

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

OFFICE PARTNERS XXIII BLOCK GI LLC,
Complainant,

Docket Nos. C-2022-3033251
C-2022-3033266

vs.

THE PITTSBURGH WATER AND SEWER
AUTHORITY,

Respondent.

**RESPONSE TO EXCEPTIONS
OF PITTSBURGH WATER AND
SEWER AUTHORITY d/b/a
PITTSBURGH WATER TO THE
INITIAL DECISION OF
ADMINISTRATIVE LAW
JUDGE DEVOE**

Filed on behalf of: Plaintiff

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LAW JUDGE DEVOE**

I. Introduction:

The Pittsburgh Water and Sewer Authority (“PWSA”) filed one exception to Administrative Law Judge Emily Devoe’s (“ALJ”) decision alleging that the ALJ “erred in Conclusion of Law Number 11 with respect to the interpretation and application of 53 Pa.C.S.A. § 5607(d)(24).” However, the repetitive four part exception asks this tribunal to ignore the plain meaning of the statute and rewrite it. Moreover, PWSA’s inconsistent positions in this case, and in others, should invoke the doctrine of judicial estoppel so as to prevent it from taking such inconsistent positions.

PWSA agrees that 53 Pa.C.S.A. § 5607(d)(24) controls:

To charge enumerated fees to property owners who desire to or are required to connect to the authority’s sewer or water system. **Fees shall be based upon the duly adopted fee schedule which is in effect at the time of payment and shall be payable at the time of application for connection or at a time to which the property owner and the authority agree.** (emphasis added).

Is there any ambiguity in the provision of the 5706? No, and there is nothing to interpret. Payment was made on March 15, 2022 (pursuant to an invoice issued on March 3, 2022). (Joint Stipulation of Facts 18 and 19).¹

II. The ALJ Correctly Applied 53 Pa. C.S.A.5607 (d)(24)

a. PWSA is Taking Inconsistent Positions in Order to Obfuscate the Clear Terms of the Applicable Statute. (Response to II(1)(A) and (B) of PWSA's Exceptions)

The statute is clear; changing it in the guise of interpretation is impermissible. The ALJ correctly explained the law of statutory interpretation and the role of the Courts as follows:

This case turns on the interpretation of a single sentence. Under the Statutory Construction Act, the object of all statutory construction is to ascertain and effectuate the General Assembly's intention. See 1 Pa.C.S. § 1921(a). "Generally speaking, the best indication of legislative intent is the plain language of the statute." *Commonwealth v. Gilmour Mfg. Co.*, 822 A.2d 676, 679 (Pa. 2003). When the words of the statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S. § 1921(b). It is only when the words of the statute "are not explicit" that a court may resort to other considerations in order to ascertain legislative intent. 1 Pa.C.S. § 1921(c).

Decision P. 33

b. The Doctrine of Judicial Estoppel and Judicial Admissions Prevents PWSA from Taking Another New Position Now. (Response to All Exceptions)

PWSA has taken contradictory positions. PWSA first argued that the approval date should control as to the applicable rate. The statute does not mention approval. PWSA has argued that approval is the date of final invoice (Appendix S). In this case, a final invoice was issued on March 3, 2023 (After the lower Tariff took effect. Finding of Fact 18).

In another case before the PUC, PWSA took the opposite stance and claimed approval occurred upon payment. See C-2023-3038775 (*3213 Penn LLC. v. PWSA*). 3213 Penn contended that the new lower tariff rates should be applied, because its permit was not approved or issued until after the lower tariff date took effect and demanded a refund. PWSA contended in its

¹ And PWSA does not require or even allow for payment at the time of application.

Amended Answer and New Matter that the approval date is the date of payment. It invoked 5607 for the proposition that fees are calculated on the date of payment. See Office Partner's Motion for Directed Verdict Paragraph 14 and Exhibit F thereto, Paragraphs 6, 8, 10, 11, 20, 21, 22, 24 of the Answer, and Paragraph 17 of the New Matter.

As the Court observed in a different context (changing positions by amending the answer to a complaint to avoid judgment) in *Avondale Cut Rate, Inc. v. Associated Excess Underwriters, Inc.*, 178 A.2d 758, 760-61 (Pa. 1962):

The actions of the defendant in this respect would indicate that it is making ducks and drakes of the law because it has utterly failed to give any explanation whatever for the inconsistent averments and exhibits in its original answer which unquestionably manifest a breach of the duty it owed the plaintiff

The doctrine of judicial admissions and estoppel was first explained by our Supreme Court in *Tops Apparel Mfg. Co. v. Rothman*, 244 A.2d 436, 438 (Pa., 1968):

Appellants in their preliminary objections admitted that they were New Jersey residents. Admissions of this type, i.e., those contained in pleadings, stipulations, and the like, are usually termed "judicial admissions" and as such cannot later be contradicted by the party who has made them. See Wigmore, Evidence § 1603(2) (3d ed. 1940).

See also *Gross v. City of Pittsburgh*, 686 A.2d 864 (Pa. Cmwlth. 1996) (City presented evidence of property value in a civil rights proceeding in federal court and was not permitted to present a different value in a condemnation case in state court).

As stated by the court in *Resolution Trust Corp. v. Farmer*, 823 F. Supp. 302 (E.D. Pa. 1993), the purpose of the doctrine of judicial estoppel is to uphold the integrity of the courts by preventing parties from abusing the judicial process by changing positions as the moment requires.

Gross, 686 A.2d 864, 867.

In *Ligon v. Middletown Area School Dist.*, 584 A.2d 376 (Pa. Cmwlth. 1990), the Court noted "the established rule that under the doctrine of judicial estoppel a party is precluded from switching positions or asserting contrary positions in the same or related actions. Moreover,

‘federal courts have long applied this principle of estoppel where litigants ‘play fast and loose’ with the courts by switching legal positions to suit their own ends.’ Gross v. City of Pittsburgh, 686 A.2d 864, 867 (Pa. Cmwlth. 1996).”

PWSA is a public corporation and has an elevated duty to the citizens. Our courts require consistency, as lack of consistency breeds contempt for the law. See Yudacufski v. Commonwealth, 454 A.2d 923, 926 (Pa. 1982) (coordinate jurisdiction rule prevented courts in different cases from holding contrary positions — that citizens in the County were prejudiced against coal companies).

The only ambiguities are PWSA’s smoke screen and inconsistent practices with regard in “approval,” “application date,” invoicing, and payment requirements. Allowing this would leave the public without clear direction. By including the term “payment,” the legislature leaves no doubt, and there is no room to “interpret” the term.

In fact, PWSA’s new position is that 53 Pa.C.S.A. § 5607(d)(24) applies but only if it is rewritten as follows:

fees are payable at the time of application for connection, and that those payable fees are then based upon the duly adopted fee schedule **which is in effect at the time of application.** (emphasis added).²

Page 11 of PWSA’s Exception.

The statute is clear, and the Court needs go no further than a review of PWSA’s various inconsistent positions in order to simply shut it down and protect the Court’s own integrity by holding that PWSA’s recent exceptions are based upon a changed position which will not be tolerated.

c. The Statute is Explicit, and the Factors Raised by PWSA Have No Impact. (Response to II(1)(C) of PWSA’ Exceptions)

PWSA cites 1 Pa. C.S.A. 1921(c) for the proposition that it is entitled to not follow the

² PWSA does not require payment on the date of application and its policy is to accept payment at any time.

letter of the statute because doing so would deprive it of a larger payment. And, that Office Partners somehow committed malfeasance. P. 8 of PWSA's Objections.

PWSA allows any applicant to pay any time after applying and issuing an invoice (See Appendix S to Office Partners Motion for Summary Judgment and page 5 of its Brief in Response to PWSA's Motion for Summary Judgment). PWSA claims that it could not possibly calculate the fee at the time of application if that could change at the time of payment. However, that is exactly what 5607 requires. And, that is what PWSA does in practice as it does not calculate any fee until it is ready to issue a permit (PWSA did it in this case as well when it recalculated the fees for Office Partners pursuant to the escrow agreement. See Stipulation of Facts 7 and 18).

PWSA cites *Norristown Mun. Waste Auth. v. 200 E. Airy, LLC*, 2011 Pa. Commw. Unpub. LEXIS 951, 31 A.3d 1262, 2011 WL 10857856 (Pa. Commw. Ct. November 30, 2011) for the proposition that application date is the date of calculation.³ In *Norristown*, the Landowner purchased a property in 2002, and the Borough issued an occupancy permit in 2005. Three years later, in 2008, the Borough asked the landowner to pay a tap fee for the 2005 connection. It had never done so before, and no invoice was issued prior to 2008.

The Borough then passed a resolution in 2008 establishing fees that would apply to Landowner's property, and, in February of 2009, filed a municipal lien for \$167,200.00. The Landowner filed an affidavit of defense, because the **2008 resolution did not apply to him, because the resolution specifically stated tapping fees applied only to connections after the Resolution's effective date.**

The Court held that the lien should be stricken, because it applied to connections after the effective date and because the Resolution did not comply with 53 Pa.C.S. 5607, as follows:

³ Pursuant to Pa. R.A.P. 126 (b)(1) the case may not be relied upon as binding precedent as it is unpublished in addition to being by a single Commonwealth Court Judge.

Consequently, we must agree with the trial court that the Authority could not rely upon the December 2008 Resolution to impose a tapping fee upon Landowner's property as it was adopted after the Authority sought payment from Landowner.

Furthermore, a review of the December 2008 Resolution reveals that the Authority lowered the water volume used to determine tapping fees but did not separately set forth by resolution the tapping fees. This Resolution does not explain the various components of the tapping fee or how it was calculated and, therefore, does not comply with 53 Pa. C.S. §5607(d)(24)(i)(C).⁹Link to the text of the note amount due.

This case has nothing in common with Office Partners' case. Office Partners is not challenging the rate in effect at time of payment.

d. PWSA Wants to Rewrite the Statute. (Response to II(1)(D) of PWSA's Exceptions)

PWSA argues that adopting the ALJ's decision would lead to absurd results and that PWSA has not been operating under the ALJ's ruling (that PWSA is violating the statute is not a defense). PWSA contends that this tribunal should hold that payment under the statute actually means "approval." The Statute says PAYMENT. This tribunal cannot rewrite it. PWSA claims enforcing the statute is absurd, impossible and unreasonable. What is unreasonable is that PWSA can calculate the fees at any time and does.⁴

Respectfully submitted,

MAURICE A. NERNBERG & ASSOCIATES

Date: 05/30/25

By: 

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XXIII Block G1 LLC*

⁴ PWSA does not and has never required payment at the time of application.

CERTIFICATE OF COMPLIANCE

I certify this filing complies with the provisions of the *Public Access Policy of the United Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: David M. Nernberg, Esq.

Signature: 

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