

In conclusion, we hold that petitioning respondents have not justified their request for reconsideration of the Commission's modified order issued herein. Accordingly,

It is ordered, That the petition of respondents, Lester S. Cotherman and William F. Sullivan, for reconsideration of the Commission's modified order herein be, and it hereby is, denied.

It is further ordered, That the request of the petitioning respondents for an oral hearing on their petition for reconsideration be, and it hereby is, denied.

AMERICAN BRANDS, INC.

Docket 8799. Order and Opinion, May 1, 1970

Order granting complaint counsel's motion to quash or limit subpoenas issued by hearing examiner to an attorney and the Secretary of the Commission.

OPINION OF THE COMMISSION

This matter is before the Commission on complaint counsel's appeal from the hearing examiner's denial of a motion to quash or limit the subpoenas *duces tecum* issued on February 18 and March 4, 1970, against Donald K. Tenney, an attorney on the Commission's staff, and Joseph W. Shea, Secretary of the Commission, respectively.

The subpoenas direct the production of documents by Messrs. Tenney and Shea and require Mr. Tenney to appear for oral deposition. The specifications of both subpoenas cover—

All memoranda and other documents passing between the Federal Trade Commission and its staff and all memoranda and other documents reflecting oral communications between the Commission and its staff relating to the Commission's letter of October 8, 1969, to Stockton Helffrich of the National Association of Broadcasters Code Authority.

The Commission's complaint herein, filed on September 29, 1969 [79 F.T.C. 255], charges respondent with engaging in unfair, misleading and deceptive advertising with respect to the tar content of its Pall Mall brand of cigarettes. Prior to filing its formal complaint, but after informing respondent on May 20 of its intention to do so, the Commission, by letter of September 2, 1969, was contacted by the Code Authority of the National Association of Broadcasters which asked whether the Commission had formulated a policy respecting the use of such words as "low," "lower," and "reduced" in describing the tar and nicotine content of cigarettes. The Commission was further advised that the Code Authority would value any guidance the Commission could offer on the tar and nicotine question.

In response to this letter, the Commission sent a letter on October 8, 1969, to Mr. Stockton Helffrich, Director of the Code Authority, stating that the use of "low" and "less" or similar words when describing tar and nicotine content, create an imprecise picture, which, absent a full and fair disclosure, could lead to a mistaken conclusion that the advertised brand is lower in tar and nicotine than many other brands. The Commission also said that the degree of imprecision created would vary according to both the context of the representation as well as the actual tar and nicotine content of the cigarettes advertised, but that imprecision could almost always be avoided if the representation is accompanied by clear and conspicuous disclosure of the following:

1. The tar and nicotine content in milligrams of the smoke produced by the advertised cigarette;
2. The tar and nicotine content in milligrams of the lowest and highest yield domestic cigarettes; and
3. If the tar and nicotine content of the advertised cigarette is compared to any other specific cigarette, the brand name and tar and nicotine content in milligrams of the smoke produced by such other cigarette.

The Commission added a further cautionary note that care should be taken to base all representations on recent test results. Finally, the Commission told the Code Authority that because of the substantial public interest in the matter, this exchange of correspondence was to be made public.

The subpoenas, which are the subject of this appeal, have been sought in connection with two defenses respondent proposes to make on the basis of the letter to the Code Authority: *first*, that the letter shows that the Commission has prejudged issues raised by the complaint; and *second*, that the letter indicates that there may have been *ex parte* communications between the Commission and its staff in violation of the Administrative Procedures Act and the Commission's Rules of Practice.

As issued by the examiner, the subpoenas cover all internal communications passing between the Commission and its staff "relating" to the letter of October 8. Respondent concedes that it intends to use the subpoena to determine if there were any intra-agency communications on the subject of the Code Authority letter *even prior to the date complaint issued* which would bear on the alleged issue of prejudgment.¹ Respondent also proposes to pursue under this subpoena the entire process behind the formulation and promulgation of the October 8 letter including the extent and identity of staff involvement.²

¹ Respondent's Answer Brief, pp. 36-38.

² *Id.* at 24-25.

We believe the examiner erred in issuing a subpoena of this scope.

While respondent professes not to argue the merits of the prejudgment charge at this time, respondent acknowledges that its discovery application rests on the assertion that the October 8th letter is *prima facie* evidence of prejudgment and, therefore, full discovery of all the facts relating to the letter is required.³ We do not agree that respondent has advanced a justification for departing from the general rule prohibiting scrutiny of the reasoning, mental processes, or motivation of either judges or administrators. *United States v Morgan*, 313 U.S. 409 (1941).

All that respondent has shown is that the Commission told the Code Authority that the degree of imprecision in cigarette advertising would vary according to the particular advertisement and according to the actual tar and nicotine content of the cigarette. The Commission then advised the Code Authority of language which could be used to avoid whatever imprecision may exist in such advertising.

This statement by the Commission proves no more than an underlying concern for precision in advertising in an area affecting the public health. That the Commission chose to express that concern in a letter to the Code Authority creates no more of a *prima facie* showing of prejudgment than would an economic report reflecting the same viewpoint, or a statement of enforcement policy, or a legislative recommendation. Indeed, the charge of administrative misconduct would be more persuasive if the Commission had done what apparently respondent is suggesting that it should have done—remained silent when asked by the Code Authority for guidance.⁴ The failure of the Commission to propose specific and clear standards adequate to the needs of advertisers, broadcasters, and the general public would be tantamount to an improper and unauthorized abrogation of one of its most positive and constructive roles. Moreover, once having made a decision to issue a complaint, the Commission is not required to restrict its role in making “explicit the unexpressed standards of fair dealing”⁵

³ *Id.* at 5.

⁴ In *Lehigh Portland Cement Co. v. Federal Trade Commission*, 291 F. Supp. 628 (E.D. Va. 1968), *aff'd* 1969 Trade Cases ¶ 72,950 (4th Cir. 1969), after a complaint was filed questioning the legality of Lehigh's vertical ready-mix concrete acquisitions, the Commission did the following: (1) issued a news release respecting its concern over the increasing trend of vertical mergers in cement; (2) solicited the views of interested persons on this subject; (3) published an economic report on the subject; and (4) publicized an enforcement policy. Answering the charge of prejudgment, the court said “The Commission not only had the right but the duty to institute and conduct an industry-wide investigation re vertical acquisitions in the cement and ready-mix concrete industries. See Section 6 and other provisions of the Federal Trade Commission Act, 15 U.S.C. § 41 et seq.” 291 F. Supp. at 631.

⁵ *Federal Trade Commission v. Standard Educ. Society*, 86 F.2d 692, 696 (2d Cir. 1936), *rev'd* on other grounds, 302 U.S. 112 (1937).

by precipitously abandoning the alternative methods of defining policy which are ordinarily available to it.⁶

Recognizing the need to preserve maximum administrative flexibility, the holdings are almost uniform that expressions of a point of view on policy issues, such as the letter sent to the Code Authority, create no presumption that the agency has irrevocably closed its mind on a particular case, and is thereby disqualified from ruling on the merits after all the facts are presented in a record. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948)⁷; Davis, Administrative Law Treatise, Section 12.01 (1958). In sum, we have been presented with no more than a bare charge of prejudice in a situation in which the Commission's action is fully consistent with its ordinary and regular processes and does not indicate any judgment concerning any particular case before it. *Cf. Singer Sewing Machine Co. v. NLRB* 329 F.2d 200 (4th Cir. 1964).⁸ Consequently, there is no warrant for permitting respondent to engage in a general probe of the agency to determine how it reached its decision either to issue the complaint or to send the letter to the Code Authority.

Since there is no basis for a charge that the members of the Commission have prejudged the factual issues raised by the complaint, it would be an abuse of the discovery procedures to allow this proceeding to be delayed for that purpose. However, respondent also alleges that the Commission's letter to the Code Authority dated October 8, 1969; (ten days after issuance of the complaint) indicates

⁶ Respondent has advanced no authority for the proposition that the choice of adjudication precludes the supplemental use of other more flexible powers. Such a contention would be without merit. "It is well settled that the exercise of dual functions by an administrative agency does not constitute a deprivation of due process. See *Pangburn v. Civil Aeronautics Board*, 311 F.2d 349 (1st Cir. 1962) and cases cited therein." *Lehigh Portland Cement Co. v. Federal Trade Commission*, 291 F. Supp. 628, 632 (E.D. Va. 1968). See, also, Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 1263, 1296 (1962). "Although the case-by-case method should not be abandoned even if that were possible it should be supplemented by greater use of two devices—policy statements and rulemaking. * * *" (Emphasis added).

⁷ In *Cement Institute* the Commission had issued a complaint challenging the legality of a multi-basing point system. Respondent based its charge of prejudice upon Commission reports made to Congress and the President which made it clear that long before the filing of the complaint the Commission had expressed the opinion that the operation of a multi-basing point system was the equivalent of price fixing in violation of the Sherman Act. In ruling on this charge, the court specifically said it was deciding "on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations." 333 U.S. at 700. Nevertheless, the court held that the Commission was not disqualified because there was no proof that the minds of the Commissioners were irrevocably closed; moreover, if the Commission were disqualified neither the Commission nor any other government agency could act upon the complaint. The court pointed out that "judges frequently try the same cases more than once and decide identical issues each time, although these issues involve issues of both law and fact" and that the Commission "cannot possibly be under stronger constitutional compulsions in this respect than a court." 333 U.S. at 703.

⁸ *Singer* involved substantially more than a self-serving charge of *ex parte* communication or prejudice. There was enough evidence of improper activities by a field examiner to make it reasonable to conclude (i.e., a *prima facie* case), that there had been misconduct, and therefore discovery was permitted. The court was simply reasoning by analogy to the examination of jurors when substantial evidence of their misconduct has been uncovered. See, e.g., *Clark v. United States*, 289 U.S. 1 (1933).

that there may have been some improper *ex parte* communication to the Commission in violation of Section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 554(d) and Section 4.7 of the Commission's Rules of Practice.

Of course, the practice of the Commission, like that of other administrative agencies, in relying upon the recommendations of its staff in determining whether to issue a complaint, is clearly lawful and essential to the proper and efficient exercise of the complaint-issuing power.* "Ex parte" communications between the Commission and its staff in this case prior to September 29, 1969, the date of the complaint, could in no sense be improper or the subject of discovery. However, we believe that preservation of public confidence in the integrity of the Commission's proceedings will be served in this case by showing our normal procedures which were followed here.

No significance attaches to the fact that the October 8, 1969, letter was dated ten days after the complaint was issued. A draft of the letter was forwarded to the Commission by the Bureau of Deceptive Practices on September 23, 1969, six days *before* complaint issued. The Commissioner to whom the matter was assigned circulated the staff draft with a recommendation that it be approved, with certain minor revisions. No Commissioner objected, and the proposed letter was approved and dispatched in due course on October 8, 1969, by the Secretary. There were no communications, written or oral, between any staff member and any member of the Commission regarding this letter between September 23, 1969, when it was submitted to the Commission by the staff, and October 8, 1969, when it was mailed by the Secretary.

So far as post-October 8, 1969, communications are concerned, the Commission instructed the General Counsel and the Secretary to review all matters submitted to the Commission after September 29, 1969, bearing in any way on the subject of cigarette advertising. Such review has been made, and it revealed no *ex parte* communications from any employee engaged in the performance of investigative or prosecuting functions which pertained in any way to the merits of this case or to that of any factually related proceeding. There is, however, one communication dated December 1, 1969, respecting tar and nicotine advertising. Because this memorandum from the staff refers to the October 8, 1969, letter to the Code Authority, it is arguably related to the charge of improper *ex parte* communications made by respondents. While we believe that respondents are not entitled to discovery of such communication because it is clearly not forbidden by the Administrative Procedure Act or the Commission's

*It is well recognized that the Commission's practice of reviewing the recommendation of subordinate employees *prior* to the decision to initiate a complaint is clearly within the exceptions to Section 5(c) of the Administrative Procedure Act. *Federal Trade Commission v. Cinderella Career and Finishing Schools Inc., et al.*, 404 F. 2d 1308 (D.C. Cir. 1968).