S.C. 20305

JOE MARKLEY ET AL.	**:**	**SUPREME COURT**
V.	**:**	**STATE OF CONNECTICUT**
STATE ELECTIONS ENFORCEMENT COMMISSION	**:** **:**	**NOVEMBER 20, 2019**

MOTION FOR PERMISSION TO FILE TRANSCRIPT EXCERPT AND FOR THE COURT TO CONSIDER IT IN THE COURT'S RESOLUTION OF THIS APPEAL

The State Elections Enforcement Commission ("the Commission") hereby requests permission to file an excerpt from the transcript of its hearing held on March 23, 2018, and for the Court to consider the excerpt in its resolution of this appeal.[1] The excerpt is relevant to questions that some Justices raised for the first time during oral argument—which questions relate to arguments that Plaintiffs did not raise or brief, and which are contrary to Plaintiffs' own arguments throughout this litigation—about the nature of the Commission's action when it denied Plaintiffs' petition for reconsideration. Counsel for Plaintiffs, Attorney Allen Dickerson, objects to this motion.

I. BRIEF HISTORY OF THE CASE

The Commission issued its final decision on February 14, 2018. Plaintiffs sought reconsideration on that same date, and their petition was denied by operation of law on March 11, 2018. The Commission subsequently voted to deny the petition during a hearing on March 23, 2018. In its written decision memorializing that vote, the Commission specifically stated that the petition was "denied," not that it was granted but that the relief requested therein was denied. Def. Apx. at DA-3.

---

[1] At Plaintiffs' request, the Commission has not submitted the excerpt as an attachment to this motion, and instead makes a proffer about what the transcript will show if the Court permits the Commission to file it.

Plaintiffs filed an administrative appeal from the Commission's final decision on May 7, 2018. The Commission moved to dismiss the appeal on the ground that it was untimely, having been filed more than forty-five days after the petition for reconsideration was denied by operation of law on March 11, 2018. The trial court granted the Commission's motion to dismiss. Plaintiffs appealed the trial court's decision to the Appellate Court, and this Court transferred the appeal to itself pursuant to Practice Book § 65-1.

II. SPECIFIC FACTS RELIED UPON

In their briefs filed in the trial court and on appeal, Plaintiffs repeatedly have conceded—and have in fact affirmatively argued—that the only relevant agency action in this case was a denial of the petition for reconsideration, and that the only relevant appeal period is therefore that set forth in General Statutes § 4-183(c)(2), which by its terms only applies when an agency "***denies*** a petition for reconsideration of the final decision ***pursuant to [§ 4-181a(a)(1)***]." Conn. Gen. Stat. § 4-183(c)(3) (emphasis added); *see, e.g.,* Tr. Ct. Doc. No. 108.00 at 1 (stating that "it is clear that the administrative appeal in this case is based upon § 4-183(c)(2)"); *id.* at 2 (arguing that "it is subsection (c)(2) which controls"); *id.* at 3 (arguing that the appeal was "brought under § 4-183(c)(2)" and that subsection (c)(2) is "the applicable subdivision of the statute" that governs the appeal period); Pl. Appellant Br. at 3, 4 (arguing that the Commission "denied" the petition for reconsideration and that the appeal period is therefore governed by "the plain language of § 4-183(c)(2)"); *id.* at 6, 7 (arguing that § 4-183(c)(2) applies and was triggered by the Commission's "denial" of the petition).

By contrast, Plaintiffs never argued that the Commission granted the petition under § 4-181a(a)(1), that it "decide[d] to reconsider the final decision" under § 4-181a(a)(2), that it "conduct[ed] such additional proceedings as may be necessary to render a decision modifying, affirming or reversing the final decision" after reconsideration under § 4-181a(a)(1) or (2) had taken place, *see* Conn. Gen. Stat. § 4-181a(a)(3), that it issued a "decision made after reconsideration" that "[became] the final decision in the contested case in lieu of the original final decision," Conn. Gen. Stat. § 4-181a(a)(4), or that the appeal period is governed by § 4-183(c)(3) because the Commission issued a "final decision made after reconsideration pursuant to [§ 4-181a(a)(3) and (4)]." Conn. Gen. Stat. § 4-183(c)(3). In fact, Plaintiffs did not even cite § 4-181a(a)(4) or § 4-183(c)(3) in any of their briefs filed in the trial court or on appeal. Moreover, they expressly conceded that, although the Commission ***could*** have decided to reconsider its final decision under § 4-181a(a)(2) after 25 days passed, ***it did not do so***. Pl. Br. at 5 (arguing that "***had*** the Commission voted on March 23, 2018, to reconsider its final decision, it ***would*** have had authority to address reconsideration" under § 4-181a(a)(2)) (emphasis added).

Because the parties have never disputed the nature of the Commission's action when it denied the petition (*i.e.*, that it denied the petition without reconsidering its original final decision or issuing a new final decision after such reconsideration had taken place), the Commission did not previously seek to further explain its decision by submitting a transcript of the hearing on March 23, 2018, either in support of its motion to dismiss or on appeal.

Despite the foregoing, during oral argument some Justices raised for the first time the question of whether the Court should construe the Commission's written ruling as a decision "to reconsider" its final decision but to deny the requested relief pursuant to the Commission's authority under General Statutes § 4-181a(a)(2), such that the appeal period would be governed by § 4-181a(a)(3) and (4) and § 4-183(c)(3) instead of § 4-181a(a)(1) and § 4-183(c)(2). Plaintiffs have not made such an argument, the parties have not briefed it, and it is not properly before the Court. Further, even if Plaintiffs had intended to make such an argument on appeal, as the appellants it was their burden—not the Commission's—to present a record for the Court to review that issue. Conn. Prac. Bk. § 61-10. Plaintiffs failed to carry that burden.

Nevertheless, to the extent the Court is inclined to consider this issue, the transcript excerpt that the Commission seeks to submit is directly relevant to the Justices' questions. Specifically, the Commission hereby proffers that, if the Court permits the Commission to submit the transcript, it will confirm that: (1) the question before the Commission at its meeting on March 23, 2018, was ***whether or not*** to reconsider its original final decision; (2) the Commission decided ***not*** to reconsider its decision; and (3) the Commission denied and rejected the petition for reconsideration ***without*** "modifying, affirming or reversing" the original final decision or issuing a new "final decision in the contested case in lieu of the original final decision." Conn. Gen. Stat. § 4-181a(a)(3) and (4). Nowhere did the Commission or its staff suggest that the Commission intended to grant the petition, to reconsider the original final decision, but to then deny the requested relief after such reconsideration had taken place.

III. LEGAL GROUNDS RELIED UPON

This motion is submitted pursuant to Practice Book §§ 60-1, 60-2(2), 60-3, 66-2 and 66-3. Specifically, Practice Book § 60-2(2) provides that the Court may "consider any matter in the record of the proceedings below necessary for the review of the issues presented by any appeal, regardless of whether the matter has been included in the appendix of any party." Conn. Practice Book Sec. 60-2(2). In addition, appellate courts may take judicial notice of matters that are part of the record in the same case, or that are "not subject to reasonable dispute" because they are "capable of ready and unquestionable demonstration." *E.g., Vendrella v. Astriab Family Ltd. P'ship*, 311 Conn. 301, 331 n.24 (2014); *State v. Ellis*, 224 Conn. 711, 727 (1993).

Here, the transcript excerpt is from the Commission's hearing at which it voted to deny Plaintiffs' petition for reconsideration. That hearing—and any transcription of it—constitute the record of the agency's decision-making process, and they indisputably are part of the administrative record upon which Plaintiffs' administrative appeal—and by extension their appeal to this Court—is based. Indeed, although the Commission did not previously submit the transcript because the Commission filed its motion to dismiss before the administrative record was due, had the Commission not filed that motion or had it been denied, the Commission would have been statutorily required to transcribe the hearing and submit the same excerpt ***as part of the administrative record***.[2] *See* Conn. Gen. Stat. § 4-183(g); Conn. Prac. Bk. § 14-7A(c).

[2] As discussed above, the Commission did not submit the transcript in support of its motion to dismiss because there was no dispute below about what the Commission did when it denied Plaintiffs' petition for reconsideration. *See supra* at 2-4.

Under such circumstances, the Court should consider the hearing transcript to be part of the "record of the proceedings below" and upon which Plaintiffs' administrative appeal—and by extension their appeal to this Court—are based for purposes of Practice Book § 60-2(2). Indeed, the "proceedings" that Plaintiffs seek to challenge in their administrative appeal are the proceedings before the Commission, not the trial court. Further, although the issue in the appeal currently before this Court is the trial court's dismissal of the administrative appeal on timeliness grounds, the "proceedings" upon which the trial court made its determination—and about which the Justices asked questions during oral argument—also are the proceedings before the Commission, and not any proceedings before the trial court.

Thus, because the hearing (and any transcription of it) is both part of the administrative record and part of the proceedings upon which Plaintiffs' administrative appeal and their appeal to this Court are based, this Court should consider the transcript to be part of the "record of the proceedings below" for purposes of Practice Book § 60-2(2). That is especially true given that the transcript is directly relevant to questions that some Justices raised for the first time during oral argument, which questions relate to arguments that Plaintiffs did not previously make, that the parties did not previously brief, and that are contrary to the arguments that Plaintiffs previously have presented throughout this litigation. *See* Conn. Prac. Bk. § 60-1.

Alternatively, to the extent the transcript excerpt does not fall within the scope of § 60-2(2), the Court nevertheless should take judicial notice of it. Transcripts of agency hearings routinely are submitted in administrative appeals as a matter of course, and without incident or dispute. *See* Conn. Gen. Stat. § 4-183(g); Conn. Prac. Bk. § 14-7A(c). Moreover, the particular transcript excerpt at issue here is "capable of ready and unquestionable demonstration," *Vendrella*, 311 Conn. at 331 n.24, as the Commission discussed the petition during the public session of its meeting, and the individuals who recorded and transcribed the meeting have certified that both the audio recording of the Commission's meeting and the transcription of it are true and accurate.[3]

IV. CONCLUSION

The Court should grant this motion, permit the Commission to file the transcript excerpt, and consider that excerpt in its resolution of this appeal.

Respectfully submitted,

STATE ELECTIONS ENFORCEMENT COMMISSION

WILLIAM TONG
ATTORNEY GENERAL

BY: */s/ Michael K. Skold*
Michael K. Skold (Juris No. 431228)
Assistant Attorney General
55 Elm Street
Hartford, CT 06141-0120
Tel: (860) 808-5020
Fax: (860) 808-5347
Email: Michael.skold@ct.gov

[3] If the Court grants this motion and requires it, the Commission can submit these certifications along with the transcript.

CERTIFICATION OF FORMAT AND SERVICE

I hereby certify that this motion complies with all applicable Rules of Appellate Procedure, that it does not contain any names or other personal identifying information that is prohibited from disclosure, and that a copy of this motion was mailed, via first-class mail, postage pre-paid on this 20th day of November, 2019 to:

Allen Dickerson
Owen Yeates
Institute for Free Speech
124 S. West St. Ste. 201
Alexandria, VA 22314
703-894-6800
adickerson@ifs.org

Doug Dubitsky
P.O. Box 70
North Windham, CT 06256
860-808-8601
doug@lawyer.com

/s/ Michael K. Skold
Michael K. Skold
Assistant Attorney General
Juris No. 431228
Office of the Attorney General
55 Elm Street
Hartford, CT 06141
Tel.: (860) 808-5020
Fax: (860) 808-5347
Email: Michael.Skold@ct.gov