

Order

IN THE MATTER OF

POSTAL LIFE AND CASUALTY INSURANCE COMPANY

Docket 6276. Order and opinion, Jan. 10, 1956

Interlocutory order denying respondent's appeal from hearing examiner's action in quashing portion of its subpoena duces tecum and granting complaint counsel's appeal from his failure to quash subpoena in entirety; denying respondent's alternative request that the Commission order release and production of documents sought; and denying appeal of complaint counsel from hearing examiner's rulings on testimony.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. Donald K. King and *Mr. J. W. Brookfield, Jr.* for the Commission.

Mr. A. Alvis Layne, Jr., of Washington, D. C., *Cobbs, Armstrong, Teasdale & Roos*, of St. Louis, Mo., and *Mr. Harold D. Knight*, of Kansas City, Mo., for respondent.

ORDER DENYING RESPONDENT'S APPEAL AND APPLICATION FOR RELEASE
OF INFORMATION AND GRANTING APPEAL OF COUNSEL SUPPORTING
THE COMPLAINT

This matter having come on to be heard by the Commission upon respondent's appeal from the hearing examiner's ruling quashing certain portions of a subpoena duces tecum directing the Secretary of the Commission to produce certain documents or information from the Commission's files and, in the alternative, application for release of information, and upon the appeal by counsel supporting the complaint from the hearing examiner's ruling refusing to quash the said subpoena duces tecum in its entirety, and from certain other rulings of the hearing examiner; and

The Commission having concluded that the appeals and application for release of information should be disposed of in the manner indicated in the accompanying opinion of the Commission:

It is ordered, That respondent's appeal from the hearing examiner's order limiting the subpoena duces tecum directing the Secretary of the Commission to produce certain documents or information and respondent's application for release of information, as well as respondent's request for oral argument on said appeal and application be, and they hereby are, denied.

It is further ordered, That the appeal of counsel supporting the complaint from the hearing examiner's order denying the motion of counsel supporting the complaint to quash the said subpoena duces

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tecum be, and it hereby is, granted, and that the said subpoena duces tecum be, and it hereby is, quashed.

It is further ordered, That the appeal of counsel supporting the complaint from the hearing examiner's rulings relating to the testimony of witnesses Alvis Layne, Jr., Henry Miller, and Donald K. King be, and it hereby is, denied.

OPINION OF THE COMMISSION

Per Curiam:

This matter is before the Commission on cross-appeals from certain actions of the hearing examiner.

The complaint charges respondent with having used misleading and deceptive representations in connection with the advertising and sale of certain of its accident and health insurance policies. During the course of the hearings on the complaint, the hearing examiner, upon application of the respondent, issued a subpoena duces tecum directing the Secretary of the Commission to produce certain documents or information from the Commission's files. A motion by counsel supporting the complaint to quash the subpoena was granted in part and denied in part by the hearing examiner. Respondent has appealed from the hearing examiner's action of quashing that portion of the subpoena which demanded the production of certain memoranda or other writings prepared by members of the Commission's staff. In the alternative, respondent, in its appeal, has requested that the Commission order the release of the documents sought. Counsel supporting the complaint, on the other hand, has appealed from the hearing examiner's failure to quash the subpoena in its entirety. Counsel supporting the complaint has also appealed from the hearing examiner's action of permitting respondent to introduce testimony as to the past course of dealing between the respondent and the Commission and has requested the Commission to order certain testimony stricken from the record.

We consider first the subpoena duces tecum issued by the hearing examiner.

Pursuant to statutory authority, the Commission, like most other agencies and departments of the Federal Government, has prescribed rules and regulations covering the custody, use and protection of material and information coming into its possession, or within the knowledge of the Commission or any of its officers or employees in the discharge of their official duties. Respondent, in its appeal, does not question the legality of these rules and regulations. Under the prescribed rules, the release of confidential information or material from the Commission's files may be authorized only by the Commission itself. The procedure to be followed by a party desiring the

disclosure of information or material from the Commission files is clearly set forth in § 1.134 of the Rules. No other method for obtaining the release of confidential information is provided for in the rules. It follows that the hearing examiner has no authority to require the production of information or material from the Commission's files by a subpoena duces tecum or otherwise. The hearing examiner, therefore, erred in issuing the subpoena and also in failing to grant in its entirety the motion of counsel supporting the complaint to quash the subpoena. Accordingly, insofar as the appeals relate to the subpoena duces tecum issued by the hearing examiner directing the Secretary of the Commission to produce certain documents or information, the appeal of the respondent is denied and the appeal of counsel supporting the complaint is granted, and the subpoena will be quashed.

We consider next respondent's alternative request, under § 1.134 of the Commission's Rules of Practice, that the Commission order the release and production of the documents sought. As indicated by the rule, the Commission in determining the action to take upon an application for the release of confidential information will consider not only whether or not the information or material sought is confidential or privileged so far as the applicant is concerned, but also the purpose for which the applicant intends to use the information or material. Here, the applicant states that the documents requested will be used as evidence in opposition to the Commission's complaint. It, therefore, is necessary to consider whether or not the data requested would in any way be helpful to the respondent in establishing a valid defense to the proceeding. This, in turn, requires a consideration of the asserted defense to which the applicant claims the information and material is relevant. This is especially required in connection with the application since some of the documents requested are already in evidence and, therefore, available to the applicant, and the applicant has made no showing that it does not have copies or originals of certain of the other documents requested.

As a defense to the proceeding, respondent alleges that it accepted and adhered to the Trade Practice Rules Relating to the Advertising and Sales Promotion of Mail Order Insurance promulgated by the Commission, that it submitted its insurance policies and literature to the staff of the Commission's Bureau of Consultation and that the Bureau approved, or failed to disapprove, the practices challenged by the complaint. In support of this defense, respondent cites the Commission's action in dismissing the complaints in *Argus Cameras, Inc.*, D. 6199, and *Wildroot Company, Inc.*, D. 5928. In both of those proceedings, the complaints were dismissed after a showing by the respondents that the particular practices challenged by the com-

plaints had been abandoned and that there was no likelihood of the practices being resumed. Evidence as to the respondent's past course of dealings with the Commission was considered in connection with the determination as to whether or not there was likelihood that the practices might be resumed.

In the instant case, respondent makes no claim that it has discontinued any of the practices challenged by the complaint. The question here is whether or not the respondent has engaged in unfair and deceptive acts and practices as alleged in the complaint. Respondent's prior course of dealing with the Commission, or with members of its staff, has no bearing on whether the respondent has engaged in the alleged unlawful practices. If it were established that the Commission, or a member of its staff, had at some time in the past conveyed to the respondent the impression that the practices involved were not objectionable, that fact would constitute no valid defense to this proceeding. (*Book-of-the-Month Club v. F.T.C.*, 202 F. 2d 486, 1953; *In the Matter of Carpel Frosted Foods, Inc.*, et al., 48 F.T.C. 581, 1951.) Aside from the fact that certain of the documents requested, namely, memoranda prepared by members of the Commission's staff, are confidential material to which the respondent has shown no legal right and the disclosure of which would be contrary to the public interest, we do not believe that the applicant has shown any real or actual need for the disclosures requested. Respondent's application for the release of information, therefore, is denied.

This leaves for consideration that portion of the appeal by counsel supporting the complaint relating to the hearing examiner's rulings permitting the introduction of testimony as to the past course of dealing between the respondent and the Commission and the hearing examiner's refusal to rule on the motion of counsel supporting the complaint that the testimony of Alvis Layne, Jr., Henry Miller, and Donald K. King be stricken. The reception of evidence is the function of the hearing examiner, Administrative Procedure Act, Section 7 (b), 60 Stat. 241, 5 U.S.C. 1006 (b), Commission Rules of Practice, § 3.15 (c), and it is for him, during the course of trial, to admit or exclude testimony and other evidence. The correctness of his rulings in that regard can best be determined at the conclusion of the hearing when the matter comes before the Commission for final decision on the merits. We therefore deny this portion of the appeal by counsel supporting the complaint.

In the view we take on the appeals and the application, oral argument thereon, which was requested by respondent, is not necessary and would serve no useful purpose.

An appropriate order will be entered.

Complaint

IN THE MATTER OF

WINDSOR PEN CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 6356. Complaint, June 6, 1955—Decision, Jan. 10, 1956*

Consent order requiring distributors in New York City to cease selling to jobbers and dealers for resale watches under the brand names "Windsor Jeweled" and "Sinsa Jeweled" with the word "jeweled" appearing on the face, when the watches were not "jeweled" and did not contain "jeweled" movements as understood in the industry.

Before *Mr. James A. Purcell*, hearing examiner.

Mr. Frederick McManus for the Commission.

Mr. Samuel J. Ernstoff and *Mr. Martin J. Forgang*, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Windsor Pen Corporation, a corporation, and Morris Fink and Sadie Fink, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Windsor Pen Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 352 Fourth Avenue, New York 10, New York.

Individual respondents, Morris Fink and Sadie Fink, are the president and secretary, respectively, of said corporation, and formulate, direct and control the policies, acts and practices of said corporate respondent. Said individual respondents have their office at the same place as the corporate respondent.

PAR. 2. Respondents are now, and for more than two years last past have been, engaged in the business of selling and distributing watches. Respondents' watches, under the brand name "Windsor Jeweled" and "Sinsa Jeweled," have been sold and distributed to jobbers and dealers for resale to retailers and to the purchasing public.