

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 99-19 (CMS920002).

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. CMS920002
v.	:	
	:	
	:	Hearing Officer - DMF
	:	
	:	
	:	
Respondent.	:	

ORDER DIRECTING COMPLAINANT TO COMPLY WITH RULE 9251

This proceeding was originally instituted and conducted pursuant to the NASD’s “Old Code” of Procedure in effect prior to August 1997. In 1998, the Securities and Exchange Commission remanded the proceeding to the NASD, and on July 22, 1999, the NASD’s National Adjudicatory Council “remanded” this proceeding to the Office of Hearing Officers “to conduct an evidentiary hearing pursuant to the NASD Code of Procedure adopted in August 1997 (‘New Code’), on the issues raised in the [SEC’s] November 8, 1998 Decision and Remand Order.”

This marked the first time that the NAC has remanded a case originally brought under the Old Code to OHO for further proceedings under the New Code.

On September 13, 1999, the Hearing Officer held a pre-hearing conference with the parties to discuss how to proceed on the remand. Relying on language in the SEC’s Decision and Order of Remand concerning the scope of its remand to the NASD, the Department of Enforcement’s position was that the only additional step appropriate on remand was the submission of additional briefs by the parties to the Hearing Panel, based on the existing evidentiary record. Notwithstanding the NAC’s express direction to “conduct an evidentiary

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hearing” under the New Code, Enforcement argued that no evidentiary hearing should be held, and Enforcement also argued that respondent was not entitled to “discovery” rights afforded respondents under Rule 9251 of the New Code. In contrast, respondent contended that, pursuant to the NAC’s remand order, he is entitled to some form of “evidentiary hearing” and to discovery under Rule 9251.

Turning first to the issue of respondent’s rights under Rule 9251, the Hearing Officer directed the parties to brief that issue. Enforcement filed its submission on September 22, 1999, and respondent filed its response to Enforcement’s submission on September 27, 1999. Enforcement still contends that Rule 9251 should not apply, but its submission is truly remarkable in one respect: Enforcement simply ignores the NAC order. Enforcement argues at length that the SEC did not require the NASD to conduct an evidentiary hearing, but instead merely required the NASD to provide some additional explanation for its original decision. Enforcement makes no effort, however, to harmonize its interpretation of the SEC’s order with the directions contained in the NAC’s order; Enforcement simply pretends that there is no such order in the record, and that the Hearing Officer need only focus on what the SEC directed. On the other hand, respondent relies on the NAC order, as well as its interpretation of the SEC’s order.

Ironically, Enforcement itself argues that “[a] lower court must comply strictly with the mandate of an appellate court; a district court’s actions on remand should not be inconsistent with either the express terms or the spirit of that mandate.” Enforcement’s Submission at p. 4, citing In re Ivan F. Boskey Securities Litigation, 957 F.2d 65 (2d Cir. 1992). By analogy, the Hearing Officer must comply strictly with the mandate of the direct appellate body in this case, which is the NAC, and must adopt procedures that are consistent with both the express terms and

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the spirit of the NAC's order. In light of Enforcement's failure, by default, to offer any basis for reading the NAC's mandate narrowly to preclude application of Rule 9251 to this proceeding on remand, the Hearing Officer concludes that both the letter and the spirit of the NAC's order require that respondent be afforded those rights.

Therefore, Enforcement is ordered to make its files available to respondent for inspection and copying in accordance with Rule 9251. In light of Enforcement's representation that it has already retrieved those materials from storage, the Rule 9251 production shall be completed by November 1, 1999, and respondent shall file and serve any motions relating to such production by November 15, 1999.

SO ORDERED

David M. FitzGerald
Hearing Officer

Dated: Washington, DC
September 30, 1999