

¹ For the reasons set forth in the Initial Decision submitted by the Administrative Law Judge, both Jules Tonkinson and Lisa Leonard Tonkinson are included in the term "Petitioner."

receipt of Respondent's answer, this matter was transmitted by the Board to the Office of Administrative Law ("OAL") for hearing as a contested matter 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 ALJ Miller.

Pursuant to the Prehearing Order of June 18, 2008, an inspection of the Petitioner's meter was scheduled. After repeated attempts to conduct the inspection, Respondent submitted an emergent motion for an order authorizing meter inspection and other requests, on July 24, 2008. In a letter order issued that same day, ALJ Miller granted the request and ordered that an on-site inspection of Petitioner's electrical meter be conducted on July 25, 2008. The letter order advised the parties that ALJ Miller would be present at the inspection, and copies of the letter order were distributed by electronic mail and fax. Telephone notice of the order was also provided. The on-site inspection was attended by ALJ Miller and representatives for Respondent. A subsequent letter dated July 28, 2008 from Respondent's counsel to the Petitioner and ALJ Miller detailed the observations made by Charles Thomas, an employee of Respondent. As noted in the Prehearing Order and in a Notice of Plenary Hearing dated June 23, 2008, a hearing was scheduled for August 6, 2008. Petitioner did not appear at the hearing, and as a result of Petitioner's failure to appear, the matter was returned to the Board. In a subsequent letter to the Board, Petitioner Jules Tonkinson explained his failure to appear at the scheduled hearing, claiming that he was unable to appear for medical reasons, and the matter was remanded to the OAL for hearing.

In a notice dated October 17, 2008, the parties were advised that a plenary hearing was scheduled for January 6, 2009. Petitioner did not appear at the scheduled hearing, and the hearing proceeded with testimony from two witnesses for Respondent.

On January 8, 2009, ALJ Miller submitted his Initial Decision in this matter to the Board. In his Initial Decision, ALJ Miller found that Petitioner had sufficient notice of the January 6, 2009 plenary hearing and that the notice provided by the OAL was not returned as undeliverable. Furthermore, there was no request for a postponement by the Petitioner and no communications from the Petitioner were received. Accordingly, ALJ Miller concluded that the Petitioner had sufficient notice of the scheduled hearing and that there were no reasons to warrant an adjournment of the January 6, 2009 hearing.

ALJ Miller also found that due to Petitioner's failure to appear at the scheduled hearing, the Petitioner's billing dispute claim was deemed resolved. Finally, ALJ Miller concluded that Respondent is authorized to discontinue service pursuant to N.J.A.C. 14:3-3A.1(a)(5) due to a hazardous corrosion of terminals within an electrical socket on Petitioner's property. ALJ Miller noted that this action is not intended to be punitive and the need to repair the socket is exclusive of any outstanding balanced owed to Respondent. Based upon the foregoing, the ALJ dismissed the action and ordered that Respondent may pursue the appropriate remedies.

Exceptions to the Initial Decision were filed with the Board by the Petitioner and received on January 23, 2009, with Replies to Exceptions submitted by the Respondent and received by the Board on January 28, 2009.

In the Exceptions, the Petitioner alleged that: (1) Petitioner was provided with no notice of the hearing scheduled for January 6, 2009; (2) Respondent, prior to the scheduled hearing date, never supplied Petitioner with requested information (discovery) or information pertaining to the on-site inspection, which Petitioner argued would have been a clear indication of the hearing date; (3) Respondent's counsel never contacted Petitioner Lisa Tonkinson prior to the scheduled hearing date although she was in possession of a power of attorney executed by Petitioner Jules Tonkinson; (4) ALJ Miller failed to respond to Petitioner's request that he be

removed from the case because the on-site inspection was conducted *ex parte* as the Petitioner could not attend due to a legitimate medical excuse; and (5) Respondent and the Board have never responded to the request by Petitioner Lisa Leonard Tonkinson to change the name of the account customer of record. Finally, Petitioner requested that the Board return the case to the OAL for a new hearing.

In its Reply to Petitioner's Exceptions, Respondent objected to Petitioner's request that the matter be returned to the OAL. Respondent questioned the legitimacy of Petitioner's claim that no notice of the hearing date was provided despite receiving the Initial Decision, which was sent to the same mailing address noticed for trial. Respondent also argued that each paragraph of the Exceptions directed toward Respondent is false and that Respondent can provide proof of its falsity if requested. Finally, Respondent requests that the Board sustain ALJ Miller's dismissal of the matter.

The Board, in its April 3 Order, found that the Exceptions submitted by Petitioner were without merit. Furthermore, the Board found that ALJ Miller's authorization of Respondent to pursue the appropriate remedies with regard to the condition of the Petitioner's meter, as provided for under N.J.A.C. 14:3-3A.1(a)(5) was proper. Accordingly, the Board adopted the Initial Decision in its entirety and ordered that the Petition of Jules Tonkinson be dismissed.

Petitioner's Motion

On April 28, 2009, Petitioner Jules Tonkinson filed with the Board a Motion, in which Petitioner requests that the Board reconsider its April 3 Order. Petitioner adds that were "a number of due process errors" that were addressed within the filed Exceptions, including Petitioner's exception to ALJ Miller's failure to honor Petitioner's request that the ALJ be recused from the matter. The Motion further states that Petitioner has documentation relating to the recusal requests and to the Petitioner's dissatisfaction with the ALJ's handling of the case and the scheduling of a meter inspection. Petitioner claimed that he did not include this documentation with the filed Exceptions because Petitioner was unaware that this documentation should have accompanied the Exceptions. However, Petitioner adds that he would like to forward the documentation to the Board for consideration. Finally, Petitioner requests a stay from collection activity, including the termination of service as Petitioner "prepare[s] for filing an appeal."

Respondent's Reply

On April 30, 2009, Respondent filed with the Board a reply to Petitioner's Motion ("Reply"), in which Respondent requests that the Board reject the Motion for being untimely, pursuant to N.J.A.C. 14:1-8.6. Respondent also urges the Board to deny the Motion because Petitioner fails to offer newly discovered evidence, which Respondent argues is a standard on a Motion for Reconsideration. Additionally, Respondent contends that Petitioner offers a baseless claim that ALJ Miller's failed to recuse himself from the matter. Respondent adds that Petitioner has not made a formal application for recusal.

Respondent also argues that the Board should reject Petitioner's request for a stay because there has been no showing for good cause to grant a stay, as required by N.J.A.C. 14:1-8.7. Respondent states that because no stay is currently in place, it intended to terminate Petitioner's service for non-payment of \$5,599.06. Respondent also adds that Petitioner's service may also be terminated on the basis that Petitioner's meter socket presents a hazard, as determined by ALJ Miller. However, in a subsequent e-mail, Respondent agreed not to terminate service pending a Board Order addressing Petitioner's request for a stay.

Discussion

Under N.J.A.C. 14:1-8.6(a), a motion for reconsideration may be filed within 15 days after the issuance of any final decision or order by the Board. The Order Adopting the Initial Decision of ALJ Miller was issued by the Board on April 3, 2009. Petitioner's Motion was filed with the Board on April 28, 2009, 25 days after the Board issued its Order. However, pursuant to the Board's authority under N.J.A.C. 14:1-1.2, the Board will nevertheless consider the merits.

Petitioner requests that the Board reconsider its decision in light of the "due process errors" Petitioner alleged within the filed Exceptions. As discussed in the Board's April 3 Order, Petitioner's Exceptions include claims that "[t]he court never responded to my request that Judge Miller excuse himself from the case as he participated in an ex parte examination of the damage to our electrical socket. This examination was scheduled regardless of a legitimate medical excuse, a preplanned surgical procedure." In its April 3 Order, the Board found that all of Petitioner's Exceptions were without merit and were rejected. In the Motion, Petitioner specifically mentions his Exception to ALJ Miller's failure to recuse himself and the scheduling of the meter inspection, conducted without the presence of Petitioner. Accordingly, the Board will address Petitioner's request as it pertains to Petitioner's Exception with regard to the recusal and the scheduling of the meter inspection.

In its April 3 Order, the Board found that upon a review of the record, there was no indication that Petitioner had either made a request or filed an appropriate motion to disqualify ALJ Miller. Furthermore, the Board noted that ALJ Miller's July 24, 2008 Order granting Respondent's Emergent Motion for an Order Authorizing a Meter Inspection advised the parties that the inspection would take place the following day. Also, according to the Order, the parties were informed of the inspection by electronic mail, fax and telephone. April 3 Order at 3-4.

In a motion for reconsideration, a party should not seek reconsideration merely because of dissatisfaction with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration should be used only in cases in which "1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence." Id.; Cummings v. Cummings, 295 N.J. Super. 374, 384 (App. Div. 1996). In other words, a party must demonstrate that the Court "acted in an arbitrary, capricious or unreasonable manner." D'Atria, supra, 242 N.J. Super. at 401.

Petitioner has failed to show that the Board's April 3 Order was based upon a "palpably incorrect or irrational or basis" or that the Board failed to consider the "significance of probative, competent evidence." Petitioner claims that he has made a request for ALJ Miller's recusal from this matter, but that he failed to provide the documentation because he was not aware that it should have been included in the filed Exceptions. Petitioner further states that he would like to forward this documentation to the Board for consideration, but he has failed to do so. As stated in the April 3 Order, there has been no indication in the record that such a request was made by the Petitioner. April 3 Order at 3.

Petitioner also requests a stay from collection activity and termination of service by Respondent while Petitioner "collect[s] the needed information to rebut the BPU's findings and prepare for filing an appeal." While it was premature for Petition to request a stay pending appeal before the Board considered his Motion for Reconsideration, the Board will address Petitioner's request.

N.J.A.C. 14:1-8.7(d) provides that "a stay will be granted only for good cause shown." As set forth in Crowe v. De Gioia, 90 N.J. 126 (1982) and its progeny, extraordinary relief, such as a

stay, can be granted if the following standards are met: 1) that the injunction would prevent irreparable harm; 2) that the movant can show a reasonable probability of success on the merits; 3) that a balancing of the equities and hardships weigh in favor of injunctive relief and 4) that a stay would be in the public interest. Id. at 132-35; McKenzie v. Corzine, 396 N.J. Super. 405, 413 (App. Div. 2007). Finally, the factors must be clearly and convincingly demonstrated. Waste Management of New Jersey v. Union County Utilities Authority, 399 N.J. Super. 508, 520 (App. Div. 2008).

The first factor provides that a stay should not be issued except when necessary to prevent irreparable harm. Harm is considered irreparable in equity if the harm cannot be adequately redressed by monetary damages. Crowe, supra, 90 N.J. at 132-133. A stay of the Initial Decision and the Board's April 3 Order would prevent Respondent from pursuing collection of the amount owed by Petitioner and from terminating service pursuant to N.J.A.C. 14:3-7.6(c) and N.J.A.C. 14:3-3A.1(a)(5). A stay of the order authorizing Respondent to discontinue service pending the repair of the customer-owned portion of the meter would not constitute irreparable harm due to the hazardous nature of the meter and because the cost of the repairs to the meter could be adequately addressed by monetary damages. However, termination of utility service for non-payment might possibly, depending on the circumstances, constitute irreparable harm that could not be adequately redressed by monetary damages.

Secondly, in order to receive a temporary stay, a movant must make a preliminary showing of "a reasonable probability of ultimate success on the merits." Crowe, supra, 90 N.J. at 133. Here, the Petitioner has not proffered any showing of a reasonable probability of ultimate success on the merits. Petitioner only provides that he is collecting "needed information" in order to rebut the Board's findings in the April 3 Order. As has been previously stated with regard to Petitioner's Motion for Reconsideration, Petitioner has failed to provide any documentation to support its claims. Therefore, because the Petitioner has failed to support his arguments, the Board concludes that the Petitioner has not made a showing of reasonable probability of success on the merits.

Thirdly, the Board must consider the balance of relative hardship to the parties. For Petitioner, full payment of the amount owed or a discontinuance of utility service would create a hardship compared to Respondent's need to pursue collection of the amount owed. While the Board does not alter the decision in its April 3 Order finding that Respondent may pursue the appropriate legal remedies with regard to Petitioner's outstanding balance, the Board acknowledges that full payment of the balance or a discontinuance of service would create a hardship.

Finally, a stay of Petitioner's obligation to pay the outstanding balance does not harm the public interest. However, because it has been determined that the meter is in a hazardous condition, the Board finds that a stay on Petitioner's obligation to repair the customer-owned portion of the meter or face a termination of service pursuant to N.J.A.C. 14:3-3A.1(a)(5) would not be in the public interest.


Accordingly, at best, Petitioner can perhaps satisfy one of the above conditions. Based upon the Board's consideration of the above factors, a stay of the portion of the Board's April 3 Order dismissing the Petitioner's billing dispute, thus permitting the Respondent to pursue appropriate remedies regarding the outstanding balance, is not justified. A stay of the portion of the April 3 Order adopting the ALJ's determination that the Respondent may discontinue service until the hazardous portion of the meter adequately repaired by Petitioner is likewise unjustified.

Based upon the above, the Board HEREBY FINDS that the Petitioner's claim that the Board failed to consider Petitioner's alleged request for ALJ Miller's recusal is not substantiated and

nothing in Petitioner's Motion warrants the Board to modify or otherwise reconsider its decision in its April 3 Order. The Board FURTHER FINDS that Petitioner has failed to show good cause for the issuance of a stay. Accordingly, the Board HEREBY ORDERS that the Motion for Reconsideration and Request for a Stay of the Board's April 3 Order is HEREBY DENIED.

DATED: 5/15/09

BOARD OF PUBLIC UTILITIES
BY:


JEANNE M. FOX
PRESIDENT


FREDERICK F. BUTLER
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER

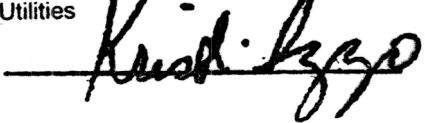

NICHOLAS ASSELTA
COMMISSIONER


ELIZABETH RANDALL
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



JULES TONKINSON

v.

ATLANTIC CITY ELECTRIC COMPANY

BPU DOCKET NO. EC08020099U

OAL DOCKET NO. PUC 6661-08

(On Remand From PUC 2632-08)

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