THE HEARST CORPORATION, ET AL.

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

Order denying respondents' motion to disqualify Commissioner Jones from participation in the proceedings.

Order Denying Motion To Disqualify

Respondents the Hearst Corporation and Periodical Publishers' Service Bureau, Inc., in a motion jointly filed on March 28, 1972, request that Commissioner Jones withdraw from participation in this proceeding or, in the alternative, that the Commission determine that she is disqualified from participation in this proceeding.

Commissioner Jones, for the reasons stated in the attached memorandum, has decided not to withdraw from participation in any further proceedings in this matter.

Traditionally, the Commission has viewed requests for disqualifications as a matter primarily to be determined by the individual member concerned, leaving it within the exercise of the Commissioner's sound and responsible discretion. This practice, the Commission believes, is proper and consistent with the law, and in the instant case the Commission finds, upon its consideration of all relevant matters, no basis for departing therefrom. Accordingly,

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

Chairman Kirkpatrick and Commissioner Jones not participating.

MEMORANDUM OF COMMISSIONER JONES IN RESPONSE TO MOTION THAT SHE WITHDRAW FROM FURTHER PARTICIPATION IN THIS PROCEEDING

By joint motion, filed March 28, 1972, respondents, the Hearst Corporation and Periodical Publishers' Service Bureau, Inc., have requested that I withdraw from participation in this proceeding or, in the alternative, that the Commission determine that I be disqualified.

I have carefully considered respondents' motion and concluded not only that no grounds have been presented but that no grounds exist which would require my withdrawal. Accordingly, I shall not withdraw from participation in this proceeding.

Respondents' alternative motion, *i.e.*, that the Commission determine that I be disqualified from participation, will be decided by the Commission without my participation in the deliberations or decision.

Respondents' motion was filed pursuant to Section 7 (a) of the Administrative Procedure Act, 5 U.S.C. 1006 (a),[1] and Section 4.7 of the Commission's Rules of Practice. Their motion is based on the fact that on February 8, 1972, Mr. Arthur E. Rowse sent a letter to me in which he thanked me for a Commission ruling in this case granting a motion to quash a subpoena issued to him. I transmitted his letter to the Commission's General Counsel who responded to Mr. Rowse by letter of March 24, 1972, advising him that his letter constituted an *ex parte* communication and that as such I could not personally respond to it. Copies of Mr. Rowse's letter were then sent to the parties in this proceeding. A handwritten postscript in Mr. Rowse's letter, however, was deleted by the General Counsel from the copies of the letter transmitted to the parties since he believed as he reported to me, that the contents of this postscript had no relation whatsoever to the instant proceeding and was of a personal nature pertaining to Mr. Rowse's daughter. Under the circumstances, I agreed that disclosure did not seem necessary or appropriate and that without doing injury to the parties in this proceeding, we could avoid any embarrassment to the daughter which might attend disclosure of the postscript.

Respondents' instant motion for my disqualification is based in part on the deletion of this postscript. While stating that they do not

[1] 5 U.S.C. § 1006 was superseded September 8, 1966, by 5 U.S.C. § 556.

seek to inquire into the nature of the "undisclosed 'personal' communication" respondents contend that the deletion of the footnote "demonstrates clearly and beyond doubt the impossibility of Commissioner Jones continuing to sit as an impartial judicial officer in this proceeding." They further argue that an "undisclosed personal relationship between a Commissioner and a newspaper activist who has publicly campaigned against one of the respondents clearly casts a cloud of suspicion and doubt over the proceeding." Further, respondents draw upon the fact that the letter was addressed "Dear Mary," and signed "Warmest regards, Ted," to argue that "the tenor of the letter, plus the very personal "Mary" and "Ted" relationship, render disqualification proper in this case." They also suggest that "the personal tone of the letter and the deletion of the postscript suggest the inference that prior *ex parte* conversation may have taken place. * * *"

The mere recitation of respondents' arguments bespeak their fatuity. They are aimed at creating the implication that somehow through some unspecified personal relationship and continued communication with Mr. Rowse, I must share his alleged views on the instant adjudication. There is absolutely no basis in fact for these implications which respondents seek to draw from Mr. Rowse's letter, nor is there any basis in law for my disqualification from this case.

First, as to respondents' insinuations of other *ex parte* communications from Mr. Rowse, I can give unequivocal assurance that no other *ex parte* communications have been made or received by me. Second, as to the deletion of the postscript, this was done as noted earlier, solely in the interest of Mr. Rowse's daughter. However, in view of the implications which respondents seek to create from the deletion of the note, I am asking the General Counsel today to send copies of the complete letter to all parties to this proceedings so they can ascertain for themselves the fact that the contents of the postscript pertain in no way to this case and could have no influence upon my ability to judge the instant proceeding fairly on its merits. Third, as to the body of the letter itself, respondents cannot seriously contend that it will unfairly influence me. It has little relevance to the issues in dispute and more important, it has been revealed to the parties according to the Commission's rules. The parties, accordingly, have a full opportunity, if relevant and appropriate, to contest its contents before the Commission in the course of this proceeding.

Finally, I come to respondents' implication that this communication will render my impartiality impossible because of some "undisclosed personal relationship" existing between Mr. Rowse and me. This contention is difficult to deal with because while clearly suggestive of improper judicial conduct on my part, respondents' charges

are in themselves quite unclear and nebulous. Respondents in effect appear to be arguing that an *ex parte* communication made on a first-name basis constitutes grounds for disqualification. Respondents' imaginings as to the existence of other *ex parte* communications or of some "undisclosed personal relationship" which preclude my impartiality here are mere fantasies on their part with no basis in fact.

To disqualify myself on the basis of these fantasies would do an injustice to the concept of a fair and impartial hearing. If disqualification were proper under such circumstances the ability of the decision maker to sit in judgment would depend solely on the whim of any third party acquaintance who might choose to indulge in an *ex parte* communication. Merely being the recipient of such communication would make impartiality suspect, despite the fact that, as is the case here, the decision maker has neither said nor done anything to imply bias or prejudice in the matter.

Furthermore, I find no merit in respondents' argument that as a matter of law I should withdraw from this proceeding. Respondents' contention that trials and/or administrative hearings must be attended by the appearance of fairness cannot of course be disputed. *In Re Murchinson*, 349 U.S. 133 (1955); *Amos Treat & Co. v. Securities and Exchange Commission*, 306 F. 2d 360 (D.C. Cir. 1962). However, unlike any of the cases cited by respondents in which the conduct of the decision maker was found to create the appearance of unfairness, no conduct on my part in this case gives rise to an appearance of unfairness.[2] In fact, the *only* conduct on my part alluded to by respondents in their motion, namely my refusal to respond to the *ex parte* communication and placing of this letter on the public record, as is required by the Commission's Rules of Practice, the

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[2] In *In Re Murchinson, supra,* for example, a judge was disqualified from deciding a contempt charge since he was the very same judge who, sitting as a one-man grand jury, had cited the defendant for contempt during the course of his grand jury testimony. In *Amos Treat, supra,* a Securities and Exchange Commissioner was disqualified from deciding a case on the grounds that his *ex parte* recommendations concerning respondent, made when he was a staff member of the Commission, created the appearance of unfairness. In *American Cyanamid Co.* v. *FTC,* 363 F.2d 757, 768 (6th Cir. 1966), the Chairman of the Federal Trade Commission was disqualified because of his prior involvement as counsel for a congressional investigation involving the same facts and issues and the same parties in the case before the Commission. It was not his service as counsel alone, but the "depth" of the investigation and his "questions and comments" as counsel which served as the basis for the court's decision. In *Cinderella Career and Finishing Schools, Inc.* v. *FTC,* 425 F.2d 583, 590 (D.C. Cir. 1970), disqualification was based on a finding that the decision maker's public statements gave the appearance of having prejudged the case. In *Pillsbury Co.* v. *FTC,* 354 F.2d 952, 964 (5th Cir. 1966), it was not so much the conduct of the Commissioners that gave rise to their disqualification but rather the exertion of "powerful external influences" upon them in the form of a congressional investigation focusing upon the mental decisional processes of the Commission in a case pending before it. Clearly a situation does not exist here which is in any way similar to these cases.