

Interlocutory Order

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Feb. 13, 1981

Denial of respondent's motions seeking disqualification of Chairman Pertschuk respecting issues outside the scope of his prior recusal.

ORDER

On July 21, 1980, respondent Kellogg Company ("Kellogg") filed a motion requesting Chairman Pertschuk to disqualify himself from all further participation in any aspect of this case or, in the alternative, that the Commission direct his disqualification. On August 5, 1980, respondent General Mills, Inc. ("General Mills") likewise moved to disqualify the Chairman. On September 22, 1980, Chairman Pertschuk filed a memorandum declining to disqualify himself and referring the matter to the full Commission for consideration of the alternative requests of Kellogg and General Mills that the Commission direct his disqualification. Chairman Pertschuk's response was placed on the public record and served on respondents.¹ For the reasons stated in the Chairman's September 22, 1980, memorandum, and the additional reasons discussed below, the alternative requests of Kellogg and General Mills are denied.

I.

Kellogg contends that "a decisionmaker cannot legally recuse himself from part of an adjudicative proceeding, while purporting to reserve to himself the right to continue presiding over the remainder of that proceeding." (Kellogg Motion at 3.) In support, Kellogg cites the same authorities and rationales as those it advanced in connection with its earlier request that Judge Berman be disqualified from presiding over the proceedings on the merits of the Commission's complaint.²

We cannot agree with Kellogg that the Chairman's recusal from the proceedings concerning Judge Hinkes' retirement mandates his disqualification from the proceedings on the merits. Each of the

¹ Because Chairman Pertschuk has himself referred the alternative requests to the Commission for decision without his participation, we need not consider whether, absent such a referral, the Commission would have power to disqualify one of its members over that member's objection.

² See Memorandum In Support of Motion of Respondent Kellogg Company to Disqualify Administrative Law Judge or, In the Alternative, for Related Discovery (Feb. 1, 1980); Memorandum of Respondent Kellogg Company in Reply to Complaint Counsel's Answer to Motion to Disqualify Administrative Law Judge (Feb. 11, 1980); Memorandum of Respondent Kellogg Company to the Commission In Support of Its Motion to Disqualify Administrative Law Judge or, In the Alternative, For Related Discovery (Feb. 20, 1980).

arguments advanced by Kellogg in support of its request has already been considered, and rejected, in our July 31, 1980, order in which we declined to disqualify Judge Berman. There, we stated:

[T]he inquiry concerning the circumstances of Judge Hinkes' retirement is "distinct and separable" from the proceedings on the merits of the complaint. * * * The proceedings involve different witnesses and testimony, bearing upon different legal and factual issues.

In these circumstances, in the absence of any statute providing to the contrary,³ the case law has permitted partial disqualification with respect to discrete aspects of what amounts to a single proceeding. *Warner v. Rossignol*, 538 F.2d 910, 913 n.6 (1st Cir. 1976) (trial judge disqualified from participating in damages phase of trial retained power to deny subsequently filed motion for new trial); *United States v. Lawrenson*, 334 F.2d 468 (4th Cir. 1964) (fact that judge assigned civil action, which was related to criminal prosecution, to another judge after presentation of affidavit of prejudice was no basis for disqualification from subsequent motions in criminal case); *Middletown Nat'l Bank v. Toledo, A.A. & N.M. R. Co.*, 105 F. 547 (S.D.N.Y. 1900); *Coastal Petroleum Co. v. Mobil Oil Corp.*, 378 So.2d 336 (Fla. App. 1980) (trial judge recused as to issues severed for separate trial properly reserved jurisdiction to enter final judgment on issues already tried); *Flannery v. Flannery*, 452 P.2d 846, 849 (Kan. 1969) (judge disqualified from presiding over divorce case based on knowledge of disputed facts was authorized to hear motion to modify divorce decree); *Price v. Gibson*, 192 P.2d 219, 224 (Kan. 1978) (probate judge disqualified from admitting will to probate because of his knowledge of testamentary capacity of testator was authorized to preside over matters arising in administration of estate).⁴

In some situations nothing less than full disqualification is

³ There is no statutory requirement that one who is disqualified from a separate, collateral phase of an adjudication is barred from participating in the decision of its other aspects. Indeed, the Commission's treatment of disqualification motions is an example. The Commissioner whose exclusion is sought in effect disqualifies himself from participating in the Commission's decision of that matter. That limited disqualification, however, does not automatically take the challenged Commissioner out of the remainder of the proceedings. Compare 5 U.S.C. 556(d). No court has specifically considered the question presented here in the context of an administrative proceeding from which a decisionmaker has partially withdrawn. However, *United Air Lines, Inc. v. CAB*, 281 F.2d 53 (D.C. Cir. 1960), implicitly supports our view that the procedures adopted in this case are proper. There, the court ordered the CAB to conduct an inquiry into claims of improper *ex parte* contacts raised on review of CAB orders. After the remand, the court sustained the procedures adopted by the CAB, specifically noting that the inquiry had been conducted "before a new examiner" who issued an initial decision limited to the *ex parte* issues. *United Air Lines v. CAB*, 309 F.2d 238, 239 (D.C. Cir. 1962).

⁴ In "bifurcated" trials, evidence on the issue of damages is heard following a decision by the trier of fact on the question of liability. There is no requirement in such instances that the same trier of fact rule on the question of damages. See, e.g., *Foerster v. Illinois Bell Tel. Co.*, 315 N.E.2d 63, 66, 20 Ill.App.3d 656 (1974); *State ex rel. La Follette v. Raskin*, 34 Wis.2d 607, 150 N.W.2d 318 (1967). Likewise, in proceedings where legal and equitable issues are mingled, a trial judge may try and determine the equitable issues while the jury is simultaneously deciding the legal issues. See *Schoenfeld v. Atomic Products Corp.*, 350 N.Y.S.2d 736 (App. Div. 1973); *Scentsas v. Citizens Ins. Co.*, 112 N.H. 47, 289 A.2d 64 (1972).

required. For example, when the decisionmaker has a financial interest in the outcome of the proceedings, or is related to one of the parties, it is obvious that partial disqualification would not cure any actual or apparent impropriety. That is not, however, the situation that we have before us. Chairman Pertschuk's withdrawal from further participation in Commission consideration of motions and requests relating to the contractual arrangement with Judge Hinkes was based on the possibility that the Commission in its deliberations concerning that separate aspect of the case might be called upon to consider the validity of the Chairman's actions, including the legal sufficiency of statements submitted by him to the Commission, and on the possibility that his testimony concerning the offer of the contract might be requested. Cf. *Flannery v. Flannery*, *supra*; *Price v. Gibson*, *supra*. But these possibilities do not impair his ability impartially to decide the remaining issues in the case. As we indicated in our January 29, 1979, order denying a similar motion by General Foods' requesting disqualification of the Chairman and each other Commissioner advised in advance of the Hinkes' contract offer, the problem which arose out of Judge Hinkes decision to retire presented managerial questions that are normally the province of the Chairman. (See Reorg. Plan No. 8 of 1950, 64 Stat. 1264.) Issues arising out of that managerial decision are distinct from the substantive merits of the case. As the record in the Commission's continuing inquiry into the Bureau of Competition's role in the Hinkes contract offer now stands there is nothing that creates even an appearance of partiality.⁵

II.

General Mills presents a somewhat different argument. Chairman Pertschuk participated in Commission orders of December 8, 1978, January 29, 1979, November 13, 1979, and March 19, 1980. Each of these orders disposed of motions and requests of respondents pertaining to the contractual arrangement with Judge Hinkes. On July 18, 1980, the Chairman recused himself from Commission consideration of then pending motions requesting further fact-finding concerning the circumstances of the contractual arrangement with Judge Hinkes. General Mills contends that the facts upon which the Chairman based his July 18, 1980, recusal were relevant to

⁵ As Chairman Pertschuk noted in his statement of July 18, 1980, (p. 1), his impartiality is "confirmed by the fact that, after reviewing the arguments made by respondent, [he] reversed [his] previous decision and determined not to submit the Hinkes contract to the Office of Personnel Management for approval, thereby affording respondents much of the relief they were seeking." See Separate Statement of Chairman Pertschuk attached to the Commission's order of December 8, 1978.

the resolution of the four aforementioned orders, and that the Chairman's failure to also recuse himself from those deliberations so tainted his appearance of impartiality that he is now required to disqualify himself from the entire case. (General Mills Motion at 2.) General Mills does not articulate why, if Chairman Pertschuk's participation in the four cited orders was improper, his disqualification from all further participation in the proceedings on the merits is now required.⁶ In any event, we disagree with General Mills' characterization of the aforementioned Commission orders.

In his July 18, 1980, memorandum, the Chairman observed that certain statements referring in part to action taken by him with respect to the Hinkes contractual arrangement had been submitted to the Commission. Because, as we have discussed above, the resolution of motions and requests then pending before the Commission pertaining to the need for additional fact-finding required consideration of the sufficiency of his statements, the Chairman concluded that his participation in those deliberations would be inappropriate. (Pertschuk Memorandum at 2.) None of the four earlier Commission orders involved comparable considerations. Thus his participation in those orders was not inconsistent with his subsequent recusal, nor did such participation raise an appearance of bias or prejudgment.

It is therefore ordered, That the motions of Kellogg and General Mills seeking Chairman Pertschuk's disqualification with respect to issues outside the scope of his prior recusal are denied.

Chairman Pertschuk and Commissioner Pitofksy did not participate.

⁶ As discussed in Part I *supra*, we have already held that the Commission's inquiry into the circumstances surrounding the contractual arrangement with Judge Hinkes is "distinct and separable" from the proceedings on the merits of the Commission's complaint.

IN THE MATTER OF
GLENDINNING COMPANIES, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 8824. Decision, Oct. 26, 1976—Modifying Order, Feb. 24, 1981

This order reopens the proceeding and modifies the cease and desist order issued against the company In the Matter of Glendinning Companies, Inc., *sub nom.*, The Coca-Cola Company, et al., on October 26, 1976, 88 F.T.C. 565, 41 FR 53653, by deleting the language "including all entry forms submitted by participants therein," from Paragraph 1(c), which required the company to keep all entry forms submitted in connection with both games of chance and games of skill, and adding to Paragraph 2 of the order, specified language which limits respondent's record-keeping obligation to maintaining only those entry forms submitted for games of skill.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND
DESIST ORDER

Petitioner, Glendinning Companies, Inc., seeks the modification of a record-keeping provision of the Order to Cease and Desist issued on October 26, 1976. Petitioner is engaged in the manufacture, promotion, sale, and distribution of promotional games used to induce the sale of products. On October 23, 1980, petitioner sought from the Commission an advisory opinion, pursuant to Rule 2.41 of the Federal Trade Commission's Rules of Practice, interpreting the phrase "all entry forms" in Paragraph 1(c) of the Order to apply solely to games of skill, and not to games of chance. On November 7, 1980, petitioner was informed that an advisory opinion was not the appropriate vehicle for the requested relief, and that the request would be treated as a Petition to Reopen and Modify the Order pursuant to Rule 2.51 of the Rules of Practice. The petition was accordingly placed on the public record for comment for thirty days. No comments were received.

Paragraph 1(c) now orders petitioner to cease and desist from:

1. Engaging in, promoting the use of, or participating in any such promotional game, contest, sweepstake or similar device, by means of any announcement, notice or advertisement, unless:

(c) There are maintained by respondent or its designee for a period of at least two years after the closing of each such promotional game or contest and the awarding of all prizes in such connection therewith, full and adequate records *including all entry forms submitted by participants therein*, which clearly disclose the operation of such promotional game or contest, the basis or method used to determine entitlement to prizes, and the facts as to the receipt of such prizes by participants entitled thereto;