Commodity Futures Trading Commission
CEA CASES

NAME: EDWARD A. COX JR. AND GEORGE F. FREY JR.

CITATION: Comm. Fut. L. Rep. (CCH) P20,635; [1977-1980 TRANSFER BINDER]

DOCKET NUMBER: 75-16; 192

DATE: JUNE 21, 1978

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NOTE: FORMERLY CEA DOCKET # 192

[P 20,635] In the Matter of Edward A. Cox, Jr., and George F. Frey, Jr.

Commodity Futures Trading Commission. No. 75-16. June 21, 1978. Order Denying Interlocutory Review in full text.

Administrative Proceedings -- Evidence -- Responsibility of Administrative Law Judge -- Admission of Evidence. -- The role of an administrative law judge in a proceeding is to compile a complete factual record from which findings of fact and credibility can be made and conclusions of law can be drawn. To fulfill this role, the ALJ is not held to the common law rules of evidence and is obligated to admit evidence at a hearing even if he is unsure as to the admissibility of the evidence. The Commodity Exchange Act provides that anyone charged with violations must receive the opportunity to place in the record the full evidentiary predicate for any arguably relevant defense. The ALJ may give such evidence as much weight as he deems appropriate in deciding a case, but the due process requirements of the hearing procedure are met when the record is complete for the agency to review in a final decision.

See P 11,200, "Liabilities -- Prohibitions" division.

On February 23, 1978, respondents Edward A. Cox, Jr. and George F. Frey, Jr. filed an application for interlocutory Commission review of an order of Administrative Law Judge George H. Painter ("Judge Painter") denying respondents' motions to disqualify Judge Painter and to stay the commencement of a hearing in this case. n1 On February

24, 1978, the Commission granted respondents' request for a stay of the proceeding pending consideration of their application for interlocutory review, the Division of Enforcement having indicated its consent to that action. On March 2, 1978, after a response to the application had been filed by the Division of Enforcement but before we undertook consideration of respondents' application, Judge Painter filed with the Hearing Clerk an order in which he removed himself as Presiding Officer in the proceeding. Since, by virtue of Judge Painter's action, respondents have attained the relief they now seek from the Commission, we see no reason to address respondents' application in an interlocutory context and, thus, it is necessary to deny their application. However, we will take this opportunity to comment generally upon an Administrative Law Judge's responsibility with respect to the taking of evidence in an administrative proceeding.

n1 The complaint filed against respondents averred that, as of May 19, 1971, they owned or controlled 75% of the wheat certificated for delivery on the May futures contract and also owned or controlled 97% of the long positions on the contract. Thus, the complaint charged that

> [at] all times on May 19, 1971, there was an insufficient supply of deliverable wheat in deliverable position not owned or controlled by the respondents, and of long May wheat futures held by persons other than respondents to permit holders of short contracts in the May 1971 wheat futures to satisfy such short contracts without purchasing from the respondents May wheat.
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> During the pre-hearing stage of the case, respondents indicated that they would demonstrate in defense that respondents' "manipulation" was merely an attempt to thwart a few large commercial traders who held a dominant short position in the market and were attempting to manipulate the market downward; and that since any trader holding a short position in the market could easily have obtained wheat not designated as regular for delivery on the contract (of which they alleged there was an abundant supply), had the wheat inspected and delivered it, there was no shortage of deliverable wheat.
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> Respondents' original motion requesting Judge Painter to disqualify himself from the proceedings and their application to the Commission for interlocutory review of the denial of the motion alleged that Judge Painter evidenced his pre-judgment of the case in an order, filed November 11, 1977 (before the beginning of an actual evidentiary hearing) wherein he stated that he felt that respondents' defenses "contained major flaws" because, among other things,
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> it is a fact that a small trader, one with five or fewer contracts, would find it virtually impossible to purchase grain, have it stored in an approved warehouse, and then tender notice of delivery to satisfy a short contract.
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> Respondents also urged that Judge Painter had, in a Notice filed February 1, 1978, indicated his adverse prejudgment of the credibility of their expert witness, Thomas A. Hierony-mous. Finally, the respondents set forth several examples of actions and statements which they urged indicated that Judge Painter was "an activist and adversary, more characteristic of a prosecutor than an impartial judge."

Pursuant to provisions of the Administrative Procedure Act, 5 U. S. C. § 556, and Section 10.8 of the Commission's Rules of Practice, 17 C. F. R. § 10.8 (1977), the Administrative Law Judge to whose docket a proceeding is assigned has broad authority to regulate the course of an administrative proceeding. Section 10.8 parallels the language of the Administrative Procedure Act and provides in pertinent part:

(a) *Functions and Responsibilities of Administrative Law Judge.* The Administrative Law Judge shall be responsible for the fair and orderly conduct of the proceeding and shall have the authority to: . . .

(3) Rule on offers of proof;

(4) Receive relevant evidence; . . .

(6) Regulate the course of the hearing . . . .

However, these broad powers of an Administrative Law Judge are not to be equated with those of a Federal District Court Judge. Indeed, the roles of each are quite different, and those differences are reflected in the nature of the hearing process.

For instance, it is clear that the strict common law rules of evidence are not applicable in administrative proceedings. *Swift & Company v. United States,* 308 F. 2d 849, 851-2 (7th Cir. 1962). By corollary, if an Administrative Law Judge has serious questions concerning whether or not certain evidence is admissible, he in general should allow it to be introduced at hearing, affording to such evidence whatever weight is appropriate. This is consistent with the primary role of an Administrative Law Judge as one who compiles a complete factual record from which findings of fact and credibility can be made and conclusions of law drawn. It is also consistent with the principle that one

charged with violations of the Commodity Exchange Act before the Commission must receive a full and fair day in court, including an opportunity to place in the record the full evidentiary predicate for any arguably relevant defense a respondent wishes to raise, even if the ultimate validity of that defense may be in dispute. Thereafter, an Administrative Law Judge may assign great weight to, little weight to, or completely disregard the evidence before him depending upon his view of the facts, credibility of witnesses, and the law. And, so long as the Judge insures that the record is complete, the hearing process will provide a full measure of due process for respondent and the best possible basis for review by the agency and the courts, who are the final legal arbiters in the case. On the other hand, a Judge who errs by refusing to admit evidence which should have been admitted will find that error much less susceptible of easy cure. n2

An old admonition of the Second Circuit notes that

> [if] a trial examiner will only keep in mind that the proper exercise of his functions requires open-mindedness, fairness and impartiality, and if he will, within reasonable limits, permit each of the parties to the proceeding before him to prove his own case, in his own way, by his own counsel, he will save himself from criticism and avoid furnishing any basis for a charge that the hearing was unfair and that bias was shown.

> n2 *Donnelly Garment Co. v. National Labor Relations Board,* 123 F. 2d 215, 224 (8th Cir. 1941); *See also National Labor Relations Board v. Burns,* 207 F. 2d 434, 436 (8th Cir. 1953); *Panhandle Eastern Pipe Line Co. v. Federal Power Commission,* 143 F. 2d 488, 493 (8th Cir. 1944), aff'd 324 U. S. 635 (1945). As Mr. Justice Stone aptly observed in a dissenting opinion In *Pittsburgh Plate Glass Co. v. National Labor Relations Board,* 313 U. S. 146, 177 (1941)
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> > One of the most important safeguards of the rights of litigants and the minimal constitutional requirement, in proceedings before an administrative agency vested with discretion, is that it cannot rightly exclude from consideration facts and circumstances relevant to its inquiry which upon due consideration may be of persuasive weight in the exercise of its discretion. [citations omitted].
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> *Cupples Co. Manufacturers v. National Labor Relations Board,* 106 F. 2d 100, 113 (2d Cir. 1939).

We also caution our Administrative Law Judges to distinguish carefully between properly drawing upon their own expertise and experience to *evaluate* evidence adduced during the hearing process and improperly *supplying* evidence during the pre-hearing or hearing process in the name of application of their expertise. n3 The evaluation of testimony and other evidence actually adduced during the hearing process is within the proper province of an Administrative Law Judge. However, any assessment of material facts in dispute undertaken prior to the commencement of the hearing process, *i.e.,* before the evidence, be it testimonial or documentary, has been placed on the record in an adversarial context is highly improper. This is particularly true where the assessment brings to bear facts not of record, but within the personal knowledge of the Judge. *Cupples Co. Manufacturers v. National Labor Relations Board, supra,* 106 F. 2d at 113; *Capital Transit Co. v. Public Utilities Commission of District of Columbia,* 213 F. 2d 176, 187 (D. C. Cir. 1953) *cert. denied* 348 U. S. 816 (1954). In short, a Judge may not bear witness in a proceeding before him, nor may he judge a witness or evidence he has not yet seen.

> n3 Of course, an Administrative Law Judge may properly invoke the provisions governing official notice contained in Section 556(e) of the Administrative Procedure Act. However, even in so doing, an Administrative Law Judge should exercise caution, especially if the fact of which official

> notice is taken, even though a matter of common knowledge, is critical to the case or challenged by the party to whose detriment it accrues. *Alvary v. United States,* 302 F. 2d 790, 794 (2d Cir. 1962); *Trans World Airlines v. Hughes,* 308 F. Supp. 679, 684 (S. D. N. Y. 1969), *modified* 449 F. 2d 51 (2d Cir. 1971) *rev'd on other grounds,* 409 U. S. 363 (1973).

In light of the foregoing, we encourage the Administrative Law Judge to whom these proceedings will be reassigned to reevaluate carefully his predecessor's rulings on the admissibility of evidence and propriety of defenses offered by the respondents in this proceeding, in particular those made on November 11, 1977, November 16, 1977, and February 1, 1978, and to reverse those which are inconsistent with our position here. The Commission wishes to assure that every respondent in proceedings before this Commission has his full day in court, including an opportunity to lay the evidentiary predicate for all colorable defenses he wishes to make and the assurance that the case will be judged only on the basis of evidence properly adduced.

Accordingly, IT IS ORDERED that respondents' application for interlocutory review is DENIED. IT IS FURTHER ORDERED that these proceedings, which Judge Painter has removed from his own docket, will be reassigned by the Chief Administrative Law Judge for further proceedings.

By the Commission (Chairman BAGLEY, Vice-Chairman SEEVERS and Commissioners DUNN, MARTIN and GARTNER).

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