

Order

88 F.T.C.

IN THE MATTER OF
NATIONAL COMMISSION ON EGG NUTRITION, ET AL.

Docket 8987. Order, July 16, 1976

Order denying respondents' request that Chairman Collier not participate in the decision of this case.

MEMORANDUM OF CHAIRMAN COLLIER IN RESPONSE TO
THE REQUEST OF RESPONDENT NATIONAL COMMISSION
ON EGG NUTRITION THAT HE WITHDRAW FROM THIS
PROCEEDING

On April 28, 1976, at oral argument before the Commission, respondents requested that I recuse myself from further participation in this proceeding because, during my tenure as the Commission's General Counsel,¹ I represented the Commission in Federal court proceedings collateral to this proceeding. Respondents were allowed 30 days after oral argument within which to submit a brief on the question of my disqualification.²

In a letter addressed to me on May 24, 1976, respondent National Commission on Egg Nutrition (NCEN) suggested that:

recusal is required in such circumstances by Canon 9 of the Code of Professional Responsibility of the American Bar Association: "A lawyer should avoid even the appearance of professional impropriety." Cf. Canon 2 of the Code of Judicial Conduct: "A judge should avoid impropriety and the appearance of impropriety in all his activities."

By this memorandum, I deny respondent's request for recusal.

Respondent has not made the more familiar allegation of "prejudgment" or "bias" sometimes raised in other contexts.³ Such an allegation would have no factual basis. No statements or representations made by or attributable to me have been cited by NCEN, nor do I know of any, which would demonstrate prejudgment or bias.

The collateral litigation mentioned by NCEN consisted of two actions which I supervised for a time. In the first, *Federal Trade Commission v. L. A. Wilhelm and National Commission on Egg Nutrition*, Misc. No. 74-73 (D.D.C.), the Office of the General Counsel, at the Commission's request and on its behalf, requested the Attorney

¹ From July 1973, through April 1975.

² Transcript of oral argument, April 28, 1976, at 3.

³ See, e.g., Davis, *Administrative Law Treatise*, Secs. 12.01-12.03 (1970); *FTC v. Cement Institute*, 333 U.S. 683 (1948); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 763-768 (6th Cir. 1966); *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962); *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 79-80 (10th Cir. 1972); *NLRB v. Richard W. Kaase Co.*, 346 F.2d 24, 28 (6th Cir. 1965); *Safeway Stores v. FTC*, 366 F.2d 795, 802 (9th Cir. 1966); *Texaco v. FTC*, 336 F.2d 754, 759-760 (D.C. Cir. 1964), *rev'd on other grounds*, 381 U.S. 739 (1965).

General to file an action against NCEN and its Secretary-Treasurer to require compliance with a pre-complaint investigational subpoena issued by the Commission's Bureau of Consumer Protection in April 1974. The action was initiated on July 18, 1974, and the District Court for the District of Columbia entered an order to show cause against the respondents on the same day. The matter was settled by agreement on September 12, 1974.

It is clear that the Commission would not be disqualified from ruling on the merits of a proceeding simply because it became necessary to seek court enforcement of a pre-complaint investigational subpoena. No one would contend that a court displayed bias against a litigant merely because it ordered the litigant to produce documents in the course of a proceeding. The petition filed in the action did not allege that NCEN had violated the law, but only that NCEN had failed to appear and produce documents in response to a Commission subpoena which had been filed in the course of an investigation to determine whether NCEN had violated the Federal Trade Commission Act.

The other proceeding was an action for a temporary injunction which was filed in the United States District Court for the Northern District of Illinois on August 1, 1974. The proceeding was commenced at the direction of the Commission and was initiated after the administrative complaint had been issued on July 23, 1974. The action was brought pursuant to Section 13(a) of the Federal Trade Commission Act, 15 U.S.C. §53(a). The Commission did not assert that respondents had violated the Federal Trade Commission Act, but only that the Commission "had reason to believe" that the respondents had done so, and that the injunction would be in the public interest. Such a finding is required by Section 13(a). The same standard of knowledge controls the issuance of an administrative complaint in the first instance, 15 U.S.C. §45(b).

The District Court dismissed the Commission's action and the Office of the General Counsel, again at the Commission's request and on its behalf, lodged an appeal with the United States Court of Appeals for the Seventh Circuit. The Commission again argued that an injunction should issue because the Commission had reason to believe that the respondents' advertisements violated the Federal Trade Commission Act.

There can be no question that the Commission was entitled to conclude that there was "reason to believe" that NCEN's advertisements violated Sections 5 and 12 of the Federal Trade Commission Act,

and to issue a complaint and request an injunction against the advertisements *pendente lite* on that basis.⁴ Indeed, the United States Court of Appeals for the Seventh Circuit held that the Commission was entitled to, and entered, such an injunction, *Federal Trade Commission v. National Commission on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1975), *cert. denied*, 426 U.S.— (No. 75-405, June 7, 1976).

It is also clear that the Commission does not prejudice a matter, foreclosing the possibility of a fair and impartial hearing on the merits, by first seeking injunctive relief, notwithstanding the fact that every petitioner for injunctive relief must contend that he has a reasonable probability of success on the merits, or, in this instance, that there is a reasonable probability that a respondent has violated Section 12 of the Federal Trade Commission Act, 15 U.S.C. §52. In such circumstances, the Commission is in the position of a judge who is sufficiently impressed with a litigant's case to issue a preliminary injunction. No one would suggest that such a judge is thereby disqualified from ruling on the merits, *NLRB v. Richard W. Kaase Co.*, 346 F.2d 24, 28 (6th Cir. 1965). The Supreme Court has implicitly rejected that argument, which was advanced by the dissent in *Federal Trade Commission v. Dean Foods Co., et al.*, 384 U.S. 597 (1966), and left unmentioned in the majority's opinion. *Accord, PepsiCo, Inc.*, 83 F.T.C. 26 (1973).

Indeed, at no point in the briefs or moving papers filed in the ancillary injunctive proceedings in this matter during my service as General Counsel is there any statement which creates even the appearance of prejudgment of the ultimate merits of the case. In both the Commission's "Memorandum of Points and Authorities in Support of Application for Temporary Injunction," filed in the Northern District of Illinois, and its brief on appeal to the United States Court of Appeals for the Seventh Circuit, the Commission never went beyond the allegation, which must be made in every action brought under Section 13 of the Federal Trade Commission Act, that, based on the record then available to it, the Commission had "reason to believe" that the respondents' advertising violated Sections 5 and 12 of the Federal Trade Commission Act. The Commission, in both actions, noted that "[t]he determination whether respondent has actually violated the law is to be made only at the conclusion of the administrative proceeding after respondent has been given a full opportunity to be heard."⁵

Therefore, the ancillary subpoena enforcement and injunctive proceedings, and the memoranda filed in each, to which the Commission was entitled under Secs. 9 and 13 of the Federal Trade Commission Act, 15 U.S.C. §§49 and 53, neither constituted prejudgment nor the

⁴ See *F.T.C. v. Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308 (D.C. Cir. 1968).

⁵ "Memorandum," *supra*, at 14; Brief, *supra*, at 24.

appearance of prejudgment and would not disqualify the Commission from ruling on the merits in this proceeding. And if the Commission is not disqualified by reason of the ancillary proceedings or the arguments my former office presented in those proceedings on the Commission's behalf, then I perceive no justification for concluding that I should be disqualified.

Nor have respondents contended that my participation in the decision of this matter would constitute a prohibited mixture of prosecutorial and adjudicative functions.⁶ As the Commission's General Counsel, I neither possessed nor exercised prosecutorial responsibility. On the contrary, the Commission's General Counsel is freed of such duties so that he may advise the Commission or individual Commissioners in all matters of law and policy in adjudicative or nonadjudicative settings.⁷

To protect against the intermingling of prosecutorial and adjudicative functions, the Commission has assigned exclusive responsibility for advocacy of administrative complaints to the Bureaus of Competition and Consumer Protection and its Regional Offices. Counsel supporting a complaint are organizationally independent of the General Counsel and are not subject to his supervision or control.⁸

In seeking the assistance of the courts through collateral actions for injunctions or discovery, the General Counsel is not an advocate for the administrative complaint. He is, instead, an advocate for the Commission itself. The positions he takes are those of the Commission. The arguments he presents to the court simply reflect the Commission's own reason to believe that the law may have been violated, based on the limited record before it. I therefore cannot agree that my participation in this proceeding creates even an "appearance of impropriety" within the meaning of the canons of ethical conduct cited by respondents.⁹

In my view, recusal is a course that should not be lightly taken. Each member of the Commission has been appointed by the President and

⁶ This is not an instance in which an agency adjudication has been tainted by an official in a prosecutorial role later becoming involved in agency decision-making, as, for example, in *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962). There a former Director of the Division of Corporation Finance, which was responsible for the prosecution of agency adjudications, including the one at issue, later became a member of the Commission and participated in quasi-judicial decisions concerning the same matter, 306 F.2d at 262. A former advocate in an adjudication was placed in a position to pass judgment in the same proceeding. Here, by contrast, the General Counsel is not an advocate in agency adjudications.

⁷ See 35 Fed. Reg. 10627 (1970), amended 36 Fed. Reg. 2943 (1971).

⁸ See 35 Fed. Reg. 10627 (1970).

⁹ In passing I would note that although there can be little question that "justice requires the appearance of justice," *In re Murchison*, 349 U.S. 133, 136 (1955), I question whether that principle, as applied to an official of a government body, should be derived from the ethical norms of private professional associations such as those invoked by respondents. Happily, this case presents no conflict between the professional ethical norms relied upon by respondents and a valid Congressional mandate. Were such a conflict presented, the latter would surely take precedence over the former. Moreover, the controlling statutes require neither that a Commissioner be an attorney nor that he perform only those duties which are consistent with his chosen profession.

confirmed by the Senate to exercise the statutory duties of his office. Each member takes an oath of office to do so faithfully. Deciding cases is one of the gravest of these duties. The refusal to perform that duty should be attended with commensurate reluctance. No facts presented here, or known to me, convince me that recusal is appropriate.

July 13, 1976.

ORDER DENYING REQUEST TO DISQUALIFY

During oral argument before the Commission on respondents' appeal from the decision of the administrative law judge in this matter, respondents' counsel requested that Chairman Collier recuse himself from participation in the Commission's decision of the case. Subsequently, on May 24, 1976, respondents addressed a letter to the Chairman repeating their request, and citing as grounds therefor the Chairman's prior participation as General Counsel of the Commission in Federal court litigation collateral to this proceeding. Respondents appear to contend that the Chairman's participation in this matter would, by virtue of his participation in the prior court litigation, contravene the dictates of Canons 9 and 2 of the Code of Professional Responsibility of the American Bar Association, and that such conflict requires recusal.

In response to that request, Chairman Collier filed a memorandum dated July 13, 1976, stating that he declined to disqualify himself from participation and setting forth at length his reasons therefor.

It is unclear from respondents' request at oral argument before the Commission and subsequent letter to the Chairman whether they desire that their request be considered solely by the Chairman or by the Commission as well. The Commission has previously entertained motions to disqualify individual Commissioners, *e.g. ITT Continental Baking Company, Inc., et al.*, 82 F.T.C. 1183, 1188 (1973), and to eliminate any ambiguity, the Commission will treat respondents' oral argument request as such a motion.

The Commission has carefully reviewed respondents' letter and the memorandum of Chairman Collier in response thereto. In light of such consideration, the Commission has determined that no grounds exist for granting the requested disqualification. Therefore,

It is ordered, That the request by respondents that Chairman Collier not participate in the decision of this case be, and it hereby is, denied.

Chairman Collier did not participate in the Commission's determination of this matter.

Complaint

IN THE MATTER OF
NATIONAL COMMISSION ON EGG NUTRITION, ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8987. Complaint, July 23, 1974—Final Order, July 20, 1976

Order requiring a Park Ridge, Ill., egg industry trade association and a New York City public relations firm, among other things to cease misrepresenting the physiological effects of consuming dietary cholesterol or eggs and to cease using a misleading trade name.

Appearances

For the Commission: *Lynne C. McCoy, Bret S. Smart, Stewart A. Block, and Mark A. Heller.*

For the respondents: *James Fox, Moses, Gibbons, Abramson & Fox, Chicago, Ill.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the National Commission on Egg Nutrition and Richard Weiner, Inc., corporations, hereinafter referred to as respondents, have violated the provisions of said 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:¹

PARAGRAPH 1. Respondent National Commission on Egg Nutrition is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 205 Touhy Ave., Park Ridge, Illinois.

Respondent Richard Weiner, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 888 7th Ave., New York, New York.

PAR. 2. Respondent National Commission on Egg Nutrition (hereinafter, NCEN) is a trade association which was organized and is maintained for the purpose of promoting, fostering and advancing the interests of its members, who consist of individuals and firms engaged in businesses relating to the egg industry, including associations of egg

¹ For purposes of this complaint, the following definitions shall apply:

a) "commerce" means commerce as defined in the Federal Trade Commission Act, and

b) "false advertisement" means false advertisement as defined in the Federal Trade Commission Act.