

## IN THE MATTER OF

## INDIANA FEDERATION OF DENTISTS

*Docket 9118. Interlocutory Order, April 28, 1983*

## ORDER DENYING PETITION FOR RECONSIDERATION

On February 21, 1983, the Commission issued its decision and final order in this matter. On March 11, 1983, respondent filed a petition for reconsideration under Rule 3.55 of the Commission's Rules of Practice. Respondent argues that a regulation promulgated by the Indiana State Board of Dental Examiners on May 8, 1982, "conflicts with the mandates of the Commission's recent Order . . . [and] compels reconsideration of the Commission's rejection of the state action exemption." (Petition at pp. 6-7)

Any petition filed under Rule 3.55 "must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission." Since respondent made no effort to apprise the Commission of the state regulation before the Commission issued its decision and order, respondent is now hard pressed to argue that the order raises questions upon which it had no earlier opportunity to argue before the Commission. Nevertheless, the Commission has considered respondent's petition on the merits and found it unpersuasive.

The regulation provides in relevant part: "Any person using dental diagnostic materials for the purpose of recommending changes in the treatment plan upon which [reimbursements by a third party] are based is practicing dentistry and must be a dentist. Indiana dentists shall not knowingly submit dental diagnostic materials to any party involved in the Unauthorized Practice of Dentistry." 828 IAC 1-4 (Indiana Register, Vol. 5 Number 5, pp. 992-3, May 1, 1982). Clearly this regulation has no relevance to respondent's state action defense in this case, which concerns conduct engaged in by respondent only up to the time the record was closed in 1979. A regulation promulgated in 1982 cannot, as complaint counsel note, retroactively immunize prior unlawful conduct. Furthermore, even if the regulation had been in effect during the relevant time period, it would not have compelled the concerted action in which respondent engaged. Respondent asserts that the use of the plural word "dentists" in the regulation must mean that Indiana dentists are required to comply *as a group* and, consequently, must conspire together to enforce the regulation among their fellows. This creative analysis exceeds the bounds of reasonableness.

Contrary to respondent's assertion, the opinion in *Gambrel v. Kentucky Board of Dentistry*, 689 F.2d 612 (6th Cir. 1982), is not instructive in this matter. *Gambrel* concerned a state board of dentistry's interpretation of a state statute as forbidding dentists from providing prescriptions for dentures directly to consumers. The court upheld the decision in this private suit that the state board's enforcement activity and the *individual* conduct of dentists subject to the statute were protected by the state action doctrine. In *Gambrel* there was no evidence of collective behavior by dentists. 689 F.2d at 20.

Respondent asserts that the Commission's order "would place Indiana dentists in a position of choosing between compliance with the new dental regulation, and compliance with the Order." (Petition at p. 17) However, the Commission's order plainly pertains only to activity engaged in by the Indiana Federation of Dentists or a successor organization, acting as an organization, or by its officers or representatives, acting on behalf of the organization. The individual conduct of IFD members is expressly excluded from the order. The order does not even govern the collective conduct of some IFD members, so long as that conduct is not performed by or on behalf of the federation or a successor organization. (However, such concerted conduct might constitute an unfair method of competition subject to challenge under the Federal Trade Commission Act.) Respondent is correct in interpreting the order to prohibit IFD from adopting a policy against the submission of x-rays or other materials to third-party payers or from "coercing any third-party payer to operate or deal in any particular way." (Petition at p. 21) But since the order deals only with collective conduct, and the state regulation concerns only individual conduct, there is no conflict between the two.

Furthermore, the evidence in the record of the Commission's proceeding indicates that none of the targets of respondent's boycott were involved in the unauthorized practice of dentistry as now prohibited by the state regulation. The regulation provides: "Any person using dental diagnostic materials for the purpose of recommending changes in the treatment plan upon which [third party] benefits are based is practicing dentistry and must be a dentist." 828 IAC 1-4-2. Contrary to respondent's assertion, the record does not demonstrate that changes in treatment are recommended by non-dentist employees of dental insurers in Indiana. Rather, all the evidence indicates that lay employees of insurers can only approve claims for reimbursement or refer them to a dental consultant for evaluation.

Respondent has also argued that the order is unclear and overbroad. Since the language to which respondent refers was contained in the draft order accompanying complaint counsel's answering brief, it is not a matter upon which respondent can claim to have had no

previous opportunity to argue. Nevertheless, the Commission has considered respondent's concerns and concluded that its fears are unfounded.

Respondent states that it is unclear whether officers and representatives of IFD are prohibited from engaging on an individual basis in conduct forbidden to IFD. Officers and representatives of IFD are members of that organization. Since the conduct of IFD members acting individually is expressly excluded from the order's effect, it follows *a fortiori* that the prohibition on conduct by "respondent . . . and its officers and representatives" refers only to conduct by or *on behalf* of IFD.

Respondent's other concern is that the order may preclude IFD from lobbying or encouraging the Indiana Board of Dental Examiners to take action that "may result in the effect proscribed by the Commission's Order." (Petition, p. 24) However, any effort by the Commission to preclude a respondent from exercising its First Amendment rights would be constitutionally impermissible. Therefore, the only reasonable interpretation of the order is that the Commission did not intend, in prohibiting conduct that might have the "effect" of requiring that dentists not submit requested materials to third-party payers, to prohibit IFD from engaging in activities that are protected by the Noerr-Pennington doctrine.

Respondent may at some future time identify certain conduct in which it may wish to engage as an organization and which it believes is or may be prohibited by the Commission's order. The appropriate course for respondent at that time would be to seek informal advice from compliance staff, to seek an advisory opinion, or to file a request to reopen and modify the order under Rule 2.51. A request for modification must show that a change in the Commission's order is compelled by changed conditions of law or fact or by the public interest.

Accordingly, respondent's petition is hereby denied.