

Agenda Date: 10/16/13
Agenda Item: 7A

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CUSTOMER ASSISTANCE

ELAINE DUBELMAN
Petitioner,

V.

UNITED WATER NEW JERSEY,
Respondent

ORDER

BPU Docket No. WC12060563U
OAL Docket No. PUC 12139-12N

Parties of Record:

Susan E. Schneier, Esq., for Petitioner, Elaine Dubelman
John P. Wallace, Esq., for Respondent, United Water New Jersey

BY THE BOARD:

BACKGROUND AND PROCEDURAL HISTORY

On or about June 27, 2012, Petitioner, Elaine Dubelman ("Petitioner") filed a petition requesting Respondent, United Water New Jersey ("Respondent") to correct an alleged overbilling of water service from November 15, 2011 to January 13, 2012. On or about August 22, 2012, Respondent filed an answer to the petition denying the allegations. On or about August 27, 2012, Petitioner filed a reply to the answer. The matter was transmitted to the Office of Administrative Law ("OAL") on or about September 6, 2012. A hearing was scheduled before Administrative Law Judge ("ALJ") Moss for December 21, 2012. Due to Hurricane Sandy and holidays, the hearing was adjourned until April 1, 2013. The hearing was again adjourned to August 5, 2013.

On or about April 25, 2013, Petitioner filed a Motion to Amend her Petition to include an additional balance of \$1,948.51 on a bill for service and consumption between May 18, 2012 and September 6, 2012 because the original petition was filed before September 6, 2012. Respondent did not oppose the Motion provided that adequate discovery would be permitted with respect to the Amended Petition. The motion was granted on May 14, 2013.

Petitioner's Motion and ALJ's Order at Issue

On or about August 8, 2013, Petitioner filed a Motion for Leave to Add an Expert Witness and to Reopen Discovery for a Limited Purpose. Specifically, Petitioner requests leave to add an expert witness who specializes in looking for and locating leaks, to the extent a leak exists, and to reopen discovery for the limited purpose of preparing and exchanging an expert report and providing Respondent an opportunity to depose said expert at the hearing. (Petitioner's Motion at page 1). Petitioner states that the need for an expert became apparent on August 5, 2013 during a conference with Respondent's counsel and engineer, who explained the mechanism of the water meter employed by Respondent. Id. Discovery had already closed at this time, but Petitioner argued that reopening discovery was justified to allow Petitioner to present an expert who could search for leaks and explain how Petitioner could have used over 1,330,000 gallons of water over the course of 172 days. Id. at pages 1-2. Petitioner further argued that Respondent would not be prejudiced and that the reopening of discovery and retention of an expert witness would assist the court in making its decision. Id. at page 2.

On or about August 12, 2013, Respondent filed a certification in opposition to Petitioner's motion. Respondent certifies that at the August 5, 2013 hearing Petitioner's counsel proposed to offer affidavits of three individuals. The Respondent objected, and the ALJ sustained the objection. (Respondent Certification at ¶ 2). Thereafter, Petitioner's counsel requested an opportunity to have the individuals testify at trial, so the matter was adjourned until September 16, 2013. Id. Respondent disputes Petitioner's assertion that the engineer discussed the workings of the water meter at the August 5, 2013 conference. Id. at ¶ 3. Rather, Respondent argues that the representative from United Water was present in order to explain a spreadsheet he had prepared relating to recent water consumption at petitioner's premises in an effort to bring about a resolution to the case. Id. Respondent argues that Petitioner has had ample time to hire an expert since the filing of her Petition in June 2012, and Respondent was ready to proceed with its witnesses on August 5, 2013. Id. at ¶¶4-5.

In an Order dated August 26, 2013, ALJ Moss granted Petitioner's motion ordering discovery to be re-opened for the limited purpose of allowing Petitioner to retain an expert on leaks. ALJ Moss further ordered that Petitioner provide Respondent with a copy of the expert report within 35 days of the ALJ's August 26, 2013 Order. If Petitioner fails to do so, then the expert's testimony would be barred. ALJ Moss reasoned that Petitioner has had ample time to obtain experts in this matter, but that Respondent has not shown that it would be prejudiced by the delay.

Respondent's Request for Interlocutory Appeal

On or about September 3, 2013, the Board of Public Utilities ("Board") received Respondent's request for interlocutory review of ALJ Moss's August 26, 2013 Order re-opening discovery to allow Petitioner to retain an expert on leaks. Respondent argues that Petitioner's Motion for Leave to Add an Expert Witness and to Reopen Discovery for a Limited Purpose should have been denied. Respondent argues that this case commenced over a year ago and discovery proceedings were completed. Respondent further argues that Petitioner's argument that Respondent's representative's explanation about the water meter suddenly demonstrated a need to hire an expert who specializes in leaks "defies logic." (Respondent's Request for Interlocutory Review, page 2).

Opposition was due within three days of receiving the request for interlocutory review. N.J.A.C. 1:1-14-10(b). The Board did not receive Petitioner's opposition until around September 24, 2013. The Board will not consider Petitioner's opposition because it is out-of-time.

DISCUSSION AND FINDINGS

An order or ruling of an ALJ may be reviewed interlocutorily by an agency head at the request of a party. N.J.A.C. 1:1-14.10(a). Pursuant to N.J.A.C. 1:14-14.4(a), a rule of special applicability that supplements N.J.A.C. 1:1-14.10, the Board shall determine whether to accept the request and conduct an interlocutory review by the later of (i) ten days after receiving the request for interlocutory review or (ii) the Board's next regularly scheduled open meeting after expiration of the 10-day period from receipt of the request for interlocutory review. In addition, under N.J.A.C. 1:14-14.4(b), if the Board determines to conduct an interlocutory review, it shall issue a decision, order, or other disposition of the review within 20 days of that determination. Under N.J.A.C. 1:14-14.4(c), if the Board does not issue an order within the timeframe set out in N.J.A.C. 1:14-14.4(b), the judge's ruling shall be considered conditionally affirmed. However, the time period for disposition may be extended for good cause for an additional 20 days if both the Board and the OAL Director concur. The Board sought an extension to make a determination as to whether to accept the request and conduct an interlocutory review. Accordingly, the Board has until October 23, 2013 to accept the request.

The legal standard for accepting a matter for interlocutory review is stated in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982). In that case, the Court concluded that an agency has the right to review ALJ orders on an interlocutory basis "to determine whether they are reasonably likely to interfere with the decisional process or have a substantial effect upon the ultimate outcome of the proceeding." Id. at 97-98. The Court also held that the agency head has broad discretion to determine which ALJ orders are subject to review on an interlocutory basis. However, it noted that the power of the agency head to review ALJ orders on an interlocutory basis is not itself totally unlimited, and that interlocutory review of ALJ orders should be exercised sparingly. In this regard, the Court noted:

In general, interlocutory review by courts is rarely granted because of the strong policy against piecemeal adjudications. See Hudson v. Hudson, 36 N.J. 549 (1962); Pennsylvania Railroad, 20 N.J. 398. Considerations of efficiency and economy also have pertinency in the field of Administrative law. See Hackensack v. Winner, 82 N.J. at 31-33; Hinfey v. Matawan Reg. Bd. of Ed., 77 N.J. 514 (1978). See infra at 102, n.6. Our State has long favored uninterrupted proceedings at the trial level, with a single and complete review, so as to avoid the possible inconvenience, expense and delay of a fragmented adjudication. Thus, "leave is granted only in the exceptional case where, on a balance of interests, justice suggests the need for review of the interlocutory order in advance of final judgment." Sullivan, "Interlocutory Appeals," 92 N.J.L.J. 162 (1969). These same principles should apply to an administrative tribunal.

[90 N.J. at 100].

The Court held that interlocutory review may be granted "only in the interest of justice or for good cause shown." Ibid. In defining "good cause," the Court stated:

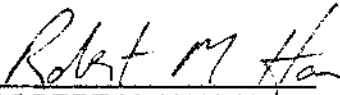
In the administrative arena, good cause will exist whenever, in the sound discretion of the agency head, there is a likelihood that such an interlocutory order will have an impact upon the status of the parties, the number and nature of claims or defenses, the identity and scope of issues, the presentation of evidence, the decisional process, or the outcome of the case.

[Ibid.].

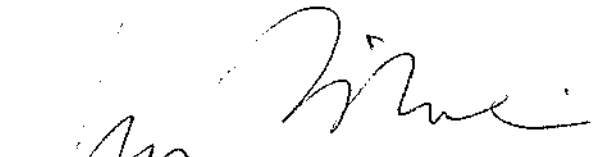
As stated above, the decision to grant interlocutory review is committed to the sound discretion of the Board, is to be exercised sparingly to avoid piecemeal adjudication, and if it is "in the interest in justice or for good cause shown." Here, Respondent has shown no good cause as to why the Board should grant the interlocutory appeal. Respondent argues that it "defies logic," but provides no concrete explanation as to why granting the interlocutory appeal would be in the interest of justice or for good cause. Rather, the ALJ has limited the scope of the re-opening of discovery to an expert on leaks and provided a timeline by which the expert report should be served. This additional information will potentially provide a more complete record in the matter. Therefore, the Board **FINDS** that interlocutory review is not warranted here. Accordingly, the Board **HEREBY DENIES** Respondent's request for interlocutory review of ALJ Moss' August 26, 2013 Order.

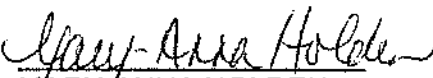
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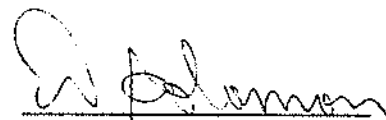
BOARD OF PUBLIC UTILITIES
BY:


ROBERT M. HANNA
PRESIDENT

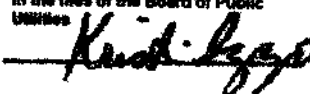

JEANNE M. FOX
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER


MARY-ANNA HOLDEN
COMMISSIONER


DIANNE SOLOMON
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


In the Matter of Elaine Dubelman, Petitioner, v. United Water New Jersey, Respondent

BPU Docket No. WC12060563U
OAL Docket No. PUC 12139-12N

SERVICE LIST

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT.NO. PUC 12139-12

AGENCY DKT. NO. WC12060563U

ELAINE DUBELMAN,

Petitioner,

v.

UNITED WATER NEW JERSEY, INC.,

Respondent.

Susan E. Schneier, Esq. for petitioner (Eddy & Associates)

John P. Wallace, Esq., for Respondent, United Water New Jersey, Inc.

BEFORE KIMBERLY A. MOSS, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Elaine Dubelman, (Dubelman or Petitioner) filed a petition with the Board of Public Utilities (BPU) on July 6, 2012, regarding a billing dispute. Petitioner is disputing the amount of the water bills. The matter was transmitted to the Office of Administrative Law (OAL) and filed on September 6, 2012. On September 28, 2012 a pre-hearing conference was held. Several conferences have been held in this matter. On or about April 25, 2013, petitioner filed a motion to amend the petition to include bills from May 18, 2012 through August 31, 2012. The motion was granted on May 14, 2013. The hearing was scheduled for August 5, 2013. At that time Petitioner stated that she

would proceed through the use of affidavits. UWNJ objected. I sustained the objection. Petitioner then requested an adjournment which was granted. The hearing was rescheduled to September 16, 2013. On August 12, 2013, petitioner filed a motion to re-open discovery to add a witness. UWNJ opposed the motion.

FACTUAL DISCUSSION

I FIND the following FACTS in this case.

There is a dispute between the parties as regarding the accuracy of petitioner's UWNJ's water bills. Petitioner wants to re-open discovery to include an expert witness, who specializes in locating water leaks. Petitioner stated that she realized that she needed this expert on August 5, 2013 while speaking with UWNJ's expert during settlement discussions prior to going on the record for the hearing. However, petitioner did not mention this when she requested the adjournment.

LEGAL ANALYSIS AND CONCLUSION

Although petitioner had ample time to obtain experts in this matter, UWNJ has not shown that it would be prejudiced by the delay. I CONCLUDE that discovery will be re-opened to allow petitioner to obtain an expert in the area of looking for and location leaks.

Based on the foregoing, it is ORDERED that discovery will be re-opened to allow petitioner to retain an expert on leaks.

It is further ORDERED that petitioner provide UWNJ with a copy of the experts report within 35 days of today's date, August 26, 2013. If petitioner does not provide UWNJ with the expert report within thirty-five days of today's date, said expert's testimony will be barred.

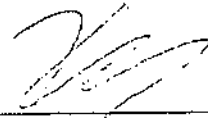
OAL DKT. NO. PUC 12139-12

This order may be reviewed by the BOARD OF PUBLIC UTILITIES either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

8-26-13

DATE

ljb



KIMBERLY A. MOSS, ALJ

Eddy & Associates
Attorneys at Law, PLLC
991 Post Road East
Westport, CT 06880
T -- (203) 341-9808
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Attorney for Petitioner

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

Docket No.: WC12060563U

Elaine Dubelman,

Petitioner,

vs.

United Water New Jersey,

Respondent,

**PETITIONER'S MOTION FOR LEAVE TO ADD AN EXPERT
WITNESS AND TO REOPEN DISCOVERY FOR A LIMITED PURPOSE**

Petitioner Elaine Dubelman respectfully requests leave to add an expert witness who specializes in looking for and locating leaks, if such leaks exist, and to reopen discovery for the limited purpose of preparing and exchanging an expert report and providing Respondent's Counsel an opportunity to depose said expert at the upcoming hearing.

The need for such expert became apparent upon discussions with Respondent's Counsel and engineer on August 5, 2013 in the conference room at 333 Washington Avenue, Newark, New Jersey, prior to the scheduled hearing. At that time, the engineer explained the mechanism of the water meter employed by United Water.

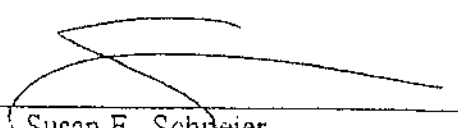
While discovery has closed, the circumstances here justify reopening discovery for the limited purpose of allowing Petitioner an opportunity to present an expert who will search for

possible leaks that could explain how Petitioner could have used over 1,330,000 gallons of water over the course of 172 days. Thus, there is no prejudice to Respondent should this Court grant Petitioner leave to present an expert witness and expert report on the above-enumerated issues. Equity favors granting this motion because it helps guard against a miscarriage of justice by protecting the integrity of the judicial process and aiding the court in making an educated decision on the matter

For the reasons stated above, Petitioner respectfully requests leave to identify an expert witness who specialized in leaks and allow that expert to present testimony and a report at the upcoming hearing.

Respectfully submitted:

By: _____


Susan E. Schaefer
EDDY & ASSOCIATES, PLLC
Attorneys for the Petitioner
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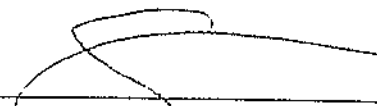
DATED:

CERTIFICATION OF SERVICE

I certify that a copy of this motion was emailed and mailed by USPS to the attorney listed below:

John Wallace, Esq.
171 East Ridgewood Avenue
Ridgewood, New Jersey 07450

Dated: 8/8/13



Susan E. Schneider
Attorney for Petitioner

Eddy & Associates
Attorneys at Law, PLLC
991 Post Road East
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Attorney for Petitioner

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

Docket No.: WC12060563U

Elaine Dubelman,

Petitioner,

vs.

United Water New Jersey,

Respondent,

CIVIL ACTION ORDER

This matter being opened to the Court by Susan Schneier, Attorney for the Petitioner, in the way of motion seeking to Amend the Complaint and the court having considered the motion of the moving party:

On this _____ day of _____, 2013:

It is ordered that the motion is _____ approved _____ denied

It is FURTHER ORDERED that a copy of this Order be served by the moving party upon all other parties or their attorneys within _____ days of the date listed above.

, J.S.C.

JOHN P. WALLACE
171 East Ridgewood Avenue
Ridgewood, NJ 07450
(201) 445-3533
Attorney for Respondent

ELAINE DUBELMAN,

Petitioner,

vs.

UNITED WATER NEW JERSEY,

Respondent,

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

Docket No.: WC12060563U

CERTIFICATION IN OPPOSITION
TO MOTION FOR LEAVE TO ADD AN
EXPERT WITNESS AND
TO REOPEN DISCOVERY

JOHN P. WALLACE, of full age, certifies as follows:

1. I am an attorney-at-law of the State of New Jersey and am attorney for the Respondent, United Water New Jersey, in the above entitled matter. I make this Certification in opposition to a motion by petitioner for leave to add an expert witness and to reopen discovery.

2. On August 5, 2013, after appearances of counsel were placed on the record, petitioner's counsel, Ms. Schneier, proposed to offer affidavits of three individuals in support of petitioner's case. When the Court sustained respondent's objection, Ms. Schneier requested an opportunity to have said individuals testify at the hearing, and over objection of respondent, the matter was adjourned to September 16, 2013 in order to permit petitioner to present said persons for live testimony. As I advised the Court, several days before the hearing I had a telephone conversation with Deborah Eddy, Esq., petitioner's daughter, who said that she had affidavits which were to be offered at the hearing, and I told her that such would not be acceptable.

Minutes before the hearing commenced, Ms. Schneier handed me a bundle of papers which included copies of said affidavits.

3. As to the conference mentioned in the motion, this was a settlement conference suggested by Judge Moss. The representative from United Water was invited to the conference in order to explain a spreadsheet he had prepared relating to recent water consumption at petitioner's premises in an effort to bring about a resolution of the case, and not the workings of a

water meter. He commented on consumption figures in bills prepared from actual meter readings which adjusted consumption figures following estimated readings on one or more earlier bills.

4. Respondent has maintained consistently that the water consumption shown on the disputed bills was calculated from actual meter readings, which showed the amount of water passing through the water meter, so that there was nothing discussed at the settlement conference prior to the start of the hearing on August 5, 2013, which would justify the relief that petitioner is seeking in this motion. Since filing her petition with the Board of Public Utilities, dated June 21, 2012, petitioner has had ample time to engage experts to discover the source of leak or leaks on her property.

5. Respondent was ready to proceed on August 5th with three witnesses present who were prepared to testify. We respectfully request that the petitioner's motion to add an expert witness and to reopen discovery be denied.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

DATED: August 12, 2013


JOHN P. WALLACE

PROOF OF SERVICE

I certify that on August 30, 2013, I served a copy of the above Request for Interlocutory Relief by regular mail on:

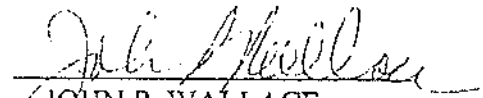
Eddy and Associates, at 991 Post Road East, Westport, CT 06880;

Honorable Kimberly A. Moss, Office of Administrative Law, at 33 Washington Street, Newark, NJ 07102;

Clerk, Office of Administrative Law, at 33 Washington Street, Newark, NJ 07102;

I certify that the foregoing statement is true. I am aware that if any of the foregoing statement is wilfully false, I am subject to punishment.

DATED: August 30, 2013


JOHN P. WALLACE