

DOCKET NO. HHB-CV-16-5017522-S : SUPERIOR COURT
: :
JOHN VIVO III : JUDICIAL DISTRICT
: OF NEW BRITAIN
VS. : :
: :
OWEN P. EAGAN ET AL. : OCTOBER 18, 2016

MEMORANDUM OF DECISION RE: MOTIONS TO DISMISS (#107 AND #111)

This is an administrative appeal from a decision of the Freedom of Information Commission (commission). The plaintiff, John Vivo III, is an inmate at MacDougall-Walker Correctional Institution who had requested certain documents from the Department of Correction (department). He complained to the commission that the department had improperly redacted information from certain documents that it disclosed and that it had failed to produce other documents. The commission held, in part, that the department had properly redacted documents in the interest of the security of the correctional institution under General Statutes § 1-210 (b) (18), which authorizes the withholding of records if the commissioner of correction has reasonable grounds to believe that their disclosure would constitute a safety risk.

The plaintiff subsequently filed this appeal, naming as defendants the commission's chairman, Owen P. Eagan, the commissioner of correction, Scott Semple, and the attorney

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general, George Jepsen. Eagan has now moved to dismiss on the ground of untimely service (#107), and Semple and Jepsen have moved to dismiss on grounds that the appeal was not timely filed or properly served on the commission (#111).

The commission represents that it mailed notice of its decision to the plaintiff on February 29, 2016. The plaintiff asserts that it was “issued” to him by his correctional counselor on March 3, 2016. Pursuant to General Statutes § 4-183 (c) (1), the plaintiff was required to file and serve his administrative appeal “[w]ithin forty-five after mailing of the final decision . . . or, if there is no mailing, withing forty-five days after personal delivery of the final decision” The forty-fifth day after February 29, 2016, was Thursday, April 14, 2016, and the forty-fifth day after March 3, 2016, was Sunday, April 17, 2016, which would have been extended to the next business day, Monday, April 18, 2016.

The commission did not provide an affidavit attesting to the date of mailing, but merely submitted a copy of a notice dated February 29, 2016, to which was attached a copy of the decision, dated February 24, 2016. Nor did it provide other proof of mailing, such as copy of a certified mail receipt. The plaintiff’s administrative appeal alleges that the decision was dated February 24, 2016, but is silent on the date of mailing. In the absence of an affidavit or other evidence establishing the date of mailing, the court will analyze the timeliness issue

based on both the date on the commission's notice of decision and on the date when the plaintiff admits he received the decision. See *Conboy v. State*, 292 Conn. 642, 650-51, 974 A.2d 669 (2009) (discussing procedures for deciding motions to dismiss, depending on the state of the record). Cf. *Connelly v. Commissioner of Correction*, 149 Conn. App. 808, 814 and 815 n.6, 89 A.3d 468 (2014) (rejecting claim that date of receipt, rather than date of mailing, should start the forty-five day limitation period, where record contained both the notice of the commission's decision and a certified mail receipt showing that it was delivered the day after the date of the notice).

Further facts relating to the issue of timeliness are shown in the court's record. On April 7, 2016, the plaintiff filed a request for a waiver of fees for filing and serving his appeal in the Hartford judicial district. His request was granted by a judge on April 13, 2016. On May 19, 2016, the plaintiff filed this administrative appeal and a return of service in the Hartford judicial district. The return of service indicated that the marshal had served all three defendants – Eagan, Semple, and Jepsen – by leaving a copy of the appeal at the office of the attorney general on May 13, 2016. The appeal was transferred to the New Britain judicial district on June 8, 2016.

On June 27, 2016, Eagan moved to dismiss the appeal on the ground that the plaintiff

had not served him at the commission's office, as required by General Statutes § 1-206 (d), but had served him through the office of the attorney general. Eagan admitted, however, that a copy of the appeal was received by the commission by regular mail on April 7, 2016.

On July 7, 2016, Semple and Jepsen moved to dismiss the appeal on the grounds that it was not filed within forty-five days of the mailing of the commission's decision and because Eagan was not properly served.

Eagan argues that the courtesy copy of the appeal received by his office on April 7, 2016, within the original appeal period, was ineffective as service because it was sent by regular mail, not certified or registered mail as required by § 4-183 (c) (1). The plaintiff argues that service by regular mail should be sufficient under *Kindl v. Department of Social Services*, 69 Conn. App. 563, 795 A.2d 622 (2002), because it is undisputed that the commission received actual notice of the appeal within the forty-five day time period and no prejudice can be shown. Whether service of an administrative appeal by regular mail is sufficient under *Kindl* in the absence of a showing of prejudice is a difficult question that does not appear to have been directly addressed by our appellate courts. See *Connelly v. Commissioner of Correction*, 149 Conn. App. 808, 812 n.4, 89 A.3d 468 (2014) (declining to decide issue of improper service by regular mail because other grounds for dismissal existed).

This court, like the Appellate Court in *Connelly*, does not address the question of proper service because the appeal was not timely filed and the court therefore lacks jurisdiction regardless of the efficacy of service by regular mail.

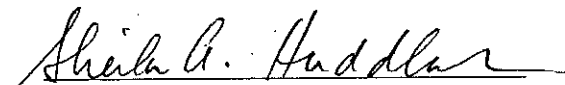
The plaintiff argues that his appeal was timely filed because he filed it within forty-five days after the granting of his fee waiver application. The plaintiff misconstrues General Statutes § 4-183 (m), which provides in relevant part that “The filing of the application for the [fee] waiver shall toll the time limits for the filing of an appeal until such time as a judgment on such application is rendered.” Contrary to the plaintiff’s belief, this tolling provision does not restart the forty-five day appeal period, but merely suspends it for the period of time while the application for fee waiver is pending. When the plaintiff filed his application for fee waiver on April 7, 2016, there were seven days remaining in the appeal period as measured from February 29, 2016. It was granted on April 13, 2016. The time limit was tolled, at most, for six days, giving the plaintiff until Tuesday, April 19, 2016, to file and serve his appeal.

Even if the plaintiff’s appeal period is measured from March 3, 2016, when he admits that he personally received the decision, the forty-five day appeal period would have run on Monday, April 18, 2016. Assuming this date was extended by the tolling under § 4-183 (m), his appeal period would have run on Monday, April 25, 2016. Whether the appeal period

started on February 29, 2016, when the commission represents that it mailed the decision, or on March 3, 2016, when the plaintiff admits that he received it, the forty-five day period expired more than three weeks before May 19, 2016, when the plaintiff finally filed his appeal.

An administrative appeal filed pursuant to § 4-183 must be both filed and served within forty-five days after issuance of the agency's decision. See *Glastonbury Volunteer Ambulance Association, Inc. v. Freedom of Information Commission*, 227 Conn. 848, 854-57, 633 A.2d 305 (1993). Failure either to file or to serve the appeal within the statutory time limit deprives the court of subject matter jurisdiction over the appeal. *Id.* Because this appeal was not filed within forty-five days of the issuance of the agency's decision, as extended by the tolling provision of § 4-183 (m), this court lacks subject matter jurisdiction. It is therefore unnecessary to reach the question as to whether the agency was effectively served within forty-five days. Accordingly, the appeal is dismissed.

BY THE COURT,


Sheila A. Huddleston, Judge