the statute. She admits, however, that she brought her claim in two different venues, beginning with the grievance pursuant to her union collective bargaining agreement. The respondents claim, therefore, that the present matter must be dismissed, predicating their argument upon General Statutes § 4-61dd (b) (4), which states:

> As an alternative to the provisions of subdivisions (2) and (3) of this subsection [i.e., a hearing before a human rights referee at the office of public hearings] . . . a state or quasi-public agency employee who alleges that a personnel action has been threatened or taken may file an appeal not later than thirty 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.)

By its use of the phrase "as an alternative," § 4-61dd (b) (4) offers a choice of mutually exclusive remedies. On August 6, 2006, the complainant filed her grievance against the respondents, as contemplated by § 4-61dd (b) (4); that matter is currently pending before an arbitrator at Step 3 of the grievance procedure.[1] (See complaint ¶12.) More than three weeks later, she filed her complaint with the chief referee pursuant to § 4-61dd (b) (3). On the record before me, it is undisputed that the complainant raises the same claims in each proceeding. The respondents argue simply that having first chosen to pursue her

[1] The Step 3 hearing was previously scheduled for October 26, 2006 but was recently continued—likely to some time after Thanksgiving. See emails from the complainant to Vicki Marino and from Marino to the complainant (both dated October 25, 2006) attached to the respondents' October 30, 2006 objection to the complainant's motion to stay this proceeding.

remedy through the grievance process, the complainant is foreclosed from proceeding before a human rights referee.

In her objection to the motion to dismiss, the complainant notes that "[p]ursuant to the terms of the collective bargaining agreement and relevant state law it is necessary for a state employee who is a party thereto to submit to arbitration in the form of the grievance process prior to instituting suit in the Superior Court." The complainant has not identified the applicable law to which she refers, nor has she provided a copy of the collective bargaining agreement, even though in my October 20, 2006 memorandum I directed her to file a copy of the agreement and her Step 3 grievance by October 24, 2006. (As of this date, the complainant still has not complied with my directive.) But even if the complainant were required to exhaust contractual remedies before proceeding in state court, she has cited no legal support for the proposition that she must exhaust contractual remedies before proceeding in this forum. Moreover, although the complainant posits that the contractual remedies differ from the statutory remedies, she has failed to identify the contractual remedies (and, as noted above, failed to provide a copy of the agreement) and has proffered no legal authority that a difference in remedies, if such difference exists, allows her to circumvent the statutory requirement to select a single forum for her claim.

The complainant offers no interpretation of § 4-61dd (b) (4) that contravenes that of the respondents. Indeed, I find that subdivision to be clear and unambiguous both on its face and in the context of the entire statute. See General Statutes § 1-2z, which states, "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."

Prior to the 2002 revisions to § 4-61dd, a state or quasi-public agency employee could seek relief from the employee review board or, if the employee were covered by a collective bargaining agreement, in accordance with procedures set forth in that agreement. As of June 3, 2002, the effective date of Public Acts 2002, No. 02-91, a complainant could avail herself of the existing processes or could also file a complaint with the chief referee. The revised statute simply offers a new option; its language unquestionably establishes that the prior avenues of redress remain as mutually exclusive alternatives.

Even if the term "alternative" were, in some way, unclear or ambiguous, extratextual evidence would confirm the respondents' reading of the statutory language. According to General Statutes § 1-1, "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language . . . ." Common usage can be found in the dictionary; see *Coppola v. Coppola*, 243 Conn. 657, 662-63 (1998); and, indeed, the Merriam-Webster Online Dictionary [2] defines the noun "alternative" as "a proposition or situation offering a choice between two or more things only one of which may be chosen"; see also The American Heritage Dictionary of the English Language (4th ed.) ("[t]he choice between two mutually exclusive possibilities").

Moreover, the legislative history of Public Act 02-91 also supports this reading. Responding to questions by Representative Lawrence Cafero, Representative James O'Rourke clarified that if a complainant chose one of the statutory routes, she would automatically be precluded from using any of the others. 45 H.R. Proc., Pt. 9, 2002 Sess., pp. 2882-2885.

In light of the foregoing, I hereby grant the respondents' motion to dismiss.

[2] The Merriam-Webster Online Dictionary is based on Merriam-Webster's Collegiate Dictionary (10th ed.).

The complainant also has moved to stay this proceeding pending resolution of her Step 3 grievance arbitration. Because I have granted the motion to dismiss, I need not address the motion to stay.

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David S. Knishkowy
Human Rights Referee

c: J. Heyel
M. Libben
J. Jones