

Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
EXXON CORPORATION, ET AL.*

Docket 8934. Order, May 13, 1975

Denial of motion by Texaco, Inc., to disqualify the administrative law judge in this proceedings.

ORDER DENYING MOTION TO DISQUALIFY ADMINISTRATIVE LAW
JUDGE

Upon his appointment as administrative law judge in this matter, Alvin L. Berman informed the parties that, as a former member of the litigation staff of the Commission's Office of General Counsel, he had represented the Commission on appeal in seven cases involving one or more of the respondents herein. Arguing that, in at least three of these matters, Judge Berman had taken positions on issues which have arisen in this proceeding, respondent Texaco moved that he disqualify himself. The judge declined to do so, on the ground his role in the previous cases had been limited to that of an advocate and his statements made in performing that function were not necessarily indicative of his own views. By order of Mar. 10, 1975, he certified this question to the

* For appearances, see, p. 91, herein.

Commission and on Mar. 20, 1975, Texaco moved, pursuant to Section 3.42(g)(2) of the Commission's Rules of Practice, that he be disqualified.

An administrative official may be subject to disqualification under either of two sections of the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* First, Section 554(d) provides in relevant part:

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision * * *.

Respondent does not argue that Judge Berman should be disqualified under this standard and our review of this matter has convinced us that such an argument would have to be rejected because his role as appellate advocate was neither investigative nor prosecutorial in nature within the meaning of Section 554.

The Administrative Procedure Act also provides for disqualification of a presiding or participating employee "[o]n the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification * * *." 5 U.S.C. §556(b). Respondent does not argue that Judge Berman is personally biased against it, but, rather, bases its motion on a line of cases holding that an administrative official should be disqualified where he has prejudged a factual issue likely to arise in a matter. The principal case in this area is *American Cyanamid Co. v. Federal Trade Commission*, 363 F.2d 757 (6th Cir. 1966), wherein then Chairman Dixon was found ineligible to participate in the decision due to his prior supervision of a congressional investigation involving many of the facts which were at issue in the Commission proceeding.

However, *American Cyanamid* is distinguishable from the case at hand because here Judge Berman did not participate in the development of the evidentiary facts in the previous case. Further, the ultimate facts in *Cyanamid* were nearly identical to those which were the focus of the congressional investigation, whereas here it is likely that whatever relationship exists between this matter and the *Texaco-Goodrich* case is attenuated at best. Finally, it should be pointed out that the court in *Cyanamid* specifically based its decision not on the mere participation by then Chairman Dixon in the legislative and administrative matters, but on "* * * the depth of the (legislative) investigation and the questions and comments by Mr. Dixon as counsel," which led the court to conclude that Mr. Dixon had formed opinions as to the ultimate facts. The same can hardly be true of Judge Berman since his participation in the previous cases was limited to the role of an advocate in the appellate court, defending findings already adjudicated by the Commission.

Respondent argues vigorously that general standards for judicial officers have been strengthened recently and that Judge Berman's continued participation in this matter would contravene those stand-

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ards as expressed in the recent amendment to 28 U.S.C. §455(a). As amended, that statute calls for the disqualification of a federal judicial official "in any proceeding in which his impartiality might reasonably be questioned." As respondent points out, the intent of this amendment was to substitute an objective standard for the subjective one employed by the former statute.

However, there is no indication that the substantive grounds for disqualification were broadened by the amendment. Since the courts applied the former statute to participation in the same or closely related cases which, as shown above, is not the situation here, we conclude that the new statute does not require Judge Berman's disqualification. Furthermore, even if the amendment was intended to broaden the grounds for disqualification, we find, based on the foregoing analysis, that respondent has not raised a reasonable question as to Judge Berman's impartiality in this matter. Accordingly,

It is ordered, That the aforesaid motion to disqualify Alvin L. Berman as administrative law judge in the above-captioned matter be, and it hereby is, denied.

Commissioner Thompson not participating.