ORIGINAL

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
The North Carolina Board of Dental Examiners, Respondent.	)	DOCKET NO. 9343

ORDER DENYING RESPONDENT'S APPLICATION FOR REVIEW OF ORDER DENYING RESPONDENT'S MOTION TO CHANGE HEARING LOCATION

I.

On January 31, 2011, Respondent filed an Application for Review of a Ruling Denying Respondent's Motion to Change Hearing Location ("Application").[1] Complaint Counsel filed its Opposition to the Application on February 2, 2011 ("Opposition").

Having fully considered all arguments in the Motion and Opposition, and as further discussed below, because Respondent has failed to meet the requirements of Commission Rule 3.23(b), the Application is DENIED.

II.

A. Standards for allowing application for review under Rule 3.23(b)

Respondent filed its Application pursuant to Commission Rules 3.23(b) and 3.41. Commission Rule 3.23(b) states:

> A party may request the Administrative Law Judge ["ALJ"] to determine that a ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy.

[1] The Office of the Secretary received the Application at 5:01 p.m. on January 28, 2011 and recorded it as filed on January 31, 2011, pursuant to Commission Rule 4.3(d), which states: "Documents must be received in the Office of the Secretary of the Commission by 5:00 p.m. Eastern time to be deemed filed that day. Any documents received by the agency after 5:00 p.m. will be deemed filed the following business day." 16 C.F.R. § 4.3(d).

16 C.F.R. § 3.23(b). Interlocutory appeals are disfavored, as intrusions on the orderly and expeditious conduct of the adjudicative process. *In re Daniel Chapter One,* 2009 FTC LEXIS 111, *1 (May 5, 2009); *In re Schering-Plough Corp.*, 2002 WL 31433937 (Feb. 12, 2002). Accordingly, the movant must satisfy a very stringent three-prong test by demonstrating that: (1) the ruling involves a controlling question of law or policy; (2) there is substantial ground for difference of opinion as to that controlling issue; *and* (3) immediate appeal from the ruling may materially advance the ultimate termination of the litigation *or* subsequent review will be an inadequate remedy. 16 C.F.R. § 3.23(b); *In re Daniel Chapter One,* 2009 FTC LEXIS 111, *1-2; *In re Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 478, at *1 (Nov. 5, 1996); *In re BASF Wyandotte Corp.*, 1979 FTC LEXIS 77, at *1 (Nov. 20, 1979).

Commission Rule 3.41 states, in pertinent part:

> (b) Expedition. Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place and shall continue, except for brief intervals of the sort normally involved in judicial proceedings, without suspension until concluded. . . .
>
> (1) The Administrative Law Judge may order hearings at more than one place . . . .

16 C.F.R. § 3.41.

B. The ruling for which interlocutory review is sought

By Order dated January 25, 2011, Respondent's Motion to Change Hearing Location ("Motion on Hearing Location") was denied ("January 25, 2011 Order"). Respondent's Motion on Hearing Location sought an order to change the location of the hearing in the above captioned matter from Washington, D.C. to Raleigh, North Carolina. The January 25, 2011 Order denied Respondent's Motion on Hearing Location on the grounds that, under the circumstance presented, to hold the hearing in Raleigh, North Carolina, was not practicable and not in the interest of administrative efficiency.

The January 25, 2011 Order held:

> Under the Commission's Rules, the Administrative Law Judge "may order hearings at more than one place" and thus has discretion to hold hearings in a location other than Washington, D.C. Indeed, in *In re North Texas Specialty Physicians*, a change of location was permitted where, unlike the instant case, all counsel were in a location other than Washington, D.C., [footnote omitted] all fact witnesses were located in or near Forth Worth, Texas, and all parties agreed that it was more practicable to hold the hearing in Fort Worth, Texas. In addition, unlike Respondent herein, the request was made at the initial scheduling conference, well in advance of trial. Finally, the Administrative Law Judge's obligations in other cases then pending in Part III adjudication permitted such a change in hearing location. Therefore, the hearing, with the exception of closing

arguments, was held in Forth Worth, Texas. *In re North Texas Specialty Physicians*, Docket No. 9312, *available at* http://ftc.gov/os/adjpro/d9312/031016 aljschedulingorder.pdf (Administrative Law Judge D. Michael Chappell presiding).

The Commission Rule requires that the hearing shall be held at one place, insofar as practicable. An overriding consideration in exercising the discretion granted to the Administrative Law Judge under the Commission Rule is whether setting the hearing away from the location set by the Commission in the Complaint will allow the hearing "to proceed with all reasonable expedition." 16 C.F.R. § 3.41(b)(1). Thus, administrative efficiency must be considered. Changing the hearing location would require the undersigned to travel to Raleigh, North Carolina. In addition, although Respondent stated that "[t]here is sufficient courtroom space within which the hearing of this matter may be conducted in Raleigh, NC," this unsupported statement fails to provide sufficient assurance that appropriate facilities are available on such short notice. Trial in this matter is set to begin on February 17, 2011, less than one month from now. To change the hearing location at this time is not practicable.

Moreover, a change in the location of this hearing, scheduled to begin on February 17, 2011, would require the Administrative Law Judge to spend significant time away from Washington, D.C., at a time when three other pending matters scheduled for trial in May 2011 will require the attention of the Administrative Law Judge. Thus, to hold the hearings in Raleigh, North Carolina is not practicable and not in the interest of administrative efficiency.

January 25, 2011 Order at 3-4.

III.

A. The January 25, 2011 Order does not involve a controlling question of law or policy

Respondent argues that "[t]here is substantial ground for difference of opinion as to the ALJ's application of Rule 3.41, which clearly is the controlling question of law in connection with Respondent's Motion." Application at 2. Respondent further states that it disagrees with the factors considered by the ALJ and with the ALJ's refusal to consider the weight of the federal cases cited by Respondent in its motion. Application at 2.

The first prong of the three-prong test in Rule 3.23 requires the movant to demonstrate that the ruling involves a controlling question of law or policy. Interpreting 26 U.S.C. § 1292(b), upon which Rule 3.23(b) is modeled, it has been held:

> "question of law". . . [refers] to a "pure" question of law rather than merely to an issue that might be free from a factual contest. The idea was that if a case turned on a pure question of law, something the court of

> appeals could decide quickly and cleanly without having to study the record, the court should be enabled to do so without having to wait till the end of the case.

Ahrenholz v. University of Illinois, 219 F.3d 674, 677 (7th Cir. 2000). *See also In re Calimlim*, 1987 FTC LEXIS 71, at *1-2 (May 20, 1987) (denying motion for interlocutory appeal where order involved a factual issue and therefore did not raise a controlling question of law).

Significantly, Respondent's arguments confirm the importance of the factual inquiry in this dispute by highlighting the location of the witnesses and focusing on the inconvenience to Respondent, its party witnesses, and non-party witnesses who must travel to Washington, D.C., for the hearing. In the January 25, 2011 Order, consideration was given not only to the location of the witnesses, but also to the fact that the motion was filed less than one month prior to the start of trial, making securing courtroom and working space impracticable,[2] and to the fact that the time period for which Respondent sought the Administrative Law Judge to spend away from Washington, D.C. was a time period when three other pending matters scheduled for trial in May 2011 also required the attention of the Administrative Law Judge.

In the January 25, 2011 Order, the circumstances presented by Respondent's Motion on Hearing Location were contrasted with the circumstances presented in a similar request made by Respondent in *In re North Texas Specialty Physicians*. There, a change of location requested by Respondent was permitted where: counsel were in a location other than Washington, D.C.; fact witnesses were located in or near Forth Worth, Texas; all parties agreed that it was more practicable to hold the hearing in Fort Worth, Texas; the request was made at the initial scheduling conference, well in advance of trial; and the Administrative Law Judge's obligations in other cases then pending in Part III adjudication permitted such a change in hearing location. January 25, 2011 Order at 3.[3] The same factors were analyzed and applied in both the January 25, 2011 Order and the decision in *In re North Texas Specialty Physicians*. The results were different in *North Texas* because the facts in that case were different. Thus, it is manifest that the January

[2] Respondent charges that the January 25, 2011 Order "unduly casts doubt on the adequacy of federal courthouse facilities in Raleigh and that the ALJ "appear[s] to have concerns as to whether such facilities are on par with those available at the Federal Trade Commission." Application at 2 and n.2. Although not relevant in evaluating whether Respondent's Application meets the standards for interlocutory review under Rule 3.23(b), this incorrect interpretation of the ruling is unfortunate. Respondent's Motion on Hearing Location did not assert that any federal court room was available for hearing on the days in which this hearing will be conducted. Rather, Respondent asserted only that there is "sufficient courtroom space . . . in Raleigh, North Carolina" for the hearing. The concern expressed in the January 25, 2011 Order was over the availability of such facilities, particularly on "such short notice" and not, as claimed by Respondent, with the "adequacy" of the federal courthouse facilities. January 25, 2011 Order at 3.

[3] Respondent states: "to hold that one factor supporting a transfer is that the parties must agree on the location is absurd." Application at 5. There was no holding in the January 25, 2011 Order that an agreement of the parties is required. Instead, consideration was given to where the witnesses were located, along with the other factors discussed in the January 25, 2011 Order.

25, 2011 Order was an application of the law to the case at hand. Accordingly, the January 25, 2011 Order does not present question of law or policy.

Furthermore, the question presented by Respondent is not a "controlling" question of law or policy. A "controlling" question of law or policy has been defined as "'not equivalent to merely a question of law which is determinative of the case at hand. To the contrary, such a question is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases.'" *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, *19 (October 17, 2000) (quoting *In re Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 478, *1 (Nov. 5, 1996)). As shown by the contrast with the decision reached in *In re North Texas Specialty,* the January 25, 2011 Order clearly was determinative only of the case at hand and an appeal would not contribute to the determination, at an early stage, of a wide spectrum of cases.

B. The January 25, 2011 Order does not involve an issue as to which there is substantial ground for difference of opinion

Even if the determination to hold the hearing in Washington, D.C., involved a controlling question of law or policy, which it does not, Respondent's Application still fails because it fails to meet the second prong of the three-prong test. Respondent does not demonstrate that there is substantial ground for difference of opinion as to the application of Rule 3.41. In support of its argument that there is substantial grounds for a difference of opinion, Respondent cites to the Administrative Procedure Act ("APA"), which states, in part, that "[i]n fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives," 5 U.S.C. § 554(b), and asserts that proper consideration was not given to factors cited by Respondent detailing the inconvenience to Respondent, its representatives, and non-party witnesses. Application at 4. To the contrary, as required by the APA, in the January 25, 2011 Order, due weight was given to the convenience and necessity of Respondent and its witnesses, but ultimately Respondent's request was denied, for reasons explained in the January 25, 2011 Order. This weighing of factors is precisely what the law contemplates and, therefore, the issue is not one as to which there is substantial ground for difference of opinion.

Indeed, to establish substantial ground for difference of opinion, a party seeking certification must show that a controlling legal question involves novel or unsettled authority. *In re Daniel Chapter One,* 2009 FTC LEXIS 111, *2; *Int'l Assoc. of Conf. Interpreters*, 1995 FTC LEXIS 452, at *5. *See also Fed'l Election Comm'n v. Club for Growth, Inc.*, No.: 5-851 (RMU), 2006 U.S. Dist. LEXIS 73933 (D.D.C. Oct. 10, 2006) (stating that "one method for demonstrating a substantial ground for difference of opinion is 'by adducing conflicting and contradictory opinions of courts which have ruled on the issue'"). The evaluation of the facts presented by Respondent's Motion on Hearing Location does not involve novel or unsettled legal authority. Rather, Commission Rule 3.41, by stating that the Administrative Law Judge "may order hearings at more than one place," clearly gives the Administrative Law Judge discretion to determine whether to hold hearings in a location other than Washington, D.C.

Moreover, this exercise of discretion does not provide grounds for interlocutory appeal. *In re Suburban Propane Gas Corp.*, 74 F.T.C. 1602, *9; 1968 FTC LEXIS 277 (Sept. 20, 1968) (denying request for interlocutory review concerning prehearing discovery on grounds that appeals concerning "issues relating to procedural details . . . concern prehearing discovery or procedure and thus are subject to the wide discretion of the hearing examiner"[4]). "The [ALJ's] proximity to the proceeding places him in a singularly favorable position to rule on [hearing location] requests and absent some overriding considerations his recommendations with respect thereto will not be disturbed." *In re Windsor Distrib. Co.*, 75 F.T.C. 1100, 1969 FTC LEXIS 137, *2 (June 24, 1969) (affirming ALJ order setting hearing in multiple locations pursuant to Rule 3.41(b)).

Respondent "disagrees with the Order's refusal to consider the weight of the federal cases cited by Respondent in its Motion detailing how the refusal to grant a request for transfer of forum to where all the witnesses were located was an abuse of discretion." Application at 4. Respondent further argues that the ALJ had discretion to give the federal cases cited by Respondent in its Motion on Hearing Location greater weight, but did not do so. Application at 4-5. As explained in the January 25, 2011 Order, the cases relied upon by Respondent adjudicated the question of transfer under 28 U.S.C. § 1404(a), a federal statute that is different from the Commission's Rule 3.41. Consideration was given to those federal cases in the January 25, 2011 Order and a determination was made not to give them greater weight. As stated in the January 25, 2011 Order: "the federal statute controlling change of venue and cases interpreting motions to transfer a case from one district court to another are not applicable." January 25 Order at 3. A determination regarding the weight to be given to federal cases cited by the Respondent cannot be said to present a novel theory or unsettled legal authority. To the contrary, it is well established that "the Federal Rules . . . do not control Commission proceedings." *In re L.G. Balfour Co.,* No. 8435, 61 F.T.C. 1491, 1492, 1962 FTC LEXIS 367, *4 (Oct. 5, 1962); *In re Gemtronics, Inc.,* 2010 FTC LEXIS 40, *10 (April 27, 2010). Thus, Respondent has not presented a question over which there is a substantial ground for difference of opinion.

To establish a "substantial ground" for difference of opinion under Rule 3.23(b), "a party seeking certification must make a showing of a likelihood of success on the merits." *In re Daniel Chapter One,* 2009 FTC LEXIS 111, *6 (citing *Int'l Assoc. of Conf. Interp.*, 1995 FTC LEXIS 452, *4-5 (Feb. 15, 1995); *BASF Wyandotte Corp.*, 1979 FTC LEXIS 77, *3 (Nov. 20, 1979) (stating that the substantial ground for difference of opinion test "has been held to mean that appellant must show a probability of success on appeal of the issue."). Commission Rule 3.41 sets forth that hearings, "insofar as practicable, shall be held at one place" and that "[t]he hearing will take place on the date specified in the notice accompanying the complaint." 16 C.F.R. § 3.41(b). Given that, in accordance with Rule 3.41, the Commission has provided for the time of the hearing in the notice accompanying the Complaint, but that the location of the hearing is left up to

[4] The title of the presiding officer was changed from "Hearing Examiner," to "Administrative Law Judge," in 1970. *In re Adolph Coors Co.,* 83 F.T.C. 32; 1973 FTC LEXIS 226 (July 24, 1973) (citations omitted).

the discretion of the ALJ, it is unlikely that Respondent would have success on an appeal of the merits of this issue. Accordingly, Respondent has not demonstrated that there is substantial ground for difference of opinion as to the application of Rule 3.41 to the facts of this case.

For the above stated reasons, Respondent has not demonstrated that the January 25, 2011 Order involves a controlling question of law or policy as to which there is substantial ground for difference of opinion.

C. An immediate appeal from the January 25, 2011 Order would not materially advance the ultimate termination of the litigation and subsequent review would not be an inadequate remedy

To merit interlocutory review, a movant must satisfy all three prongs of the three-prong test in Rule 3.23. Although Respondent has failed to satisfy the first two prongs, that (1) the ruling involves a controlling question of law or policy; and that (2) there is substantial ground for difference of opinion as to that controlling issue, Respondent's argument in support of the third prong is addressed.

The third prong of the three-prong test in Rule 3.23 requires a movant to show either that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation *or* that subsequent review will be an inadequate remedy. Respondent does not argue that appeal of the January 25, 2011 Order might materially advance the termination of the litigation. Indeed, a ruling confirming the location of the hearing has absolutely no bearing on any issue that might materially advance the termination of the litigation.

Instead, Respondent argues only that if Respondent's Application is not heard immediately on appeal, then the hearing will proceed on February 17, 2011 in Washington, D.C. and that Respondent will have to bear the hardships of proceeding with trial in Washington, D.C. Application at 6. However, Respondent, although having the burden of persuasion as the movant, failed to present or offer any authority in support of this argument. In a case relied upon by Respondent in its Motion on Hearing Location, in holding that the district court had abused its discretion in refusing to transfer the case before it to another district court, the Court of Appeals for the Fourth Circuit, after the conclusion of the trial, remanded the case for another trial. *Southern Ry. Co. v. Madden*, 235 F.2d 198, 201 (4th Cir. 1956) (cited in Respondent's Motion on Hearing Location at 4-5). Thus, a pretrial denial of transfer may be remedied on appeal from a decision on the merits. A new trial or hearing may not be the remedy that Respondent prefers, but it is a remedy and Respondent has failed to demonstrate that this is an "inadequate remedy" as required by Rule 3.23. Even if such remedy could be considered an "inadequate remedy," Respondent's Application is nonetheless denied because Respondent failed to satisfy the first two prongs of the very stringent three-prong test required by Rule 3.23(b).

IV.

Respondent has failed to meet the requirements of Rule 3.23(b). After full consideration of Respondent's Application and Complaint Counsel's Opposition, and having fully considered all arguments and contentions therein, Respondent's Application is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: February 7, 2011