

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 99-20 (CMS920002).

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

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

**ORDER DENYING MOTION TO STAY PROCEEDINGS
AND TO VACATE CURRENT SCHEDULING ORDER**

On October 14, 1999, the Department of Enforcement filed a motion requesting that this proceeding be stayed and that the schedule for Enforcement to make documents available to respondent for inspection and copying, pursuant to Rule 9251, be vacated. The asserted justification for such action was Enforcement’s announcement that it has “filed a Motion for Clarification with the Review Subcommittee (‘RSC’) of the National Adjudicatory Council (‘NAC’).” Enforcement’s motion for a stay and to vacate the current schedule will be denied for several reasons.

First, Enforcement’s “Motion for Clarification” is, in effect, an attempt to obtain interlocutory review of the Hearing Officer’s September 30, 1999, Order Directing Complainant to Comply with Rule 9251, in which the Hearing Officer concluded that “both the letter and the spirit of the NAC’s [remand] order require that respondent be afforded [his] rights under Rule 9251.” (A copy of the September 30 order is attached.) Such interlocutory review is not permitted under the Code of Procedure. Rule 9148 provides: “Except as provided in Rule 9280,

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there shall be no interlocutory review of a ruling or order issued by any Adjudicator in a proceeding governed by the Code. If an Adjudicator grants interlocutory review of a ruling or order, such review shall not stay a proceeding, except under Rule 9280 or as otherwise ordered by the Adjudicator.”¹ The Hearing Officer did not grant interlocutory review of the September 30 order, or of any other aspect of this proceeding.

Second, even if interlocutory review were proper, it would not be appropriate to stay this proceeding, which has been pending since 1992. Prior to the September 30 order, Enforcement stated that it had retrieved from storage the materials that it would have to disclose to the respondent pursuant to Rule 9251, and Enforcement has offered no basis for concluding that it would suffer any prejudice from providing the same discovery to this respondent as is afforded to every other respondent under the new Code. On the other hand, it is important to move forward to bring this matter to a close after all these years.

Third, Enforcement offers no reason why, if it wanted clarification of the RSC’s order, which is dated July 22, 1999, it did not do so in a timely manner, shortly after the order was issued. Instead, Enforcement waited until after the Hearing Officer issued the September 30 order setting a schedule for Enforcement to comply with Rule 9251. Enforcement’s delay in seeking clarification from the RSC makes its request for a stay inappropriate.

Finally, the Hearing Officer notes that Enforcement’s Motion for Clarification directed to the RSC failed to include a copy of the Hearing Officer’s September 30 order. As the Hearing Officer explained in the September 30 order:

Notwithstanding the NAC’s express direction to “conduct an evidentiary 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”

¹ Rule 9280 concerns “Contemptuous Conduct,” and has no application to the review sought by Enforcement in this case.

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 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.

Thus, Enforcement was given a full opportunity to address to the Hearing Officer, in the first instance, its arguments regarding the proper interpretation of the RSC's order, but Enforcement failed to do so, apparently preferring to take its arguments directly to the RSC. In light of Enforcement's failure to address the RSC's order in its submission to the Hearing Officer, which might have obviated the need for it to seek clarification from the RSC, it is particularly inappropriate to stay this proceeding.

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Therefore, Enforcement's Motion to Stay Proceedings and to Vacate Current Scheduling Order is denied. In light of Enforcement's action in filing its Motion for Clarification with the General Counsel, for transmittal to the RSC, without seeking or obtaining leave from the Hearing Officer, a copy of this order will also be forwarded to the General Counsel, so that, if the RSC considers Enforcement's Motion for Clarification, the record will be complete.

SO ORDERED

David M. FitzGerald
Hearing Officer

Dated: Washington, DC
October 18, 1999