

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Theresa Terry	:	
	:	
v.	:	C-2016-2536427
	:	
Capital City Cab Service, Inc.	:	

INITIAL DECISION

Before
Joel H. Cheskis
Administrative Law Judge

INTRODUCTION

This Decision grants a motion to dismiss for failure to prosecute because the complainant failed to appear for the hearing at the designated date and time despite being given notice of the hearing.

HISTORY OF THE PROCEEDING

On March 14, 2016, Theresa Terry filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against Capital City Cab, Inc. (Capital City), Docket Number C-2016-2536427. In the complaint, Ms. Terry averred that the vehicle she was in was being operated in a dangerous manner, was not clean inside or in the trunk and had no heat. Ms. Terry provided additional information regarding the cab, including that “the whole cab is out of line. Both ends front and back need to be aligned.”

The formal complaint was served on Capital City by the Commission’s Secretary on March 29, 2016.

On April 13, 2016, Capital City filed an answer to the formal complaint admitting or denying the various averments made by Ms. Terry in her complaint. In particular, Capital City denied that the vehicle was operated in a dangerous manner but noted that the ride was accepted on a winter morning that, among other things, required a few minutes to warm the cab adequately after several minutes of idleness and required snow equipment to be stored in the trunk. Capital City concluded its answer by averring that the complaint should be dismissed.

On July 12, 2016, a hearing notice was issued establishing an initial in-person hearing for this matter for Monday, August 29, 2016 at 10:00 a.m. in hearing room 4 of the Commonwealth Keystone building in Harrisburg and assigning me as the Presiding Officer. Of note, the Hearing Notice issued indicated among other things: “You may lose this case if you do not take part in this hearing and present facts on the issues raised.” A prehearing order dated July 14, 2016 was issued setting forth various procedural rules that would govern the hearing. Similar to the hearing notice, the prehearing order stated: “If a party fails to participate in the hearing, the hearing may proceed without that party and a decision may be entered against that party.” Both the hearing notice and the prehearing order were sent to Ms. Terry at the address provided on her complaint via first-class mail. Neither was returned to the Commission as undeliverable.

The hearing convened on August 29, 2016, as scheduled. Joseph T. Sucec, Esquire appeared on behalf of Capital City. No one appeared on behalf of Ms. Terry.

The record in this case consists of the hearing transcript of seven pages. The record closed in this proceeding when the transcript was filed with the Commission on September 6, 2016. This Initial Decision memorializes the ruling at the conclusion of the hearing granting Capital City’s motion to dismiss the complaint for failure to prosecute.

FINDINGS OF FACT

1. The Complainant in this case is Theresa Terry.
2. The Respondent in this case is Capital City Cab Service, Inc.
3. No one appeared at the hearing on behalf of Ms. Terry. Tr. 1, 4.
4. Ms. Terry received notice of the hearing when she was sent a hearing notice to the address she provided on her complaint on July 12, 2016. Tr. 5.
5. Ms. Terry also received notice of the hearing when she was sent a prehearing order to the address she provided on her complaint on July 14, 2016. Tr. 5.
6. Neither the hearing notice nor the prehearing order was received back by the Commission as undeliverable. Tr. 5.
7. During the hearing, counsel for Capital City indicated that he made several attempts to reach Ms. Terry to discuss her complaint both at the time the complaint was filed and during the several days prior to the hearing but was unable to reach her. Tr. 5-6.
8. The start of the hearing was delayed approximately 15 minutes to accommodate any delay for Ms. Terry. Tr. 1, 4.
9. The hearing notice and the prehearing order issued in this matter stated that, if a party fails to participate in the hearing, the hearing may proceed without that party and a decision may be entered against that party.

DISCUSSION

Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a). "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950). In this proceeding, based on a reading of her complaint, Ms. Terry seeks a finding that Capital City operated its cab in a dangerous manner. Ms. Terry, therefore, has the burden of proof in this proceeding.

Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. Schneider v. Pa. Pub. Util. Comm'n., 479 A.2d 10 (Pa.Cmwlth 1984). This due process requirement is satisfied when the parties are accorded notice and the opportunity to be heard. Id.

No one appeared on behalf of Ms. Terry at the date and time set for the hearing in her case despite notice of the hearing. Commission regulations address circumstances when a party fails to appear in a proceeding. Section 5.245 provides:

§ 5.245. Failure to appear, proceed or maintain order in proceedings.

- (a) After being notified, a party who fails to be represented at a scheduled conference or hearing in a proceeding will:
- (1) Be deemed to have waived the opportunity to participate in the conference or hearing.
 - (2) Not be permitted to reopen the disposition of a matter accomplished at the conference or hearing.
 - (3) Not be permitted to recall witnesses who were excused for further examination.

52 Pa.Code § 5.245(a).

The hearing notice and the prehearing order were sent to Ms. Terry by regular first class mail. Neither the hearing notice nor the prehearing order was returned to the Commission as undeliverable. Accordingly, it must be presumed that these documents sent to Ms. Terry in the ordinary course of business were received by Ms. Terry. Berkowitz v. Mayflower Securities, Inc., 455 Pa. 531, 317 A.2d 584 (1974); Meierdierck v. Miller, 394 Pa. 484, 147 A.2d 406 (1959); Samaras v. Hartwick, 698 A.2d 71 (Pa. Super. 1997); Judge v. Celina Mutual Insurance Co., 303 Pa. Super. Ct. 221, 444 A.2d 658 (1982). Of note, both the hearing notice and the prehearing order stated that, if a party fails to participate in the hearing, the hearing may proceed without that party and a decision may be entered against that party. Counsel for Capital City also indicated that he made several attempts to reach Ms. Terry to discuss the complaint but has not been able to speak with her. Tr. 5-6.

No one appeared on behalf of Ms. Terry at the time of the hearing. Nor did anyone ever request a postponement or continuance of the hearing. As such, Ms. Terry had notice and an opportunity to be heard in this proceeding, but chose not to appear. Therefore, Ms. Terry's due process rights have been fully protected. Sentner v. Bell Telephone Company of Pennsylvania, Docket No. F-00161106 (Order entered October 25, 1993); *see also*, 52 Pa.Code § 5.245(a).

During the hearing, counsel for Capital City moved to have the complaint dismissed with prejudice for lack of prosecution. Tr. 6. By failing to appear and present any evidence in support of her complaint, Ms. Terry has failed to carry her burden. Thus, it is appropriate to dismiss the complaint with prejudice. Jefferson v. UGI Utilities, Inc., Docket No. Z-00269892 (Order entered December 26, 1995); *see also*, Hanna El-Ayazra v. West Penn Power Co., Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016). Accordingly, the merits of the complaint will not be addressed in this Initial Decision.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. § 701.

2. Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).

3. "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950).

4. Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. Schneider v. Pa. Pub. Util. Comm'n., 479 A.2d 10 (Pa.Cmwlth 1984). This due process requirement is satisfied when the parties are accorded notice and the opportunity to be heard. Id.

5. After being notified, a party who fails to be represented at a scheduled conference or hearing in a proceeding will: 1) be deemed to have waived the opportunity to participate in the conference or hearing; 2) not be permitted to reopen the disposition of a matter accomplished at the conference or hearing; and 3) not be permitted to recall witnesses who were excused for further examination. 52 Pa.Code § 5.245(a).

6. Ms. Terry's due process rights have been fully protected. Sentner v. Bell Telephone Company of Pennsylvania, Docket No. F-00161106 (Order entered October 25, 1993); 52 Pa.Code § 5.245(a).

7. Ms. Terry failed to carry her burden of proof in this proceeding.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion of Capital City Cab Service, Inc. to dismiss the formal complaint of Theresa Terry at Docket Number C-2016-2536427 for failure to prosecute is granted.
2. That the formal complaint filed by Theresa Terry at Docket Number C-2016-2536427 is hereby dismissed with prejudice.
3. That this matter be marked closed.

Date: September 15, 2016

_____/s/_____
Joel H. Cheskis
Administrative Law Judge