DOCKET NO. HHB-CV-16-6034438-S	:	SUPERIOR COURT
OHAN KARAGOZIAN	:	JUDICIAL DISTRICT OF NEW BRITAIN
VS.	:	
FREEDOM OF INFORMATION COMMISSION ET AL.	:	DECEMBER 2, 2016

MEMORANDUM OF DECISION RE: MOTIONS TO DISMISS (#102 & #104)

The defendant, the Freedom of Information Commission (commission), moved to dismiss this administrative appeal for lack of subject matter jurisdiction because the plaintiff failed to serve the appeal on the commission at its offices. (#102) The defendant, the Board of Examiners for Opticians of the State of Connecticut Department of Public Health (board), joined in that motion. (#104.) The plaintiff's counsel did not dispute the facts alleged in the motion to dismiss but argued that counsel was misled by the Attorney General's office, which agreed to accept service on behalf of the commission, and by the commission itself, in that its notice of decision referred only to General Statutes § 4-183 without also citing General Statutes § 1-206 (d), which requires service of all process on the commission to be made at the commission's office, not the Attorney General's office. The court concludes that the plaintiff's failure to serve the commission at its office deprives the court of jurisdiction, and the appeal is accordingly dismissed.

Undisputed Facts

The undisputed jurisdictional facts are as follows: On July 15, 2016, the commission mailed notice of its final decision to all parties in Docket #FIC 2015-743, Ohan Keragozian v. Board of Examiners for Opticians, State of Connecticut Department of Public Health (board), and State of Connecticut Department of Public Health. A cover letter to the final decision stated "This will serve as notice of the Final Decision of the Freedom of Information Commission in the above matter as provided by § 4-183(c), G.S." The final decision dismissed the plaintiff's complaint, which related to a tape recording of a board meeting the plaintiff had attended.

On August 2, 2016, the plaintiff prepared a citation and appeal. The citation correctly stated the commission's address as 18-20 Trinity Street, Hartford, Connecticut, and the board's address as 410 Capitol Avenue, Hartford, Connecticut. On August 3, 2016, a marshal purportedly served each defendant by leaving two copies of the citation and appeal at the Attorney General's office. He did not serve the defendants at the addresses shown on the citation. On August 9, 2016, the plaintiff filed the appeal and the return of service, which represented that service had been made upon the commission through its "Agent for Service, Kimberly P. Massicotte, Associate Attorney General, 55 Elm Street, Hartford, CT 06141-0120."

On September 2, 2016, an assistant attorney general filed an appearance for the board

and served a copy of her appearance on the commission. On September 8, 2016, the commission appeared through counsel. On September 15, 2016, the commission moved to dismiss, arguing that service was defective because General Statutes § 1-206 (d) requires service of administrative appeals on the commission at its office. In its motion to dismiss, the commission represented that it received a copy of the appearance for the board on September 6, 2016, and that as of the date of the motion, September 15, 2016, the commission still had not been served with a copy of the appeal by the plaintiff.

On October 3, 2016, the plaintiff filed an "affidavit of service" by the marshal who had served the appeal. The marshal attested that he had first checked that both defendants were not on the Attorney General's "no-serve List." He then went to the Attorney General's office to serve both defendants. He asked to talk to "someone in charge of authorizing acceptance of these two defendants." Someone named Sigrid Sacerdote came out of the office and stated that the Attorney General's office would accept for both defendants as agent for service. The marshal then left two true and attested copies of the citation and appeal with the "Agent for Service, Kimberly P. Massicotte, Associate Attorney General." The defendants have not contested any of the facts recited in the marshal's affidavit.

On October 7, 2016, the plaintiff filed a brief in opposition to the motion to dismiss. He represented that the Attorney General has issued a notice to every state marshal in Connecticut regarding service. The notice, which was attached as an exhibit to the plaintiff's

brief, states that the Attorney General is not authorized to accept service on any state employee being sued in his or her individual capacity. The notice then lists "Agencies We Cannot Accept Service For." The Freedom of Information Commission is not on the list. The plaintiff argued that because the commission is not among the listed agencies, it can reasonably be inferred that the Attorney General is authorized to accept service for the commission. The notice contains a caveat at the bottom of the page. It states: "If you leave any papers here for any process we are not authorized by law to accept, service will not be properly effectuated, and the papers will not be forwarded to the correct recipient. Our acceptance of process cannot be deemed a concurrence that service on this office is appropriate." The plaintiff asserts that he relied on the marshal's report that the commission was not on the no-serve list and on the Attorney General's office's acceptance of service in concluding that the service was sufficient.

Analysis

A motion to dismiss properly tests the jurisdiction of the court. See Practice Book § 10-30. There is no inherent or constitutional right to judicial review of administrative actions. *Neyland* v. *Board of Education*, 195 Conn. 174, 183, 487 A.2d 181 (1985). Our Supreme Court has repeatedly held that "appeals to the courts from administrative officers or boards may be taken only when a statute provides authority for judicial intervention." (Internal quotation marks omitted.) Id. The Supreme Court has further held that "[a]

statutory right to appeal may be taken advantage of only by strict compliance with the statutory provisions by which it is created." *Royce* v. *Freedom of Information Commission,* 177 Conn. 584, 587, 418 A.2d 939 (1979). "The appeal provisions of the statute are jurisdictional in nature, and, if not complied with, render the appeal petition subject to dismissal." (Internal quotation marks omitted.) *Hillcroft Partners* v. *Commission on Human Rights & Opportunities*, 205 Conn. 324, 326, 533 A.2d 852 (1987).

Appeals of the commission's decisions are governed by two statutes: General Statutes § 4-183, which is part of the Uniform Administrative Procedure Act; and General Statutes § 1-206, which is part of the Freedom of Information Act. Section 4-183 (c) (1) generally governs administrative appeals. It provides in relevant part that "[w]ithin forty-five days after mailing of the final decision under section 4-180 . . . a person appealing as provided in this section shall serve a copy of the appeal on the agency that rendered the final decision at its office or at the office of Attorney General in Hartford and file the appeal with the clerk of the superior court . . . ." If § 4-183 alone applied, the plaintiff's service would have been proper and timely. But appeals of the commission's decisions are also governed by § 1-206 (d), which specifically applies to the commission. It provides in relevant part: "Any party aggrieved by the decision of said commission may appeal therefrom in accordance with the provisions of section 4-183. . . . Notwithstanding the provisions of subsection (c) of section 4-183 and section 52-64, all process shall be served upon said commission at its office."

The provisions in § 1-206 (d) except the commission from the general rules of General Statutes § 4-183 (c), which, as stated above, provides for service of process on state commissioners by service on the Attorney General's office, and from General Statutes § 52-64, which provides that service of process on the state, including its commissions, may be made by serving the Attorney General's office. Section 1-206 (d) is not ambiguous; its "notwithstanding" provision expressly supercedes the effect of §§ 4-183 and 52-64.[1] Even if it were ambiguous, it would control the service of process on the commission. "[W]hen general and specific statutes conflict they should be harmoniously construed so the more specific statute controls." *McKinley* v. *Musshorn*, 185 Conn. 616, 624, 441 A.2d 600 (1981).

An administrative appeal filed pursuant to § 4-183 must be served on the agency that rendered the decision within forty-five days after issuance of the agency's decision. See *Tolly v. Dept. of Human Resources*, 225 Conn. 13, 27-28, 621 A.2d 719 (1993). "If there is no service at all on the agency within the forty-five day period, the court lacks subject matter jurisdiction over the appeal by virtue of the clear implication of the language in § 4-183, read against the background of the preexisting law." Id., 28. In this case there is no evidence that the commission was ever served at its office. Indeed, there is no evidence that it had any sort

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[1] The reason for requiring that the commission have its own counsel, rather than being represented by the Attorney General's office, is obvious. The Attorney General's office represents state officers and employees who are parties before the commission and whose positions on appeal are frequently adverse to the commission's decisions. The Attorney General cannot represent opposing sides in such appeals.

of notice that the appeal had been filed before September 6, 2016, when it received a copy of the board's appearance. September 6 was more than forty-five days following the commission's issuance of notice of its decision.

The plaintiff protests that he was misled by the Attorney General's office and by the commission itself. He claims that the marshal was misled first by the notice sent by the Attorney General's office and then by the express representation of an employee of the Attorney General's office that service would be accepted. He also argued that the commission also misled him by referring only to § 4-183 in its notice of final decision and not also referring to § 1-206. This is, in essence, an equitable estoppel argument.

"Under our well-established law, any claim of estoppel is predicated on proof of two essential elements: the party against whom estoppel is claimed must do or say something calculated or intended to induce another party to believe that certain facts exist and to act on that belief; and the other party must change its position in reliance on those facts, thereby incurring some injury. . . . It is fundamental that a person who claims an estoppel must show that he has exercised due diligence to know the truth, and that he not only did not know the true state of things but also *lacked any reasonably available means of acquiring knowledge*." (Emphasis added.) *In re Michaela Lee R.*, 253 Conn. 570, 604, 756 A.2d 214 (2000).

The plaintiff cannot argue, and has not argued, that he lacked any reasonably available means of acquiring knowledge. The reasonably available means of knowledge is in the

in an administrative appeal could be waived on equitable grounds where a plaintiff claimed he had been misinformed by a court clerk. The court held that "his late appeal cannot be saved from dismissal under the doctrine of equitable tolling because the forty-five day service requirement established by § 4-183 (c) is jurisdictional in nature, and thus cannot be waived or circumvented for any reason." Id., 718-19. The same principle applies here.

The plaintiff also argued that the board's action in joining in the commission's motion to dismiss is frivolous because the board was properly served. The plaintiff is mistaken. Failure to serve the agency that *rendered* the decision deprives the court of subject matter jurisdiction over the entire appeal, and where there is no appeal, proper service on other defendants is simply a moot point. See *Tolly* v. *Dept. of Human Resources*, supra.

Because the time limit of § 4-183 is jurisdictional, and because the commission was not served within the forty-five days prescribed by § 4-183, the court lacks subject matter jurisdiction over this appeal. Accordingly, the appeal is dismissed.

BY THE COURT,

Sheila A. Huddleston

Sheila A. Huddleston, Judge