



STATE OF NEW JERSEY
Board of Public Utilities
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Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

WATER

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| TOWN OF CLINTON, |) | ORDER DENYING MOTION FOR |
| Petitioner |) | INTERLOCUTORY REVIEW |
| |) | |
| v. |) | |
| |) | |
| BOROUGH OF LEBANON, |) | BPU DOCKET NO. WO21060896 |
| Respondent |) | OAL DOCKET NO. PUC 05575-21 |

Parties of Record:

Richard P. Cushing, Esq., Gebhardt & Kiefer, P.C., for the Town of Clinton
John R. Lanza, Esq., Lanza & Lanza, L.L.P., for the Borough of Lebanon
Brian O. Lipman, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD:

This matter is before the New Jersey Board of Public Utilities (“Board” or “BPU”) by way of motion dated October 22, 2021 filed by the Respondent, the Borough of Lebanon (“Borough” or “Respondent”) seeking interlocutory review of Administrative Law Judge Jacob S. Gertsman’s (“ALJ Gertsman”) ruling on October 19, 2021. For the reasons noted herein, the Board denies the Borough’s request for interlocutory review.

BACKGROUND AND PROCEDURAL HISTORY

On June 9, 2021, the Town of Clinton (“Town” or “Petitioner”) filed a petition with the Board seeking a determination of a dispute between Petitioner and the Borough, regarding the application of municipal ordinance 2020-05 (“Ordinance”) passed by the Borough on July 5, 2020, which requires that certain road restoration standards be employed on Main Street following excavation. The Petitioner claims that the Ordinance is unreasonable and amounts to a refusal of the municipal consent conferred by the Borough to the Town for the purpose of furnishing the Borough’s residents with water.¹ The Respondent filed its answer on June 24,

¹ Petition, p. 1.

2021, asserting, among other things, that the Board did not have jurisdiction in this matter.² The matter was transmitted to the Office of Administrative Law (“OAL”) as a contested case on June 29, 2021, and was assigned to AL Gertsman for consideration and hearing.

On August 12, 2021, ALJ Gertsman conducted a status conference with the Town, the Borough, the New Jersey Division of Rate Counsel (“Rate Counsel”) and Board Staff (“Staff”). Following the status conference, the Petitioner filed a motion to establish jurisdiction and the Respondent filed a cross-motion to dismiss for lack of jurisdiction.³ At ALJ Gertsman’s direction, Staff and Rate Counsel also submitted briefs on the issue of jurisdiction. The Petitioner, Rate Counsel and Staff filed briefs in favor of establishing jurisdiction on September 17, 2021 and the Respondent’s reply brief was filed on September 29, 2021.⁴

After reviewing the briefs, ALJ Gertsman conducted another status conference on October 18, 2021 during which he concluded that the Board had jurisdiction. ALJ Gertsman subsequently memorialized his decision via letter Order on October 19, 2021, wherein he also directed the Petitioner to file an amended petition which specified that it was not seeking to overturn the Ordinance by November 2, 2021. ALJ Gertsman further directed the Respondent to file its amended answer on or before November 16, 2021.

Motion for Interlocutory Review

On October 22, 2021, pursuant to N.J.A.C. 1:1-14.10(a) and (b), the Borough filed a Motion for Interlocutory Review of the ruling made by ALJ Gertsman during the status conference held in this matter on October 18, 2021 and memorialized in his letter Order dated October 19, 2021. The Respondent contends that ALJ Gertsman erred in his determination that the Board has jurisdiction in this matter, stating that the Town is seeking to invalidate the Ordinance passed in July 2020, requiring concrete road replacement within the Borough, rather than asphalt.⁵

In its motion, the Borough states that the “BPU should grant interlocutory review and overturn the order granting Petitioner’s motion to establish jurisdiction and denying Respondent’s cross-motion to dismiss for lack of jurisdiction.”⁶ The Respondent argues that rather than seeking to exercise its authority under the municipal consent, the Town seeks to invalidate the road restoration ordinance passed by the Borough and that the authority regarding municipal roads is designated exclusively to municipalities by N.J.S.A. 40:67-1 and 40:67-4.⁷

The Respondent asserts that “[n]o administrative agency has inherent power, and none may arrogate to itself the authority to accomplish ends not envisaged by the legislative grant or to employ means not fairly within the powers that have been bestowed,” citing Knight v. Hoboken Rent Leveling & Stabilization Bd., 332 N.J. 547, 551 (App. Div. 2013), and that the “sovereign powers of a municipality should not be subordinated to Board jurisdiction ‘by interference’ or ‘lightly implied.’” In the Matter of the Petition of the Merchantville-Pennsauken Water

² Answer, p. 4.

³ Letter Order, p. 2.

⁴ Ibid.

⁵ Respondent’s Brief, Motion for Interlocutory Appeal, p. 2.

⁶ Ibid.

⁷ Ibid.

Commission, 2021 WL 1752511 at *2 (N.J. Bd Reg. Comm. April 27, 2021, citing Jersey City Incinerator Authority v. Dept. of Publ. Util., 146. N.J. Super. 243, 255-256 (App. Div. 1976).

Opposition to Motion for Interlocutory Review

The Town filed its opposition to the Borough's Motion for Interlocutory Review on October 25, 2021, arguing that the Board has broad jurisdiction over the issues to be resolved in this case, pursuant to N.J.S.A. 48:2-13 and 14, and N.J.S.A. 40A:31-23(d)(1), as well as extensive case law.⁸

The Town states that it provides water to more than 1,250 customers beyond the municipal borders, making it subject to the jurisdiction of the Board in this matter, pursuant to N.J.S.A. 40A:31-23 (d) and (f); however, the Town is not subject to BPU rate setting, provided the Town charges all of its customers the same rates.

N.J.S.A. 14:2-13(a) states, "The board shall have general supervision and regulation of and jurisdiction and control over all public utilities as defined in this section and their property, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions of this Title..." N.J.S.A 40A:31-23(d)(1) further provides that "[E]xcept as may otherwise be provided by subsection e. of this section and subject to the terms of any agreement entered into by participating local units or between a supplying and receiving local unit or units and the provisions of this act, a local unit or local units owning and operating water supply facilities in accordance with the provisions of N.J.S.A. 40A:31-4, which supply water to more than 1,000 billed customers within another local unit, shall be subject to the jurisdiction, regulation and control of the Board of Public Utilities in accordance with the provisions of Title 48 of the Revised Statutes..." The Town indicates that it serves approximately 1,250⁹ customers outside of the Town, including 709 customers in the Borough.¹⁰

The Town argues that while the Board has the authority to conduct an interlocutory review of an ALJ's order, that authority should be used sparingly, citing In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982), and that "'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)."¹¹

DISCUSSION AND FINDINGS

An order or ruling of an ALJ may be reviewed on an interlocutory basis by an agency head at the request of a party. N.J.A.C. 1:1-14.10(a). Any request for interlocutory review shall be made to the agency head no later than five (5) working days from the receipt of the order. N.J.A.C. 1:1-14.10(b). 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

⁸ Petitioner's response to motion, p. 1.

⁹ The Town misstated the amount of customers it serves outside of its municipal borders as 12,500 in its letter brief. However, the petition indicates that it serves approximately 12,500 customers in total. Petition at paragraph 11.

¹⁰ Petitioner's response to motion at 3.

¹¹ Ibid.

interlocutory review by the later of (i) 10 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. Additionally, 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. Finally, it should be noted that N.J.A.C. 1:1-14.10(i) in relevant part provides that:

any order or ruling reviewable interlocutorily is subject to review by the agency head after the judge renders the initial decision in the contested case, even if an application for interlocutory review:

1. Was not made;
2. Was made but the agency head declined to review the order or ruling; or
3. Was made and not considered by the agency head within the established time frame.

Here, ALJ Gertsman's decision was issued on October 19, 2021, and the Borough filed its motion on October 22, 2021, which is within the five (5) day time period set forth in N.J.A.C. 1:14-14.10(b). Moreover, the Board's next regularly scheduled Agenda meeting following the expiration of the specified 10-day time period for reviewing the motion is November 17, 2021. As such, the Board is within the time limit set forth in N.J.A.C. 1:14-14.4(a) to consider the Borough's request for interlocutory review.

Turning to the legal standard for accepting a matter for interlocutory review, in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982), the New Jersey Supreme 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 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. Id. at 100. 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." Id. The Court further 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.

As set forth above, the decision to grant interlocutory review is committed to the sound discretion of the Board, and may be granted in the interest of justice. Having reviewed the Borough's motion, the Township's response and ALJ Gertsman's decision, the Board is not persuaded that it is appropriate to grant interlocutory review. The Board deems it unnecessary to review the merits of the ALJ's rulings at this stage, and instead will review the proceeding in its entirety, following the filing of briefs, the issuance of ALJ Gertsman's decision, and any exceptions filed thereto. The Board believes that the rulings made during the conduct of the proceeding by ALJ Gertsman who, consistent with N.J.A.C. 1:1-14.6, has the power to develop the record and render a decision dispositive of the issues before the OAL, should remain undisturbed at this juncture. The parties will be afforded another opportunity to address the issue prior to the Board's issuance of a final decision. Likewise, the Board is free to revisit this matter, and, if necessary, require the parties to further brief the issues and "reject or modify conclusions of law, interpretations of agency policy, or findings of fact" in ALJ Gertsman's decision, pursuant to N.J.A.C. 1:1-18.6.

Accordingly, the Board **HEREBY DENIES** the Borough's Motion for Interlocutory Review of ALJ Gertman's letter Order issued on October 19, 2021, which found that the Board has jurisdiction over this matter.

The Order shall become effective on November 24, 2021.

DATED: November 17, 2021

BOARD OF PUBLIC UTILITIES
BY:



JOSEPH L. FIORDALISO
PRESIDENT



MARY-ANNA HOLDEN
COMMISSIONER



DIANNE SOLOMON
COMMISSIONER



UPENDRA J. CHIVUKULA
COMMISSIONER



ROBERT M. GORDON
COMMISSIONER

ATTEST: 

AIDA CAMACHO-WELCH
SECRETARY

TOWN OF CLINTON V. BOROUGH OF LEBANON
 BPU DOCKET NO. WO21060896 & OAL DOCKET NO. PUC 05575-21

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