

IN THE MATTER OF
GROLIER, INCORPORATED, ET AL.

Docket 8879. Interlocutory Order, Aug. 13, 1981

ORDER DENYING MOTION TO DISQUALIFY JUDGE VON BRAND

This matter is before us once again on Respondent's Motion for Disqualification and Removal of the Administrative Law Judge ("Renewed Motion"). Grolier was given the opportunity to raise this issue a second time when the United States Court of Appeals for the Ninth Circuit remanded the case because it believed that there was an erroneous "flat refusal" by the Commission to disclose to Grolier anything at all about Administrative Law Judge von Brand's prior participation in the Grolier case while he served as an attorney-advisor to former Commissioner MacIntyre. *Grolier, Inc. v. FTC*, 615 F.2d 1215, 1222 (9th Cir. 1980).

The Commission denied Grolier's discovery request when it held that, as a matter of law, attorney-advisors were not engaged in investigating or prosecuting matters so as to bring them within the proscription of Section 554(d) of the Administrative Procedure Act ("APA"), 5 U.S.C. 554(d). See *Grolier, Inc.*, 87 F.T.C. 179, 181 (1976). The Ninth Circuit held however that Section 554(d) precluded attorney-advisors to the Commissioners "from [subsequently] participating in the adjudication of cases [as administrative law judges] in which they have actually performed * * * ['investigative and prosecuting'] functions, and in 'factually related cases,'" and stated that "[o]nce an attorney-advisor is shown to have been 'engaged in the performance of investigative or prosecuting functions,' through prior acquaintance with *ex parte* information, 554(d) says he 'may not * * * participate or advise in the decision * * *.'" *Id.*, 615 F.2d 1221. The Ninth Circuit therefore held that Judge von Brand's "actual involvement" with "information received outside of the controlled adjudicative setting" (615 F.2d 1220, 1221) was the critical determination to be made on disqualification. The court remanded the case for us to reconsider the denial of discovery and thereafter the disqualification motion.

Since the case was remanded, Grolier has made extensive submissions, mostly consisting of documents from the Commission's files, which it had prior to the Ninth Circuit's decision. Despite directions to Grolier to state the impact these documents might have on the disqualification issue,¹ Grolier has presented only a recast version of

¹ Order Reopening Proceeding and Directing Submission of Further Information, September 12, 1980.

an argument previously rejected by both the Commission and the court of appeals. Although advanced at length, the argument is simply that because Judge von Brand served as an attorney-advisor he is presumed to have a close relationship with his Commissioner and further presumed to be aware of everything circulated among the Commissioners² and, because the Commission considered several matters involving Grolier while he was an attorney-advisor, Judge von Brand must be presumed to have been exposed to information outside of the controlled adjudicative setting and, hence, disqualified. See Renewed Motion. Grolier also argues that, although the Commission has searched its files thoroughly and repeatedly for relevant material, Grolier is entitled to further discovery because it is still unable to connect Judge von Brand with any prior Grolier matter. We shall address these issues after a brief review of the history of this matter to put Grolier's present arguments in perspective.

History of the Disqualification Motion

Judge von Brand served as an attorney-advisor to Commissioner MacIntyre from 1963 to 1970. The Commission issued its complaint against Grolier on March 8, 1972.³ Hearings on the complaint extended from 1973 to 1976 and were conducted before two Administrative Law Judges.⁴ Judge von Brand's prior role at the Commission was related in a Commission press release announcing his appointment as a judge on March 18, 1975, and reported in the Antitrust and Trade Regulation Reporter on March 25, 1975 (706 ATRR 32, 33) (R. 3301-02). The first prehearing conference before Judge von Brand was held on March 19, 1975. *Id.* Judge von Brand reheard much of the testimony at Grolier's insistence (R. 1804-29, 1967-81). Almost a year later, just five days before the end of hearings before Judge von Brand, Grolier's president testified that Commissioner MacIntyre may have met with him in 1966 or that he may have met Commissioner MacIntyre.⁵ Judge von Brand immedi-

² The argument has apparently escalated because now Grolier would charge Judge von Brand with knowledge of every document possessed by the staff even though there is no indication it was previously seen by the Commissioners. *E.g.*, Renewed Motion, 7, 8; Johns Affidavit, Exhibits D-F, I; Righthand Affidavit, Exhibits I and M; see footnotes 12 and 13, *infra*.

³ The original record revealed, in affidavit form, the undisputed fact that the recommendation to issue a complaint, based on the results of the staff's investigation, was not forwarded to the Commission until *after* Judge von Brand left Commissioner MacIntyre's office. R. 4663-64. Exhibit BB to the Righthand Affidavit indicates that the Commission was advised that the investigation was progressing while Judge von Brand was an attorney-advisor. Nothing in the record or in Commission practice indicates that the Commission knew the substance of the information Grolier provided at that time to the investigatory staff.

⁴ The first judge assigned to hear the case retired after a year of hearings had been held (R. 1793).

⁵ The actual testimony was: "I only recall having met Mr. MacIntyre and I don't remember, or I think, I am quite sure at one of the earlier discussions with the Chairman he was there, but it was a very informal discussion just trying to say who I was and where I hoped to be able to take the company in the following 20 years." (Tr. 16115).

ately disclosed that he had worked for Commissioner MacIntyre but stated that he had no recollection of any events involving Grolier.

Armed with this bit of testimony Grolier filed a motion to disqualify Judge von Brand along with a discovery request for all documents relating to Grolier which were before the Commission during the period from 1963 to 1971. Judge von Brand entered a statement in the record pointing out that his former position had been a matter of public (and published) record since he presided over the case; that he had no recollection of working on Grolier matters; that he had asked a former secretary to search Commissioner MacIntyre's former suite of offices for any records relating to Grolier; that no such records were located nor were there any logs that would show who worked on any particular matter, and that he has searched his own files and could find nothing related to Grolier in them. Statement of Administrative Law Judge Concerning Motion for Disqualification, January 30, 1976. On February 10, 1976, the Commission declined to disqualify Judge von Brand and denied discovery. *Grolier, Inc.*, 87 F.T.C. 179 (1976).

On April 30, 1976, Grolier replicated its discovery motion for documents in a Freedom of Information Act ("FOIA") request. On May 17, 1976, the Secretary of the Commission granted the request in part and denied it in part. Grolier appealed this determination to the Commission. On June 28, 1976, the Commission granted Grolier access to most of the documents but withheld, in whole or in part, 41 documents. Submission of Documents in Response to the Commission's Order of September 12, 1980 ("Submission"), Exhibit A, paras. 26-29; Exhibit C. On August 20, 1976, Grolier filed a lawsuit under FOIA to obtain the 41 documents withheld. *Grolier, Inc. v. FTC*, Civil Action No. 76-1559 (D.D.C.). On November 1, 1976, an affidavit and an index of the 41 documents withheld were filed by the Commission. Submission, Exhibits B and C. On May 6, 1977, the Commission responded to interrogatories propounded by Grolier about the nature of the Commission's search for documents and about how Commission records are maintained. Submission, Exhibit D. On July 22, 1977, the district court ordered an additional search for documents which was conducted with negative results. Submission, Exhibit E. On March 10, 1978, the district court granted summary judgment for the Commission, holding that the documents withheld were exempt from production under FOIA. Submission, Exhibit F. Grolier appealed. Then, because the District of Columbia Circuit had changed its interpretation of the status of Commission "blue minutes,"⁶ the

⁶ *Bristol-Myers Co. v. FTC*, 194 U.S. App. D.C. 285, 598 F.2d 18 (1978).

Commission sought a remand. On remand the Commission, on March 13, 1979, voluntarily released 11 of the 14 blue minutes in their entirety. Minor deletions were made in the three remaining minutes. Submission, Exhibit G. The district court subsequently ordered the release of all the blue minutes. Submission, Exhibit H. Grolier again appealed.⁷

Meanwhile, in the adjudicative proceeding, Judge von Brand issued his initial decision on October 12, 1976. *Grolier, Inc.*, 91 F.T.C. 331 (1978). Grolier appealed this decision to the Commission which issued a Final Order and Opinion on March 13, 1978. *Grolier, Inc.*, 91 F.T.C. 476 (1978). Grolier did not attempt to use the documents it obtained in June 1976, or the Index describing the withheld documents it obtained in November 1976, when it made its disqualification and discovery arguments to the Commission and the court of appeals.

On remand from the Ninth Circuit Judge von Brand has executed an affidavit reaffirming that he has no recollection of working on Grolier matters as an attorney-advisor. In view of the time period involved and the volume of documents that passed through Commissioner MacIntyre's office, he cannot positively say he never saw a circulation relating to Grolier. Judge von Brand also relates conversations he had with a former secretary to Commissioner MacIntyre and the Commissioner himself and states that both recall that another attorney-advisor, Mr. Powers (now deceased), worked on Grolier matters. Judge von Brand also describes searches he made for records that might show his involvement with Grolier matters. First, he searched his personal files and found nothing related to Grolier. Second, he had another former secretary search Commissioner MacIntyre's former suite of offices for Grolier related documents or anything that would show which attorney-advisor worked on Grolier matters. The results were negative. Finally, he directed the Secretary of the Commission to search the Grolier files for anything that would show whether he had prepared documents related to Grolier. Again, nothing was found. Affidavit of Theodor P. von Brand.

Commissioner MacIntyre has also filed an affidavit stating that he compartmentalized work assignments in his office. He assigned investigational matters to Mr. Powers and, after his departure, to Mr. Volhard. Motions were assigned to Mr. Michaels and adjudicatory matters were assigned to Judge von Brand. To the best of his recollection, Commissioner MacIntyre did not discuss matters relat-

⁷ The appeal was dismissed after the Commission released all the documents in this proceeding. See Order, March 10, 1981.

ing to Grolier with Judge von Brand and he was not aware that Judge von Brand had contact with any Grolier matters as an attorney-advisor. Finally, Commissioner MacIntyre states that all his official files remained in his office when he left the Commission, that the personal files he removed have since been destroyed and that he has no documents related to Grolier now. Affidavit of Everette MacIntyre.

Finally, although none of the 28 documents withheld in the FOIA case shed any light on Judge von Brand's involvement with Grolier matters, we provided them to Grolier as a matter of discretion. Order, March 10, 1981.

Further Discovery Is Unnecessary

Grolier again contends it is entitled to discovery beyond its original request for documents and that if this discovery is denied an adverse inference must be drawn against Complaint Counsel. Renewed Motion, 18-27. No further discovery is necessary. Our March 10, 1981, Order in essence granted Grolier's original request for documents but rejected additional requests Grolier made.⁸ We are satisfied, both independently and in light of the court of appeals decision, that there is sufficient information available in the record to make an accurate determination under Section 554(d) of the Administrative Procedure Act (5 U.S.C. 554(d)) that there is no basis to disqualify Judge von Brand.

The affidavits of the two principals, Commissioner MacIntyre and Judge von Brand, demonstrate that neither recalls discussing any Grolier matters with the other. Furthermore, both state that Judge von Brand handled only adjudicatory matters for Commissioner MacIntyre. More importantly, our files have been searched several times for any document that Judge von Brand might have seen, and a district court has approved the adequacy of some of those searches. Grolier has been given every document relating to Grolier that circulated among the Commissioners while Judge von Brand served as an attorney-advisor as well as many documents that were not. Not a single document connects Judge von Brand with a single Grolier circulation.

Grolier has substantially more information than was available in other cases where courts have upheld an agency decision to deny discovery on the possible disqualification of a decisionmaker. For example, in *San Francisco Mining Exch. v. SEC*, 378 F.2d 162, 168,

⁸ Grolier sought ten categories of documents and to depose Commissioner MacIntyre, Judge von Brand and three other individuals formerly employed in Commissioner MacIntyre's office.

170-71 (9th Cir. 1967), the party urging disqualification contended that additional discovery had been improperly denied because it appeared that the agency had authorized the commencement of adjudication in 1962 based on a staff letter and that some decision-makers had earlier served on the prosecuting staff of the agency (as late as July 15, 1960). The Ninth Circuit rejected the contention. It held that even if a decisionmaker had participated in investigating or prosecuting earlier proceedings, that fact would not be enough to justify additional discovery, especially because the earlier proceedings were alluded to in the opinion and thus were either in the administrative record or would have been known through official notice. The court also held that, absent a factual showing of some ground to believe that an improper commingling of functions did occur, further discovery was not appropriate. It was not enough to allege, as Grolier does here, that the decisionmaker "might have" participated in an earlier investigation or adjudication. *Id.* 378 F.2d at 170. See also, *Au Yi Lau v. I.N.S.*, 558 F.2d 1036, 1042-43 (D.C. Cir. 1977) (affidavit by decisionmaker previously employed as prosecutor that he had "no knowledge of or familiarity with" the case in that capacity held sufficient to defeat a motion to disqualify); *Adolph Coors Co. v. FTC*, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (affidavit by attorney-advisor that he had not participated in decision held sufficient); *R.A. Holman and Co. v. SEC*, 377 F.2d 655, *cert. denied*, 389 U.S. 991 (1967) (discovery and disqualification properly denied where decisionmaker's affidavit stated that he had not "acquired substantial knowledge of the facts in issue," even though he had been a prosecutor when the investigation began).

Thus, it is clear to us that, under established judicial precedents, the fact that Grolier can find no indication of Judge von Brand's participation in earlier matters related to it does not mean that it is entitled to still further discovery, rather it means simply that there is no basis for disqualifying Judge von Brand. See *Grolier, Inc. v. FTC*, *supra*, 615 F.2d at 1221.

Grolier also argues that because we have refused to allow further discovery, an adverse inference should be drawn. Renewed Motion, 22-27. Complaint Counsel has responded by asserting that an adverse inference should not be drawn where, as here, a proper assertion of privilege is made to withhold documents. Answer to Respondent's Motion for Disqualification of the Administrative Law Judge, 3-4. Although Complaint Counsel is correct, there are other reasons not to draw an adverse inference against Complaint Counsel.

First, the adverse inference rule applies to the parties, not the deciding tribunal. Complaint Counsel is not withholding any infor-

mation from Grolier. Indeed, the very case Grolier relies upon in urging that the inference be drawn, *International Union (UAW) v. NLRB*, 459 F.2d 1329, 1338 (D.C. Cir. 1972), holds that the inference dissipates if, as here, a decisionmaker sanctions the withholding of evidence. Second, even if an inference adverse to Complaint Counsel could have been drawn from our earlier refusal to grant discovery, it was eliminated when we provided Grolier with every document it originally sought. Finally, Grolier's argument stands the inference in its head. The Supreme Court has held that an adverse inference arises when a party provides weak evidence but refuses to produce strong evidence in its control. See, e.g., *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939). Here we have given Grolier the strong evidence (every document that exists and proof that no other records exist) but it seeks to obtain weak evidence (the testimony of those who have sworn they cannot recall any involvement by Judge von Brand with Grolier matters).

In any event, if we were to infer anything from the fact that Grolier's review of all the documents before the Commission fails to establish a single connection between Judge von Brand and Grolier matters, it would be to infer not that evidence of a nexus between the two must exist, but that none exists.

There Is No Basis To Disqualify Judge von Brand

Despite the tremendous volume of paper that accompanies Grolier's motion, its substantive argument for disqualification covers barely a page (Renewed Motion, 27-28) and can be summarized in a sentence. Basically, the argument is that because several matters involving Grolier were before the Commission while Judge von Brand served as attorney-advisor, it must be assumed that he saw them and that he should therefore be disqualified. With such an uncritical treatment of the issue, we could safely reject the motion by relying on the court of appeals statement that "Where [there is] * * * no evidence of actual involvement in Grolier matters by then attorney-advisor von Brand, the normal course of action would be to refuse to disqualify him." *Grolier, Inc. v. FTC*, *supra*, 615 F.2d at 1221. But to finally resolve any doubts on the issue, we shall discuss Grolier's specific contentions.

Grolier argues that because Judge von Brand's 1976 statement referred to the fact that he worked on adjudicative and "informal

matters" there is circumstantial evidence he was exposed to anything it characterizes as an informal matter.⁹ See Renewed Motion, 5, 7, 14, 16, 17, 18, 27. We reject this argument for several reasons.

First, as Complaint Counsel points out (Answer, 1-3) this argument is the same *per se* argument, advanced under another name, that the court of appeals squarely rejected. See, *Grolier, Inc., supra*, 615 F.2d at 1221.¹⁰ Like the Ninth Circuit, we hold that "[f]or the purposes of disqualification [attorney-advisors] are not chargeable with involvement in all cases that were before the agency during their advisorship." 615 F.2d at 1221.

Second, we note that none of the attachments to the Furth Affidavit would serve as a basis for disqualification because the Ninth Circuit held that one of Congress' concerns in enacting Section 554(d) was to prevent the "possible use in the decisional process of information received outside of the controlled adjudicative setting * * * ." 615 F.2d at 1220. All the documents appended to the Furth Affidavit were introduced as evidence in the controlled adjudicative setting (introduced mainly by Grolier) and therefore there is no danger that Judge von Brand improperly used these documents in arriving at a decision.¹¹ See *San Francisco Mining Exch. v. SEC, supra*, 378 F.2d at 169.

Third, it is undisputed that none of the documents Grolier submitted involve the prosecution of this case. The recommendation to issue a complaint was not forwarded to the Commission until after Judge von Brand ceased to serve as an attorney-advisor.¹² Affidavit of Edward Steinman. Very few of the documents Grolier has filed even concern the formal investigation of this case and none of them contain facts or information not adduced at the hearing that could have been interpolated by Judge von Brand.¹³ See *Final Report of*

⁹ Grolier argues that an earlier consent order and assurance of voluntary compliance must be considered informal matters that Judge von Brand must have seen. While these procedures are informal methods of ending investigations, both arise under Part 2 of our Rules of Practice, 16 C.F.R.2.1 *et seq.* governing "Nonadjudicative Procedures". As such, they would normally be handled by an attorney-advisor connected with an investigation, not adjudicatory matters.

In any event, Grolier's speculation about what Judge von Brand meant in 1976 when he said he worked on "informal matters" as well as adjudicative matters is insufficient to create a factual issue, particularly in light of the affidavits of Judge von Brand and Commissioner MacIntyre.

¹⁰ Grolier now places sole reliance on the 1976 statement and matters that were in the record before the court of appeals. We note that Grolier challenged the verity of this statement when it was before the court of appeals and it should not be allowed to rely upon it now for the first time. See Petitioners' Reply Brief, No. 78-2159 (9th Cir.) at 25-26 n.12. We ordered Grolier to address the issue of timeliness (Order, September 12, 1980 at 3), but it chose not to do so. We, therefore, hold this aspect of the matter is untimely.

¹¹ In any event, the Supreme Court has made clear that due process is not violated by the mere fact that a decisionmaker has knowledge of investigative facts. *Withrow v. Larkin, supra*, 421 U.S. at 55.

¹² One document in the record (Johns Aff., Exh. W.) is dated after the staff recommended that the complaint issue, but that matter was not before the Commission until after Judge von Brand left his position as attorney-advisor and therefore has no bearing on the issue.

¹³ The Commission's investigation leading to this adjudication began on February 22, 1970, with a staff memorandum (Righthand Aff. Exh. AA) requesting the issuance of an investigational resolution and of an Order to

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the Attorney General's Committee on Administrative Procedure, 56 (1941); *Grolier, Inc. v. FTC*, *supra*, 615 F.2d at 1219-20. See also *San Francisco Mining Exch. v. SEC*, *supra*, 378 F.2d at 168, 170-71.

Fourth, all the other documents Grolier has referred to concern other matters involving Grolier.¹⁴ Our Order reopening this proceeding directed Grolier to comment on whether any of the documents it submitted fell within the legal definition of "factually related case" as that term is used in the Administrative Procedure Act. 5 U.S.C. 554(d). Grolier chose not to address this issue, apparently relying on the assumption that any time the same party was before the agency a factually related case is involved. The assumption does not withstand analysis.¹⁵ The matters before the Commission while Judge von Brand was an attorney-advisor resulted in a consent order, an assurance of voluntary compliance ("AVC") and compliance reports that followed them. Renewed Motion, 7-13. Under the Commission's present (and former) Rules, both a consent order and an AVC brought to an end the matter under investigation and required the submission of compliance reports. Neither the consent order (concerning the pre-1964 debt collection practices of Grolier) nor the AVC (concerning the pre-1967 home solicitation and recruiting practices of Grolier) could have formed, or did form, the basis of the complaint in this matter which, by and large, depended on post-1969 evidence. See *Grolier, Inc.*, *supra*, 91 F.T.C. at 437 and n.99. That a respondent may have recidivist tendencies does not make the earlier proceedings "factually related" cases.¹⁶ This interpretation is confirmed by the Attorney

File a Special Report. That memorandum recounted public facts about prior matters involving Grolier, stated that the information on hand was outdated and discussed what information each question in the Special Report was designed to elicit. The Commission authorized both (Johns Aff., Exh. S); (Righthand Aff., Exhs. R and S). No other documents were before the Commission during the formal investigation and therefore could not have been before Judge von Brand. Grolier's Response to the Special Report (Furth Aff., Exh. T), in addition to being presented in the controlled adjudicative setting, clearly went to the staff and not to the Commission (See Johns Aff., Exh. BB). In April and July 1970, representatives of the Attorney General of Texas and Maryland, respectively, were to examine our files (Johns Aff., Exhs. U and V). On November 7, 1970, staff submitted a progress report to the Commission indicating that it had: received a response to the Special Report; requested and received a supplemental submission; conducted interviews and proposed a questionnaire; and it expected to transmit a proposed complaint in 45 days. There is no allusion to the substance of any of these matters (Righthand Aff. Exh. BB).

¹⁴ Several of the documents submitted by Grolier duplicate each other. Compare Righthand Aff., Exhs. L, M, N and P with Johns Aff., Exhs. J, N, O and P. Several documents are memoranda to the file which were prepared and retained by the Commission's staff and therefore were not available to the Commission (or Judge von Brand). Righthand Aff., Exhs. I and M; Johns Aff., Exhs. D, E, F, B and I. Many of the documents contain no substantive facts or information regarding Grolier but only reflect assignments of a matter (to a Commissioner or to staff) or other procedural matters. Righthand Aff., Exhs. D, F, G, H, K, Q, R, S, T, U, V, X and Z; Johns Aff., Exhs. G, H, K, Q, R, S, T, U, V and W.

¹⁵ The Court of Appeals for the District of Columbia recently stated that "it would be a mistake to assume automatically" that Section 554(d) prevents any *ex parte* communication between the Commission and its staff simply because adjudication arose at one point. *RSR Corp. v. FTC*, 656 F.2d 718 (D.C. Cir. No. 80-2131, April 30, 1981) (slip op. at 10-11). See also *EDF v. EPA*, 510 F.2d 1292, 1305 (D.C. Cir. 1975); *Alaska S.S. Co. v. FMC*, 356 F.2d 56, 61 (9th Cir. 1966).

¹⁶ We note that even in judicial disqualification cases involving criminal matters there is no prohibition

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General's Manual on the Administrative Procedure Act, 54, n.6 (1947)¹⁷ which discusses how the term is to be construed. It states:

The limitation of the prohibition against consultation to those who perform investigative or prosecuting functions "in that or a factually related case," should be construed literally.

* * * * *

The phrase "factually related case" connotes a situation in which a party is faced with two different proceedings arising out of the same or a connected set of facts. For example, a particular investigation may result in the institution of a cease and desist proceeding against a party as well as a proceeding involving the revocation of his license. The employees of the agency engaged in the investigation or prosecution of such a cease and desist proceeding would be precluded [from assisting in the decision in both proceedings] ***. However, they would not be prevented from assisting the agency in the decision of other cases (in which they had not engaged as either investigators or prosecutors) merely because the facts of these other cases may form a pattern similar to those they had theretofore investigated or prosecuted.

This interpretation also conforms with the Ninth Circuit's holding that the evils to be avoided by Section 554(d) are both the likelihood that former investigators or prosecutors will interpolate facts not in the record and that because they are likely to have developed a "will to win," they cannot resolve the issues objectively. 615 F.2d at 1120.¹⁸

Finally we are not convinced, as Grolier apparently is, that the mere existence of *ex parte* communications, assuming any took place here with respect to facts at issue in this case, necessarily leads to Judge von Brand's disqualification. Normally under the APA when an *ex parte* communication occurs the remedy is not to disqualify the decisionmaker but to place the communication "on the record" and to give the party not privy to it an opportunity to comment. See *Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978); *United States Lines, Inc. v. FMC*, 584 F.2d 519, 542-43 (D.C. Cir. 1978); *Home Box*

against an individual prosecuting another for one offense and subsequently sitting as a judge in a case involving the same offender. See, e.g., *Gravenmier v. United States*, 469 F.2d 66, 67 (9th Cir. 1972); *United States v. Winston*, 613 F.2d 221 (9th Cir. 1980). Because we conclude that the earlier matters involved here are not factually related, it is not necessary for us to decide whether they are "cases".

¹⁷ The Manual is based on a review of the legislative history of the Administrative Procedure Act. Courts give it deference because of the role of the Department of Justice in drafting the APA. See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 n.19 (1978).

¹⁸ In *San Francisco Mining Exch. v. SEC*, *supra*, 378 F.2d at 170-71 n.9, the Ninth Circuit quoted the *R.A. Holman* opinion in rejecting an argument that discovery was mandated by the fact that the decisionmaker had previously prosecuted the same parties. The court held that to disqualify a decisionmaker based on his former status "would be tantamount to disqualifying from participation in a SEC adjudicatory proceeding, all personnel from the Divisions of Corporation Finance and Trading and Exchanges without regard to the extent of their connection with the proceeding in its investigatory stages, and would tend to prevent the appointment to the Commission of persons who have had previous experience with its work." In this case, if Grolier's Renewed Motion were granted it would have a similar effect, but with even less basis.

Office, Inc. v. FCC, 567 F.2d 9, 58-59 (D.C. Cir.); *cert. denied*, 434 U.S. 829 (1977).

If Judge von Brand had received *ex parte* communications in this case while serving as Judge, under our rules he would not be disqualified, but rather required to place the communications on the record and Grolier would have an opportunity to comment. See 16 CFR 4.7. Likewise, if the Commission had considered some matter *dehors* the record our decision would not be automatically void for the Ninth Circuit has held that: "to constitute fatal error it must appear that an administrative agency's journey outside the record worked substantial prejudice." *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1265 (9th Cir. 1977). Under these circumstances it would indeed be anomalous to automatically disqualify Judge von Brand simply because he had been exposed to some *ex parte* communication in his earlier status as an attorney-advisor. Here Grolier has all the *ex parte* communications and we specifically directed Grolier to comment on any that indicated he received factual "information * * * outside of the controlled adjudicative setting" that could have been interpolated. Order, September 12, 1980. Despite its voluminous submissions Grolier has not pointed to any specific facts or information that could have been interpolated. We conclude therefore, that even if we were to assume that Judge von Brand saw all the documents the error would be harmless. See 5 U.S.C. 706.

Conclusion

Our records have been thoroughly searched and Grolier has been given access to all matters that came before the Commission during the time that Judge von Brand served as an attorney-advisor. Grolier has presented no evidence that he was *actually* involved with any Grolier matters. Under the Ninth Circuit's opinion, there is, therefore, no basis on which to disqualify Judge von Brand. 615 F.2d at 1221. Neither has Grolier been hindered in its efforts to secure evidence. The Ninth Circuit urged us to consider giving Grolier documents if Grolier could point to inadequacies or inconsistencies in the affidavits before us. While the Commission did not believe any such defects existed, Grolier was given the documents as a matter of discretion. Even if we were required to assume Judge von Brand was initially familiar with every document (and the Ninth Circuit held that we were not required to do so) disqualification would not follow. None of the documents involve the prosecution of this case or even the decision to issue a complaint. Those few that were created during the time the staff was conducting the formal investigation do not

discuss or refer to the substance of the investigation. A large number of the earlier documents do not contain any facts or information that could have been interpolated. Moreover, the bulk of the documents were presented to Judge von Brand in the controlled adjudicative setting and therefore, even if he had seen these items earlier, no improper interpolation could exist. The few remaining documents concern earlier, completed, proceedings against Grolier. Under a proper interpretation of "a factually related case" as it is used in Section 554(d) of the APA, exposure to those earlier proceedings is not disqualifying. In short, Grolier has not presented a scintilla of evidence to support its argument that Judge von Brand should be disqualified. We therefore deny the motion to disqualify Judge von Brand.

This ruling disposes of all matters we were required to consider by the Ninth Circuit's remand of the case and we might simply reaffirm our earlier Final Order. However since the Final Order issued the Commission has modified the Final Order in another encyclopedia case, *Encyclopaedia Britannica*, Docket No. 8908. We therefore invite the parties to address the issues of whether similar modifications to the Final Order are appropriate in this case and, if so, whether they should be made now or, as in *Britannica*, await appellate review of the Final Order.

Therefore, *it is ordered*, That Grolier's renewed motion to disqualify Judge von Brand is denied, and

It is further ordered, That Grolier state, within 14 days of this Order, whether it believes a modification of the Final Order is appropriate, the reasons therefor, and when it should be modified, and

It is further ordered, That Complaint Counsel thereafter respond to Grolier's submission within 14 days.

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IN THE MATTER OF

BORDEN, INCORPORATED

FTC File No. 1-23281. Interlocutory Order, Sept. 1, 1981

ORDER REOPENING PROCEEDING AND MODIFYING STIPULATION

Respondent having requested reconsideration of stipulation no. 8260, executed by the Realemon-Puritan Company on March 3, 1952, and accepted by the Federal Trade Commission on April 1, 1952 [48 F.T.C. 1660];

Accordingly, *it is ordered* that the matter is reopened and that the stipulation herein is modified to read:

BORDEN, INC., the successor to the Realemon-Puritan Co., the amended name of a corporation organized under the laws of the State of Illinois as Puritan Co. of America, with its principal place of business in Chicago, Illinois, engaged in the business of offering for sale and selling in commerce a lemon-juice product unsweetened, and made by reconstituting lemon juice concentrate, designated on its label Realemon Brand Reconstituted Lemon Juice, or Realemon Brand Lemon Juice from Concentrate, entered into an agreement in connection with the offering for sale, sale and distribution of that product, that it will cease and desist in its advertising of such product from:

- (1) Designating its reconstituted lemon juice or lemon juice from concentrate as "Realemon" without stating conspicuously and prominently that said product is reconstituted or from concentrate;
- (2) Using the terms "Realemon Brand Lemon Juice", "lemon juice", or any similar term in describing its reconstituted lemon juice or lemon juice from concentrate without using conspicuously and prominently the term "reconstituted" or "from concentrate" as an adjacent modifying descriptive word or words;
- (3) Representing that its reconstituted lemon juice or lemon juice from concentrate is the juice of tree ripened lemons.