determinations and actions.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order, Feb. 15, 1968

Order remanding respondent's request for disclosure of certain documents to the hearing examiner to allow respondent to supplement its application.

ORDER REMANDING APPLICATION TO THE HEARING EXAMINER

The respondent has filed an application, certified to the Commission by the hearing examiner, requesting the disclosure of certain specified documents allegedly in the Commission's files. The application was filed "Pursuant to the Freedom of Information Act of 1966 and the Commission's 1967 Rules of Practice, and in light of the Hearing Examiner's and Commission's discretion to regulate discovery in adjudicative proceedings."

The Commission having considered the matter:

It is ordered, That the application for disclosure of documents be, and it hereby is, remanded to the hearing examiner with the direction to afford the respondent an opportunity to supplement the application so that, as regards such documents referred to therein which are subject to § 3.36 of the rules of practice, said application will meet the requirements of the rule. If this is done, the hearing examiner is further directed to again certify the matter to the Commission with his recommendation.

Commissioner MacIntyre not participating.

ASSOCIATED MERCHANDISING CORPORATION ET AL.

Docket 8651. Order, Feb. 16, 1968

Order remanding respondents' request for consent order procedure to hearing examiner for resubmission to Commission.

ORDER REFERRING REQUEST UNDER § 2.34(d) TO HEARING EXAMINER

Respondents, Associated Merchandising Corporation et al., have submitted a request to the Commission asking that this matter be withdrawn from adjudication pursuant to § 2.34(d) of the Commission's

Rules of Practice for the purpose of negotiating a settlement by the entry of a consent order.

Any request for withdrawal of a matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order should be in the form of a motion addressed to the hearing examiner and by him certified to the Commission with his recommendation (§ 3.22 of the Rules of Practice); accordingly, without having considered the merits of this request,

The Commission refers this matter to the hearing examiner with directions (1) to have complaint counsel respond to respondents' request and (2) to then certify the matter back to the Commission with his recommendation as to whether it should be withdrawn from adjudication for the purpose of negotiating a settlement by the entry of a consent order.

It is so ordered.

NATIONAL EXECUTIVE SEARCH, INC., ET AL.

Docket 8731. Order, Feb. 21, 1968

Order denying complaint counsel's request to file interlocutory appeal relative to the issuance of a subpoena duces tecum directed to the president of the corporate respondent.

Order Denying Permission to File Interlocutory Appeal

This matter having come on to be heard upon complaint counsel's request filed February 5, 1968, for permission to file an interlocutory appeal from the hearing examiner's ruling on the record on January 30, 1968, denying their motion requesting him to amend the prehearing order so as to provide for the issuance of a subpoena duces tecum to John W. Costello, president, National Executive Search, Inc.; and respondents' motion for permission to answer interlocutory appeal or to otherwise plead; and

It appearing that the Commission on January 26, 1968 [p. 1236 herein], issued an order directing the hearing examiner, in connection with the disputed subpoena, to modify the pretrial order to the extent appropriate under § 3.21(d) of the Commission's Rules of Practice, and to proceed accordingly; and that the examiner, on January 30, 1968, denied complaint counsel's motion to amend the pretrial order for the reason that the application at that stage of the proceeding (which was at or near the end of the presentation of complaint counsel's case-in-chief) was untimely, the hearing examiner stating on the record in this connection that he would consider the issuance of the requested subpoena at the rebuttal stage of the pro-

ceeding to the extent the door is opened by respondents on the question; and

The Commission having determined in the circumstances that the hearing examiner's ruling is limited to the stage of the proceeding at the time of the ruling relating only to the request for the issuance of a subpoena in connection with complaint counsel's case-in-chief; that as to such limited ruling complaint counsel have failed to show that it involves substantial rights and will materially affect the final decision and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice, as required by § 3.23(a) of the Commission's Rules of Practice, and that therefore the request should be denied; and having further determined that in the circumstances respondents' motion for permission to answer is moot and need not be acted upon:

It is ordered, That complaint counsel's request for permission to file an interlocutory appeal, filed February 5, 1968, be, and it hereby is, denied.

LAKELAND NURSERIES SALES CORP. ET AL.*

Docket 6666. Order, Feb. 29, 1968

Order denying respondents' request to remand case to hearing examiner to receive evidence disproving certain facts allowed in record by official notice.

ORDER DENYING REQUEST TO REMAND PROCEEDINGS TO THE HEARING EXAMINER

This matter having come on to be heard upon respondents' motion, filed February 5, 1968, requesting, pursuant to Rule 3.43(d) of the Commission's Rules of Practice, that the Commission remand the proceedings herein to the hearing examiner for the purpose of affording the respondents the opportunity to disprove certain facts as to which the hearing examiner took official notice and to offer evidence with respect to the scope of subparagraph 1 of the first paragraph of the order, which assertedly rests on the finding as to which the hearing examiner took official notice, and for a stay or extension of time for respondents to file an appeal from the initial decision pending a determination of the request here made; and upon complaint counsel's answer in opposition to respondents' motion, filed February 15, 1968; and

It appearing that the hearing examiner issued his initial decision herein on January 12, 1968, and that the respondents filed a notice of an intention to appeal therefrom; that respondents, on their appeal,

*Formerly known as Lakeland-Deering Nurseries Sales trading as Lakeland Nurseries Sales.

will have full opportunity to challenge the initial decision or any part thereof, including the scope of subparagraph 1 of the first paragraph of the order in the initial decision and the action of the hearing examiner in taking official notice of a fact or of facts; that the Commission, after hearing such appeal and upon its consideration of the whole record, will then have an opportunity to dispose of the issues and to make a determination whether or not the taking of official notice was proper and necessary; and that at such time it would be appropriate to grant to respondents, to the extent, if any, that the decision relies on official notice, the opportunity to show to the contrary; and it further appearing that respondents, by order of February 20, 1968, have been granted an extension of time from February 24, 1968, to and including March 25, 1968, within which to file their appeal from the initial decision: and

The Commission having determined that until such time as it has had the opportunity to review the issues on the whole record the remand to the examiner as requested would be premature and therefore should be denied:

It is ordered, That respondents' motion to remand this matter to the hearing examiner for the purpose of affording respondents the opportunity to disprove facts as to which the hearing examiner took official notice and to offer evidence with respect to the scope of subparagraph 1 of the first paragraph of the order contained in the initial decision be, and it hereby is, denied.

VENT-AIR LENS LABORATORIES, INC., ET AL.

Docket 8715. Order, Mar. 7, 1968

Order denying respondents' request for withdrawal of case from adjudication for consent order procedure.

Order Denying Request to Withdraw Matter from Adjudication

The hearing examiner having certified to the Commission, on February 21, 1968, the motion of respondents to withdraw the matter from adjudication for the purpose of negotiating a consent settlement by the entry of a consent order; and

The Commission having determined that respondents have not shown exceptional and unusual circumstances as required by § 2.34(d) of the Commission's Rules of Practice and that therefore the matter should not be withdrawn from adjudication:

It is ordered, That respondents' request to withdraw this matter from adjudication be, and it hereby is, denied.

It is further ordered, That any further motion in this matter seeking withdrawal from adjudication be filed jointly by complaint counsel and respondents and that it contain an assurance that counsel have every reason to believe that consent negotiations will result in an order acceptable to the Commission.

UNIVERSE CHEMICALS, INC., ET AL.

Docket 8752. Order, Mar. 13, 1968

Order directing respondents and complaint counsel to file affidavits relative to the question of holding hearings in more than one place.

ORDER DIRECTING FILING OF SUPPLEMENTAL AFFIDAVITS

Respondents, on February 29, 1968, filed a motion requesting permission to file an interlocutory appeal, under Section 3.23(a) of the Commission's Rules of Practice, from the hearing examiner's order filed February 16, 1968, granting in part and denying in part complaint counsel's motion for hearings in more than one place. As a result of the hearing examiner's order, hearings are scheduled to be held in Chicago, Illinois, Evansville, Indiana, Omaha, Nebraska, and Minneapolis, Minnesota. Complaint counsel, on March 5, 1968, filed an answer opposing respondents' request.

Respondents argue that, because they operate an assertedly small business enterprise which requires their presence for its operation, the scheduling of hearings in more than one place would be financially oppressive to them.

The hearing examiner, is his order ruling on the request for scheduling hearings at different locations, stated that he had taken into account not only the convenience of respondents but the witnesses to be called as well. He determined that respondents, in their objections, did no more than suggest that the proposed hearings would be inconvenient and involve some additional expense; that there was no showing that the proposed schedule was unduly burdensome or otherwise prejudicial. On the other hand, he found that there would be twenty-seven witnesses called who would need to be transported from various locations if the hearing was held only in Chicago and that the inconvenience and expense involved in such transportation would outweigh the inconvenience and expense to respondents.

Section 3.41(b) of the Commission's Rules of Practice provides, in pertinent part, as follows: "Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place and shall continue without suspension until concluded. Consistent with the

requirements of expedition, the hearing examiner shall have the authority to order brief intervals of the sort normally involved in judicial proceedings and, in unusual and exceptional circumstances for good cause stated on the record, he shall have the authority to order hearings at more than one place." The objective of this provision is to avoid unnecessary delay in the conduct of adjudicative proceedings. It plays an important part in effectuating "the policy of the Commission that, to the extent practicable and consistent with requirements of law, such proceedings shall be conducted expeditiously. In the conduct of such proceedings the hearing examiner and counsel for all parties shall make every effort at each stage of a proceeding to avoid delay." (Section 3.1.) Under the Commission's Rules hearings at more than one place are the exception, not the rule, and must be affirmatively justified, where so ordered by the hearing examiner, by "unusual and exceptional circumstances for good cause stated on the record."

In order to determine whether the hearing examiner's order in this matter meets the standards required by Section 3.41, the Commission finds that additional specific information is required. The assertions of both parties, on the basis of which the hearing examiner entered his order, were too generalized. Complaint counsel are directed to file with the Secretary of the Commission, within five days after service of this order upon them, a supplemental affidavit specifying in detail the cost or difficulties which would be involved in holding the hearings in only one place, together with any other "unusual and exceptional circumstances" asserted to constitute good cause for the hearing examiner's order. Similarly, respondents shall, within the same period, file with the Secretary a supplemental affidavit specifying in detail the nature and extent of the alleged financial and other burdens upon them if the hearing examiner's order should be upheld.

It is so ordered.

By the Commission, without the concurrence of Commissioner MacIntyre.

ALL-STATE INDUSTRIES OF NORTH CAROLINA, INC., ET AL.

Docket 8738. Order and Opinion, Mar. 18, 1968

Order denying respondents' motion to dismiss complaint on grounds that the Chairman had prejudged the case and that complaint counsel was conducting post-complaint investigation.