

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Howard Smith

v.

Philadelphia Gas Works

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C-2016-2569010

INITIAL DECISION

Before
Rebecca Waldemar
Special Agent

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 having notice of the hearing.

HISTORY OF THE PROCEEDING

On September 30, 2016, Howard Smith (Complainant) filed with the Pennsylvania Public Utility Commission, a Formal Complaint against Philadelphia Gas Works (PGW or Respondent). In his Complaint, Mr. Smith alleged that PGW was threatening to terminate, or had already terminated, his service. He requested a payment arrangement.

On October 20, 2016, PGW filed an Answer to Mr. Smith's Complaint. In its Answer, Respondent admitted that it had terminated Mr. Smith's service and averred that the Complainant had broken two company issued payment arrangements. PGW requested that the Complaint be dismissed.

On November 15, 2016, the Commission issued a Telephone Hearing Notice scheduling an initial telephonic hearing for this matter for Tuesday, December 6, 2016 at 10:00 a.m. and assigning me as the Presiding Officer. Of note, the Hearing Notice stated, among other things: “Attention: You may lose this case if you do not take part in this hearing and present facts on the issues raised.” Additionally, a Prehearing Order dated November 17, 2016 was issued establishing the procedures pertaining to the hearing. Similar to the Hearing Notice, the Prehearing Order stated: “This case will be dismissed if you do not participate in the hearing and present evidence on the issues raised.” Both the Hearing Notice and the Prehearing Order were sent to Complainant at the address provided in his Complaint via first-class mail. Neither were returned to the Commission as undeliverable.

On December 5, 2016, Complainant’s Physician faxed a note to me stating that Mr. Smith was under his care and was using a medical apparatus which made it difficult for the Complainant to speak. The fax contained a request for a continuance. I provided a copy of the fax to PGW’s counsel.

The hearing convened on December 6, 2016, as scheduled.¹ Laureto Farinas, Esquire appeared on behalf of Respondent. Complainant appeared *pro se* and requested a continuance noting the note provided by his doctor. Respondent did not object and I continued the hearing. On December 13, 2016, the Commission issued a Telephone Hearing Notice scheduling a further telephonic hearing for this matter for Tuesday, January 17, 2017 at 10:00 a.m. Of note, this Hearing Notice also stated, among other things: “Attention: You may lose this case if you do not take part in this hearing and present facts on the issues raised.”

The hearing convened on January 17, 2017, as scheduled. I attempted to call the Complainant at the number provided in the Complaint at the scheduled time, but he did not answer. I again called the Complainant approximately 15 minutes later, who again did not answer. I left a message during the first call explaining this was the date and time scheduled for his hearing and that he could lose his case if he did not appear. I left a message during the second call informing the Complainant that since he did not answer my call, the hearing would

¹ A tape recording of the hearing was made, no court reporter being present.

proceed in his absence. Neither the Complainant nor anyone on his behalf appeared nor had the matter been withdrawn, settled, or continued. No witnesses were presented and no exhibits were introduced into the record at the hearing.

Respondent's counsel moved that the Complaint be dismissed with prejudice for lack of prosecution pursuant to 52 Pa.Code § 5.245. In accordance with Commission policy, the motion to dismiss will be granted. The record closed in this proceeding at the conclusion of the hearing.

FINDINGS OF FACT

1. The Complainant in this case is Howard Smith.
2. The Respondent in this case is Philadelphia Gas Works.
3. No one appeared at the hearing on behalf of Mr. Smith.
4. The Commission notified the Complainant of the initial hearing by hearing notice dated November 15, 2016 and sent a Prehearing Order on November 17, 2016.
5. An initial hearing was held, and the matter continued, on December 6, 2016.
6. The Commission notified Complainant of the further hearing by Hearing Notice dated November 13, 2016.
7. The Hearing Notice clearly stated the date and time for the further hearing.
8. The Hearing Notice was not returned to the Commission as undeliverable.

9. The Hearing Notice for the further hearing as well as the Hearing Notice for the initial hearing and the Prehearing Order issued in this matter explained that, if a party failed to participate in the hearing, that party may lose the case.

10. The parties did not settle prior to the hearing nor was a continuance requested or the matter withdrawn.

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 his Complaint, the Complainant seeks a payment arrangement. The Complainant, 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.* Neither the Complainant nor anyone on his behalf appeared at the hearing despite twice receiving notice of the hearing. Commission regulations address circumstances when a party fails to appear in a proceeding. Section 5.245 provides that if a party fails to appear at a hearing after being notified, that party will be deemed to have waived the opportunity to participate in the hearing and will not be permitted to reopen the disposition of the matter. 52 Pa.Code § 5.245(a).

The Hearing Notice, the Prehearing Order, and the further Hearing Notice were sent to Complainant by regular first class mail to the address he provided in his Complaint filed with the Commission. None were returned to the Commission as undeliverable. Accordingly, it must be presumed that these documents sent to the Complainant in the ordinary course of

business were received by him. *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, the Hearing Notice, the Prehearing Order, and the further Hearing Notice all explained that, if a party failed to participate in the hearing, the hearing may proceed without that party and the party could lose its case. I attempted to contact the Complainant twice to connect him to the hearing and was unable to reach him.

No one appeared on behalf of Mr. Smith at the time of the hearing. Nor did he request a postponement or continuance of the hearing. As such, Complainant had notice and an opportunity to be heard in this proceeding, but chose not to appear. Therefore, his 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 PGW moved to have the Complaint dismissed with prejudice for lack of prosecution. By failing to appear and present any evidence in support of his Complaint, Mr. Smith has failed to carry his burden of proof. Thus, the Complaint is appropriately dismissed. *El-Ayazra v West Penn Power Company*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016). I will decline to dismiss the case with prejudice as the Complainant has experienced what may be serious health problems and actively participated in his case before the further hearing.

Accordingly, the merits of the Complaint will not be addressed in this Initial Decision and the Complaint will be dismissed, without prejudice, for Complainant's failure to prosecute and carry his burden of proof.

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. Mr. Smith'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. Mr. Smith failed to carry his burden of proof in this proceeding.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion of Philadelphia Gas Works to dismiss the Formal Complaint of Howard Smith at Docket Number C-2016-2569010 for failure to prosecute is granted.
2. That the Formal Complaint filed by Howard Smith at Docket Number C-2016-2569010 is hereby dismissed for failure to appear and prosecute.
3. That this matter be marked closed.

Date: February 7, 2017

_____/s/
Rebecca Waldemar
Special Agent