

IN THE MATTER OF
KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Jan. 29, 1979

Order denying motion to dismiss the complaint, or in the alternative, to withdraw the proceedings from adjudication and to hold an evidentiary hearing.

ORDER

On November 29, 1978, General Mills filed a motion and supporting memorandum seeking dismissal of the complaint, or alternative relief including withdrawal of the proceedings from adjudication and an evidentiary hearing on the negotiations with Judge Hinkes. Complaint counsel responded on December 12, 1978. The Commission has reviewed these submissions as well as the Order, separate statement of Chairman Pertschuk, and accompanying materials issued on December 8, 1978, and has determined that the relief requested by General Mills should be, and hereby is denied.

I

With respect to General Mills' assertion that the complaint must be dismissed because any continuation of the proceedings will violate General Mills' statutory and constitutional rights, the Commission has concluded that the grounds stated do not warrant the relief requested. In the first place, members of the Commission other than Chairman Pertschuk were unaware of the negotiations with Judge Hinkes at the time that they occurred. Hence, no basis exists in support of a claim that the Commission as a body violated General Mills' rights. Second, Chairman Pertschuk's conduct with respect to the Hinkes contract neither demonstrates a lack of impartiality nor creates an appearance thereof. On the contrary, his conduct was motivated solely by considerations of sound administration and a desire to accommodate the interests of all the parties in bringing these proceedings to an expeditious conclusion. Clearly, the circumstances surrounding his actions would not lead a reasonable person to conclude otherwise.

To the extent that General Mills' motion is based upon contacts between Chairman Pertschuk and Judge Hinkes, it is important to note that Chairman Pertschuk was not acting as an interested party or on behalf of an interested party, but as the "administrative head of the agency." Rules of Practice Section 0.8(a); Reorganization Plan No. 8 of 1950, Section 1(a), 64 Stat. 1264, *reprinted in* 15 U.S.C. 41 App. Further, the Chairman's actions were not related to the merits

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of the proceeding in any way, nor did he discuss the merits with Judge Hinkes. In light of these facts, the Commission has concluded that there is no actual or apparent lack of impartiality on the part of the Chairman or of any other Commissioner, and that the course of negotiations did not prejudice General Mills' rights in any manner.

II

While General Mills argues that the Commission has an "affirmative duty" to hold an evidentiary hearing, the authorities cited do not warrant such a conclusion. The facts here are clearly distinguishable from the circumstances involved in *United Air Lines, Inc. v. CAB*, 281 F.2d 53 (D.C. Cir. 1960), and *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959). Moreover, to the extent that the motion otherwise seeks the information contained in or appended to the Commission's order of December 8, it is dismissed as moot. To the extent that it seeks to probe beyond the explanation already offered, it is denied. General Mills seeks in effect, to probe the predecisional "mental processess" of an agency. Such probing of the mental processes is disfavored, especially where, as here, the reasons for an agency decision are stated. *United States v. Morgan*, 313 U.S. 409, 422 (1941); *National Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1144-46 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974). In this case, the Chairman has given an ample statement concerning his actions, and related memoranda have been released. See Order of December 8, 1978. Nor has there been any showing of bad faith or improper behavior. On the contrary, the Commission believes that the documents in the record demonstrate the absence of improper behavior or bad faith.

III

Finally, the Commission declines to entertain General Mills' request to withdraw this matter from adjudication and to consider the possibility of settlement. General Mills is entirely free to follow the procedures set forth in Rules of Practice Section 3.25, should it choose to do so.

IV

It is ordered, That (1) General Mills' motion of November 29, 1978, is dismissed as moot to the extent it seeks relief already granted; and (2) To the extent it seeks relief not previously granted, it is denied in all respects.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Jan. 29, 1979

Order denying motion to disqualify FTC Chairman and each other Commissioner advised in advance of proposal to retain ALJ on contract basis.

ORDER

On December 7, 1978, General Foods Corporation filed a motion to disqualify Chairman Pertschuk and each other Commissioner advised in advance of the proposal to retain Judge Hinkes on a contract basis. On January 11, 1979, the Chairman responded to General Foods' motion and refused to disqualify himself. That response was placed on the public docket and served on the parties.

In responding to General Foods' alternative motion that the Commission itself determine whether the Chairman should be disqualified from participating in these proceedings,¹ we see no reason to differ from the result reached by the Chairman. The Chairman's actions were undertaken pursuant to his administrative authority under Reorganization Plan No. 8 of 1950, 64 Stat. 1264. The documents which have been released, and the Chairman's statement of December 8, clearly indicate that his actions in this matter were taken without reference to the merits of the case. Under the circumstances we do not believe that any bias, prejudgment or apparent unfairness has been demonstrated. *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962).

As to General Foods' motion to disqualify each of the Commissioners who had advance knowledge of the Hinkes contract, the record is clear that no such Commissioner was so advised. Accordingly,

It is ordered, That the motion of General Foods Corporation to disqualify FTC Chairman Michael Pertschuk and each other Commissioner advised in advance of the proposal to retain Judge Hinkes on a contract basis be, and the same hereby is, denied.

Chairman Pertschuk and Commissioner Pitofsky did not participate.

¹ General Foods argues that the Chairman should be disqualified not only from participating in any decision with respect to the Hinkes contract, but also from participating in any future deliberations in this case.