

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. C9B030076

Hearing Officer—Andrew H. Perkins

**ORDER CORRECTING ORDER DISMISSING AFFIRMATIVE DEFENSE
AND DENYING RESPONDENT'S MOTION TO RECONSIDER**

On June 30, 2004, the Respondent filed a motion to reconsider the Order Dismissing Affirmative Defenses ("Dismissal Order"). This Order is issued without waiting for a reply from the Department of Enforcement because the hearing is scheduled to begin next week.

The Respondent addresses the following three issues in his Motion.

1. First, the Respondent notes that the Dismissal Order was incorrectly dated June 22, 2004, because it was issued on June 28, 2004. Accordingly, the Hearing Officer amends the date of the Dismissal Order to June 28, 2004.

2. Second, the Respondent objects to the Dismissal Order on the ground that the Department of Enforcement had not moved to have the Respondent's affirmative defense be dismissed. The Respondent contends that the Hearing Officer overstepped his authority under the NASD Code of Procedure. In addition, the Respondent argues that the "cumulative conduct of the NASD's employees to date calls into serious question the ability of the NASD to hold an impartial Hearing ... given the fact that the NASD had refused for more than a year to

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investigate [the Respondent's] allegations of serious anti-investor activities by _____ during the course of a customer arbitration.”

The Hearing Officer, however, has the authority and responsibility to provide a fair and efficient hearing on the charges alleged in the Complaint. (*See* Procedural Rule 9235.) In this regard, the Hearing Officer has the authority to limit irrelevant evidence from the record. Pursuant to that authority, the Hearing Officer issued the Dismissal Order on his own motion to give the Parties advance notice that the Respondent's claim that this proceeding must be dismissed under The Sarbanes-Oxley Act of 2002, Public Law 107-204, 116 Stat. 745 (the “Act”) is legally insufficient and that, therefore, evidence in support of this defense would not be admitted at the hearing.

3. Finally, the Respondent contends that the Hearing Officer erred in concluding that the Sarbanes-Oxley Act did not bar this proceeding. In the Respondent's view, the Hearing Officer must accept his claim without further inquiry and dismiss this proceeding. However, whether the Respondent views himself as an informant or “whistleblower” under Section 1107 of the Sarbanes-Oxley Act (codified as 18 U.S.C. § 1513(e)) is irrelevant to this proceeding. NASD has a statutory mandate as a self-regulatory organization under the Securities Exchange Act of 1934 (the “Exchange Act”) to investigate suspected violations of NASD's Conduct Rules and the federal securities laws and regulations. A respondent charged with such violations cannot insulate himself from regulatory or criminal scrutiny by complaining about the misconduct of others. Otherwise, anytime a registered representative feared a regulatory or criminal investigation he could block the investigation merely by making a complaint to a law enforcement officer of an alleged federal offense. Such a construction of the Sarbanes-Oxley Act would frustrate enforcement of the nation's securities laws and regulations. Indeed, under the Respondent's construction, even the Securities and Exchange Commission and the Department

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of Justice could not proceed against a self-appointed "whistleblower." In short, Congress did not intend to eviscerate the securities laws when it passed the Sarbanes-Oxley Act.

The Respondent's allegations of misconduct by employees at his former firm are of no consequence to this proceeding. The hearing in this disciplinary proceeding is to determine if the allegations in the Complaint are true, and, if so, to impose appropriate remedial sanctions for the found violations. The Hearing Panel has no jurisdiction over the Respondent's "whistleblower" claims.¹

In conclusion, the Hearing Officer denies the Respondent's Motion to Reconsider. Section 1107 of the Sarbanes-Oxley Act does not provide an affirmative defense to this disciplinary proceeding.²

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

July 1, 2004

¹ According to the Respondent's Answer, he filed a federal action in November 2003 against NASD in the United States District Court for the District of New Jersey (Case No. 03-5481) alleging in part that NASD instituted this disciplinary proceeding to discredit him as a "whistleblower." The issue therefore is before the federal court.

² Moreover, the Respondent cannot challenge NASD's motive in bringing this proceeding. (*See Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993) (holding that the intent of NASD staff members is irrelevant).