This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 01-10 (C3A000056).

NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C3A000056
v.	:	
	:	Hearing Officer - DMF
Respondent.	:	

ORDER DENYING MOTION FOR RECONSIDERATION

The Department of Enforcement has filed a motion requesting reconsideration of the order issued on April 20, 2001, concerning respondent's motion to dismiss. In that order, the Hearing Officer analyzed the motion as a motion for summary disposition, denied the motion insofar as it sought dismissal of this proceeding based on the five year limitations period set forth in 28 U.S.C. §2462, and deferred decision on the motion insofar as it argued that the delay in filing the Complaint makes this proceeding "inherently unfair," under the analysis applied in Jeffrey Ainley Hayden, Exchange Act. Rel. No. 42772, 2000 SEC LEXIS 946 (May 11, 2000).

The Hearing Officer found that Enforcement's own allegations about when the events on which the Complaint rests occurred raised concern under Hayden. The Hearing Officer also determined that, in light of this concern and Enforcement's claim that it is aware of "many more facts critical to a Hayden analysis that have not been established," it was incumbent upon Enforcement to come forward with "evidence sufficient to establish the existence of genuine issues of material fact relevant to a Hayden

analysis in this proceeding, including when the NASD had notice that _____ might have engaged in the misconduct charged and any other circumstances that Enforcement contends are relevant under Hayden."

In seeking reconsideration, Enforcement objects that _____'s motion did not satisfy various technical requirements for summary disposition motions under Rule 9264. As a result, Enforcement argues, it is required to "respond to a motion that is only partially focused and not ripe for ruling." Enforcement also complains that by requiring Enforcement to come forward with evidence to support its claim that it knows undisclosed facts critical to a Hayden analysis, the order "unfairly shifted onto the Department's shoulders a burden that would otherwise be the Respondent's." Enforcement proposes that, instead, the Hearing Officer require _____ to review Enforcement's upcoming document production, searching for the critical facts to which Enforcement has alluded, and, if he finds them, to supplement his motion with a statement of additional undisputed facts. "Only then will his motion be ripe for a response," says Enforcement.

_____ opposes Enforcement's motion. He argues, first, that he properly filed a motion to dismiss, which the Hearing Officer, acting within his authority, elected to analyze under the standards applicable to motions for summary disposition; he urges that, under such circumstances, it would be unfair to reject his motion just because it did meet all the technical requirements applicable to summary disposition motions. Second, he contends that "the approach urged by the Department is ill-conceived and illogical." He points out that Enforcement has indicated it will be producing "88 linear inches" of files for his review, and objects that he should not "be forced to pore through these documents to search for an answer that the Department could easily just provide." _____ also contends that "it would seem unlikely in the extreme that the discovery documents offered to _____ would include information

concerning the manner in which the Department learned of the alleged misconduct, the internal decision-making processes which led to the decision to file the complaint, and when the various events in the decision making process occurred. Based on counsel's experience, the kinds of NASD internal memoranda which would contain this information are not ordinarily included in discovery documents." Finally, _____ offers additional factual support for his motion, in the form of an affidavit of his counsel indicating that the NASD may have been informed of the events at issue in this proceeding through the filing of a Form U-4 in September 1996, and that the NASD took _____'s testimony in June 1997, approximately 3 1/2 years before the Complaint was filed.

Discussion

The NASD's disciplinary process remains a business person's forum. The overriding goal in administering that forum is to ensure that the proceedings are conducted in a fair and efficient manner; procedural maneuvering for its own sake is unwelcome. The provisions of the Code of Procedure are interpreted in a common sense manner to achieve these goals.

Enforcement's procedural objections to _____'s motion are purely formalistic. Enforcement objects that _____ did not include with the motion a "statement of undisputed facts," or "affidavits or declarations that set forth such facts as would be admissible at the hearing," as required by Rule 9264(d). The Rule requires a statement of facts to help parties and adjudicators identify and focus on the factual issues underlying a motion for summary disposition, and it requires that a motion be supported by evidence to ensure that there is support for a moving party's factual claims. Here, the facts on which the motion rested were the dates on which the alleged violations occurred, as alleged by

Enforcement. Enforcement is bound by its own allegations; and it would be meaningless to insist that _____ file a statement of undisputed facts listing those dates.

Enforcement complains that _____'s motion was premature because motions for summary disposition are not permitted under Rule 9264 until after Enforcement produces its documents to respondent, pursuant to Rule 9251(a). As _____ points out, he filed a motion to dismiss, not a motion for summary disposition; the Hearing Office elected to analyze the motion under summary disposition standards. Furthermore, the motion rests on Enforcement's own allegations. It is Enforcement that claimed – and still claims – that it knows undisclosed critical facts bearing on the proper resolution of the Hayden issue. It is not premature to require Enforcement to back up that claim with concrete evidence from its own files.

Enforcement's proposal that the Hearing Officer require _____ to search for that evidence within the 88 linear inches of documents that Enforcement intends to produce is unreasonable.[1] Indeed, as _____ notes, there is no guarantee that the critical facts to which Enforcement has alluded will be reflected in the documents it is required to produce under Rule 9251(a)(1). In any event, in the prior order, the Hearing Officer found that _____ had made enough of a showing, based on Enforcement's own allegations, to shift the burden to Enforcement to come forward with evidence from its own files to establish the facts that Enforcement itself described as critical to the correct resolution of the Hayden issue.[2] The Hearing Officer adheres to that conclusion.

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[1] Enforcement has indicated that the 88 inches includes not only materials pertaining to _____, but documents relating to three other individuals who, along with _____, were part of a single investigation. While this production is appropriate under Rule 9251(a)(1), it might make it even more difficult for _____ to locate the relevant critical facts to which Enforcement has alluded.

[2] The additional facts asserted in the affidavit that _____ submitted with his opposition to the motion for reconsideration lend further support to that conclusion.

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The motion for reconsideration is denied.

SO ORDERED

_____

David M. FitzGerald
Hearing Officer

Dated: Washington, DC
May 1, 2001