



Agenda Date: 08/18/11

Agenda Item: 7A

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CUSTOMER ASSISTANCE

NEAL E. BRUNSON,
Petitioner,

v.

UNITED WATER NEW JERSEY,
Respondent.

) ORDER DENYING REQUEST
) FOR INTERLOCUTORY
) REVIEW

)
)
) BPU Docket No. WC09120998U
) OAL Docket No. PUC 05707-10

Parties of Record:

Neal E. Brunson, Esq., Rutherford, New Jersey, Petitioner
John P. Wallace, Esq., Ridgewood, New Jersey, on behalf of United Water New Jersey

BY THE BOARD:

This matter is before the New Jersey Board of Public Utilities ("Board") on the request of Neal E. Brunson, Esq. ("Petitioner") for interlocutory review of Administrative Law Judge Kimberly A. Moss's ("ALJ Moss") Order dated June 17, 2011, denying Petitioner's motion in limine to bar any evidence associated with a water meter test and related documents.

BACKGROUND

On or about December 17, 2009, Petitioner filed a petition disputing a bill by United Water New Jersey ("Respondent" or "United Water") requiring him to pay \$2,763.27 for under-billed water consumption. In its Answer, Respondent alleged that Petitioner's old water meter, in place since August 2000, was not accurately registering usage, as Petitioner's bills only reflected facility charges. Thereafter, the Board transmitted this matter to the Office of Administrative Law ("OAL") for hearing and initial disposition as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Both parties in this matter filed discovery motions which were heard by ALJ Moss. On June 1, 2011, Petitioner filed a motion in limine to bar evidence in connection with an October 4, 2008 water meter test and related documents. Petitioner contended that the report was untimely and created unfair surprise. Petitioner, among other things, claimed that he was prejudiced by the

breach of the discovery process and inability to challenge the meter test report by securing his own test and expert.

Respondent filed opposition to Petitioner's in limine motion on June 9, 2011. Respondent noted that Petitioner was provided with a copy of the meter removal order, a copy of the meter test, and the name of tester. Respondent further claimed that Petitioner failed to cite any authority which would support his suggestion that the document supplied is not authentic. Finally, Respondent asserted that if Petitioner had examined his water bills between August 2000 and September 2008, he would have noticed that he was not charged for water consumption during that period.¹

On June 17, 2011, ALJ Moss made findings of fact and conclusions of law and issued an order denying Petitioner's motion in limine. ("ALJ Moss's June 17, 2011 Order"). ALJ Moss found that Petitioner's water meter was tested and likely discarded on October 4, 2008. ALJ Moss's June 17, 2011 Order at 2. ALJ Moss also found that Untied Water had provided Petitioner with a meter test report in response to an Order to provide more specific answers. Moreover, ALJ Moss found that subsequent to the filing of the motion in limine, Respondent has provided the names of the people who tested the meter, removed the meter from the premises, and recalculated the water consumption charges. In addition, ALJ Moss found that there was no evidence that the meter test report is not authentic. Ibid.

ALJ Moss analyzed the legal application of N.J.A.C. 14:3-4.8(c), which prohibits a utility from removing a customer's meter during the pendency of a complaint. ALJ Moss's June 17, 2011 Order at 3. ALJ Moss determined that the regulation was inapplicable to the instant case as the meter was discarded more than one year before the complaint was filed. Moreover, Respondent did not know that the Petitioner would file a complaint over a year later. ALJ Moss rejected Petitioner's contention that the report was provided untimely, noting that there have been discovery delays by both parties in this matter. Accordingly, ALJ Moss denied Petitioner's motion to bar any evidence associated with the water meter test and related documents. ALJ Moss also ordered that an evidentiary hearing would commence on June 28, 2011. Ibid.

REQUEST FOR INTERLOCUTORY REVIEW

On June 28, 2011, the Board received Petitioner's request for interlocutory review of ALJ Moss's June 17, 2011 Order. Petitioner maintains that Respondent failed to present the October 4, 2008 meter test report in a timely fashion, and that Respondent's counsel intended to create surprise and an unfair advantage at trial. Petitioner further claims that Petitioner had the right to independently test the meter in question.

On June 28, 2011, the Board received Respondent's opposition to Petitioner's request for interlocutory review. Respondent initially notes that Petitioner's request was not timely made in accordance with N.J.A.C. 1:1-14.10. Respondent claims that Petitioner was provided with the meter test report on May 5, 2011, and that Petitioner was given the names of people who removed the meter, tested the meter, and recalculated the charges for water consumption.

¹ Petitioner and Respondent exchanged letters on June 6 and June 8, 2011, on which ALJ Moss was copied.

DISCUSSION AND FINDING

An order or ruling of an ALJ may be reviewed interlocutorily by an agency head at the request of a party. N.J.A.C. 1:1-14.10(a). Any request for interlocutory review shall be made to the agency head no later than five working days from the receipt of the order. N.J.A.C. 1:1-14.10(b).² Pursuant to N.J.A.C. 1:14-14.4(a)³, the Board must first determine whether to grant the request for interlocutory review.

The legal standard for accepting a matter for interlocutory review is stated in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982). In that case, the Court concluded that an agency has the right to review ALJ orders on an interlocutory basis "to determine whether they are reasonably likely to interfere with the decisional process or have a substantial effect upon the ultimate outcome of the proceeding." Id. at 97-98. The Court indicated that the agency head has broad discretion to determine which ALJ orders are subject to review on an interlocutory basis. However, it noted that the power of the agency head to review ALJ orders on an interlocutory basis is not itself totally unlimited, and that interlocutory review of ALJ orders should be exercised sparingly. Id. at 100. In this regard, the Court noted:

In general, interlocutory review by courts is rarely granted because of the strong policy against piecemeal adjudications. See Hudson v. Hudson, 36 N.J. 549 (1962); Pennsylvania Railroad, 20 N.J. 398. Considerations of efficiency and economy also have pertinency in the field of administrative law. See Hackensack v. Winner, 82 N.J. at 31-33; Hinfey v. Matawan Reg. Bd. of Ed., 77 N.J. 514 (1978). See infra at 102, n.6. Our State has long favored uninterrupted proceedings at the trial level, with a single and complete review, so as to avoid the possible inconvenience, expense and delay of a fragmented adjudication. Thus, "leave is granted only in the exceptional case where, on a balance of interests, justice suggests the need for review of the interlocutory order in advance of final judgment." Sullivan, "Interlocutory Appeals," 92 N.J.L.J. 162 (1969). These same principles should apply to an administrative tribunal.

[90 N.J. at 100].

In the administrative arena, as in a court case, interlocutory review may be granted "only in the interest of justice or for good cause shown." Ibid. The Court found that an agency has the right to review orders of an ALJ on an interlocutory basis:

² Respondent claims that Petitioner's request was untimely because he likely received ALJ Moss's order on June 17, 2011. Petitioner dated his request for interlocutory review on June 23, 2011. Because June 17, 2011 was a Friday, Petitioner's request was made within five working days, and is therefore timely.

³ In this matter, the papers were not received sufficiently in advance of the time items were due for the July 14, 2011 agenda. Accordingly, the Board has relaxed the procedural rules to prevent unfairness or injustice pursuant to N.J.A.C. 1:1-1.3(b) and 1:1-14.10(g) so as to extend the time in which to decide whether to conduct an interlocutory review. See In re Petition of Elizabethtown Water Company, WR03070510 (Order dated December 10, 2003).

whenever in the sound discretion of the agency head, there is a likelihood that such an interlocutory order will have an impact upon the status of the parties, the number and nature of the claims or defenses, the nature or scope of issues, the presentation of evidence, the decisional process or the outcome of the case.

[Ibid.].

As stated above, the decision to grant interlocutory review is committed to the sound discretion of the Board, and is to be exercised sparingly to avoid piecemeal adjudication. The instant case does not present any exceptional issue that would warrant review at this juncture. In the present case, ALJ Moss has merely denied Petitioner's motion in limine to bar evidence associated with the water meter test and related documents. Whether the meter test report and the related documents will eventually be admitted into evidence and, what, if any, weight will be attributed to the documents is yet to be determined by ALJ Moss. Accordingly, review at this stage would result in the type of piecemeal adjudication case law warns against and is not in the interest of justice.

Accordingly, the Board **HEREBY DENIES** the Petitioner's request for interlocutory review of ALJ Moss's June 17, 2011 Order.

DATED: 8/18/11

BOARD OF PUBLIC UTILITIES
BY:


LEE A. SOLOMON
PRESIDENT


JEANNE M. FOX
COMMISSIONER

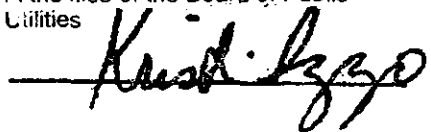

JOSEPH L. FIORDALISO
COMMISSIONER


NICHOLAS ASSELTA
COMMISSIONER

ATTEST:


CARMEN DIAZ
ACTING SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities



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v.
UNITED WATER NEW JERSEY
BPU DOCKET NO.: WC09120998U
OAL DOCKET NO.: PUC-05707-10

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