STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: December 15, 2015)

STEPHEN SULYMA	:	
	:	
	:	
v.	:	**C.A. No. KC-2015-0992**
	:	
NATIONAL GRID, RHODE ISLAND DIVISION OF PUBLIC UTILITIES AND CARRIERS	:	

DECISION

RUBINE, J. This matter is before the Court on appeal by Stephen Sulyma (customer or Sulyma) from a final order in a contested case heard by the Rhode Island Division of Public Utilities and Carriers (the Division or DPUC). Opposing Sulyma below, and in this appeal, is National Grid (the Utility), the utility providing electrical service to Sulyma. Jurisdiction is established under the Administrative Procedures Act, G.L. 1956 § 42-35-15 (judicial review of contested cases).

I

Facts and Travel

The issues presented in this appeal involve application of the Rules and Regulations Governing the Termination of Residential Electric, Gas and Water Utility Service (the Termination Rules). These Termination Rules, promulgated by the Division, govern, inter alia, termination of residential service for gas and electricity for customers who fail to pay an overdue bill because of financial hardship or other qualifying reasons. Financial hardship is defined in the Termination Rules as covering those families having a combined gross income equal to or less than sixty (60) percent of the Rhode Island median income, or those who are eligible for

LIHEAP (the federal Low Income Home Energy Assistance Program). Neither DPUC nor the Utility questioned Sulyma's eligibility as a result of financial hardship for payment programs offered under the Termination Rules.

After the Utility notified Sulyma of its intention to terminate his electric utility service, he sought an informal review by the Division of his dispute with the Utility over the terms of a payment plan relative to customer's liability for arrearages which were past due. In the informal review, the Division initially determines what payment plan is appropriate for the customer by choosing from an array of payment plans set forth in the Termination Rules which are available to residential customers. There are at least eight payment plans prescribed under the Termination Rules for customers who fall into the category of financial hardship. The terms of the plans vary according to whether or not the customer's service has been terminated and whether the customer has defaulted on prior plans.

In this instance, Sulyma was dissatisfied with the payment plan prescribed following the informal review. Accordingly, he requested a full evidentiary hearing before a hearing officer designated by the Division, a procedure to which the customer is entitled under the Termination Rules, and which was conducted on September 24, 2015. The Court was provided with a certified copy of the record pertaining to this hearing, including a transcript, and the Report and Order prepared by the hearing officer, which was approved by the Administrator of the DPUC on October 5, 2015. The customer seeks review of this Report and Order in the Superior Court, leading to the instant appeal.

Following the full evidentiary hearing, the hearing officer determined that the customer qualified for Protected Status Customer Step P-3 Payment Plan (the Plan). This Plan requires the customer to make a down payment equal to 25% of the customer's outstanding unpaid utility

balance. At the time, the customer's outstanding unpaid balance was $2043.49. Accordingly, the down payment for Sulyma would be $510.85. Sulyma indicated at the hearing that he was unable to make the down payment provided in the Plan in one lump sum due to his recent reemployment, but also described how he would have sufficient cash flow to be able to meet the down payment if given an opportunity to pay that amount in a series of periodic payments.

Under the Plan, Sulyma, in addition to the down payment, would be required to pay twelve monthly installments of $127.72 for the remaining arrearage. This monthly arrearage payment is in addition to payments for current monthly usage, which, when included in the case of Sulyma, would result in a total estimated monthly payment of $247.72. Failure to make the down payment or required monthly arrearage payments timely allows the Utility to terminate service within ten business days following the default. Sulyma testified that, although he had been previously unemployed, he is currently employed. Notwithstanding his current employment, Sulyma further indicated that he was not presently able to make the required 25% down payment, but, given a reasonable amount of time, he would be able to make the down payment as his continuing employment income would give him the ability to pay the total estimated monthly payments over a twelve-month period.

The Division determined that the evidence showed five previous defaults under prior-established payment plans. In the Division's opinion, the previous defaults rendered Sulyma eligible only for the Step 3 Payment Plan. Although Sulyma believes he should be entitled to arrearage forgiveness, his previous default under a Henry Shelton Act Arrearage Forgiveness Plan renders him ineligible for any further arrearage forgiveness under that statute. See G.L. 1956 § 39-2-1(d)(1). Sulyma, in essence, admits that he has previously defaulted, but asks DPUC to nonetheless modify the terms of his repayment plan because of his recent

unemployment and single-parent status. According to Sulyma, he does not dispute the current arrearage, but simply requires a modification of the Plan to extend the period of time for payment in light of his current limited cash flow. DPUC stated that, as a result of previous defaults, its "hands are tied," and it can only offer a payment plan as mandated by the Termination Rules. Report and Order at 8, n.13 (October 5, 2015). Sulyma filed the instant action asking the Court to reverse, vacate, or modify this determination.

II

Standard of Review

Judicial review of agency determinations is conducted pursuant to § 42-35-15. Specifically, § 42-35-15(g) provides that the standard of review for administrative agency appeals in the Superior Court is limited.

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> > "(1) In violation of constitutional or statutory provisions;
> > "(2) In excess of the statutory authority of the agency;
> > "(3) Made upon unlawful procedure;
> > "(4) Affected by other error or law;
> > "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> > "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

The Court does not independently weigh the evidence before the agency; instead, the Court reviews the record to determine whether substantial evidence existed to support the agency's decision. Lischio v. Zoning Bd. of Review of N. Kingstown, 818 A.2d 685, 690 (R.I. 2003). Substantial evidence means '"such relevant evidence that a reasonable mind might accept as

adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.'" Id. at 690 n.5 (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I.1981)).

III

Analysis

A

The Decision of the DPUC

Following a full evidentiary hearing on September 24, 2015, DPUC issued a Report and Order, dated October 5, 2015, detailing its findings and conclusions regarding Sulyma's application for review of the termination of his utility services. This Report and Order discloses two issues which require the Court to remand this matter to DPUC for further hearing. Both errors arise out of DPUC's failure to consider the "special circumstances" exception provision of the Termination Rules. First, the Report and Order is affected by error of law as DPUC's construction of that rule effectively renders it nugatory. Second, the Report and Order does not disclose the evidentiary basis for any determination of Sulyma's status under the exception provision. For the following reasons, this matter is therefore remanded to DPUC for further hearing on Sulyma's circumstances and a decision as to whether those circumstances reach the threshold of "special circumstances."

B

DPUC's Decision is Affected by Error of Law

The application of a statute or regulation is a matter of no great controversy in the State of Rhode Island. "[W]hen the language of a statute is clear and unambiguous, [the Superior] Court must interpret the statute literally and must give the words of the statute their plain and

ordinary meanings." State v. Diamante, 83 A.3d 546, 548 (R.I. 2014) (internal quotation marks omitted). In the administrative context, an agency's interpretation of its own regulation is generally accorded great deference, unless the interpretation is "'plainly erroneous or inconsistent with the regulation.'" Kolbe v. BAC Home Loans Servicing, LP, 738 F.3d 432, 452 (1st Cir. 2013) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)). This manner of interpretation is known as Auer deference, in reference to the United States Supreme Court's decision in Auer v. Robbins, 519 U.S. 452, 461 (1997); however, the substance of the doctrine predates that decision and is a longstanding fixture of American administrative law. Id. at n.21.

Rhode Island has adopted a form of Auer deference, as "'[t]he law in Rhode Island is well settled that an administrative agency will be accorded great deference in interpreting a statute whose administration and enforcement have been entrusted to the agency.'" Duffy v. Powell, 18 A.3d 487, 490 (R.I. 2011) (quoting State v. Swindell, 895 A.2d 100, 104 (R.I. 2006)). The grant of authority to administer and enforce a statute will perforce require, where statutes so authorize, the creation and enforcement of administrative rules, the interpretation of which is committed to that agency, but subject to judicial review under the deferential Auer standard. See Great Am. Nursing Ctrs., Inc. v. Norberg, 567 A.2d 354, 356-57 (R.I. 1989) (noting that rules issued pursuant to delegated legislative power have force and effect of law); Sec. 39-1.1-3 ("The commission shall promulgate such rules and regulations as are necessary to ensure that termination of utility service for outstanding indebtedness shall be authorized only after the utility has complied with reasonable methods of debt collection as defined by the division.") (emphasis added); see also 3 Charles H. Koch, Jr. Administrative Law and Practice § 10:26 at 462-63 (3d ed. 2010) ("[A] court will give great deference to an agency's interpretation of its

own rules . . . [a]lthough the doctrine requires deference, it does not require that courts give agency interpretations controlling effect; thus courts are free to substitute judgment if they strongly disagree with the agency's legal interpretation [of its own rule].").

DPUC's Termination Rules explicitly provide it with authority to unilaterally modify the terms and conditions of a payment plan upon good cause. The Termination Rules, at Part VI, Section 7 provide that:

> "The Public Utilities Commission or Administrator of the Division of Public Utilities and Carriers retains the jurisdiction to grant an exception to the provisions of these regulations to any party for good cause shown.
>
> "Notwithstanding anything in the forgoing, if special circumstances warrant, the Division of Public Utilities and Carriers shall have the authority, after an informal or formal hearing, or after an informal investigation, to require a public utility to adjust the terms of a customer's residential payment plan under either the Protected Customer Payment Plans outlined in Part V, Section 4(E)(1), or the Standard Customer Payment Plans outlined in Part V, Section 4(E)(2)."

DPUC made clear in its decision that it considered exercising its authority to issue an exception under this section of the Termination Rules in assessing Sulyma's application for review. Report and Order at 3. In deciding whether Sulyma qualified for a special circumstances exception, DPUC took note of Sulyma's testimony at the evidentiary hearing:

> "[i]t is clear from the Complainant's testimony concerning the Complainant's finances that the Complainant may, at this time, find it difficult to make a 25% down payment, and may not at present be able to pay even the Complainant's current average monthly usage, much less bring down the Complainant's past-due balance." Report and Order at 7.

DPUC does not appear to have inquired into or considered the particular circumstances giving rise to Sulyma's inability to pay. Instead, DPUC stated that "[a]n inability to pay . . . does not constitute 'special circumstances' that would justify the Division in stepping this Complainant

down the payment plan ladder or otherwise modifying the terms of the payment plan . . ." Report and Order at 7-8. DPUC therefore interpreted its Termination Rules to hold that an inability to pay is per se incompatible with a special circumstances exception.

While DPUC is clearly interpreting its own rule and would normally be entitled to expansive deference, this interpretation of the special circumstances exception provision is plainly erroneous and inconsistent with the regulatory scheme. See Auer, 519 U.S. at 461. Indeed, the provision would have little to no purpose whatsoever if an inability to pay universally precluded a customer determined to be in "financial hardship"—as defined in the Termination Rules—an exception; absent an inability to pay, it is unclear why any public utility customer would be on a payment plan, let alone petition DPUC to modify one. Furthermore, the regulation—on its face—contemplates that there may be some circumstances leading to an inability to pay that merit special consideration: if "special circumstances warrant," DPUC can require a utility to accept a modified payment plan. Termination Rules, Part VI, Section 7 (emphasis added). What circumstances constitute "special circumstances" do not appear to be defined anywhere in the Termination Rules. The determination of which circumstances leading to an inability to pay are special enough to warrant an exception is therefore within DPUC's discretion on a case-by-case basis—subject to the general requirement that such a determination is neither arbitrary nor capricious. The DPUC determination that there can be no circumstances leading to an inability to pay that would justify consideration of applying the special circumstances rule contained in Part VI, Section 7 of the Termination Rules is an error of law. Such an interpretation ignores an explicit provision of DPUC's own regulations. Referring to the Division's own language in its Report and Order, the Division's hands were not "tied," because

the Termination Rules contemplate some flexibility to vary the payment terms of a particular payment plan under special circumstances.

The Court's review of DPUC's Report and Order leaves plain the conclusion that DPUC erred as a matter of law in interpreting its Termination Rules to prohibit the granting of a special circumstances exception based on an inability to pay. This interpretation effectively reads Part VI, Section 7 of the Termination Rules out of existence. When faced with clear and unambiguous language embodying the power of law, the Court will enforce that language literally. This means that when confronted with an application that includes or implies a request for consideration under the special circumstances exception, DPUC must address that request in its decision and determine what circumstances led to an inability to pay and explain why those circumstances do or do not warrant an exception.

C

The DPUC's Decision is Insufficient to Enable Meaningful Review

The error of law described above is compounded by the inadequacy of the administrative record before the Court on the question of Sulyma's eligibility for a special circumstances exception. It is well settled in Rhode Island that an administrative determination must be supported by a decision that adequately sets forth findings of fact and reasons for the decision made. Irish P'ship v. Rommel, 518 A.2d 356, 358 (R.I. 1986). Our Supreme Court has specifically recognized that the reasons underlying this requirement

> "'are so powerful that the requirement has been imposed with remarkable uniformity by virtually all federal and state courts, irrespective of a statutory requirement. The reasons have to do with facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative consideration, helping parties plan their cases for rehearings and judicial review, and keeping agencies within their jurisdiction.'"

> Id. (quoting Hooper v. Goldstein, 104 R.I. 32, 44, 241 A.2d 809, 815 (1968)).

For meaningful judicial review of agency determinations, the agency must provide, in its decision, the facts underlying its conclusions; if it does not, the Court will not search the record for supporting evidence or decide the matter in the first instance. Id. at 359 (quoting Hooper, 104 R.I. at 44, 241 A.2d at 815). Where the record presented is inadequate to facilitate review, the matter will be remanded to the agency for further development of the record. Id.

There is simply nothing in DPUC's Report and Order that enables the Court to meaningfully review DPUC's determination that Sulyma's circumstances were not sufficiently special to warrant an exception. The Report and Order briefly refers to evidence presented at the September 24, 2015 hearing that indicated that Sulyma would "find it difficult" to make the required down payment, but there is no reference to the underlying circumstances leading to this difficulty. Careful administrative consideration requires agency decision-makers to set forth their findings of fact and reasoning. See id. As the Court will not search through the record to find evidence supporting an agency's conclusion—and as it is unclear that DPUC investigated the circumstances of Sulyma's inability to pay at all, given its erroneous application of Part VI, Section 7—the matter must be remanded to DPUC for further development of the record.

IV

Conclusion

The Court expresses no opinion as to Sulyma's circumstances and whether they warrant a special exception. The DPUC must fully consider requests for exceptions under the regulatory framework they have established. The Court acknowledges that the termination of public utility service is a difficult balancing process and that both the Division and public utility providers exercise great care and solicitude in determining whether termination is appropriate in a given

case, but the importance of the process and its consequences in turn make it critical that the process proceed according to the laws and regulations established to govern it.

This matter is hereby remanded to the DPUC for proceedings consistent with this opinion. The Court requests that counsel for DPUC and counsel for the Utility prepare a form of judgment incorporating remand to the DPUC.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **Sulyma v. National Grid, et al.**

CASE NO: **KC-2015-0992**

COURT: **Kent County Superior Court**

DATE DECISION FILED: **December 15, 2015**

JUSTICE/MAGISTRATE: **Rubine, J.**

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