

counsel's request for permission to file an interlocutory appeal be, and it hereby is, dismissed.

Commissioner MacIntyre not concurring.

IN THE MATTER OF
BAKERS OF WASHINGTON, INC., ET AL.

Docket 8309. Order and Memorandum, Nov. 12, 1964

Order denying respondent's motion that chairman be disqualified from participation in this proceeding.

MEMORANDUM OF CHAIRMAN DIXON IN REGARD TO RESPONDENT'S
MOTION THAT HE BE DISQUALIFIED

NOVEMBER 4, 1964

Respondent Continental Baking Company has moved that I withdraw from this proceeding or that, in the alternative, the Commission as a body "determine Chairman Dixon to be disqualified, from any consideration or participation in this proceeding."

Respondent alleges, in substance, that by reason of my prior position and duties as Counsel and Staff Director of the Senate Antitrust and Monopoly Subcommittee, my further participation in the instant proceeding would raise the "appearance" of a lack of "objectivity, impartiality, and fairness." Respondent points out that, as Counsel for the Subcommittee when it conducted the "Study of Administered Prices in the Bread Industry" in 1959, I interrogated a number of bread company officials, including R. Newton Laughlin, president of respondent Continental. It is said that my "interrogation concerned the manner in which Continental's business was conducted in Seattle, including the manner in which Continental effected price changes in

that market. The strongly implied conclusion of the interrogation was that Continental's prices in Seattle were directed by, and controlled from, out-of-state." Respondent also argues that the transcript of the Subcommittee's hearings¹ and its report² "strongly suggest that Chairman Dixon and his staff had concluded that agreements affecting price did exist in the Seattle market."

The first difficulty with respondent's motion is that it is not timely. The events that allegedly disqualify me occurred in 1959. This proceeding was decided on the merits—that is, Continental and the other respondents were found to have fixed bread prices—by our hearing examiner on July 20, 1962. Thereafter, the matter was fully briefed and argued before the Commission itself. On February 28, 1964, the Commission³—including myself—affirmed the examiner's decision on the merits, finding that respondents had in fact conspired to fix the price of their breads. Then, on April 27, 1964, respondent Continental moved that the matter be reopened so as to permit respondent, in accordance with Section 7(d) of the Administrative Procedure Act, to "show the contrary" of certain facts officially noticed in our decision in support of the finding that Continental's pricing activities in Seattle had occurred "in" interstate commerce. This was granted on May 21, 1964, and the proceeding was reopened and remanded to our hearing examiner for the sole purpose of giving respondent its opportunity to show the contrary of those noticed jurisdictional facts. No further evidence was to be received on the price fixing question; that was already settled as far as this Commission was concerned.

At no time between the issuance of the examiner's decision in 1962—the point at which the matter became ripe for Commission review—and our own decision on the merits in 1964 did respondent Continental express any dissatisfaction with my "objectivity, impartiality, and fairness," or with the possibility that my 1959 interrogation of its president might have raised doubts about the "appearance" of my fairness. No such question was raised when the matter was briefed and argued to the Commission on the merits in 1963. Respondent was silent on this point when it petitioned us, in April 1964 (nearly two months after our decision on the merits), for an opportunity to challenge the noticed jurisdictional facts. Now, however, more than two (2) years after the examiner's initial decision, and nearly nine (9) months after our own decision on the merits, respondent moves that I disqualify myself because of matters that occurred in 1959.

¹ "Study of Administered Prices in the Bread Industry," Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, 86th Cong., 1st Sess., pursuant to S. Res. 57 (Part 12, 1959).

² S. Rep. No. 1923, 86th Cong., 2d Sess. (1960).

³ One member of the Commission dissented.

Respondent explains its sudden doubts about the "appearances" of the matter by implying that the issue only arose during the hearings on remand, that is, during or after July 1964. In our remand order, we had noted that the Commission's own attorney, if he desired to present evidence explaining or rebutting that offered by Continental on remand, should be permitted to do so. At the remand hearing in Seattle in July 1964, Continental offered testimony by its San Francisco regional manager in an apparent effort to show that, contrary to the facts noticed by the Commission in its earlier decision on the merits, the manager of its Seattle bread plant sets the company's prices in that market without any direction or control by the regional office in San Francisco. This testimony went, therefore, to the question of whether the price fixing already found by the Commission in its February 1964 decision had occurred in interstate commerce.

In rebuttal, the Commission's attorney introduced into the remand record, pursuant to a stipulation with Continental's attorney, some seven (7) pages of testimony excerpted from the Subcommittee's 1959 bread hearings.⁴ The witness testifying there was Mr. Laughlin, president of Continental. Some of the questions were asked by Senator Kefauver, others by the Subcommittee's staff members, including myself. The part that interested the Commission's attorney was Mr. Laughlin's testimony before the Subcommittee that he had personally approved, from his Rye, New York, headquarters office, a particular price increase in 1958 by his Seattle bread plant.

Now, on the basis of the fact that this borrowed testimony was not introduced into this record until July 1964, respondent seeks to imply, I gather, that the "appearance" of unfairness has just now entered the case, thus explaining its failure to make timely objection to my participation in the proceeding.

As I read this record, however, that testimony borrowed from the Subcommittee's transcript is merely repetitious of evidence already received in the original hearings.⁵ In my view, therefore, that testimony adds nothing to this record and I would vote to strike it as cumulative if respondent so desires.

We come back, therefore, to the fact that Continental now considers me disqualified to participate in the adjudication of a narrow, jurisdictional aspect of the case whereas, when the matter was before me and the other commissioners on the merits many months ago, respond-

⁴ N. 1, *supra*.

⁵ For example, the manager of Continental's Seattle bread plant had testified as follows: "Q. Now, I show that Exhibit 23E to the witness and I would like to ask the witness whether that indicates that the president of the company [in New York] gave approval to the 1958 suggested price raise [in Seattle]?"

"THE WITNESS: Yes, it does." [Tr. 426-427]

ent expressed no dissatisfaction with my fairness and my qualification to hear and decide that larger question. It is in the anomalous position of arguing that, while it had not doubts about my "impartiality" on February 28, 1964, when I participated in the decision that it had in fact fixed prices, I am disqualified to hear the rest of the case nine months later, not because of intervening events, but because of something that happened in 1959.

Respondent did not ask for my disqualification when the case was argued before us in 1963, and decided by us in 1964, for the simple reason that I had displayed no disqualifying bias or prejudice against Continental in the Subcommittee's 1959 hearings, and respondent's president and attorneys⁶ knew it. Indeed, while respondent first says the Subcommittee transcript "strongly suggests" I had already—in 1959—"concluded that agreements affecting price did exist in the Seattle market," it does not seriously press this contention that I am in fact biased and prejudiced against Continental. "To state legal and compelling grounds for the present motion it is not necessary to claim that Chairman Dixon has, in fact, prejudged the issues—including the precise jurisdictional issue now presented. It is enough to show, as a comparison of the present pending issue with Chairman Dixon's interrogation of Mr. Laughlin on that issue does show, that the *appearance* [respondent's emphasis] of objectivity, impartiality, and fairness would be lost unless there were disqualification. . . . Certainly a movant in such a situation as this is not required to prove that, as a subjective matter, the administrator has in fact 'prejudged' the issue, nor that his 'fairness' has been destroyed, nor that he is 'biased,' nor even need the movant prove as a matter of fact that continued participation by the administrator would be 'prejudicial' to the movant's rights All that need be shown are objective facts which might lead an impartial observer to question whether there was some measure of adjudgment of the facts or law prior to consideration of the particular case. The motion should be granted if the appearance of complete fairness would be compromised by continued participation."⁷

This "appearances" argument pushes a generally salutary principle of administration to a wholly unwarranted extreme. Appearances are indeed a factor to be considered, as I noted in my memorandum opinion

⁶ When the company's president, Mr. Laughlin, appeared before the Subcommittee on June 18, 1959, he was accompanied by three other officers of the company, including its then assistant general counsel, Mr. Roy M. Anderson. Mr. Anderson, now the company's vice president and general counsel, has participated in the instant proceeding continuously. For example, he appeared "of counsel" on Continental's petition of August 22, 1962, asking the Commission—including myself—to review the examiner's initial decision in this case. He appeared in the same capacity on Continental's exceptions to that initial decision and brief to the Commission—filed November 9, 1962. Neither document makes any mention of the 1959 Subcommittee hearings or of any alleged bias or prejudice on my part.

⁷ Memorandum in Support of Motion to Disqualify (October 21, 1964).

in *Lloyd A. Fry Roofing Co.*, Dkt. 7908 (June 30, 1964) [65 F.T.C. 1317], 3 CCH Trade Reg. Rep. Par. 16,968. It is but one of the relevant factors, however, and must be weighed against competing considerations, including the important principle that administrators, in the absence of affirmative proof to the contrary, "are assumed," in the words of Mr. Justice Frankfurter, "to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *United States v. Morgan*, 313 U.S. 409, 421 (1941). This presumption of fairness is so basic that the courts will decide a charge of administrative bias or prejudice only after the accused administrator has made his final decision on the merits, thus permitting a resolution not only of the bias question itself, but an evaluation of the complaining party's "proof of effect" of that alleged bias on the administrative decision. *National Lawyers Guild v. Brownell*, 225 F. 2d 552, 555 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 927 (1956).

The "appearances" principle, in other words, is not a rigid command of the law, compelling disqualification for trifling causes, but a consideration addressed to the discretion and sound judgment of the administrator himself in determining whether, irrespective of the law's requirements, he should disqualify himself. Thus "[i]t has been held that the bias or prejudice alleged must be 'personal,' and that a mere prejudgment of the case is not sufficient." *Marquette Cement Mfg. Co. v. Federal Trade Commission*, 147 F. 2d 589, 592 (7th Cir. 1945), *aff'd* *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 700-703 (1948).⁸ In its opinion in that case, the Supreme Court held squarely that members of the Federal Trade Commission are disqualified to hear a case only where their minds are "irrevocably closed" on the matter before them.⁹ 333 U.S. at 701. This judicial refusal to infer administrative bias or prejudice except upon proof of "irrevocably closed" minds stems not merely from the so-called "rule of necessity" but from the obvious fact that the administrator's performance of his

⁸ See *Eisler v. United States*, 170 F. 2d 273, 277-278 (D.C. Cir. 1948), *removed from docket*, 338 U.S. 189 (1949), a case involving the charge that Judge Holtzoff, having investigated "aliens and Communists, including appellant," in his former post as Special Assistant to the Attorney General, was biased and prejudiced. The Court of Appeals for the District of Columbia Circuit held: "Upon review of such an affidavit we do not hesitate to uphold the ruling of the court below that the affidavit should be stricken, for it does not establish bias and prejudice in the personal sense contemplated by the statute, assuming truth in all the facts stated. Prejudice, to require recusation, must be personal according to the terms of the statute, and impersonal prejudice resulting from a judge's background or experience is not, in our opinion, within the purview of the statute." 170 F. 2d at 278. See also *O'Malley v. United States*, 128 F. 2d 676 (8th Cir. 1942), *rev'd on other grounds*, 317 U.S. 412 (1943).

⁹ See also *National Lawyers Guild*, *supra*, 225 F. 2d at 555, and *Lumber Mut. Casualty Ins. Co. of New York v. Locke*, 60 F. 2d 35 (2d Cir. 1932). In the latter case, an administrator had written a letter indicating, in substance, that, having investigated the matter in question to his full satisfaction, the formal hearing was a mere formality. In response to a charge of prejudice, the court said: "However tactless or undesirable such remarks may have been, they fell short of a statement that nothing that might be shown at such a hearing would change his mind. . . . They did not indicate that his mind was not open

statutory duties is presumed, in the absence of clear proof to the contrary, to be not only regular in all respects but affirmatively in the public interest. As one recent commentator has summed it up, "every adjudicator has a positive duty to fulfill his adjudicative functions unless *actually* disqualified, and both the individual parties to a controversy and the public at large have a vested interest in such administrator's participation in the case involved. Consequently, while an administrator should scrupulously search his conscience to test his impartiality, it is almost as great a fault to employ self-disqualification too readily as too sparingly."¹⁰

The real difficulty with respondent's argument in the instant case is that even the "appearance" of bias and prejudice is lacking. Nothing in the 1959 Subcommittee proceedings pointed to by respondent meets its own test of whether "objective facts" have been shown that would suggest such bias or prejudice to the "impartial observer." Respondent itself noticed nothing of the sort when it brought the case before me and the other commissioners in 1963, and I see no reason to believe it would be less sensitive on the question than an "impartial observer."

Respondent's further suggestion that administrators must be disqualified from hearing a case if there is some evidence that they have made "some measure of adjudgment of the . . . law prior to consideration of the particular case"¹¹ would have, if accepted, the singular disadvantage of disqualifying any administrator or judge the second time a particular legal question came before him. As the Supreme Court has said: "Neither the *Tumey* decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions of both law and fact." *Cement Institute, supra*, 333 U.S. at 703. And added the Court, "the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court." *Ibid.* "If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. See *Morgan v. United States*, 313 U.S. 409,

to any proof, but only that when so full an examination had been made no matters affecting the result were likely to be developed." 60 F. 2d at 38 (emphasis added).

¹⁰ Comment, "Prejudice and the Administrative Process," 59 *Northwestern Univ. L. Rev.* 216, 233-234 (emphasis added) (May-June 1964). See also Law, "Disqualification of SEC Commissioners Appointed From the Staff: *Amos Treat*, *R. A. Holman*, and the Threat to Expertise," 49 *Cornell L. Q.* 257 (Winter 1964), for a particularly penetrating discussion of the problems posed by the too-ready disqualification of administrators.

¹¹ Continental's "Memorandum in Support of Motion to Disqualify," October 21, 1964 (emphasis added).

421. Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. . . ." *Id.*, at 702. Indeed, it is hornbook law that the kind of "personal" bias that disqualifies, *Marquette Cement, supra*; *Eisler, supra*, refers to an "irrevocably closed" view of the particular parties or facts involved in a specific case, not to the adjudicator's preconceptions about the law. "Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification."¹²

Our *Lloyd A. Fry* matter¹³ and *Texaco, Inc. v. Federal Trade Commission*, 336 F. 2d 754 (D.C. Cir. 1964), have no bearing on the instant question. *Fry* involved, as my Memorandum was at pains to emphasize, "peculiar facts" that are clearly not present here, particularly the fact that its size and conduct had been such that I had, in truth, retained some personal recollection of its business practices. While my mind was certainly not "irrevocably closed" on the issues posed, and I was thus not compelled by law to disqualify myself, *Cement Institute, supra*, 333 U.S. at 701, I thought the circumstances there unique enough that, on balance, my withdrawal would not be inappropriate. The *Texaco* case is even less applicable here. Nothing was involved there but the precise words of a particular speech, words that the court construed as indicating that I had prejudged in 1961 a case not heard until two years later, in 1963. The words found disqualifying there are not, needless to say, present in the instant case. See *Pure Oil Co., et al.*, Dkts. 6640, 6641, 6898, 7567, and 8537 (Memorandum of Chairman Dixon), October 29, 1964 [p. 1552 herein].

I have previously discussed in considerable detail my view of the various considerations involved in cases of this sort. *Campbell Taggart, supra*; *Lloyd A. Fry, supra*; and *Pure Oil Co., supra*. Rather than repeat them here, I refer respondent to my discussion in those cases and the authorities cited there.

Finally, I want to say here that I have "scrupulously searched my conscience" and hereby assure this respondent that, insofar as any man can know his own mind, I have made absolutely no prejudgments of any kind in this case, and harbor no biases of any sort against Continental.¹⁴ I think it my duty to continue my participation here,

¹² Davis, 2 *Administrative Law Treatise* 130, 131 (1958). "Our tradition rightly interpreted is that the judge should be neutral toward the question of whether the specific defendant is guilty. It is a perversion of that tradition to demand that the judge be neutral toward the purposes of the law." *Id.*, at 138, n. 28, quoting Jaffe, "The Reform of Administrative Procedure," 2 *Pub. Ad. Rev.* 141, 149 (1942).

¹³ Dkt. 7908 (June 30, 1964) (Memorandum of Chairman Dixon), 3 CCH Trade Reg. Rep. Par. 16,968 [65 F.T.C. 1317].

¹⁴ Respondent assures me that "it is no answer to the motion for the administrator to say he does not labor under any of these infirmities." Memorandum in Support of Motion to Disqualify (October 21, 1964). In *National Lawyers Guild, supra*, however, the Court of Appeals for the District of Columbia Circuit noted the charged administrator's affidavit "denying his prejudgment and explaining that the only determination thus far made by him is that the evidence warranted his proposal to designate, a preliminary and *ex parte* determination. He reaffirms under oath his intention 'to make an impartial final de-

particularly in view of the fact, as noted, that not even Continental questioned my fairness until many months after the Commission's decision, with my participation, on the substantive price fixing question involved in the matter. If Continental did not consider me biased on that crucial question—and, indeed, does not allege I am biased now—I can see no reason why I should now withdraw from participation in the Commission's decision on the much narrower jurisdictional question remaining before it.

ORDER DENYING MOTION TO DISQUALIFY

Respondent Continental Baking Company, by motion filed October 21, 1964, has requested that Chairman Dixon withdraw from participation in this proceeding or, in the alternative, that the Commission determine that he be disqualified from any consideration or participation in this proceeding. On November 4, 1964, Chairman Dixon filed with the Commission a memorandum denying existence of any grounds for his disqualification from participation in this proceeding. As was stated in *American Cyanamid Company, et al.*, F.T.C. Docket No. 7211, Order Denying Motions to Disqualify, December 20, 1961:

Under the Commission's practice, disqualification is treated as a matter primarily for determination by the individual member concerned, resting within the exercise of his sound and responsible discretion. The Commission believes this practice to be proper and consistent with the law.

In this case, as in *American Cyanamid*, no basis for departing from the normal practice has been shown. Accordingly,

It is ordered, That the motion to disqualify Chairman Dixon from participation in this proceeding be, and it hereby is, denied.

Commissioner Dixon not participating.

IN THE MATTER OF SUN OIL COMPANY

Docket 6641. Order and Opinion, Nov. 16, 1964

Order denying respondent's motion that Commissioner MacIntyre be disqualified