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ORIGINAL

Decision No. 90929 OCT 23 1979

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Mervin R. Bailey,)
)
 Complainant,)
)
 v.)
)
 John B. Williams, dba Donner Lake)
 Utility Company,)
)
 Defendant.)

Case No. 10690
(Filed November 9, 1978)

Raymond M. Cadei, Attorney at Law, for
John B. Williams, defendant.

ORDER OF DISMISSAL

Mervin R. Bailey, (complainant) filed his 13-page complaint with 21 pages of attachments on November 9, 1978. In substance the complaint alleges a billing dispute arising out of complainant's purchase on December 7, 1976 of residential property with water service provided by John B. Williams, dba Donner Lake Utility Company (defendant). Complainant alleges that the property was conveyed to him (escrow closed) while he was out of the country and that he did not take physical possession of the property until September 20, 1977. He also alleges that the property was rented to a tenant between March 1, 1977, and August 31, 1977. He does not state who, if anyone, occupied the house between December 7, 1976, and March 1, 1977, or between August 31 and September 20, 1977. He believes that the water bill for the period of the tenancy was paid by the tenant.

The complainant further alleges that when he took possession of the house on September 20, 1977, the water service was found to be on. "Therefore", he states, "it was not necessary to contact anyone to have the service turned on." Complainant claims that, since he was new to the area, he "assumed that water service was included in the property tax rate as it is in other communities [in] which [he had] lived."

It was not until certain water outages occurred (which were the basis of Case No. 10521), complainant states, that he learned of the existence of the defendant.^{1/} Complainant excuses his failure to report his existence as a water customer to defendant by arguing among other things, that: (1) service was poor and therefore defendant did not deserve compensation, (2) he was never billed, (3) it was the duty of the water company to determine by regular inspections what water services were on, and (4) no law required him to come forth and contact the utility company if the water was found to be on at the time of physical possession.

By letter dated April 17, 1978, the complainant was billed for \$376.50 of past-due water charges. The total included \$184.50, which defendant now concedes was properly payable by the former owner of the property. The remainder of \$192.00 consisted of annual charges of \$96.00 for each of the years 1977 and 1978. The letter required payment by May 3, 1978 under threat of disconnection. In response to the letter, complainant sent a check dated April 28, 1978, for \$96.00 to the Commission. This sum was disbursed by the staff to the defendant on October 19, 1978, in connection with a related informal complaint matter.

^{1/} The outages referred to occurred between September, 1977, and February, 1978, according to the complaint in Case No. 10521. That complaint was filed March 16, 1978, and Mervin R. Bailey was one of the complainants. Hearings were held August 8th and 9th, 1978, and the matter was concluded by Decision No. 89956, dated February 14, 1979.

A new bill, dated June 26, 1978, was later sent to the complainant requiring payment of a total of \$200.00, consisting of \$8.00 for the period of December 3 to 31, 1976, and annual charges of \$96.00 per year for 1977 and 1978. On August 15, 1978, the defendant disconnected complainant's service for nonpayment.

Almost three months elapsed before complainant filed his formal complaint on November 9, 1978. On December 6, 1978, complainant deposited an additional \$104.00 with the Commission and on December 9, 1978, his service was restored. His troubles, however, were not yet at an end. In January 1979, he was billed \$96.00 for water service for the year 1979. When he failed to pay the bill, his service was disconnected on May 2, 1979. On May 25, 1979, complainant deposited \$40.00 with the Commission, representing \$8.00 for each of the first five months of 1979. He offered to pay \$8.00 per month thereafter if his service was restored. This offer was inconsistent with defendant's tariffs and was declined. On June 13, 1979, complainant deposited an additional \$56.00 with the Commission and his service was restored the same day.

Procedural Background

The defendant filed its answer on January 5, 1979. Thereafter, attempts by the calendar clerk to contact complainant by telephone to establish agreeable hearing dates were unsuccessful due to complainant's absence. Hearings were nevertheless set for March 20, 1979, in San Francisco and complainant was duly notified by notice of hearing and letter mailed February 6, 1979.

Complainant responded by letter dated February 22, 1979, that he had not received a copy of defendant's answer from the Commission, and asked that a filed copy be provided and that the hearing dates be postponed in order to allow him time to prepare his case. He stated in addition that he was not available on March 19 and 20, the dates set for hearing. No explanation of his unavailability was offered. He also requested that all future communications with him be by mail.

Pursuant to complainant's request, the hearing dates in March were canceled, a copy of the answer was provided to him, and alternative dates in May were suggested. Complainant was instructed by letter dated March 1, 1979, to advise the Administrative Law Judge which of the three dates in May he preferred, or to suggest three dates in May or the first two weeks of June convenient to him.

By letter dated March 21, 1979, complainant replied:

"Thank you for sending a filed copy of "Answer to Complaint". True, I did receive a copy from the defendants' counsel but found it unacceptable because there was no proof from you or the PUC that an answer had ever been filed. Also, there was no proof the copy sent to me by the defendants' counsel was identical to the one filed. Of the 14 copies required to be filed by the defendants (Rules 13.1, 7, 11), it is logical that I would be on the distribution list. It is my position that neither you nor the PUC were inconvenienced nor the hearing unduly delayed by my request to show proof an answer was filed and a copy sent to me."

Complainant then listed five defects in the defendant's answer, based upon which he refused the answer and returned it to the Administrative Law Judge. He requested that the defendant be ordered to comply with the Commission's rules and to correct the alleged deficiencies, stating that: "Until these issues have been resolved, a definite date cannot be set for the hearing."

On March 26, 1979, the Administrative Law Judge responded by letter to each of complainant's assertions regarding deficiencies in the defendant's answer, concluding:

"In my opinion the answer was filed and served in accordance with the Commission's Rules of Practice and Procedure and is sufficient. The case is now ready for hearing. Please advise me by April 6, 1979, which of the dates mentioned in my letter of March 1, 1979, you prefer. If I do not hear from you by April 6, I will assume that each of the proposed hearing days is satisfactory to you and will set the matter for the one Mr. Redmon prefers."

Complainant responded by letter dated March 29, 1979, as follows:

"My preference for a hearing date will be during the first two weeks of June. No specific dates can be given at this time due to the way my days off are allotted. A bid system is used whereby days off are awarded according to seniority. On the 15th of the month prior to the month the days off are taken, the bid is awarded; i.e. on May 15th I will know the days off for June.

"The bid for June will be submitted as follows; first choice, June 11 - 15th, second choice, June 4 - 8th. This is by no means a guarantee that I will be awarded one of these periods. You will be advised on May 15th, my availability for June. Unfortunately, this is most likely an inconvenience for everyone involved, but no alternatives exist. Should a conflict arise with Mr. Redmon's availability, I will be asking for priority since my profession directly serves more people than his.

"Your patience on this matter is appreciated."

It is obvious from this last communication that the proffered dates in May were peremptorily rejected by complainant, for as of March 29, 1979, he could not have known his days off in May. That information would only have been available on April 15.

Nevertheless, the Administrative Law Judge replied May 7, 1979:

"Regarding your letter of March 29, 1979, I will set the date for hearing in June as soon as you advise me of your preferred dates and after I have confirmed those dates with Mr. Redmon."

In a letter dated May 23, 1979, complainant concluded:

"Due to the numerous incidents^{2/} created by DLUC [defendant] since filing Complaint 10690, it is my intention to amend the original complaint. I am therefore requesting a July hearing date. When my July days off have been awarded, I will notify you."

2/ Here complainant apparently refers to the May 2, 1979, disconnection, discussed above.

By letter to complainant dated June 18, 1979, the attorney for the defendant indicated his preference for a hearing date "at any time during the month of July which is available to you."

Having the agreement of both parties on a hearing date sometime in July, the Administrative Law Judge wrote to the complainant on June 21, 1979, requesting that he send a statement of his days off in July by June 30, 1979 at the latest. No response was received.

Early in July the Administrative Law Judge asked the calendar clerk to set a hearing on July 23 and 24. The calendar clerk spoke with complainant on the telephone on July 5th. According to her notes, which have been made a part of the correspondence in this proceeding, complainant stated that he was amending the complaint and he requested a date in August. Nevertheless, the hearing was set for July 23 and 24 over the objection of the complainant.

Complainant responded by letter dated July 10, 1979, as follows:

"During the last half of June, I was incommunicado due mostly to being outside the contiguous United States. Hence, I did not know and was unable to notify you of my July availability. The circumstances involved were beyond my control.

"As discussed with your clerk July 5th, I will not be available July 23rd nor any other day during the balance of the month. Due to an illness it was necessary to take sick leave early in July. My days off for the month have therefore transpired.

"August days off have been bid for the last half of the month. Precise information will be forwarded to you upon my receipt. This time frame appears mutually acceptable to all parties as an alternative to a July hearing.

"Thank you for your patients (sic) and understanding concerning this matter."

This request for a continuance to another undisclosed date was opposed by defendant's letter of July 13, 1979, and denied by letter of the Administrative Law Judge dated July 13, 1979. Complainant was advised that:

"The Commission is not obligated to set your case for hearing only on a date convenient to you, especially in light of your repeated refusal even to suggest such a date.

"Since you are the moving party, your failure to appear for hearing on July 23, 1979, will result in a recommendation to the Commission that your case be dismissed for lack of prosecution."

The case came on regularly for hearing at 10:00 a.m. July 23, 1979, in San Francisco, pursuant to notice duly given of the time and place of hearing. The defendant, John B. Williams, of Reno, Nevada, president and owner of Donner Lake Utility Company, appeared personally and by Sacramento counsel. Since the complainant failed to appear at the hearing, defendant's counsel made an oral motion to dismiss the proceeding for failure of prosecution. The motion was taken under submission.

A telegram from complainant was received by the Commission at 10:26 a.m. on July 23, 1979, requesting a continuance until August 15, 16, 17, or 20, 1979. No facts were offered supporting the request for a continuance. It was not delivered to the Administrative Law Judge until after the hearing had adjourned.

Discussion

The above narrative on the procedural history of this matter clearly shows the complainant has not made a good faith or timely effort to bring this matter to hearing. We have extended the complainant a reasonable opportunity for a hearing; he has not met his end of the obligation. If we were to continue to attempt to set hearings we expect only a continuation of broken commitments and further waste of staff resources. Accordingly, based on the following findings of fact and conclusions of law, we believe the complaint should be dismissed with prejudice.

Findings of Fact

1. Defendant has billed complainant for a total of \$296.00 representing charges for service between December 3, 1976, and December 31, 1979.

2. Complainant has deposited with the Commission, during the pendency of both his informal complaint and this proceeding, a total of \$296.00, of which \$96.00 was disbursed to defendant on October 19, 1978, by the staff. The sum of \$200.00 remains on deposit with the Commission.

3. Complainant's property received service for only 24 days in December, 1976, assuming transfer of ownership occurred on December 7, 1976. Accordingly, 24/366th of the annual charge of \$96.00, or \$6.30, is payable.

4. The entire annual charge of \$96.00 is payable for 1977.

5. Complainant's property received service for only 249 days in 1978. Accordingly, 249/365th of the annual charge of \$96.00, or \$65.49, is payable.

6. Complainant's property received service for only 322 days in 1979. Accordingly, 322/365th of the annual charges of \$96.00, or \$84.69 is payable.

7. The total payable by complainant for the disputed period is:

1976	\$ 6.30
1977	96.00
1978	65.49
1979	84.69
Total	<u>\$252.48</u>

8. Since complainant has paid \$96.00, the amount remaining due is \$156.48.

9. Of the \$200.00 on deposit with the Commission \$156.48 should be disbursed to defendant and \$43.52 should be disbursed to complainant.

10. Complainant has been afforded several opportunities to be heard but has in each case failed, neglected, or refused to take advantage thereof. The reasons stated for such refusal, failure, or neglect are lacking in that particularity necessary for assigning to them any credence.

Conclusions of Law

1. Complainant's conduct constitutes inexcusable dilatoriness, which has imposed unjustifiable burdens upon the staff and the defendant.

2. The Commission has no duty to coerce a moving party into the courtroom. The requirements of due process are fulfilled when reasonable opportunities to be heard have been provided, despite a party's failure, refusal, or neglect to take advantage thereof.

3. Reasonable opportunities to be heard have been provided to complainant.

4. Complainant has altogether failed, refused, or neglected to take advantage of the opportunities to be heard provided by the Commission.

5. Complainant's failure, refusal, or neglect, as stated in Conclusion 4, are without adequate excuse or justification.

6. The complaint should be dismissed with prejudice for lack of prosecution.

7. The funds on deposit with the Commission should be disbursed in accordance with Finding 9.

O R D E R

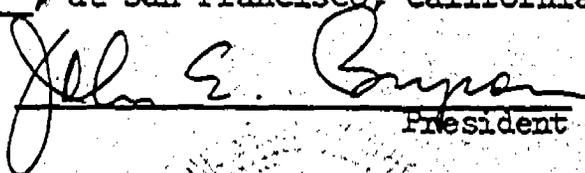
IT IS ORDERED that:

1. Case No. 10690 is dismissed with prejudice.
2. From the \$200.00 on deposit with the Commission \$156.48 shall be disbursed to the defendant John B. Williams, dba Donner Lake Utility Company, and \$43.52 shall be disbursed to the complainant Mervin R. Bailey.

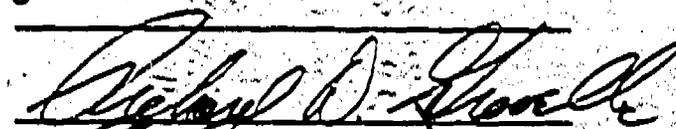
The effective date of this order shall be thirty days after the date hereof.

Dated OCT 23 1979, at San Francisco, California.

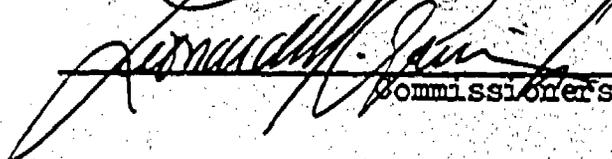
Commissioner Vernon L. Sturgeon, being necessarily absent, did not participate in the disposition of this proceeding.



 President







 Commissioner's