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NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
	:	Disciplinary Proceeding
Complainant,	:	No. CAF980002
	:	
v.	:	
	:	Hearing Officer - DMF
	:	
	:	
Respondents.	:	
	:	

ORDER DENYING MOTION TO DISQUALIFY A PANELIST

Respondents _____ have moved for the disqualification of a member of the Extended Hearing Panel appointed to hear this proceeding, pursuant to Rule 9234. The Department of Enforcement has filed an opposition. Pursuant to Rule 9234(c), the Hearing Officer has authority to decide the motion.

Under Rule 9234(b), disqualification of a Panelist is appropriate if "a conflict of interest or bias exists, or circumstances otherwise exist where the Panelist's fairness might reasonably be questioned . . . ." In proposing this Rule, the NASD explained that "the standard borrows heavily from the conflict of interest standard applicable to federal judges." The NASD further explained:

> The Association intends to rely on [the] judicial interpretation of the clause "in which his impartiality might reasonably be questioned" in 28 U.S.C. 455(a), in interpreting the proposed clause, "if circumstances exist where . . . [the Adjudicator's] fairness might reasonably be questioned." The notions of impartiality and fairness are inextricably linked in an analysis of whether an Adjudicator fairly judges a proceeding.

62 Fed. Reg. 25255-56 (May 8, 1997). The NASD specifically cited Pepsico, Inc. v. McMillan, 764 F.2d 458, 460 (7th Cir. 1985), in which the court explained: "The test for an appearance of partiality is . . . whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case."

The Panelist's Prior Service on a Hearing Panel

The Respondents argue, first, that the Panelist must be disqualified because he once served on a Hearing Panel (under the old Code of Procedure) that considered unrelated charges against _____, who are also respondents in this proceeding. The Respondents contend that, because of this prior service, the Panelist's "ability to fairly hear this matter without any pre-conceived bias against the Respondents is unlikely, as he has already found the other respondents to have engaged in wrongful conduct."

This argument is without merit. An adjudicator is presumed impartial until the contrary is proven. The Respondents have not articulated any basis for concluding that "an objective, disinterested observer fully informed of the facts . . . would entertain a significant doubt that justice would be done" in this case just because the Panelist served on a Hearing Panel in a prior proceeding in which the Respondents were not parties.

It is well established that, ordinarily, a claim of disqualifying bias cannot be based on information that the adjudicator learned, or opinions or attitudes that the adjudicator developed, as a result of a prior proceeding. As the Supreme Court has explained:

> Not all unfavorable disposition towards an individual (or his case) is properly described by [the] terms [bias or prejudice]. . . . The words connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate . . . . [N]ot subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long

> been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.
>
> . . . .
>
> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Liteky v. United States, 510 U.S. 540, 550, 555 (1994) (emphasis added).

The Respondents acknowledge that "[t]ypically a panelist will not be recused simply for having served on another panel relating to the same respondents if the matters bear no relevancy to each other." They argue, however, that disqualification is required in this case because Enforcement "alleges there is a correlation between the instant matter and the [earlier] _____ matter. By serving as a panelist for the _____ Complaint, [the Panelist] brings his pre-conceived beliefs and opinions about the respondents to this hearing, and will be unable to decide the merits of the instant matter in an unbiased and impartial manner, based on the fact [sic] presented in this matter."

Based on the present record, there does not appear to be any significant "correlation" between this proceeding and the prior proceeding. The charges are entirely different and relate to a different time period. The Respondents, however, point to a Motion in Limine filed by Enforcement, in which Enforcement argued that certain factual determinations in the earlier proceeding concerning the relationship of _____ with an individual named _____ should be binding on _____ in this proceeding. Enforcement did not argue that the findings should be binding on the Respondents, and the Hearing Officer denied the motion because it is not clear that those factual determinations are relevant to this proceeding, even as to _____, much less as to the Respondents. Moreover, because _____ and

_____ have been held in default for failing to take part in the Final Pre-Hearing Conference held on December 16, 1998, the charges against _____ will be decided by the Hearing Officer, not by the Hearing Panel. Thus, the Respondents have failed to show any "correlation" between the issues considered by the earlier Panel and the issues relating to the Respondents in this case.

Furthermore, even if there were some "correlation" between the two proceedings, the Panelist's service on the prior case would not require that he be disqualified from this proceeding. As explained above, determinations made by adjudicators in earlier proceedings do not establish grounds for disqualification, unless the moving party proves that the adjudicator has "a deep-seated favoritism or antagonism that would make fair judgment impossible." This standard is not satisfied merely by showing the adjudicator ruled against a party in a prior proceeding, even if that ruling might have an impact on the adjudicator's evaluation of the evidence in the subsequent case. For example, in Lewis v. Tuscan Dairy Farms, Inc., 25 F.3d 1138, 1141 (2d Cir. 1994), a trial judge was not disqualified even though in an earlier, unrelated proceeding he had found one of the defendants was not a credible witness and had held that defendant in contempt of court. Those determinations simply reflected the judge's assessment of the record in the earlier proceeding; they did not establish a basis for concluding that the judge would be unable to decide the new proceeding fairly, based on the evidence. The same reasoning applies to the Panelist in this case.

The Respondents have not offered any evidence that the Panelist harbors any "deep-seated antagonism" against them that "would make fair judgment impossible" in this case. In a footnote, the Respondents claim that "[u]pon information and belief [the Panelist] has referred to certain of the Respondents as 'rogue brokers.'" Such a vague, unattributed, and unsubstantiated allegation

cannot establish a basis for disqualifying the Panelist. Rule 9234(b) requires that motions to disqualify a Panelist be accompanied by "an affidavit setting forth in detail the facts alleged to constitute the grounds for disqualification." This is consistent with long-established requirements in the federal courts. "A legally sufficient affidavit must meet the following requirements: (1) the facts must be material and stated with particularity; (2) the facts must be such that, if true, they would convince a reasonable man that a bias exists; and (3) the facts must show the bias is personal, as opposed to judicial, in nature." Henderson v. Department of Public Safety and Corrections, 901 F.2d 1288, 1296 (5th Cir. 1990). "Mere conclusions, opinions, rumors, or vague gossip are insufficient." Hodgson v. Liquor Salesmen's Union Local No. 2, 444 F.2d 1344, 1348-49 (2d Cir. 1971). "Facts including time, place, person, and circumstances must be set forth." United States v. Townsend, 478 F.2d 1072, 1073 (3d Cir. 1973).

The allegation in the Respondents' footnote is not supported by any affidavit, and the Respondents have failed to allege where, when, and under what circumstances the Panelist made the alleged statement, or even to which respondents he was allegedly referring. Without such details, it would be impossible for "an objective, disinterested observer" to be "fully informed of the facts underlying the grounds on which recusal [is] sought," much less to "entertain a significant doubt that justice [will] be done in [this] case." In summary, the Respondents have shown no basis for disqualifying the Panelist based on his service on the earlier Hearing Panel.

The Panelist's Prior Service on the Market Surveillance Committee

The Respondents also argue that the Panelist must be disqualified because he was a member of the Market Surveillance Committee in 1996 when the Committee initiated another disciplinary proceeding against _____ concerning _____ response to a request for information issued by the NASD staff. For reasons that are not coherently explained in their motion, the

Respondents contend that the disciplinary proceeding "was ultra vires and an abuse of the MSC's authority," and, further, that "such events may result in civil liability for the Association and others in connection with the wrongful pursuit of _____ and the violation of his rights." From this dubious springboard, without any clear rationale or factual support, they leap to the contention that the Panelist, as a member of the Committee that authorized the earlier disciplinary proceeding against _____, has an "interest" in the outcome of this proceeding that requires his disqualification.

The Respondents' argument is premised on a mistake of fact. The Panelist left the Market Surveillance Committee before 1996, and therefore he was not a member of the Committee when it initiated the proceeding against _____. Even if he had been a member of the Committee, the Respondents have not articulated any basis for disqualifying him.[1]

The Respondents rely on Datek Securities Corp., Exchange Act Release No. 32560, 1993 SEC LEXIS 1693 (June 30, 1993). In that case, the SEC held that "a person cannot be permitted to participate on an adjudicatory hearing panel in any proceeding in which that person, or the firm at which that person is employed, may be perceived to be a victim of, or a participant in, conduct that is the basis for the respondent's alleged wrongdoing." There is no allegation, much less proof, in this case, however, that the Panelist or his firm were in any way involved in the conduct that is the subject of this proceeding. In Datek, the SEC also referred to the Supreme

[1] On January 20, 1999, the Second Circuit issued a Summary Order setting aside the sanctions imposed on _____ in the earlier disciplinary proceeding, on the ground that, at the time, the MRC did not have authority to request information pursuant to Rule 8210; that "a reasonable person would have assumed that the Deputy Director of Market Surveillance was acting on behalf of the MSC" when he issued a request for information to _____; and that, therefore, "____ was justified in thinking that any information that he gave to the MSC was voluntary and that he therefore could proffer it subject to whatever conditions seemed appropriate to him." _____ v. SEC, No. 98-4103 (Jan. 20, 1999). Nothing in the Second Circuit's decision suggests either that the MRC's action in initiating the disciplinary proceeding was "ultra vires," or that there would be any basis for imposing civil liability upon anyone.

Court's warning that "those with substantial pecuniary interest in legal proceedings should not adjudicate those disputes," quoting Gibson v. Berryhill, 411 U.S. 564, 579 (1973). Once again, there is no allegation or proof that the Panelist has any financial interest of any kind in the outcome of this proceeding. The Respondents' unsupported allegations that the prior disciplinary proceeding against _____ could lead to "civil liability for the Association and others" does not establish that the Panelist has any disqualifying financial interest. In short, Datek offers no support whatsoever for the Respondents' motion.

Accordingly, the Respondents' motion for disqualification of a Panelist is denied.

SO ORDERED

_____
David M. FitzGerald
Hearing Officer

Dated: Washington, DC
February 8, 1999