

(5) If on motion under this rule a summary decision is not rendered upon the whole case or for all the relief asked and a trial is necessary, the hearing examiner shall make an order specifying the facts that appear without substantial controversy and directing further proceedings in the action. The facts so specified shall be deemed established.

Our Rule 3.24 was formulated on the basis of Rule 56 of the Federal Rules of Civil Procedure. Part (d) of Rule 56, the counterpart to Commission Rule 3.24(a)(5), has been interpreted to apply where judgment was not sought upon the whole case.¹ Courts often have distinguished a partial summary decision, which is an interlocutory order not final for appeal purposes, from a summary decision on the whole case, which is a final judgment.²

Rule 3.24 clearly does not provide for an initial decision on only part of the issues. In filing this initial decision, the hearing examiner has disregarded the procedures of Rule 3.24(a)(5) for handling partial summary decisions.

We, therefore, cannot consider this document an initial decision under Rule 3.24. Where a summary decision does not dispose of all issues, the decision must be framed in the form of an interlocutory order and must direct further proceedings in accord with Commission rules. Accordingly,

It is ordered, That the initial decision of the hearing examiner filed herein on November 17, 1970, be, and it hereby is, vacated; and

It is further ordered, That the proceedings be, and they hereby are, remanded to the hearing examiner for disposition in accord with Commission rules and this opinion.

EASTERN DETECTIVE ACADEMY, INC., ET AL.

Docket 8793. Order and Opinion, Jan. 5, 1971

Order denying respondent's request for assignment of counsel because of his financial inability to hire attorney.

OPINION AND ORDER DENYING MOTION FOR ASSIGNMENT OF COUNSEL

By letter dated December 21, 1970, which has been treated as a motion, respondents have asserted financial inability to retain counsel

¹ "In other words, interpreting paragraph (d) as a whole, it appears plain that a summary judgment is not contemplated or authorized for any portion of a claim less than the whole." *Biggins v. Olmer Ironworks*, 154 F.2d 214, 216 (7th Cir. 1946). (Emphasis supplied.)

² *Hagberg v. City of Sioux Falls*, 281 F. Supp. 460 (S.D.S.D. 1968); *Driver v. F. A. Mitchell Co.*, 35 F.R.D. 226 (E.D. Pa. 1964); *Metal Coating Corporation v. Baker Manufacturing Corporation*, 227 F. Supp. 529 (W.D. Wis. 1964); *New Hampshire Fire Insurance Co. v. Perkins*, 30 F.R.D. 382 (D. Del. 1962); *Coffman v. Federal Laboratories, Inc.*, 171 F.2d 94 (3d Cir. 1948) *cert. denied*, 336 U.S. 913 (1949).

and have requested the Commission to assign counsel for the purpose of prosecuting an appeal in this matter, which is set for oral argument on January 6, 1971.¹ This question has been raised a number of times in the instant proceedings.

The issue of financial inability to retain counsel was first raised by the individual respondent herein on January 26, 1970, three months after the close of evidentiary hearings. In this letter, he requested dismissal of the action rather than appointment of counsel. In an order issued January 29, 1970, the hearing examiner denied this motion for dismissal, but stated that "[i]n the event respondents do wish to have counsel assigned to represent them, they should submit a further application setting forth in detail such facts as will support their assertion that they are financially unable to retain counsel, including copies of financial statements, income tax returns, and other similar documents from which an appraisal of their financial condition may be made." The examiner set February 9, as the date by which respondents were required to submit financial data.

In a letter dated February 10, 1970, respondent asserted to the hearing examiner that he had "attempted to obtain the services of an accountant to prepare a financial statement," but had been unable to do so. He also requested an extension of time within which to file proposed findings. The examiner denied this request on February 17, stating in passing that the respondent had "elect[ed] not to request an assignment of counsel." In a letter received by the Secretary's office on March 13, 1970, respondent complained in general terms that he had not been afforded an adequate opportunity to seek assigned counsel, and that he had been denied a fair hearing. In response to this letter, the Commission on April 6, 1970, vacated the initial decision stating "it is not clear in the particular circumstances that the hearing examiner provided a full opportunity for respondents (a) to establish their asserted financial inability to pay counsel and (b) to file their proposed findings and conclusions." The matter was returned to the examiner for further consideration of these issues.

On April 6, the examiner entered an order which stated, in part:

If respondents still desire the assignment of counsel, they should submit a new application therefor, on or before May 1, 1970. Such application should consist of (1) a sworn narrative statement setting forth in detail the facts on which they base their assertion that they are unable to pay for counsel to represent them and (2) appropriate supportive documentary evidence consisting

¹ The motion is made on behalf of both the individual and corporate respondents, who have been represented throughout these proceedings by the individual respondent Leven, appearing *pro se*. However, since the Commission's recent Policy Statement on Counsel for Indigent Respondents makes it clear that the right to assigned counsel in Commission proceedings extends only to natural persons and partnerships, this opinion will deal with the motion only as it pertains to the individual respondent.

of financial statements, income tax returns and such other documents as will permit an objective appraisal of their financial ability or lack of ability to retain counsel. So that there will be no misunderstanding, the examiner wishes to make it clear that respondents are not required to retain an accountant to prepare a special financial statement. Any financial statement which may have been prepared during the past year will suffice. If there are no such statements in existence, respondents need not submit any financial statement, except that if they conclude it would be to their advantage to submit a currently-prepared financial statement they may do so.

The examiner's order also provided that "[i]n the event respondents elect not to submit a request for the assignment of counsel, * * * but prefer to submit * * * informal findings without the use of record references and legal terminology or references, such findings and conclusions shall be submitted on or before May 1, 1970."

Respondent replied in a letter dated April 17, 1970, which made no effort to revive or press the request for assignment of counsel; instead, his letter was devoted to the claim that the short period provided for filing proposed findings demonstrated the examiner's bias, and he again moved to have the complaint dismissed. The examiner certified this motion to the Commission on April 30, 1970. On May 13, the Commission issued an order [77 F.T.C. 1628] denying this motion and reinstating the initial decision which had been vacated. In the opinion accompanying this order, the Commission noted that respondents "make no further claim regarding the assignment of counsel, the principal purpose for the return of the proceeding to the examiner, although they were given ample opportunity to do so." No further communications were received from the respondent prior to the present motion, which was received in the Secretary's office on December 22, fifteen days before the appeal was scheduled for oral argument.

As the foregoing summary of the record indicates, respondent has been provided with numerous opportunities to demonstrate that he is financially unable to retain counsel, and was expressly invited to do so in a form that would be non-technical and convenient to him. He has neither produced nor proffered any concrete, particularized facts in support of his claim, and he has not provided any reason or justification for his failure to press this claim until the eve of oral argument.

In these circumstances, we conclude that the respondent's due process rights have been fully safeguarded, and that there is no basis for further delaying final adjudication of this matter.

Having considered all of the views and arguments contained in all of the briefs submitted by respondents and complaint counsel in connection with this matter,

It is ordered, That respondent's motion for assignment of counsel be, and hereby is, denied.

CROWELL-COLLIER PUBLISHING COMPANY, ET AL.

Docket 2751. Order and Opinion, Jan. 21, 1971

Order denying respondent's petition that case be reopened for purpose of suspending effective date of Paragraph 3 of order.

OPINION OF THE COMMISSION

This matter is before the Commission upon a pleading of respondents entitled, "Motion to Reconsider Paragraph 3 of Order (or Petition to Reopen Proceeding)." The Commission is asked to suspend the effective date of Paragraph 3 of the order to cease and desist presently in effect pending Commission consideration and determination of proposed Rule (g) in its pending rulemaking proceeding applicable to door-to-door sellers. Respondents state that the Commission may regard its pleading as a "Petition for Reopening" due to changed conditions, under Subpart H of the Commission's Rules of Practice for Adjudicative Proceedings.

The Commission's order to cease and desist, issued on September 30, 1966 [70 F.T.C. 977], was made effective against respondents on February 4, 1969 [75 F.T.C. 241]. The order was affirmed by the United States Court of Appeals for the Sixth Circuit on May 27, 1970, *sub nom., P. F. Collier & Son Corporation v. Federal Trade Commission*, 427 F.2d 261 (1970). Certiorari was denied by the Supreme Court on November 23, 1970 [400 U.S. 926], thus making the order final. Under these circumstances, we deem it appropriate to treat respondents' pleading as a petition to reopen the proceeding, to be considered under Rule 3.72(b) of the Commission's Rules of Practice for Adjudicative Proceedings.

Paragraph 3 of the Commission's order requires that respondents, in connection with the direct or door-to-door sale and distribution of merchandise, cease and desist from:

Failing to disclose at the time admission is sought into the home, office or other establishment of the prospective purchaser or purchaser that the person making the call is respondent's salesman and is soliciting the sale of respondent's merchandise.

This provision was included in the Commission's original order to cease and desist which was issued on September 30, 1966, but not made effective until the Commission's final order issued February 4, 1969. Respondents at that time had argued to the Commission that Paragraph 3 was improper and should not be included in the order. Among the contentions presented were that this proscription had not been imposed in prior cases where allegedly similar practices had been found and that respondents were being discriminated against and were being

subjected to an unduly harsh requirement. The Commission considered respondents' contentions but, for reasons fully stated in its opinion, concluded that the inclusion of the paragraph was "fully appropriate" and it declined to modify the order.

Respondents, on appeal to the Sixth Circuit, specifically questioned the inclusion of Paragraph 3 in the order to cease and desist. The Court rejected respondents' arguments, stating:

The fact that the orders issued against Crowell-Collier's competitors were insufficient does not mean that the order in this case must also be. Such a situation would afford the basis for an argument that Colliers' competitors should have been dealt with likewise, not that the petitioners should escape. *Heavenly Creations, Inc. v. Federal Trade Commission*, 339 F. 2d 7 (2d Cir. 1964); *Exposition Press, Inc. v. Federal Trade Commission*, 295 F. 2d 869 (2d Cir. 1961); *International Art Company v. Federal Trade Commission*, 109 F.2d 393 (7th Cir. 1940); *National Candy Company v. Federal Trade Commission*, 104 F.2d 999 (7th Cir. 1939). The purpose of Commission orders is not to put those employing deceptive acts or practices *in pari delicto* with each other [427 F.2d at 276].

Respondents filed a petition for rehearing, limited to the one issue—whether Paragraph 3 of the order should be affirmed. On July 14, 1970, the Sixth Circuit denied respondents' petition. Respondents petitioned for writ of certiorari, again contending that Paragraph 3 of the order should be deleted. The Supreme Court denied certiorari on November 23, 1970.

From the foregoing, it is evident that respondents have fully litigated, both before the Commission and the courts, the propriety of Paragraph 3 of the order. All of the contentions raised by respondents in their present pleading, but one, were previously presented to the Commission in the course of adjudicating this case. Similarly, they were all presented to the Sixth Circuit, which affirmed the Commission, and to the Supreme Court, which denied certiorari. The one new contention now made is that there are "changed conditions" in that the Commission has initiated a proceeding for the promulgation of a trade regulation rule concerning door-to-door sales and that Paragraph (g) of the proposed rule is similar to Paragraph 3 of the order to cease and desist.

This allegation falls far short of suggesting changed conditions of fact or law necessary to meet the requirements of Rule 3.72(b). The Commission's order was issued and affirmed by the Court notwithstanding respondents' allegation that Paragraph 3 was discriminatory and unduly burdensome in view of an absence of comparable proscriptions outstanding against their competitors. Certainly, consideration by the Commission of a rule which, if adopted, would impose similar requirements upon respondents' competitors cannot be relied upon to constitute such a change as would justify suspending the effectiveness