CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXXII No. 29 January 19, 2021 101 Pages

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CONNECTICUT LAW JOURNAL
(ISSN 87500973)

Published by the State of Connecticut in accordance with the provisions of General Statutes § 51-216a.

Commission on Official Legal Publications
Office of Production and Distribution
111 Phoenix Avenue, Enfield, Connecticut 06082-4453
Tel. (860) 741-3027, FAX (860) 745-2178
www.jud.ct.gov

RICHARD J. HEMENWAY, *Publications Director*

Published Weekly – Available at https://www.jud.ct.gov/lawjournal

Syllabuses and Indices of court opinions by
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Tel. (860) 757-2250

The deadline for material to be published in the Connecticut Law Journal is Wednesday at noon for publication on the Tuesday six days later. When a holiday falls within the six day period, the deadline will be noon on Tuesday.

ORDERS

CONNECTICUT REPORTS

VOL. 336

TATAYANA OSBORN ET AL. *v.* CITY OF WATERBURY ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 197 Conn. App. 476 (AC 39574), is denied.

Richard M. Franchi, in support of the petition.

Daniel J. Foster, acting assistant corporation counsel, in opposition.

Decided January 5, 2021

STATE OF CONNECTICUT *v.* ANASTASIA SCHIMANSKI

The defendant's petition for certification to appeal from the Appellate Court, 201 Conn. App. 164 (AC 41802), is granted, limited to the following issue:

"Did the Appellate Court properly uphold the trial court's denial of the defendant's motion to dismiss the

charge of operating a motor vehicle while her operator's license was under suspension pursuant to General Statutes § 14-215 (c) (1)?"

James B. Streeto, senior assistant public defender, and *Aaron J. Levin*, former certified legal intern, in support of the petition.

Kathryn W. Bare, senior assistant state's attorney, in opposition.

Decided January 5, 2021

CHRISTOPHER ANTHONY BROWN *v.* STATE OF CONNECTICUT

The plaintiff's petition for certification to appeal from the Appellate Court, 201 Conn. App. 903 (AC 42562), is denied.

W. Theodore Koch III, assigned counsel, in support of the petition.

Jonathan M. Sousa, deputy assistant state's attorney, in opposition.

Decided January 5, 2021

JAYSAN YOUNG *v.* COMMISSIONER OF CORRECTION

The petitioner Jaysan Young's petition for certification to appeal from the Appellate Court, 201 Conn. App. 905 (AC 42892), is denied.

Robert L. O'Brien, assigned counsel, in support of the petition.

Brett R. Aiello, deputy assistant state's attorney, in opposition.

Decided January 5, 2021

IAN WRIGHT *v.* COMMISSIONER OF CORRECTION

The petitioner Ian Wright's petition for certification to appeal from the Appellate Court, 201 Conn. App. 339 (AC 43170), is denied.

MULLINS, J., did not participate in the consideration of or decision on this petition.

Ian Wright, self-represented, in support of the petition.

Zenobia G. Graham-Days, assistant attorney general, in opposition.

Decided January 5, 2021

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CONNECTICUT APPELLATE REPORTS

Vol. 202

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE JOSIAH D. ET AL.*
(AC 44096)

Bright, C. J., and Lavine and Elgo, Js.**

Syllabus

The respondent father appealed from the judgments of the trial court terminating his parental rights with respect to his two minor children. He claimed that the court committed reversible error by failing to notify him that it would be drawing an adverse inference from his decision not to testify, and that this court should exercise its supervisory authority over the administration of justice to adopt an advisement requiring the trial court to affirmatively notify him that it would be drawing an adverse inference upon his decision not to testify. *Held*:

1. The trial court properly notified the respondent father that it may draw an adverse inference from his decision not to testify: prior to the presentation of evidence, the court notified the father of his rights pursuant to *In re Yasiel R.* (317 Conn. 794), which included the right to remain silent and the notice required to a parent under the applicable rule of practice (§ 35a-7A), that the judicial authority may draw an adverse inference from his failure to testify, which was entirely consistent with the holding of our Supreme Court that the notice be given at the very start of the termination trial, before a decision as to whether to challenge evidence has been communicated to the court, and to all parents involved in a termination trial, not just to those parents whose attorneys have made a tactical decision not to contest evidence; moreover, contrary to the father's claim, § 35a-7A does not require a second notice to the parent that the court would be drawing an adverse inference from a parent's failure to testify, as the rule itself provides notice to a parent that the court may draw an adverse inference, and a notice provided at the start of the trial is the least coercive manner of advising a parent of his or her right to remain silent and the possible consequences of doing so; furthermore, even if it were assumed that the court was required to affirmatively notify the father that it would be drawing an adverse inference from his failure to testify, the notice given at the beginning of the termination trial was proper, and any impropriety was harmless in light of the court's detailed findings of fact in its memorandum of decision and its subsequent articulation, which dispelled any notion that the

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

** The listing of judges reflects their seniority status on this court as of the date of oral argument.

court's drawing of an adverse inference from the father's decision not to testify was determinative of the court's decision to terminate his parental rights.

2. This court declined to exercise its supervisory authority over the administration of justice to require a trial court in a termination of parental rights trial to affirmatively notify a parent that it would be drawing an adverse inference from the parent's decision not to testify, notice that is beyond what is required by § 35a-7A; this case did not present the type of extraordinary circumstance for which the exercise of supervisory power was intended, and § 35a-7A ensures the fair and just administration of the courts in termination of parental rights cases.

Argued November 9, 2020—officially released January 13, 2021***

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of Fairfield, Juvenile Matters, where the matter was tried to the court, *Brillant*, *J.*; judgments terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

Karen Oliver Damboise, for the appellant (respondent father).

Kim Mathias, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon* and *Evan O'Roark*, assistant attorneys general, for the appellee (petitioner).

Opinion

LAVINE, J. The respondent father, Geraldo D. (father), appeals from the judgments of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating his parental rights with respect to his sons, Josiah D. (Josiah) and Jovani D. (Jovani)

*** January 13, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

(collectively, sons or boys),[1] on the ground that he had failed to achieve a sufficient degree of personal rehabilitation pursuant to General Statutes § 17a-112 (j) (3) (B) (i). On appeal, the father does not challenge the trial court's findings and conclusions but claims that (1) the court committed reversible error by failing to notify him that it would be drawing an adverse inference from his decision not to testify in accordance with Practice Book § 35a-7A and *In re Samantha C.*, 268 Conn. 614, 847 A.2d 883 (2004), and (2) this court should exercise its supervisory authority to adopt a canvass requiring the trial court to notify the father that the court would draw an adverse inference upon his decision not to testify. The petitioner counters that the court properly notified the father in accordance with Practice Book § 35a-7A, but if this court determines that the court's notice was improper, the error was harmless, as it did not adversely affect the outcome of the trial.[2] We conclude that the court properly notified the father that it may draw an adverse inference from his decision not to testify and decline the father's invitation to exercise our supervisory authority to require any notice beyond what is required by Practice Book § 35a-7A. We affirm the judgments of the trial court.

"Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3) (B) (i)] exists by clear and convincing evidence. The [petitioner] . . . in petitioning to terminate those rights, must allege and prove one or more

[1] The court also terminated the parental rights of the boys' mother, who is not a party to this appeal. In this opinion, we refer to her as the mother. The mother testified at the termination of parental rights trial.

[2] Counsel for the boys has adopted the brief filed by the petitioner.

of the statutory grounds. . . . Subdivision (3) of § 17a-112 (j) carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental rights in the absence of consent. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun." (Internal quotation marks omitted.) *In re Tresin J.*, 334 Conn. 314, 322–23, 222 A.3d 83 (2019). "If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase. In the dispositional phase, the trial court determines whether termination is in the best-interests of the child." (Internal quotation marks omitted.) *In re Destiny R.*, 134 Conn. App. 625, 629, 39 A.3d 727, cert. denied, 304 Conn. 932, 43 A.3d 660 (2012).

The record discloses that employees of the Department of Children and Families (department) had been involved with the boys' family since 2004, as a result of a referral regarding one of their mother's older children. In May, 2016, and again in November, 2016, the petitioner filed neglect petitions and motions for orders of temporary custody with respect to the boys, but subsequently withdrew them and the boys were returned to their parents. The department, however, continued to be involved with the family in connection with the mother's older child and pursuant to a referral from local police. The petitioner invoked a ninety-six hour administrative hold on the boys on March 24, 2017. On March 28, 2017, the petitioner filed motions for orders of temporary custody and neglect petitions as to each of the boys. On May 31, 2017, the court, *Ginocchio*, *J.*, adjudicated the boys neglected. On April 13, 2018, the petitioner filed petitions for the termination of the parental rights of the father and the mother as to each of the boys. As to the father, the petitioner alleged,

pursuant to § 17-112 (j) (3) (B) (i), that, in a prior proceeding, the boys were found to have been neglected, abused, or uncared for, and that the father had failed to achieve a sufficient degree of personal rehabilitation that would encourage the belief that within a reasonable time considering the ages and needs of his sons, the father could assume a responsible position in their respective lives.

The termination of parental rights trial was held before the court, *Brillant*, *J.*, on September 24, 25, and 26, and December 10, 2019. On February 24, 2020, the court issued a memorandum of decision, which included the procedural history, the court's factual findings and conclusions, and an order terminating the father's parental rights as to the boys. In its decision, the court noted that the father had appeared for trial and was represented by counsel.[3] The court advised the father of his rights pursuant to *In re Yasiel R.*, 317 Conn. 773, 794, 120 A.3d 1188 (2015).[4] The court noted that the petitioner

[3] The father was aided at trial by a Portuguese speaking interpreter.

[4] On September 24, 2019, before the presentation of evidence and in the presence of the father, the court stated:

"The Court: The court is mandated to provide the parties, the parents, immediately before the trial with a canvass, an advisement, to insure that the parents understand the trial process, their rights during the trial, and any potential consequences. And this is what I will advise you of. If there is anything you don't understand, please let me know and you can speak with your attorneys.

"Regarding the termination of parental rights trial that will be commencing after this advisement, the petitioner . . . has previously filed with this court a legal document called a termination of parental rights petition, in which [the petitioner] seeks to have this court permanently end the legal parent-child relationship between you and Josiah and Jovani. Because [the petitioner] is the one who filed the . . . termination of parental rights petition, and is the one asking this court to permanently sever your legal relationship with your children, it is up to [the petitioner] to prove [the] case at a termination of parental rights trial, which is today by clear and convincing evidence.

"If [the petitioner] prevails or wins and the trial court grants the termination of parental rights petition, you will have no legal rights, no authority and no responsibility for your children. You will no longer have any right to make decisions of any kind regarding these children, Josiah and Jovani.

had introduced twenty-eight exhibits and called eight witnesses at trial. The father was represented by counsel, but he "did not introduce any exhibits, did not testify on his own behalf, and did not call any witnesses." The court stated that it drew "an adverse inference with regard to [the] [f]ather." At the petitioner's request, the court took judicial notice of the court record.

The court found that on February 10, 2017, local police reported to the department that a motorist had

You will not be entitled to any state or federal benefits or entitlements on behalf of the children and the children are free to be adopted only upon the termination of any of the parental rights.

"A termination of parental rights trial gives you, the parents, an opportunity to defend against the termination of parental rights petition. The termination of parental rights trial, at the trial anything you say or have said can and will be used against you. You have the right to remain silent and say nothing and do nothing which would help [the petitioner] prove [the] case. You have the right, if you choose, to tell the judge your side of the story and it's called testifying on your own behalf. You have the right to confront and cross-examine witnesses and/or evidence meaning the state will call their witnesses and you can challenge those witnesses. You can ask questions through your attorney of those witnesses to cause them to prove the truthfulness of the evidence that they're putting forth. And again, you can call witnesses on your own behalf and provide documents through your attorneys. . . .

"*As I just stated, your decision to testify or not testify at this termination of parental rights trial is yours to make. However, if you choose not to testify whether fully at the trial or any other partial hearing, the trial judge may draw an adverse inference, which means it could be held against you. It could be looked at negatively, and it could actually help* [*the petitioner's*] *case if you choose not to testify. Also, such an adverse inference, or a negative consequence, may be that* [*the petitioner*] *wins the trial if you choose not to testify.*

"If you do not present any witnesses on your own behalf or do not object to the testimony or exhibits, the documents that come in through the trial, or if you do not cross-examine, question the state's witnesses, [the petitioner's] witnesses, the court will decide the case based on the evidence that was presented at the trial. Do you have any questions? . . .

"The Court: And [Father], do you have any questions, sir?

"[The Father]: No.

"The Court: And do you understand the rights and everything I've just said? . . .

"The Court: [Father]?

"[The Father]: I understood." (Emphasis added.)

seen then three year old Josiah running across the street in heavy traffic. Josiah had been playing in the yard of the family home under the father's supervision, but the father did not realize that Josiah had left the yard until he saw him across the street with the motorist and the police. At the time, the department investigated the family home and found that it was cluttered and needed to be cleaned.

On March 23, 2017, an elementary school staff member reported to the department that Josiah had not attended preschool since March 9, 2017. The department attempted to visit the family home on March 23, 2017, but no one was home. The department visited the nearby maternal grandmother's home. The maternal grandmother informed the department that due to intimate partner violence between the father and the mother, she financially assisted the mother in leaving the home the mother shared with the father. The department returned to the home and met the father, who informed the department that the mother had taken the boys on a vacation because he and the mother could not afford heat or electricity in the home. The department observed that the home was cold, cluttered with laundry, smelled of dirty diapers, and appeared to be without electricity.

On March 24, 2017, the department invoked a ninety-six hour administrative hold on the boys due to its concerns regarding their lack of adequate housing. On March 28, 2017, the court, *Hon. Jonathan J. Kaplan*, judge trial referee, granted the petitioner's motions for orders of temporary custody of the boys. The petitioner had filed neglect petitions on behalf of each of the boys as to each of his parents on March 17, 2017. On May 31, 2017, Judge Ginocchio adjudicated the boys neglected and committed them to the care of the petitioner.[5] On

[5] In her brief on appeal, the petitioner represents that at the start of the neglect proceeding on May 10, 2018, Judge Ginocchio stated to the father: "No one could force you to testify at a trial such as this, however, if you don't testify, it could be held against you."

February 8, 2018, Judge Ginocchio and, on January 10, 2019, the court, *Maronich*, *J.*, approved the department's permanency plans for termination of the father's parental rights as to his sons and for the boys to be adopted. On April 13, 2018, the petitioner filed petitions for termination of the father's parental rights as to his sons, alleging in part that the father had failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of the boys, the father could assume a responsible position in their lives pursuant to § 17-112 (j) (3) (B) (i).[6]

The court found that the father was born in 1975, and that he has a wife and two children in Brazil. His primary language is Portuguese, and he relies on the mother for interpretation. He is an undocumented individual, who works as a landscaper, and has no criminal history in the United States. In June, 2017, after the boys had been committed to the petitioner's care, the father was referred to the Midwestern Connecticut Council of Alcoholism, Inc. (MCCA) for a substance abuse and mental health assessment. His test results were negative and no treatment recommendations were made for him. In September, 2018, the father again was referred to MCCA to confirm that he had no substance abuse issues, but he did not comply with the referral.

Although the father had no reported substance abuse or mental health issues, the department referred him to the Women's Center and to the Center for Safer Communities for parenting classes, intimate partner violence, and individual counseling beginning in August, 2018. The department made the referrals due to its concerns regarding the father's judgment and decision-making skills as a parent, and also because the maternal grandmother and local police had reported that the father

[6] The petitioner also filed petitions to terminate the parental rights of the mother.

was involved in intimate partner violence. The father also was referred to Family and Children's Aid for individual therapy with a Portuguese speaking clinician. The father did not comply with the services offered.

The court also found that the father is oblivious to the mother's substance abuse issues and was not aware that she needed methadone maintenance.[7] Although the father made his whereabouts known to the department, he did not cooperate with the department's requests to visit the family home and did not allow the department to assess it until days before trial. He failed to keep all of the appointments set by the department. The father did not attend a parenting program, did not attend meetings with ABLE Home Healthcare (ABLE) to understand and learn how to care for Josiah's special needs, and he did not attend meetings with the Birth to Three program for Jovani.

In 2019, the department asked the father to undergo another substance abuse evaluation because the mother was actively using drugs, and it had been approximately two years since his last assessment. The father complied with the court-ordered evaluations. The father, however, did not sign releases granting the department permission to communicate with or to gather information from all service providers. The department arranged for the father to visit with the boys for one hour, one day a week, but the father did not attend all of the scheduled visits.

The court made the following findings with respect to each of the boys. Josiah was born in September, 2013. The mother took methadone during her pregnancy with him and, therefore, he was exposed to methadone in utero. Following his birth, he spent several weeks

[7] In adjudicating the petitions to terminate the mother's parental rights as to the boys, the court found, in part, that the mother had an extensive substance abuse history dating back to 2011. She has been diagnosed with opiate dependence, cocaine abuse, and alcohol abuse.

in the neonatal intensive care unit of a hospital where he was treated for drug withdrawal. Josiah and his younger brother, Jovani, were removed from the care of their parents on March 24, 2017, due to intimate partner violence and lack of adequate housing. At the time of his removal, Josiah presented with delayed language development, social and emotional issues, and physical aggression. He was not verbal, not toilet trained, and his development was comparable to that of an eighteen to thirty month old child. Josiah was diagnosed with autism, and he was provided with in-home services for fifteen to twenty hours per week to learn life skills through ABLE. Josiah's foster parents engaged in 50 percent of the hands-on activities with him.

Due to Josiah's developmental delays and the inability of some of his former foster parents to meet his special needs, he had multiple foster care placements between March and July, 2017. At the time of trial, he had been in the same nonrelative therapeutic foster home since July, 2017. With the assistance of special education classes and in-home behavioral support, the court found that Josiah was thriving, despite having had multiple caregivers. Josiah and Jovani were not placed together because Josiah requires one-on-one attention to address his developmental needs. The boys visit together with their parents once a week. Josiah has bonded with his foster parents, who love him and are willing to adopt him.

Jovani was born in December, 2015. Due to her prior heroin addiction, the mother took methadone during her pregnancy and thus exposed Jovani to the drug. He has been diagnosed with attention deficit hyperactivity disorder and post-traumatic stress disorder. He lived with his parents until he was removed from their care on March 24, 2017, due to his parents' intimate partner violence and inadequate housing. He was fifteen months old at the time and was placed in a nonrelative foster

home, where he continued to reside at the time of trial. When he was placed in foster care, Jovani was not able to chew or to eat solid food. He could not walk and spoke by " 'babbling.' " The Birth to Three program reported that he had a global developmental delay and immediately began to provide him with physical therapy, occupational therapy, and speech therapy. Due to his medical diagnoses, he received parent involved treatment, psychotherapy, and parent-child management, once per week. Those treatment programs required a consistent caregiver to attend therapy with Jovani on a regular basis in order for him to feel safe and to be able to process all that had occurred in his life, including having been removed from his parents' home. He needs therapy on a consistent basis so that he can regulate his feelings and not feel afraid, and he requires services for communication and fine motor skill development and problem-solving. Jovani's development had progressed at the time of trial so he no longer was receiving services from Birth to Three, but he still was receiving occupational and speech therapy.

The court also found that as of the adjudicatory date,[8] the petitioner has known of the father's whereabouts and continuously has offered him services. The court therefore found by clear and convincing evidence that the department had made reasonable efforts to locate and to offer the father appropriate services to facilitate his reunification with the boys. Those services included a referral to a Portuguese speaking therapist for individual therapy so that the father could understand the boys' special needs; services to help the father understand the mother's substance abuse issues; services to teach the father appropriate coping skills due to his history of intimate partner violence; Birth to Three to engage the father in Jovani's developmental services; information regarding the ABLE program to help the father

[8] The adjudication date is the date that the petitioner files a petition for termination of parental rights. See *In re Kylik A.*, 153 Conn. App. 584, 596, 102 A.3d 141, cert. denied, 315 Conn. 902, 104 A.3d 106 (2014).

understand and care for Josiah's needs and communication; guidance and encouragement to engage with Josiah's school regarding his individual education program; assessment of relative resources for foster care placement; administrative review of treatment plans, and case management services. The department also arranged for the father to visit with the boys weekly. The court further found that the father was unwilling to benefit from the reunification efforts the department offered him.

In addition, the court found by clear and convincing evidence that the department had met its burden and proved that the father had not achieved a degree of personal rehabilitation that would encourage the belief that within a reasonable period of time, given the ages of the boys, their special needs, and their need for permanency, the father could assume a responsible position in the boys' lives. This is especially true because Josiah has autism and relies on many developmental and behavioral services. Jovani also has special needs and requires therapy. The department scheduled weekly visits for the father and his sons, but the father did not attend them all. Initially, the department provided transportation for the father from the family home to the visitation site, but transportation ceased in approximately April, 2019, due to the father's inconsistent participation and logistical problems. The court found that the boys had been out of the father's care since March, 2017, and that they were in need of permanency and stability.

Wendy Levy, a clinical psychologist, evaluated the father and reported that he has cognitive limitations and is dependent on the mother. He failed to engage in the services recommended to him, particularly parenting classes to learn how to care for the boys who have special needs. According to Heather Bullock of ABLE, due to Josiah's autism and behavior, the father would need to be extremely diligent and consistently involved, otherwise Josiah's developmental progress

could regress. Josiah's behavior could worsen as his language skills suffer.

The father was offered numerous services to aid his reunification with his sons, including substance abuse evaluation services, mental health services, parenting education, and supervised visits, but he was unwilling to complete his court-ordered specific steps to facilitate reunification. The father's primary issues are lack of adequate decision-making for his sons and lack of appropriate judgment as he remained in a relationship with the mother even after the boys were taken from their care and two of the mother's other children were removed from her care. He has not taken the steps necessary to gain an understanding of the boys' special needs.

The court found that, although the father does not have substance abuse issues, he was still required to complete a parenting program and an intimate partner violence program, but he completed neither one. The father argued that there was no need for an intimate partner violence program because there had been no more such incidents between him and the mother. The father, however, continues to associate with the mother who has a track record of either injuring her children or not taking care of their many needs, which stifles the children from thriving emotionally, physically, developmentally, and educationally. The father remains in a relationship with the mother and has failed to do anything of substance proactively or reactively, with or without the mother, to advance his ability to properly care for his sons.

The court concluded that the father is unable to meet the developmental, emotional, educational, and moral needs of his sons. By all indications, the father cannot and will not provide for the boys' safe shelter, nurturance, and security. He refused to cooperate with the department and did not consistently attend scheduled visits with his sons. The court found that the father had failed to achieve a reasonable degree of rehabilitation to care for his sons.

The court further found that the father failed to gain sufficient insight into his issues to the extent necessary for the boys to safely return to his care. The father failed to achieve sufficient personal rehabilitation by failing to acquire adequate housing on a timely basis, failing to benefit from parenting education, failing to benefit from intimate partner violence education, and failing to benefit from department assistance in educating him about his sons' special needs. The court recognized that the father is a hard worker and does not have a substance abuse problem. However, he failed to learn how to be a parent to his sons who have special needs because he did not attend educational programs and meet with service providers. The court found on the basis of credible testimony and documentary evidence, pursuant to General Statutes §§ 17a-112 (j) (1) and 17a-111b (a), that the petitioner had met her burden of proof by clear and convincing evidence that the father failed to achieve the degree of rehabilitation that would encourage the belief that in a reasonable time, he could assume a responsible position in the lives of Josiah and Jovani.

The court then addressed the dispositional requirements of § 17a-112 (k).[9] The court made the following

[9] General Statutes § 17a-112 (k) provides in relevant part that, except in cases in which a parent consents to termination of his or her parental rights, "in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended . . . (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents . . . and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest

written findings. The department had made reasonable efforts to reunite the father with his sons by offering him timely and appropriate services. The father refused the services offered to him and, therefore, did not fulfill his obligations pursuant to the specific steps ordered by Judge Ginocchio on May 31, 2017. Because he failed to comply with the specific steps, the father has failed to benefit from the services the department offered to him, which had a negative impact on the reunification process.

Six and one-half year old Josiah is happy to see his father when they visit. He has autism and relies on his foster parents to meet all of his needs, including participation in ABLE, which helps Josiah accomplish the tasks of daily living. He has bonded with his foster parents, who are nurturing, loving, and ready, willing, and able to adopt him.

Jovani has lived with his foster mother since he was fifteen months old; he is now four years old. He has bonded with his foster mother, who has devoted a great deal of time to help him grow developmentally, educationally, physically, and emotionally. Jovani enjoys his visits with his father, but he looks to his foster parents to fulfill his needs on a daily basis. His foster parents are committed to loving and caring for him and are willing to adopt him.

The boys' foster parents are attentive to the boys' respective special needs. The boys refer to their respective foster mothers as " 'mom.' " The court found that,

of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent . . . (B) the maintenance of regular contact or communication with the . . . custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

although the boys and the father love one another, much more is required for the father to be reunified with them.

Pursuant to its previously discussed findings, the court concluded that the father had made insufficient efforts to adjust his individual circumstances, conduct or conditions to make it in the best interests of the boys to return safely to his care in the foreseeable future. The father has not been able to put the boys' interests before his own, and he has failed to take advantage of the services offered to him to facilitate reunification. The father sat idly by while the mother struggled with substance abuse. He did not take a leadership role in taking care of his sons. Under the care of their foster families and with the assistance of service providers, the boys have thrived in nurturing, stable, and loving environments. To take them from their foster environments would cause them to suffer.

Finally, the court found that there was no credible evidence that the father has been prevented from maintaining a meaningful relationship with either Josiah or Jovani. The department encouraged him to maintain a relationship with the boys. No unreasonable act or conduct by any person or agency nor the father's economic circumstances has prevented him from maintaining a meaningful relationship with his sons. The father's failure to maintain a meaningful relationship with his sons is a result of his own actions or circumstances in refusing to cooperate with the services provided to him.

When determining whether termination of the father's parental rights is in the best interests of the boys, the court considered the factors in § 17a-112 (k). See footnote 9 of this opinion. The court made written findings regarding the termination of the father's parental rights as to the boys and found by clear and convincing evidence that the only way the boys will find stability, con-

tinuity, continued growth and development is through permanency. The father is not able to assume a responsible position in the boys' lives given their ages, special needs, and immediate need for permanency. The court concluded that grounds exist to terminate the father's parental rights as he had failed to rehabilitate and that it is in the best interests of the boys to do so. The court, therefore, ordered the parental rights of the father terminated and appointed the petitioner the boys' statutory parent for the purpose of securing their adoptions as expeditiously as possible.

Thereafter, the father appealed and, on May 15, 2020, filed a preliminary statement of issues, i.e., whether (1) the court committed reversible error by failing to notify him that it would draw an adverse inference upon his decision not to testify in accordance with Practice Book § 35a-7A and *In re Samantha C.*, supra, 268 Conn. 614, and (2) this court should exercise its supervisory authority to adopt an advisement affirmatively notifying him that the court would draw an adverse inference upon his decision not to testify.

On June 15, 2020, the petitioner filed a motion for articulation, requesting that the trial court articulate its February 24, 2020 memorandum of decision regarding the court's decision to draw an adverse inference against the father because he did not testify at trial. The petitioner stated that the court's decision was ambiguous with respect to the significance of the adverse inference the court drew against the father, which is the subject of the issues the father raised on appeal.[10] The father did not oppose the motion for articulation.

[10] The petitioner asked the court to articulate the following five questions:"1. In stating the court takes an adverse inference with regard to [the] father . . . did the trial court mean that it was drawing an adverse inference against [the father] pursuant to *In re Samantha C.* on the basis that he did not testify at trial?

"2. If so, what weight did the court give the adverse inference, particularly as it relates to the evidence the [petitioner] presented at trial regarding [the father's] failure to regularly visit the [boys], failure to engage in recom-

The court granted the petitioner's motion for articulation on July 17, 2020, and issued a memorandum of decision addressing the petitioner's five questions. "The court drew an adverse inference against the father . . . pursuant to *In re Samantha C.*, [supra] 268 Conn. 614 . . . for his choice not to testify at trial. . . . The father's choice not to testify, merely showed the court that [the] father had nothing favorable to say to demonstrate that he could properly care for his children or assume a responsible position in their lives. Even without the adverse inference drawn by the court, the court carefully considered all of the evidence and statutory criteria and specifically made findings of fact upon which it relied. . . . The court's findings of fact were found by clear and convincing evidence, which did not rely on the adverse inference [drawn] against [the] father. Even if the court had not [drawn] an adverse inference against [the] father, the court still would have found by clear and convincing evidence that [the] father was unwilling to benefit from the department's reasonable reunification efforts, based on the findings of fact

mended services . . . and failure to learn how to meet the [boys'] specialized needs? . . .

"3. With respect to the efforts element: If the court had not drawn an adverse inference, would it nonetheless have found by clear and convincing evidence that [the father] was unwilling to benefit from the department's reasonable reunification efforts, given that [the] father refused to cooperate with [the department] and did not consistently attend the visitations he was offered and failed to complete recommended services for parenting education and intimate partner violence? . . .

"4. With respect to the adjudicatory element: If the court had not drawn an adverse inference, would it nonetheless have found by clear and convincing evidence that [the father] had failed to rehabilitate, given that he failed to engage in the services offered to him, is unable to meet the developmental, emotional, educational, and moral needs of [the boys], and cannot and will not provide for the [boys'] safe shelter, nurturance, and security? . . .

"5. With respect to the best interests element: If the court had not drawn an adverse inference, would it nonetheless have found by clear and convincing evidence that termination of parental rights was in the best interests of the minor [boys], given the [boys'] respective ages, their specialized needs, the [father's] inability to meet those needs, and the [boys'] need for permanent loving homes?" (Citations omitted; internal quotation marks omitted.)

which were fully articulated in the decision. . . . The court would have made the same findings of fact and conclusions of law by clear and convincing evidence, resulting in it being in the best interests of the minor children to terminate the parental rights, even without the court having drawn an adverse inference against [the] father for his failure to testify. The court's determination that termination of the parental rights was in the best interests of the minor children was based on the findings of fact and statutory criteria that were fully articulated in the decision." We now address the claims raised by [the] father in the present appeal.

I

The father first claims that the court committed reversible error by failing to notify him that *it would be drawing* an adverse inference from his decision not to testify at the termination of parental rights trial contrary to Practice Book § 35a-7A and *In re Samantha C.*, supra, 268 Conn. 614. We disagree.

As previously set forth, prior to the presentation of evidence, the trial court notified the father of his rights pursuant to *In re Yasiel R.*, supra, 317 Conn. 794, which included an advisement of his rights under Practice Book § 35a-7A.[11] Specifically, the court stated: "[Y]our decision to testify or not testify at this termination of parental rights trial is yours to make. However, if you choose not to testify whether fully at the trial or any other partial hearing, the trial judge *may draw an adverse inference*, which means it could be held against you. It could be looked at negatively and it could actually help [the petitioner's] case if you choose not to testify. Also, such an adverse inference, or a negative consequence, may be that [the petitioner] wins the trial if you choose not to testify." (Emphasis added.) Immediately thereafter the court asked the father whether he

[11] As noted in footnote 5 of this opinion, Judge Ginocchio provided the notice required by Practice Book § 35a-7A to the father at the neglect proceeding.

had any questions, and he stated, "[n]o." The court also asked the father if he understood his rights. The father stated that he understood. At the end of the first day of evidence, the father's counsel, Diane Beltz-Jacobson, stated: "I believe my client may testify a short—a short testimony, Your Honor." On the second day of trial, the court asked Beltz-Jacobson whether she had witnesses to testify. Beltz-Jacobson stated: "I do not, Your Honor."

On appeal, the father claims that at the time the court learned that he would not testify, it should have advised him that it "was going to [draw] an adverse inference for his failure to testify." The father claims that the notice given by the court at the start of trial merely informed him of the possibility that the court could draw an adverse inference, not a certainty that it would draw an adverse inference from his decision not to testify. The father, therefore, contends that the court failed to provide the notice required by Practice Book § 35a-7A and *In re Samantha C.*, supra, 268 Conn. 614. We are not persuaded.

The father's claim requires us to construe Practice Book § 35a-7A to determine whether the court failed to comply with the rule. "The interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation. . . . The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary. . . . In seeking to determine [the] meaning [of a statute or a rule of practice, we] . . . first . . . consider the text of the statute [or rule] itself and its relationship to other statutes [or rules]. . . . If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence . . . shall not be considered. . . . When [the provision] is not plain and unambiguous, we also look for interpretive

guidance to the . . . history and circumstances surrounding its enactment, to the . . . policy it was designed to implement, and to its relationship to existing [provisions] and common law principles governing the same general subject matter. . . . We recognize that terms [used] are to be assigned their ordinary meaning, unless context dictates otherwise." (Citations omitted; internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 594, 181 A.3d 550 (2018).

Practice Book § 35a-7A provides: "If a party requests that the judicial authority draw an adverse inference from a parent's or guardian's failure to testify or the judicial authority intends to draw an adverse inference, either at the start of any trial or after the close of the petitioner's case-in-chief, the judicial authority shall notify the parents or guardian that an adverse inference *may be drawn* from their failure to testify." (Emphasis added.) Pursuant to the words of § 35a-7A and our review of the notice the court gave to the parties, the court did exactly what was required of it. The court advised the father at the start of the trial in the language of § 35a-7A, that is, that "an adverse inference may be drawn from [the parents'] failure to testify." The father does not contend otherwise; his contention is that he was entitled to more than what § 35a-7A requires. He wanted the court to tell him that it intended to or that it would draw an adverse inference if he failed to testify. Section 35a-7A contains no language that requires the trial court to notify a parent that it will draw an adverse inference from the parent's failure to testify. The plain language of § 35a-7A notwithstanding, the father claims that the court's notice was inconsistent with *In re Samantha C.*, supra, 268 Conn. 614. We disagree.

In re Samantha C. concerned the termination of the respondent parents' parental rights as to their minor child. "The trial court found, by clear and convincing

evidence, that the respondents had failed to achieve sufficient rehabilitation . . . and, accordingly, that court granted the [termination] petitions. In doing so . . . the trial court expressly drew an adverse inference against the respondents for their failure to testify at the termination proceeding . . . .'' *In re Samantha C.*, supra, 268 Conn. 617. The principal issue in the appeal to our Supreme Court was ''whether then existing [Practice Book (2001)] § 34-1 (f) allowed an adverse inference to be drawn against the respondents, without prior notice, for their failure to testify in a proceeding in which the petitioner sought to terminate their parental rights.'' (Footnote omitted.) Id., 616–17.

Our Supreme Court concluded that Practice Book (2001) § 34-1 (a), that required the judicial authority to ''advise and explain to the parents their right to silence at the commencement of any [termination] proceeding, coupled with the trial court's repeated affirmation of that right throughout the various proceedings underlying this appeal, would have led a reasonable person to believe that such a right was, in fact, unqualified. Consequently, the [parents] were entitled to be notified by the court of the prospect that an adverse inference *might be drawn* from their silence. Put another way, if a trial court is inclined to draw an adverse inference against a parent for his or her failure to testify in a termination proceeding, it is incumbent upon the court to advise the parent accordingly.'' (Emphasis added; internal quotation marks omitted.) Id., 666. Our Supreme Court reasoned that Practice Book (2001) ''§ 34-1 (a) strongly suggests that [it is] incumbent upon the trial court, not only to state expressly that parents have a right to silence, but also to explain, to some extent, the parameters of that right. The question then becomes precisely how much explanation was required in [*In re Samantha C.*].'' Id., 667.

After reviewing the law regarding adverse inferences drawn from a party's failure to testify in noncriminal

proceedings; id., 634–67; the court answered the "how much" explanation question, stating that "a central purpose behind chapter 34, especially [Practice Book (2001)] § 34-1 (a), was to enable parents in termination proceedings to make informed choices in structuring their defense. With those principles in mind, we conclude that requiring the court to notify parents in the event that it may be inclined to draw an adverse inference is the most plausible procedural solution." Id., 673. Subsequently, Practice Book § 35a-7A was adopted and requires the judicial authority to "notify the parents or guardian that an adverse inference may be drawn from their failure to testify." The notice requirement of Practice Book § 35a-7A, therefore, is consistent with our Supreme Court's decision in *In re Samantha C.* In the present case, the court informed the father that the trial court may draw an adverse inference if he did not testify, which is in accord with Practice Book § 35a-7A.

In his appellate brief, the father states that the canvass the court gave at the start of trial was given pursuant to *In re Yasiel R.*, supra, 317 Conn. 773, and therefore was insufficient because it was not given pursuant to Practice Book § 35a-7A. This argument lacks merit, as it ignores the reasoning of *In re Yasiel R.*, which requires "a brief canvass of all parents immediately before a parental rights termination trial so as to ensure that the parents understand the trial process, their rights during the trial and the potential consequences." Id., 794. More importantly, however, is the fact that the canvass in *In re Yasiel R.* incorporates the notice required by § 35a-7A, i.e., "if the respondent does not intend to testify, he or she should also be advised that if requested by the petitioner, or the court is so inclined, the court may take an adverse inference from his or her failure to testify, and explain the significance of that inference." Id., 795.

Our review of the notice given by the trial court in the present case discloses that it was entirely consistent with the holding of our Supreme Court that the canvass "be given to all parents involved in a termination trial, not just those whose attorneys choose not to contest evidence. Indeed, we require that the canvass be performed at the very start of the termination trial, before a decision as to whether to challenge evidence has been communicated to the court. In so doing, the canvass we require does not single out those parents whose attorneys have made a tactical decision not to contest the evidence presented. As a result, the canvass we require does not interfere with the attorney-client relationship but serves to inform and protect *all* parents." (Emphasis in original.) Id., 794.

We find it of particular importance that our Supreme Court stated that the canvass was not to interfere with the attorney-client relationship. In the present case, the court advised the father of his rights before the start of evidence, at a time when the court was unaware of the evidence to come before it and, therefore, it was not in a position to determine whether it intended to draw an adverse inference if the father decided not to testify. At the end of the first day of trial, Beltz-Jacobson informed the court that the father may give "short testimony." On the second day of trial, however, Beltz-Jacobson informed the court that she did not have any witnesses. By giving the canvass set forth in *In re Yasiel R.* in the presence of both the father and Beltz-Jacobson at the start of trial, the court provided the necessary information that the father and Beltz-Jacobson could use to plan their trial strategy, free from any suggestion that the court had a preference as to whether the father should testify.

It is without question that a parent may not be compelled to testify at a termination of parental rights trial and need not testify on his or her own behalf. See

Practice Book § 32a-1; *In re Samantha C.*, supra, 268 Conn. 645. It also is without question that parents in a termination of parental rights proceeding are entitled to counsel. See Practice Book § 32a-1. Despite claiming that the court should have advised him that it intended to draw an adverse inference from his decision not to testify, the father argues that giving the notice required by Practice Book § 35a-7A at the start of trial may have a coercive effect on a parent's decision whether to testify. We disagree with the father's argument, as the notice provision of Practice Book § 35a-7A strikes a balance between a parent's right to remain silent and the risk that the trial court may draw an adverse inference from a parent's decision not to testify. Moreover, as our Supreme Court recognized, the purpose of former Practice Book (2001) § 34-1 (a) "was to enable parents in termination [of parental rights] proceedings to make informed choices in structuring their defense." *In re Samantha C.*, supra, 268 Conn. 673. Practice Book § 35a-7A has the same purpose. Whether a parent testifies at a termination of parental rights trial is a decision for the parent to make in consultation with his or her counsel without the coercive effect of the advisement for which the father argues. Practice Book § 35a-7A does not require a second notice; that rule itself provides notice to a parent that the court *may draw* an adverse inference from a parent's decision not to testify. Contrary to the father's argument, a notice provided at the start of the trial is the least coercive manner of advising a parent of his or her right to remain silent and the possible consequences of doing so. At the start of both the neglect proceeding and the termination trial, the father was advised of the possible consequences of his decision not to testify.

The father looks to General Statutes § 52-216c and *State* v. *Malave*, 250 Conn. 722, 737 A.2d 442 (1999), to support his position that the court was required to

advise him that it *would* draw an adverse inference from his decision not to testify. Both the statute and *Malave* are inapplicable to a termination of parental rights trial. Section 52-216c and *Malave* concern jury instructions and final arguments of counsel permitted in civil and criminal cases, respectively. Section 52-216c provides: "No court in the trial of a civil action may instruct the jury that an inference unfavorable to any party's cause may be drawn from the failure of any party to call a witness at such trial. However, counsel for any party to the action shall be entitled to argue to the trier of fact during closing arguments, except where prohibited by section 52-174, that the jury should draw an adverse inference from another party's failure to call a witness who has been proven to be available to testify." Although a termination of parental rights proceeding is noncriminal in nature; *In re Samantha C.*, supra, 268 Conn. 673; such cases are tried to the court, not to a jury. Furthermore, a parent has an unquestionable right to remain silent in a termination of parental rights proceeding. There is no such right in a civil trial subject to § 52-216c. Thus, § 52-216c is inapplicable in a termination of parental rights trial, as the statute pertains to jury instructions and the right of counsel to argue to the finder of fact the absence of available witnesses who might have been expected to testify.

Section 52-216c and *Malave* have their historical roots in the missing witness rule. As a matter of policy, in *Malave*, our Supreme Court abandoned the missing witness rule of *Secondino* v. *New Haven Gas Co.*, 147 Conn. 672, 165 A.2d 598 (1960), overruled in part by *State* v. *Malave*, 250 Conn. 722, 739, cert. denied, 528 U.S. 1170, 120 S. Ct. 1195, 145 L. Ed. 2d 1099 (2000),[12]

[12] In *Secondino*, our Supreme Court stated that "[t]he failure of a party to produce a witness who is within his power to produce and who would naturally have been produced by him, permits the inference that the evidence of the witness would be unfavorable to the party's cause." (Internal quotation marks omitted.) *Secondino* v. *New Haven Gas Co.*, supra, 147 Conn. 675. "[T]he jury charge explaining the rule commonly is referred to as the *Sec-*

in criminal cases. *State* v. *Malave*, supra, 250 Conn. 739. A brief review of the *Malave* decision illustrates why it is inapplicable to a termination of parental rights proceeding in which the trial court is the finder of fact.

In *Malave*, a 1999 decision, our Supreme Court examined the history of the missing witness rule and its associated jury instruction in civil and criminal cases. The court had "adopted the missing witness rule for civil cases more than seventy years ago . . . and expressly approved the rule for use in criminal cases nearly twenty-five years ago. . . . In 1998, however, the legislature prohibited the use of the missing witness instruction in civil cases; Public Acts 1998, No. 98-50 . . . ."[13] (Citations omitted.) Id., 729. The court set forth a number of policy reasons why the missing witness jury instruction was no longer appropriate in civil or criminal cases. Id., 730–38. The policy reason most relevant to the present case concerned jury instructions.[14] *Malave*, therefore, does not support the father's position because jury instructions are not relevant in termination of parental rights cases and counsel do not argue to a jury.[15]

ondino instruction or the missing witness instruction." *State* v. *Malave*, supra, 250 Conn. 724 n.2.

[13] The act was codified at § 52-216c. "The statement of purpose of the legislation abolishing the missing witness rule in civil cases was '[t]o overrule the decision of [our] Supreme Court in *Secondino* . . . and its progeny which results in longer trials with additional witnesses.' " (Emphasis omitted.) *State* v. *Malave*, supra, 250 Conn. 737 n.14; see footnote 12 of this opinion.

[14] The court was concerned about the influence a missing witness instruction may have on the jury. "[T]he risk that the jury will give undue weight to a witness' absence is further enhanced because, under the *Secondino* rule, the trial court expressly instructs the jury that it may draw an adverse inference from the party's failure to call the witness. [T]here is a difference between what the jury might infer on its own, which can never be completely controlled, and what the jury might think when the absence of certain evidence is highlighted by . . . the judge's instructions." (Internal quotation marks omitted.) *State* v. *Malave*, supra, 250 Conn. 735.

[15] In abandoning the *Secondino* rule, our Supreme Court did "not prohibit counsel from making appropriate comment, in closing arguments, about the

In a termination of parental rights trial, the trial court is the arbiter of fact and is well aware of the witnesses and evidence presented by each of the parties. By giving the notice required by Practice Book § 35a-7A at the beginning of trial, the trial court puts the respondent parent on notice that the court may draw an adverse inference if the parent does not testify. On the basis of that notice, the parent and his or her counsel can make a tactical decision regarding the evidence to present and whether the parent will testify. The notice informs a parent's trial strategy at the beginning of the case, not after the parent has presented his or her evidence, which is the time at which the court is able to draw an adverse inference, if at all.[16] Consequently, we conclude that the court properly informed the father of his right to remain silent and the possibility that the court may

absence of a particular witness, insofar as that witness' absence may reflect on the weakness of the opposing party's case." *State* v. *Malave*, supra, 250 Conn. 739. "Fairness, however, dictates that a party who intends to comment on the opposing party's failure to call a certain witness must so notify the court and the opposing party in advance of closing arguments. Advance notice of such comment is necessary because comment on the opposing party's failure to call a particular witness would be improper if that witness were unavailable due to death, disappearance or otherwise. That notice will ensure than an opposing party is afforded a fair opportunity to challenge the propriety of the missing witness comment in light of the particular circumstances and factual record of the case." Id., 740.

[16] In his brief, the father relies on dicta in *In re Jason B.*, 137 Conn. App. 408, 48 A.3d 676 (2012), that he has taken out of context. The father and the respondent in *In re Jason B.* both correctly noted that a trial court "must inform a respondent if it intends to draw an adverse inference from his or her decision not to testify." Id., 414. Immediately following that rule of law, this court stated: "See Practice Book § 35a-7A ('[i]f a party requests that the judicial authority draw an adverse inference from a parent's or guardian's failure to testify or the judicial authority intends to draw an adverse inference, either at the start of any trial or after the close of the petitioner's case-in-chief, the judicial authority shall notify the parents or guardian that an adverse inference may be drawn from their failure to testify')." Id., 414–15. The notice given by the court in the present case is consistent with the notice required, i.e., "an adverse inference may be drawn . . . ." Practice Book § 35a-7A. *In re Jason B.* does not support the father's contention on appeal.

draw an adverse inference if he chose to do so. A second notice that the court intended to draw such an inference was not required.[17]

In response to the father's claim, the petitioner argues that, even if we were to conclude that the court was required to notify the father that it would be drawing an adverse inference from the father's failure to testify, which we do not, any error was harmless in light of the court's detailed findings of fact in its memorandum of decision and its articulation. The petitioner contends that the trial court's articulation dispels any notion that the court's drawing of an adverse inference from the father's decision not to testify was determinative of the court's decision to terminate the father's parental rights as to his sons. We agree with the petitioner.

The question to consider with respect to harmless error is whether the claimed erroneous act of the trial court likely affected the result of the trial. *State* v. *Ledbetter*, 41 Conn. App. 391, 399, 676 A.2d 409 (1996), aff'd, 240 Conn. 317, 692 A.2d 713 (1997). "The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment." (Internal quotation marks omitted.) *In re Xavier H.*, 201 Conn. App. 81, 95, 240 A.3d

[17] Requiring a second notice also is inadvisable for another more pragmatic reason. Judges presiding at a court side trial generally do not determine what evidence to credit or what inferences to draw until all the evidence has been presented. A judge typically reviews all of the evidence, frequently reading transcripts of the proceeding and/or reviewing his or her notes and carefully considers the legal and factual issues presented, as well as the practical ramifications of a decision and their effect on the litigants. Consequently, we expect that in most termination of parental rights cases, the judge is unlikely to be prepared to say, during the presentation of evidence, much less at the start of evidence, before the intense deliberative process commences, that he or she has decided to draw an adverse inference because a parent has decided not to testify. In the present case, the father is proposing

1087, cert. denied, 335 Conn. 981, 241 A.3d 705, and cert. denied, 335 Conn. 982, 241 A.3d 705 (2020).

We have reviewed the court's factually detailed memorandum of decision and its articulation. The court's articulation is in keeping with its memorandum of decision, which is replete with factual findings and details regarding the father, the efforts made by the department to reunify him with the boys, the father's failure to comply with the court-ordered steps, his unwillingness to benefit from services offered to him, and the type of parenting the boys need due to their special needs. The court articulated that the father failed to achieve the degree of rehabilitation which would encourage the belief that in a reasonable time he could assume a responsible position in the lives of his sons.[18] On appeal, the father does not challenge any of the court's factual findings. We, therefore, agree with the petitioner that the notice given at the beginning of the termination trial was proper and that any impropriety was harmless.

II

The father also claims that this court should exercise its supervisory authority to adopt an advisement for the trial court to affirmatively notify the father that it would be drawing an adverse inference upon his decision not to testify at trial. We decline the father's invitation to exercise our supervisory authority as the present case does not present the type of extraordinary circumstance for which the exercise of our supervisory power

a rule that would require a judge to opine prematurely on a matter of great importance. We are not prepared to create such a rule.

[18] The father contends that the court's failure to advise him that it would be drawing an adverse inference for his failure to testify was harmful, because had he known of the adverse inference, he would have offered noncumulative testimony. This argument comes a bit late. The father did not file a motion to open the judgment or for reconsideration. The father has not provided a proffer of what his testimony might have been nor has he explained why he did not voluntarily offer it at trial, and how it would have affected any of the court's factual findings.

is intended. "Supervisory authority is an extraordinary remedy that should be used sparingly . . . . Although [a]ppellate courts possess an inherent supervisory authority over the administration of justice . . . [that] authority . . . is not a form of free-floating justice, untethered to legal principle . . . . Our supervisory powers are not a last bastion of hope for every untenable appeal. They are an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole . . . . Constitutional, statutory and procedural limitations are generally adequate to protect the rights of the [litigant] and the integrity of the judicial system. Our supervisory powers are invoked only in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts." (Internal quotation marks omitted.) *In re D'Andre T.*, 201 Conn. App. 396, 407, A.3d , cert. denied, 336 Conn. 902, A.3d (2020). Practice Book § 35a-7A ensures the fair and just administration of the courts in termination of parental rights cases. Consequently, there is no basis for this intermediate appellate court to exercise its supervisory authority.

The judgments are affirmed.

In this opinion the other judges concurred.

ROBERT MEYERS *v.* TOWN OF MIDDLEFIELD
(AC 42555)

Lavine, Prescott and Elgo, Js.*

Syllabus

The plaintiff, a building official for the defendant town of Middlefield, appealed from the judgment of the trial court dismissing his administrative appeal from the decision of the defendant's Board of Selectmen to

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

terminate his employment. The plaintiff was responsible for processing applications for certificates of occupancy and administering and enforcing the state building code. The board alleged, inter alia, that during the plaintiff's employment as the town building official, his performance and conduct regarding several long-standing projects was unreasonable and that he failed to follow instructions and directives. The board alleged that the plaintiff obstructed the issuance of a certificate of occupancy to P Co., a company that owned a commercial ski property. Thereafter, the board unanimously voted to terminate the plaintiff's employment and the plaintiff filed a complaint in the Superior Court, pursuant to statute (§ 29-260 (c)), appealing his discharge, which the court dismissed. *Held*:

1. The trial court did not err in determining that there was substantial evidence in the record to support the board's decision to terminate the plaintiff's employment as the town's building official: the evidence demonstrated that the plaintiff sought to carry out his vow of never granting P Co. a certificate of occupancy by constantly interjecting new or resolved compliance issues whenever P. Co. was on the verge of being issued a certificate of occupancy; moreover, there was substantial evidence of the plaintiff's insubordination when he abandoned his duties by leaving an inspection against instruction, repeatedly acted outside the scope of his role by raising matters outside his jurisdiction to obstruct the issuance of the certificate of occupancy to P Co., and misplaced paperwork submitted to him by P Co. on more than one occasion.
2. The plaintiff could not prevail on his claim that the trial court improperly upheld the board's decision to terminate his employment because the decision violated public policy, constituting a wrongful discharge, this claim having failed for the lack of a factual finding by the board or the trial court that the termination of his employment was pretextual and/or retaliatory; there was substantial evidence before the board to support the plaintiff's discharge on one or more of the grounds set forth in its notice of charges, as the facts presented to the board supported a conclusion that his dismissal was warranted for failing to perform the duties of his office, conduct which fell within the statutorily authorized basis in § 29-260 (b) to terminate his employment, as the record demonstrated that the plaintiff vowed that he would never issue a certificate of occupancy to P Co. regardless of P Co.'s compliance with the building code.

Argued September 15, 2020—officially released January 19, 2021

Procedural History

Administrative appeal from the decision of the defendant's board of selectmen terminating the plaintiff's employment as a building official, brought to the Superior Court in the judicial district of Middlesex and tried

to the court, *Frechette*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Eric R. Brown, for the appellant (plaintiff).

John A. Blazi, for the appellee (defendant).

Opinion

PRESCOTT, J. The plaintiff, Robert Meyers, appeals from the judgment of the Superior Court dismissing his administrative appeal from the unanimous decision of the Board of Selectmen of the Town of Middlefield (board) to terminate his employment as the statutory building official for the defendant, the town of Middlefield (town). On appeal, the plaintiff claims that the court improperly (1) concluded that the decision to terminate his employment was supported by substantial evidence in the record and (2) upheld the decision of the board to terminate the plaintiff's employment because the decision violated public policy. We disagree and, accordingly, affirm the judgment of the court.

The record reveals the following relevant facts and procedural history. The plaintiff was employed as a building official[1] for the town pursuant to General Statutes § 29-260 (a) since April, 2011.[2] As delineated in

[1] The terms "building official" and "building inspector" are used interchangeably by the parties. We use "building official" throughout this opinion to comport with the language of General Statutes § 29-260.

[2] General Statutes § 29-260 provides in relevant part: "(a) The chief executive officer of any town, city or borough . . . shall appoint an officer to administer the code for a term of four years . . . . Such officer shall be known as the building official. . . .

"(b) Unless otherwise provided by ordinance, charter or special act, a local building official who fails to perform the duties of his office may be dismissed by the local appointing authority . . . provided, prior to such dismissal, such local building official shall be given an opportunity to be heard in his own defense at a public hearing in accordance with subsection (c) of this section.

"(c) No local building official may be dismissed under subsection (b) of this section unless he has been given notice in writing of the specific grounds for such dismissal and an opportunity to be heard in his own defense,

§ 29-260 (a), the plaintiff was required to administer and to enforce the State Building Code (building code) in the town. The plaintiff also was responsible for processing applications for certificates of occupancy. Jon Brayshaw was the elected first selectman of the town when the plaintiff commenced his employment with the town.

In 2008, the town purchased property known as Powder Ridge Mountain Park, located at 99 Powder Hill Road in Middlefield (property). At some point during the property's vacancy between 2008 and 2012, the plaintiff sent a "Notice of Unsafe Structure" to the town regarding the property in which the plaintiff cited various violations of the building code. In September, 2012, the town sold the property to Powder Ridge Mountain Park and Resort, LLC (company). The plaintiff thereafter rescinded the "Notice of Unsafe Structure" in December, 2012.

After the purchase of the property by the company, the plaintiff requested additional work hours and support from the town in order for him to perform his duties with respect to other large scale construction projects underway in the town and to assist with oversight of the proposed renovations to the property. In response, the town hired another building official, Harwood Loomis,

personally or by counsel, at a public hearing before the authority having the power of dismissal. Such public hearing shall be held not less than five or more than ten days after such notice. Any person so dismissed may appeal within thirty days following such dismissal to the superior court for the judicial district in which such town, city or borough is located. . . . The court shall review the record of such hearing and if it appears that testimony is necessary for an equitable disposition of the appeal, it may take evidence or appoint a referee or a committee to take such evidence as the court may direct and report the same to the court with his or its findings of fact, which report shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may affirm the action of such authority or may set the same aside if it finds that such authority acted illegally or abused its discretion. . . ."

as a consultant, and also hired an assistant building official, Vincent Garofalo, to assist the plaintiff with the inspections of the property. The town also later enlisted the help of other state and local officials, including Deputy State Building Inspector Daniel Tierney, to assist the plaintiff with processing the application for a certificate of occupancy with respect to the property.

In November, 2015, Edward Bailey replaced Jon Brayshaw as the town's first selectman. Upon assuming his new role, Bailey became aware of ongoing conflict between Sean Hayes, the owner of the company, and the plaintiff. Specifically, one source of major conflict stemmed from the plaintiff's repeated denials of the company's applications for a certificate of occupancy for a second floor restaurant, bar, and kitchen that were located in the ski lodge on the property.

The company had begun renovating the second floor restaurant in December, 2015. Garofalo conducted an inspection of the second floor in December, 2015, and concluded that a temporary certificate of occupancy could be issued so long as a fire watch was on duty because the sprinkler system was not yet operational. The Middlefield Fire Department agreed to provide the fire watch service. The plaintiff, however, denied the company's request for a temporary certificate of occupancy, attributing the denial to the lack of an operational sprinkler system.

The plaintiff also issued an abatement order that led to the business closing temporarily. Tierney eventually waived the fire sprinkler requirement so that the company could receive a temporary certificate of occupancy and reopen for business. Despite Tierney's waiver, the plaintiff proceeded again to deny the temporary certificate of occupancy due to the absence of the sprinkler system. The town's fire marshal informed the company that the fire department no longer could provide its fire watch services because the company did not have a temporary certificate of occupancy.

One month later, a construction services building official completed an inspection of the property for an electrical permit for fire pump wiring and determined that the building code requirements had been met. When Garofalo advised the plaintiff that the company's electrical permit was ready for approval, the plaintiff indicated to Garofalo that he would issue it. Despite the plaintiff's representation to Garofalo, the plaintiff five days later raised an issue with the electrical permit application. The plaintiff claimed that the company was in violation of the building code because the fire pump lacked a reliable source of power and needed an additional source of power or backup power. The plaintiff further claimed that he could not issue an electrical permit with the ongoing fire pump violations unless the company submitted a modification request and received approval from the state waiving the company's need to satisfy the applicable building code provision. Tierney and other officials had informed the plaintiff that no such modification request was required because the company was not in violation of the building code as it pertained to the wiring for the fire pump. After meeting resistance from the plaintiff, Tierney suggested to the company that it should submit a modification request, despite not needing one, in order to avoid any further impediments to the renovation project. The company then submitted a modification request in February, 2016, that was subsequently approved by Tierney. After receiving the approval, the company sought another temporary certificate of occupancy from the plaintiff, but, rather than issuing the temporary certificate, the plaintiff raised another issue with the company's property as grounds for denying the company a temporary certificate of occupancy.

On March 4, 2016, the plaintiff requested information from Garofalo about an inspection of the septic pump

wiring. Garofalo informed the plaintiff that the pump had no bearing on whether to grant a temporary certificate of occupancy because the pump was not a part of the structure and, thus, it did not require any approval by the building official. Nevertheless, an inspection was completed at the plaintiff's insistence, and the pump passed inspection on March 7, 2016. The plaintiff received notice of the pump inspection results, and the company immediately requested that he issue a certificate of occupancy. The plaintiff informed the company that he would conduct a final walk-through of the property the following week before issuing a certificate of occupancy.

Before the walk-through took place, Garofalo raised his concerns to Bailey in an e-mail about the plaintiff's conduct throughout the Powder Ridge renovation project. Garofalo believed, on the basis of his observations, that the plaintiff was using insignificant compliance issues as a pretext for denying the company's temporary certificate of occupancy, that the plaintiff was not interested in compliance or assisting the company to become compliant, and that the plaintiff was ignoring his official duties.

The final walk-through did not take place until April 11, 2016, after which the town's fire chief indicated that a certificate of occupancy could be issued. In response to an advisement by both Garofalo and the fire chief that the certificate of occupancy should be issued, the plaintiff stated that he could not approve the request for a certificate of occupancy because he was not permitted to attend the final walk-through and did not have paperwork for propane tanks that were located outside the company's ski lodge. Tierney informed the plaintiff that the propane tanks had no bearing on the certificate of occupancy approval and that, even if they did, as noted by Hayes on numerous occasions, the company had sub-

mitted the propane tank applications in 2012 and 2013,[3] and the plaintiff had failed to take any action on those applications. On May 19, 2016, the plaintiff referred Hayes to the Office of the State's Attorney for criminal prosecution for alleged building code violations at the property, citing an earlier sprinkler code violation as the basis for the referral, despite the fact that the sprinkler system was now compliant with the building code. No action was taken by the Office of the State's Attorney.

On June 1, 2016, the company submitted another request for a certificate of occupancy. On June 15, 2016, the plaintiff conducted an inspection of the property. After the inspection, in a memorandum prepared by Bailey,[4] Bailey indicated that he asked the plaintiff to submit a report to him on the inspection by June 16, 2016, to which the plaintiff responded he could not do so because it was an "unreasonable request." Bailey agreed to extend the deadline to June 17, 2016. In a June 16, 2016 e-mail, the plaintiff responded to the company's June 1, 2016 request by informing the company that he would not issue the certificate of occupancy because the company had not addressed the propane tank violation that the plaintiff had pointed out earlier. The plaintiff then submitted the inspection report to Bailey on June 21, 2016, four days later than the June 17, 2016 deadline Bailey had set. The inspection report included a denial of the company's request for a certificate of occupancy and cited, inter alia, parking lot violations and the absence of a permit for one of the propane tanks.

After the plaintiff's denial of the company's application for a certificate of occupancy because the company's propane tank outside the building purportedly

[3] Although the owner, Hayes, stated in his communications with the plaintiff that the applications were submitted in 2012 and 2013, the record shows they were actually submitted in 2013 and 2014.

[4] Bailey documented his interactions with the plaintiff in numerous memoranda.

required a permit under the building code, Tierney sought to clarify for the plaintiff that the propane tanks were not within the jurisdiction of the building official. Hayes then appealed the plaintiff's decision by way of an e-mail to the State Building Inspector, Joseph Cassidy, seeking clarification regarding the provisions in the building code relied on by the plaintiff in his denial of the company's application. In response to Hayes' appeal, Cassidy sent a letter dated June 28, 2016, to Hayes and to the plaintiff informing them that the local fire marshal had primary jurisdiction over the propane tanks, not the local building official, and that the installation of the tanks did not fall within the building code. Despite Cassidy's clarification regarding the governing authority over propane tanks, the plaintiff continued to disagree with Cassidy's interpretation of the building code.

On July 5, 2016, Tierney provided the plaintiff with an e-mail from William Abbott, the State Fire Marshal, to inform the plaintiff that the provisions on which he had relied in construing the building code regarding the propane tanks had been repealed on January 1, 2015. The plaintiff had been relying incorrectly on a 2009 revision of the building code. Nevertheless, the plaintiff claimed that Tierney, Cassidy, and Abbott were wrong in their construction of the building code, which prompted Bailey to insist that the plaintiff personally reach out to Abbott to discuss the issue regarding the propane tanks. The plaintiff, however, explicitly refused to do so.

Hayes submitted another formal request to the plaintiff for the property's certificate of occupancy on July 5, 2016, and also requested an inspection of the second floor restaurant. The plaintiff told the company that he had left a letter that was ready to be sent out by Nancy Davidson, the land use office assistant, but Davidson did not see such letter upon her return to the office on

July 6, 2016.[5] In a memorandum written by Bailey, Bailey indicated that the plaintiff refused to conduct the inspection as requested by the company, stating that he was "too busy" to inspect the company's property and "had other things to do." On July 8, 2016, Hayes reached out to state and local officials in an e-mail to express his frustration with the issues he had faced in the past two years in attempting to obtain a certificate of occupancy from the plaintiff. Hayes also disclosed in the e-mail that the plaintiff publicly had stated that he never would sign the certificate of occupancy for the property.

In Bailey's final memorandum regarding his interactions with the plaintiff, Bailey detailed the final incident that led to the institution of termination proceedings against the plaintiff. Bailey wrote that while he and the plaintiff were at the company's property for an inspection on July 8, 2016, the plaintiff raised new issues that he had never raised before. Bailey also wrote that, during the inspection, Hayes informed the plaintiff again that he already had submitted applications for the propane tanks in 2012 and 2013, which were awaiting the plaintiff's approval. The plaintiff responded to Hayes by stating that he did not want to hear what Hayes had to say regarding the applications. The plaintiff then left, indicating that he did not want to be involved in a "hostile situation." Despite Bailey's order that the plaintiff stay and complete the inspection, the plaintiff left without completing the inspection. Bailey placed the plaintiff on paid administrative leave on July 12, 2016, following the incomplete inspection at the property.

An investigation by the board into the plaintiff's performance and conduct ensued. The board consisted of

[5] Davidson made a handwritten notation on the e-mail sent by the plaintiff that she had not seen a letter at her desk from the plaintiff upon her return to the office on July 6, 2016.

Bailey, Taryn Ruffino, and Brayshaw. Predisciplinary hearings were held by the board thereafter, during which the plaintiff and his union representatives[6] were allowed to respond to the concerns raised about the plaintiff's performance and conduct as a building official. The predisciplinary hearings took place on August 2, October 13, November 9, and December 13, 2016.

On January 18, 2017, Bailey sent the plaintiff a written notice stating that the board would conduct a public hearing on January 24, 2017, to consider terminating the plaintiff from his position. The notice also specifically outlined the reasons why the board was considering such action: "[1] Your failure and/or refusal to promptly [and] reasonably perform your duties, including but not limited to long-standing projects such as Powder Ridge. Indeed, you allowed months to pass with little if any follow-up to resolve such long-term projects. Your failure and/or refusal in this regard is supported by the complaints that the [t]own has received that you have intentionally and unjustifiably obstructed and prevented Powder Ridge from obtaining a certificate of occupancy for an extended period of time and your own statements made on several occasions that you will never issue such a certificate of occupancy with respect to that project. It is further supported by your failure to accept guidance and/or directives of state and local officials who were assisting with resolving this project. [2] Your failure to maintain and retain proper documentation submitted by applicants and records of your own actions with respect to such long-term projects such as Powder Ridge. Such documentation issues include errors and inaccuracies and failure to provide relevant and required backup for legal documents. [3]

[6] The plaintiff was protected by a collective bargaining agreement with the AFSCME Council 4, Local 818 union. A provision in the collective bargaining agreement provided that the plaintiff could be terminated from his position as a building official only for just cause.

Your failure to follow reasonable instructions and/or abide by your assigned work hours including but not necessarily limited on the following dates: January 20, 2016, April 11, 2016, May 12, 2016, May 13, 2016, May 18, 2016, and July 8, 2016. [4] Your display of inappropriate conduct and/or insubordination on May 12, 2016, May 13, 2016, May 19, 2016 and July 8, 2016."

A public hearing moderated by Bruno Morasutti, the town attorney, was conducted on January 24, 2017. The evidence presented to the board during the public hearing included testimony, e-mails, memoranda written by Bailey detailing his observations, and other documents. After considering the evidence before it, in a special meeting held on February 16, 2017, the board unanimously voted to terminate the plaintiff from his position as the building official with an effective termination date of February 21, 2017. The board did not issue written findings regarding the factual basis for its decision to terminate the plaintiff or state explicitly which of the grounds for termination listed in the notice of charges it deemed established.

After the termination of his employment, the plaintiff filed a complaint with the Superior Court pursuant to § 29-260 (c), appealing the board's decision to terminate his employment. After the parties' submitted briefs in support of their respective positions, the court conducted a hearing limited to oral argument. The court subsequently issued a memorandum of decision in which it concluded that the plaintiff had failed to demonstrate that the board had acted improperly. In doing so, the court first discussed the appropriate standard of review of the board's decision. The court noted that there is a dearth of authority on the standard of review for administrative appeals brought pursuant to § 29-260. The court then determined that it should use the standard of review applicable in appeals from decisions of municipal zoning boards. In most circumstances, that standard

requires a reviewing court to uphold the decision of the zoning board provided that the board did not unreasonably, arbitrarily or otherwise abuse its discretion, and the decision is supported by substantial evidence. See, e.g., *Rapoport* v. *Zoning Board of Appeals*, 301 Conn. 22, 32–34, 19 A.3d 622 (2011).

Applying that standard, the court determined that the board did not abuse its discretion or act illegally in deciding to terminate the plaintiff's employment because there was substantial evidence in the record to support the board's decision to terminate the plaintiff from his position. Specifically, the court concluded that there was substantial evidence before the board that the plaintiff failed to perform his duties when he intentionally obstructed, without justification, the issuance of a certificate of occupancy for the property. Moreover, the court concluded that the substantial evidence before the board showed that the plaintiff neglected to "pass on items that fell under the building code, walked off of an inspection of Powder Ridge," and repeatedly raised additional issues that were not under the building code and therefore his jurisdiction, thereby leading to an inference that the plaintiff did so in an improper attempt to prevent the company from obtaining a certificate of occupancy. The court dismissed the plaintiff's appeal on January 17, 2019.

This appeal followed. Additional facts will be set forth as necessary.

I

We first address the plaintiff's factual challenge to the propriety of the board's decision to terminate his employment pursuant to § 29-260. Specifically, the plaintiff asserts that the court improperly determined that there was substantial evidence in the record to support

the board's decision to terminate his employment as the town's building official.[7] We are not persuaded.

At the outset, as a matter of first impression, we first must establish the proper standard of appellate review of the propriety of a board's decision to terminate a building official's employment pursuant to § 29-260. Section 29-260 (c) itself contains some language bearing on the standard of review: "The court may affirm the action of [the board] or may set [the board's decision] aside if it finds that [the board] acted illegally or abused its discretion. . . ." General Statutes § 29-260 (c). The statute, however, does not address the manner in which this determination should be made.

The town asserts that this court, consistent with the trial court's approach, should adopt the substantial evidence test typically applied in zoning appeals to review the plaintiff's claims on appeal. The plaintiff asserts that, with respect to his claim that the board's decision to terminate his employment violates public policy, this court should apply a de novo standard of review because it is fundamentally a legal determination. With respect to his factual challenge to the propriety of the board's decision, the plaintiff concedes that the substantial evidence standard of review should be applied, but relies on cases applying that standard when reviewing decisions from municipal personnel and pension appeals boards.

We conclude that we should adhere to the standard of review set forth in administrative appeals from municipal boards and agencies[8] outside of the zoning context. See, e.g., *O'Connor* v. *Waterbury*, 286 Conn. 732,

[7] In his brief on appeal, the plaintiff set forth his claims in a different order. For the sake of convenience, we discuss the plaintiff's claims in reverse order.

[8] The Uniform Administrative Procedure Act (UAPA), codified at General Statutes § 4-166 et seq., by its terms does not apply to appeals from municipal administrative agencies. An appeal is governed by the UAPA only if the aggrieved party is appealing a final decision of a "*state* board, commission,

740–41, 945 A.2d 936 (2008) (administrative appeal from decision of Waterbury's retirement board). The present appeal raises legal and factual claims that are akin to the types of claims raised in administrative appeals from the decisions of boards of selectmen or similar types of administrative agencies in the employment context. See *Rodgers* v. *Board of Education*, 252 Conn. 753, 760–61, 749 A.2d 1173 (2000) (appeal from board of education's decision to terminate tenured teacher's employment); *Fagan* v. *Stamford*, 179 Conn. App. 440, 453–55, 180 A.3d 1 (2018) (appeal from pension trust fund board's decision to award former police officer disability pension that was one half his annual compensation); see also *Greene* v. *Waterbury*, 126 Conn. App. 746, 749–50, 12 A.3d 623 (2011) (appeal from retirement board's denial of former firefighter's request to resubmit disability pension application).[9]

Accordingly, to the extent that the plaintiff challenges the factual conclusions of the board, we review his claims pursuant to the substantial evidence standard set forth in *O'Connor*: "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court

department or officer authorized by law to make regulations or to determine contested cases . . . ." (Emphasis added.) General Statutes § 4-166 (1); see also General Statutes § 4-183 (a).

[9] In determining the appropriate standard of review, we decline to rely on municipal land use appeals, as the trial court did here, for a source of those standards of review. Although there may be significant similarities between the standards of review applied in land use cases and other types of appeals from municipal agencies, we recognize that land use proceedings are highly regulated and may involve different standards of review in certain contexts such as affordable housing appeals. See chapter 124 of the General Statutes; compare *Property Group, Inc.* v. *Planning & Zoning Commission*, 226 Conn. 684, 697–98, 628 A.2d 1277 (1993), with *River Bend Associates, Inc.* v. *Zoning Commission*, 271 Conn. 1, 21–25, 856 A.2d 973 (2004).

may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . .

"The substantial evidence rule governs judicial review of administrative fact-finding . . . . An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . . It is fundamental that a plaintiff has the burden of proving that the [municipal board], on the facts before [it], acted contrary to law and in abuse of [its] discretion . . . . The law is also well established that if the decision of the [municipal board] is reasonably supported by the evidence it must be sustained. . . . This substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review." (Citations omitted; internal quotation marks omitted.) *O'Connor* v. *Waterbury*, supra, 286 Conn. 741–42

Before discussing the evidence in the record, it is important to emphasize that the board gave notice of several bases on which it was considering termination. As we previously discussed, on January 18, 2017, the town sent the plaintiff a notice that listed the reasons why the board was considering his dismissal. Specifically, the notice indicated that the plaintiff had (1) failed and/or refused to promptly and reasonably perform his duties, including but not limited to long-standing projects such as Powder Ridge, where the plaintiff allowed months to pass with little if any follow-up to resolve such long-term projects, (2) failed to maintain and to

retain proper documentation submitted by applicants and records of his own actions with respect to such long-term projects as Powder Ridge, including documentation of errors and inaccuracies and a failure to provide relevant and required backup for legal documents, (3) failed to follow reasonable instructions and/or to abide by his assigned work hours including but not limited to January 20, April 11, May 12, May 13, May 18 and July 8, 2016, and (4) displayed inappropriate conduct and/or insubordination on May 12, May 13, May 19, and July 8, 2016.

Moreover, it is important to emphasize that the board did not issue written findings regarding the factual basis for its decision to terminate the plaintiff's employment or state explicitly which of the grounds for termination listed in the notice of charges it deemed established. With respect to the lack of written findings of fact by the board, the plaintiff failed to pursue a number of potential avenues to remedy this problem. First, the plaintiff failed to request, as permitted by § 29-260 (c), that the court take additional evidence or testimony. The plaintiff also failed to request that the court "appoint a referee or a committee to take such evidence as the court may direct and report the same to the court with his or its findings of fact, which report shall constitute a part of the proceedings upon which the determination of the court shall be made." General Statutes § 29-260 (c). Finally, the plaintiff could have requested that the court, while maintaining its jurisdiction over the appeal, remand the case to the board so that the board could issue written factual findings. See, e.g., *Hartford* v. *Hartford Electric Light Co.*, 172 Conn. 71, 73, 372 A.2d 131 (1976) (reviewing court authorized to remand matter to administrative agency for additional findings); *Commission on Human Rights & Opportunities* v. *Hartford*, 138 Conn. App. 141, 154 n.9, 50 A.3d 917 (reviewing court authorized to remand matter to agency

for articulation of factual findings), cert. denied, 307 Conn. 929, 55 A.3d 570 (2012). The plaintiff, however, failed to pursue any of the described avenues, thereby limiting the scope of our review of the board's decision. Thus, if we find substantial evidence to support any of the alleged grounds for dismissal, then we must affirm the board's decision to terminate the plaintiff's employment. See, e.g., *Samperi* v. *Inland Wetlands Agency*, 226 Conn. 579, 587–88, 628 A.2d 1286 (1993) ("[a] reviewing court must sustain the agency's determination if an examination of the record discloses [substantial] evidence that support any one of the reasons given" (internal quotation marks omitted)); *Keiser* v. *Conservation Commission*, 41 Conn. App. 39, 42, 674 A.2d 439 (1996) ("[I]t is improper for the reviewing court to reverse an agency decision simply because [the] agency failed to state its reasons for its decision on the record. The reviewing court instead must search the record of the hearings before the commission to determine if there is an adequate basis for its decision." (Internal quotation marks omitted.)). Because the board made no explicit findings as to which of these grounds had been proven, and the plaintiff has failed to take steps to remedy the lack of specific findings, we review the evidence that was before the board to determine whether there was substantial evidence to support the board's decision to dismiss the plaintiff on the basis of *any* of the grounds set forth in the notice.

On appeal, the plaintiff seeks to reduce the reason for his dismissal by the board as a termination rooted in a mere disagreement about the interpretation of the building code provisions and political corruption. A review of the evidence that was before the board, and which we must assume the board credited, tells a different story.

The record contains evidence that the plaintiff stated on more than one occasion that he would *never* grant

the company a certificate of occupancy. The board was free to infer from this evidence that the plaintiff would continue to refuse to issue a certificate of occupancy for the property even if the company was in full compliance with the exact letter of the building code. Such conduct, of course would constitute an abject failure of the building official "to perform the duties of his office" within the meaning of § 29-260 (b).

The board's conclusion that the plaintiff would never issue a certificate of occupancy to the company even if the property was in full compliance with the building code is buttressed by not just the plaintiff's words but also his conduct. For example, Garofalo had found it appropriate for the restaurant to be granted a temporary certificate of occupancy after his and Tierney's inspection in January, 2016. Garofalo had approved the grant of the temporary certificate of occupancy after the local fire department offered to provide fire watch services because the sprinkler system was not operational. Nevertheless, the plaintiff decided to ignore Garofalo's findings and issued a notice of violation to the company and ordered closure of the restaurant on January 15, 2016. Moreover, even though Tierney granted the company a waiver of the sprinkler system requirement on January 19, 2016, the plaintiff issued a *second* notice of violation to the company on January 21, 2016, on the basis of the very sprinkler system for which Tierney had issued a waiver. Accordingly, there was no valid basis for the second notice of violation, and the board reasonably could have concluded that the plaintiff's conduct is a clear reflection of his desire to impede the company from ever receiving a certificate of occupancy.

In an even more telling act of interference with the company's legitimate efforts to obtain a certificate of occupancy, the plaintiff referred the company's owner for criminal prosecution months later on May 19, 2016,

based on the very sprinkler system issue that the company already had resolved and for which it previously had received a waiver.

In furtherance of his stated goal, the plaintiff raised other issues outside the purview of the building code as a pretext for repeated denials. For instance, the plaintiff frustrated the issuance of a temporary certificate of occupancy by requiring an inspection of the septic pump wiring, even after Garofalo informed the plaintiff that the pump was not a part of the structure and thus did not need to be inspected in order for the plaintiff to issue a temporary certificate of occupancy. In response, the company had the pump wiring inspected even though it was not necessary to do so. Nonetheless, although the pump wiring underwent and passed inspection, the plaintiff still refused to grant the company's renewed request for a certificate of occupancy even after the plaintiff received notice of the favorable septic pump inspection results.

Additionally, on April 6, 2016, the Middlefield fire chief recommended that a certificate of occupancy should be issued for the second floor restaurant and bar at the property after finding that the company had met the necessary requirements. After a final walk-through on April 11, 2016, with Garofalo and other officials, Garofalo sent an e-mail the next day to the plaintiff and the other parties involved that all outstanding issues with the restaurant had been resolved and a certificate of occupancy should be issued for the restaurant and bar. The plaintiff again denied the company's request for the certificate of occupancy in a letter sent to the company on April 20, 2016, citing as grounds for the denial that he was not allowed to attend the inspection and noting the propane tank permit issue, even though the propane tanks had no bearing on issuing the certificate of occupancy.

On June 1, 2016, the company again requested a certificate of occupancy in an e-mail to the plaintiff. The plaintiff completed another inspection of the property on June 15, 2016, and sent a certificate of occupancy report to Hayes on June 17, 2016, refusing to grant a certificate of occupancy. The plaintiff cited purported violations that were outside the second floor restaurant and bar such as parking lot violations and a purported propane tank violation. The plaintiff also insisted that the propane tanks were within the purview of the building code despite being told otherwise by Cassidy, Abbott, and Tierney. Even though the plaintiff dwelled on the purported lack of propane tank permits, the company actually had submitted permit applications on two separate occasions in 2013 and 2014, on which the plaintiff had failed to act and also apparently had misplaced. The evidence of the plaintiff's unwillingness or inability to account for the applications previously submitted to the plaintiff by the company supports the board's decision to terminate the plaintiff's employment for failing to maintain and to retain proper documentation submitted by applicants, as alleged in the notice of charges. This evidence is also consistent with the plaintiff's statements that he would never issue a certificate of occupancy to the company.

Finally, on July 8, 2016, during the last inspection that was requested by the company, the plaintiff chose to leave mid-inspection and failed to complete the inspection because he did not want to answer the owner's questions regarding the propane permit applications that had been submitted to the plaintiff but on which the plaintiff had yet to act. The plaintiff chose to abandon his duties by leaving the site of the inspection despite being instructed by Bailey to complete the inspection. The plaintiff's decision to ignore Bailey's directive is evidence that supports the board's decision to terminate

the plaintiff's employment for insubordination and for failure to abide by his assigned work hours.

In sum, there is substantial evidence in the record that tends to demonstrate that the plaintiff sought to carry out his stated vow of never granting the company a certificate of occupancy by constantly interjecting new or resolved compliance issues whenever the company was on the verge of being issued a certificate of occupancy. The plaintiff also frustrated the application process with collateral matters and misplaced paperwork submitted to him by the company on more than one occasion. Furthermore, the record contains substantial evidence of the plaintiff's insubordination when he abandoned his duties by leaving the inspection against Bailey's instruction and also repeatedly acted outside the scope of his role by raising matters outside his jurisdiction to obstruct the issuance of the certificate of occupancy.

Consequently, because one of the main functions of the plaintiff's role was to issue a certificate of occupancy for those buildings that complied with the building code, there was substantial evidence presented to the board to support a conclusion that the plaintiff failed to perform his duties when he stated he would never issue the company a certificate of occupancy and repeatedly denied the company's application for a temporary certificate of occupancy and a certificate of occupancy despite the company's compliance with the building code. Because there was substantial evidence adduced at the hearing to support the board's decision to terminate the plaintiff's employment on at least one of the grounds set forth in the notice, we conclude that the court properly rejected the plaintiff's attack on the factual determinations implicitly made by the board.

II

The plaintiff next claims that the court improperly upheld the decision of the board to terminate his employ-

ment because the decision violated public policy, thereby, constituting a wrongful discharge. Specifically, the plaintiff argues that he was wrongfully discharged because his discharge contravened a clear public policy of the state to promote public safety by requiring a building official to ensure full compliance with the building code and to "be free of political or commercial pressures or considerations in rendering his decisions regarding compliance with the building code." In the plaintiff's view, the board's decision to discharge him from his position for the reasons set forth in the notice of charges was pretextual. Instead, the plaintiff attempts to characterize the action of the board as an improper attempt to ensure that the redevelopment of the property was successful and that the property returned to the municipal tax rolls. The plaintiff argues that any dispute about his application of the building code should not have been resolved by the termination of his employment but, instead, addressed through the proper statutory appeal procedures set forth in General Statutes §§ 29-252 (d)[10] and 29-266.[11] We are not persuaded by his public policy claim for the reasons that follow.

[10] General Statutes § 29-252 (d) provides: "The State Building Inspector or his designee shall review a decision by a local building official or a board of appeals appointed pursuant to section 29-266 when he has reason to believe that such official or board has misconstrued or misinterpreted any provision of the State Building Code. If, upon review and after consultation with such official or board, he determines that a provision of the code has been misconstrued or misinterpreted, he shall issue an interpretation of said code and may issue any order he deems appropriate. Any such determination or order shall be in writing and be sent to such local building official or board by registered mail, return receipt requested. Any person aggrieved by any determination or order by the State Building Inspector under this subsection may appeal to the Codes and Standards Committee within fourteen days after mailing of the decision or order. Any person aggrieved by any ruling of the Codes and Standards Committee may appeal in accordance with the provisions of subsection (d) of section 29-266."

[11] General Statutes § 29-266 provides in relevant part: "(a) A board of appeals shall be appointed by each municipality. . . .

"(b) When the building official rejects or refuses to approve the mode or manner of construction proposed to be followed or the materials to be used in the erection or alteration of a building or structure, or when it is claimed

At the outset, it is important to note that the plaintiff's public policy claim is rooted doctrinally in two distinct types of cases. First, the plaintiff relies on our Supreme Court's decision in *Sheets* v. *Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980). In *Sheets*, a wrongful employment termination case, the court considered whether public policy limits an employer's right to terminate an at-will employee's position where the employee alleges a retaliatory discharge. The plaintiff in *Sheets* alleged that his employer terminated his at-will employment in retaliation for the plaintiff's insistence that the employer adhere to requirements imposed by a certain food labeling statute. Id., 473. The court was faced with determining whether an "exception to the traditional rules governing employment at will" should be recognized "so as to permit a cause of action

that the provisions of the code do not apply or that an equally good or more desirable form of construction can be employed in a specific case, or when it is claimed that the true intent and meaning of the code and regulations have been misconstrued or wrongly interpreted, or when the building official issues a written order under subsection (c) of section 29-261, the owner of such building or structure . . . may appeal in writing from the decision of the building official to the board of appeals. When a person other than such owner claims to be aggrieved by any decision of the building official, such person . . . may appeal, in writing, from the decision of the building official to the board of appeals . . . .

"(c) If, at the time that a building official makes a decision under subsection (b) of this section, there is no board of appeals for the municipality in which the building official serves, a person who claims to be aggrieved by such decision may submit an appeal, in writing, to the chief executive officer of such municipality. If . . . the municipality fails to appoint a board of appeals . . . such officer shall file a notice of such failure with the building official from whom the appeal has been taken and, prior to such filing, mail a copy of the notice to the person taking the appeal. Such person may appeal the decision of the building official to the Codes and Standards Committee . . . . If the municipality succeeds in appointing a board of appeals, the chief executive officer of the municipality shall immediately transmit the written appeal to such board, which shall review the appeal in accordance with the provisions of subsection (b) of this section.

"(d) Any person aggrieved by any ruling of the Codes and Standards Committee may appeal to the superior court for the judicial district where such building or structure has been or is being erected."

for wrongful discharge where the discharge contravenes a clear mandate of public policy." Id., 474.

The plaintiff's reliance on *Sheets* in maintaining his argument that the board's decision to terminate his employment was illegal and violated public policy is misplaced. The plaintiff in *Sheets* had little protection from an improper discharge because he was an at-will employee. In the present case, the plaintiff is not an at-will employee who can be fired for virtually any reason but instead is protected by the safeguards contained in § 29-260 (b) that permit the termination of his employment if he "fails to perform the duties of his office . . . ." Additionally, the plaintiff enjoyed the protections of a collective bargaining agreement[12] and thus could only be terminated for just cause. " 'Just cause' substantially limits employer discretion to terminate, by requiring the employer, in all instances, to proffer a proper reason for dismissal, by forbidding the employer to act arbitrarily or capriciously." *Sheets* v. *Teddy's Frosted Foods, Inc.*, supra, 179 Conn. 475. Unlike in *Sheets*, in which the court decided to formulate judicial protections for an at-will employee who otherwise would have no recourse when faced with an improper retaliatory discharge; id., 477; the plaintiff in the present case does not need the protection of a public policy exception that prevents an employer from terminating an employee's employment because he already is entitled to the statutory and collective bargaining protections that apply to him.

The plaintiff's public policy claim also is grounded in a second line of authority that permits a reviewing court to overturn a decision of an arbitrator in an employment matter if the arbitrator's decision violates public policy. See, e.g., *Burr Road Operating Co. II, LLC* v.

[12] "Collective bargaining agreements ordinarily contain provisions prohibiting dismissal without 'cause' or 'just cause' which now serve to protect a significant portion of the work force from groundless dismissal." *Magnan* v. *Anaconda Industries, Inc.*, 193 Conn. 558, 563–64, 479 A.2d 781 (1984).

New England Health Care Employees Union, District 1199, 316 Conn. 618, 630–31, 114 A.3d 144 (2015). As we recently stated, "[t]o determine whether an arbitration award must be vacated for violating public policy, we employ a two-pronged analysis. . . . First, we must determine whether the award implicates any explicit, well-defined, and dominant public policy. . . . To identify the existence of a public policy, we look to statutes, regulations, administrative decisions, and case law. . . . Second, if the decision of the arbitrator does implicate a clearly defined public policy, we then determine whether the contract, as construed by the arbitration award, violates that policy." (Internal quotation marks omitted.) *Bridgeport Board of Education* v. *NAGE, Local RI-200*, 160 Conn. App. 482, 491, 125 A.3d 658 (2015). "A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." *United Paperworkers International Union, AFL-CIO* v. *Misco, Inc.*, 484 U.S. 29, 42, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987).

The present appeal, of course, does not arise from an arbitration proceeding involving a consensual resolution of the contractual rights of the parties. Instead, the underlying administrative proceeding is statutorily authorized and governed by the standards and procedures dictated by the legislature in § 29-260. If the board's decision to terminate the plaintiff's employment for failing to discharge the duties of his office was determined by a court to be "illegal" because it violated or undermined the plaintiff's rights or some well established public policy, then the plaintiff would undoubtedly be entitled to a reversal of the board's decision. In other words, the plaintiff's reliance on the arbitration cases is misplaced and, more importantly, unnecessary, because the

legislature has authorized a reviewing court to reverse a board's decision if it is "illegal."

The fundamental flaw in the plaintiff's public policy claim is that it lacks the necessary factual predicate,[13] that is, a factual finding by the board or the Superior Court that the town's termination of the plaintiff's employment was pretextual and/or retaliatory. Indeed, if the facts as found by the board, or by the Superior Court pursuant to § 29-260 (c), were that the plaintiff should be terminated from his position because he had performed his duties by raising legitimate issues with town officials about the meaning, application, and enforcement of the building code as it relates to the property, he would be well-placed to assert that his dismissal was illegal.

For the reasons set forth in part I of this opinion, there was substantial evidence before the board to support the plaintiff's discharge on one or more of the grounds set forth in its notice of charges. The facts presented to the board amply supported a conclusion that his dismissal was warranted for failing to discharge the duties of his office. We emphasize that substantial evidence was presented to support a conclusion that the plaintiff had vowed that he would never issue a certificate of occupancy to the company regardless of the company's compliance with the building code. Such conduct squarely falls within the statutorily authorized basis to

[13] Citing *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, 252 Conn. 416, 429 n.7, 747 A.2d 1017 (2000), and other arbitration cases, the plaintiff asserts that this court, in reviewing his public policy claim, should exercise de novo review of the board's decision. We disagree. Although the question of whether an "explicit, well-defined, and dominant public policy" exists is a legal question subject to plenary review; (internal quotation marks omitted) *Bridgeport Board of Education* v. *NAGE, Local RI-200*, supra, 160 Conn. App. 491; the factual question of whether the employer dismissed the employee for a legitimate reason that does not implicate or transgress the identified public policy is subject to more deferential review. In the context of an administrative appeal pursuant to § 29-260, that standard of review invokes the substantial evidence test as described in part I of this opinion.

terminate his employment: a failure "to perform the duties of his office . . . ." General Statutes § 29-260 (b). Consequently, the plaintiff's public policy claim fails for the lack of the necessary factual predicate.

The judgment is affirmed.

In this opinion the other judges concurred.

VOGUE *v.* ADMINISTRATOR, UNEMPLOYMENT COMPENSATION ACT
(AC 42845)

Bright, C. J., and Cradle and Suarez, Js.

Syllabus

The plaintiff appealed to the trial court from the decision of the Employment Security Board of Review affirming the decision of an appeals referee of the Employment Security Appeals Division that the plaintiff was liable for certain unpaid unemployment compensation contributions under the Unemployment Compensation Act (§ 31-222 et seq.). The plaintiff sold jewelry and provided body piercing and tattoo services in its store at a shopping mall. The plaintiff and S, a tattoo artist, entered into an agreement under which the plaintiff would receive one half of S's fees for tattoo services that S would sell from a room in the plaintiff's store. An audit by the defendant Administrator of the Unemployment Compensation Act thereafter determined that S was an employee of the plaintiff, rather than an independent contractor, as the plaintiff had claimed. The appeals referee found, inter alia, that S did not pay rent to the plaintiff for the room, that S performed tattoo services only during store hours, and that the plaintiff advertised on its website and Facebook page that customers could have tattoos done at its store. The board determined that the plaintiff failed to satisfy any of the three requirements of the ABC test, as set forth in § 31-222 (a) (1) (B) (ii) (I), (II) and (III), which governs the determination of whether services performed by an individual constitute employment under the act. On appeal from the appeals referee's decision that affirmed the defendant's determination, the board reasoned that, under part B of the ABC test in § 31-222 (a) (1) (B) (ii) (II), S's tattoo services were not performed outside of the plaintiff's usual course of the business or outside of the place of its business, and that S's tattoo services were an integral part of the plaintiff's business enterprise. After the plaintiff appealed to the trial court, the board denied in part a motion the plaintiff filed to correct certain of the appeals referee's findings of fact. The defendant then filed a motion for judgment in which it asserted that the plaintiff had failed to

prove that S was not an employee pursuant to the act. The court agreed with the board that the plaintiff failed to satisfy part B of the ABC test, and granted the defendant's motion and rendered judgment dismissing the plaintiff's appeal. The court rejected the plaintiff's claim that the board's findings were improper and concluded that the board properly determined that the plaintiff failed to satisfy part B of the ABC test. *Held* that the trial court properly dismissed the plaintiff's appeal, as the board and the court properly applied part B of the ABC test in § 31-222 (a) (1) (B) (ii) (II) to the plaintiff's employment relationship with S: the record contained substantial evidence for the court and the board to have determined that S's provision of tattoo services was within the plaintiff's usual course of business and a regular part of its business enterprise, the board's conclusion that S's services were an integral part of the plaintiff's business and that tattoo customers were part of its customer base was strongly supported by the board's findings that the plaintiff, at no cost to S, provided S with a workspace and permitted him to use its credit card machine to collect payments, and the plaintiff's advertisements reflected that the plaintiff portrayed itself to the public as a seller of tattoo services that were offered during the hours in which the plaintiff's store was open for business; moreover, the only income S earned was derived from the tattoo services he provided in the plaintiff's store, the plaintiff required tattoo customers to sign a waiver of liability as to the plaintiff and S, and, contrary to the plaintiff's claim that the board and the court focused solely on the plaintiff's advertisements and not on other findings that did not support the board's determination, the board and the court indicated that their decisions were made after a review of the entire record.

Argued September 16, 2020—officially released January 19, 2021

Procedural History

Appeal from the decision of the Employment Security Board of Review affirming the decision of an appeals referee of the Employment Security Appeals Division that the plaintiff was liable for certain unpaid unemployment compensation contributions, brought to the Superior Court in the judicial district of New London; thereafter, the Employment Security Board of Review denied in part the plaintiff's motion to correct; subsequently, the plaintiff filed an amended appeal with the trial court; thereafter, the court, *S. Murphy, J.*, affirmed the Employment Security Board of Review's denial in part of the plaintiff's motion to correct, granted the defendant's motion to dismiss and rendered judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Santa Mendoza, for the appellant (plaintiff).

Krista D. O'Brien, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Philip M. Schulz*, assistant attorney general, for the appellee (defendant).

Opinion

SUAREZ, J. The plaintiff, Vogue, appeals from the judgment of the trial court, rendered in favor of the defendant, the Administrator of the Unemployment Compensation Act, dismissing the plaintiff's appeal from the decision of the Board of Review of the Employment Security Appeals Division (board).[1] The board had affirmed the decision of an appeals referee of the Employment Security Appeals Division (appeals division), who had affirmed the decision made by the defendant, following an audit of the plaintiff, that the plaintiff was liable for unpaid unemployment compensation contributions under the Unemployment Compensation Act (act), General Statutes § 31-222 et seq., with respect to one of its employees. The primary issue in this appeal is whether the court improperly interpreted and applied part B of the so-called "ABC test" of the act, which governs whether an employment relationship exists for purposes of the act.[2] We affirm the judgment of the trial court.

[1] The record reflects that the plaintiff is Immortal Studios, LLC, doing business as Vogue. Despite the fact that the plaintiff's appeal to the trial court was docketed under the plaintiff's business name only, a review of the record reflects that it brought its appeal to the trial court as Immortal Studios, LLC, doing business as Vogue. A review of its filings before this court reflects that the plaintiff has brought the present appeal in that same capacity.

[2] In this appeal, the plaintiff also claims that the trial court improperly refused to correct several findings made by the board. We dispose of this claim with little discussion. The plaintiff filed a motion to correct the board's findings. The board granted, in part, and denied, in part, the motion to correct. The court carefully considered and rejected the plaintiff's claim that several findings should be corrected. Having considered the arguments made by the plaintiff, the findings at issue, and the record, we are not persuaded that any error exists with respect to the court's rejection of the plaintiff's claims regarding the findings made by the board. We conclude

The following undisputed facts and procedural history underlie the present appeal. The plaintiff leases retail space in an indoor shopping mall in Waterford. It sells, among other things, body jewelry and body piercing services. In 2013, the plaintiff entered into an agreement with an individual, Mark Sapia, whereby, in exchange for a portion of Sapia's profits, Sapia would sell tattoo services from the rear portion of the plaintiff's store. On March 11, 2016, after one of the defendant's field officers conducted an audit of the plaintiff's business for 2014 and 2015, the defendant concluded that Sapia was an employee of the plaintiff, not an independent contractor as the plaintiff had maintained. Consequently, the defendant reclassified payments made to Sapia in 2014 and 2015 by the plaintiff as wages, and, with respect to those wages, the plaintiff was liable for the payment of contributions required under the act. The defendant, however, did not conclude that the plaintiff wilfully had failed to report Sapia as an employee.

In March, 2016, the plaintiff appealed from the defendant's decision to the appeals division. On August 15, 2016, an appeals referee conducted an evidentiary hearing. In a memorandum of decision dated September 2, 2016, the appeals referee set forth several findings of fact. After discussing relevant legal principles, the appeals referee concluded that the defendant properly had determined that Sapia was an employee of the plaintiff, not an independent contractor. Thus, the appeals referee affirmed the defendant's decision and dismissed the plaintiff's appeal.

The appeals referee's findings were as follows: "(1) [Sapia] worked as a tattoo artist at [the plaintiff's store] from approximately 2013 through the time of the audit.

that the findings challenged in this appeal are either immaterial to an analysis under part B of the ABC test, on which the court relied, or that the plaintiff has not demonstrated that the findings should be corrected pursuant to the standard set forth in Practice Book § 22-9 (b).

Sapia himself personally performs the tattoo services for the customers at [the plaintiff's store]. The owner of [the plaintiff] classified Sapia as an independent contractor when the company was [completing] a registration form with the [defendant].

"(2) Based on that information, the [defendant] conducted an audit of [the plaintiff] and checked its payroll records and the status of individuals working for that company. [The plaintiff] had four employees working for the company, not including the owner or [Sapia].

"(3) When Sapia began working for [the plaintiff], the parties agreed that when [Sapia] tattooed the customer, Sapia would get 50 percent of the sales price and the owner would get the other 50 percent. Sapia was allowed to use the credit card machine for [the plaintiff's store] when selling his tattoo services. Sapia did not have to pay to use that credit card machine. The owner would then give Sapia his percent[age] of the credit card sales once those transactions were approved by the credit card company. [The plaintiff] had a back room in the store where Sapia was to perform his tattoo work on the customers. The price of the tattoo was determined by Sapia.

"(4) The owner also had Sapia sign an agreement when they started working together, which indicated that Sapia was an independent contractor, outlined the payment arrangements, and allowed the owner to review or check the work performed by Sapia. That agreement also stated that [Sapia] was responsible for correcting any mistakes with the tattoos and that [the plaintiff] could deduct moneys from Sapia if a customer complaint was not resolved.

"(5) Although the agreement also required that Sapia carry his own business liability insurance, Sapia did not do so, which the owner knew.

"(6) The owner provided Sapia with a sterile environment at the store where [the plaintiff] is located for

him to perform his tattoo services for the general public. Sapia is registered with the state of Connecticut as a tattoo technician, and when he is placing the tattoos on the customers, he must do so in a sterile environment.

"(7) Sapia did provide his own ink and needles in order to place the tattoos on the customers he serviced at [the plaintiff's store]. Sapia also used his own laptop for his work.

"(8) [The plaintiff] keeps track of all of the tattoo sales made by Sapia when he is working in the store. When a customer paid for the tattoo in cash, then Sapia would keep 50 percent of the sale for himself and turn over the other 50 percent to the owner. The owner did not pay any other moneys to Sapia in 2014 and 2015. Sapia only performed his tattoo services during the store hours established by [the plaintiff] because the owner did not issue a store key to Sapia, who could not access the store on his own.

"(9) When Sapia sold a tattoo and applied the tattoo on the customer, the customer received a receipt, which listed the business name of the [plaintiff] company, Vogue, as well as the phone number, address and website for [the plaintiff company] Vogue. The [plaintiff's] owner also required that Sapia have the customers sign a waiver/release form, which was an agreement between [the plaintiff] and the customer, to release both [the plaintiff] and Sapia from various types of liability.

"(10) [The plaintiff] is in the business of providing piercings, selling jewelry for the piercing, and offering tattoo services. [The plaintiff] advertises through its website and its Facebook page that a customer can have piercings or tattoos done at its store and lists the hours that the tattoo artist is in the store.

"(11) [The plaintiff] provides a back room in the store where Sapia is able to perform his tattoo services for the customers of [the plaintiff]. [The plaintiff] also provides a table, chairs, and cleaning supplies for that room.

"(12) Sapia does not have to submit an invoice to [the plaintiff] in order to be paid his 50 percent of the tattoo services that he provides to the customers at [the plaintiff's store]. Sapia does not pay any rent to [the plaintiff] to use the employer's sterile room to perform his services, and all advertisements are done by [the plaintiff], other than [Sapia] mentioning his tattoo services on his social media sites, which also include the contact information at [the plaintiff's store].

"(13) The [plaintiff's] owner was not aware of any insurance or other paperwork to show that Sapia had established his own business or that he had his own company [that] offered tattoo services to the general public.

"(14) When the field auditor [for the defendant] conducted the audit, the only income reported by Sapia was the moneys that he received from [the plaintiff]."

In September, 2016, the plaintiff appealed from the decision of the appeals referee to the board. In a memorandum of decision dated January 19, 2017, the board expressly adopted the findings of fact of the appeals referee without modification, with the exception of the tenth finding of fact, to which the board added the following finding: "Sapia is the only tattoo artist performing tattoo services for the [plaintiff]."

Like the appeals referee, the board stated that its analysis of whether Sapia was an employee for purposes of the act was governed by the ABC test that is codified at General Statutes § 31-222 (a) (1) (B) (ii) (I), (II) and (III), with parts A, B, and C of the test corresponding to clauses (I), (II) and (III), respectively, of the statute. Section 31-222 (a) (1) (B) (ii) defines " '[e]mployment' " in relevant part as any service performed by "any individual who, under either common law rules applicable in determining the employer-employee relationship or under the provisions of this subsection, has the status

of an employee. Service performed by an individual shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed . . . .'' In light of the fact that the ABC test is written in the conjunctive, ''unless the party claiming the exception to the rule that service is employment shows that all three prongs of the test have been met, an employment relationship will be found.'' *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, 265 Conn. 413, 419, 828 A.2d 609 (2003).

The board addressed whether the plaintiff, which claimed that the services provided by Sapia did not constitute employment for purposes of the act, had satisfied its burden of demonstrating that all three prongs of the test were satisfied. The board determined that the plaintiff had failed to satisfy all three prongs of the ABC test. We focus on the board's analysis under part B because that portion of the board's analysis is dispositive of the plaintiff's claim on appeal. As set forth previously, pursuant to part B, service is deemed to be employment unless and until it is shown that ''such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enter-

prise for which the service is performed . . . .'' General Statutes § 31-222 (a) (1) (B) (ii) (II).[3]

With respect to part B of the test, the board concluded that Sapia's service was not performed outside of the plaintiff's usual course of the business or the place of its business. The board stated: ''In the case before us, the [plaintiff] describes itself on its website as 'your one stop destination for body jewelry, stainless steel jewelry, as well as piercing and tattoo services.' The [plaintiff's] website also advertised that it provided tattoo services during all open store hours. While we recognize that Sapia was the only tattoo artist performing these services on the employer's behalf, both the [plaintiff's] website and Facebook page describe the company as 'Vogue Tattoo and Piercings.' Therefore, we find that the services that Sapia provided were integral to the employer's business and were not outside its usual course of business. Sapia also provided his services at the [plaintiff's] store and, thus, not 'outside [of] all [the] places of business' for [the plaintiff].''

Accordingly, the board determined that Sapia was employed by the plaintiff for purposes of the act and that the plaintiff was liable for any contributions related to his wages that were required by the act. The board affirmed the decision of the appeals referee and dismissed the plaintiff's appeal.

In February, 2017, the plaintiff appealed from the decision of the board to the trial court in accordance with General Statutes § 31-249b[4] and Practice Book

[3] As we will explain in greater detail, because the court concluded that the plaintiff failed to satisfy part B of the test, and all three parts of the test must be satisfied to demonstrate that service does not constitute employment under the act, the court did not address parts A and C of the ABC test. In light of our conclusion that the court properly upheld the board's analysis under part B, we likewise need not address parts A and C of the test.

[4] General Statutes § 31-249b provides in relevant part: ''At any time before the board's decision has become final, any party, including the administrator, may appeal such decision, including any claim that the decision violates statutory or constitutional provisions, to the superior court for the judicial

§ 22-1 et seq. In its appeal, the plaintiff asserted that several of the board's findings were not supported by the evidence and that the board had misapplied relevant legal principles to the facts of the case. In January, 2018, the plaintiff, pursuant to Practice Book § 22-4,[5] filed with the board a motion to correct fourteen of its findings. In April, 2018, the board issued a memorandum of decision in which it granted, in part, and denied, in part, the motion to correct. Before we discuss the corrected findings, we observe that, to the extent that it granted the motion, however, the board determined that its modified findings did not alter its conclusion that Sapia was an employee of the plaintiff.

The board granted the plaintiff's request that it correct finding thirteen to state: "Sapia advertised his services to the general public through social media, including his Instagram, Etsy, Facebook, and e-mail. He also had business cards that advertised his services." The board stated that this correction did not affect its analysis with respect to part C of the ABC test.

The board granted the plaintiff's request that it correct finding twelve to reflect that, "in addition to [the plaintiff's] advertising on its website, Sapia also advertised his own services through social media . . . ." The

district of Hartford or for the judicial district wherein the appellant resides. Any or all parties similarly situated may join in one appeal. . . . An appeal may be taken from the decision of the Superior Court to the Appellate Court in the same manner as is provided in section 51-197b. . . ."

[5] Practice Book § 22-4 provides: "If the appellant desires to have the finding of the board corrected, he or she must, within two weeks after the record has been filed in the Superior Court, unless the time is extended for cause by the board, file with the board a motion for the correction of the finding and with it such portions of the evidence as he or she deems relevant and material to the corrections asked for, certified by the stenographer who took it; but if the appellant claims that substantially all the evidence is relevant and material to the corrections sought, he or she may file all of it, so certified, indicating in the motion so far as possible the portion applicable to each correction sought. The board shall forthwith upon the filing of the motion and of the transcript of the evidence, give notice to the adverse party or parties."

board stated that this alteration of its finding did not affect its analysis with respect to part C of the ABC test.

The board granted the plaintiff's request that it add the following language to finding eight: "The [plaintiff's] store hours are limited by the mall's hours of operation, and Sapia is free to perform his tattoo services anywhere or at any time." The board stated that this correction did not affect its conclusion with respect to part C of the ABC test because "the [plaintiff] was unable to provide other specific details regarding the tattoo work that Sapia performed and received compensation to perform."

The board granted the plaintiff's request that it modify its decision to add the following finding: "The [plaintiff] set aside a designated workspace in its store. Sapia's workspace was required to be clean and have no rug." The board stated: "In the case before us, regardless of the type of flooring required by the health department, it is undisputed that Sapia performed his work at the [plaintiff's] retail establishment. Thus, he performed services at the [plaintiff's] place of business, and this proposed finding would not alter our conclusion with regard to part B of the ABC test."

The board granted the plaintiff's request to correct its decision with respect to Sapia's activities in the plaintiff's store, stating: "The [plaintiff] permitted Sapia to create, sell, and display his artwork in the space and to keep 100 percent of the proceeds that any person would pay for his art." The board, in concluding that this alteration of its findings did not affect its analysis under the ABC test, stated in relevant part: "The [plaintiff] did not provide proof establishing that Sapia, in fact, sold any pieces of art while he was working in the [plaintiff's] store. However, [the plaintiff's owner] testified that Sapia creates, displays, and is free to sell his artwork in the [plaintiff's] store. . . . Nonetheless, this corrected finding addresses just one factor that is

weighed in the balancing test for part A, and, thus, the [plaintiff] has not shown that this correction would alter the ultimate outcome in this case." (Citation omitted.)

The board granted the plaintiff's request that it modify finding seven to include the following language: "Sapia owns all of his own intellectual property and stores this property on his personal laptop." The board stated that this alteration did not alter its conclusion under part C of the ABC test.

The board granted the plaintiff's request that it modify a portion of the transcript of the hearing before the appeals referee by adding the following finding: "Sapia has the right to find a substitute to come in and perform tattoo services." The board explained that this finding did not alter its conclusion under part A of the ABC test because Sapia's right to obtain a substitute was just one of many factors it may consider in its evaluation of the facts. In sum, despite amending some of its factual findings, the board maintained its conclusion that the plaintiff failed to satisfy all three parts of the ABC test.[6]

[6] We note that the board denied seven of the plaintiff's requests to correct its findings. Specifically, the board denied the plaintiff's request that finding fourteen state: "Sapia sold tattoo-style artwork to customers for which the [plaintiff] had no rights to any income, and sold his tattoo art, tattoos and designs to the general public at his studio and on websites, such as Etsy." The board denied the request to modify finding twelve to reflect that Sapia advertised his own services by means of distributing personal business cards. The board denied the plaintiff's request that finding ten reflect "that the [plaintiff] lists the hours that the tattoo artist is in the store and to call for availability." The plaintiff also asked the board "to add language reflecting that Sapia was not required to be in the [plaintiff's] store for any set times and that he was under his own incentive as to whether or not he was in the store on any given day." The board denied the request that it delete a reference in its decision to the fact that "Sapia would only be available certain hours during the [plaintiff's] hours of operation . . . ." The board denied the request that it delete the following finding from its decision: "[T]he [plaintiff] provided no evidence that Sapia actually performed tattoo services under his own name or has a regular or established clientele." The board denied the plaintiff's request that it adopt a finding that Sapia set his own prices. Finally, the board denied the plaintiff's request that it find as follows: "Sapia has liability to Vogue to correct defective work, and for a proper accounting of commissions paid and [owed], and for client refunds."

In May, 2018, after the board issued its decision with respect to the plaintiff's motion to correct, the plaintiff filed an amended appeal in the trial court. As it did in its original appeal, the plaintiff argued that the board had based its decision on erroneous findings and that it misapplied the law to the facts of the case. The plaintiff challenged the board's determination that Sapia was an employee under parts A, B, and C of the ABC test. The amended appeal included claims of error related to the board's decision on the plaintiff's motion to correct.[7] Thereafter, the defendant filed a motion for judgment in his favor and an accompanying memorandum of law. Essentially, the defendant argued therein that the plaintiff had failed to prove that Sapia was not an employee for purposes of the act and that the board had correctly applied the law to the facts of the case. The plaintiff filed an objection to the motion for judgment.

In January, 2019, the court heard argument on the defendant's motion for judgment and the plaintiff's objection thereto. Thereafter, on April 4, 2019, the court rendered judgment dismissing the appeal. In its memorandum of decision, the court first addressed the merits of that portion of the plaintiff's amended appeal in which the plaintiff claimed that the board erred by denying five of the requests set forth in its motion to correct. After it rejected the plaintiff's claim that the board's findings were improper and that a remand to the board for a new hearing was necessary, the court addressed the claim that the board improperly had interpreted and applied the ABC test.

The court focused its analysis on part B of the test, stating in relevant part: "The plaintiff . . . challenges the board's determination that the plaintiff failed to meet part B of the ABC test because it failed to establish

[7] Specifically, in May, 2018, the plaintiff, pursuant to Practice Book § 22-8, filed claims of error with respect to portions of the board's decision on the motion to correct. See footnote 2 of this opinion.

that Sapia performed his services outside the usual course of business. The plaintiff argues that tattoo services are not a continuous business with respect to the plaintiff because [tattoo services are only performed] when Sapia is physically present. The defendant argues that the plaintiff's focus on Sapia's availability ignores the definition of usual course of business . . . .

"Part B of the test is stated in the disjunctive. Thus, the plaintiff bears the burden of establishing either that the services were outside the usual course of its business or that the services were performed outside of its place of business. The plaintiff need only prove one of the two in order to satisfy part B of the test. A review of the pleadings reveals that the plaintiff does not challenge the board's finding that the tattoo services provided by Sapia were [not] outside of its place of business. Therefore, the court will only address the plaintiff's argument that Sapia performed his services outside the usual course of [its] business."[8]

After setting forth relevant authority concerning part B of the ABC test, the court stated: "In the present case, the findings of fact made by the referee and adopted by the board make it clear that the board did not act unreasonably or arbitrarily in concluding that the provision of tattoo services was within the plaintiff's usual course of business. Substantial evidence exists in the record for the board to have determined that the provision of tattoo services was within the plaintiff's usual course of business. The plaintiff's business has offered tattoo services on a regular and continuous basis. The record reflects that the plaintiff had hired a tattoo artist prior to hiring Sapia and that [the plaintiff's owner] interviewed several candidates when he advertised the

[8] The court also stated: "Even if the plaintiff were to argue that Sapia performed his services outside of the plaintiff's place of business, the record reflects that Sapia provided his tattoo services at the plaintiff's store and, thus, not outside the plaintiff's place of business."

position of tattoo artist before Sapia began providing tattoo services at the plaintiff's store in 2013. The plaintiff's website also advertises tattoo services during all open store hours. Moreover, the plaintiff held itself out to the public as providing tattoo services. The board found that the plaintiff's website and Facebook page advertise the company as 'Vogue Tattoo and Piercings' and describe the plaintiff's store as 'your one stop destination for body jewelry, stainless steel jewelry, as well as piercing and tattoo services.' "

Having rejected the plaintiff's argument that the board improperly had determined that it failed to satisfy part B of the ABC test, the court concluded its analysis by stating: "Because the three parts of the ABC test are conjunctive, the inability of the plaintiff to satisfy any single one of those parts necessarily results in a conclusion that an employer-employee relationship exists for the purposes of the act. Therefore, in the present case, because the plaintiff has failed to satisfy part B of the test, the court deems it unnecessary to consider parts A or C. . . . The board properly concluded that [the] plaintiff failed to prove that Sapia was employed as an independent contractor under the provisions of the [act]." (Citation omitted; footnote omitted.) Accordingly, the court granted the defendant's motion to dismiss the appeal, and this appeal followed.

We now turn to the claim raised on appeal. The plaintiff asserts that the board improperly interpreted and applied part B of the ABC test to the facts of the present case. We disagree.

Previously in this opinion, we set forth the relevant language of the ABC test codified in § 31-222 (a) (1) (B) (ii). As relevant to the present claim, part B defines " '[e]mployment' " in relevant part as any service performed by "any individual who, under either common law rules applicable in determining the employer-employee relationship or under the provisions of this

subsection, has the status of an employee. Service performed by an individual shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that . . . (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed . . . .'' General Statutes § 31-222 (a) (1) (B).

The plaintiff argues that the trial court erred in failing to conclude that the board's ultimate determination was unreasonable and illogical in light of the facts of the present case. According to the plaintiff, the board interpreted the phrase ''usual course of the business for which the service is performed'' in § 31-222 (a) (1) (B) (ii) (II) too broadly, concluding that tattoo services are part of the plaintiff's usual business, and failed to focus its analysis properly on the specific business enterprise in which the plaintiff was engaged, which it claims is limited to the sale of body jewelry and body piercing services. The plaintiff argues in relevant part: ''Sapia is a tattoo artist and is permitted by the plaintiff, pursuant to a written contract, to operate a tattooing artistry business within the leased unit that the plaintiff pays for. The plaintiff and Sapia have not undertaken the same enterprise. The plaintiff is not a direct provider of tattooing services. Sapia has his own separate business for which he determines the scheduling and the prices, and which is not integrated in any way with the plaintiff's body jewelry piercing business. Sapia is not paid by the plaintiff to provide services to the plaintiff. The services are provided by Sapia directly to Sapia's tattoo clients who pay Sapia's remuneration directly to him after he negotiates the price he wants to charge for the service.

"The plaintiff's enterprise and its specific business activities do not include tattooing people. No one else is licensed to do so. The plaintiff has provided a space for a tattoo artist and is remunerated accordingly with a percentage of the artist's sales. . . .

"Sapia performs services for the tattoo customer and deals with the customer directly on all matters of the transaction, especially the pricing and the scheduling of the transaction. None of this involves the plaintiff's customers, [because the services provided by the plaintiff and Sapia] are completely separate and distinct.

"Under the facts of this case, it is undisputed that the plaintiff has a retail jewelry store selling body jewelry and piercing services. It was found that Sapia was given a backroom space to perform his tattoos on persons who liked his 'deviant art' tattoos. Sapia advertises to his own clientele, schedules all his own appointments and also accepts walk-ins from the mall. Sapia provides his own art supplies and owns the software designs and all of his own intellectual property. None of the work product is retained or owned or usable by the plaintiff. The plaintiff is not paying Sapia to appear and sit hourly in the back room. It is Sapia [who] makes his own schedules and determines the fees for his own enterprise."

Before we turn to the merits of the plaintiff's claim, we set forth some principles that guide our review. "To the extent that an administrative appeal, pursuant to . . . § 31-249b, concerns findings of fact, a court is limited to a review of the record certified and filed by the board of review. The court must not retry facts [or] hear evidence. . . . If, however, the issue is one of law, the court has the broader responsibility of determining whether the administrative action resulted from an incorrect application of the law to the facts found or could not reasonably or logically have followed from such facts. Although the court may not substitute its

own conclusions for those of the administrative board, it retains the ultimate obligation to determine whether the administrative action was unreasonable, arbitrary, illegal or an abuse of discretion." (Internal quotation marks omitted.) *Mattatuck Museum-Mattatuck Historical Society* v. *Administrator, Unemployment Compensation Act*, 238 Conn. 273, 276, 679 A.2d 347 (1996) (*Mattatuck*).

Separate from the plaintiff's argument that the board misapplied the law to the facts found, the issue of whether the board properly interpreted § 31-222 (a) (B) (ii) (II) presents this court with a question of law that is subject to plenary review. "Although [o]ur review of an agency's decision on questions of law is limited by the traditional deference that we have accorded to that agency's interpretation of the acts [that] it is charged with enforcing . . . [i]t is well settled . . . that we do not defer to the board's construction of a statute . . . when . . . the [provision] at issue previously ha[s] not been subjected to judicial scrutiny or when the board's interpretation has not been time tested." (Citation omitted; internal quotation marks omitted.) *Kirby of Norwich* v. *Administrator, Unemployment Compensation Act*, 328 Conn. 38, 47, 176 A.3d 1180 (2018).[9]

In interpreting a portion of the ABC test, our Supreme Court explained in relevant part: "[W]hen interpreting provisions of the act, we take as our starting point the fact that the act is remedial and, consequently, should be liberally construed in favor of its beneficiaries. . . . Indeed, the legislature underscored its intent by expressly mandating that the act shall be construed, interpreted

[9] The defendant asserts that this court should defer to the board's reasonable findings but does not assert that the board's interpretation of § 31-222 (a) (1) (B) (ii) (II), as applied to the unique fact pattern presented by the present case, is time-tested or that its interpretation previously has been subjected to judicial scrutiny. The plaintiff asserts that part B of the ABC test has not been subjected to significant judicial or agency interpretation.

and administered in such manner as to presume coverage, eligibility and nondisqualification in doubtful cases. General Statutes § 31-274 (c). . . . We also note that exemptions to statutes are to be strictly construed. . . . Nevertheless, the act should not be construed unrealistically in order to distort its purpose. . . . While it may be difficult for a situation to exist where an employer sustains his burden of proof under the ABC test . . . it is important to consider that [t]he exemption [under the act] becomes meaningless if it does not exempt anything from the statutory provisions . . . where the law and the facts merit the exemption in a given case. . . . Rather, statutes are to be construed so that they carry out the intent of the legislature. . . . We must construe the act as we find it . . . .'' (Citations omitted; internal quotation marks omitted.) *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, 320 Conn. 611, 616–17, 134 A.3d 581 (2016).

The portion of part B at issue in this appeal, which focuses on whether the service performed is within the usual course of the business of the employer, was interpreted by our Supreme Court in *Mattatuck*, supra, 238 Conn. 273. Thus, we rely on that prior judicial interpretation of the statutory provision at issue. In *Mattatuck*, our Supreme Court discussed the ''usual course of the business'' element of part B, stating: ''First, it must be determined for whose 'business' the service was performed . . . . [T]he plain language of prong B . . . requires inquiry into '*the* business for which the service is performed . . . .' '' (Citation omitted; emphasis in original.) Id., 279; see General Statutes § 31-222 (a) (1) (B) (ii) (II). ''Prong B does not refer to the type of business, but, rather, to the specific business activities engaged in by the enterprise. Accordingly, with respect to this prong, we examine the particular activities engaged in by the plaintiff.

"We next define the term 'usual.' The plaintiff argues that 'usual' does not mean 'if you do it, it is within your usual course of business.' We agree. To define the term in such a manner would include every relationship, including bona fide independent contractors, within the purview of the act. Indeed, the administrator does not argue for such a definition. Rather, the administrator asserts, and we agree, that 'usual,' in accordance with its common usage, simply means that an activity is performed by the enterprise on a regular or continuous basis. In the terms of § 31-222 (a) (1) (B) (ii) (II), if the activity is not performed on a regular or continuous basis, then the employer has satisfied prong B because the activity is 'outside the usual course of the business' of the enterprise. . . .

"Prong B . . . does not compel an inquiry into the substantiality or extent of a particular business activity in relation to other activities conducted by the enterprise. We agree that the mere fact that an enterprise undertakes an activity as an isolated instance does not render that activity within its 'usual course of business.' If, however, an enterprise undertakes an activity, not as an isolated instance but as a regular or continuous practice, the activity will constitute part of the enterprise's usual course of business irrespective of its substantiality in relation to the other activities engaged in by the enterprise.

"In sum, prong B requires the finder of fact to determine whether the activity performed is within the 'usual course of business' of the specific business at issue. In our view, 'usual course of business,' as used in § 31-222 (a) (1) (B) (ii) (II), means that the enterprise performs the activity on a regular or continuous basis, without regard to the substantiality of the activity in relation to the enterprise's other business activities." (Footnotes omitted.) *Mattatuck*, supra, 238 Conn. 279–81. Applying this test, the court concluded that the plaintiff museum, which operated largely as an exhibition hall for historic artifacts and art, was the employer

of individuals who provided art courses at the museum, even though such lessons may have been insubstantial as compared to the museum's other activities. Id., 280, 282.

After a careful review of the board's decision, we conclude that the board did not misinterpret the statute. As did the trial court, the board expressly cited to and relied on our Supreme Court's binding interpretation of part B of the ABC test as set forth in *Mattatuck*. Furthermore, we agree with the trial court that the board's application of the statute to the facts of the present case, and its determination that the offering of tattoo services was within the plaintiff's usual course of business, was neither unreasonable nor arbitrary.

In determining whether the board's decision logically followed from the facts found, we observe that the board adopted finding ten made by the appeals referee, which directly shed light on the nature of the plaintiff's business enterprise. The finding provides: "[The plaintiff] is in the business of providing piercings, selling jewelry for the piercing, and offering tattoo services. [The plaintiff] advertises through its website and its Facebook page that a customer can have piercings or tattoos done at its store and lists the hours that the tattoo artist is in the store." We observe that the plaintiff does not dispute that this finding was based on the evidence in the record concerning the contents of its website and its Facebook page.[10] This evidence reflects that the plaintiff portrayed

[10] The evidence, which was credited by the board, reflects that the plaintiff, by means of its website and Facebook page, described its business as "Vogue Tattoo and Piercing." The plaintiff's website introduced potential customers to the services it provides, in relevant part: "Welcome to Vogue, your one stop destination for body jewelry, stainless steel jewelry, as well as piercing and tattoo services." One portion of the plaintiff's website stated: "Tattoo Artist available daily from noon to 8 p.m., except Sundays." Another portion of the website stated: "Tattoo Artist Mark Sapia. Available for walk-ins daily except for Sundays. Call for availability . . . ." The phone number listed on the website was for the plaintiff's business.

itself to the general public as a seller of body jewelry, piercing services, *and* tattoo services. Moreover, this evidence reflects that tattoo services were offered for sale during the hours in which the plaintiff's store was open for business. As the board found, Sapia earned income by means of providing tattoo services in the plaintiff's store and, in fact, his only income was derived from the moneys that he received from the plaintiff for performing tattoo services in its store.

The plaintiff attempts to discount the probative value of its online advertisements. Yet, as our Supreme Court observed in *Mattatuck*, the manner in which a business portrays its business activities to the public, rather than an evaluation of the type of business that it is, is integral to an analysis under part B of the ABC test. *Mattatuck*, supra, 238 Conn. 282 (finding that museum held itself out to public as offering art courses, produced brochures concerning art courses, distributed brochures announcing art courses, and listed art course instructor as member of its faculty, which supported conclusion that art courses were regular part of museum's business enterprise). Thus, there was a basis in the board's findings to support its ultimate determination that the tattoo services provided by Sapia were integral to the activities undertaken by the plaintiff's business enterprise and part of its usual course of business.

The plaintiff argues that, with respect to their analyses under part B, both the board and the court focused solely on the finding concerning the plaintiff's website and Facebook page and not on other relevant findings that did not support the board's determination.[11] However, nothing in the decisions of the board or the court supports the assertion that *any* relevant findings were

[11] Although, in connection with this claim, the plaintiff relies on facts that were not found by the board, we will confine our analysis to the findings of the board.

ignored because both the board and the court indicated that their decisions were made following a review of the entire record and reflected a review of the entire record. The plaintiff interprets the board's findings and the evidence to support a determination that Sapia's business enterprise was separate and distinct from that of the plaintiff. Even if some of the board's findings, viewed in artificial isolation, could be interpreted as the plaintiff suggests, it does not detract from the reasonableness of the board's conclusion, which was made in consideration of all of its findings. "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . [A]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts." (Citation omitted; internal quotation marks omitted.) *JSF Promotions, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 265 Conn. 417–18.

Furthermore, several other findings of fact made by the board, particularly with respect to the work environment that the plaintiff provided Sapia, support the board's conclusion that providing tattoo services was an ongoing and integral part of the plaintiff's business activities. Specifically, the board found that the plaintiff provided Sapia with a workspace in the back room of its store at no cost to Sapia, the plaintiff required tattoo customers to sign a waiver releasing the plaintiff and Sapia from various types of liability, the plaintiff permitted Sapia to use its credit card machine to collect payments from tattoo customers at no cost to Sapia, and

tattoo customers received a receipt, which listed the plaintiff's name and contact information. These subordinate findings strongly supported the board's ultimate finding that Sapia's services were a regular part of the plaintiff's business enterprise.

We also reject the plaintiff's argument that the board's findings reflected that Sapia's services merely enhanced the jewelry and body piercing services that it was offering to its own customers purchasing jewelry and piercing services. We agree with the court that the aforementioned findings of the board reflect that the services provided by Sapia were an integral part of the plaintiff's ongoing business activities and that tattoo customers were part of the plaintiff's customer base. Although the plaintiff argues that its customers and Sapia's customers are "completely separate and distinct," the manner in which the plaintiff advertised its business to the public strongly supports the board's finding that Sapia regularly performed a part of the plaintiff's business enterprise, which was the sale of jewelry, piercing services, *and* tattoo services. We fail to see how Sapia's tattoo services were any less integral to the plaintiff's business than were the art courses at issue in *Mattatuck*.

On the basis of the foregoing, we conclude that the court and the board properly applied part B of the ABC test to the plaintiff's employment relationship with Sapia, and properly concluded that substantial evidence exists in the record for the board to have determined that the provision of tattoo services was within the plaintiff's usual course of business.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

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MEMORANDUM DECISIONS

JOSEPHINE S. MILLER *v.* CHARLES BURBY ET AL.
(AC 43320)

Bright, C. J., and Prescott and Elgo, Js.

Argued January 5—officially released January 19, 2021

Plaintiff's appeal from the Superior Court in the judicial district of New Britain, *Hon. Stephen F. Frazzini*, judge trial referee.

Per Curiam. The judgment is affirmed.

JEFFREY P. GOULD *v.* COMMISSIONER OF CORRECTION
(AC 42758)

Alvord, Cradle and Suarez, Js.

Argued January 5—officially released January 19, 2021

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Kwak*, *J.*

Per Curiam. The appeal is dismissed.

KATHERINE L. COLLIBEE *v.* STEVEN BITTEKER
(AC 43010)

Alvord, Prescott and Cradle, Js.

Argued January 6—officially released January 19, 2021

Defendant's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Hon. Michael E. Shay*, judge trial referee.

Per Curiam. The judgment is affirmed.

JOHN STANLEY KAMINSKI *v.* COMMISSIONER OF CORRECTION
(AC 43787)

Alvord, Elgo and Alexander, Js.

Argued January 7—officially released January 19, 2021

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Bhatt*, *J.*

Per Curiam. The appeal is dismissed.

EDWARD PALMER *v.* COMMISSIONER OF CORRECTION
(AC 43148)

Prescott, Alexander and Vitale, Js.

Argued January 11—officially released January 19, 2021

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Newson*, *J.*

Per Curiam. The judgment is affirmed.

RELIABLE MECHANICAL CONTRACTORS, LLC, ET AL. *v.* ROBERT RICKETTS ET AL.
(AC 43556)

Prescott, Alexander and Vitale, Js.

Argued January 11—officially released January 19, 2021

Appeal by the plaintiff Elijah El-Hajj-Bey from the Superior Court in the judicial district of Hartford, *Budzik*, *J.*

Per Curiam. The judgment is affirmed.

BANK OF AMERICA, NATIONAL ASSOCIATION
v. KATHI SORRENTINO ET AL.
(AC 43495)

Prescott, Alexander and Vitale, Js.

Argued January 11—officially released January 19, 2021

Appeal by the named defendant from the Superior Court in the judicial district of Fairfield, *Spader*, *J.*

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting new law days.

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whether trial court erred in finding that plaintiffs satisfied defendant's debt despite plaintiffs' failure to produce evidence of written discharge of promissory note; whether trial court properly denied plaintiffs' postjudgment motion for attorney's fees and expenses.

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LaPierre *v.* Mandell & Blau, M.D.'s, P.C. 44
Medical malpractice; motion to dismiss; personal jurisdiction; claim that trial court erred in granting motion to dismiss for lack of personal jurisdiction; whether trial court properly dismissed action for failing to comply with statute (§ 52-190a) that governs medical malpractice actions; whether allegations of complaint satisfied test set forth in Boone *v.* William W. Backus Hospital *(272 Conn. 551) for determining whether claim sounds in medical malpractice.*

Meyers *v.* Middlefield 264
Administrative appeal; employment termination pursuant to statute (§ 20-260); whether trial court improperly determined that record was sufficient to support decision of town's Board of Selectmen to terminate plaintiff's employment as town's building official; claim that board's decision terminating plaintiff's employment violated public policy and constituted wrongful discharge.

Miller *v.* Burby (Memorandum Decision). 901

Newtown *v.* Ostrosky 13
Foreclosure; whether trial court properly denied motion to reargue and for reconsideration of judgment of foreclosure by sale; claim that foreclosure judgment should be opened and vacated; claim that default for failure to plead entered by court clerk was invalid and could not serve as basis for foreclosure judgment; adoption of trial court's memorandum of decision as statement of facts and applicable law.

Palmer *v.* Commissioner of Correction (Memorandum Decision). 902

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State *v.* Ervin B. 1
Threatening in second degree; claim that evidence was insufficient to support finding that defendant made physical threat against his wife for purposes of conviction of threatening in second degree in violation of statute (§ 53a-62 (a) (1)).

Vogue *v.* Administrator, Unemployment Compensation Act 291
Unemployment compensation; whether trial court properly dismissed appeal from decision of Employment Security Board of Review; whether plaintiff was liable for certain unpaid unemployment compensation contributions under Unemployment Compensation Act (§ 31-222 et seq.); whether board and trial court properly applied part B of ABC test under § 31-222 (a) (1) (B) (ii) (II) in concluding that tattoo artist was plaintiff's employee; whether record contained substantial evidence for board to have determined that provision of tattoo services was within plaintiff's usual course of business and part of its business enterprise; claim that board and trial court focused solely on plaintiff's advertisements and not on other findings that did not support board's determination.

Wittman *v.* Intense Movers, Inc. 87
Corporate dissolution; breach of fiduciary duty; notice to purchase shares of company pursuant to statute (§ 33-900 (b)); motion to enforce settlement agreement; whether defendants established that trial court improperly enforced settlement agreement.