

right of the Commission to reissue this complaint in the event facts and circumstances appear to warrant such action.

DECISION OF THE COMMISSION

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner as to the above-named respondents shall, on the 20th day of October 1960, become the decision of the Commission.

IN THE MATTER OF

BAAR & BEARDS, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket 6400. Complaint, Aug. 23, 1955—Decision, Oct. 21, 1960

Order requiring importers in New York City to cease violating the Flammable Fabrics Act by transporting and selling in commerce silk scarves manufactured in Japan which were so highly flammable as to be dangerous when worn, and furnishing their customers with false guaranties representing that tests showed the scarves not to be dangerously flammable.

Mr. Brockman Horne representing the Commission.

Halperin, Natanson, Shivitz, Scholer & Steingut, by *Mr. Harry J. Halperin*, of New York, N.Y., for respondents.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint herein charges the respondents, Baar & Beards, Inc., a corporation, and Sylvan M. Baar and Milton Beards, individually and as officers of said corporation, with violation of the Federal Trade Commission Act and the Flammable Fabrics Act, as also with violations of the Rules and Regulations promulgated under the last-named Act, in the sale of articles of wearing apparel so highly flammable as to be dangerous when worn by individuals. All respondents were duly served with the aforesaid complaint according to law and, within the required time, filed answer thereto denying the pertinent charges of violation, and thereafter a supplemental answer alleging, as a separate defense, that the Flammable Fabrics Act is unconstitutional.

On the issues thus joined the matter proceeded to trial, during the course of which certain testimony was had and exhibits received

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in evidence, all of which testimony was stenographically reported and, together with the exhibits, duly filed of record in the Office of the Commission in Washington, D.C., as required by law.

Subsequent thereto, both parties were accorded an opportunity, of which they availed, of filing with the hearing examiner their respective Proposed Findings of Fact and Conclusions of Law, those deemed proper to be admitted having been incorporated herein, and those rejected being ignored, as a reading of this Initial Decision may indicate.

FINDINGS AS TO THE FACTS

1. As charged in the complaint, and formally admitted by the respondents' answer, respondent Baar & Beards, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of New York. Sylvan M. Baar and Milton Beards are individuals and, respectively, President and Secretary-Treasurer of respondent corporation and, as such, they formulate, direct and control its policies, acts and practices. The address of all respondents is 15 West 37th Street, New York 18, New York.

2. The Flammable Fabrics Act states, "The term 'article of wearing apparel' means any costume or article of clothing worn or intended to be worn by individuals except hats, gloves, and footwear." A scarf is, therefore, an article of wearing apparel. Subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, respondents did import from Japan, under entry No. 957817 dated October 5, 1954, a quantity of scarfs which were described as "4 momme Habutae printed silk scarfs" entered under Paragraph No. 1210 and as such subject to the provisions of the Flammable Fabrics Act. Respondents on November 9, 1954, at the request of the Collector's office, submitted samples for testing, and on December 22, 1954, were notified by the Collector that the test showed that the samples did not meet the requirements of the Act. Subsequently respondents had an independent test made which confirmed the Collector's findings that the merchandise did not meet the Flammable Fabrics Act requirements as to flammability, and further showed that the scarfs did not weigh 4 momme but only 3.53 momme.

3. In August, 1954, class tests had been conducted on behalf of the National Women's Neckwear and Scarf Association, Inc., which showed that 4-momme silk scarfs have a burning time of 3.5 seconds or more, which is within the requirement of the Act and the Rules and Regulations thereunder. Respondents state that the purchase of the aforementioned merchandise "was made only after" these tests were made. No tests were made by respondents of the actual merchandise received, nor of scarfs weighing only 3.53 momme. But in

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"order to accommodate one particular mail-order house," respondents took an order for one lot of 200 dozen 4 momme habutae printed scarfs, and actually delivered on this order 164 dozen scarfs from this importation, and "which of course were quickly turned over to the mail-order house in question" (RX 1A).

4. Also subsequent to the effective date of the Act, respondents made purchases of silk scarfs subject to the Flammable Fabrics Act from the following suppliers within the United States of America:

Supplier	Date	Merchandise purchased ¹
Ch. Chraime.....	Nov. 5, 1954	2,320 dozen 4 MM 32" x 35" Printed, Silk Scarves Made in Japan (CX 3).
S. Shamash & Sons, Inc.....	Oct. 28, 1954	2,363 dozen Japanese Silk Prints, 8 designs, 3 momme Habutae Scarfs, flameproofed, handrolled hems, 400 dz. 33" x 33", 1,963 dz. 32" x 32" (CX 1).
Wieder Scarfs.....	Nov. 11, 1954	900 dozen—described in the Salesnote Confirming Order, dated 10/25/54 (CX 4) as #3 m/m prints flame retarded—merchandise must pass requirements of Flammable Fabrics Act: 32" x 35" (CX 5b). ²
do.....	Nov. 15, 1954	900 dozen—same as above (CX 6-R).
Brochers Trading Corp.....	Nov. 3, 1954	3,950 dozen Japanese Silk Scarfs 32" x 35" printed on 4 M/M Habutae (CX 19-A).
do.....	Nov. 15, 1954	250 "yds." (believe it means doz.) Japanese Silk Scarfs 32" x 35" printed on 4 M/M Habutae (CX 20).
Ch. Chraime.....	Nov. 15, 1954	5,000 4 MM Solid Silk Scarves, 32" x 35" Made in Japan (RX 6).

¹ Actually purchased and received by respondents, 15,683 dozen.

² NOTE: Salesnote (CX 4) shows 2,500 doz.; invoice and remittance statement (CXs 5a and 5b) show 00 doz.

5. The merchandise purchased from Shamash & Sons, Inc. was invoiced as "flameproofed" (CX 1); the Salesnote Confirming Order (CX 4) of Wieder Import Co., Inc. scarfs show they were to be "flame retarded—merchandise must pass requirements of Flammable Fabrics Act"; with reference to the two Chraime purchases, there were two separate letters (RXs 8 and 5) addressed by Chraime to respondents, dated respectively 11/5/54 and 11/23/54, stating:

* * * the undersigned hereby guarantees that reasonable and representative tests, made according to the procedures prescribed in Section 4(a) of the Flammable Fabrics Act, show that fabrics used or contained in the articles of wearing apparel and fabrics otherwise subject to said act, covered by and in the form delivered under this document, are not, under the provisions of such act, so highly flammable as to be dangerous when worn by individual. (RX 8);

the stipulation of record (Tr. 369, 370) is that "all of the goods" purchased by respondents as shown in Paragraph 4 were purchased "upon the representation * * * that all * * * had either been flameproofed or tested" and would thus meet the requirements of the Flammable Fabrics Act.

6. From merchandise procured from the sources shown in Paragraph 4, above, the record shows respondents made sales as follows:

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20 dozen scarfs to Ohrbachs of Los Angeles, 11/4/54 (CX 29-A); 3 dozen scarfs to Broadway Dept. Store, Los Angeles, 11/11/54 (CX 27); 250 dozen scarfs to Specialty House, New York City, 11/18/54 (CX 8) (These had been purchased by respondents from Ch. Chraime); 2 dozen scarfs to Broadway Dept. Store, Los Angeles, 11/30/54 (CX 25); 25 dozen scarfs to Lit Bros., Philadelphia, 12/31/54 (CX 22).

The invoices on all these sales, except one (the invoice for the 11/30/54 transaction with Broadway appears to be incomplete, as it cannot be established that it is an exception), carry a guarantee by respondents in the following language:

Insofar as the items covered by this invoice are subject to the provisions of the Flammable Fabrics Act, the undersigned guarantees that, upon the basis of a Guaranty received, or, in its own behalf, reasonable and representative tests made according to the procedures prescribed in Section 4(a) of the Flammable Fabrics Act, show that fabrics used or contained in the articles of wearing apparel and fabrics otherwise subject to said Act, covered by and in the form delivered under this document, are not, under the provisions of said Act, so highly flammable as to be dangerous when worn by individuals.

7. Six of the respondents' scarfs which were received in evidence were subjected to flammability tests in accordance with the standards in Commercial Standard 191-53 (Revised), a publication of the United States Department of Commerce titled "Flammability of Clothing Textiles," as expressly authorized and provided by § 4(a) of the Flammable Fabrics Act. The tests were conducted by Frank J. Feeny, a chemist, who from June, 1954, to June, 1956, was engaged in the testing of textiles for the Federal Trade Commission, and whose qualifications as an expert to conduct flammability tests were proved to the satisfaction of the Hearing Examiner. The samples tested and the results of the tests are as follows:

(a) From Commission's Exhibit 28-A, which is a scarf procured February 23, 1955, by a Federal Trade Commission representative from Ohrbach's in Los Angeles, 10 samples were tested and the average flame-spread time was determined to be 2.60 seconds (CX 31 b).

(b) Likewise, from Commission's Exhibit 28-E, a scarf procured February 23, 1955, also from Ohrbach's, 10 samples were tested and the average flame-spread time was determined to be 2.82 seconds (CX 31 b.)

(c) Likewise, from Commission's Exhibit 26-A, a scarf procured February 21, 1955, from the lot sold 11/11/54 by respondents to the Broadway Dept. Store, Los Angeles, samples were taken and tested, showing the average flame-spread time as 2.86 seconds (CX 32-B).

(d) Similar test procedures were followed with respect to scarfs identified as Commission's Exhibits 11, 12 and 13, which are silk scarfs or parts of silk scarfs which had been sold by respondents in-

directly to Specialty House through Headline Accessories by an invoice bearing respondents' guarantee. The tests show the average flame-spread time to be 3.28 seconds, 3.28 seconds and 3.46 seconds, respectively (Tr. 256; CXs 32-A and -B, 33-A and -B, and 34-A and -B).

The minimum flame-spread time prescribed for "normal flammability" by the Flammable Fabrics Act as amended is 3.5 seconds; when the flame-spread time is less than 3.5 seconds, the textile or fabric is classified as "Class 3, rapid and intense burning," and under the Act, "shall be deemed so highly flammable * * * as to be dangerous when worn by individuals." § 3(a) of the Act, *inter alia*, provides:

The manufacture for sale, the sale, or the offering for sale, in commerce, or the importation into the United States, or the introduction, delivery for introduction, transportation or causing to be transported in commerce or for the purpose of sale or delivery after sale in commerce, of any article of wearing apparel which * * * is so highly flammable as to be dangerous when worn by individuals, shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

8. The respondents were notified by the Collector of Customs on December 22, 1954, that the sample which they had submitted from their importation of 10/5/54 did not meet the requirements of the Flammable Fabrics Act. This evidence was not controverted. The results of the tests demonstrate the failure of other of the scarfs imported and sold by respondents to pass the prescribed tests, and thus to be entitled to enter the channels of commerce; they demonstrate further that the guarantee which respondents placed on some of their invoices was false. Respondents have not made such reasonable and representative tests, and the tests which were made did not show that the scarfs were not so highly flammable as to be dangerous when worn by individuals.

9. With respect to guaranty, the Flammable Fabrics Act provides:

SEC. 8. (b) It shall be unlawful for any person to furnish, with respect to any wearing apparel or fabric, a false guaranty (except a person relying upon a guaranty to the same effect received in good faith signed by and containing the name and address of the person by whom the wearing apparel or fabric guaranteed was manufactured or from whom it was received) with reason to believe the wearing apparel or fabric falsely guaranteed may be introduced, sold, or transported in commerce, and any person who violates the provisions of this subsection is guilty of an unfair method of competition, and an unfair or deceptive act or practice, in commerce within the meaning of the Federal Trade Commission Act.

The guaranty which respondents endorsed on certain of their invoices was, as hereinbefore found, false. It has been urged that

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respondents are exempt under § 8(a) from liability under § 8(b) because they relied upon representations made to them and received in good faith, by the person or persons who manufactured the scarfs or from whom they were received. § 8(a) provides that under certain conditions "No person shall be subject to prosecution under § 7 of this Act for a violation of § 3 of this Act". Respondents' acts and practices constitute a violation of § 3, but the prosecution prescribed by § 7 is for a misdemeanor for wilful violation of § 3 or § 8(b) of the Act, conviction of which subjects the violator to a fine of not more than \$5,000 and/or imprisonment for not more than one year. It is not applicable to a proceeding of a civil or preventive nature where the only possible sanction is the issuance of a cease-and-desist order.

10. Respondents in the course and conduct of their business are in competition in commerce with others in the sale and offering for sale of scarves which are not flammable "articles of wearing apparel" under the provisions of the Flammable Fabrics Act.

11. The use by the respondents of the acts, practices and policies as herein found has resulted in substantial trade in commerce being unfairly diverted to them from their competitors and substantial injury has been done to competition in commerce.

THE DEFENSE

In their defense to the action, respondents contended that the Commission's flammability tests were not conducted according to the specifications of Commercial Standard 191-53 in that they were not conducted in a draft-free room with the apparatus at room temperature. The tests were conducted in a windowless room approximately 10' X 6' in size, with a door into the hallway usually open. There was no evidence of the presence of drafts, nor was there any evidence that the apparatus, at the time of the tests, was not at room temperature. No weight is accorded this attempted defense.

Respondents assert that the Flammable Fabrics Act is unconstitutional. This attempted defense is not within the power of the Hearing Examiner to decide.

CONCLUSION

The acts and practices of respondents as hereinabove found were and are in violation of the Flammable Fabrics Act and of the Rules and Regulations promulgated thereunder, and constitute un-

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fair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent Baar & Beards, Inc., a corporation, and its officers, and respondents Sylvan M. Baar and Milton Beards, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

1. (a) Importing into the United States; or
(b) Selling, offering for sale, introducing, delivering for introduction, transporting, or causing to be transported, in commerce, as "commerce" is defined in the Flammable Fabrics Act; or
(c) Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce, any article of wearing apparel, which, under the provisions of § 4 of the said Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals;
2. Selling or offering for sale any article of wearing apparel made of fabric which, under the provisions of § 4 of said Act, as amended, is so highly flammable as to be dangerous when worn by individuals and which has been shipped or received in commerce, as "commerce" is defined in said Act;
3. Furnishing to any person a guaranty with respect to any article of wearing apparel which respondents, or any of them, have reason to believe may be introduced, sold or transported in commerce, which guaranty represents, contrary to fact, that reasonable and representative tests made under the procedures provided in § 4 of the Flammable Fabrics Act, as amended, and the rules and regulations promulgated thereunder, show and will show that the article of wearing apparel, or the fabrics used or contained therein, covered by the guaranty, are not, in the form delivered or to be delivered by the guarantor, so highly flammable under the provisions of the Flammable Fabrics Act as to be dangerous when worn by individuals, provided, however, that this prohibition shall not be applicable to a guaranty furnished on the basis of, and in reliance upon, a guaranty to the same effect received by respondents in good faith signed by and containing the name and address of the person by whom the wearing apparel was manufactured or from whom it was received.

OPINION OF THE COMMISSION

By TAIT, *Commissioner*:

The complaint in this matter charges respondents with violating the Flammable Fabrics Act, as amended, by importing and selling articles of wearing apparel which, under the provisions of Section 4 of said Act, were so highly flammable as to be dangerous when worn by individuals, and by furnishing a false guaranty with respect to such wearing apparel. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondents to cease and desist from the practices found to be unlawful. Respondents have appealed from this decision.

The first argument made on this appeal is that the entire proceeding has been invalidated by reason of the failure of the hearing examiner to file his initial decision within the time prescribed by § 3.21 of the Commission's Rules of Practice. Section 3.21 provides, *inter alia*, that within thirty days after the date of an order closing a proceeding before the hearing examiner, the hearing examiner shall make and file an initial decision which shall become the decision of the Commission thirty days after service thereof upon the parties unless prior thereto an appeal is filed, the Commission stays the effective date of the decision, or the Commission places the case on its own docket for review.

It appears that on January 20, 1958, the hearing examiner issued an order closing the case for the taking of testimony and reception of evidence and fixing February 17, 1958, as the time for the filing of proposed findings, conclusions and order. On February 6, 1958, the hearing examiner, at the request of respondents' counsel, issued an order extending the time for filing proposed findings to March 10, 1958. His initial decision was not filed until March 17, 1960.

The hearing examiner's order dated January 20, 1958, closing the record for the taking of testimony and the reception of evidence was not an order closing the proceeding contemplated by § 3.21. This must have been apparent to respondents since the hearing examiner, at respondents' request, fixed the time for filing proposed findings well beyond the date on which the initial decision should have been filed had the order of January 20, 1958, been made pursuant to § 3.21. While the order issued by the hearing examiner on January 20, 1958, is not one which is required under the Rules of Practice, it is not unusual in a Commission proceeding for a hearing examiner to formalize the closing of a record for the reception of evidence by means of such an order and thereafter to issue an order closing the proceeding.

As we stated in *Directory Publishing Corporation*, Docket 5920 (1953), § 3.21 is designed to expedite the disposition of the Commission's formal docket, and the primary purpose of the first paragraph of the rule is to provide a procedural method whereby initial decisions may become decisions of the Commission thirty days after service thereof in the event certain contingencies do not occur. Although the hearing examiner did not violate the letter of the rule in the manner contended by respondents, he did violate the intention of the rule by his failure to file his initial decision within a reasonable time. Certainly there is nothing in the record or in the nature of the case itself which would justify or excuse this inordinate delay. Nor can there be any doubt that this delay, if prejudicial to respondents, would invalidate the proceeding. There is no evidence that respondents have been prejudiced, however, and, as a matter of fact, they have made no attempt in their brief to show that they were injured in any manner by the lapse of time between the filing of the proposed findings and the issuance of the initial decision. Although they contended in oral argument that they would be injured by the publicity of an adverse decision at this time, they have failed to show how such publicity would be more damaging to them now than it would have been had it occurred in 1958. The argument on this point is, therefore, rejected.

Respondents' appeal also questions the adequacy of the evidence relied upon by the hearing examiner in finding that certain scarves sold by respondents did not meet the flammability standards of Section 4 of the Act. They argue first of all that evidence was introduced of tests performed on only six scarves and that there is no proof that these scarves were representative samples of the merchandise sold by them. The hearing examiner, however, did not find that the six scarves were representative of respondents' merchandise, nor was it necessary for him to do so. Section 3 of the Act prohibits transactions involving "any article of wearing apparel" or "any fabric" which under the provisions of Section 4 is so highly flammable as to be dangerous when worn by individuals. The showing that six scarves sold by respondents had failed to pass the flammability test is sufficient to establish a violation of the Act.

Respondents also argue that flammability tests performed by the expert who testified in support of the complaint had not been conducted in accordance with the requirements of the Commercial Standard (CS 191-53) promulgated by the Secretary of Commerce and designated by the Flammable Fabrics Act as the standard setting forth the procedure for making such tests. This same argument was raised before the hearing examiner and rejected by him

and we find nothing in the record or in the respondents' brief to indicate that the hearing examiner's ruling on this point should be disturbed.

Respondents also contend that the public interest does not require the issuance of an order to cease and desist in this matter, pointing out that the number of sales of lightweight scarves shown to have been made by them constituted a very small percentage of their total sales of scarves and further stating that there has been no showing of injury to competition. This argument must also be rejected. The existence of public interest in a matter arising under the Flammable Fabrics Act rests not on injury to competition but on the injury which may be inflicted on the ultimate consumer. Moreover, by the express language of the Act, a single violation constitutes an unfair method of competition and an unfair and deceptive act or practice. Under such a statute, the showing of only one violation is ground for the issuance of an order to cease and desist. *The Fair v. Federal Trade Commission*, 272 F. 2d 609 (7th Cir. 1959).

Respondents also contend that there has been a good faith discontinuance of the practices alleged in the complaint and that a cease and desist order is, therefore, unnecessary at this time. They argue in this connection that the alleged violations were minimal in nature and resulted from the unfamiliarity of their employees with a newly enacted law, that they voluntarily discontinued the practices, and that there is no likelihood that such practices will be resumed.

In order to show that they attempted in good faith to comply with the requirements of the Flammable Fabrics Act, respondents state that they disposed of existing stocks of lightweight scarves prior to the effective date of the Act, July 1, 1954. The record discloses, however, that although respondents knew in January 1954 that scarves weighing 4 momme (a Japanese measure of weight) might violate the Act, they, nevertheless, imported 16,000 dozen of such lightweight scarves during the first six months of 1954.

Respondents also state that their importation of 164 dozen lightweight silk scarves (shown to be dangerously flammable under the Act) was made in reliance upon a so-called "class" test conducted on behalf of the National Women's Neckware and Scarf Association, Inc., which showed that silk scarves weighing 4 momme would comply with the requirements of the Act. The test referred to by respondents was not a class test as provided for in the rules and regulations promulgated under the Act. Moreover, it appears that respondents' secretary-treasurer, Milton Beards, who saw the test report and who was a director of the Association, knew or should

have known that this test did not prove or even indicate that all silk scarves weighing 4 momme would not be dangerously flammable under the Act. According to the report of the test, it was conducted for the purpose of determining whether three scarves, identified as 4 momme habutae (plain-woven Japanese silk), would meet the requirements of the Flammable Fabrics Act. Respondents should have known that the results of this test would not indicate the flammability characteristics of other scarves of the same weight but of different weave and construction. Mr. Beards testified in this connection that silk is not a uniform fiber and that it is, therefore, "very difficult to be sure when you start off with a borderline product to know whether they will pass or not."

Respondents also purchased over 15,000 dozen lightweight scarves from four domestic suppliers after the Act became effective. Only one of these suppliers furnished a written guaranty that tests had been made showing that the fabric used in the wearing apparel was not dangerously flammable under the Act, and respondents made no tests of their own. They nevertheless sold scarves received from these suppliers with the guaranty that reasonable and representative tests had been made. Respondents also ignored the requirement in the rules and regulations concerning the maintenance of records by persons furnishing guarantees. Consequently, they could not determine from which supplier they had purchased scarves which they had guaranteed to some of their own customers.

Respondents also argue that one of their officials would have testified that no transaction with respect to questionable merchandise had ever occurred after December 31, 1954, but was prevented from doing so. In view of respondents' failure to keep adequate records concerning the sale of such goods, we would not have been greatly impressed by this testimony had it been admitted. Moreover, even if respondents did not sell any of the lightweight scarves after December 31, 1954, we could not infer from that fact that they had discontinued the practice on an entirely voluntary basis. Although the Commission's investigation did not begin until the early part of 1955, the Bureau of Customs had obtained samples of scarves imported by respondents and, by letter of December 22, 1954, had notified respondents that the goods were dangerously flammable. In view of this notification, we think that any action taken by respondents to stop the sale of questionable merchandise was in anticipation of a proceeding against them under the Flammable Fabrics Act.

Under these circumstances, we cannot say that there has been a good faith discontinuance of the practices charged in the complaint. Furthermore, the showing of respondents' indifference to the require-

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ments of the Act and the rules and regulations promulgated thereunder and their willingness to gamble with potentially dangerous merchandise militates against a finding that there is no likelihood that these practices will be resumed. We are of the opinion, therefore, that despite the delay in the trial of this case and in the filing of the hearing examiner's initial decision, the proceeding is not moot and an order to cease and desist should be issued.

Respondents' appeal is denied and the initial decision will be adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and adopting the initial decision:

It is ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.
