

DIVISION OF CONSUMER AFFAIRS,
Petitioner,
v.
**ACME MARKETS, INC., GREAT ATLANTIC & PACIFIC
TEA CO., INC., SINGER SUPERMARKETS, INC., AND
VILLAGE SUPERMARKETS, INC.,**
Respondents.

Decided September 29, 1981

Initial Decision on Motion

SYNOPSIS

The Division of Consumer Affairs filed complaints against Acme Markets, Inc., the Great Atlantic and Pacific Tea Co., Inc., Singer Supermarkets, Inc. and Village Supermarkets, Inc. charging violations of the New Jersey Consumer Fraud Act, *N.J.S.A. 56:8-25* in that the respondents had sold food at prices higher than those advertised and did not have items available for purchase during the advertised period.

The respondents moved to take the deposition on oral examination of the Executive Director of the Division's Office of Consumer Protection in order to demonstrate that procedures used by the Division to check compliance were discriminatorily applied and thus constituted selective enforcement of the laws.

In ruling on the motion, the administrative law judge noted that under the Uniform Administrative Procedure Rules of Practice, depositions upon oral examination on written interrogatory are available only on motion for good cause shown, *N.J.A.C. 1:1-11.3*. In deciding such a motion, the judge shall consider policy governing discovery generally and shall weigh specific need for the deposition, the extent to which information sought cannot be obtained in other ways, undue hardship and matters of expense, privilege or oppressiveness.

Here, the judge noted, the respondents had merely alleged in affirmative defenses that various inspection processes were arbitrary and capricious. The respondents had failed to show any reason why the information and data sought could not be secured through less formal means of discovery such as written interrogatory and requests for admission which would have been available simply on notice. In addition, the respondents had failed to demonstrate that the Executive Director was the one with personal knowledge of the events in

question nor did they demonstrate that the Director had any direct involvement in such events.

Accordingly, the administrative law judge determined that the respondents had failed to demonstrate the good cause necessary to order such depositions and denied the respondents' motion.

Israel David Dubin, Deputy Attorney General, for Petitioner (James R. Zazzali, Attorney General of New Jersey, Attorney)

Anthony J. Napodano, Esq. for Respondents

OSPENSON, ALJ:

The Director of the Division of Consumer Affairs of the Department of Law and Public Safety of New Jersey filed complaints against Acme Markets, Inc., Great Atlantic and Pacific Tea Co., Inc., Singer Supermarkets, Inc., and Village Supermarkets, Inc., in June 1981 under the New Jersey Consumer Fraud Act (*N.J.S.A.* 56:8-1 *et seq.*), and regulations promulgated thereunder in *N.J.A.C.* 13:45A-1 *et seq.*, charging, generally, that after task force inspections of respondents' business places in June and July 1980 there were found, variously, instances of food items sold at prices higher than those advertised, contrary to *N.J.S.A.* 56:8-2.5, and items found unavailable for purchase during the advertised period, contrary to *N.J.A.C.* 13:45A-9.2. Civil penalties, costs and orders directing respondents to cease and desist from acts or practices violative of the Consumer Fraud Act were demanded by complainant. The complaints are not consolidated.

Subsequently, respondents filed answers denying allegations of the complaints and raising in their behalf separate defenses, among which were allegations the complaints constituted discriminatory selective enforcement and thus denied respondents equal protection of the laws, and allegations calling into question validity of methodology and correctness of sampling procedures and enforcement thresholds.

On July 29, 1981, the Director transmitted the matters to the Office of Administrative Law for hearing and determination as contested cases, pursuant to the Administrative Procedure Act, *N.J.S.A.* 52:14B-10.

Before scheduled prehearing conferences in the Office of Administrative Law, respondents filed identical motions in each case for orders granting them leave to take the deposition on oral examination of Patricia A. Royer, Executive Director of the Office of Consumer

Protection, Division of Consumer Affairs, and for orders adjourning hearing dates to permit discovery.

In certifications supporting the motions, respondents asserted the actions stemmed from a series of task force inspections conducted by complainant during the months of June and July 1980. According to press reports, it was said, 32 out of 77 supermarkets inspected were cited by the Division of Consumer Affairs. A task enforcement sampling procedure and enforcement tolerances, adopted by complainant before inspections, were alleged not have been equally applied to all business places.

The certification asserted that in conference with Patricia A. Royer, Executive Director of the Office of Consumer Protection of the Division of Consumer Affairs, respondents were told the inspectors were instructed to select at random 25 percent of the items advertised by a particular supermarket as constituting an inspection sample and that, if 25 percent of the items were not so sampled, there would be no violation. An enforcement tolerance of 11 percent, it was said, was then applied to the sample to determine if a citation would issue.

Respondents argue they seek to demonstrate complainant's sampling procedures were invalid, were discriminatorily applied and thus constituted illegal selective enforcement of the laws.

In order to establish such defenses, it was urged, it is necessary to take the deposition of the Executive Director of OCP. Her deposition will provide respondents, they say, with opportunity to discover in detail actual procedures used by complainant, results of all inspections, nature of all citations and violations issued, and the manner of enforcement.

Petitioner contests the motions. In memoranda of law, petitioner said that before conducting its assigned inspections, investigators were instructed to peruse local newspapers and locate any advertisements placed by a supermarket. Having chosen a particular advertisement, the individual investigator was to count the total number of items listed and then designate one-quarter or 25 percent for inspection. The investigators were then to conduct inspections at particular supermarkets to determine whether the predesignated items were available and, if so, whether they were being sold at prices advertised. All results of inspections were evaluated and an enforcement threshold of 11 percent was applied. Supermarkets that were to be cited were notified and conferences held. Ultimately, said petitioner, the above contested cases were transmitted to the Office of Administra-

tive Law in August 1981. In substance, petitioner argued respondents had not shown good cause for the relief sought by way of oral deposition of Royer. Petitioner denied selective or discriminatory enforcement of the Consumer Fraud Act.

In a reply, respondents insisted their submissions demonstrated good cause for the relief sought. They claimed alternative discovery methods, for example, by written interrogatory were inadequate because, they said, answers to such interrogatories would be prepared with assistance of counsel and might be incomplete and insufficient. They disavowed any purpose to probe the mind of the deposition witness and said all that was sought was to determine factually if procedures and tolerances were equally applied in all cases.

DISCUSSION

Administrative agency discovery practice in the Office of Administrative Law limits available methods of discovery on notice to written interrogatories, production of documents or things, property inspection, physical and mental examinations and requests for admission. *N.J.A.C.* 1:1-11.2. Depositions upon oral examination or written interrogatory are available, however, only on motion for good cause shown. In deciding such motion, the administrative law judge shall consider policy governing discovery generally and shall weigh specific need for the deposition, the extent to which information sought cannot be obtained in other ways, the requested location and time for the deposition, undue hardship and matters of expense, privilege or oppressiveness. *N.J.A.C.* 1:1-11.3.

Discovery methods according to such policy are generally designed to assist parties in preparing to meet their responsibilities and protect their rights during hearings without unduly delaying, burdening or complicating the hearing process and with due regard to the rights and responsibilities of other parties and persons affected. Accordingly, parties are obliged to exhaust all less formal opportunities to obtain discoverable material before invoking provisions for discovery practice. *N.J.A.C.* 1:1-11.1.

In respect of discovery by deposition in New Jersey administrative agency practice, therefore, it may be said such practice differs from that obtaining in Superior Court of New Jersey under court rules in R. 4:14-1 *et seq.* There, depositions may normally be taken simply on notice and without a showing of the good cause required for that method in the Office of Administrative Law. But in the case of high-level government officials, it may well be that the right to deposition

discovery is similarly restricted and constrained both administratively as well as judicially.

In *Hyland v. Smollok*, 137 *N.J. Super.* 456 (App. Div. 1975), certif. den. 71 *N.J.* 328 (1976), an action on a complaint in lieu of prerogative writ in which the Attorney General of New Jersey sought to have removed an officer of a county vocational school for his refusal to testify before a grand jury, the Appellate Division reversed an order of the trial court permitting defendant to take the deposition of the Attorney General and the Director of the Division of Criminal Justice. The court said at 460, "the Attorney General and the Director of the Division of Criminal Justice, as well as other high-level government officials, should not be deposed, absent a showing of first hand knowledge or direct involvement in the events giving rise to an action, or absent a showing that such deposition is essential to prevent injustice."

Similarly, in *New Jersey Turnpike Authority v. Sisselman*, 106 *N.J. Super.* 358 (App. Div. 1969), the court affirmed a trial judge's denial of defendant's motion to take oral depositions of three Turnpike Authority Commissioners. The denial was properly based, said the court, on the premise the Commissioners were immune from inquiry into mental processes by which they made their decisions, absent allegations of improper behavior on their part. In *State v. Mitchell*, 164 *N.J. Super.* 198 (App. Div. 1978), the Appellate Division affirmed the trial court's denial of a right of defendant to take oral depositions of the Attorney General, the Director of the Division of Criminal Justice and the Superintendent of State Police in a case in which defendant had been indicted by a state grand jury for giving false information to law enforcement agencies. Defendant had argued he was able to find only three reported opinions dealing with prosecutions under the particular statute involved, that such statistics presumptively demonstrated selective and discriminatory prosecution and that depositions of the highly placed law enforcement officers were necessary to assist him in perfecting his constitutional defense. The court affirmed denial of the motion, being of the view the extraordinary relief was an unwarranted incursion upon the prosecutorial function, unsupported by any preliminary showing of improper conduct on the part of the state's representatives.

Here, one notes, respondents have merely alleged in affirmative defenses that inspection processes of the OCP were arbitrary and capricious and that respondents have been selectively and invidiously, and therefore unconstitutionally, singled out for prosecution. In gen-

eral, it is said, a prosecutor is vested with broad discretion in selecting matters for prosecution and a decision to prosecute or not is to be accorded judicial deference absent a showing of arbitrariness, gross abuse of discretion or bad faith. *State v. Mitchell, supra.*

In any event, it appears from the record and certification by respondents that no reason has been shown why the information and data sought could not be secured through less formal methods of discovery such as written interrogatory and requests for admission available to respondent simply on notice. To that extent, therefore, respondents have not demonstrated the good cause necessary for establishment of a right to the more intrusive discovery method of oral deposition of a highly placed officer of the OCP. Respondents have failed to demonstrate that Executive Director Royer of the OCP is one who has personal knowledge of events and facts giving rise to the substantive administrative agency actions against them. Nor have respondents established that the officer had direct involvement in such events. Nor has it been established even presumptively that the officer was guilty of improper behavior in any respect. Indeed the argument hypothetically advanced is that of improper systemic selective enforcement not improper personal or individually selective enforcement by the officer.

Finally, one must note that Royer's presumed participation in the selection of stores for inspection was limited to making a recommendation to complainant, that is, to the Director of the Division of Consumer Affairs who, according to the complaints, is the officer who brought the actions, having been charged by law and regulation to do so. It cannot be said, therefore, the taking of such deposition is essential to prevent injustice.

Accordingly, and based on the foregoing, respondents' motions for orders granting leave to take the deposition on oral examination of Patricia A. Royer, Executive Director of the Office of Consumer Protection of the Division of Consumer Affairs, are **DENIED** for want of good cause shown as required by *N.J.A.C.* 1:1-11.3(a).