

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF THE COMPLAINT OF
JIMMY HAYES,**

COMPLAINANT,

V.

CASE NO. 15-1662-EL-CSS

**THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY**

RESPONDENT.

SECOND ENTRY ON REHEARING

Entered in the Journal on February 20, 2019

I. SUMMARY

{¶ 1} The Commission, pursuant to R.C. 4903.10, denies the application for rehearing filed by Jimmy Hayes.

II. PROCEDURAL HISTORY

{¶ 2} The Cleveland Electric Illuminating Company (CEI or Company) is an electric light company as defined in R.C. 4905.03 and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} On September 23, 2015, Jimmy Hayes (Complainant or Mr. Hayes), who held a commercial account for electric service at a McDonald's restaurant, filed a complaint against CEI. In the complaint, Complainant alleges that CEI failed to meet its obligation to return his security deposit, in an amount of \$5,900, plus interest.

{¶ 4} On October 12, 2015, CEI filed its answer to the complaint. In its answer CEI admits none of the specific allegations made in the complaint, indicates that some of the information set forth in the complaint requires no response, asserts that it lacks knowledge

sufficient to admit or deny a number of the allegations of the complaint, and sets forth several affirmative defenses.

{¶ 5} On November 29, 2017, the Commission issued an Opinion and Order (Order) finding that Complainant failed to carry the burden of proving that CEI did not return the alleged October 1996 security deposit for a commercial account that was closed in 2009.

{¶ 6} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission. Any such application is required to set forth specifically the grounds on which the party considers the order to be unreasonable or unlawful. R.C. 4903.10, also provides, in part, that if the Commission grants such rehearing, it shall not take any evidence that, with reasonable diligence, could have been offered during the original hearing.

{¶ 7} On December 28, 2017, as supplemented on December 29, 2017, Complainant filed an application for rehearing of the Order. In his application for rehearing, it appears Complainant sets forth two assignments of error. First, Complainant submits that the Commission erred by failing to acknowledge in the Order that CEI received Complainant's payment of a security deposit in the amount of \$5,900. In support of this contention, Complainant seeks to introduce now, on rehearing, two documents that he did not previously proffer as exhibits. As his second assignment of error, Complainant submits that the Commission should have, but did not, find that CEI failed to follow the security deposit refund policy described in Hayes Ex. 8, a copy of an October 1, 2012 e-mail message, ostensibly authored by CEI's counsel, which purports to describe the security deposit refund policy that CEI had in place in 1996.

{¶ 8} On January 18, 2017, CEI filed a memorandum contra Complainant's application for rehearing. In its pleading, CEI makes three arguments: first, that Complainant's application for rehearing fails to meet procedural requirements of Ohio

Adm.Code 4901-1-35; second, that Complainant's attempt to introduce, only now on rehearing, documents that could have been produced earlier, is improper and would be prejudicial to CEI; and, third, even if the Commission were to allow such documents into the record now, doing so would not change the outcome of this case.

{¶ 9} On January 24, 2018, the Commission granted Complainant's application for rehearing for the limited purpose of further consideration of the matters specified in the application for rehearing.

III. DISCUSSION

A. *CEI's Arguments Regarding Alleged Procedural Flaws in Complainant's Post-Order Pleadings*

{¶ 10} First, we will consider CEI's arguments that Complainant's post-order pleadings contain procedural flaws that should preclude the Commission from even considering them as an application for rehearing. Pointing to the December 28, 2017 pleading's caption "Complainant Request for Appeal," CEI avows that no legal authority exists which permits an "appeal" to the Commission. Even if Complainant's pleadings could be deemed to be an application for rehearing, says CEI, they are procedurally improper because they do not contain numbered or lettered paragraphs, allegedly do not articulate any grounds upon which Complainant claims the Order is unreasonable or unlawful, and nowhere specifically asks for a rehearing.

{¶ 11} Under R.C. 4903.10, a party may apply for rehearing "in respect to any matters determined in that proceeding." CEI's arguments regarding procedural flaws in Complainant's post-order pleadings seek to elevate form over substance. We find that Complainant's pleadings substantially comply with the requirements of the rehearing statute and, thus, it is appropriate to treat Complainant's December 28, 2017 pleading, as supplemented, as an application for rehearing. It is clear that Complainant is seeking to have the Commission reconsider the reasonableness and lawfulness of the Order, based on the two assignments of error which we have gleaned from Complainant's post-order

pleadings and described above. See *In re the Complaint of Warren Jay Yerian v. Buckeye Rural Electric Coop., Inc.*, Case No. 02-2548-EL-CSS, Entry on Rehearing (May 19, 2004) at 4.

B. Complainant's First Assignment of Error

{¶ 12} Next, we will consider the Complainant's first assignment of error: namely, that the Commission erred by failing to acknowledge in the Order that CEI received Complainant's payment of a security deposit in the amount of \$5,900. To bolster this argument, Complainant is now seeking to introduce, on rehearing, two documents that have never previously been proffered as exhibits.

{¶ 13} The first document (First Document) is a portion of a bank statement which Complainant now submits for the purpose of showing that, during the October 1996 period covered by his bank statement, funds associated with Check # 3077, in the amount of \$11,571.75, were withdrawn from Complainant's bank account and received by CEI.

{¶ 14} The second document (the Second Document) is a newly produced copy of the same deposit receipt that was, at hearing, admitted into evidence as Hayes Ex. 5. There are only two differences between Hayes Ex. 5, and the Second Document: first, the issuing company's name "The Illuminating Company" (CEI's name in 1996) is at least partially obscured in Hayes Ex. 5, but is fully visible on the Second Document. Second, Hayes Ex. 5 is a copy of only the front-side of the deposit receipt, whereas the Second Document is a two page document which, on the second page, reflects, for the first time, the back-side of the deposit receipt. Only one thing appears on the back side of the deposit receipt, namely, Complainant's address. Complainant's stated purpose in proffering the Second Document is to show "that the receipt was addressed to Jimmy Hayes at his home business address and is formatted in a manner, with CEI's letterhead plainly legible, to further support Complainant's view of a legitimate receipt."

{¶ 15} CEI contends that any differences that exist between Hayes Ex. 5 and the Second Document are inconsequential. Moreover, says the Company, the documents comprising the two proffered rehearing exhibits are not new; both date from 1996 and, as

such, were presumably within Complainant's possession and control at all relevant times. Yet, observes CEI, Complainant has offered no reason or explanation why he did not produce these documents in discovery or seek to introduce them at hearing. To allow Complainant to introduce the two documents now, under such circumstances, submits CEI, would be unfairly prejudicial to Respondent.

{¶ 16} Further, CEI believes that the exhibits Complainant is seeking to introduce on rehearing do not substantiate the factual propositions that Complainant claims that they do. CEI posits that: (1) Complainant's purpose in submitting the First Document has been to explain why, when the amount of the alleged security deposit was \$5,900, he wrote a check in the amount of \$11,571.74; and (2) Complainant's purpose in submitting the Second Document, i.e., the portion of his bank statement listing that check, has been to prove that he paid the security deposit to CEI. CEI points out that, even if the proffered documents could be properly admitted, the First Document, which is two pages of a heavily redacted bank statement, identifies only a total check amount, not the purpose(s) for which the check was written. As such, says CEI, it does not substantiate Complainant's claim that one portion of the check written for \$11,571.74, was for payment of the amount of the security deposit while another portion of the same check was for payment of an amount due on a monthly service bill that, incidentally, has never been entered into the record.

{¶ 17} Continuing, CEI suggests that even if, hypothetically, the two documents proffered as rehearing exhibits were admitted, they would not change the outcome of the case because they have no bearing on the key issue in the case, namely whether or not CEI owes a refund of a security deposit to Complainant. CEI contends that the Commission found in favor of CEI because it concluded, based on the evidence (including CEI's applicable tariff, CEI's records, and the testimony of CEI's witness), that CEI refunded any security deposit to Complainant or credited the deposit to his account prior to 1998. Order at ¶ 25. For that reason, CEI asserts that even if the rehearing exhibits showed that Complainant paid a deposit or explained the amount of the check, neither showing would

change the Commission's ultimate conclusion, set out in the Order, about the disposition of any security deposit.

{¶ 18} Upon review, the Commission finds that Complainant's first assignment of error is without merit and fails to provide proper grounds for granting rehearing of the Order. The Commission finds that neither of Complainant's two proffered rehearing exhibits should be admitted into evidence. Under R.C. 4903.10, on rehearing, we may not "take any evidence that, with reasonable diligence, could have been offered upon the original hearing." With regard to this R.C. 4903.10 prohibition, we note that Complainant has provided no explanation as to why these rehearing exhibits could not, with reasonable diligence, have been introduced at the original hearing in this case. Considering the record in this matter, the Commission finds that Complainant had the opportunity to present these exhibits at hearing but did not. As noted in the attorney examiner's October 21, 2016 Entry, the burden of proof rests with the complainant in complaint proceedings and it is the complainant's responsibility to appear and be prepared to present evidence in support of the complaint. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966). We will not allow the Complainant a "second bite of the apple" to satisfy his evidentiary burden. To do so would be prejudicial to Respondent. Therefore, we agree with CEI and, pursuant to R.C. 4903.10, will not take any additional evidence, including the two proffered rehearing exhibits.

{¶ 19} Nevertheless, even if we were to consider this additional evidence at this time, we agree with the Company that the outcome would remain the same. In regard to his first assignment of error, Complainant's whole effort has been to show, perhaps more definitively than he feels he might have at hearing, that CEI received the check by which Complainant claims to have paid his security deposit in October 1996. Complainant has attempted to do so by producing both the portion of his October 1996 bank statement on which, he claims, the check appears, as well as a cleaner, double-sided copy of his deposit receipt. All this is unnecessary, and as CEI correctly indicates, should have no impact on the outcome of this case, given that the question of whether a deposit was initially paid by

Complainant is not the dispositive issue in this case. The Commission has already found, on the basis of the existing record, that “it is likely a refund to the Complainant or a credit against charges owed to CEI occurred prior to 1998.” Order at ¶ 25. As such, Complainant’s first assignment of error fails to present a reason for granting rehearing.

C. *Complainant’s Second Assignment of Error*

{¶ 20} Next, we will consider the Complainant’s second assignment of error; namely, that the Commission should, but did not, find that CEI failed to follow the deposit refund policy described in Hayes Ex. 8. We note that CEI neither directly identified nor addressed this topic in its response to Complainant’s application for rehearing.

{¶ 21} On rehearing, Complainant claims that he began to inquire about the return of the refund “within two years of the time the deposit was paid,” and that according to the alleged Company deposit refund policy described in Hayes Ex. 8, “that deposit should have been returned starting after the 13th month of good payment status”.

{¶ 22} Unlike the two documents discussed in relation to Complainant’s first assignment of error, Hayes Ex. 8 was properly presented and admitted into the record during the evidentiary hearing. Upon review, the Commission finds that Hayes Ex. 8, as presented by Complainant to demonstrate CEI failed to follow the alleged policy contained therein, was thoroughly considered and afforded the appropriate evidentiary weight by the Commission in its Order. Order at ¶¶ 23-26. Notably, the Commission’s Order focuses on the fact that, regardless if this is a correct characterization of the Company’s deposit refund policy or not, Complainant’s inability to establish a record of the transactions that occurred on his account prior to December 23, 1997, coupled with his inability to counter the existing documentary evidence which supports the conclusion that, after that date, CEI never held a security deposit, requires the Commission to conclude that Complainant has failed to sustain his evidentiary burden. Order at ¶ 26.

{¶ 23} What we were able to conclude was that “[t]he uncontested evidence [shows], as of December 23, 1997, Complainant owed a balance on the account of \$6,747.57 and was

assessed late charges 28 times during the ensuing 32-month period.” Order at ¶ 27. While Complainant contends that the amount due as of December 23, 1997, “goes to prove that the account remained current and the security deposit had not yet been refunded”, we find no basis exists to support this assertion. Knowing the balance amount due on an account on any given date, by itself, provides no basis for ascertaining whether the account is then, or has remained, current. Again, no company-issued bill or statement covering a record of the transactions that occurred on his account prior to December 23, 1997 has been submitted. Order at ¶ 24. Without such a bill or other corroborating evidence, we are left without the means to ascertain, on the basis of the record before us, whether Mr. Hayes’ account was current or if a deposit was being held by the Company as of December 23, 1997. By the time of the filing of the complaint, which was nearly 20 years from the time Complainant claims he began requesting the return of a deposit, it was incumbent upon Complainant to have retained and to have introduced such evidence into the record because, by that time, CEI had no obligation under the Commission’s record retention rules to have kept it among its own business records. As a result, we continue to find that the evidence of record more likely supports the inference that the deposit was either refunded or applied as a credit toward Complainant’s account prior to 1998. Order at ¶¶ 25, 27.

{¶ 24} Accordingly, we find that Complainant’s second assignment of error is without merit and fails to provide proper grounds for granting rehearing of the Order.

{¶ 25} Having found both of Complainant’s assignments of error to be without merit, the Commission finds that Complainant’s application for rehearing should be denied. As a final matter, any assignments of error raised by Complainant in this proceeding that have not otherwise been addressed in this Second Entry on Rehearing are hereby denied.

IV. ORDER

{¶ 26} It is, therefore,

{¶ 27} ORDERED, That the application for rehearing filed by Mr. Hayes be denied, as set forth in this Second Entry on Rehearing. It is, further,

{¶ 28} ORDERED, That a copy of this Second Entry on Rehearing be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

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