DOCKET NO. HHB-CV-17-6036748-S	:	SUPERIOR COURT
STATE OF CONNECTICUT DEPARTMENT OF INSURANCE; COMMISSIONER, STATE OF CONNECTICUT DEPARTMENT OF INSURANCE	:	JUDICIAL DISTRICT OF NEW BRITAIN
VS.	:	
FREEDOM OF INFORMATION COMMISSION	:	JUNE 26, 2017

MEMORANDUM OF DECISION RE: MOTION TO DISMISS (#106) AND MOTIONS FOR STAY (#103 AND #109)

This administrative appeal was brought pursuant to General Statutes § 4-183 (b), which permits a person to appeal a "preliminary, procedural or intermediate agency ruling" if (1) it appears likely that the person appealing will otherwise be entitled to appeal from the final agency action and (2) postponement of the appeal would result in an inadequate remedy. The plaintiffs challenge an intermediate ruling requiring them to submit certain documents for agency review. They also seek to stay the administrative proceeding pending judicial review of the intermediate order. The defendant has moved to dismiss, asserting that the plaintiffs have not exhausted their administrative remedies and that postponement of the appeal, therefore, would not result in an inadequate remedy. The court concludes that under controlling appellate authority, the plaintiffs are required to exhaust their administrative remedies. The appeal is therefore dismissed.

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JUDICIAL DISTRICT OF
NEW BRITAIN

PROCEDURAL HISTORY

The plaintiffs in this action are the Connecticut Department of Insurance and the Commissioner of the Department of Insurance (collectively, department). The defendant is the Freedom of Information Commission (commission). On March 8, 2017, the department filed this appeal to challenge an order by the commission's hearing officer to submit certain documents for in camera review to determine whether they were exempt from disclosure. The department asserted that General Statutes §§ 38a-131 (c) and 38a-137 categorically prohibit it from disclosing to anyone information provided to the department by insurance companies that are required to file preacquisition notifications pursuant to § 38a-131 (a). It further argued that filing of an in camera index would violate those statutes because it would implicitly acknowledge that a filing had been made under § 38a-131 (a).

On March 15, 2017, the department moved to stay the commission proceeding pending this interlocutory appeal. In that motion, the department represented that an evidentiary hearing was scheduled to take place on April 3, 2017. The court ordered the commission to file any objection or other response to the appeal by March 30, 2017.

On March 27, 2015, the commission moved to dismiss the appeal, claiming that the department had not exhausted its administrative remedies. Before the motion could be heard in this court, the parties agreed that the department would seek a ruling by the commission as

a whole on the hearing officer's order to submit documents for in camera review. At the parties' request, the court did not proceed with a hearing on the motion to dismiss at that time.

On May 19, 2017, the department filed an objection to the commission's motion to dismiss. It represented that the commission had voted to uphold the hearing officer's order requiring the department to submit documents for in camera review, and that it had therefore exhausted its administrative remedy with respect to that order. It further argued that it would be unable to prevail before the commission without presenting testimony that the documents are exempt from disclosure under other provisions of state law, including General Statutes §§ 1-210, 38a-69a, and 38a-8.

The court heard argument on the motion to dismiss on June 9, 2017. At that argument, the department represented that after its objection was filed, the hearing officer issued a proposed final decision requiring disclosure of documents that the department believes are statutorily confidential under §§ 38a-131 (c) and 38a-137. On June 16, 2017, the department filed a second motion to stay and submitted exhibits documenting the progress of the complaint before the commission, up to and including the proposed final decision, which is scheduled to come before the commission at its meeting on June 28, 2017. The department contends that a stay is necessary because, if the commission proceeds to vote on the proposed final decision, the commission's proceeding will be concluded and the department will not have an opportunity to present its alternative claims of exemption to the commission. The

department acknowledges that the issues it presents are novel, both as to procedure under General Statutes § 4-183 (b) and as to the merits of its claims with respect to General Statutes §§ 38a-131 and 38a-137. As of the date of this decision, the commission has not filed a response to the department's second motion to stay.

DISCUSSION

A motion to dismiss is properly used to test the court's subject matter jurisdiction. Practice Book § 10-30. "Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it." *Peters* v. *Dept. of Social Services*, 273 Conn. 434, 441, 870 A.2d 448 (2005). When a question of subject matter jurisdiction is raised, it must be adjudicated before the court can proceed any further. See *Baldwin Piano & Organ Co.* v. *Blake*, 186 Conn. 295, 297, 441 A.2d 183 (1982).

It is well established there is no absolute right of appeal to the courts from the decision of an administrative agency. *Middlebury* v. *Dept. of Environmental Protection*, 283 Conn. 156, 163, 927 A.2d 793 (2007). The Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183, "grants the Superior Court jurisdiction over appeals of agency decisions only in certain limited and well-delineated circumstances." (Internal quotation marks omitted.) Id. As a general rule, an aggrieved party can appeal only from a final decision in a contested case under § 4-183 (a). However, § 4-183 (b) provides a limited exception to the requirement of a final decision. The question presented here is whether

"postponement of the appeal would result in an inadequate remedy," as required by § 4-183 (b) (2).[1]

In *Doe* v. *Dept. of Public Health*, 52 Conn. App. 513, 519, 727 A.2d 260, cert. denied, 249 Conn. 908, 733 A.2d 225 (1999), the Appellate Court held that § 4-183 (b) "reflects the principle that exhaustion of administrative remedies is required except in exceptional circumstances." It concluded that to satisfy § 4-183 (b) (2), a person appealing under § 4-183 (b) must show that the agency is incapable of providing an adequate remedy. In *Doe*, a physician challenged the jurisdiction of the Connecticut medical examining board to adjudicate a statement of disciplinary charges brought against him by the department of public health, where the department had failed to complete the investigation leading to the charges in a timely manner. He claimed that the board's proceeding against him would violate his rights to due process and to confidentiality. The Appellate Court affirmed the trial court's dismissal of the appeal, holding that the board was "capable of providing an adequate remedy because completing the administrative proceedings could provide the plaintiff with complete vindication." Id., 522.

In *Doe*, the Appellate Court analyzed the availability of an appeal under General

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[1] At oral argument on the motion to dismiss, the court misunderstood certain of the parties' claims and questioned the department about the adequacy of judicial review. Upon further reflection, the court recognizes that the issue presented is the adequacy of administrative remedies, not judicial remedies. It therefore addresses only that issue.

Statutes § 4-183 (b) under the general principles of the exhaustion doctrine as established and articulated by many Supreme Court decisions, including *Polymer Resources, Ltd.* v. *Keeney*, 227 Conn. 545, 558, 630 A.2d 1304 (1993); *Housing Authority* v. *Papandrea*, 222 Conn. 414, 420, 610 A.2d 637 (1992); and *Pet* v. *Dept. of Health Services*, 207 Conn. 346, 353, 542 A.2d 672 (1988). In each of those cases, the Supreme Court concluded that a plaintiff had failed to exhaust administrative remedies because the administrative agency in question had the authority to provide complete vindication of the plaintiff's rights. By contrast, in *Dukes* v. *Durante*, 192 Conn. 207, 223-24, 471 A.2d 1368 (1984), and *Cahill* v. *Board of Education*, 187 Conn. 94, 444 A.2d 907 (1982), the Supreme Court concluded that the plaintiff was not required to exhaust administrative remedies because the defendant agency lacked the authority to provide an adequate remedy.

In *Dukes*, a class action, the plaintiffs were low-income families who had been forced to vacate their substandard housing in New Haven when the city condemned that housing. The plaintiffs sought an injunction to require the city to provide adequate housing to families displaced by the city's housing code enforcement. The defendants asserted that the plaintiffs were required first to exhaust their administrative remedies under General Statutes § 8-278, which authorized any person aggrieved by an agency action concerning eligibility for relocation payments to appeal to the commissioner of transportation or to the commissioner of housing. The Supreme Court disagreed. It concluded that the plaintiffs' claim for injunctive

relief was based on the defendants'failure to provide decent, safe and adequate housing prior to displacing the plaintiffs, and that § 8-278 was limited to a determination of eligibility for relocation payments. Consequently, resort to that adminstrative procedure would have been futile because the statute did not authorize the agency to provide such injunctive relief. *Dukes* v. *Durante*, supra, 192 Conn. 223-24.

In *Cahill* v. *Board of Education*, supra, 187 Conn. 103-04, the plaintiff, a teacher, challenged the defendant's failure to restore her to a position of like nature, seniority, status and pay after she returned from a sabbatical. The defendant asserted that she had failed to exhaust her administrative remedies under a collective bargaining agreement. The Supreme Court disagreed because the relevant agreement specifically prohibited use of the grievance procedure for teacher transfers, the issue presented by the plaintiff. The court concluded that no grievance procedure was available for the plaintiff to exhaust.

The Supreme Court's decisions on exhaustion and the Appellate Court's analysis in *Doe* indicate that an appeal under § 4-183 (b) is permitted only in exceptional circumstances where the agency *cannot* provide relief to the plaintiff. To determine whether this is such a case, further analysis of the department's claims is required.

The underlying claim before the commission was a complaint filed on September 7, 2016, by Senator Kevin Kelly, then the ranking member and now the co-chair of the General Assembly's Joint Standing Committee on Insurance and Real Estate. Senator Kelly alleged

that the department refused to provide records of communications and meetings relating to Anthem, Inc.'s proposed acquisition of Cigna Corporation. The complaint was docketed as a contested case, FIC #2016-0638, and a contested case hearing was held on December 14, 2016. On December 20, 2016, pursuant to § 1-21j-37 (f) of the Regulations of Connecticut State Agencies, the hearing officer ordered the department to submit for in camera review a copy of any records for which an exemption to disclosure was claimed. The department was also ordered to submit an index referencing each record claimed to be exempt.

The department objected to the order. The hearing officer suspended the order pending the resolution of the plaintiffs' objection. After the department's objection, the complainant's response, and the department's reply were submitted, the hearing officer issued a revised order, limiting the scope of the documents required to be filed in camera and extending the deadline. The department partially complied with the order, submitting for in camera review certain documents that are not at issue here. It invoked General Statutes § 4-183 (f) to seek a stay of the balance of the order from the hearing officer. That stay was denied because § 4-183 (f) applies only to appeals pending in Superior Court. The hearing officer also reopened the record to take evidence concerning the claims of exemption regarding the documents that the department had submitted for in camera review. An evidentiary hearing was scheduled for April 3, 2017. Then, on March 8, 2017, the department filed this appeal, and on March 15, 2017, it filed the first of its two motions to stay the

proceedings before the commission.

The department's claims are based on General Statutes §§ 38a-131 (c) and 38a-137. Section 38a-131 generally governs acquisitions of insurance companies. Section 38a-131 (c) provides in relevant part that, with respect to such acquisitions, "the acquiring party shall file a preacquisition notification in accordance with this section and the acquired party may file a preacquisition notification. The commissioner shall treat any information filed under this subsection as confidential in the same manner as provided under section 38a-137." The preacquisition notification, known as a "Form E" filing, requires information deemed necessary by the commissioner to evaluate the competitive impact of the proposed acquisition in this state. See General Statutes § 38a-131 (d).

General Statutes § 38a-137 (a) provides in relevant part that "[a]ll information, documents, materials and copies thereof obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made pursuant to section 38a-14a and all information reported, furnished or filed pursuant to sections 38a-135 and 38a-136 shall (1) be confidential by law and privileged, (2) not be subject to disclosure under section 1-210, (3) not be subject to subpoena, and (4) not be subject to discovery or admissible in evidence in any civil action." This confidentiality mandate is not quite as absolute as the previous sentence suggests, because § 38a-137 (a) continues: "The commissioner shall not make such information, documents, materials or copies public without the prior written

consent of the insurance company to which it pertains unless the commissioner, after giving the insurance company and its affiliates who would be affected thereby notice and opportunity to be heard, determines that the interests of policyholders, security holders or the public will be served by the publication thereof, in which event the commissioner may publish all or any part thereof in such manner as the commissioner may deem appropriate. The commissioner may use such information, documents, materials or copies in the furtherance of any regulatory or legal action brought as part of the commissioner's official duties."

In addition to the confidentiality provision of subsection (a) quoted above, subsection (b) of General Statutes § 38a-137 further provides: "Neither the commissioner nor any person who receives information, documents, materials or copies as set forth in subsection (a) of this section or with whom such information, documents, materials or copies are shared, while acting under the authority of the commissioner, shall testify or be required to testify in any civil action concerning such information, documents, materials or copies."

The department argues that the plain language of these provisions categorically prohibits the commissioner or her designees from disclosing any information related to a preacquisition notification filed under § 38a-131 (c), including whether such a notification was filed. It asserts that disclosure of the fact of a preacquisition notification could lead to violation of the federal securities laws if a proposed merger had not been publicly announced. It further asserts that the submission of any documents for in camera review based on a

claimed exemption under § 38a-131 (c) and § 38a-137 (a) and (b) would disclose the fact that a preacquisition notification was filed, and that the filing of an in camera index, which must be signed by the custodian of the records being submitted, would violate the prohibition against testifying about the documents found in § 38a-137 (b).

The provisions at issue in § 38a-131 (c) and § 38a-137 (a) and (b) were enacted in 2012 and have not been subjected to judicial review. The department's construction of the provisions is not wholly implausible, but it is not inevitable, either. The fact that § 38a-137 refers to §§ 38a-14a, 38a-135, and 38a-136, but not to § 38a-131, raises at least a question as to how these provisions are intended to interact. Moreover, the department's construction of the provision would appear to insulate the commissioner's decisions with respect to publishing the information at issue from judicial as well as from administrative review.

The commission makes several arguments in response to the department's claims. It notes that Anthem's proposed acquisition of Cigna was widely publicized and that there is no longer any basis for claiming confidentiality as to the *fact* of the filing of a preacquisition notification. It further points out that a summary of Anthem's Form E filing is posted on the department's website.[2] It points out that the complainant has agreed that the Form E filings,

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[2] The statement, captioned "Acquisition by Anthem, Inc. Of Cigna Corporation - Overview of Transaction and Connecticut Competitive Impact Analysis," appears at the following address: http://www.cidverifylicense.ct.gov/portalApps/viewFile.aspx?F=109 (last accessed June 25, 2017).

including any supporting documents or materials filed by the insurance company, are categorically exempt from disclosure, and, accordingly, the revised order does not encompass the Form E filings. What remains at issue are communications between the commissioner, her staff, representatives of Anthem and Cigna, federal regulators and regulators from other states concerning the proposed acquisition. The commission argues that submission of documents to the hearing officer for in camera review does not make public any information relating to the documents because the commission has adequate safeguards in place to protect the confidentiality of documents submitted, and the in camera index need not contain information derived from the documents.

These arguments relate to the merits of the department's claim that it is categorically prohibited from complying with the order to submit the documents. The merits of the claim, however, are not directly at issue in deciding the motion to dismiss. Rather, the issue presented on the motion to dismiss is whether postponement of an appeal will result in an "inadequate remedy."

The department argues that the commission was required to seek interlocutory review of its order requiring the in camera submission of the documents because the order was essentially an investigative subpoena. Both the UAPA and the Freedom of Information Act allow an agency to apply to Superior Court to enforce a subpoena to produce documents. See

General Statutes § 4-177b[3] and General Statutes § 1-205 (d).[4] The department claims that these provisions *require* the commission to seek judicial review of a respondent's refusal to comply with an order to submit documents for in camera review, which the department argues is in essence a subpoena. Whether an order to submit documents for in camera review is effectively a subpoena is a question that the court need not decide, because the language of the provisions on which the department relies is purely permissive. While the commission has the authority under these provisions to seek judicial enforcement of an order to produce documents that a respondent refuses to obey, nothing in the provisions requires it to do so.

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[3] General Statutes § 4-177b provides in relevant part: "In a contested case, the presiding officer may . . . subpoena witnesses and require the production of . . . documents . . . to any hearing held in the case. If any person disobeys the subpoena or . . . refuses . . . to produce any . . . documents requested by the presiding officer, the agency may apply to the superior court for the judicial district of Hartford or for the judicial district in which the person resides . . . setting forth the disobedience to the subpoena or refusal to answer or produce, and the court or judge shall cite the person to appear before the court or judge to show cause why the . . . documents should not be produced . . . . Nothing in this section shall be construed to limit the authority of the agency or any party as otherwise allowed by law."

[4] General Statutes § 1-205 (d) provides in relevant part: "Said commission shall have the power to investigate all alleged violations of said Freedom of Information Act and may for the purpose of investigating any violation . . . subpoena witnesses under procedural rules adopted by the commission to compel attendance and to require the production for examination of any books and papers which the commission deems relevant . . . . In case of a refusal to comply with any such subpoena . . . , the superior court for the judicial district of Hartford, on application of the commission, may issue an order requiring such person to comply with such subpoena and to testify; failure to obey any such order of the court may be punished by the court as a contempt thereof."

The department also argues that exhaustion is futile because the commission has already upheld the in camera order and is sure to approve the proposed final decision when it meets on June 28, 2017. The proposed decision, submitted by the department with its second motion for stay, concludes that the department did not meet its burden of proving the exemptions claimed for the documents it withheld from in camera review and includes an order requiring disclosure of the documents at issue. At the hearing on the motion to dismiss on June 9, 2017, the commission's counsel argued that the commission has not yet voted on the proposed decision and may yet reject it. As the commission's counsel argued, it is possible that the commission will not approve the proposed decision. It has the authority to reject the proposed decision and, for that matter, to reconsider and reverse its own earlier ruling upholding the hearing officer's prior order for in camera review. Under *Doe* v. *Dept. of Public Health*, supra, 52 Conn. App. 513, and the Supreme Court cases cited therein, the fact that the commission still has the authority to grant relief from the hearing officer's order for in camera review compels the conclusion that the department is required to exhaust its administrative remedies before taking an appeal.

The department argues, however, that the commission will inevitably approve the proposed final decision. When it does so, the commission's jurisdiction will end, and the department will be deprived of an opportunity to submit the documents it now withholds for in camera review as to additional claims of exemption. This claim is a subtle one that the

court has spent considerable time pondering. The department claims that it has a duty to assert all exemptions to which the documents may be entitled under both the insurance laws and the Freedom of Information Act. It further asserts that the documents now withheld on the claim of a categorical exemption under General Statutes §§ 38a-131 (c) and 38a-137 may also be exempt under General Statutes §§ 1-210, 38a-69a, or 38a-8, but it cannot assert those exemptions until and unless judicial review has established that §§ 38a-131 (c) and 38a-17 do not prohibit it from submitting the documents for in camera review. That is, the department believes it is required to refuse to testify about or submit certain documents for in camera review under §§ 38a-131 (c) and § 38a-137, but that it is required to testify about and submit the same documents for in camera review of claimed exemptions under §§ 1-210, 38a-69a, or 38a-8. It is, in essence, a claim that the department has a legal right to assert inconsistent exemptions, and that interlocutory judicial review *invalidating* its claimed exemption under §§ 38a-131 (c) and 38a-137 is necessary to allow it to assert other exemptions.

The problem with this novel argument is that it requires the court to assume that the commission will reject the department's arguments and approve the proposed final decision. If the commission were to reject the proposed decision and conclude that the documents at issue are categorically exempt, there would be no need to return the case to the hearing officer to consider alternative claims of exemption. The department would thereby obtain complete vindication with respect to the documents at issue.

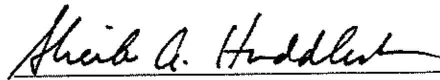
Even if it is likely that the commission will approve the proposed final decision, the commission still has the *authority* to reject it. The fact that an agency may have previously indicated how it will decide a question has been held not to excuse compliance with the exhaustion requirement on the ground of futility. *Stepney, LLC* v. *Fairfield*, 263 Conn. 558, 565, 821 A.2d 725 (2003); see also *Polymer Resources, Ltd.* v. *Keeney*, supra, 227 Conn. 562 (conclusory assertion that agency will not reconsider its decision does not excuse compliance with exhaustion doctrine). The issue presented here may be closer than the usual question because the commission has already upheld the in camera order, but the court cannot discern how it is fundamentally different from the issue presented in cases such as *Polymer Resources*, supra. The department has not cited, and the court has not found in the limited time available, a case in which exhaustion has been excused based on the predictability of the administrative outcome.

CONCLUSION

The Appellate Court has held that jurisdiction under General Statutes § 4-183 (b) is to be assessed under the principles of exhaustion articulated by the Supreme Court in cases such as *Stepney, LLC* v. *Fairfield*, supra, 263 Conn. 565, and *Polymer Resources, Ltd.* v. *Keeney*, supra, 227 Conn. 562. See *Doe* v. *Dept. of Public Health*, 52 Conn. App. 519. In light of those controlling precedents, the court concludes that the department has not exhausted its administrative remedies and, therefore, cannot rely on General Statutes § 4-183 (b) to bring an

appeal of a preliminary, procedural or intermediate agency action. The appeal is therefore dismissed. Because the appeal is dismissed, the court does not address the department's motions for stay.

BY THE COURT,



Sheila A. Huddleston, Judge