SCHOOL SERVICES, INC., ET AL.

Docket 8729. Order and Memorandum, May 14, 1968

Order denying the respondents' motion that the Chairman be disqualified from hearing this case.

MEMORANDUM OF CHAIRMAN DIXON

MAY 14, 1968

Respondents, School Services, Inc., et al., by motion filed May 3, 1968, have requested me to withdraw from further participation in this proceeding, or in the alternative that the Commission determine that I be disqualified from such further participation.

The complaint in this matter charges, in part, that respondents have falsely represented that they offer a course of instruction that qualifies students to be airline stewardesses and that Cinderella Career College and Finishing School is a college. In his initial decision issued on January 26, 1968 [74 F.T.C. 920, 926], the hearing examiner found that the evidence does not sustain the charges and ordered that the complaint be dismissed. The case is now pending before the Commission upon appeal of counsel supporting the complaint.

On March 15, 1968, I delivered an address before the Government Relations Workshop of the National Newspaper Association. Respondents, in their motion, quote the following excerpt from that speech:

> If really effective brakes are to be applied, they will have to be applied by business itself. Government can throw an assist, but whether our system of free competitive enterprise can survive depends on the vigor with which reputable business can serve the consumer. Granted that this is a very broad generalization, it is nonetheless valid. Consider, for example, how it fits the newspaper business. What kind of vigor can a reputable newspaper exhibit? The quick answer, of course, pertains to its editorial policy, its willingness to present the news without bias. However, that is only half the coin. How about ethics on the business side of running a paper? What standards are maintained on advertising acceptance? What would be the attitude toward accepting good money for advertising by a merchant who conducts a "going out of business" sale every five months? *What about carrying ads that offer college educations in five weeks,* fortunes by raising mushrooms in the basement, getting rid of pimples with a magic lotion, *or becoming an airline's hostess by attending a charm school?* Or, to raise the target a bit, how many newspapers would hesitate to accept an ad promising an unqualified guarantee for a product when the guarantee is subject to many limitations? Without belaboring the point, I'm sure you're aware that advertising acceptance standards could stand more tightening by many newspapers. *Granted that newspapers are not in the advertising policing business, their advertising managers are savvy enough to smell deception when the odor is strong enough.* And it is in the public interest, as well as their own, that their sensory organs become more discriminating. The Federal Trade Commission, even where it has jurisdiction, could not protect the public as quickly. (Emphasis added by respondents.)

It is respondents contention that the emphasized references to advertisements offering "college educations in five weeks" and "becoming an airline's hostess by attending a charm school" were "unmistakenly an allusion to the allegations in the present case." They request that I withdraw for the reason that my remarks reflect prejudgment of the issues or, if I have not prejudged the issues, that I should withdraw to assure the appearance of complete fairness in this proceeding.

In the first place, respondents' assertion that the advertising representations used as examples in my remarks "unmistakenly" allude to the allegations in this matter is completely without foundation. Indeed, respondents make no attempt to show any correlation between the charges before the Commission and my remarks. My reference was to claims for a college education in five weeks, but there is no allegation in the complaint that respondents' courses are limited to such a time period. In fact, the examiner's decision, which issued before my remarks were made, states that respondents' courses extend for an appreciably longer period of time. The reference to advertising representations that a person may become an airline hostess by attending a charm school is likewise not related to any questions involved in this case at the time my remarks were made. The complaint is directed in part at the respondents' alleged advertising claims that one of their specific courses of instruction qualifies students to be airline stewardesses. The issue before the Commission, however, is not the truth or falsity of such claim [1] but whether or not respondents have made the alleged representation. And this, obviously, is not a matter to which my remarks were directed.

In referring to the advertising representations mentioned in my remarks, I had no particular case in mind. I merely listed certain principles in advertising which, based on my judgment and experience, would indicate a possible breach of acceptable standards.

In my opinion, this matter falls squarely within the holding of the Supreme Court in the *Cement Institute* case.[2] In that case, the Commission issued a formal complaint based on an earlier investigation of the basing point system as used in the cement industry. Prior to complaint, the Commission had reported to Congress that the industry's basing point system was a price fixing device and was unlawful under the Sherman Act and the Federal Trade Commission Act. In denying respondents' motion for disqualification of the Commission, the Supreme Court stated that:

> 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

[1] The parties stipulated that none of respondents students, merely because they had completed a course of instruction in Cinderella Career College & Finishing School, qualify for a job as an airline stewardess (Initial Decision, p. 40) [74 F.T.C. 920, 958–959].

[2] *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948).

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 both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court. (333 U.S. at 702–703.)

It is established law that the kind of personal bias that requires disqualification is that which has led to an irrevocably closed mind on the issues. On this point, the Supreme Court in the *Cement Institute* case has stated that:

In the first place, the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities. (333 U.S. at 701.)

The court of appeals in commenting on this question of prejudice in *Eisler* v. *United States*, 170 F. 2d 273 (D.C. Cir. 1948) has stated that "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."

The issues in this case have been fully litigated and the record is before us. My decision on these issues will be based solely on the evidence in this record. If my decision is adverse to respondents, and I am in the majority, respondents will have an absolute, statutory right to test, in the courts, whether the majority's findings are supported by evidence.[3]

As to the "appearances" contention in respondents' motion, I have stated in my memorandum refusing to withdraw from participation in *Bakers of Washington*, Docket 8309 (November 4, 1964) [66 F.T.C. 1562, 1566], that this principle "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." The Supreme Court's decision in the *Cement Institute* case, *supra*, makes it clear that an administrator's duty 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.

[3] Section 5(c) of the Federal Trade Commission Act provides in part that any party "required by an order of the Commission to cease and desist . . . may obtain a review of such order" in the appropriate court of appeals. "Upon such filing of the petition and transcript the court . . . shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission. . . . The findings of the Commission as to the facts, *if supported by evidence*, shall be conclusive" (emphasis added).

As I further pointed out in my memorandum in the *Bakers of Washington* matter, this principle has been summed up in the statement of a recent commentator that "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." [4]

I can state without reservation that I have scrupulously searched my conscience and that I have not prejudged the issues in this case, nor do I harbor any bias or prejudice against the respondents. My decision will be based entirely on the facts contained in the record. Accordingly, it is my decision not to withdraw from participation in this proceeding.

I shall not participate in any deliberation or decision by the Commission on respondents' alternate request.

Order Denying Motion to Disqualify

Respondents, School Services, Inc., et al., by motion filed May 3, 1968, requested that Chairman Dixon withdraw from further participation in this proceeding, or, in the alternative, that the full Commission disqualify Chairman Dixon. Chairman Dixon, for the reasons stated in the attached memorandum, has decided not to withdraw from participation in any further proceedings in this matter.

A tribunal which is asked to rule on the ability of one of its own members to make an objective and impartial judgment faces a most difficult and delicate responsibility. This responsibility cannot be treated lightly.

Traditionally, the Commission has viewed requests for disqualification as a matter primarily to be determined by the individual member concerned, leaving it within the exercise of his sound and responsible discretion. This is only proper and consistent with the law and no basis for departing therefrom has been demonstrated in the instant proceeding. Accordingly,

It is ordered, That the motion for disqualification of Chairman Dixon be, and it hereby is, denied.

By the Commission, with Chairman Dixon and Commissioner Elman not participating.

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[4] Comment "Prejudice and the Administrative Process," 59 *Northwestern Univ. L. Rev.* 216, 233–234 (May–June 1964).

SWINGLINE INC.

Docket 8759. Order, May 24, 1968

Order denying respondent's request that proceeding be withdrawn from adjudication.

Order Denying Request to Withdraw Proceeding From Adjudication

This matter is before the Commission upon the hearing examiner's certification of May 10, 1968, of respondent's request to certify a motion to withdraw the proceeding from adjudication. The hearing examiner recommends that the motion be denied.

Although § 2.34(d) of the Rules of Practice and Procedure provides that the consent order procedure is not available after complaint has issued, it also provides that the Commission, upon request, may in exceptional and unusual circumstances and for good cause shown withdraw a proceeding from adjudication in order to negotiate a consent order.

In its motion respondent states that since the issuance of the complaint it has obtained new counsel and it now desires the opportunity to negotiate a consent order. In addition, respondent claims that changed circumstances warrant withdrawal of the matter from adjudication.

Respondent has not met the exceptional and unusual circumstances requirement nor shown good cause which would warrant withdrawal of the proceeding from adjudication. It should be noted that prior to the issuance of the complaint an attempt was made to settle the matter by entry of a consent order to cease and desist. Moreover, as a general rule the Commission will not entertain a request to withdraw a proceeding from adjudication unless it is accompanied by at least a concrete proposal of settlement by respondent. In the instant proceeding, respondent has done no more than express a desire to dispose of the matter through negotiation of a consent order without even submitting to the Commission, for its consideration, a proposed order to cease and desist.

For these reasons we agree with the hearing examiner that the requirements of § 2.34(d) for withdrawal of the proceeding from adjudication have not been met. Accordingly,

It is ordered, That the request to withdraw the proceeding from adjudication be, and it hereby is, denied.