hearings pending appeal be, and they hereby are, denied.

Chairman Kirkpatrick not participating.

J. J. NEWBERRY CO.

Docket 8849. Order, May 15, 1972

Order returning to the hearing examiner for further proceedings consistent with views expressed in the order, the certification of respondent's application for a subpoena *ad testificandum* directed to a Commission official.

Order Ruling on Hearing Examiner's Certification

This matter is before the Commission upon the hearing examiner's order, filed April 27, 1972, certifying to the Commission respondent's application for subpoena *ad testificandum* directed to Edward B. Finch, Assistant Director for Textiles and Furs in the Commission's Bureau of Consumer Protection, and complaint counsel's answer in opposition to the application.

Respondent, in its application, states that it is its intention to examine Mr. Finch with respect to the following areas of inquiry:

1. Whether the Federal Trade Commission (and/or the Bureau or Division of the Commission responsible for enforcement of the Flammable Fabrics Act) had in effect, during the period May 1, 1969 through July 14, 1971, any formal or informal policy or policies (and/or so-called 'battle plan'), not published in the Federal Register, concerning the enforcement of the Flammable Fabrics Act; and in particular, whether there was any such policy with respect to retailers who purchased textile products subject to the Act from domestic suppliers.

2. Whether an exception to the aforesaid policy or policies was made with respect to respondent; and if so, the reasons for such an exception.

3. If there was no policy of the nature described in paragraph 1 above, information as to the recommendations made by the Bureau or Division responsible for the enforcement of the Flammable Fabrics Act, as to whether the Commission should institute a formal proceeding against respondent herein.

4. Mr. Finch's characterizations and impressions of respondent's cooperation in connection with the Commission investigation which led to the issuance of the complaint herein, and a comparison of respondent's cooperation with the cooperation of other retailers similarly situated as to which Mr. Finch had personal knowledge.

5. Whether Mr. Finch has knowledge as to whether all, most, or any of the retailers named in Commission Press Releases during the period January 1, 1970 through July 14, 1971, were formerly investigated by the Commission's staff.

The hearing examiner, in his certification, recommends he be authorized to issue a subpoena *ad testificandum* to Mr. Finch and that respondent be permitted to examine the witness with respect to each of the areas of inquiry listed except for Paragraph 3.

Under Section 3.36(c) of the Commission's Rules of Practice an application for the issuance of a subpoena to an official or employee of the Commission is a request which shall be ruled upon by the hearing examiner.[1] The rule also provides that to the extent the motion is granted the hearing examiner shall provide such terms and conditions as may appear necessary and appropriate for the protection of the public interest. While Section 4.11(d) of the rules contains a requirement that an official or employee served with a subpoena or other compulsory process for Commission confidential records or information must advise the Commission of such service and thereby seek its instructions, subpoenas issued under Section 3.36 are excepted. Thus, it is clear that the authority which the Commission has delegated to the hearing examiner includes that of issuing subpoenas *ad testificandum* to employees or officials of the Commission. Further, this authority is not subject to review except for the limited right to seek interlocutory appeal provided for in Section 3.23.

The hearing examiner concedes that he is authorized by Section 3.36 to rule on this application. He explains that he does not do so "to expedite the resolution of the question * * *." He believes that a ruling by him would be appealed by one party or the other anyway and "[w]ith a Commission ruling thus required, the certification

[1] If the hearing examiner is not available the rule provides that the application shall be ruled upon by the Director of Hearing Examiners or such other hearing examiner as he may designate.

procedure permits such a ruling while avoiding the additional time that the appellate procedure would involve." [2]

We are not convinced that certification is either the most expeditious or the most desirable procedure in this instance. The hearing examiner has broad authority to rule on a question involving the issuance of a subpoena. There are no circumstances here suggesting that the examiner cannot appropriately decide the question and we believe he should have decided it. The Commission's rules contain no specific limitation on the types of questions which a hearing examiner may certify; nevertheless, those having to do with the basic fact-finding function of the hearing examiner—in this case, whether or not respondent has justified its request—are within the special competence of the hearing examiner and, we believe, ordinarily should be decided by him.

Furthermore, it does not appear to us that this matter is ripe for review even though the hearing examiner takes the position there will be an appeal whatever his decision might be. To the contrary, an appeal is not inevitable, since this would depend on the circumstances and conditions of his ruling.[3] There are, in fact, two steps in issuing a subpoena requiring the production of confidential Commission documents or the appearance of a Commission employee. The first is the decision whether or not to require the production or appearance. The hearing examiner has considered this step at great length, and is apparently convinced that respondent has made a sufficient showing to justify the subpoena to Mr. Finch. His entire rationalization is in terms of respondent's requirements and needs.

There is, however, another step to be taken by the hearing examiner upon his decision to issue a subpoena under Section 3.36, and that is to provide such terms and conditions "as may appear necessary and appropriate for the *protection of the public interest*" (emphasis supplied). The hearing examiner has not indicated that he has considered this part of the rule or that he has made any such determination. He has suggested, it is true, that he would set some limits on the expected testimony but it is not clear from his certification that these are "terms and conditions" which would be established for the "pro-

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[2] The hearing examiner also states that certification "appears appropriate because the issue involves Commission policy and an interpretation of the Commission's Order and Opinion dated March 15, 1972, * * *" [p. 1016 herein]. It is not clear what exactly the hearing examiner means by this nor is it clear why either of the factors mentioned, if they are involved, justify the hearing examiner's not ruling on the question.

[3] Additionally, Commission Rule 3.23 sharply limits interlocutory appeals. See the Commission's recent interpretation of this rule in *Missouri Portland Cement Company*, Docket 8783 (April 28, 1972) [p. 1035 herein.].

tection of the public interest;" nor is it clear that these are the only terms and conditions he would require upon his ruling.

There is no rigid or formal procedure involved here. If the examiner had issued the subpoena, it perhaps could be assumed, without a showing to the contrary, that he had taken the protection of the public interest into account. No such assumption is possible in the circumstances presented. Thus, in addition to the other considerations mentioned, it seems to us that an essential determination within the competence of the hearing examiner has not been made, and that with this deficiency it would be premature for the Commission to rule on the matter.

This order should not be taken as a decision one way or the other on the merits, that is, on the question of whether or not respondent has justified its request for a subpoena to Edward B. Finch. Accordingly,

It is ordered, That this matter be. and it hereby is, returned to the hearing examiner for further proceedings consistent with the views expressed in this order.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order, Memorandum of Commissioner Jones, June 9, 1972