Agenda Date: 7/14/11
Agenda Item: 7B

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

CUSTOMER ASSISTANCE

MARC HOLLOWAY,
Petitioner,

v.

NEW JERSEY NATURAL GAS COMPANY,
Respondent.

ORDER ON REMAND

BPU Dkt.No. GC10050329U
OAL Dkt. No. PUC 07329-10

Parties of Record:

Marc Holloway, pro se
Eileen F. Quinn, Esq., New Jersey Natural Gas Company

BY THE BOARD:

By petition filed with the Board of Public Utilities (Board) on May 12, 2010, Marc Holloway (Petitioner) requested a formal hearing regarding alleged improper charges assessed by New Jersey Natural Gas Company (Respondent or NJNG) against his account, which charges comprised of a balance transfer from another residential account, a security deposit fee, and repair charges.

After the filing of Respondent's answer, the Board transmitted this matter to the Office of Administrative Law (OAL) on July 30, 2010 as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The matter was assigned to Administrative Law Judge (ALJ) Ana C. Viscomi. ALJ Viscomi scheduled an evidentiary hearing for January 27, 2011. Respondent requested an adjournment of the January 27, 2011 hearing, to which Petitioner consented. Petitioner, however, failed to appear on the adjournment date, March 9, 2011. Respondent and its witness appeared and, after waiting for one hour, the ALJ proceeded to hear Respondent's proofs ex parte. After considering Petitioner's explanation for his nonappearance and Respondent's objection, ALJ Viscomi issued a Letter Opinion on March 17, 2011 (LO), denying Petitioner's request to reschedule the hearing. On March 28, 2011, Petitioner filed his explanation for his nonappearance with the Board. Thereafter, on April 25, 2011, ALJ Viscomi issued an Initial Decision on the merits in favor of Respondent based on the testimony presented at the proof hearing of March 9, 2011.

By this Order, the Board remands this matter to the OAL for further findings and determinations as more fully discussed below.

DISCUSSION

N.J.A.C. 1:1-14.4(a) provides:

> If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall, unless proceeding pursuant to (d) below, direct the Clerk to return the matter to the transmitting agency for appropriate disposition . . . .

If the ALJ receives an explanation and concludes that there was good cause for the failure to appear, the judge shall reschedule the matter for hearing. N.J.A.C. 1:1-14.4(c)(1). If the judge concludes that there was no good cause for the nonappearance, the judge may refuse to reschedule the matter and shall issue an initial decision explaining the basis for the conclusion, or may reschedule the matter and, at his or her discretion, impose sanctions. N.J.A.C. 1:1-14.4(c)(2).

N.J.A.C. 1:1-14.4(d) states:

> If the appearing party requires an initial decision on the merits, the party shall ask the judge for permission to present ex parte proofs. If no explanation for the failure to appear is received, and the circumstances require a decision on the merits, the judge may enter an initial decision on the merits based on the ex parte proofs, provided the failure to appear is memorialized in the decision.

As stated previously, Respondent requested an adjournment of the original hearing date and obtained Petitioner's consent. Respondent informed Petitioner via telephone that the hearing date would be rescheduled to March 9, 2011. Both the OAL and Respondent forwarded letters to Petitioner advising of the new hearing date. Neither letter was returned as undeliverable.

Petitioner did not appear at the March 9, 2011 hearing. Respondent appeared with one witness. ALJ Viscomi waited one hour before going on the record, to give the Petitioner time to arrive in the event he was running late. During that time, both the court and Respondent's counsel confirmed that their offices had not received a call or facsimile from Petitioner concerning his non-appearance. After the hour elapsed, ALJ Viscomi proceeded to conduct an ex parte hearing pursuant to N.J.A.C. 1:1-14.4(d). ALJ Viscomi noted that she would allow Petitioner one business day to contact her office and explain his non-appearance before closing the record and issuing her Initial Decision.

On March 15, 2011, Petitioner left a message with the court, requesting confirmation of the hearing date since it had been changed. On March 16, 2011, the ALJ's secretary contacted Petitioner, advising that the hearing had proceeded on March 9, 2011 and that the record was closed. That same day, March 16, 2011, Petitioner sent a letter to the ALJ and Respondent's counsel, requesting that the matter be rescheduled. Petitioner claimed that he had been driving when he received the telephone call from Respondent seeking his consent to adjourn the hearing to March 9, 2011. Although he consented to the adjournment, Petitioner confused March 9, 2011 with March 19, 2011. He further stated that he had never received Respondent's letter confirming the March 9, 2011 hearing date. On March 16, 2011, Respondent opposed Petitioner's request because Petitioner had been noticed of the March 9, 2011 hearing date during the telephone call and subsequently in writing by the court and by Respondent.

Denying Petitioner's request, ALJ Viscomi stated:

> Your request that I reschedule this hearing is untimely. It was required to be submitted by March 10, 2011, in accordance with N.J.A.C. 1:1-14.4. Regardless, you admit to knowing of the March 9, 2011, hearing date. Your professed confusion is not convincing. March 19, 2011, is a Saturday. And there have not been "many court dates scheduled and rescheduled." One hearing date was rescheduled with your consent to both the adjournment and the new hearing date; March 9, 2011. The OAL notice forwarded to you on January 25, 2011, was received by your adversary on January 31, 2011. Your notice was mailed to the same address you have provided us and has not been returned as undeliverable.
>
> [LO at 3]

Following the issuance of the Letter Opinion, Petitioner submitted his explanation for his nonappearance to the Board on March 28, 2011.[1] Thereafter, on April 25, 2011, ALJ Viscomi issued an Initial Decision.[2]

As noted above, N.J.A.C. 1:14.4(d) permits an ALJ to receive an appearing party's proof ex parte. In addition, state agencies and the Appellate Division have upheld initial decisions imposing sanctions or dismissing petitions under certain circumstances. For example, in In re Pearson, 2006 N.J. AGEN LEXIS 772, the agency adopted the ALJ's dismissal of the termination action, following an ex parte hearing where petitioner missed several hearing dates and failed to respond to numerous attempts to contact him. In In re Thompson, 2007 N.J. AGEN LEXIS 1138, the agency adopted the dismissal of the termination appeal and the imposition of sanctions against petitioner after he exhibited intentional delay tactics and a history of not showing up for hearings. Also, in Rockefeller v. PSE&G, 2003 N.J. PUC LEXIS 256, the Board adopted an initial decision which had dismissed the petition when petitioner's nonappearance was found to be intentional. Likewise, in White v. N.J. Department of Transportation, 95 N.J.A.R. 1 (ETH), the Appellate Division concluded that the ALJ had acted properly and not arbitrarily in permitting an ex parte hearing after petitioner missed several appearances. Furthermore, in L.E.H. ex rel. Z.H. v. Bd. of Educ. of West Orange, 2009 NJ AGEN LEXIS 919, the parent claimed that she did not appear at a scheduled hearing because she had not received the hearing notice although it had been sent to her address of record. Despite petitioner's nonappearance at scheduled hearings before the Board and the OAL, the Commissioner of Education remanded the matter for further proceedings, noting that "[he] cannot ignore petitioner's assertion – however incredible the Board may believe it to be – that she did not receive notice of the scheduled hearing . . . ."

Unlike the above cited cases, however, the record here does not reflect that Petitioner missed several court appearances or that his failure to appear was an intentional delay tactic. Petitioner called the ALJ on March 15, 2011, in an attempt to confirm the March 19, 2011 hearing date. It does not appear that Petitioner had any reason to call the ALJ other than a belief, albeit a mistaken one, that he was confirming the hearing date. There was no indication at that point that Petitioner was aware of the penalty that was imposed for his nonappearance that would have prompted him to call. The record does not reflect that Petitioner had been

[1]There is no record that Respondent filed an objection following Petitioner's submission on March 28, 2011.

[2]There is also no record that either party has filed exceptions to the Initial Decision.

contacted on the day of the hearing or after the hearing by the court or Respondent. In addition, as soon as Petitioner was informed of his failure to appear, he immediately wrote a letter to the court with a curious yet plausible explanation. The fact that Petitioner responded so quickly supports his intention to pursue the action. Finally, the record indicates that this was the only time that Petitioner had missed a scheduled date.

Although *pro se* litigants are not entitled to greater rights than are litigants who are represented, it is nevertheless fundamental that the court system protect the procedural rights of all litigants and to accord procedural due process to all litigants. What constitutes due process varies with the circumstances of each case as well as with the individual situation of particular litigants. Rubin v. Rubin, 188 N.J. Super. 155, 159 (App. Div. 1982). Under these circumstances herein, the record does not establish that Petitioner has failed to prosecute his claim. Therefore, he should be afforded a reasonable opportunity to present his claim.

For the reasons set forth above, the Board HEREBY REMANDS the matter to the OAL, pursuant to N.J.A.C. 1:1-18.7(a), so that the matter may be rescheduled. Petitioner is reminded, however, that in pursing his claims, he is expected to comply with applicable procedural rules and bears the burden of proof by a preponderance of the competent credible evidence as to those matters which are justiciable before the OAL. Atkinson v. Parsekian, 37 N.J. 143 (1962). Accordingly, Petitioner should be allowed to present his case and to challenge Respondent's testimonial and documentary evidence subject to the direction of the ALJ pursuant to N.J.A.C. 1:1-14.6.

The Board HEREBY ORDERS that the matter is HEREBY REMANDED.

DATED: 7/14/11

BOARD OF PUBLIC UTILITIES
BY:

LEE A. SOLOMON
PRESIDENT

JEANNE M. FOX
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

NICHOLAS ASSELTA
COMMISSIONER

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

ATTEST:

KRISTI IZZO
SECRETARY

MARC HOLLOWAY

V.

NEW JERSEY NATURAL GAS COMPANY

BPU DOCKET NO. GC10050329U
OAL DOCKET NO. PUC07329-10

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OFFICE OF ADMINISTRATIVE LAW

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BOARD OF PUBLIC UTILITIES
NEWARK, NJ

INITIAL DECISION-
FAILURE TO APPEAR
PURSUANT TO N.J.A.C. 1:1-14.4
OAL DKT. NO. PUC 7329-10
AGENCY DKT. NO. GC10050329U

MARC HOLLOWAY,
Petitioner,
v.
NEW JERSEY NATURAL GAS COMPANY,
Respondent.

Marc Holloway, petitioner, pro se

Eileen F. Quinn, Esq., for respondent

Record Closed: March 10, 1011

Decided: April 25, 2011

BEFORE **ANA C. VISCOMI,** ALJ

By letter dated May 5, 2010, petitioner requested a hearing to challenge respondent's assessment of $2,758.05, representing a balance transfer from a prior residence, two repair charges for meter tampering and a security deposit. The matter was transmitted to the Office of Administrative Law (OAL) on June 9, 2010, for a hearing as a contested case. It was assigned to me on August 13, 2010, and I conducted a pre-hearing conference on September 27, 2010. At petitioner's request,

he was afforded a thirty-day period of time to either settle this case or retain counsel. The matter was then scheduled for hearing on January 27, 2011, but that was adjourned at the request of respondent's counsel due to a conflict with another matter scheduled in Superior Court. It was rescheduled, with petitioner's consent, for March 9, 2011. On that date, petitioner failed to appear. In accordance with N.J.A.C. 1:1-14.4, respondent requested to proceed forward *ex parte* so that I may issue an Initial Decision on the merits. The record then closed on March 10, 2011, in accordance with N.J.A.C. 1:1-14.4, in order to allow the petitioner the opportunity to explain his failure to appear at the hearing. Petitioner called my office on March 15, 2011, and submitted an explanation the next day. (C-1.) Respondent submitted a letter the same day opposing any request to re-open the hearing. (C-2.) I denied the request and issued a letter Order dated March 17, 2011. (C-3.) I incorporate herein by reference the failure to appear issue

Patrick Hughes, Supervisor of Security Systems for New Jersey Natural Gas (hereinafter "NJNG"), testified with regard to the three distinct areas for which petitioner has incurred an unpaid balance of $2,758.05. He is familiar with NJNG's collection practice as well as the investigation of theft services, method of usage calculation, and all security measures utilized to seal the water meter devices.

First, as to the balance transfer from another residence, Hughes testified that petitioner opened a residential account at Verdant Road prior to the current account at Ardmore Avenue. This was verified by the Social Security number connected to both accounts. (R-A.) As a result, NJNG transferred the balance due and owing from the Verdant Road account, $1,928.80, to the Ardmore Avenue residential account. Although petitioner has made certain payments on his account, the history of payments on his account is replete with checks returned due to insufficient funds. Second, due to petitioner's poor payment history, NJNG assessed a $300 security deposit on his account. Finally, two separate repair charges were assessed on the account; $320.23 and $209.02. (R-F, R-H.) Hughes testified these repair charges were necessitated after petitioner had tampered with meter locking devices (MLD) that had been installed after service was disconnected on two separate occasions. The installation of an MLD

after gas service has been disconnected is a federal requirement, Hughes testified. The only way to tamper with an MLD, and thereby illegally reconnect gas service, is by either striking it with a blunt force object or cutting it off. Hughes testified this creates a dangerous situation because the seal is no longer tight and gas can leak and then explode. When the NJNG repair person visited the site on two separate occasions, he discovered the MLD had been broken and that the high pressure valve was turned to the "on" position. Hughes testified this is a common form of tampering and theft.

I **FIND** the petitioner was properly billed for a balance due at the previous account as the proofs establish the residential account at the prior residence was created utilizing the same social security number. I further **FIND** that the two meter repair charges were properly assessed to petitioner's account as the service was improperly restored after being disconnected by tampering with the MLD installed on two separate occasions. This is in accordance with Tariff § 6.13. I further **FIND** that the deposit charge of $300 was properly assessed on this account due to the poor payment history. This is in accordance with Tariff § 2.7.

Based on the foregoing, petitioner's appeal is **DISMISSED** for failure to appear, and **ORDER** petitioner to pay the respondent NJNG a total of $ 2,758.05.

hereby **FILE** my initial decision with the **BOARD OF PUBLIC UTILITIES** for consideration

This recommended decision may be adopted, modified or rejected by the **BOARD OF PUBLIC UTILITIES,** which by law is authorized to make a final decision in this matter. If the Board of Public Utilities does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SECRETARY OF THE BOARD OF PUBLIC UTILITIES, 2 Gateway Center, Suite 801, Newark, NJ 07102,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 25, 2011
DATE

Ann C. Viscomi
ANA C. VISCOMI, ALJ

Date Received at Agency: 4/25/11

Date Mailed to Parties: APR 26 --

/lam

APPENDIX

Witnesses

For petitioner:

None

For respondent:

Patrick Hughes

Exhibits

For the Judge:

C-1 Petitioner's explanation for not appearing at hearing
C-2 Respondent's response
C-3 Judge's letter Order

For petitioner:

None

For respondent:

RA-RP