

Interlocutory Order

90 F.T.C.

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION, ET AL.

Docket 8918. Interlocutory Order, Aug. 18, 1977

Denial of complaint counsel's application for review of ALJ's order denying reconsideration of prior order which disallowed request for substitution of witnesses on previously submitted list.

ORDER DENYING APPLICATION FOR REVIEW

Complaint counsel here seek interlocutory review of a July 13, 1977 order by Administrative Law Judge Hyun, denying reconsideration of his June 14, 1977 order, which, in essence, disallowed a request for substitution of witnesses on a previously submitted list. Complaint counsel's application is filed notwithstanding the Administrative Law Judge's denial, by order of July 20, 1977, of a requested determination under Rules of Practice Section 3.23(b) which would have allowed interlocutory appeal.

Section 3.23 of our Rules, by its terms, exhausts the available avenues for interlocutory appeal to the Commission. Since no contention is or could be made that an appeal will lie in this case under subsection (a) of this section, and the requisite determination under subsection (b) was denied, there would appear to be no basis for entertaining the present application.

Complaint counsel nonetheless urge that the assertedly grave impact of the Administrative Law Judge's ruling invokes our "inherent power to review a ruling by an administrative law judge" even where the requirements of Section 3.23 are not met. As authority for the existence of such a power, they cite two rulings in *Kellogg Co., et al.*, reported at 83 F.T.C. 1756 (1974) and 86 F.T.C. 650 (1975). Both of these rulings dealt with applications, like the present one, premised upon our inherent power to review interlocutory rulings. In both instances the applications were denied. To be sure, there is language in both rulings indicating that review might be granted on a showing of clear abuse of discretion on the part of the Administrative Law Judge. 83 F.T.C. at 1758; 86 F.T.C. at 651. Another ruling in the same matter, reported at 86 F.T.C. 318, may be read as suggesting that a showing of irreparable harm to the appealing party is also requisite to its exercise. See 86 F.T.C. at 319, n. 1.

These tests are not met here. Moreover, the decision we are asked to review is peculiarly of the sort best left to the discretion of the Administrative Law Judge. Far from being an issue of "law or policy"

which we might appropriately resolve on interlocutory appeal, it goes to the heart of the Administrative Law Judge's duty to ensure that the hearing proceeds fairly and expeditiously.

It is therefore ordered, That the application is denied.

Interlocutory Order

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IN THE MATTERS OF

BRISTOL-MYERS COMPANY, ET AL. D. 8917

AMERICAN HOME PRODUCTS CORPORATION, ET AL.

D. 8918

STERLING DRUG INC., ET AL. D. 8919

Dockets 8917, 8918, 8919. Interlocutory Order, Aug. 23, 1977

Order denying motion of complaint counsel for interlocutory review of ruling of Administrative Law Judge which granted respondents access to two reports of interviews with one of respondents' witnesses.

ORDER DENYING APPLICATION FOR INTERLOCUTORY APPEAL

Complaint counsel in these three proceedings apply for interlocutory review of the Administrative Law Judge's ruling granting access, in connection with a joint hearing to take testimony applicable to each case, to two reports, prepared by complaint counsel, of interviews with one of their witnesses. The application follows a ruling dated August 2, 1977, by the Administrative Law Judge determining that the question involved meets the standards for interlocutory review set out in Section 3.23(b) of our Rules of Practice.

This application for review was the subject of an earlier motion, filed July 29, 1977, entitled "Motion For Extension Of Time In Which To File Application For Interlocutory Appeal Under Section 3.23(a)(1)." It was urged that the Administrative Law Judge's order "required the disclosure of Commission records," in the terms of that portion of the Rule; and that characterization seems unassailable on the basis of the facts before us. We denied that motion because the only ground urged for an extension was complaint counsel's desire to seek appeal simultaneously under both subsection (a)(1) and subsection (b). We held that such a procedure:

... would make a nullity of the 5-day time limit contained in subsection (a). Similarly situated applicants could always seek subsection (b) certification as well as a subsection (a) appeal, thereby avoiding the time constraint. Because the time limitation serves the important purpose of reinforcing the ALJ's control over the orderly progress of adjudicative hearings, we cannot countenance such a result.

This consideration applies with equal force to the present motion. Complaint counsel could have made application for review of the order in question under Section 3.23(a)(1), within the five-day period prescribed thereunder. They did not. We cannot now countenance the