

Commission a report in writing setting forth, in detail, the manner and form in which they have complied with the order to cease and desist contained herein.

---

IN THE MATTER OF  
TYSONS CORNER REGIONAL SHOPPING CENTER,  
ET AL.

*Docket 8886. Opinion and Order, May 24, 1973.*

Order and opinion denying respondents' application for review of the administrative law judge's order of March 1, 1973, and their motion for expedited consideration and for hearing on the application, on the ground that no due process rights have been violated.

OPINION OF THE COMMISSION

This matter is before the Commission upon an application by respondents, filed April 4, 1973, for permission to file an interlocutory appeal to review a ruling of the administrative law judge. This application was filed pursuant to Section 3.23(b) of the Commission's Rules of Practice for Adjudicative Proceedings. Review is sought of the administrative law judge's "Order Ruling on Jurisdictional Question" issued on March 1, 1973. The respondents have also obtained from the administrative law judge a determination that his ruling involves a controlling question of policy as to which there is substantial grounds for difference of opinion, and that an immediate appeal to the Commission may materially advance the ultimate termination of the litigation. On April 11, 1973, a response to respondents' application was filed by complaint counsel.

I

Respondents have raised, as an affirmative defense in the present proceeding, the claim that the participation of Alan S. Ward, Director of the Bureau of Competition, in the investigation, pre-complaint and adjudicatory proceedings is contrary to Section 0.735-10 of the Commission's rules. They contend that the Commission's failure to enforce this section governing the conduct of its employees is violative of respondents' due process rights and, therefore, justifies dismissal of the complaint.

Specifically, respondents assert that Mr. Ward's involvement

as a member of a private law firm in a related private antitrust suit against the respondents,<sup>1</sup> which was settled prior to his assumption of his present position with the Commission, should have disqualified him from exercising his normal responsibilities as bureau director with respect to the present case. The failure of Mr. Ward to disqualify himself and the continuing refusal of the Commission to disqualify him, respondents allege, are actions which, in the language of Section 0.735-10 "might result in, or create the appearance of . . . [l]osing complete independence on impartiality; [or] affecting adversely the confidence of the public in the integrity of the Government." The claim raised by respondents before the administrative law judge is, by respondents' admission<sup>2</sup> identical to that contained in their motion of February 15, 1972, requesting the Commission to withdraw the proposed complaint issued under Part II of the Commission's rules and to assign the investigation to personnel not under Mr. Ward's supervision. On May 3, 1972, the Commission denied respondents' motion.

Thereafter, the Commission, fully aware of respondents' contention, issued the complaint in this matter under Part III of its rules. Three of the present respondents subsequently sought to enjoin the adjudicatory proceeding on the same grounds now urged for dismissal. On July 13, 1972, the District Court of the District of Columbia denied respondents' motion for a preliminary injunction and dismissed the case holding, *inter alia* that the procedural infirmity claimed by respondents did not warrant district court intervention in the uncompleted administrative proceeding and that the issues raised by respondents could be presented on judicial review.

## II

When respondents, for the third time, raised the identical issue before the administrative law judge, he held in his ruling of March 1, 1973, that the due process issue involving the purported violation of Rule 0.735-10 was beyond his jurisdiction. He noted that the rule encompassed only matters of employee conduct, which are within the sole administrative discretion of the Commission. Furthermore, he deemed the issue raised by respondents essentially a challenge to the Commission's

<sup>1</sup> *Dalmo Sales Co. v. Tysons Corner Regional Shopping Center*, 308 F. Supp. 988 (D.D.C. 1970), *aff'd*, 429 F.2d 206 (D.C. Cir. 1970).

<sup>2</sup> Application for Review of "Order On Jurisdictional Question," p. 2; Answer to Application for Review of Order on Jurisdictional Question, p. 8.

determinations that there was “reason to believe” that respondents had violated the Federal Trade Commission Act and that the issuance of the complaint would be “to the interest of the public,” the statutory standards for issuance of complaints under Section 5(b) of the Federal Trade Commission Act. The administrative law judge concluded that the matters raised by respondents here were so intertwined with the Commission’s judgement that they were vested entirely within the discretion of the Commission, and that he lacked jurisdiction to consider such issues.

The ruling of the administrative law judge on this issue is correct and it is affirmed.

On the merits of respondents’ claim, which we, in our discretion may reach on this application even though it has not been certified, we hold that, even assuming the validity of respondents’ allegations, no due process rights have been violated. Moreover, in the circumstances of this case, the alleged rule violations cannot be deemed to have undermined the independence of the Commission’s decision to issue the Part III complaint. One is hard-pressed to find any merit in respondents’ contention that the violation of a Commission regulation governing the conduct of its employees, dealing with appearances rather than prejudicial misconduct, and existing solely for the benefit of the Government,<sup>3</sup> can, standing alone, rise to an infringement of due process rights. Section 0.735–10 is obviously a “housekeeping” rule<sup>4</sup> designed to preserve the integrity of the Commission by establishing “unusually high standards of honesty, integrity, and conduct” even to the point of prohibiting actions “which might result in, or create the appearance of” improper conduct. This rule is designed to promote public confidence in the Commission, and violations therefore may subject an employee to disciplinary action through internal personnel procedures as prescribed in Section 0.735–7 of the rules; but we fail to see how the mere appearance of impropriety, without more, could prejudice respondents. Yet, respondents have consistently maintained that they are not questioning Mr. Ward’s professional competency, dedication, or integrity,<sup>5</sup> but are merely concerned with the appearance of a lack of impartiality on the part of Mr. Ward.

<sup>3</sup> See, *Exchange Nat’l. Bank of Chicago v. Abramson*, 295 F. Supp. 87 (D. Minn. 1969).

<sup>4</sup> The line of cases holding that agencies must abide by their own procedural rules, e.g., *Vitarelli v. Seaton*, 359 U.S. 535 (1959) is therefore inapposite.

<sup>5</sup> Memorandum in Support of Motion of Proposed Respondents to Withdraw the Proposed Complaint, p. 11.

Interpreting respondents' claim, in the broadest sense, it is really no more than an allegation of staff bias, which, unlike Commissioner bias, has never been held to constitute a denial of due process or a defense to a complaint. *Maremont Corp. v. FTC*, 431 F.2d 124, 128 (7th Cir. 1970). In fact, we would be surprised if attorneys charged with prosecution of any matter in any agency could consistently maintain a position of complete impartiality much less an appearance of total impartiality.

Bias presents a due process issue only when it undermines the independence of the Commission's decision making process. Traditionally, Commission decisions to issue a complaint and the requisite determinations that there is reason to believe that a violation has occurred and that the proceeding would be in the public interest are made independently by the Commission on the basis, not only of the staff's recommendations, but also of its own review of the evidence uncovered in the investigation. In the circumstances surrounding the issuance of the two complaints in the present case, there is no indication whatsoever that the normal complaint issuance procedure employed by the Commission was not followed. The Commission, in its letters to respondents on May 3, 1972, actually described in detail the procedure followed when the Part II complaint was issued. And, the Commission was fully aware of the allegations of respondents prior to the issuance of the Part III complaint. Absent a clear showing of prejudicial impropriety at the decision making level or proof that evidence had been tampered with, neither of which is even alleged by respondents, the Commission's decision to issue a complaint will not be disturbed and an evidentiary inquiry into the decision making processes of the Commission is inappropriate.

### III

The administrative law judge observed in his ruling that collateral proceedings against the Commission in the United States District Court for the District of Columbia had been commenced by three of the respondents after the issuance of the complaint here, seeking to enjoin any administrative action by the Commission. An Assistant United States Attorney represented the Commission. In his oral argument before the Court in opposition to the granting of an injunction counsel stated, *inter alia*:

[A]s the Court knows from the motion we have filed to dismiss, the position of

the defense is that, administrative remedies not having been exhausted, there is an absence of subject matter jurisdiction and at this time, then, pursuant to rule 12(h)(3), we would suggest that to the Court—that there would be an absence of subject matter jurisdiction.

The Plaintiffs certainly have the opportunity to pursue their argument with respect to the impropriety of Mr. Ward's participation and any taint that might have accrued, *and to develop the record at the hearing level*, and in the event that an adverse decision might be made on that point, to pursue it before the Commission and even, then, should they not prevail either on the point, they will have recourse to judicial review. [Transcript, p. 21 (emphasis added)].

The administrative law judge in his ruling noted that it “is the Commission which must define whatever obligations were assumed as a result of those representations.” It was on this basis that the determination required by Section 3.23(b) as a prerequisite for a request to file an interlocutory appeal was subsequently made by the administrative law judge.

Respondents interpret the emphasized portion of the counsel's statement to the District Court as a promise to them that they would be afforded the opportunity to introduce evidence in the record on this issue before the administrative law judge. Respondents, we think read too much into the statement. Clearly, counsel was merely discussing the general rule of law that a party must exhaust administrative remedies before resorting to the courts.

That the Assistant United States Attorney's representation was so interpreted by the Court is apparent from the detailed findings and conclusions the District Court filed with its order dismissing the collateral action for lack of jurisdiction over the subject matter. And neither the judge's statements at the conclusion of the hearing nor his detailed findings and conclusions contain any reference to any Commission obligation, express or implied, to grant respondents an evidentiary hearing on this issue. In fact, the Court in its conclusions of law expressly held: “The issue in question [*i.e.*, Mr. Ward's participation] can be raised by plaintiffs on judicial review of a final Commission order, if a final order is issued in the administrative proceedings.” Certainly, we cannot interpret the District Court's decision to require an evidentiary hearing when the defense raised by respondents is legally unsupportable.

In view of the foregoing, the Commission has determined that respondents' Application for Review of “Order on Jurisdictional Question” should be denied. An appropriate order will be entered.

Order

82 F.T.C.

ORDER DENYING APPLICATION FOR INTERLOCUTORY REVIEW AND  
DENYING MOTION FOR EXPEDITED CONSIDERATION AND HEARING

Upon consideration of the Application for Review of the administrative law judge's order of March 1, 1973, filed by respondents on April 4, 1973, and Motion for Expedited Consideration and for Hearing on their Application for Review filed by respondents May 16, 1973, and for the reasons stated in the accompanying opinion,

*It is ordered*, That the Application for Review be, and it hereby is, denied.

*It is further ordered*, That the Respondents' Motion for Expedited Consideration and for Hearing on their Application for Review be, and it hereby is, denied.

Commissioner Dennison not participating.

---