CONNECTICUT APPELLATE COURT

AC 42005

JOE MARKLEY, ET AL V. STATE ELECTIONS ENFORCEMENT COMMISSION

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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This case presents the odd circumstance where an administrative agency finds respondents in violation of a law, denies respondents' petition for reconsideration, and then argues that a lack of jurisdiction forecloses—not the agency's use of its enforcement powers—but respondents' appeal to protect their constitutional rights. But General Statutes §§ 4-181a and 4-183 (the "Statutes") protect administrative respondents' appellate rights from "uncertainty caused by an agency's conduct"—from administrative misdirection, malfeasance, or maladroitness—by ensuring a denial of reconsideration from which respondents can appeal. SEEC Resp. at 5 (citing *Zaneski-Nettleton v. Conn. Dep't of Soc. Servs.*, 2018 Conn. Super. LEXIS 191, at *16 (Super. Ct. Jan. 29, 2018). And Plaintiffs Markley and Sampson seek only to take advantage of that right: The State Elections Enforcement Commission ("Commission" and "SEEC") deliberated and denied Plaintiffs' petition, and Plaintiffs timely appealed that denial. By the Statutes' plain language, as well as the demands of equity, the Superior Court should have concluded that Plaintiffs' appeal was timely and that the Commission had violated their First Amendment rights.

A. The SEEC Violated Plaintiffs' Rights While Misleading Them

Responding to a complaint by a political opponent that they had improperly spent campaign funds—that they had spent campaign funds furthering other candidates' campaigns—the Commission investigated Plaintiffs and held a hearing on August 31, 2017. *See* Opening Br. at 2; SEEC Final Decision at 1 (App. A91). At the hearing, Mr. Sampson explained that communications conveying where Plaintiffs stood on issues advanced by the governor directly furthered their campaigns—that such ads provided some of the most

valuable information their constituents could have in determining whether to vote for them.[1] Nevertheless, the Commission held that the communications had in fact furthered the campaigns of the governor's direct opponents, and that Plaintiffs had therefore violated statutory requirements that all campaign expenditures directly further their own campaigns. *See*, *e.g.*, Opening Br. at 3; SEEC Decision at 8 ¶¶ 18-19 (App. A98).

Plaintiffs immediately filed a petition to reconsider, but the Commission kept putting the petition onto later and later agendas. Opening Br. at 3. That is, even though the SEEC later claimed that Plaintiffs' petition was constructively denied on March 11, 2018, the SEEC placed the petition on its agendas for the March 14, March 21, and March 23 meetings. *See* Opening Br. at 7. And it was only at the March 23 meeting that the Commission denied the petition.

The Commission's general counsel placed the petition on the Commission's agenda each time. *See* Opening Br. at 8. One would assume that the Commission's general counsel understood the state's campaign laws and the Commission's procedures and authority, and that the repeated placement of the petition on the Commission's agendas indicated that the Commission continued to have the authority and duty to address the petition. And the Commission agreed, actually considering and denying the petition on March 23. Dismissal Memorandum at 2 (App. A25). Indeed, the Commission mailed "[n]otice of that action . . . to the plaintiffs" five days later. *Id*.

[1] *See, e.g.*, Testimony of Rob Sampson at State Election Enforcement Committee hearing, 12:00-16:35 (August 31, 2017), https://www.youtube.com/watch?v=AK7iYShCQ34 (discussing the communications and their relevance to the voters of Southington in deciding to vote for Mr. Sampson).

Yet the SEEC now argues that the Commission's agendas and its actual decision were a farce, and that the Plaintiffs have lost their right to appeal by relying on them. As discussed below, the plain language of the Statutes demands otherwise. But even if these post-hoc arguments are not just a last-ditch attempt to avoid a compelling constitutional challenge, then equity demands that the Court reject the Commission's arguments. That is, the SEEC's arguments indicate a trap for the unwary, where dangers to respondents' First Amendment rights are concealed by the Commission's ignorance or malfeasance. At best, the Commission's arguments would mean that the state's campaign laws and procedures surrounding them are so convoluted that even the Commission and its counsel cannot follow them. Or it means that the Commission and its counsel deliberately obscured the deadline and misled Plaintiffs. Either way, the Commission led Plaintiffs into a hidden trap, one prohibited by equity. *See* Opening Br. at 8.

The Commission's sole response to Plaintiffs' constitutional arguments casts further doubt on its post-hoc arguments that Plaintiffs' forfeited their right to appeal. The SEEC argues—without any explanation, analysis, or citation to the record, briefing, or law—that "[a]ny discussion of the merits is wholly inappropriate in the context of this appeal." SEEC Resp. at 6. For all the reasons stated in Plaintiffs' Opening Brief, *id*. at 10-22, General Statutes §§ 9-601a(a), 9-601b(a), 9-607(g), 9-616(a), 9-706, as well Regs. Conn. State Agencies §§ 9-706-1 and 9-706-2, are unconstitutional. But the fact that the SEEC cannot muster any substantive defense against a claim of First Amendment harm should further make this Court wary of the SEEC's post-hoc forfeiture argument.

Thankfully, as discussed in Plaintiffs' Opening Brief and below, the Commission made a decision on Plaintiffs' petition, and neither the plain language of the Statutes nor equity demand the unjust result the Commission advocates.

B. Under the Statutory Language and Equity, the Commission's Actual Decision Is the Relevant Trigger

1. The Commission had authority to address the petition for reconsideration

Beyond the cavalier violations of Plaintiffs' First Amendment rights, the issue in this appeal is not whether to toll the appellate period under § 4-183, which is jurisdictional. *See* Opening Br. at 9. Rather, this appeal is about how to correctly apply § 4-183 and § 4-181a—whether the plain language of the Statutes and equity both demand that the final decision triggering the appellate period in Plaintiffs' case run from the Commission's actual, final decision. As noted in Plaintiffs' Opening Brief, the Commission's argument that it lacks jurisdiction to reconsider after a constructive denial is belied by the text of the Statutes, and the Commission's interpretation would lead to unjust and absurd results. *See* Opening Br. at 4-10.[2]

The Commission insists that the plain language of the Statutes must be followed, *see, e.g.*, SEEC Resp. at 5, but there is nothing in the plain language of § 4-181a(a)(1) saying that the SEEC cannot issue an actual denial after a constructive denial. Rather, the plain language of the statute requires that the Commission issue a decision whether to reconsider, and the Commission retains jurisdiction and authority to reconsider its final decision for up to

[2] Although the Commission continues to conflate them, whether the court had jurisdiction to hear the appeal and whether the commission had jurisdiction or authority to reconsider its decision are distinct issues. *See, e.g.*, SEEC Resp. at 1 ("no authority to rule").

40 days after a final decision, whether or not respondents have filed for reconsideration. *See* § 4-181a(a)(2); Opening Br. at 5.[3]

Moreover, contrary to the Commission's arguments, SEEC Resp. at 8, the Statutes' plain language nowhere says that the SEEC cannot consider and deny a petition for reconsideration after a constructive denial. The statute orders the SEEC to make a decision, and it tells the Commission that it should fulfill that duty within 25 days. § 4-181a(a)(1). And the Statutes give respondents like the Plaintiffs a constructive denial they may use for appellate purposes if the SEEC fails to make a timely decision. § 4-181a(a)(1). But the Statutes do not say that the SEEC may not consider a petition for reconsideration even after a constructive denial: Denying such authority would not serve any interests of justice or judicial efficiency. *See* Opening Br. at 6. If an administrative agency realized that its final decision might be in error, even after the constructive deadline had passed, it could reverse its decision, saving all the parties and the courts the time and expenses of continuing

[3] *Butts v. Bysiewicz*, 298 Conn. 665 (Conn. 2010) is not to the contrary. There, the Supreme Court of Connecticut rejected an appeal of the Secretary of State's refusal to place an incumbent judge's name on the ballot. *Id*. at 666. State law required specific methods of delivery for the certificate of party endorsement at issue, and it provided specific penalties for late delivery. *Id*. at 675-77. As discussed above, however, the plain language of the Statutes here does not preclude the Commission from addressing a petition after a constructive denial, and the plain language nowhere penalizes an appeal from such an actual decision. Furthermore, *Butts* was not a case where the plaintiff had detrimentally relied on state action, as here, and the plaintiff had not been diligent—he waited 78 days after the delivery deadline and 34 days after he knew that delivery had not occurred. *Id*. at 671-72. And the plaintiff had other statutory methods to get on the ballot. *Id*. at 672 n.5. Here, however, Plaintiffs timely filed their appeal within 45 days of the SEEC's actual decision. Furthermore, the interests are reversed: the voters there had a right know and investigate the views of those on the ballot, which required orderly filing deadlines. *Id*. at 674-75. Here, however, Plaintiffs were penalized for effectively explaining their views to voters, at the expense of their constitutional rights. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) ("However, securing First Amendment rights is in the public interest.").

litigation. Moreover, even if an administrative agency ultimately affirmed its final decision, such a denial of reconsideration would focus the issues for appeal. Consequently, the interests of justice and judicial efficiency conform to the Statutes' plain language—that nothing prevents the Commission from actually addressing a petition for reconsideration, even after a constructive denial.

2. Triggering from the actual decision best fits the statutory language

If the Commission has authority to do just what it did—review and deny a petition for reconsideration, even after a constructive denial—then running the appellate period from the Commission's actual decision better comports with the Statutes' plain language. The Statutes require that a respondent file an appeal "within forty-five days after the *agency denies* a petition for reconsideration." § 4-183(c) (emphasis added). Legal necessity and administrative indolence sometimes require that we construe no decision whatsoever as a decision, but where a statute hinges on whether an agency made a denial, and an actual denial is available, using that denial as the trigger better fulfills the statute's requirements.

In addition, following the Statutes' plain language would not cause the chaos the SEEC fears. *See* SEEC Resp. at 8 ("If Plaintiffs were correct, moreover, agencies ***always*** could disregard the twenty-five day deadline and rule on a petition for reconsideration at any time of their choosing, thereby defeating the entire purpose of the 2006 amendments." (emphasis in original)). The purpose of the amendments is to provide definitive deadlines so that administrative agencies cannot hinder respondents' appellate rights. *See Zaneski-Nettleton*, 2018 Conn. Super. LEXIS 191, at *16 (noting hardships agencies had caused by delaying decisions for months or years). That purpose is fulfilled whenever respondents choose to appeal from the Commission's actual decision, as Plaintiffs did here. And it is also

fulfilled when respondents rely on a constructive denial rather than await an actual decision. When respondents have the opportunity to rely on either an agency's actual decision or a constructive decision, there is no way for an agency to "defeat[] the entire purpose of the 2006 amendments." SEEC Resp. at 8.[4] And if the Commission fears appeals triggered by the decisions it makes after a constructive denial, then it need only refrain from making those decisions.

Despite the Commission's reliance on the case, *Zaneski-Nettleton* does not sustain the Commission's arguments. The court there never held that an appeal was untimely when measured from an agency's actual decision. In that case, the respondents petitioned for reconsideration on May 3, 2012; a constructive denial occurred on May 28, 2012; the agency granted the petition to reconsider in part on June 5, 2012; the respondent filed for an appellate fee waiver on June 29, 2012 (tolling the statute of limitations until granted); the fee waiver was granted July 20, 2012; and respondent filed her appeal on certain issues the same day. 2018 Conn. Super. LEXIS 191, at *10-12. That earlier appeal was timely but dismissed for failure to prosecute. *Id*. at *11. The appeal at issue in *Zaneski-Nettleton*, filed in 2016 and dealing with different issues, was untimely because it was filed nearly four years after any of the relevant deadlines, including the agency's actual

[4] Thus, the Commission's reliance on both *Studer v. Studer*, 320 Conn. 483, 495 (Conn. 2016) and *Kasica v. Town of Columbia*, 309 Conn. 85, 93 (Conn. 2013) is unavailing. In the former, the Connecticut Supreme Court held that courts should construe statutes so that no part is superfluous, and in the latter that courts should look to the policy the legislature intended when a statute is ambiguous or not plain. As noted above and in Plaintiffs' Opening Brief, *id*. at 5, Plaintiffs' interpretation of the statutes in fact preserves all the Statutes' provisions and serves the legislature's intent of protecting respondents' rights of appeal from improper agency action.

"decision after reconsideration." *Id*. at *14-15.[5] Thus, the *Zaneski-Nettleton* Court was not presented with the issue whether an appeal within 45 days of actual agency action is timely, even if the agency acted after a constructive denial.

The Commission would rely on *Zaneski-Nettleton*'s statement that "agency *inaction* can trigger the time limits for appeals" and that "[a] person seeking to preserve appellate rights must be vigilant with respect to the deadlines that arise from" an agency's failure to fulfill its duties. *Id*. at *16-17 (emphasis in original). But, that observation was not made in the context of a respondent who timely filed an appeal after an agency's actual decision, as here. *See id*. at *17 (noting that respondent failed to file within any "of the time limits prescribed"). And, importantly, the court notes the deadlines at § 4-183 were meant to relieve the "hardships on persons waiting for decisions on important issues." *Id*. at *16.

C. Plaintiffs Did Not Forfeit Their Arguments in Equity

Finally, the SEEC incorrectly argues that Plaintiffs forfeited their arguments in equity by not raising those arguments before the Superior Court. Even if the precedent cited by the Commission were relevant, this argument would nonetheless be factually incorrect. Plaintiffs' objections to the motion to dismiss began with a focus on equitable concerns. *See* Plaintiffs' Memorandum Objecting to Motion to Dismiss at 2 (App. A106). There, Plaintiffs noted the bad faith in the Commission's actions, giving "notice to Plaintiffs delaying a decision" and "publically [sic] taking the position that it would discuss and consider plaintiff's [sic] objections," when "it in fact had no intention of doing so." *Id*. Plaintiffs then argued that it was

[5] Timing from the agency's actual decision on June 5, 2012, the court calculated that a timely appeal would have to have been filed within 45 days of July 16, 2012, if the agency mailed its final decision on reconsideration that day, or within 45 days of September 3, 2012, if the agency failed to mail the decision. *Id*. at *13-14.

unfair to "lull[them] with the promise of good faith proceedings while simultaneously running down the clock for any appeal." *Id*.

In addition, the cases the Commission cites and the arguments it makes both fail to support its positions. First, even if it were true that Plaintiffs had not raised the equity argument in their objections to the dismissal motion, they would nonetheless be able to raise that argument here in support of an issue or claim they raised below, namely, that dismissal would be improper. The case cited by the SEEC, *Doyle Grp. v. Alaskans for Cuddy*, 164 Conn. App. 209 (Conn. App. Ct. 2016), stands only for the proposition that parties may not raise an "issue [or claim] for the first time" on appeal. *Id*. at 227. To the contrary, the Connecticut Supreme Court has explicitly recognized that a party "can raise [a] new argument on appeal in support of [a] properly preserved claim," just not "add new . . . claims as he went along." *Perez-Dickson v. City of Bridgeport*, 304 Conn. 483, 503 (Conn. 2012) (internal quotation marks omitted). Here, even if they had not raised arguments in equity before the Superior Court, the equitable arguments made here would be nothing more than new arguments in support of properly preserved claims.

Furthermore, despite the SEEC's efforts to refashion Plaintiffs' arguments, SEEC Resp. at 12-13, Plaintiffs have not argued that the Court should toll the appellate period at § 4-183. Rather, they have argued that—even if the plain language of the Statutes did not demand that the appellate deadline run from the Commission's actual decision rather than any constructive denial—equity would demand that the triggering denial under § 4-181a(a)(1) be the Commission's actual decision. *See* Opening Br. at 7-10.[6]

[6] For this reason, *Godaire v. Freedom of Information Commission*, 141 Conn. App. 716 (Conn. App. Ct. 2013), does not support the Commission's arguments. Unlike Plaintiffs here,

And *Ethics Commission v. Freedom of Information Commission*, 302 Conn. 1 (Conn. 2011), upon which the Commission relies, *see* SEEC Resp. at 13, does not hold that equitable concerns do not apply to § 4-181a. That case did not address § 4-181a—the statute is not even mentioned in the decision. And, accordingly, the court there certainly did not hold that "the statutory deadlines set forth in § 4-181a(a)(1) ***also*** are jurisdictional in nature." SEEC Resp. at 13 (emphasis in original).

Rather, *Ethics Commission* dealt with the principle that administrative agencies are creatures of statute and must act within the powers granted them by statute. And that is all Plaintiffs want the SEEC to do. The Commission has the authority, indeed the obligation, to respond to petitions for reconsideration, *see* § 4-181a(a)(1) ("*shall* decide whether to reconsider" (emphasis added)), and the Commission did in fact decide. Plaintiffs here are simply asserting their right to rely on the SEEC's decision.[7]

Moreover, even if the Commission had lacked authority to act but nonetheless did, and Plaintiffs relied on that action, equity demands that Plaintiffs' reliance not harm them. It is the elementary nature of equity that, even when statutory law falls short, fairness is served. *See Wells Fargo Bank, N.A. v. Melahn*, 148 Conn. App. 1, 9 (Conn. App. Ct. 2014) (noting equity applies when there is "no adequate remedy at law" (quoting *Lithuanian Brotherhelp*

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the parties in *Godaire* asked that the court equitably toll the appellate period at § 4-183. *Id*. at 718. While § 4-183 implicates this Court's jurisdiction, § 4-181a does not.

[7] For the same reason, the SEEC's reliance on *Kleen Energy Sys., LLC v. Comm'r of Energy & Envtl. Prot.*, 319 Conn. 367 (Conn. 2015), is inapposite. *See* SEEC Resp. at 13. Under the Uniform Administrative Procedure Act, an agency could only issue a declaratory ruling when there was a final decision in a contested case. *Kleen Energy Sys.*, 319 Conn. at 382. The agency lacked authority to make a declaratory ruling because there was no contested case. *Id*. As discussed above, however, the Commission has the authority and duty to respond to petitions for reconsideration.

Soc'y v. Tunila, 80 Conn. 642, 645 (1908))); *Morgera v. Chiappardi*, 74 Conn. App. 442, 458 (Conn. App. Ct. 2003) (noting that equity applies where representations have "prejudice[d] the party relying upon it" and that "[e]quity always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the real relations of parties." (emphasis removed) (internal quotation marks omitted)).

CONCLUSION

As stated in Plaintiffs' Opening Brief, courts must ensure "fairness" in the appeals of administrative actions, and equitable relief is further required here because of the Commission's actions and Plaintiffs' reliance on them. Opening Br. at 8-9 (quoting *Ierardi v. Comm'n on Human Rights & Opportunities*, 15 Conn. App. 569, 576 (Conn. Ap. Ct. 1988) and citing *Godaire v. Dep't of Soc. Servs.*, 174 Conn. App. 385, 401 (Conn. App. Ct. 2017)). For the reasons stated above and in Plaintiffs' Opening Brief, Plaintiffs ask that the Court conclude that their appeal was timely filed. Furthermore, Plaintiffs ask the Court to hold unconstitutional General Statutes §§ 9-601a(a), 9-601b(a), 9-607(g), 9-616(a), 9-706, as well Regs. Conn. State Agencies §§ 9-706-1 and 9-706-2, or remand and direct the Superior Court to hold them unconstitutional.

Dated April 22, 2019

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CERTIFICATION

Pursuant to the Connecticut Practice Book Rules of Appellate Procedure § 67-2, I hereby certify the following:

1) Copies of the foregoing reply brief were sent via first-class mail to counsel of record and to the trial judge who rendered a decision that is the subject matter of the appeal, in compliance with § 62-7, as listed;
2) The reply brief filed with the appellate clerk is a true copy of the reply brief that was submitted electronically pursuant to § 67-2(g);
3) The reply brief does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law;
4) The reply brief complies with all provisions of § 67-2; and
5) The electronically submitted reply brief was transmitted electronically to counsel of record and the trial court, for whom an e-mail address has been provided, as listed below:

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