

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Kevin Johnson

v.

Philadelphia Gas Works

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F-2019-3008518

INITIAL DECISION

Before
Gail M. Chiodo
Special Agent

INTRODUCTION

This decision grants a motion to dismiss the complaint of a gas service customer for the failure of the complainant to appear for the hearing and prosecute the complaint despite being given notice of the date and time of the hearing.

HISTORY OF THE PROCEEDING

On March 11, 2019, Kevin Johnson (Complainant) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against Philadelphia Gas Works (PGW or Respondent) averring that Respondent is threatening to shut off his service or has already shut off his service, that there are incorrect charges on his bill, and that he would like a payment arrangement.

The complaint is a timely appeal from a decision of the Commission's Bureau of Consumer Services (BCS) in case number 3615990 issued on January 21, 2019 which dismissed the informal complaint.

On April 3, 2019, Respondent filed an answer in which it admitted that it had provided notice of intent to terminate Complainant's service for an unpaid balance but that it was not pursuing termination pending the outcome of the complaint. Respondent also denied that the charges to Complainant's account are incorrect, and averred that Complainant is ineligible for another Commission payment arrangement. Respondent requested that the complaint be dismissed.

On April 4, 2019, a Call-In Telephonic Hearing Notice was served on the parties scheduling an initial telephonic hearing for May 2, 2019 at 10:00 a.m. and the case was assigned to me pursuant to 52 Pa. Code § 56.174.¹ Of note, the Hearing Notice stated the following: "Attention: You may lose the case if you do not take part in this hearing and present facts on the issues raised." (emphasis in original).

On April 18, 2019, a Prehearing Order was served on the parties which reminded the parties of the date and time of the hearing and addressed, *inter alia*, various procedures applicable to the hearing including how a party could request a change of the scheduled hearing date if needed. Further, the Prehearing Order stated that Complainant may lose the case if he did not take part in the hearing and present evidence on the issues raised.

On May 2, 2019, the hearing convened as scheduled. Laureto A. Farinas, Esquire, appeared on behalf of Respondent along with a witness, Jocelyn Moore, Senior Customer Review Officer, and was prepared to proceed. Complainant did not appear. In an abundance of caution, at approximately 10:05 a.m., I called the Complainant at the mobile phone number provided by him on his complaint. I left a voicemail stating that the hearing had convened as scheduled, provided him again with the toll-free bridge number and PIN number to participate in the hearing that was provided in the Hearing Notice and Prehearing Order, and stated that the hearing would proceed at 10:15 a.m. in his absence if he did not appear.

¹ 52 Pa. Code § 56.174 (providing for review by a special agent of decisions of the BCS and any other case in which the issue is solely the ability to pay).

At approximately 10:15 a.m., the hearing proceeded in Complainant's absence. No testimony was taken and no exhibits were introduced into the record. Attorney Farinas noted for the record that, in an effort to resolve this matter, both he and Ms. Moore separately tried to contact Complainant a few days prior to the hearing by calling Mr. Johnson; both left voicemails and Mr. Johnson did not return either of their calls. Next, Respondent moved to dismiss the complaint with prejudice for the failure of Complainant to appear and prosecute his complaint. I took this motion under advisement.

The record closed following the close of the hearing. As of the date of this decision, neither the Office of Administrative Law Judge (OALJ) nor the undersigned has received any communication from Mr. Johnson explaining his absence at the hearing. For the reasons discussed below, this decision grants Respondent's motion to dismiss the complaint.

FINDINGS OF FACT

1. The Complainant is Kevin Johnson.
2. The Respondent is Philadelphia Gas Works, which provides gas service to Complainant.
3. The service address is 7092 Forrest Avenue, Philadelphia, Pennsylvania.
4. On April 4, 2019, a Call-In Telephonic Hearing Notice was served on the parties scheduling an initial telephonic hearing for May 2, 2019 at 10:00 a.m.
5. The Hearing Notice stated the following: "*Attention: You may lose the case if you do not take part in this hearing and present facts on the issues raised.*" (emphasis in original).

6. On April 18, 2019, a Prehearing Order was served on the parties which stated the date and time of the scheduled hearing and the various procedures applicable to this proceeding, including how a party could request a continuance of the hearing date, if needed.

7. The Prehearing Order stated that Complainant's failure to participate in the hearing and present evidence on the issues raised may result in the case being dismissed for the failure to appear.

8. Both the Hearing Notice and Prehearing Order were served on Complainant by first-class mail to the address provided by him in the complaint.

9. Neither the Hearing Notice nor the Prehearing Order were returned to the Commission as being undeliverable.

10. The Complainant did not appear and participate in the telephonic hearing when it convened on May 2, 2019.

DISCUSSION

Due Process and Notice

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.Cmwlt. 1984). This due process requirement is satisfied when the parties are provided notice and the opportunity to be heard. *Id.*

The record shows that Complainant was provided notice and the opportunity to be heard. First, on April 4, 2019, Complainant was served a Call-In Telephonic Hearing Notice which stated the date and time of the hearing and how to participate. Second, on April 18, 2019, Complainant was served a Prehearing Order which reminded the parties of the date and time of the hearing and how to participate.

Further, both documents advised the parties, *inter alia*, how to request a continuance prior to the hearing, and that failure to appear for the hearing and present evidence on the issues raised in the complaint would result in dismissal of the complaint.

Both documents were served separately and by regular, first-class mail to the address provided on the complaint. Neither document was returned as being undeliverable. Thus, it must be presumed that these documents were received by the Complainant. *Berkowitz v. Mayflower Securities, Inc.*, 317 A.2d 584 (Pa. 1974); *Meierdierck v. Miller*, 147 A.2d 406 (Pa. 1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa. Super. 1997); *Judge v. Celina Mutual Insurance Co.*, 449 A.2d 658 (Pa. Super. 1982).

Failure to appear, waiver and “unavoidable” standard

Both the Public Utility Code and the Commission’s regulations provide that, after being notified, a party who fails to appear at a scheduled hearing shall be deemed to have waived the opportunity to participate in the hearing, not be permitted thereafter to reopen the disposition of the matter accomplished at the hearing, and not be permitted to recall excused witnesses. 66 Pa.C.S. § 332(f) and 52 Pa.Code § 5.245(a) respectively. However, these provisions do not apply if the presiding officer determines that the failure to be represented was unavoidable and that the interests of the other parties and of the public would not be prejudiced by permitting the reopening or further examination. 66 Pa.C.S. § 332(f); 52 Pa.Code § 5.245(b).

The Complainant failed to appear for the hearing despite being given written notices. Further, once the hearing began and Complainant did not appear, out of an abundance of caution, at approximately 10:05 a.m., the undersigned called the Complainant at the mobile phone number provided by him on his complaint, and left a voicemail stating that the hearing had convened as scheduled, provided him again with the same toll-free bridge number and PIN number to participate in the hearing that was provided in the Hearing Notice and Prehearing Order, and stated that the hearing would proceed at 10:15 a.m. in his absence if he did not appear. To date, no communication has been received by the undersigned or the OALJ by, or on behalf of, Complainant regarding whether Complainant’s absence was unavoidable.

Further, I note that at the hearing, Attorney Farinas stated that, in an effort to resolve this matter, both he and Ms. Moore separately tried to contact Complainant a few days prior to the hearing by calling Mr. Johnson; both left voicemails and Mr. Johnson did not return either of their calls.

Consequently, I find that Complainant waived the opportunity to participate in a hearing on the matters raised in the complaint and Complainant's absence was not unavoidable.

Burden of proof and dismissal of complaint

As the proponent of any request for relief, Complainant bears the burden of proof by a preponderance of the evidence. 66 Pa.C.S. § 332(a); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). By failing to participate and proffer any evidence to support the complaint, the Complainant has failed to meet this burden. Thus, it is appropriate to dismiss the Complaint with prejudice. *Williams v. PECO Energy Co.*, Docket No. C-2018-300734 (Opinion and Order entered March 14, 2019), *citing, inter alia, Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Opinion and Order entered December 26, 1995). Accordingly, the merits of the Complaint will not be addressed.

Consequently, Respondent's motion to dismiss with prejudice will be granted.

CONCLUSIONS OF LAW

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

2. The Commission is required to provide due process to the parties appearing before them; this due process requirement is satisfied when the parties are provided notice and the opportunity to be heard. *Schneider v. Pa. Pub. Util. Comm'n.*, 479 A.2d 10 (Pa.Cmwlth. 1984).

3. After being notified, a party who fails to appear at a scheduled hearing shall be deemed to have waived the opportunity to participate in the hearing, not be permitted thereafter to reopen the disposition of the matter accomplished at the hearing, and not be permitted to recall excused witnesses. 66 Pa.C.S. § 332(f); 52 Pa.Code § 5.245(a).

4. If the presiding officer determines that the failure to be represented was unavoidable and that the interests of the other parties and of the public would not be prejudiced by permitted the reopening or further examination, the presiding officer may find that a party did not waive the opportunity to participate in the hearing. 66 Pa.C.S. § 332(f); 52 Pa.Code § 5.245(b).

5. Complainant's due process rights have been fully protected and Complainant's failure to appear was not unavoidable. *Schneider v. Pa. Pub. Util. Comm'n.*, 479 A.2d 10 (Pa.Cmwlth. 1984); 66 Pa.C.S. § 332(f); 52 Pa.Code § 5.245(a).

6. As the party seeking relief, Complainant bears the burden of proof by a preponderance of the evidence. 66 Pa.C.S. § 332(a); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

7. By failing to participate in the hearing and proffer any evidence to support the complaint, the Complainant has failed to meet the burden of proof. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion of Philadelphia Gas Works to dismiss the complaint of Kevin Johnson with prejudice at Docket No. F-2019-3008518 for failure to prosecute is granted.

2. That the complaint of Kevin Johnson against Philadelphia Gas Works at Docket No. F-2019-3008518 is dismissed with prejudice.

3. That the docket at Docket No. F-2019-3008518 is marked closed.

Date: June 4, 2019

/s/
Gail M. Chiodo
Special Agent