

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of)

PUBLIC

Inova Health System Foundation,)
a corporation, and)

Docket No. 9326

Prince William Health System, Inc.,)
a corporation.)

237773
27
536154

**COMPLAINT COUNSEL'S RESPONSE TO RESPONDENTS' MOTION FOR
RECUSAL OF COMMISSIONER ROSCH**

In contrast to Complaint Counsel's opposition to Respondents' motion to stay the administrative proceeding, we do not take a formal position on Respondents' motion to recuse Commissioner Rosch. We write here, however, to express our view that the grounds put forth by Respondents do not appear to warrant recusal and to support the authority of the Commission to make the type of appointment it made here. As set forth in Complaint Counsel's opposition to Respondents' motion to stay these proceedings, our main interest is to ensure the swift administration of justice, both to preserve our ability to remedy the likely anticompetitive effects of Inova's acquisition of PWHS, and to provide Respondents with an expeditious resolution of this litigation. *See* FTC Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.1 (2003) ("It is the policy of the Commission that, to the extent practicable and consistent with requirements of law, [adjudicative] proceedings shall be conducted expeditiously."). Our response set forth below is not intended to support the authority of any particular hearing officer but to support the process.

First, the rule regarding the appointment of presiding officials in adjudicative

proceedings could not be clearer. Rule 3.42(a) states plainly that: “Hearings in adjudicative proceedings shall be presided over by a duly qualified Administrative Law Judge or by the Commission or one or more members of the Commission sitting as Administrative Law Judges[.]” 16 C.F.R. § 3.42(a). Far from being a process created for the instant matter, the rule authorizing the appointment of “one or more members of the Commission” to hear adjudicative proceedings has existed in largely the same form as when it was first implemented more than 40 years ago. *See* Rules of Practice for Adjudicative Proceedings, 32 Fed. Reg. 8,449, 8,451 (June 13, 1967) (codified at 16 C.F.R. § 3.42(a)). Indeed, Respondents do not even attempt to argue that the appointment of a Commissioner as a hearing officer is not expressly authorized under the rules. Rather, they attempt to impose conditions on that appointment that do not exist in the relevant rules, the applicable statutory authority, or in the controlling case law.

The inappositeness of the sole statutory authority on which Respondents rely for the recusal motion, 5 U.S.C. § 554(d)(2), could not be more evident. Far from providing any basis for Respondents’ motion to recuse, the cited authority plainly exempts current Commissioners, such as Commissioner Rosch, from the statute’s provisions. The language is not complex. Section 554(d)(2)(C) states, in pertinent part: “This subsection does not apply . . . (C) to the agency or a member or members of the body comprising the agency.” 5 U.S.C. § 554(d)(2)(C). Given the readily apparent exemption for “members of the body comprising the agency” (*i.e.*, Commissioners) under the statute, Respondents, unsurprisingly, cannot point to a single case where section 554(d)(2)(C) was applicable (in the sense that the case dealt with an actual “member” like a Commissioner), but the provisions of 554(d)(2) were still held to apply. In fact, in *Gibson v. FTC*, 682 F.2d 554 (5th Cir. 1982), the Fifth Circuit expressly noted those respondents’ concession of this rather obvious point: “[Respondents] contend that an attorney-

advisor, *as opposed to a Commissioner*, is not exempt from the disqualification by 5 U.S.C. § 554(d)(2)(C).” 682 F.2d at 561 (emphasis added).

Respondents here lean heavily on the Ninth Circuit’s decision in *Grolier, Inc. v. FTC*, 615 F.2d 1215 (9th Cir. 1980), but that Court never reached the situation presented here – a Commissioner performing the routine duties of a Commissioner, and then, while still a Commissioner, acting as a presiding officer at the administrative hearing (as opposed to acting as a member of the quasi-appellate body as Commissioners routinely do). Rather, *Grolier* dealt with a recusal motion against a former attorney-advisor. The Court noted that an argument for imputing the 554(d)(2)(C) exemption to an attorney-advisor “would be compelling” if the former attorney-advisor ALJ in that case had still been an attorney-advisor, but he was not. *Grolier*, 615 F.2d at 1220. By contrast, Commissioner Rosch remains a Commissioner today and thus, the exemption of 554(d)(2)(C) plainly applies. Nothing in *Grolier* or in any case cited by Respondents holds otherwise.

As specifically designed by Congress, the FTC, along with many other independent agencies, “combines the functions of investigator, prosecutor and judge.” *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 79 (10th Cir. 1972). The APA specifically envisions this dual role. *See FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968) (pursuant to APA § 554(d), “agency” and “members of the body comprising the agency” are exempt from required separation of the adjudicatory and prosecutorial functions of the agency).

As Respondents are well aware, the FTC’s rules of practice and procedure require that the Commissioners both vote out an enforcement complaint *and* ultimately adjudicate the complaint on the merits. Thus, “an adjudicative proceeding is commenced when an affirmative vote is taken by the Commission to issue a complaint.” 16 C.F.R. § 3.11. The ALJ conducts a

hearing, develops the evidentiary record and issues an initial decision. 16 C.F.R. § 3.51. Upon appeal of that initial decision by a party, or upon the Commission's own initiative, the Commission reviews the initial decision, "exercis[ing] all the powers it could have exercised if it had made the initial decision." 16 C.F.R. § 3.54(a). In keeping with the full scope of its powers, in reviewing the initial decision, the Commission conducts a de novo review of the record developed by the ALJ. *See, e.g., Chicago Bridge & Iron Co., N.V. v. FTC*, 515 F.3d 447, 456 (5th Cir. 2008) (denying merging parties' petition to review Commission's divestiture order reached after "briefing, argument and a de novo review of the record" by Commission). It is the Commission (through its Commissioners) that ultimately issues any binding orders. In other words, there is little difference between one or more Commissioners sitting as a presiding official at a hearing or as a member of the reviewing panel – in both instances, a Commissioner has complete fact-finding authority.

The duality of the enforcement and adjudicative functions is a well-accepted characteristic of the FTC. Just as well-accepted is the routine participation of Commissioners in the investigatory process as staff review the evidence to determine whether to recommend the issuance of a complaint. *See Withrow v. Larkin*, 421 U.S. 35, 52 (1975) ("no support for the bald proposition" that "agency members who participate in an investigation are disqualified from adjudicating"). During this stage, staff and the merging parties regularly discuss the case with Commissioners, both jointly and independently through ex parte communications. Indeed, the non-participation of a Commissioner in these communications and meetings would be an abdication of his or her responsibility as one of the heads of the agency. Not surprisingly, Respondents expressed no concern about their ex parte meeting with Commissioner Rosch prior to the issuance of the complaint, even though they had every expectation that, if a complaint was

issued, he (along with the other Commissioners) would ultimately perform a de novo review of any resultant administrative proceeding.

It is only when the complaint has issued and the adjudication phase has begun that ex parte communications are then prohibited. 16 C.F.R. § 4.7(b). This prohibition applies equally to ALJs and Commissioners. *Id.* For this reason, after a Part III complaint is voted out, the Commissioners, ALJ, and staff adhere to a strict firewall that prohibits ex parte communications. As with the Commission's ability to select a presiding official, this protocol of imposing a firewall after the complaint has issued has been in place since the original implementation of the FTC's rules of practice. *See* 32 Fed. Reg. 8,449, 8,458 (codified at 16 C.F.R. § 4.7).

Given these circumstances, the appointment of Commissioner Rosch to preside over the hearing does not raise an appearance of impropriety and certainly does not come close to rising to the level of a due process violation.¹ In fact, the Commission has gone out of its way to limit

¹Respondents cite Complaint Counsel's statement in a May 20, 2008 filing in the collateral action in the United States District Court for the Eastern District of Virginia that the administrative proceeding is "moving forward on a very expedited basis," as evidence that Complaint Counsel knows how Commissioner Rosch will rule on scheduling matters. Respondents' Motion to Recuse at 3-4. This claim is entirely without merit. Complaint Counsel accurately described this administrative proceeding as moving forward expeditiously both because of the volume and scope of discovery that had already occurred in the administrative proceeding (*see* Complaint Counsel's Notice of Exchange of Discovery and Service of Discovery Request, dated May 15, 2008), and because of the Commission's public commitment to expeditiously render its final order. *See* FTC News Release (dated May 9, 2008), *available at*, <http://www.ftc.gov/opa/2008/05/inova.shtm> (committing the Commissioners to "a just and expeditious resolution of any potential appeal that may be taken to the full Commission," and to making "every effort to issue an appellate decision approximately 90 days after receiving a notice of appeal (assuming no cross-appeal) or 120 days (assuming a cross-appeal)."). In addition, Complaint Counsel's proposed scheduling order in this action, provided to Respondents on May 14, 2008, reflected an expedited proposed schedule. Respondents' allegations, based on little more than an innocuous statement in a brief (as well as insinuations that Commission losses in certain hospital merger cases and other non-merger cases before ALJs led to Commission Rosch's appointment), amount to a thinly-veiled attack against the integrity of the Commission, without meaningful basis, and flatly contradicts the long-standing

the conflict inherent in every proceeding before the members of an administrative body which both votes out and adjudicates complaints. Unlike in the routine case, where the Commissioners ultimately rule on the complaint they vote out, Commissioner Rosch did not vote on the complaint here. To credit Respondents' arguments, one must disregard a clear and long-standing FTC rule authorizing appointments like this, an explicit exemption for Commissioners from the cited provision of the Administrative Procedure Act, and routine Commission practice. Respondents' arguments do not warrant recusal of Commissioner Rosch in this matter, or any future Commissioner appointed to sit as presiding official in an adjudicative proceeding under circumstances similar to those presented here.

Respectfully submitted,



Matthew J. Reilly
Norman Armstrong Jr.
Complaint Counsel
Federal Trade Commission
601 New Jersey Ave., N.W.
Washington, D.C. 20580
(202) 326-2072

“presumption of honesty and integrity in those serving as adjudicators”. *Withrow*, 421 U.S. at 47.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 27, 2008, I served the attached Response to Respondents' Motion for Recusal of Commissioner Rosch upon the following:

Office of the Secretary
Federal Trade Commission
H-159
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Hon. Commissioner J. Thomas Rosch
Administrative Law Judge
H-528
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

David P. Gersch
Counsel for Inova Health System Foundation
and Prince William Health System
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, DC 20004


Norman Armstrong, Jr., Esq.
Complaint Counsel