It was further ordered, That this case be remanded to the hearing examiner for further proceedings in conformity with the views expressed in the aforesaid opinion.

It was further ordered, That after such proceedings have been terminated the hearing examiner shall forthwith make and file, in accordance with the provisions of §3.21 of the Commission's Rules of Practice, a new initial decision based on the record as then constituted.

GEORGE McKIBBIN & SON ET AL.

Docket 7245. Order and Opinion, Oct. 29, 1959

Interlocutory order denying motion for trial de novo following death of hearing examiner, for lack of showing of any conflict in the testimony—principally that of expert witnesses—which needed to be resolved on the basis of the witnesses' credibility as evidenced by their demeanor or conduct while testifying.

OPINION OF THE COMMISSION

By the COMMISSION:

This is an interlocutory appeal by the respondents from the hearing examiner's denial of their motion for a trial *de novo*.

The complaint charges respondents with making false, misleading and deceptive representations in connection with the offering for sale and sale of an encyclopedic dictionary in violation of Section 5 of the Federal Trade Commission Act. Hearings presided over by the hearing examiner originally appointed to take testimony in this proceeding were held in New York, New York, and Washington, D.C., at which time testimony and other evidence in support of and in opposition to the allegations of the complaint was introduced. After counsel supporting the complaint had rested his case but prior to the completion of the respondents' defense, the hearing examiner, before whom the testimony had been taken, died. Thereafter, a substitute hearing examiner was designated to preside in the proceeding. By motion filed July 20, 1959, respondents requested that the testimony taken and the record made before the original hearing examiner be stricken and that all evidence be received *de novo* before the substitute hearing examiner. Respondents argued in support of this motion that a determination of material questions of fact which had arisen or which might possibly arise, would depend upon an evaluation of the credibility of the witnesses and that the substitute hearing examiner should, therefore, have an opportunity to see and hear all witnesses in order to make this evaluation. The hearing examiner denied the motion and respondents have now filed an appeal from this denial.

The argument on appeal is based primarily on the court's interpretation of Section 5(c) of the Administrative Procedure Act in *Gamble-Skogmo, Inc., et al.* v. *Federal Trade Commission*, 211 F. 2d 106. This section provides that "The same officers who preside at the reception of evidence * * * shall make the recommended decision or initial decision * * * except where such officers become unavailable to the agency." As interpreted in the aforementioned decision, the primary purpose of this provision was to set forth a procedural guaranty that the hearing examiner who presides at the hearings and receives the testimony of the witnesses will prepare the recommended or initial decision as a means of insuring that the parties will be afforded the benefit of proper credibility evaluation. The court held, therefore, that even in the event of examiner unavailability, the substitute hearing examiner must engage in a *de novo* receiving of evidence in those cases where, as a result of conflicting testimony, the evaluation of the credibility of witnesses constitutes a material factor in the reaching of a recommended or initial decision.

This case cannot be considered as authority for respondents' broad position that a trial *de novo* must be granted whenever the credibility of witnesses who have testified before the original hearing examiner is in issue. The court's ruling was merely to the effect that when a substitute hearing examiner must make a choice between the testimony of conflicting witnesses and such choice may affect his decision, he must see and hear these particular witnesses testify in order that he may be able to evaluate their truthfulness. Since the only reason for recalling such witnesses is to afford the substitute hearing examiner an opportunity to observe their demeanor while testifying, it is believed that in most instances the parties' procedural rights would be fully protected if the witnesses who have given conflicting testimony are recalled solely for the purpose of cross-examination.

The evidence received before the original hearing examiner in this proceeding consists primarily of the testimony of expert witnesses. The respondents have failed to show, and the record does not disclose, any conflict in this testimony which should properly be resolved on the basis of the witnesses' credibility as evidenced by their demeanor or conduct while testifying. The argument that there should be a *de novo* receiving of evidence at this time is, therefore, without merit.

Respondents also argue that in subsequent hearings they will produce witnesses whose testimony may be at variance with that of the witnesses who appeared in support of the complaint. We think, however, that a satisfactory solution to such a situation,

should it occur, is set forth in the order from which this appeal was taken. The hearing examiner has advised therein that if it should appear that the credibility of witnesses who had previously testified is in issue, these witnesses would be recalled for further examination.

The respondents' appeal will be denied and an appropriate order will be entered.

ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's ruling denying respondents' motion for a trial *de novo;* and

The Commission, for the reasons stated in the accompanying opinion, having concluded that this appeal should be denied:

It is ordered, That respondents' appeal be, and it hereby is, denied.

It is further ordered, That this case be, and it hereby is, re-