



STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center, Suite 801
Newark, NJ 07102
www.nj.gov/bpu/

CUSTOMER ASSISTANCE

NEAL E. BRUNSON,
Petitioner,

)

ORDER

)

v.

UNITED WATER NEW JERSEY,
Respondent.

BPU Dkt. No. WC09120998U
OAL Dkt. No. PUC 05707-10

Neal E. Brunson, Esq., Rutherford, New Jersey, Petitioner

John P. Wallace, Esq., Ridgewood, New Jersey, on behalf of Respondent, United Water
New Jersey

BY THE BOARD:

On January 19, 2011, the Board of Public Utilities (Board) granted United Water New Jersey's (United Water or Respondent) request for interlocutory review of a discovery ruling made by Administrative Law Judge (ALJ) Kimberly Moss, directing Respondent to produce the addresses of all customers who United Water had, within the past three (3) years, back billed for more than three (3) years' worth of undercharges. The Board now reverses the discovery ruling which required the disclosure of customers' addresses.

BACKGROUND

Pleadings

On or about December 17, 2009, Neal E. Brunson, Esq. (Petitioner) filed a petition, disputing a bill by United Water requiring him to pay \$2,763.27 for under-billed water consumption. Petitioner alleges that following Respondent's replacement of a water meter, Respondent alleged that the old water meter, in place since August 2000, was inaccurate and that Petitioner owed United Water additional monies. Petition at 1. Petitioner claims that he was unaware of

the alleged malfunction and that United Water had access to the old meter at all times. Petitioner further alleges that United Water did not provide him with a technical explanation for its calculations nor with an analysis of his water usage both before and after August 2000. Petitioner further claims that United Water was seeking to collect charges beyond the statutory authority for back billing and that Respondent was seeking to displace its negligence and failure to read, inspect and change its meter onto the consumer. *Id.* at 1-2. Petitioner, among other things, seeks an injunction, preventing United Water from disconnecting service and eliminating the disputed bill. Petitioner also requests discovery regarding how United Water calculates catch-up charges and technical information about the operation of Petitioner's previous water meter. *Id.* at 2.

On May 25, 2010, Respondent filed an answer generally denying Petitioner's allegations. Respondent asserts that the Petitioner failed to pay for water consumption as his bills only reflected facility charges. Answer at 1. Respondent further states that Petitioner knew or should have known that he had not received bills indicating water consumption. Respondent asserts that Petitioner is obliged to pay the subject bill for water consumption pursuant to N.J.A.C. 14:3-4.6. *Id.* at 2. Thereafter, the Board transmitted this matter to the Office of Administrative Law (OAL) for hearing and initial disposition as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Discovery Dispute

During the prehearing discovery period, Petitioner requested, among other things, production of "a list of names and addresses of any other water users who have been charged with back water payments of more that [sic] three (3) years." See, Respondent's Motion to Strike, Certification of John P. Wallace, (Wallace Cert.), Exhibit A at 6, Production Request Number 4. On October 26, 2010, pursuant to N.J.A.C. 1:1-10.4, Respondent moved to strike Petitioner's discovery requests.¹ Respondent alleges that the discovery requests seek information which is irrelevant and unduly burdensome, and which would not lead to discovery of admissible evidence. United Water also states that "it would be an unfair burden to require Respondent to review records of thousands of customers to identify 'any other water users who have been charged with back water payments of more than three years', if indeed such language is meaningful." Wallace Cert., &3.

On November 8, 2010, Petitioner submitted an unsigned, two-page certification (Petitioner Cert.), in opposition to Respondent's Motion to Strike. Relying on Harmon v Great Atlantic and Pacific Tea Co., 273 N.J. Super. 552, 556 (App. Div. 1994), Petitioner argues that parties are entitled to all records that lead to probative evidence and that discovery is to be "an aid to ascertaining the truth" *Id.* at 556. Petitioner criticizes United Water's objection as generic and asserts that Production Request Number 4 seeks information "of similarly situated customers of United Water who may also have been assessed back charges. The demands seek information concerning United Water's business practices and whether the defendant has acted improperly in regards to its customers." Petitioner Cert., &10. Responding to Respondent's claims that the discovery is burdensome, Petitioner states that his request is limited to the past three years. Petitioner Cert., &11. In addition, Petitioner states that he is not seeking the

¹ Respondent moved to strike five discovery requests. Only Production Request Number 4 is the subject of this interlocutory review.

names of United Waters delinquent customers, only the utility users similarly situated to the complainant.” Petitioner Cert., &13. Finally, Petitioner states, “United Water claims that the undersigned breached his contract and as a consequence they are [sic] entitled to six years of back payments. If the defendant’s records show a pattern of conduct of back billing its customers when its’ meters malfunction, such information is very probative.” Petitioner Cert., &12.

On or about November 12, 2010, Respondent filed a Reply Certification (Wallace Reply Cert.), wherein it asserts that the names and addresses of water users are confidential. Wallace Cert., &3. In order to protect privacy, Respondent does not provide personal information of its customer base. Moreover, Respondent, a private utility company, strictly protects personal customer information. Ibid. Furthermore, Respondent claims that Petitioner’s attempt to investigate its business practices is nothing more than an attempt to harass, rather than to develop any probative information. Id. at &4.

On or about November 22, 2010, Petitioner filed a sur-reply letter, stating that “issues related to a company’s privacy concerns are routinely governed by protective orders. These orders prevent parties from misusing proprietary and private information that could affect a company’s operations. This office would consent to the use of a properly framed protective order.” See, Petitioner’s Sur-Reply Letter. Reiterating his earlier arguments, Petitioner states that he is seeking to discover evidence of improper back billing by United Water, which information can come from complaints filed against Untied Water as well as business records. Ibid.

Discovery Order at Issue

On December 6, 2010, ALJ Moss issued an order partially granting and partially denying Respondent’s Motion to Strike (Discovery Order).² Referencing N.J.A.C. 1:1-10.1, ALJ Moss states:

Notice to Produce request number four which requests the names and addresses of water users who have been charged with back water payments of more than three years could lead to discoverable admissible evidence. However, I will restrict the information to be produced by Respondent to the addresses of the other customers of Respondent, who have been charged with back water payments of more than three years for the past three years.

[Discovery Order at 3-4].

Thus, ALJ Moss withheld disclosure of the names of United Water’s customers, but permitted disclosure of their addresses. Ibid.

² Other aspects of the Discovery Order are not challenged in this interlocutory appeal.

Request for Interlocutory Review

On December 20, 2010, Respondent filed a request for interlocutory review of the Discovery Order directing Respondent to produce the addresses of all customers who were back billed for more than three (3) years over the past three (3) years. Respondent claims that disclosure of its customers' addresses is a violation of their privacy, because it can easily lead to discovery of the customers' names. Respondent also claims that publishing the identity of such persons reveals the existence of a possible debt and "a debtor who is not party to this case . . . is entitled to be free of searches regarding his or her financial issues and charges owed to United Water." United Water Interlocutory Review Request at 1.

Respondent further claims that its customer records should be regarded as confidential pursuant to Lamorte Burns & Co. v. Walters, 167 N.J. 285, 298 (2001) (where the Court chronicled a history of protecting customer lists under New Jersey law as trade secrets). United Water also cites In re Solid Waste Util. Cust. Lists, 106 N.J. 508 (1987), where the Court recognized that the Board has authority to compel production of customer lists, even if the lists constituted privileged trade secrets, so long as adequate safeguards were provided. Thus, Respondent argues that the Discovery Order would require giving a portion of Respondent's customer list to another customer without the permission of the customers on that list, and without safeguards protecting the privacy interests of those customers. United Water Interlocutory Review Request at 2. Finally, Respondent states that its database cannot readily recognize the search parameters. Accordingly, United Water requests that the Board reverse the Discovery Order directing the disclosure of the addresses of United Water's customers and strike Production Request Number 4 in its entirety.

Petitioner's Opposition

On January 14, 2011, Petitioner forwarded a letter to the Board's counsel, wherein he objects to the granting of interlocutory review on the basis that Respondent did not first seek leave from ALJ Moss to file an interlocutory appeal.³ Petitioner further claims that the Discovery Order protects the rights of United Water.

The Board's Grant of Interlocutory Review

On January 19, 2011, the Board granted United Water's request for interlocutory review. In addition, pursuant to N.J.A.C. 1:1-14.10(c) and N.J.A.C. 1:14-14.4(a), the Board directed the Board's Secretary to issue a letter notifying the Director of the Office of Administrative Law and the parties of the Board's determination to review the Discovery Order. N.J.A.C. 1:1-14.10(d) provides that if an agency grants interlocutory review, a party opposed to the grant of interlocutory review may, within three days of receiving notice that review was granted, submit to the agency arguments in favor of the order being reviewed. The Board construes Petitioner's letter of January 11, 2011 as a submission pursuant to N.J.A.C. 1:1-14.10(d).

³ N.J.A.C. 1:1-14.10 and N.J.A.C. 1:14-14.4 do not require that a party seeking interlocutory review first seek leave from the administrative law judge.

The Board is to decide the review no later than twenty days from its determination to grant the request for interlocutory review. N.J.A.C. 1:14-14.4(b). The time period for disposition may be extended for good cause for an additional twenty days if both the Board and the Director of the Office of Administrative Law concur. N.J.A.C. 1:14-14.4(c). Because the next regularly scheduled public Board meeting of February 10, 2011 was outside the twenty day period provided in N.J.A.C. 1:14-14.4(b), and to ensure that the Board had sufficient time to consider the arguments and render its decision, the Board requested a 20-day extension of time for issuing its decision on the merits of the interlocutory review pursuant to N.J.A.C. 1:14-14.4(c). The Board now renders its decision on the merits.

DISCUSSION

Free and full pretrial discovery is a hallmark of modern litigation. In civil cases, the rule is simply that parties may obtain discovery regarding any unprivileged matter which is relevant to the subject matter involved in the pending action. R. 4:10-2(a). The Office of Administrative Law rules on discovery reflect this same approach. See, Div. of Gaming Enforcement v. Boardwalk Regency, 9 N.J.A.R. 274, 283 (Casino Control Commission 1986). N.J.A.C. 1:10.1(a) provides that:

The purpose of discovery is to facilitate the disposition of cases by streamlining the hearing and enhancing the likelihood of settlement These rules are designed to achieve this purpose by giving litigants access to facts which tend to support or undermine their position or that of their adversary.

[N.J.A.C. 1:10.1(a)].

Although discovery rules are liberally construed, the information sought to be discovered must be relevant to the subject matter of the dispute. Korostynski v. Division of Gaming Enforcement, 266 N.J. Super. 549 (App. Div. 1993). Relevancy includes facts that have a tendency to prove any fact of consequence to the determination of the action. Pressler, Current N.J. Court Rules, comment 1 on R. 4:10-2. In other words, material facts are those that have some bearing to the claims being litigated. See also, K.S. v. ABC Professional Corp., 330 N.J. Super. 288, 291 (App. Div.), leave to appeal granted,⁴ 165 N.J. 596 (2000) (noting that “the scope of discovery is not infinite. It is limited by R. 4:10-2(a) to information that is ‘relevant to the subject matter involved in the pending action.’”); and Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 535 (1996) (noting that in determining whether materials are discoverable, the court, as an initial matter, must evaluate their relevance to the issues raised in this litigation.).

This billing dispute stems from Petitioner’s receipt of a United Water bill after Respondent discovered that Petitioner’s meter had allegedly failed to accurately register Petitioner’s water usage. Petitioner claims that he was unaware that the meter was malfunctioning. Respondent claims that Petitioner knew or should have known that his bills did not reflect actual water

⁴ There is no subsequent reported history of this case or any opinion of the Supreme Court.

consumption. Petitioner is seeking the elimination of the disputed charges as well as information concerning his water usage and meter.

Petitioner's document demand, as modified by the Discovery Order, requests the addresses of all other similarly situated customers who United Water has back billed. The information requested, however, is immaterial to Petitioner's claims. The addresses of other customers from whom United Water may have sought to collect undercharges as a result of a malfunctioning meter have no relevance to the issues surrounding Petitioner's water usage or the accuracy of his meter. The addresses of similarly situated customers also shed no light on whether Petitioner knew that his meter was under reporting usage. Petitioner's bills were either accurate or they were not.

In Korostynski, the plaintiff alleged that he was wrongfully terminated as a result of an investigation that he conducted while employed as a state trooper. Korostynski, supra, 266 N.J. Super. at 549. Plaintiff requested "personnel files and internal investigation records of all other similarly situated former employees" who then ceased to be employed. Id. at 552. The Division of Gaming Enforcement argued that the materials were not discoverable because they are irrelevant, privileged and confidential. Before addressing the Division's claims that the materials were confidential, the Court stated that the discovery rules require that the information sought to be discovered must be relevant. Id. at 553. The Court noted that plaintiff claimed that he was wrongfully terminated as a result of an improper internal investigation, in breach of his employment agreement, and in violation of public policy. The Court held that the files regarding former employees had no relevance whatsoever to his claims. "Either plaintiff was wrongfully terminated or he was not; the records of other former employees are entirely immaterial to the resolution of this issue." Thus, the Court found that the records were not discoverable.

Similarly, Petitioner here is requesting the addresses of other similarly situated customers -- customers who United Water has back billed. The addresses of those customers have no bearing on the question of Petitioner's actual water usage or whether Respondent adhered to the rules concerning back billing. Like the terminated employee in Korostynski, Petitioner seeks information which is irrelevant to the resolution of Petitioner's dispute. Thus, the Board **HEREBY FINDS** that the addresses are immaterial and the Board **HEREBY REVERSES** the Discovery Order compelling United Water to produce a list of its customers' addresses.

Moreover, in considering a discovery motion, the court shall "weigh the specific need for the information, the extent to which the information is within the control of the party and matters of expense, privilege, trade secret and oppressiveness." N.J.A.C. 1:1-10.1(c). Here, Petitioner does not articulate a specific need for the addresses of United Water's customers. In addition, Petitioner fails to elaborate with any level of specificity how a pattern of back billing, even if it exists, is probative or relevant to the issue of whether Respondent properly billed Petitioner in this dispute. Petitioner's reliance on Harmon is also misplaced. The threshold determination is whether the information requested is relevant. Moreover, it is not necessary for the Board to resolve the issue concerning the confidentiality of United Water's customer account information under the circumstances of this case. As stated in Korostynski, "to even get to the balancing of a litigant's particularized need against the . . . interest in confidentiality . . . , a finding that the material sought is relevant must be made." Korostynski, supra, 266 N.J. Super. at 555. As stated previously herein, the Board finds that the information which Petitioner seeks is

irrelevant. Therefore, the Board **FINDS** that the minimum requirement of the discovery rules -- that the information sought must be relevant -- has not been met herein.

Upon careful review and consideration, the Board **HEREBY FINDS** that the addresses of other similarly situated customers are not relevant to the issues in dispute. Therefore, the Board **HEREBY REVERSES** the Discovery Order permitting disclosure of United Water back-billed customers' addresses and **HEREBY STRIKES** Production Request Number 4 in its entirety.

DATED: 2/10/11

BOARD OF PUBLIC UTILITIES
BY:


LEE A. SOLOMON
PRESIDENT



JEANNE M. FOX
COMMISSIONER




JOSEPH L. FIORDALISO
COMMISSIONER

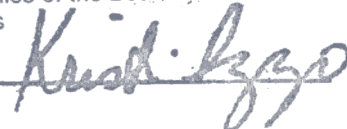


NICHOLAS ASSELTA
COMMISSIONER

ATTEST:


KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities



KRISTI IZZO

NEAL E. BRUNSON

v.

UNITED WATER NEW JERSEY

**BPU DOCKET NO. WC09120998U
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