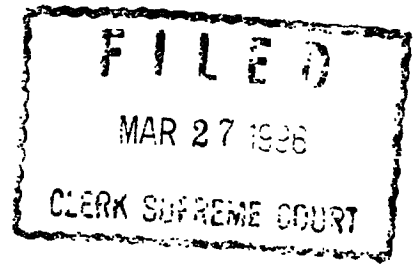
IN THE COURT OF APPEALS OF IOWA



No. 5-567 / 94-1770

ROBERT C. WILLMS,
Petitioner-Appellant,

and

OFFICE OF CONSUMER ADVOCATE, IOWA DEPARTMENT OF JUSTICE,
Intervenor-Appellant,

vs.

UTILITIES BOARD, UTILITIES DIVISION, IOWA DEPARTMENT OF COMMERCE,
Respondent-Appellee,

and

IES UTILITIES, INC.,
Intervenor-Appellee.

Appeal from the Iowa District Court for Cass County, J. C. Irvin, Judge.

Utility customer and Office of Consumer Advocate appeal refusal of Iowa Utilities Board to hold formal hearing on whether customer was overbilled for gas usage. **REVERSED AND REMANDED.**

James R. Maret, Consumer Advocate, Des Moines, for appellant.

Caroline D. Giddings, Cedar Rapids, for appellee IES Utilities, Inc.

Diane Munns, General Counsel, and Gary Stump, Assistant General Counsel, Des Moines, for appellee Iowa Utilities Board.

Heard by Sackett, P.J., Habhab, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.

SCHLEGEL, S.J.

At issue is whether a utility customer was denied due process when the Iowa Utilities Board ("Board") refused to grant his request to initiate a formal proceeding. We reverse and remand.

Robert Willms was a customer of IES Utilities, Inc. Since 1988 he had complained to IES about what he believed to be unreasonably high bills for natural gas service. After a new meter had been installed and his gas usage decreased significantly, he filed a complaint with the Board alleging he had been overbilled for gas service due to a faulty meter. Willms was not satisfied with the informal resolutions proposed by the Board. Pursuant to Iowa Code section 476.3(1) he petitioned the Board to initiate a formal proceeding. The request for a formal hearing was denied. Willms sought judicial review by the district court. The Office of Consumer Advocate intervened on behalf of Willms, and IES intervened on behalf of the Board. The district court affirmed the Board's decision to deny a hearing.

On appeal Willms presents only the question of whether he had a constitutional right to a formal hearing. He is not challenging the propriety of the Board's action under the provisions of Iowa Code section 476.3.[1] We review to determine if a hearing

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[1] Iowa Code section 476.3(1) (1993) provides in relevant part --

> The complainant or the public utility also may petition the board to initiate a formal proceeding which petition shall be granted if the board determines that there is any reasonable ground for investigating the complaint.

determine if a hearing was constitutionally mandated notwithstanding the language of that statute. *See Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 465 N.W.2d 280, 284 (Iowa 1991) (party had due process right to hearing even though statute permitted Board to order nongeneral rate increase without hearing). Our review is de novo when it is alleged an agency's denial of a hearing violates the right to due process. *See id.* at 281.

In support of his petition for a formal hearing, Willms relied on the disparity of usage recorded by the old and new meters installed at his residence, comparisons of his billings to neighbors' billings, and the statement by an IES representative that the old meter ran a "little fast." Using degree day usage data recorded by his new meter as a baseline, Willms believed his old meter overcharged him by approximately fifty-six percent on a degree day basis.

IES denied the meter was defective and provided three meter test results which showed it tested within the error tolerance limits prescribed by the Board. It claimed the disparity in usage between the old and new meters must have been caused by Willms' usage patterns.

In general, procedural due process demands that whenever a state agency determines the legal rights, privileges, or duties of a specific party based upon that party's particular facts and circumstances, the agency is bound to provide an opportunity for an evidentiary hearing. *See Allegre v. Iowa State Bd. of Regents*, 349 N.W.2d 112, 115 (Iowa 1984). Usually an agency must provide an individual

with an opportunity for a hearing of some sort when it takes action of particular applicability, defining a persons's rights, on the basis of adjudicative facts. *Id.*

An exception to this general principle is when there is an absence of relevant disputed facts. *Id.* The Board was confronted with Willms' allegation of a defective meter. Willms' claim was based on comparative billings, a disparity in usage between the old and new meters, and an alleged statement made by an IES employee regarding whether the meter ran fast. In denying Willms' request for a formal hearing the Board rejected all of this and denied the request for a hearing based on IES's meter test results. The Board determined the legal rights of Willms without giving him the opportunity for an evidentiary hearing. We find Willms had a due process right to an evidentiary hearing and remand for that purpose.

We reject the argument Willms was not deprived of due process because he could pursue his claim in a separate court action. The Board has exclusive jurisdiction of overcharge claims related to rate and "technical-type" grounds. *Iowa Elec. Light and Power Co. v. Lagle*, 430 N.W.2d 393, 398 (Iowa 1988). Willms' claim falls within the latter category, and, absent a formal proceeding before the Board, he has no alternative avenue for obtaining an evidentiary hearing.

REVERSED AND REMANDED.

Sackett, P.J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting) 000203

I respectfully dissent.

In all appeals, we look first to the statement of issues presented for review. That issue or those issues form the basis for appeal and serve as the beacon that guides us through the appellate process.

The Office of Consumer Advocate (OCA) emphasizes it does not ask us to hold the Board's denial of Mr. Willms' request for a formal complaint to be in violation of Iowa Code section 17A.19(8)(g) (1995). Rather, the OCA asks us to hold that the Board's action violated constitutional due process requirements and should, accordingly, be reversed.

The OCA argues the district court erred in its conclusion that the Board's denial of a hearing did not violate Mr. Willms' due process rights. It contends the district court misapplied the supreme court's holding in *Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393 (Iowa 1988), in part because the district court ignored a related precedent, *Mid-Iowa Community Action v. Iowa State Commerce Comm'n*, 421 N.W.2d 899 (Iowa 1988).

Both IES Utilities and the Utilities Board argue Mr. Willms is not prohibited from pursuing his claim against IES in a court of law, citing *Oliver v. Iowa Power & Light Co.*, 183 N.W.2d 687 (Iowa 1971), and the *Iowa Elec.* case cited by the OCA.

The OCA contends the utility and the Utility Board failed to address the dichotomy of types of claims against utilities as established in *Oliver* and *Iowa Elec.*

Turning first to *Oliver*, our supreme court concluded there were two types of claims against utilities: one type of case in which jurisdiction is properly placed in the agency; and the second type in which a complainant can proceed to district court without exhausting administrative remedies. *Oliver*, 183 N.W.2d at 692. In *Oliver*, our supreme court held a customer could file an independent court suit to recover past payments of wrong amounts without pursuing any proceedings before the agency. *Oliver*, 183 N.W.2d at 692. Additionally, the court held that section 490A.3 provided "no machinery and grants no authorization to the commission to require reparation by a utility for wrong amounts charged" because the language in section 490A.3 provides that "the commission shall determine . . . charges . . . to be thereafter observed and enforced." *Oliver*, 183 N.W.2d at 692. Concluding the doctrine of primary jurisdiction did not apply, the court then ruled a customer was not prohibited from pursuing a judicial remedy for an overbilling. *Id.*

In the later case of *Iowa Elec.*, the supreme court identified the following distinction:

> [T]here are two types of cases concerning utility charges, and the initial jurisdiction as to each is different. In one type of case, the customer complains about alleged overcharges but does not claim that the rates were unreasonable. For example, the claim might be that the meter was misread or the charge exceeded the filing tariff. This type of case, we noted, is properly resolved by the courts. *Oliver*, 183 N.W.2d at 689.

> In the second type of case, a customer seeks to recover overcharges on the ground that the utility company's rates were unreasonable or complains on other technical-type grounds. In that case, the customer must proceed before the appropriate board to have reasonable rates assessed.

Iowa Elec., 430 N.W.2d at 398.

It is clear under *Iowa Elec.* the type of case involved in the proceedings determines the jurisdictional question. If Mr. Willms' complaint is determined to be of the first type, the district court's ruling would not be in error because Mr. Willms would be able to pursue his claim in district court. On the other hand, if it is determined that Mr. Willms' complaint is of the second class, the trial court's ruling would be in error because Mr. Willms would not be able to pursue his claim in district court.

Quite frankly, I am impressed with the thoroughness of the briefs submitted by the parties. The due process issue rises or falls on which of the two types of cases characterized in *Iowa Elec.* apply to the case at bar. The majority comes down on the side of the second type of case on the ground the facts here are of a technical type. I would hold otherwise and agree with the trial court when it stated:

> Since there are no legal prohibitions preventing Willms from pursuing his claim in a court of law, there has been no denial of any constitutional right to a hearing which may exist.

Before proceeding further, there is one other case that is directed to our attention, i.e., *Mid-Iowa Co. Action v. Iowa State Commerce Comm'n*, 421 N.W.2d 899 (Iowa 1988). *Mid-Iowa*, a 1988 case, involved questions of the second type. Our

supreme court in *Mid-Iowa* held that jurisdiction was properly placed in the Utility Board for *Mid-Iowa* involved questions of the second type discussed above, those which turn on the expertise of the Board because they involved imposition of civil penalties. *Mid-Iowa Co. Action v. Iowa State Commerce Comm'n*, 421 N.W.2d 899, 901 (Iowa 1988). In addition, because of a change in the wordage of section 476.3 of our code, the supreme court determined in *Mid-Iowa* the Iowa Utilities Board had the authority to order payment of refunds to customers who have paid unlawful utility charges. *Id.* However, the supreme court in *Iowa Elec.* made it clear that *Mid-Iowa* did not overrule *Oliver* and further found that the Utility Board does not have exclusive jurisdiction in cases relating to utility overcharges. *Id.*

In *Oliver*, the petitioner's complaint was that he had been overcharged for electric power. The utility moved to dismiss Oliver's claim on the ground he did not exhaust his remedy before the Iowa State Commerce Commission. As stated by the OCA in its initial brief, the *Oliver* court ruled that a customer was not prohibited from pursuing a judicial remedy for an overbilling. *Oliver*, 183 N.W.2d at 692. The *Oliver* court held, "a person charged a wrong amount by a public utility has a cause of action in court." *Id.* at 691-92. The court further held, "if a person proceeds before the commission by informal complaint only, as plaintiff did here, we are clear that neither he nor the utility is bound in an independent court suit . . . by the result before the commission." *Id.*

It occurs to me the dispute before us falls within the first category of cases identified in *Iowa Elec.*, i.e., when "the customer complains about alleged overcharges but does not claim that the rates were unreasonable." *Iowa Elec.*, 430 N.W.2d at 398. Under that type where the complaint alleges overcharges but does not claim the rates were unreasonable, the complaint can be resolved by the courts. Such is not the case in the second type for there it is provided that if the customer seeks to recover overcharges on the ground the utility company rates were unreasonable or complains on other "technical-type" grounds, then the customer must proceed before the appropriate board to have reasonable rates assessed.

Here, petitioner does not complain the rates were unreasonable nor does he challenge the rates or ask that the rates be assessed. He is merely seeking to recover the amount of overcharges he believes he is entitled to because of an alleged defective meter. His complaint is based on the rates as already established.

I cannot agree that this complaint is based on "technical-type" grounds so as to invoke the second type of cases defined in *Iowa Elec.*[1] I would hold the Board

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[1] In one of its footnotes, the OCA states: "As noted in its initial brief, the OCA believes the Court should consider overruling *Iowa Electric* in its entirety, or reexamining the *Iowa Electric* dichotomy. According to the *MICA* holding, the amendment to Iowa Code section 476.3(1) means that a customer with a complaint against a utility can obtain retroactive relief in an action filed with the Board. 421 N.W.2d at 901. Since the administrative remedy is adequate under the amended section 476.3(1), there is no legal justification for allowing customers to pursue identical remedies in a court action. The Board has the necessary expertise and requisite legal authority to order an adequate retroactive remedy for the examples of billing disputes the Court identified as the "first type of case" in *Iowa Electric*. Access to the court system's limited resources should be reserved for actions in which the Board has no special expertise."

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does not have primary jurisdiction over Mr. Willms' complaint and he is able to pursue his action in district court without exhausting his administrative remedies.

The OCA further argues the petitioner was entitled to a formal evidentiary hearing under the Fourteenth Amendment of the United States Constitution because he had a protected property right not to be overcharged for utility service. Section 476.3 of our code provides three ways a formal complaint proceeding may be commenced. The third way of the statute provides, "the complainant or public utility also may petition the Board to initiate a formal proceeding which petition shall be granted if the Board determines there is any reasonable ground for investigating the complaint." Iowa Code § 476.3(1) (1993). It is clear under this part of the statute the Board need only grant a request from a complainant for formal complaint proceedings if it determines there is any reasonable grounds for investigating the complaint. There is sufficient evidence in the record to establish the fact the Board did, in fact, make a determination the response of IES was adequate and reasonable. In its order denying petitioner's request for formal complaint proceedings, the Utility Board concluded, "the Board's review of the file shows there are no reasonable grounds for investigating the complaint."

"Contested case hearings as envisioned in Iowa Code section 17A.12 are those in which the legal rights, duties, or privileges of a party are required by constitution or statute to be determined by the agency after the opportunity for an evidentiary hearing. Iowa Code § 17A.2(5) (1993). If the agency establishes a less formal

hearing procedure than is mandated by section 17A.12 in those situations in which there is no statutory or constitutional entitlement to a contested case hearing, any adjudication that takes place in that procedure is reviewed as 'other agency action' and not as a contested case." *See Sindlinger v. Iowa State Bd. of Regents*, 503 N.W.2d 387, 389 n.1 (Iowa 1993). From my review of the pertinent statutes, I can find no constitutional or statutory mandate requiring a hearing on petitioner's complaint. As such, I do not believe petitioner's complaint rises to the level of a contested case hearing.

I would affirm the trial court.