

IN THE MATTER OF
GROLIER INCORPORATED, ET AL.

Docket 8879. Order, Feb. 10, 1976

Respondents' motion to disqualify and remove administrative law judge denied; and denial of respondents' discovery requests relative to evidence which would subject administrative law judge to disqualification; request for oral argument also denied.

Appearances

For the Commission: *Edward D. Steinman, David C. Fix and Robert D. Friedman.*

For the respondents: *Frederick P. Furth and Cullinan, Burns & Holmer, San Francisco, Calif.*

ORDER DENYING MOTION TO DISQUALIFY ADMINISTRATIVE
LAW JUDGE

Administrative Law Judge Theodor P. von Brand informed the parties at a hearing on January 14, 1976, that he had been a legal advisor to Commissioner Everette MacIntyre from 1963 until January 1971. The law judge's disclosure was prompted by testimony by one of respondents' officials as to a meeting he had attended at which Mr. MacIntyre was present in 1966 or 1967.

Respondents now move under Section 3.42(g)(2) of the Rules of Practice to disqualify Judge von Brand on the ground that his presence on Commissioner MacIntyre's staff and his participation in this matter as administrative law judge violate the Administrative Procedure Act, 5 U.S.C. §554(d). The section prohibits an employee "engaged in the performance of investigative or prosecuting functions for an agency in a case" from participating or advising in the decision or recommended decision of that or a factually related case. Respondents also claim that the law judge's participation in this matter involves the appearance of impropriety.

During the time Judge von Brand was an advisor to Commissioner MacIntyre, the Commission had before it, among other things, the following matters involving respondents: a proposed complaint and proposed consent order, an assurance of voluntary compliance, and a resolution directing a non-public investigation.

The law judge has declined to disqualify himself and has submitted a response under Section 3.42(g)(2) in which he states that he has no recollection of having worked "on matters involving these respondents while serving as legal advisor to Commissioner MacIntyre," but that

"[i]n view of the volume of the circulations going through a Commissioner's office and the time span involved, [he] cannot say that [he] never saw or reviewed a circulation or staff recommendation relating to these respondents." The judge takes the position that "[l]egal advisors to the Commissioners are not engaged in the performance of investigative or prosecuting functions. Legal advisors to Commissioners, who function essentially as law clerks in reviewing circulations or staff recommendations, act in an advisory capacity to their Commissioners, as distinguished from agency employees in the operating bureaus who are responsible for securing or presenting evidence."

The requirement that adjudicatory and prosecuting or investigative functions be segregated arose out of a concern that "a man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of those who decide questions." See, Senate Judiciary Committee Print, June 1945. Those who have done the actual work of investigating and building the case and those who have prosecuted the case with a "will to win," Davis, *Administrative Law Treatise*, §13.07 (1958), may have a sufficient stake in the case to preclude the dispassionate judgment that due process and the Administrative Procedure Act require. We do not believe that an assistant to a Commissioner, who provides advice during the pre-complaint stage of an investigation, has the kind of stake in the outcome that would inhibit a fair decision. Cf. Gellhorn & Byse, *Administrative Law: Cases and Comments*, 1036 (6th ed. 1974).

For these reasons, we see no apparent impropriety in Judge von Brand's continued participation in this matter.¹

Respondents also seek discovery of documents which they assert to be "reasonably calculated to lead to the discovery of evidence concerning Commission actions taken with respect to, or Commission contacts with, the respondents during Judge von Brand's tenure as a legal advisor." Respondents claim that some of the documents are "reasonably calculated to lead to evidence showing whether Judge von Brand had direct contact with any matters pertaining to the respondents while he served as legal advisor." Respondents also move for a subpoena addressed to the law judge directing him to appear at a deposition hearing and testify concerning any participation he may have had, from 1963 through 1971, in any Commission activities related to the respondents.

¹ The Commission expects that the law judge will confine his decision to the record. We note he has stated that he has no recollection of having seen any circulations or staff recommendations pertaining to these respondents while he was on Commissioner MacIntyre's staff.

Because we do not believe that Judge von Brand would be subject to disqualification even if it could be shown that he advised Commissioner MacIntyre on matters pertaining to these respondents, the discovery requests are denied. Accordingly,

It is ordered, That respondents' motion to disqualify and remove the administrative law judge be, and it hereby is, denied;

It is further ordered, That respondents' aforesaid discovery requests be, and they hereby are, denied.²

² Respondents' request for oral argument is also denied.

Complaint

87 F.T.C.

IN THE MATTER OF
VIRGINIA MORTGAGE EXCHANGE, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING
ACTS

Docket 9007. Complaint, Jan. 28, 1975—Final Order, Feb. 10, 1976

Order requiring an Annandale, Va., loan broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Bernard Rowitz, Thomas J. Keary and Alan L. Cohen.*

For the respondents: *William L. Warfield, Annandale, Va.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Virginia Mortgage Exchange, Inc., a corporation, and William L. Warfield, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Virginia Mortgage Exchange, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia with its principal office and place of business located at 7616 Little River Turnpike, Annandale, Virginia.

Respondent William L. Warfield is an officer of the corporate respondent. He formulates, directs, and controls the acts and practices of the corporate respondent including the acts and practices herein-after set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been,