Commodity Futures Trading Commission
CEA CASES

NAME: PROFESSIONAL COMMODITY SERVICE, INC., AND THEODORE W. LORD, SR.

CITATION: 32 Agric. Dec. 585

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(No. 15,074)

In re PROFESSIONAL COMMODITY SERVICE, INC., and THEODORE W. LORD, SR. CEA Docket No. 193. Decided March 16, 1973.

Order Vacating Recommended Decision and Order and Remanding Case for Futher Proceedings

This order is issued in accordance with the facts and circumstances as set forth herein.

Darrold A. Dandy, for complainant.

Garth C. Grisson, Denver, Colorado, for respondents.

John G. Liebert, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

PRELIMINARY STATEMENT

This is an administrative proceeding under the Commodity Exchange Act (7 U.S.C. 1 *et seq.),* in which the Administrative Law Judge, John G. Liebert, filed a recommended decision and order on March 8, 1973. The proposed order denied the corporate respondent's application for registration as a futures commission merchant (1) because respondents did not establish that the corporation met the minimum financial requirements for registration, and (2) because the individual respondent wilfully omitted material facts from the application for registration with the intention of misleading the Commodity Exchange Authority. A cease and desist order was also proposed by the Administrative Law Judge.

Although the Administrative Law Judge rejected the complainant's recommendation that the respondent should, in addition, be prohibited from trading on contract markets for one year, he refused to allow the complainant to offer evidence as to the importance of accurate financial statements, the seriousness of the violations, and the nature of the sanction that should be imposed (Tr. 100-101). Since all of this evidence is important to a determination by the Judicial Officer as to whether the one-year suspension of trading privileges should be imposed (in the event that it is ultimately concluded that the violations occurred), this matter must be remanded to the Administrative Law Judge to receive such evidence.

The hearing in this case was held on September 7, 1972. In decisions filed by the Judicial Officer on October 29, 1971 (*In re American Fruit Purveyor's, Inc.,* 30 Agriculture Decisions 1542, 1596, fn. 39), and April 12, 1972 (*In re Sy B. Gaiber & Co.,* 31 Agriculture Decisions 474, 505, fn. 20), the policy for the Department was established that evidence in support of the sanction recommended by the complainant should be introduced in administrative hearings. In a ruling on petition for reconsideration in the case of *In re Sy B. Gaiber & Co., supra,* the Judicial Officer set forth at length the policy for the Department as to the

admissibility of evidence relating to the sanction to be imposed (31 Agriculture Decisions 843, 847-850), stating:

Fifth, I have given little weight to the Hearing Examiner's recommended sanction because in this case, as in all -- or at least most -- disciplinary cases under the Department's regulatory

programs, the record is not particularly helpful in determining the sanction that should be issued. I have observed for 23 years that the Department's administrative agencies go to great lengths to prove that a particular violation occurred but introduce no evidence to aid the Hearing Examiners and the Judicial Officer in determining the sanction to be issued. The administrative officials are disappointed when they know from their expertise that the sanctions imposed in particular cases are too lenient to effectuate the purposes of the regulatory programs; but when they fail to share the benefit of their administrative expertise with the Hearing Examiners and the Judicial Officer, they have no one but themselves to blame for their disappointment as to the sanction.

In *In re American Fruit Purveyor's, Inc.,* 30 Agriculture Decisions 1542, 1596, fn. 39, filed on October 29, 1971, I stated:

It would be helpful in determining the sanction in a case if the record contained testimony as to how serious or detrimental the particular violation involved in the case is to the regulated industry. In addition, testimony as to the nature of the respondent's business would also be helpful so that the Judicial Officer would have some idea as to how "costly" a particular suspension would be to the respondent. For example, in the absence of any evidence as to the nature of the respondent's business, the Judicial Officer might not know whether a particular suspension order would "cost" the respondent $ 100 or $ 10,000.

Similarly, in the Decision in the present case, p. 46, fn. 20, I stated:

It has not been the general practice in administrative disciplinary cases to introduce evidence in support of the sanction recommended by the complainant. I believe that such evidence would aid the Hearing Examiners and the Judicial Officer in determining the sanction to be imposed. Such evidence could explain, *e.g.,* the nature of the regulation or administrative program involved in the case, the administrative reasons for the regulation or program, the flagrancy or seriousness of the violation,

and the effect of a particular sanction on the respondent in view of the nature and extent of his business activities. It may be appropriate to introduce such evidence at the conclusion of the case so that appropriate consideration can be given to the respondent's defense. The respondent should also be permitted to introduce evidence as to the appropriate sanction to be issued, assuming that the complainant prevails in the case.

On further consideration, I believe such evidence should be introduced by the complainant after it has completed presenting its evidence as to the violations, rather than at the conclusion of the case.

Some elaboration on the nature of the evidence that I believe should be presented by the administrative officials may be helpful.

In a case involving failure to meet the minimum financial requirements of the Act and regulations, the complainant should explain the administrative necessity for the regulations and the damage or potential damage caused by violations of the regulatory requirements. Where a particular provision such as the proprietary safety factor is involved, an explanation as to the administrative reasons for the proprietary safety factor should be given.

If a case involves failure to file required reports, the administrative reasons for requiring the reports should be given.

In a case under the Perishable Agricultural Commodities Act involving failure to pay promptly for produce, the evidence should show whether failure to pay promptly is a serious problem in the industry and what damage, if any, it causes to the marketing system.

In a case involving false weighing under the Packers and Stockyards Act, the evidence should show whether false weighing is a serious problem in the livestock industry. For example, what damage is being done from false weighing and to whom? What is the estimated loss of livestock sellers from false weights? What percentage of the livestock markets investigated on a routine spot check basis appears to be falsely

weighing livestock. n2 Have the sanctions imposed in prior proceedings served as a deterrent to false weighing, *e.g.*, how does the current percentage of false weighing compare with the percentage in the past five years?

n2. Although such testimony would be subject to reasonable cross-examination as to the basis for the complainant's statistics, *e.g.*, the methods and procedures used in determining markets falsely weighing livestock, it would not be reasonable to mention the names of particular firms that the complainant found falsely weighing livestock, or to prove the exact details of violations by persons who are not parties to the pending proceeding.

In cases under all regulatory programs, if the administrative officials believe that the sanctions previously imposed for similar violations have not been adequate to serve as a deterrent to the regulated industry, the evidence should set forth their views in this respect. Similarly, if industry conditions change so that a sanction once adequate is no longer deemed adequate by the administrative officials, the evidence should establish that fact.

The foregoing illustrations are not meant to be complete, but merely to serve as a guide to the type of background information I believe the agencies should introduce in order to aid the Hearing Examiners and the Judicial Officer in arriving at an appropriate sanction. Such background information is more important than an opinion expressed by an administrative official as to the exact number of days that a suspension order should embody. However, an opinion by an expert witness, *e.g.*, a Branch Chief or Area Supervisor throughly familiar with the administrative program, as to the exact sanction necessary to effectuate the purposes of the Act, would be proper. Particularly in a proceeding in which there is no jury, it is permissible for an expert witness to express an opinion on the ultimate issue to be decided. See, *e.g.*, *Builders Steel Co.* v. *Commissioner of Internal Rev.*, 179 F.2d 377, 379-380 (C.A. 8). However, no recommendation is made to the administrative officials as to whether such an opinion should be given by way of testimony rather than argument.

Since the Administrative Law Judge rejected the administrative official's recommendation to impose a one-year suspension of trading privileges on the respondents, but would not permit the administrative officials to offer evidence in support of their recommended sanction, the proceeding should be remanded to the Administrative Law Judge to receive such evidence.

The Administrative Law Judge offered to permit the complainant's attorney to make an offer of proof with respect to such excluded evidence (Tr. 101), but the complainant's attorney did not make such an offer of proof. The rules of practice provide that if the Secretary decides that the referee's ruling in excluding evidence

was erroneous, the offer of proof shall be considered a part of the transcript (17 CFR 0.11(e) (8)). However, even if an offer of proof had been made in this case, the Judicial Officer could not have treated it as evidence in this case. That would have denied the respondents the right of cross-examination. In the circumstances of this case, to have treated such an offer of proof as evidence would have violated the fundamental concepts of due process of law.

Evidence as to the sanction to be imposed if violations are sustained is particularly important in view of the decision issued by the Judicial Officer on March 8, 1973, in *In re George Rex Andrews,* CEA Docket 195. In that case, a new sanction policy under the Commodity Exchange Act was set forth, and it was held therein that all prior sanctions previously imposed under the Commodity Exchange Act would no longer be regarded as relevant. It was stated that the new sanction policy would apply to pending cases. In these circumstances, the administrative officials should reconsider their recommended sanction in the light of the criteria in the *George Rex Andrews case.* Their recommendation on remand may or may not be the same as that previously made prior to the *George Rex Andrews* decision. The relevant provisions of the *George Rex Andrews* decision are attached as an appendix to this order.

Inasmuch as the proceeding must be remanded for further proceedings, some additional excluded evidence should be received, which might not have otherwise warranted a remand.

The Administrative Law Judge refused to let Richard P. Sargeant, Assistant Director of the Commodity Exchange Authority's Registration and Audit Division in Washington, D. C., who has been an employee of the agency for over 30 years (Tr. 96), express an opinion as to whether the respondent corporation is unfit to engage in business as a futures commission merchant and as to whether its application for registration should be denied (Tr. 98-100). The Judge rejected such testimony primarily because it "asks for an opinion as to * * * one of the ultimate determinations in this hearing." (Tr. 98). The Judge stated that he would receive testimony only from the Administrator of the Commodity Exchange Authority with respect to such matters (Tr. 98-100). This ruling was erroneous. Even in a judicial proceeding, where there is no jury it is permissible for an expert witness to express an opinion on the ultimate issues to be decided. See, *e.g., Builders*

Steel Co. v. *Commissioner of Internal Rev.,* 179 F.2d 377, 379-380 (C.A. 8); *In re Sy B. Gaiber & Co., supra,* Ruling on Reconsideration, 31 Agriculture Decisions 843, 850). *A fortiori* such opinions should be permitted by an expert witness in an administrative proceeding in which the technical rules of evidence applicable in court proceedings are not applicable. See the cases cited in *In re American Fruit Purveyor's, Inc., supra,* 30 Agriculture Decisions 1542, 1575 (1971).

It would be unduly disruptive to the administrative process if only the administrator of a program who had the ultimate decision making authority were permitted to testify as to the policies of the agency or to give opinions on the ultimate issues in a proceeding. As a practical matter, any employee of the Commodity Exchange Authority who testifies that he is thoroughly familiar with the policies and procedures of the agency is probably competent to express an opinion as an expert witness relating to the agency's work or testify as to the policies of the agency.

The Commodity Exchange Authority is a small regulatory agency with about 170 employees. It is involved in only a few hearings each year. It is not likely that the Administrator of the agency would send an employee to testify or express an opinion as to a matter who did not, in the judgment of the Administrator, have a thorough knowledge of the agency's activities, policies, and procedures. Based upon 23 years' experience with the Department's regulatory agencies, I would be surprised if one of the Department's employees were sent to testify as to a matter when he was not sufficiently knowledgeable to testify. This does not, of course, mean that I would agree with his

testimony. But I cannot reasonably foresee a case arising where it would not be an abuse of discretion for an Administrative Law Judge to refuse to permit one of the Department's employees to testify as to a matter solely on the ground that the particular employee testifying was not a high enough official to express the agency's viewpoint. It is theoretically possible that an incompetent Department witness may be sent to testify, but highly unlikely. Cross-examination as to the witness' knowledge and expertise is, of course, available to the private litigant.

In addition, inasmuch as the proceeding is being remanded for further proceedings, although I have not yet determined whether such evidence is necessary, the Administrative Law Judge should also receive evidence as to whether the respondent corporation

met the minimum financial requirements on August 4, 1972. The respondents attached to their answer a new statement of financial condition as of August 4, 1972, purporting to show that the corporation met the minimum financial requirements as of that date. The complainant attempted to show that its audit made as of August 4, 1972, showed that the firm still did not meet the financial requirements on that date (Tr. 142-143). In order to obviate the additional expense that would be incurred from a further hearing in the event that such evidence is ultimately deemed relevant and material, this evidence should be received at this hearing.

The respondents should, of course, be permitted to introduce evidence with respect to any of the matters referred to herein. It appears likely that all of the evidence referred to herein can be received during a single day's hearing.

Insofar as practicable, this proceeding should be given priority over other matters and should be concluded as soon as practicable inasmuch as an application for a license is being held in abeyance pending the completion of this proceeding. That is why this order is being issued at this time instead of waiting for exceptions to be filed.

ORDER

The Decision and Order of the Administrative Law Judge filed on March 8, 1973, in this proceeding is vacated and the proceeding is remanded to the Administrative Law Judge with instructions to reopen the hearing to receive additional evidence, as set forth herein, and to file a new recommended or initial Decision and Order in this proceeding. Insofar as practicable, this proceeding is to be given priority over other matters and concluded as soon as practicable.

APPENDIX

This appendix consists of sections II-V from the decision of the Judicial Officer in *In re George Rex Andrews,* CEA Docket 195, 32 Agriculture Decisions -- (Decision filed March 8, 1973).

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