Commodity Futures Trading Commission
CEA CASES

NAME: CARGILL, INCORPORATED, ERWIN E. KELM, H. ROBERT DIERCKS, WALTER B. SAUNDERS, AND BENJAMIN S. JAFFRAY

CITATION: 23 Agric. Dec. 917

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AGRICULTURE DECISIONS

BEFORE THE SECRETARY OF AGRICULTURE

UNITED STATES DEPARTMENT OF AGRICULTURE

(No. 9258)

In re CARGILL, INCORPORATED, ERWIN E. KELM, H. ROBERT DIERCKS, WALTER B. SAUNDERS, AND BENJAMIN S. JAFFRAY. CEA Docket No. 120. Decided August 6, 1964.

Ruling on Disqualification of Referee

The fact that the hearing examiner served as counsel for complainant prior to his appointment as hearing examiner and as counsel for complainant in a disciplinary proceeding against respondent corporation which terminated in a consent order in 1954 not grounds for disqualification of examiner and affidavit of disqualification is without merit.

Decision by Thomas J. Flavin, Judicial Officer

RULING ON AFFIDAVIT OF DISQUALIFICATION OF REFEREE

I

On July 20, 1964, John G. Dorsey, one of the attorneys for respondent Cargill, Incorporated, in this disciplinary proceeding under the Commodity Exchange Act (7 U.S.C. § 1 *et seq.*) filed an "Affidavit of Disqualification" requesting that Hearing Examiner Benjamin Holstein be disqualified as referee n1 in this proceeding.

n1 Section 6(b) of the act (7 U.S.C. § 9) provides that a hearing upon alleged violations of the act may be held before a "referee" designated by the Secretary.

The affidavit states that the affiant has reason to believe and does believe that respondents would not have a fair hearing in the proceeding before Examiner Holstein. The affidavit relates that Mr. Holstein, prior to becoming a hearing examiner, was a member for many years of the Office of General Counsel, United States Department of Agriculture, and in that capacity ". . . served repeatedly and successfully as counsel supporting the complaint in disciplinary proceedings for alleged violations of the Commodity Exchange Act." The affidavit goes on to state that because of Mr. Holstein's long experience and orientation as a prosecutor he cannot, despite his best efforts to the contrary, escape a measure of bias and prejudice in favor of the complainant and counsel supporting the complaint and against respondents.

The affidavit also points out that Mr. Holstein once served as counsel for the complainant in a disciplinary proceeding under the act against the respondents in CEA Docket No. 58 which terminated in 1954 by means of a consent

order and which involved charges of manipulation and attempted manipulation of prices by Cargill. The affiant says that because of Mr. Holstein's position and experience in that case the affiant believes that it will be virtually impossible for Mr. Holstein to judge objectively and fairly in the pending proceeding. The pending proceeding concerns alleged manipulation of futures prices.

The affidavit contains no reference to any acts or statements by Mr. Holstein indicating any *personal* bias or prejudice on his part toward respondents.

§ 0.7(b) of the rules of practice (17 CFR 0.7(b)) under the act provides:

"Disqualification of referee. Any party may file with the hearing clerk a timely affidavit of disqualification of the referee which shall set forth with particularity the grounds of alleged disqualification. After such investigation or hearing as the Secretary may deem necessary, he may find the affidavit without merit or may direct that another referee be assigned to the proceeding. Where the affidavit is found without merit, the affidavit, any record made thereon, and the finding and order of the Secretary shall be made a part of the record.

A referee shall ask to be withdrawn from any proceeding in which he deems himself disqualified for any reason."

Section 7(a) of the Administrative Procedure Act (5 U.S.C. 1006(a)) says in part:

". . . The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification, of any such officer, the agency shall determine the matter as a part of the record and decision in the case."

Mr. Holstein has not withdrawn as referee in the proceeding and he has not asked that he be withdrawn. Without comment, he has referred the affidavit to the Judicial Officer for disposition. Accordingly he does not agree with the affiant's allegations that he cannot judge fairly and impartially in the proceeding.

II

We are unaware of any policy or practice generally in which a judge is disqualified from presiding at a criminal trial because, before ascending the bench, he had been engaged in a career as prosecuting attorney. Nor do we observe that a judge at a civil trial is disqualified because his years of practice at the bar may have been largely on behalf of either plaintiffs or defendants in civil cases. With respect to hearing examiners in administrative proceedings we see no reason why experience in prosecuting cases should disqualify a hearing examiner any more than experience as counsel for respondents in such proceedings should do so. On the contrary candidates for hearing examiner positions in some

Federal agencies are not qualified unless they have had experience in the proceedings coming before the agency. See United States Civil Service Commission's Announcement No. 318, an announcement of examination for the filling of hearing examiner positions.

Besides, Mr. Holstein spent many years representing the complainant in disciplinary proceedings under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) as well as under the Commodity Exchange Act. We have seen no signs of bias or prejudice against respondents in the proceedings under that act in which he has been hearing examiner. For example, in P&S Docket No. 2612-A, a major proceeding under the Packers and Stockyards Act, he recommended dismissal of the complaint against two of the respondents following presentation of the

complainant's case. *In re James Allan & Sons, et al.,* 22 Agric. Dec. 1101 (22 A.D. 1101) (1963). See also *In re Lester Murtha,* 21 Agric. Dec. 1213 (21 A.D. 1213) (1962), in which a ruling made by Mr. Holstein in favor of a respondent in another proceeding under that act was reversed by the Judicial Officer.

The fact that Mr. Holstein once represented the Commodity Exchange Authority in a disciplinary proceeding against respondents does not compel his disqualification as referee in this proceeding. There is no problem by virtue of that part of section 5(c) of the Administrative Procedure Act (5 U.S.C. 1004(c)) which prohibits participation in the decision in any case by any officer, employee or agent engaged in the performance of investigative or prosecuting functions *in that case or a factually-related case.* The Cargill proceeding of ten years ago is a completely different case from the present proceeding. Moreover, it ended in a consent order without a hearing. We are not aware of any precedents which require disqualification of judges under such circumstances. See generally, Frank, *Disqualification of Judges,* 56 Yale L. Journal 605 (1947). Practically all the reported cases in this area dealing with the disqualification of judges concern the prior connection of the judge *with the case,* or *with the facts in the case,* as a prosecutor or investigator rather than the matter of the judge once having prosecuted the defendant in an earlier case. In at least one case, however, it has been held that a judge is not disqualified in a criminal trial because he had been a prosecutor of the accused for violating the same law in a previous case *Trinkle* v. *State* 127 S.W. 1060, 59 Tex. Cr. 257 (1910).

In summary, we think that hearing examiners are entitled to at least the same presumptions of freedom from bias and prejudice

as judges are accorded. Too, under our practice, the referee makes only recommended findings of fact, conclusions and orders. The entire record of evidence and argument is the basis for the final decision and order. Of course respondents may raise for consideration before final decision any objections to anything said or done by the referee during the proceeding which they claim constitutes bias or prejudice against them.

The affidavit is found without merit and another referee will not be assigned the proceeding.

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