

Gregory Berry
P.O. Box 13291
Philadelphia, PA 19101
(415) 321-9683
gregoryberry@gmail.com

May 13, 2010

James McNulty, Secretary
Pennsylvania Public Utility Commission
Room B-20, North Office Building
Harrisburg, PA 17105-3265

RE: Gregory Berry v. PGW, Docket No. F-2010-2163390

Dear Secretary McNulty:

Pursuant to 52 Pa. Code § 5.63(b), Gregory Berry hereby files this Reply to New Matter Raised by Defendant's Answer to Complainant's Motion for Judgment on the Pleadings in the above captioned matter.

If additional information is required, please do not hesitate to contact the undersigned. Thank you for your assistance in this matter.

Sincerely,

Gregory Berry

Enclosure

cc: Mr. Laureto Farinas, Regular Mail

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|----------------------------------|---|-----------------------------------|
| GREGORY BERRY, |) | |
| Complainant and Appellant |) | Docket No.: F-2010-2163390 |
| |) | |
| v. |) | |
| |) | |
| PHILADELPHIA GAS WORKS, |) | |
| Defendant and Respondent |) | Date: May 13, 2010 |
| <hr/> | | |

**REPLY TO NEW MATTER RAISED BY
DEFENDANT’S ANSWER TO COMPLAINANT’S
MOTION FOR JUDGMENT ON THE PLEADINGS**

To the Honorable Administrative Law Judge assigned to this case:

Pursuant to 52 Pa. Code § 5.63, Complainant Gregory Berry hereby replies to the ostensible new matter raised by defendant PGW in its Answer to Complainant’s Motion for Judgment on the Pleadings, in the above-captioned matter. This reply to defendant’s answer, which was postmarked April 26, 2010, is timely under 52 Pa. Code §§ 5.63(a) & 1.56(b).

PGW apparently misunderstands the purpose of a motion for judgment on the pleadings, and the burden of proof involved. As a result PGW in its answer has attempted to correct the deficiencies of its original answer by amending new defenses at this late date. Mr. Berry respectfully requests that this Commission reject PGW’s attempt to correct the deficiencies of its original answer, an attempt which serves actually to demonstrate the point of Mr. Berry’s motion for judgment on the pleadings.

In addition to the reasons outlined below, PGW's pleading of new matter, if deemed such, is entirely deficient pursuant to 52 Pa. Code § 5.62. In any event, PGW's corrections do not cure the deficiencies of its original answer.

A complainant's motion for judgment on the pleadings is a claim that the defendant has failed to state a *legal* defense to a claim. (*See, e.g., Donegal Mut. Ins. Co. v. Miller*, 419 A.2d 724, 727 (Pa. Super. Ct. 1980) (“[F]ailure to state a legal defense to a claim’ [(Pa. R. Civ. P. No. 1032(a))] . . . is a restatement of the basic principles that a claim without legal merit can not sustain a verdict or judgment” (quoting 2 Goodrich-Amran 2d § 1032:5, at 337, 338)).) For any motion on the pleadings, all well-pled facts are assumed against the movant. (*See, e.g., Goldman v. McShain*, 247 A.2d 455, 459 (Pa. 1968) (“[A] motion for judgment on the pleadings is in the nature of a demurrer, and as such is adjudicated upon the assumption that all of the opposing party's . . . well-pleaded allegations are true.”).) PGW's repeated insistence in its answer that genuine issues of material fact exist that must be tried is wholly irrelevant to a motion for judgment on the pleadings. Amazingly, even if this were not true, PGW *admitted* every fact averred by Mr. Berry in his motion! The defendant's contention that facts that both sides *agree to* are genuine issues requiring trial is bizarre in addition to irrelevant.

Due to the defendant's apparent misunderstanding of this motion, its answer is not a response to Mr. Berry motion for a judgment on the pleadings, but amounted instead to an amendment to its original answer. PGW took the opportunity to deny legal arguments Mr. Berry made in his formal complaint. The time to do that was 40 days ago when it filed its original answer. In other words, PGW's answer to Mr. Berry's claim that it has failed to state a legal defense is to try to state a legal defense. But that is a train that left the station a long time ago.

Because PGW has offered new denials to Mr. Berry's formal complaint, Mr. Berry is required under 52 Pa. Code § 5.63(b) ("Replies to answers seeking affirmative relief or new matter") to reply to the ostensibly new matter.

PGW in its answer makes three new claims: (1) that it did not violate its duty of good faith, honesty, and fair dealing (PGW Answer to the Complainant's Motion for Judgment on the Pleadings, at 3); (2) that it did not violate any duty to avoid harm (*id.*); and (3) that it did not violate any provisions of the Pennsylvania Administrative Code (*id.*). It is unclear whether these are intended to be new factual claims, or new legal defenses. What they actually are are legal conclusions. They are not factual averments, but at any rate *as* new factual pleadings they would have no place in PGW's answer to Mr. Berry's motion for judgment on the pleadings.

If they are intended to be legal claims, however, they likewise are irrelevant to this motion, but in addition are wholly deficient *as* legal claims. Simply saying “no we didn’t” would not rise to the level of a legal argument on the most generous of law school exams. Even if this Commission were to allow those statements to be amended to the defendant’s answer to Mr. Berry’s original complaint, PGW has *still*, even at this late date, failed to comply with § 5.61(b)(2) & (4), which require PGW to advise Mr. Berry and the Commission of the nature of its defense, and to state concisely the matters of law relied upon. Mr. Berry and this Commission still have no idea what PGW’s legal defenses might be, if any.

For the foregoing reasons, Mr. Berry respectfully requests that this Commission deny PGW’s attempt to amend its answer to Mr. Berry’s formal complaint, that it deem PGW in default for failing to file an adequate answer to the formal complaint pursuant to 52 Pa. Code § 5.61(b) & (c), and that it grant Mr. Berry’s motion for judgment on the pleadings.

Respectfully submitted,

Gregory Berry, pro se
P.O. Box 13291
Philadelphia, PA 19101
(415) 321-9683
gregoryberry@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Service List:

For Defendant:

Laureto Farinas, Esquire
Philadelphia Gas Works
800 W. Montgomery Avenue
Philadelphia, PA 19122
(215) 684-6982

Date: May 13, 2010

Gregory Berry
P.O. Box 13291
Philadelphia, PA 19101
(415) 321-9683
gregoryberry@gmail.com