BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,295
No. 18,444

R. A. HOLMAN & CO., INC.,

Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.,

Appellees.

On Appeal from Orders of the United States District Court for the District of Columbia

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QUESTIONS PRESENTED

In the opinion of the appellees the questions presented by these appeals are:

1. Whether a district court order denying a motion for summary judgment without specification of the reasons therefor is an appealable order.

2. Whether a plaintiff asserting two separate grounds in support of requested injunctive relief may make a deliberate election to rely solely upon one of the grounds at a hearing in the district court on its motion for a preliminary injunction, continue to rely solely upon that ground in appellate proceedings, and then, having ultimately failed to obtain preliminary relief upon that ground, attempt to obtain a second preliminary injunction on the basis of the other ground not theretofore relied upon.

3. Whether a party to an administrative proceeding pending before the Securities and Exchange Commission may avoid the operation of the principle of exhaustion of administrative remedies by bringing an injunctive action in the district court in order to obtain judicial review of an interlocutory order of the Commission rejecting the party's contentions:

(a) that the Commission's hearing examiner presiding over the administrative hearing is disqualified by reason

of his having passed the age of mandatory retirement and his continuing service is therefore allegedly at the will of the Commission without what is claimed to be the requisite independence of the Commission required by the Administrative Procedure Act, and

(b) that the objection to the hearing examiner's presiding, raised for the first time after the party had participated in the hearing for almost a year and a half during which more than 8,000 pages of testimony were taken and 440 exhibits introduced, was timely under Section 7(a) of the Administrative Procedure Act.

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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

I. The Current Appeals

These appeals, consolidated by order of this Court dated April 14, 1964, arise from an injunctive action commenced by appellant in the court below on June 13, 1962, in which appellant seeks to have the Securities and Exchange Commission and its individual members, appellees herein, and its hearing examiner[1/] enjoined from continuing to conduct an administrative proceeding to which appellant is a party.

1/ The hearing examiner was not served with process below (JA v-vi) and is not an appellee here.

The same injunctive action was the subject of this Court's decision in No. 17,202 [2] and the administrative proceeding sought to be halted was also the subject of this Court's decision in Nos. 16,464 [3], 17,202 and 18,300. In No. 18,295 appellant seeks review of an order of the district court denying appellant's second attempt to obtain a preliminary injunction against further conduct of the proceeding and in No. 18,444 appellant seeks review of an order denying its motion for summary judgment.

II. The Administrative Proceeding and Appellant's Continuation in Business.

Appellant is a corporate broker and dealer in securities and is registered with the Commission under Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(b) (JA 2). On September 26, 1960, the Commission instituted an administrative proceeding, pursuant to Sections 15(b) and 15A of the Act, 15 U.S.C. 78o(b), 78oA, to determine whether grounds were present warranting (1) the revocation or suspension of appellant's registration as a broker-dealer and (2) the expulsion or suspension of appellant from membership in the National Association

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2/ Securities and Exchange Commission v. R. A. Holman & Co., Inc., __ App. D.C. __, 323 F.2d 284 (1963), certiorari denied, 375 U.S. 943 (1963).

3/ R. A. Holman & Co., Inc. v. Securities and Exchange Commission, 112 App. D. C. 43, 299 F.2d 127 (1962), certiorari denied, 370 U.S. 911 (1962).

of Securities Dealers, Inc. (JA 4). The order instituting the proceeding noted that certain information had been reported to the Commission by its staff which, if true, tended to show that appellant had wilfully violated the securities registration and antifraud provisions of the Securities Act of 1933 and various antifraud provisions of the Securities Exchange Act of 1934 in connection with appellant's distribution of the stock of Pearson Corporation (JA 62-67).

Appellant has been free to engage in the securities business as a registered broker-dealer since the inception of the proceeding in September of 1960. Appellant may not, however, without a Commission determination to the contrary, underwrite securities issues exempt from registration by Regulation A under the Securities Act of 1933.[4/] As noted below (infra, p.12), much of the delay in the completion of the proceeding has been due to appellant's own activities.

III. Appellant's First Attempt to Halt the Commission's Proceeding.

On June 13, 1961, nearly nine months after the institution of the administrative proceeding, appellant commenced an action in the district court seeking to have the Commission enjoined from further conduct of the proceeding upon the alleged grounds that improper ex

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4/ Appellant's disability respecting Regulation A underwritings is due to the fact that appellant was the underwriter of securities covered by a filing which is subject to a Regulation A suspension proceeding under Rule 261 of Regulation A, 17 CFR 230.261, which proceeding has been consolidated with the proceeding to determine whether to revoke appellant's broker-dealer registration. See Rule 252(e)(2) of Regulation A, 17 CFR 230.252(e)(2); R. A. Holman & Co., Inc. v. Securities and Exchange Commission, 112 App. D. C. 43, 45, 299 F.2d 127, 129 (1962), certiorari denied, 370 U.S. 911 (1962).

parte communications had occurred between the Commission's staff and members of the Commission and that a quorum of the Commission had not been present when a particular order had been entered by the Commission (JA 50-51, 110). The district court dismissed the complaint and appellant appealed to this Court and requested an order staying the administrative proceeding pending appeal. This Court denied the stay and affirmed the district court's order, holding, inter alia, that the district court had correctly determined that it had no jurisdiction to enjoin the proceeding because of the alleged ex parte communications and lack of a quorum. R. A. Holman & Co., Inc. v. Securities and Exchange Commission, 112 App. D. C. 43, 299 F.2d 127 (1962), certiorari denied, 370 U.S. 911 (1962).

IV. Appellant's Second Attempt to Halt the Commission's Proceeding.

On May 15, 1962, four months after this Court's decision in the above-described action but before the Supreme Court had denied appellant's petition for a writ of certiorari, appellant moved in the administrative proceeding to disqualify the hearing examiner who had been presiding over the evidentiary hearings since their commencement in 1960. Appellant asserted that the examiner had reached the age of mandatory retirement on October 22, 1957, that since that time he had been employed by the Commission pursuant to the reemployment provision of Section 13(a) of the Civil Service Retirement Act, 5 U.S.C. 2263(a), which provides that

such reemployed persons serve "at the will of the appointing officer", and that therefore the hearing examiner was without the requisite "independence" of the Commission required by Section 11 of the Administrative Procedure Act, 5 U.S.C. 1010 (JA 14-15). The hearing examiner denied appellant's motion and certified his ruling to the Commission, which, on May 28, 1962, entered a memorandum opinion and order also denying appellant's motion, holding that the examiner's appointment was not violative of the Administrative Procedure Act, that the objectives of both that Act and the Retirement Act could consistently be retained, and that, in any event, appellant's motion to disqualify the examiner was untimely. 40 S.E.C. 1133, 12 Ad. L. 2d 424 (JA 224-234).

Sixteen days later appellant commenced the present action in the court below, again seeking to have the Commission enjoined from continuing to conduct the administrative proceeding involving appellant. This time appellant's complaint was divided into two counts, the first of which presented a challenge to the qualification of two members of the Commission and was based upon this Court's decision in Amos Treat & Co. v. Securities and Exchange Commission, 113 App. D. C. 100, 306 F.2d 260, which had been handed down only a month earlier, on May 11,

1962 (JA 2-12).[5] Count II of the complaint (JA 12-21) presented the same challenge to the qualification of the hearing examiner which had been presented to the Commission and which was the subject of the Commission's decision of May 28. Appellant prayed, on the basis of both counts, that the Commission be enjoined from further conducting the proceeding and be ordered to strike the record theretofore made in the proceeding (JA 21).

Appellant's motion for a preliminary injunction came on for hearing before the district court, Judge Hart sitting, on June 29, 1962 (JA 158). During this hearing counsel for appellant elected to rely solely upon the allegations of Count I of the complaint (the alleged disqualification of the commissioners) and did not urge the ground set forth in Count II (the alleged disqualification of the hearing examiner). Prior to announcing his decision Judge Hart had warned counsel that Count II would not be considered unless counsel pressed it.[6] The district court, believing that Count I of appellant's

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5/ The alleged disqualification of the members of the Commission had also been the subject of a motion filed by appellant in the administrative proceeding on June 4, 1962 (JA 8). The injunctive action was instituted nine days thereafter, before the Commission had ruled on this motion.

6/ At the conclusion of argument by counsel for appellant, addressed solely to Count I of the complaint, the following colloquy took place (JA 166):

> The Court: Now what about this Hearing Examiner, are you very serious about that?
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> Mr. Freeman [counsel for appellant]:
>
> Yes, we are, Your Honor, but as far as this is concerned, if we get this preliminary injunction, that will resolve the question. This is a basic question

(continued)

complaint presented a case indistinguishable from Amos Treat, supra, granted appellant's motion for a preliminary injunction solely upon the basis of Count I (JA 185, 208-210). However, on June 13, 1963, this Court reversed the order of the district court and held that appellant was required to exhaust its administrative remedies before presenting to the courts its challenge to the qualification of the members of the Commission. Securities and Exchange Commission v. R. A. Holman & Co., Inc., __ App. D. C. ___, 323 F.2d 284. In the proceedings before this Court, in which the Commission had asked this Court to reverse the order of preliminary injunction and appellant had urged its reasons why the preliminary injunction had been properly entered, appellant (which was appellee in those proceedings) did not urge the alleged disqualification of the hearing examiner as a basis for sustaining the order of the district court.[7] On August 1, 1963

6/ (continued from p. 6)

> and the other is secondary. It is novel. We don't have an all-fours case in the Court of Appeals and we prefer to rest for the present on the motion.
>
> The Court: The first point; all right.

At the conclusion of argument by counsel for the Commission, the following colloquy occurred (JA 178):

> Mr. Ferber [counsel for the Commission]:
>
> Now, I don't know whether Mr. Freeman has conceded arguendo, at least, that on the Hearing Examiner point —
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> The Court: Well, he at least hasn't prosecuted it and unless he does, I won't consider it.
>
> Mr. Ferber: Then I will not go into that . . . .

7/ See Brief for Appellee in No. 17,202.

this Court denied appellant's petition for rehearing en banc (which also failed to urge the alleged disqualification of the hearing examiner) and on October 14, 1963, it denied appellant's motion to stay the transmission of the opinion and certified copy of judgment pending application for certiorari. The district court, on October 25, 1963, vacated its preliminary injunction against further conduct of the administrative proceeding in accordance with this Court's direction (JA 211) and appellant's petition for a writ of certiorari was denied on December 9, 1963. 375 U.S. 943.

V. Appellant's Third Attempt to Halt the Commission's Proceeding -- Resulting in the Order Appealed from in No. 18,295.

About five months after this Court's decision respecting appellant's second attempt to halt the proceeding, but prior to the Supreme Court's denial of appellant's petition for a writ of certiorari to review that decision, appellant returned to the district court and attempted to renew its motion for a preliminary injunction which had been filed in June of 1962, this time relying solely upon the allegations of Count II of the complaint. On December 20, 1963, a hearing on this attempted renewal was had before the district court, Judge Hart again sitting, at the conclusion of which Judge Hart indicated that he would not issue the requested preliminary injunction. On December 27, 1963, an order was entered denying the requested relief for the stated reasons that (1) appellant "had an opportunity to urge the ground set forth in Count II of the complaint as a basis for relief at the first hearing on its motion for a preliminary injunction

and failed to do so, . . . and may not be afforded a second opportunity to obtain a preliminary injunction based upon the ground set forth in Count II" and (2) "insofar as . . . [appellant] seeks injunctive relief based upon the ground set forth in Count II of the complaint, . . . [appellant] has failed to exhaust its administrative remedies" (JA 195). It is this order which is appealed from in No. 18,295. On January 3, 1964, this Court denied appellant's motion for a stay of the administrative proceeding pending appeal.

VI. Appellant's Fourth Attempt to Halt the Commission's Proceeding.

On January 2, 1964, appellant commenced an original action in this Court (No. 18,300) seeking a writ of mandamus or prohibition directing that the Commission's hearing examiner perform no acts in the administrative proceeding. Again, the substantive ground relied upon was identical to that advanced to the Commission by appellant's motion to disqualify the hearing examiner, which motion had been denied by the Commission on May 28, 1962, and to that asserted in Count II of the complaint which remained pending in the district court. Appellant moved for a stay of the administrative proceeding pending consideration of the petition and on January 3, 1964, this Court denied the requested stay, along with the requested stay in No. 18,295, following an extensive hearing before the Court, Chief Judge Bazelon and Circuit Judges Bastian and Burger sitting. Appellant's petition for a writ of mandamus or prohibition was denied on January 28, 1964.

VII. Appellant's Motion for Summary Judgment -- Resulting in the Order Appealed from in No. 18,444.

About one week prior to the commencement of the mandamus action in this Court, appellant filed in the district court a motion for summary judgment in the injunctive action (JA 223). Along with its motion appellant submitted to the court a proposed order denying its motion and stating that the district court was "of the opinion from the undisputed facts of record that . . . [appellant] has failed to exhaust its administrative remedies" (JA 235, 236). While the Commission agreed with appellant that the latter's motion for summary judgment should be denied, it objected to the entry of any order which stated that the facts were undisputed and urged that there existed a genuine issue of material fact and that the motion should be denied for that reason.[8/] The motion came on for hearing before the district court, Judge Sirica sitting, on January

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8/ Specifically, the Commission asserted that there was a genuine issue as to when the facts respecting the alleged disqualification of the hearing examiner were first available to appellant (JA 218). The Commission contended that this issue was material to its defense that appellant's suit was barred under the doctrine of res judicata, since appellant could have raised the alleged disqualification of the hearing examiner when it brought the first injunctive action in June of 1961 (JA 50-52). Appellant's reply to the Commission's Statement of Genuine Issues asserted that there was no dispute as to when the facts respecting the alleged disqualification first came to appellant's attention and did not contest the Commission's assertion that the disputed fact was when the facts were first available to appellant (JA 219).

23, 1964 (while the mandamus action was pending in this Court) and on January 30 the court entered an order denying the motion. The order did not state, as appellant had proposed, that it was entered on the basis of undisputed facts or that appellant had failed to exhaust its administrative remedies and there is nothing in the record to indicate that the court considered any issue other than whether there existed any genuine issues of material fact in reaching its decision. The order denying appellant's motion merely states that upon the basis of the pleadings and argument the motion is "denied" (JA 221). It is this order which appellant seeks to have reviewed in No. 18,444. The Commission, on March 13, 1964, moved to dismiss the appeal in No. 18,444 on the ground that the order sought to be reviewed is interlocutory and non-appealable; on April 14 this Court denied the motion "without prejudice to a renewal thereof in appellees' brief on the merits".

VIII. The Current Status of the Administrative Proceeding.

The length of the administrative proceeding has resulted in large part from delays caused by appellant.[9/] As pointed out by appellant (Br. 8), however, the evidentiary hearings before the hearing examiner in the proceeding have now been concluded and the parties have filed proposed findings of fact with the examiner.

9/ The evidentiary hearings were scheduled to begin on November 21, 1960, but were postponed at the suggestion of appellant's counsel, in which the staff of the Commission joined, so that the parties might attempt to effect a stipulation of facts. The stipulation was never achieved and the hearings commenced before the hearing examiner on December 16, 1960. From that date until June 13, 1961, when appellant first attempted to enjoin the proceeding, there had been a total of eight adjournments of the hearings, totaling 140 days. Appellant either requested or joined in the requests for six of these adjournments, totaling 120 days, including every such request after January 31, 1961. All requests for adjournments after March 14, 1961, during this period, were opposed by the Commission's staff (JA 54). From that time until February 9, 1962, the period in which the Commission's staff presented its evidence, there were 53 possible hearing days lost because of adjournments requested by appellant. Thereafter, until June 13, 1962, when appellant instituted the present injunctive action, 28 possible hearing days were lost by reason of appellant's requested adjournments. In addition, during this period when appellant was presenting its case, it introduced much evidence of a cumulative nature, even after the staff had conceded what appellant was attempting to show (JA 54-55, 56-58). Appellant also during this period failed to have witnesses present to testify (JA 55-56, 58, 206-207). Finally, there were no hearings conducted during the fifteen-month period in which the preliminary injunction obtained by appellant was in effect (JA 208-210, 211).

STATUTES INVOLVED

Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78y(a), provides in pertinent part:

> "Any person aggrieved by an order issued by the [Securities and Exchange] Commission in a proceeding under this title to which such a person is a party may obtain a review of such order in the Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . . Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, and enforce or set aside such order, in whole or in part. . . ."

Section 7(a) of the Administrative Procedure Act of 1946, 5 U.S.C. 1006(a), provides in pertinent part:

> "Any . . . [presiding] 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."

Section 11 of the Administrative Procedure Act, 5 U.S.C. 1010, provides:

> "Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good

> cause established and determined by the Civil Service Commission [hereinafter called the Commission] after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purpose of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpoena witnesses or records, and pay witness fees as established for the United States courts."

Section 13(a) of the Civil Service Retirement Act, 5 U.S.C. 2263(a), which was enacted as an amendment to the Act in 1956, provides:

> "Notwithstanding any other provision of law, an annuitant heretofore or hereafter retired under this chapter shall not, by reason of his retired status, be barred from employment in any appointive position for which he is qualified. An annuitant so reemployed shall serve at the will of the appointing officer."

SUMMARY OF ARGUMENT

I. The appeal in No. 18,444 should be dismissed because the order sought to be reviewed — an order denying appellant's motion for summary judgment without specification of any reason therefor — is an interlocutory and non-appealable order. There is nothing in the record in the present case to indicate that the district court, in entering the order, considered any issue other than whether there

existed any genuine issue of material fact. Hence within the prior decisions of this Court the order cannot be considered as an order "refusing" an injunction within the meaning of 28 U.S.C. 1292(a)(1), even though appellant sought only injunctive relief by its complaint. Indeed, appellees have repeatedly asserted the existence of a genuine issue of material fact, which assertion has been ignored by appellant, relevant to appellees' defenses that appellant's injunctive action is barred under the doctrines of res judicata, estoppel and laches.

II. The order appealed from in No. 18,295 -- denying appellant's second attempt to obtain a preliminary injunction -- should be affirmed because, as found by the district court, appellant waived, for purposes of preliminary relief, the ground now asserted for such relief by deliberately electing not to urge that ground at the first hearing on its motion for a preliminary injunction over a year and a half earlier. To permit appellant to split its grounds for relief as it has here attempted would sanction a unique example of piecemeal and unnecessary litigation foreign to all principles designed to achieve orderly administration of justice.

III. The order under review in No. 18,295 may also be affirmed upon the grounds that (1) appellant may not circumvent the statutory procedure for obtaining judicial review of orders of the Securities and Exchange Commission exclusively in the courts of appeals by bringing an injunctive action in the district court and (2) even if appellant had followed the prescribed statutory procedure, judicial

review of the Commission's ruling respecting the qualification of the hearing examiner would still have been premature under the well-established doctrine of exhaustion of administrative remedies. There is no exception to the exhaustion doctrine where violations of the Administrative Procedure Act are alleged; whether or not there is an exception where fundamental matters involving constitutional rights are concerned, no such matters are involved in the present case, as is pointed out in Point IV.

IV. While it is unnecessary for this Court to consider the merits of the Commission's determinations (a) that its hearing examiner was not disqualified because he had been reappointed after retirement age pursuant to Section 13(a) of the Civil Service Retirement Act, which provides that reemployed persons serve "at the will of" the appointing officer, and (b) that appellant's objections to his participation were untimely, the Commission's decision in this regard was clearly correct.

A. The primary problem respecting independence of hearing examiners has related to independence from the prosecutory staffs of agencies and is dealt with in Section 5(c) of the Administrative Procedure Act. Appellant makes no claim that the hearing examiner is not independent of the Commission's prosecutory staff. Rather, it contends that he is not independent of the Commission, which itself will render the ultimate adjudicatory decision in the administrative proceeding. However, the

"independence" of hearing examiners established by Section 11 of the Administrative Procedure Act, which provides, inter alia, that examiners may be discharged only for "good cause" as determined by the Civil Service Commission, appears from the legislative history to have been intended primarily to secure competent hearing examiners by giving them protections not available to other Civil Service employees; it was not intended to make examiners independent of the policies of the agencies or their members. Moreover, a party to an administrative proceeding, as distinguished from the hearing examiner himself, should not be permitted to raise questions of technical compliance with Section 11 where there is no claim that the party is being deprived of a fair hearing before a competent examiner.

Any possible conflict between the provisions of Section 11 of the Administrative Procedure Act and Section 13(a) of the Retirement Act, pursuant to which the examiner presiding in the administrative proceeding was reemployed, must be resolved against appellant. Since the subsequently-enacted provisions of the Retirement Act were stated to be "[n]otwithstanding any other provision of law," they take precedence over language which may be inconsistent in an earlier statute, despite "a rule of construction" therein, whereby the earlier statute was to be broadly interpreted. But even should the Administrative Procedure Act be deemed to prevail over the provisions of the

Retirement Act, the effect would not assist appellant but would merely limit the provision of Section 13(a) of the Retirement Act so that reemployed hearing examiners would not be discharged at the will of the appointing officer but only "for good cause", as provided in Section 11 of the Administrative Procedure Act. This follows from the initial language of Section 11, providing that the Civil Service laws apply "to the extent not inconsistent with" the Administrative Procedure Act.

B. Section 7(a) of the Administrative Procedure Act requires the filing of "timely" objections to the qualifications of hearing officers. Appellant's motion to the Commission, filed a year and a half after the proceeding had commenced and after over 8,000 pages of record had been amassed, must be regarded as untimely, particularly in view of the fact that the circumstances of the hearing examiner's appointment were available to appellant from the outset of the proceeding.

ARGUMENT

I. The Appeal in No. 18,444 Should be Dismissed Because the Order Sought to be Reviewed is Interlocutory and Non-Appealable.

It is well established that a "denial of a motion for summary judgment is an interlocutory order and, unless within some statutory category that permits an appeal from such an interlocutory order, is non-appealable." 6 Moore, Federal Practice (2d ed. 1953) p. 2298. This is because the movant's claim remains pending for trial after summary judgment has been denied. 6 Moore, op cit. supra, at p. 2318; 3 Barron & Holtzoff, Federal Practice and Procedure (Wright ed. 1958) p. 196.

The present case is controlled by this Court's decision in Ercona Camera Corp. v. Brownell, 100 App. D. C. 394, 246 F.2d 675 (1957), which, as here, involved simultaneous appeals from a denial of a motion for a preliminary injunction and a denial of a motion for summary judgment in an action seeking declaratory and injunctive relief. The Court stated (100 App. D. C. at 395):

> "As to the denial of the summary judgment, which was ordered by the District Court without specification of its reasons, the Government moved in this court to dismiss the appeal. That motion will be granted. See Division 689 v. Capital Transit Co., 1955, 97 U.S. App. D.C. 4, 227 F.2d 19.[1]

"1. As in the case cited, 'there is nothing in the record to indicate that the equity powers of the District Court were invoked on the motion for summary judgment.' 97 U.S. App. D.C. at pages 4-5, 227 F.2d at pages 19-20 (concurring opinion). In fact, appellants' motions for summary judgment and preliminary injunction were filed separately and were denied on different days. 'At least without a clear showing that the court considered the

> merits of a plea to its equitable jurisdiction, the denial of summary judgment cannot be deemed an "interlocutory order * * * refusing" an injunction within § 1292(1) [of title 28 U.S.C.].' Ibid."

See also Division 689 v. Capital Transit Co., 97 App. D. C. 4, 227 F.2d 19 (1955); Morgenstern Chemical Co. v. Schering Corp., 181 F.2d 160 (C.A. 3, 1950); 6 Moore, op cit. supra, at p. 2321; 3 Barron & Holtzoff, op cit. supra, at pp. 197-98.

Similarly, the order sought to be reviewed in No. 18,444, as noted above (p. 11 , supra), merely "denied" appellant's motion for summary judgment without specification of any reason for such denial (JA 221). And while it is true that appellant sought only injunctive relief by its complaint, the order denying summary judgment cannot be considered an order "refusing" an injunction within the meaning of 28 U.S.C. 1292(a)(1) unless it is clear that the district court, in denying the motion, considered the actual merits of appellant's plea to its equitable jurisdiction. There is nothing in the record in the present case which indicates that the court did consider the merits of appellant's claim or that it felt bound by the earlier ruling, with respect to appellant's renewal of the motion for a preliminary injunction, that appellant must exhaust its administrative remedies. The record in the present case, if indicative of anything in this respect, suggests that the court did not consider the merits of the controversy for, as pointed out above (p. 11 , supra), the court

did not include in its order the language proposed by appellant that appellant had failed to exhaust its administrative remedies (JA 235).

Appellant's brief ignores completely appellees' contention, asserted in the district court (JA 218), that a genuine issue of material fact exists with respect to appellees' defenses that appellant's suit is barred by the doctrine of res judicata and that appellant has been guilty of laches and should be estopped from contending that the hearing examiner has been invalidly appointed. In support of these defenses appellees have alleged that the pertinent facts respecting the alleged disqualification of the hearing examiner relied upon by appellant existed and were available to appellant as early as October 28, 1960 (JA 52-53).

If, as appellees allege, the pertinent facts existed and were available to appellant at the time it instituted its first suit to enjoin the administrative proceeding in June of 1961, then under the doctrine of res judicata appellant was required to include such facts as a basis for the relief sought in that suit. Appellant's complaint in its prior suit, as in the instant suit, was that appellant was being subjected to an invalid administrative hearing. Appellant here seeks the same relief sought then — that the hearing be enjoined.

Therefore, both suits are in fact the same cause of action.[10/] The doctrine of res judicata prevents such "piecemeal" litigation as appellant attempts here and its applicability makes the decree in the first action, which denied the injunction sought by appellant, an absolute bar to its second suit even as to issues which were not, but which might have been, presented in the first suit.[11/] See Angel v. Bullington, 330 U.S. 183, 186, 193 (1947); Chicot County District v. Bank, 308 U.S. 371, 375 (1940); Grubb v. Public Utilities Commission, 281 U.S. 470, 479 (1930).

Whether the pertinent facts upon which appellant relies existed and were available to appellant since October of 1960 is also material to appellees' defenses of laches and estoppel. In United States v. Tucker Truck Lines, 344 U.S. 33 (1952), the Court held that an issue

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10/ In Baltimore S. S. Co. v. Phillips, 274 U.S. 316, 321 (1927), the Court stated:

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong."

11/ Appellees do not contend that the first suit is res judicata as to whether the alleged infirmities have rendered the proceeding invalid since appellant may still raise these contentions upon review of any adverse final order of the Commission. The res judicata effect of the first suit is limited to whether appellant has a basis to enjoin the administrative proceeding.

whether a hearing examiner is appointed in violation of the Administrative Procedure Act is a question which a party may be deemed to have waived if it is not timely raised. In reaching this holding, the Court stressed that it was the duty of the party asserting invalidity of the appointment of a hearing examiner to "bestir" himself to learn the facts. Here, appellant continued to participate in the administrative proceeding for a year and a half without raising any question as to the purported invalid appointment of the hearing examiner. The importance of these defenses is pointed up by the fact that the issue here is not merely whether the hearing examiner was invalidly appointed but, in addition, whether appellant is entitled to injunctive relief.

Appellant has not made clear whether it disputes appellees' allegations that the pertinent information was available to appellant as of October 28, 1960, or whether appellant merely contends that even if established such a fact is immaterial and the date upon which the facts came to appellant's "attention" is controlling.[12/]

12/ In the district court, appellant missed the point of appellees' statement of genuine issues. Appellant stated that appellees "are incorrect in stating a genuine issue of fact exists with respect to whether the facts relied upon by plaintiff concerning the disqualification of the hearing examiner came to its attention as early as October 28, 1960. . ." (JA 219). Of course, appellees made no such statement. A plain reading of appellees' Statement of Genuine Issues (JA 218) shows that the appellees' position is that the pertinent facts "existed and were available" on October 28, 1960.

In either event, appellant apparently believes that its motion for summary judgment was denied not because of the existence of a genuine issue of material fact, but rather because the court felt that as a matter of substance appellant was not entitled to a judgment in its favor, or, conversely, that appellees were entitled to judgment. Significantly, however, the court below did not enter summary judgment for the appellees. See Division 689 v. Capital Transit Co., 97 App. D. C. 4, 5, 227 F.2d 19, 20 (1955) (concurring opinion); Local 453 v. Otis Elevator Co., 314 F.2d 25, 27 (C.A. 2, 1963); 6 Moore, op cit. supra, at pp. 2088-89.

Appellees, on the basis of the foregoing principles, hereby respectfully renew their motion, filed herein on March 13, 1964, to dismiss the appeal in No. 18,444.

II. Appellant has Waived its Right to Obtain a Preliminary Injunction on the Basis of Count II of its Complaint by Failing to Urge the Ground Set Forth in That Count at the First Hearing on its Motion for a Preliminary Injunction.

The first reason for the district court's denial of a preliminary injunction in the order appealed from in No. 18,295 was that appellant had been afforded ample opportunity to urge the ground set forth in Count II of the complaint at the June, 1962, hearing on its motion for a preliminary injunction, had failed to exercise that opportunity,

and could not be permitted to urge that ground over a year later at a second hearing on the same motion (JA 195).

Appellant filed its motion for a preliminary injunction in June of 1962, requesting such relief "upon the grounds. . . set forth in the . . . complaint" (JA 36). Those grounds were that two members of the Commission were allegedly disqualified from participating in the administrative proceeding (Count I) (JA 2-12) and that the hearing examiner was allegedly likewise disqualified (Count II) (JA 12-21). The motion came on for hearing before the district court that same month and appellant's counsel, without knowing how the court would rule respecting Count I of the complaint, made a deliberate election to rest solely upon Count I and not to urge Count II as a basis for preliminary relief, even after the court had warned counsel that it would not consider Count II unless counsel pressed it (JA 158-185). See note 6 , supra. Subsequently, the district court did rule in appellant's favor with respect to Count I and the Commission appealed to this Court, urging reversal of the order of preliminary injunction. Again, before this Court appellant neglected to urge the ground asserted in Count II of the complaint as a basis for affirmance of the order of

the district court.[13] Instead, as we have seen, following this Court's reversal appellant returned to the district court and, in December of 1963, attempted to renew the June, 1962, motion for a preliminary injunction, this time relying solely upon the ground alleged in Count II of the complaint. The same judge who had presided at the June, 1962, hearing on the earlier motion for a preliminary injunction concluded that appellant at that hearing had waived the ground set forth in Count II, for purposes of preliminary relief.

This holding, recognizing that the orderly administration of justice prohibits the type of piecemeal litigation engaged in here by appellant, was clearly correct. Cf. Angel v. Bullington, 330 U.S. 183, 192-93 (1947):

> ". . . The doctrine of res judicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. . . . And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties. . . ."

13/ See Brief for Appellee in No. 17,202. Indeed, appellant did not even urge that should this Court determine that the district court ruling respecting Count I was incorrect it should remand the matter for determination of whether a preliminary injunction should issue on the basis of Count II. Consequently, this Court simply "reversed" the order of preliminary injunction. Securities and Exchange Commission v. R. A. Holman & Co., Inc., __ App. D. C. __, 323 F.2d 284.

These remarks are even more appropriate to the present case where the ground now advanced had been specifically brought to the court's attention and, for purposes of the preliminary injunction sought, had been abandoned. A reversal of the district court's holding would sanction a procedure whereby a plaintiff with more than one alleged ground for relief could litigate each ground separately, consuming the time of the district court, this Court, and the Supreme Court as many times as there might be grounds asserted for the relief sought in his complaint.

Since appellant elected not to attempt to obtain preliminary relief based upon Count II of the complaint, the order appealed from in No. 18,295 should be sustained for this reason alone.

III. Appellant May Not Obtain Judicial Review of an Order of the Securities and Exchange Commission by Way of an Injunctive Action in the District Court Since Exclusive Jurisdiction to Review Such an Order is Vested in the Courts of Appeals; In Any Event, Appellant Must Exhaust its Administrative Remedies Before Seeking Judicial Review of Such an Order.

Section 25(a) of the Securities Exchange Act, 15 U.S.C. 78y(a), vests the various courts of appeals with "exclusive" jurisdiction to review orders of the Commission entered in proceedings under the Act upon the petition of persons "aggrieved" by such orders. See American Sumatra Tobacco Corp. v. Securities and Exchange Commission, 68 App.

D. C. 77, 93 F.2d 236 (1937); Okin v. Securities and Exchange Commission, 130 F.2d 903 (C.A. 2, 1942), affirming 46 F. Supp. 481 (S.D. N.Y.); Securities and Exchange Commission v. Andrews, 88 F.2d 441 (C.A. 2, 1937). It is clear in the present case that appellant, by way of an injunctive action in the district court, is seeking review of the Commission's order of May 28, 1962 (40 S.E.C. 1133), ruling that the Commission's hearing examiner was not disqualified from participating in the administrative proceeding and that appellant's motion to disqualify him was untimely. That order, if and when appellant becomes "aggrieved" by it, should be subject to judicial review only in the appropriate court of appeals and appellant should not be permitted to circumvent the prescribed statutory procedure, as it has repeatedly attempted to do throughout the administrative proceeding (see pp. 3-11, supra).

Whether or not appellant had sought review of the hearing examiner question in the proper court, however, such review would still have been premature, for, as has been authoritatively held time and again, administrative remedies must first be exhausted before judicial relief is available. See, e.g., Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1954); Securities and Exchange Commission v. Otis & Co., 338 U.S. 843 (1949); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Securities and Exchange Commission v. R. A. Holman & Co., Inc., __ App. D. C. ___, 323 F.2d 284 (1963), certiorari denied, 375 U.S. 943 (1963); R. A. Holman & Co., Inc. v. Securities and Exchange Commission, 112 App. D. C. 43,

299 F.2d 127 (1962), certiorari denied, 370 U.S. 911 (1962); National Lawyers Guild v. Brownell, 96 App. D. C. 252, 225 F.2d 552 (1955), certiorari denied, 351 U.S. 927 (1956); Young v. Higley, 95 App. D. C. 122, 220 F.2d 487 (1955); Riss & Co. v. Interstate Commerce Commission, 86 App. D. C. 79, 179 F.2d 810 (1950). On the first occasion when appellant sought to enjoin the administrative proceeding, this Court stated (112 App. D. C. at 46, 299 F.2d at 130):

> "Allowing the Commission a prior opportunity to decide these matters avoids agency delay and gives the Commission a chance to correct its own errors. It may also, of course, eliminate any need for court review if the Commission eventually decides in Holman's favor."

That was over two years ago. In the present posture of the case — the evidentiary hearings having been concluded and the parties to the administrative proceeding having filed proposed findings with the hearing examiner (see p. 12, supra) [14/] — there is even less reason not to await the Commission's ultimate determination before judicial review. [15/]

14/ One can speculate that the administrative proceeding might have been concluded by now had appellant not been successful in obtaining a preliminary injunction which was in effect for over fifteen months (JA 208-211).

15/ Appellant's argument that any ultimate decision entered in the proceeding will be invalid and that appellant's disability with respect to Regulation A underwritings will continue for a longer period of time if the proceeding is permitted to reach a conclusion than if the proceeding were halted now (Br. 18-19) assumes that the Commission will ultimately decide against appellant in the pending proceeding. Should the Commission decide in appellant's favor, however, it is unlikely that appellant will claim that the final order is invalid.

Contrary to appellant's assertions, there is no exception to the doctrine of exhaustion of administrative remedies where violations of the Administrative Procedure Act are alleged, indeed, even where the alleged violation concerns the qualification of the hearing examiner presiding over a proceeding. See Riss & Co., supra, 86 App. D. C. 79, where a challenge to the qualification of a hearing examiner allegedly appointed in violation of Sections 5(c) and 11 of the Act was rejected by this Court as premature.[16/] And whether or not there is, as suggested by appellant, an exception to the exhaustion principle where there are concerned "fundamental" matters involving rights guaranteed by the Constitution (Br. 20-21), as is pointed out in Point IV, infra, the participation of the hearing examiner in the proceeding here involved does not even violate the Administrative Procedure Act, let alone appellant's rights under the Constitution.

16/ Appellant attempts to utilize the case of Federal Home Loan Bank Board v. Long Beach Federal Savings and Loan Ass'n, 295 F.2d 403 (C.A. 9, 1961), as creating an exception to the exhaustion doctrine where the qualification of a hearing examiner is involved. While we believe that case was incorrectly decided, it is nevertheless clearly distinguishable because it did not involve an attempt to enjoin administrative proceedings, but involved a subpoena enforcement action in which the court of appeals found it necessary to determine the validity of the examiner's appointment in order to decide whether the subpoenas issued by him were valid. Moreover, in holding that the examiner was disqualified prior to the conclusion of the administrative proceeding the court specifically noted (id. at 410) that "the administrative proceeding. . .[had] not yet really gotten under way." In the present case, by way of contrast, the administrative proceeding is nearly completed. In any event, it appears that in that case that "[c]ounsel for all parties" took the position that "the district court could have dealt with the question" and that the court of appeals "should decide the matter." Id. at 409, fn. 10.

The district court, therefore, correctly concluded that appellant's failure to exhaust its administrative remedies also precluded it from obtaining a preliminary injunction based upon Count II of the complaint (JA 195) and the order appealed from in No. 18,295 can be sustained solely upon this ground. The foregoing argument, of course, would apply with equal force to the order sought to be reviewed in No. 18,444 had the district court reached the merits of the case in entering that order.

IV. The Commission's Decision Sought to be Reviewed Herein was Clearly Correct.

For reasons heretofore set forth, it is not necessary for this Court to consider at this time -- prior to any ultimate decision of the Commission adverse to appellant -- whether the Commission was correct in determining (1) that the hearing examiner was not disqualified from conducting the administrative proceeding and (2) that, in any event, appellant's objections before the Commission were too late. The district court did not reach these questions. Nevertheless, should this Court believe it necessary to consider these questions, as appellant urges, we submit that for the reasons set forth below the Commission was clearly correct.

A. The Commission's Hearing Examiner is Not Disqualified from Conducting the Administrative Proceeding to Which Appellant is a Party.

Appellant contends (Br. 11-12) that Mr. Swift, the hearing examiner who has been conducting the administrative proceeding, lacks "the independence from the Securities and Exchange Commission required by Section 11 of the Administrative Procedure Act", because since 1957, when Mr. Swift reached the age of mandatory retirement, to the present time, he has been reappointed to the position of hearing examiner on a year-to-year basis pursuant to the provision of Section 13(a) of the Civil Service Retirement Act, 5 U.S.C. 2263(a). Section 13(a), by amendment passed subsequent to the Administrative Procedure Act, authorizes reemployment of retired annuitants and provides that such reemployed persons "shall serve at the will of the appointing officer". Appellant's argument ignores both the primary purpose of Section 11 of enabling agencies to secure competent hearing examiners to assist them in their adjudicatory functions and the fact that under the plain language of the statutory provisions involved any conflict between them must be resolved against appellant.

Since agencies obviously cannot preside over all evidentiary matters coming before them, they have appointed and utilized hearing examiners to assist them in the exercise of their quasi-judicial

functions.[17] Prior to the adoption of the Administrative Procedure Act in 1946 the rights of hearing examiners were comparable to those of any other Civil Service employee and, indeed, persons were sometimes appointed to assist agencies as examiners on an ad hoc basis. The independence of hearing examiners from the agencies' prosecutory staffs was of substantial concern.[18] Section 5(c) of the Administrative Procedure Act, dealing with separation of functions, was intended to insure such independence. While the authorities cited at pp. 14-17 of appellant's brief are apparently intended to create the impression that the examiner here is not independent of, and is by virtue of his reemployment subject to influence by, members of the Commission's prosecutory staff, this is not what appellant's arguments tend to show. At most, appellant claims that the examiner is not independent of the Commission itself. Such independence is not called for by the need for separation of the adjudicatory function from the prosecutory function since the Commission itself may act in an adjudicatory capacity in the administrative proceeding

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17/ See, e.g., Final Report of the Attorney General's Committee on Administrative Procedure (1941), p. 47, where it was noted that hearing examiners were "in a very real sense acting for the head of the agency" and were hearing cases "because the heads cannot as a practical matter themselves sit." As noted in the Senate Committee Report on the bill which became the Administrative Procedure Act, that Committee had utilized the Final Report of the Attorney General's Committee in framing the bill, which itself was an outgrowth of the work of the Attorney General's Committee. See Administrative Procedure Act -- Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. (1946) p. 190.

18/ See Final Report of the Attorney General's Committee on Administrative Procedure, supra, at pp. 56-57.

at any stage and will make the ultimate adjudicatory decision.[19]

Section 11 of the Administrative Procedure Act, 5 U.S.C. 1010, provides that "[s]ubject to the Civil Service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary" to preside over formal agency proceedings and that such examiners may be removed by the agency "only for good cause established and determined by the Civil Service Commission. . . after opportunity for hearing and upon the record thereof." In the light of the functional relationship between an agency and its hearing examiners and the desire that the latter "should be men of ability and prestige",[20] the foregoing provisions were primarily designed to secure a competent corps of hearing examiners so that agencies might feel free

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19/ Appellant's reliance upon Tumey v. Ohio, 273 U.S. 510 (1927) (Br. 17), which involved a judicial officer who had a financial stake in convicting those who came before him, assumes that the members of the Securities and Exchange Commission have an interest in finding against respondents in proceedings before the Commission.

20/ See Final Report of the Attorney General's Committee on Administrative Procedure, supra, at p. 46.

to delegate a greater amount of decisional responsibility to them.[21] Viewed in this perspective, and considering the fact that there is nothing to prevent an agency or any of its members from presiding over an administrative hearing,[22] the "independence" sought to be achieved by Section 11 was not an independence of the examiners from the policies of the agencies but largely additional protection, not available to other Civil Service employees, against loss of employment by reason of political or other changes that might discourage "men of judicial qualifications and capacity" from seeking hearing examiner positions.[23]

21/ Id. at pp. 46-47, 214.

22/ See Section 7(a) of the Administrative Procedure Act, 5 U.S.C. 1006(a).

23/ Id. at p. 47. As stated with respect to Section 11 by Congressman Walter, who was Chairman of the Subcommittee of the House of Representatives Committee on the Judiciary that was responsible for drafting the Administrative Procedure Act:

> "If there be any criticism of the operation of the civil-service system, it is that the tenure security of civil-service personnel is exaggerated." S. Doc. No. 248, 79th Cong., 2d Sess. p. 371 (1946).

The description of the purpose of Section 11, quoted at pp. 17-18 of appellant's brief, is not legislative history of that Section but rather the interpretation of a practitioner who pointed out that his connection with the passage of the Administrative Procedure Act "was not such as to give . . . [him] any special knowledge of the subject." New York University School of Law Institute, Federal Administrative Procedure Act and the Administrative Agencies (1947) p. 307. In any event, his interpretation is not inconsistent with the concept that the primary purpose of Section 11 was to secure competent persons for the positions of hearing examiners.

Appellant does not question the fact that Mr. Swift was originally properly appointed and, accordingly, that the Congressional purpose of achieving a hearing examiner of the appropriate competency has been served. Nor is there anything to indicate that Mr. Swift has not continued to be competent. Appellant points to the fact that, if retired, Mr. Swift would receive less income from the government (Br. 8). He would also have more leisure time, however, and in this connection it may be assumed that a conscientious hearing examiner would continue to accept reemployment even against his own preference in order to conclude a proceeding that had gone on for many months. The question whether or not, subsequent to his seventieth birthday, he may now be removable only for "good cause" established by the Civil Service Commission would appear to be one to be raised only by Mr. Swift and not by a party to the proceeding before him. This question seems more akin to the category of questions which this Court in Nash v. Interstate Commerce Commission, 96 App. D. C. 203, 225 F.2d 42 (1955), has suggested are "for consideration and decision by the agencies involved" (i.e., the appointing agency and the Civil Service Commission) than to those involving a question whether a party to an administrative proceeding is receiving a fair trial. In our view a party to a proceeding before a hearing examiner should not be able to raise a question with respect to technical compliance with the requirements of Section 11, where this does not deprive him of a fair trial before a competent hearing officer, and where, indeed, the

problem he envisages is a purely hypothetical one.[24/] The question appellant seeks to raise here is comparable to questions raised in Federal Trial Examiners Conference v. Ramspeck, 104 F. Supp. 734, 741 (D.D.C. 1952), affirmed per curiam, 91 App. D. C. 164, 202 F.2d 312 (1952), reversed, 345 U.S. 128 (1953), where questions respecting employment and discharge of hearing examiners were raised on behalf of the hearing examiners -- not on behalf of a party to any proceeding.

One of the determinations by the district court in Ramspeck from which no appeal was taken was that a regulation of the Civil Service Commission providing that agencies may make conditional appoint-

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24/ In this connection it should be noted that in Federal Home Loan Bank Board v. Long Beach Federal Savings and Loan Ass'n, note 16, supra, the General Counsel of the Board was active in selecting the hearing examiner who was borrowed from another agency. 295 F.2d at 410. While not discussed in the opinion, the court may well have been influenced by the fact that the General Counsel had responsibility for the prosecution of the administrative proceeding. See Long Beach Federal Savings and Loan Ass'n v. Federal Home Loan Bank Board, 189 F. Supp. 589, 606, fn. 12 (S.D. Cal., 1960).

ments of hearing examiners pending final decision of their eligibility for absolute appointment was valid.[25] As noted by the Commission (JA 85) the contention advanced in that case that the regulation enabled agencies to hold a club over the heads of any examiners by keeping them in a conditional status if their decisions were unsatisfactory was rejected. The comparable suggestion made by appellant here should also be rejected.

The theory of the Commission's decision was that the Administrative Procedure Act did not purport to deal with retired federal employees and that provisions applying generally to government employees who have reached the mandatory retirement age are applicable to hearing examiners. Cf. Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953), where it was held that a discharge of a hearing examiner by an agency pursuant to a reduction in force in accordance with Civil Service regulations was not violative of Section 11 of the Administrative Procedure Act. Similarly, the retention of a hearing examiner who has passed the age of mandatory retirement pursuant to conditions prescribed by the Civil Service Commission is not violative of Section 11. As in

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25/ As the court there noted, the Attorney General's Committee, which was also concerned with the "independence" of hearing examiners, recommended conditional appointment of hearing examiners in certain situations. See Final Report of the Attorney General's Committee on Administrative Procedure, supra, at p. 48.

the Ramspeck case "it must be assumed that the [Civil Service] Commission will prevent any devious practice by an agency which would abuse this Rule." 345 U.S. at 142.

The retention of retired employees had been a part of the Civil Service program long before the enactment of the Administrative Procedure Act.[26/] In the enactment of Section 11 of that Act "Congress put 'the entire tradition of the Civil Service Commission . . . to use.'"[27/] The subsequent enactment of the reemployment provision in its present form was expressly stated to be "notwithstanding any other provision of law." Congress surely could have specifically excluded hearing examiners from the reemployment provision, but it did not do so, although various other classes of persons were specifically excluded from its coverage. See Section 2 of the Retirement Act, 5 U.S.C. 2252. Clearly Congress intended to retain the objectives of both Section 11 of the Administrative Procedure Act and Section 13(a) of the Retirement Act with respect to hearing examiners.

To uphold appellant's contention would not only deprive all agencies of the benefit of service of able and experienced hearing

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26/ See 5 U.S.C. 715, 41 Stat. 617 (May 22, 1920).

27/ Ramspeck v. Federal Trial Examiners Conference, 91 App. D. C. 164, 165, 202 F.2d 312, 313 (1952) (dissenting opinion, quoting from Administrative Procedure Act -- Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. (1946) p. 215).

examiners who have reached retirement age and are willing and able to continue to serve in their prior capacities, but would force agencies either not to utilize examiners close to retirement age or run the risk that extensive hearings would have to begin anew in the event that the examiner reached the retirement age during the pendency of those hearings, at least where the credibility of witnesses might be in issue.[28/]

Finally, we emphasize that any possible conflict between the provisions of Section 11 of the Administrative Procedure Act and the subsequently-enacted provisions of the Retirement Act providing for the reemployment of annuitants cannot be resolved in the manner suggested by appellant. The Retirement Act specifically provides that "notwithstanding any other provision of law" a retired annuitant shall not be barred from reemployment, subject to the conditions provided in the Retirement Act. Appellant nevertheless contends that the provisions of the earlier Administrative Procedure Act create an implied exception to this provision, barring the reemployment of hearing examiners under the Retirement Act. While, on occasion, a later statute may create an implied exception to, or impliedly supersede, some provision of an earlier act, this process

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28/ See Gamble-Skogmo, Inc. v. Federal Trade Commission, 211 F.2d 106 (C.A. 8, 1954), which recognized that an agency has the privilege of reemploying retired hearing examiners, although the question of the effect of Section 11 of the Administrative Procedure Act was not raised.

obviously cannot operate in reverse. An earlier act cannot supersede a later one. The language of Section 12 of the Administrative Procedure Act upon which appellant relies that "no subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly" was stated in the legislative history to be "a rule of construction" so that courts would "interpret the Act as applicable on a broad basis unless some subsequent act clearly provides to the contrary."[29/] Any conflict between the Administrative Procedure Act and the Retirement Act should be resolved either by holding that the latter Act governs, or else by concluding, consistently with the introductory sentence of Section 11 of the Administrative Procedure Act, which provides that the Civil Service laws apply, "to the extent not inconsistent" with the Administrative Procedure Act, that reemployed hearing examiners are removable "only for good cause established and determined by the Civil Service Commission . . . after opportunity for hearing and upon the record thereof." Whichever construction be adopted, it is neither necessary nor appropriate to conclude, as does appellant, that retired hearing examiners may not be reappointed at all - a result which expressly conflicts with the latest expression of the Congressional will.

29/ Statement of Attorney General appended to Senate Report. Administrative Procedure Act -- Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. (1946) p. 231.

B. Appellant's Attempt to Disqualify the Hearing Examiner was Untimely.

Section 7(a) of the Administrative Procedure Act, 5 U.S.C. 1006(a), provides that parties challenging the qualifications of an administrative hearing officer shall file a "timely" and sufficient affidavit of disqualification. Appellant's first challenge to the qualification of the hearing examiner in the present case was presented in its motion to disqualify the examiner filed in the administrative proceeding in May of 1962 when the proceeding had progressed for a year and a half, 440 exhibits had been introduced and over 8,000 pages of record had been amassed (JA 231). The Commission, in rejecting that motion, pointed out in its opinion of May 28, 1962 (JA 231; 40 S.E.C. at 1138):

> "Movants assert that they checked the age of the hearing examiner in April 1962. However, as the hearing examiner observed when ruling on the instant motion, the fact that he was 'well along in life' would certainly have been no secret to respondents during the course of the extensive proceedings before him. We think it was incumbent upon movants to exercise due diligence to raise any objection to the examiner for any reason early in the proceedings, and that having failed to do so they must be deemed to have waived any such objection."

It seems clear that appellant simply "did not bestir itself to learn the facts"[30/] concerning the hearing examiner's appointment until it became apparent that appellant's first attempt to halt the administrative proceeding (see pp. 3-4 , supra) would be unsuccessful. Appellant's motion cannot be said to have been "timely" simply because appellant did not inquire into the pertinent facts until most of the

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30/ United States v. Tucker Truck Lines, Inc., 344 U.S. 33, 35 (1952).

administrative hearings had been completed. Cf. Bishop v. United States, 16 F.2d 410, 411 (C.A. 8, 1926), where the court pointed out that it was the intent of the provision of the Judicial Code requiring timely objections to judges' qualifications "that the affidavit must be filed in time to protect the government from useless costs, and protect the court in the disarrangement of its calendar, and prevent useless delay of trials, and parties filing such affidavits should be held to strict diligence in presenting the claim of disqualification."

CONCLUSION

For the foregoing reasons the appeal in No. 18,444 should be dismissed and the order appealed from in No. 18,295 should be affirmed. Should this Court find, however, that the order sought to be reviewed in No. 18,444 is an appealable order, that order should also be affirmed.

Respectfully submitted,

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