

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHYLLIS and EDWIN HUEGEL,	:	CIVIL ACTION
JOSEPHINE SPENCER, MELODY and	:	
MICHAEL SEIP, CHRISTINE and LOUIS	:	NO. 00-5077
BIZARIE, VALERIE and EPHRAIM	:	
CORSINO, BETTY SMITH, and ROSE	:	
SHEPPARD, on behalf of themselves and	:	
all others similarly situated,	:	
Plaintiffs,	:	
v.	:	
	:	
CITY OF EASTON and THOMAS A.	:	
GOLDSMITH, in his individual and	:	
official capacities, DEPARTMENT OF	:	
PUBLIC SERVICES, and KRISTIE	:	
MEIRS, as Director of the	:	
DEPARTMENT OF PUBLIC SERVICES,	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

November 29, 2000

This case is before the court on plaintiff's motion for a preliminary injunction. A hearing was held in this case on October 19, 2000. At the request of this court, the parties attempted to resolve this dispute amicably. For reasons which are not readily apparent, they failed. Thus, my findings of fact, based upon pleadings filed to date and the testimony at the hearing, follows:

FINDINGS OF FACT

1. Plaintiffs are all homeowners and residents of the City of Easton, with the exception of Betty Smith and Rose Sheppard, who are tenants of a city-owned rental housing unit.

2. Plaintiffs Spencer, Huegel and Bizarie were delinquent in their water bills and ultimately had to leave their respective residences following notices of termination because the water and sewer service was terminated by the City of Easton (Easton). Although the other plaintiffs testified about problems regarding water bills, those have either been resolved or are being resolved without those plaintiffs losing their place of residence.

3. Spencer, Huegel and Bizarie are all delinquent in the payment of their water bills and have been so for many months.

4. Spencer owes \$3,446.37 according to P-1 and made no payments from July 15, 1998 until August of 2000. The actual amount due is not clear from the Notes of Testimony, but Spencer does not disagree that she owes money to Easton (N.T. at 25).

5. Huegel owes \$6,540.87 for water, sewer and refuse. Since January 1, 1999 until the present, Huegel has made eight payments and does not object to the amount she is paying. (N.T. at 75).

6. Bizarie owes \$4,775.92 (P-16) and the last water bill payment was May 7, 1998.

7. The testimony revealed that Spencer, Huegel and Bizarie appear to be either earning or receiving sufficient income to get by on a day to day basis, but for reasons not clear from the record have been unable to pay their water bills.

8. All plaintiffs apparently claim to be representatives of others who were targeted by the Easton program begun this year to collect delinquent accounts.

9. According to the testimony of Mayor Goldsmith, customers with delinquent accounts were notified by letter that they had 30 days to pay their accounts and that if they did not bring them current, they could face termination. (N.T. at 144).

10. Also, the notices on both the regular quarterly bills and on the delinquent notices advised the customers that if they disputed the bills, they should immediately notify the Bureau of Water. (N.T. at 150).

11. Consideration was given to any potential hardship that would be caused to the customer. This hardship was defined as extreme medical hardship and not self-imposed financial hardship. (N.T. at 147). Customers were able to have their complaints or claims for hardship reviewed by Easton before termination.

12. There was however no notice of legal appeal rights on the notice to terminate but in the future, notices will contain the manner in which a termination notice can be appealed. (N.T. at 163).

13. It appears that the decision regarding the above was made effective on or after September 29, 2000. (N.T. at 183, 184).

14. The program of collecting accounts was successful to the extent that for every 20 targeted accounts, 16, by conservative estimate, paid. (N.T. at 148).

15. The average outstanding balance of the delinquent accounts was \$2,400, and the average length of delinquency was two years and 10 months. (N.T. at 149).

16. The mayor testified that he was not aware of any appeals taken to the Health Board or under the local agency law from the notices of termination. (N.T. at 151, 152).

17. Six people have been identified to date as qualifying for hardship as defined by Easton. (N.T. at 158, 159).

18. No water and sewer services were terminated until disputes concerning the bill itself or a claim of hardship had been considered by Easton.

19. The plaintiffs whose services were terminated have made arrangements to live elsewhere. These new arrangements are inconvenient, but they appear to be adequate.

20. With regard to Spencer, Huegel and Bizarie, Easton has made the following offer: "The City will agree that your clients whose services were previously terminated will receive written notice of their rights as set forth in the enclosures and that, if they pursue their rights and appeal, subject to the procedures as set forth, utility service may be restored pending resolution of the appeal." This offer was rejected because it was

contingent upon the plaintiffs' entirely withdrawing their federal legal action, according to plaintiffs' counsel.

CONCLUSIONS OF LAW

The above findings of fact are based upon the record to date, which includes about 200 pages of testimony, 22 plaintiff exhibits and certified copies of City Ordinances. No discovery has been taken and on the whole, the record could not possibly represent all pertinent facts surrounding this controversy.

Plaintiffs claim that they are likely to prevail on the merits because they have shown both substantive and procedural due process violations.

First, the record before this court absolutely refutes any substantive due process violation. Although plaintiffs set forth various alleged capricious acts in their brief, the record itself is devoid of any arbitrary or capricious government action. Instead, it shows a conscientious effort on the part of Easton to collect monies which it is undisputed it is owed and to do so in a way which would address potential hardship to customers with medical problems and even consider payment plans in some instances.

Plaintiffs argue that Easton adopted a policy and practice that utterly failed to take into account any vicissitudes of normal life such as unexpected job loss, illness and the like. That statement is simply not supported by the record in this case.

Plaintiffs spend precious little time in their brief arguing what the record does support and that is that the plaintiffs were not provided an actual notice of what

hearing or appeal rights were available pertaining to their water being turned off, resulting in their being forced to vacate their residences. However, as set forth in the findings of fact, they were constantly told to notify the Bureau of Water if they had problems with their bills. It was not until September 29, 2000 that it became clear that notices of hearing or appeal rights would be given.

As to the three plaintiffs who left their house without such notice, is there a procedural due process violation?

All parties agree that plaintiffs have a protected property interest in receiving water and sewer services and occupying their homes.

A pre-deprivation hearing and an appeal under existing law is available to the three plaintiffs, but there is no evidence that they were made aware of the latter. Indeed, as I found as a fact, the City has now taken steps to be sure that delinquent customers are advised of their hearing or appeal rights when they receive termination notices. Nevertheless, the City of Easton believes due process was accorded these plaintiffs for the following reasons:

(1) repeated billings to the plaintiffs noting the delinquent amount due with instructions to call a specific office with any questions;

(2) more than two notices to each of the plaintiffs indicating that failure to pay would result in termination of services, urging the plaintiffs to contact the City concerning their account;

(3) review by the City's oversight committee and the City's Health Officer of each and every request for consideration as filed by the plaintiffs, none of which included any dispute of the amount claimed due;

(4) admissions by the plaintiffs that they owed the City for past water, sewer and garbage services;

(5) admissions by two of the only named plaintiffs (Corsino and Sheppard) who later disputed the amounts of their bills, that they received courteous attention from and opportunity with the City to review the disputed accounts;

(6) the plaintiffs' claims of due process violations are not made in good faith but simply as an effort to delay compliance with their obligation to pay for municipal services delivered to them at the City's expense.

Plaintiffs on the other hand argue that procedural due process is a fluid, flexible concept depending on, among other things, the nature of the protected property interest. A recent case from this circuit, Sullivan v. Barnett, 139 F.3d 158 (3rd Cir. 1998) surveyed the issue of due process. In Sullivan, *supra*, the court cited by way of example the process which was due, according to the Supreme Court of Iowa, before an employee's worker's compensation benefits were terminated. That notice included as a minimum:

(1) the contemplated termination;

(2) that the termination was to occur at a specific time;

(3) the reasons for the termination;

(4) that the person being terminated could submit any evidence or documents, disputing or contradicting the termination and thereafter be advised whether the termination is still contemplated;

(5) that the person being terminated had the right to petition for review.

The court in Sullivan then went on to say:

Informed by established precedent, we hold that in the case of terminating the medical benefits of a workers' compensation employee, at a minimum due process requires that employees receive notice that includes (1) timely notification that their medical benefits might cease prior to the deprivation, (2) an explanation of the reasons for the proposed termination, (3) an opportunity to respond to the accusations alleged, and (4) information advising them of the availability of the procedures that they may utilize to protest the proposed termination.

In my judgment, Easton complied with all four of the above criteria.

Plaintiffs seem to be arguing that where the protected property interest is in occupying one's home, procedural due process should include notice to customers as to their legal right to appeal from Easton's decision to (1) terminate their services; (2) condemn their home because it no longer has water or sewer service; and (3) thereby force them to vacate. I have found no case specifically on point for this proposition and counsel has not pointed out any such case either.¹

1. The Sullivan court's recitation of notice requirements forms the basis for my legal conclusion and is set forth as follows:

A. Notice

(continued...)

In conclusion, I remind the parties that due process is really nothing more or nothing less than fair play. It has been said that the concept of equal protection and due process stem “from our American ideal of fairness.” Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 698 (1954) and that the essence of due process prohibits enactments “that shock the sense of fair play.” Galvan v. Press, 347 U.S. 522, 74 S.Ct. 737 (1954). In the jurisdictional sense, due process requires that the maintenance of a suit in a particular

1. (...continued)

“[A]dequate notice detailing the reasons for a proposed termination” of a constitutionally protected liberty or property interest must be afforded to individuals prior to the deprivation. *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020-21, 25 L.Ed.2d 287 (1970). Notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane*, 339 U.S. at 314, 70 S.Ct. at 657. The level of notice required before an individual is deprived of a constitutionally protected property interest depends upon the particular benefits at issue. “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

In *Memphis Light, Gas & Water Division*, the Supreme Court held that a Memphis utility company did not provide constitutionally sufficient notice to its customers prior to terminating their utilities. Although the utility gave its customers notice that their service could be terminated for nonpayment of their bill, the company failed to inform its patrons of how they could protest or object to charges on their bills. The Court concluded that “[n]otice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination ... as unjustified.” 436 U.S. at 14-15, 98 S.Ct. at 1563 (emphasis added).

In *Goldberg v. Kelly*, the Court considered whether the notice provisions of New York City’s welfare termination process comported with due process. As welfare recipients were given seven days advance notice of the impending termination, a letter informing them of the precise questions raised about their continued eligibility and the legal and factual bases for the Department of Social Services’ doubts, and a personal conference explaining the same, the Court held that the notice provisions were adequate. See 397 U.S. at 268, 90 S.Ct. at 1020-21. Similarly, although notice was not directly at issue in *Mathews v. Eldridge*, 424 U.S. 319, 324, 96 S.Ct. 893, 897-98, 47 L.Ed.2d 18 (1976), the Court acknowledged that recipients of Social Security disability payments were afforded proper notice which included a letter informing them that their benefits would be terminated prior to the deprivation, a detailed explanation of the reasons for the proposed termination, and the opportunity to submit additional evidence to the agency making the determination prior to the actual deprivation.

Moreover, we held in *Ortiz v. Eichler*, 794 F.2d 889 (3d Cir. 1986), that the notice provided by Delaware prior to the termination or denial of Aid to Families with Dependent Children, Food Stamps, and Medicaid benefits was constitutionally deficient because it failed to explain the reasons for the state agency’s action and did not contain the agency’s specific calculations utilizing an employee’s income or financial resources to ascertain his/her eligibility in making its determination. See *id.* at 892, 895.

forum not offend “traditional notions of fair play and substantial justice. International Shoe v. State of Washington, et al., 326 U.S. 310, 66 S.Ct. 154 (1945).

In my judgment, Easton, by its change in policy, is now giving an additional notice which it is not obliged to do under existing case law, but seems to be in the best interest of fairness. Nonetheless, my sense of fair play is not shocked by what has occurred to these particular plaintiffs before this additional notice was given. They were told of the contemplated termination well in advance of its occurrence. They knew that if they did not pay the water and sewer bill, which none of them disputed that they owed, the services would be terminated. They were told when it was going to occur and the persons to see to dispute the termination. They were told how to protest the termination, and they did in fact meet with Easton officials. Moreover, they had the right under existing state law to appeal their termination.² Their failure to exercise it cannot be the basis for claiming that Easton denied them due process. Thus, I believe the three plaintiffs, Huegel, Spencer and Bizarie, as well as the other plaintiffs who testified, have not shown a likelihood of success on the merits on either due process claim. Consequently, they are not entitled to the injunctive relief they request.

Plaintiffs have also filed a motion for class certification. This will be denied without prejudice since, if this motion is to be pursued, more discovery is needed.

2. While plaintiffs may not know of these rights, free legal counsel is apparently available in Easton to service just such people as these plaintiffs.

An order follows.

