

Order

81 F.T.C.

On September 6, 1972, the staff of the Commission filed with the Commission an answer to respondents' petition. The Commission has determined that, pursuant to Section 4.7 of the Commission's Rules of Practice, respondents shall receive a copy of any opinion or recommendation adverse to their petition of August 7, 1972, which is submitted either by a person who is not employed by the Commission or an attorney of the Commission who performs any investigative or prosecuting function in connection with the proceeding. Therefore, respondents should be furnished with a copy of the answer to their petition. The Commission has also determined that respondents' petition of August 7, 1972, and the answer thereto contain sufficient information to enable the Commission to render an informed decision on the issues raised therein and that the submission of further responses or the presentation of oral argument are unnecessary. Accordingly, *It is ordered*, That respondents be furnished with a copy of the answer to respondents' Petition for Modification of the Order in Docket No. C-2245.

It is further ordered, That respondents' requests to submit a written brief and to present oral argument be, and they hereby are, denied.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order, Oct. 30, 1972.

Order dealing with question of re-employment of administrative law judge who is scheduled to retire prior to his completion of this case.

ORDER DISPOSING OF CERTIFICATION OF MOTION

Before the Commission is a certification by Administrative Law Judge Goodhope of a motion by respondents requesting the Commission to determine and recommend to the President that the public interest requires the temporary re-employment of Administrative Law Judge John B. Poindexter for purposes of completion of the trial and rendition of an initial decision in this matter. In support of their motion respondents show that commencing on April 11, 1972, twenty-two days of hearings have been held in four cities and some fifty-five witnesses called by complaint counsel have testified. Additional hearings are to be scheduled with complaint counsel and respondent calling additional witnesses.

On September 21, 1972, the Acting Director, Office of Administrative Law Judges, issued an order substituting Administrative Law Judge Andrew C. Goodhope for Judge Poindexter. The latter will

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reach mandatory retirement age in November 1972 and under the Civil Service Retirement Act will automatically be separated from Federal Service on the last day of that month. It appears the hearings cannot be concluded by that time.

Respondents move in the alternative for an order striking the present record and directing *de novo* hearings, contending that credibility of witnesses will be an issue in this case, and that one hearing officer should observe all the witnesses.

In their answer, complaint counsel join the respondents' request that Administrative Law Judge Poindexter be reemployed for the purpose, but do not agree that *de novo* hearings is the only other available option.

As to respondents' motion that the Commission determine and recommend to the President that the public interest requires the temporary re-employment of Administrative Law Judge Poindexter, the question of requesting extension of employment of a hearing officer is not within the scope of the Commission's adjudicatory powers, but is an administrative decision that lies solely within the authority of the Chairman of the Federal Trade Commission. Reorganization Act of 1949, 63 Stat. 203, as amended, and Reorganization Plan No. 8 of 1950, 64 Stat. 1264. As indicated in previous interlocutory orders in this case, the Chairman is not participating in any adjudicative aspects of this proceeding. However, in his role as head of administrative operations of this agency, he has informed the Commission that it is his policy not to seek extensions of employment beyond the compulsory retirement age of employees under his supervision, including hearing officers, and that no such extension or re-employment will be sought in this instance.

In his certification of the above motion, Administrative Law Judge Goodhope indicated that "under controlling authorities" respondents' alternative motion to strike the record and commence *de novo* hearings would have to be granted should Judge Poindexter's employment not be extended. Complaint counsel, as an alternative, urged that Judge Poindexter could be requested to submit a report to the new administrative law judge including his assessment of the credibility of witnesses whom he saw and heard. Administrative Law Judge Goodhope did not comment on this proposed alternative, but cited *Gamble-Skogmo, Inc. v. Federal Trade Commission*, 211 F. 2d 106 (8th Cir. 1954) and 2 Davis, *Adm. Law Treatise*, § 11.18, p. 113, as "controlling" and as requiring *de novo* hearings.

However, we do not read the decision in *Gamble-Skogmo* as automatically foreclosing other possible alternatives. In that case, the one

hearing examiner who heard all the witnesses retired and the initial decision was prepared by his successor who did not hear any of the witnesses and who had not received a report from the first examiner as to his assessment of the credibility of those witnesses who gave conflicting testimony. The case stands for the proposition that where credibility evaluation of witnesses constitutes an important aspect of the case, demeanor evidence should be preserved. 2 Davis, *Adm. Law Treatise* § 11.18; *Appalachia Power Co. v. F.P.C.*, 328 F. 2d 237 (4th Cir. 1960). But as Professor Davis has suggested, this can be accomplished by having the first hearing officer make a report on the credibility of witnesses he has heard prior to the time he becomes unavailable to the agency. 2 Davis, *Adm. Law Treatise*, p. 113.¹

As to questions of credibility that may arise should respondents call witnesses whose testimony directly conflicts with the testimony given by witnesses who have already testified, respondents can always be given the opportunity to have the latter witnesses recalled so that the new administrative law judge can also observe their demeanor while on the witness stand. See *George McKibbin & Son*, 56 F.T.C. 1645 (1959).²

We think the administrative law judge, in ruling on the respondents' alternative motion, should consider whether these alternative procedures would be appropriate in the circumstances of this case. In making such a determination, he should feel free to consult with Administrative Law Judge Poindexter, as well as hearing from the parties.

The matter is remanded for further proceedings. It is so ordered.

Without the participation of Chairman Kirkpatrick and with Commissioner MacIntyre agreeing only to the result of the remand for further proceedings.

¹ It is not unprecedented for more than one hearing officer to each file reports on the part of a case in which each presided. See Note, "Replacing Finders of Fact—Judge, Juror, Administrative Hearing Officer," 68 Col. L. Rev. 1317, 1334 n. 97 (1968) ("It is common practice in the ICC to have different examiners hear the evidence offered by different parties"); Davis, *Adm. Law Treatise*, 1970 Supp., p. 431.

² In the *McKibbin* case, the Commission reviewed the holding in *Gamble-Skogmo*, and stated:

"This case cannot be considered as authority for respondents' broad position that a trial *de novo* must be granted whenever the credibility of witnesses who have testified before the original hearing examiner is in issue. * * * [I]t is believed that in most instances the parties' procedural rights would be fully protected if the witnesses who have given conflicting testimony are recalled solely for the purpose of cross-examination."

The Commission upheld the hearing examiner's denial of a motion for a trial *de novo*.