

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 99-04 (C11970032).

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C11970032
v.	:	
	:	Hearing Officer - SW
	:	
	:	
Respondent.	:	

ORDER DENYING MOTION TO DISQUALIFY HEARING OFFICER

Respondent filed a Motion to Disqualify Hearing Officer Witherspoon on March 25, 1999, on the ground that Hearing Officer Witherspoon received a copy of an e-mail detailing the concerns of a _____. Respondent believed a copy of the e-mail was attached to a Motion for a Protective Order, which _____ filed on March 11, 1999.¹ The Department of Enforcement did not respond to Respondent’s motion. The disqualification motion was referred to the NASD Regulation’s Deputy Chief Hearing Officer pursuant to Rule 9233(c).

Respondent’s Allegation

In support of his disqualification motion, Respondent alleged that by receiving a copy of the e-mail, Hearing Officer Witherspoon has “prejudiced my constitutional right to a fair pre-hearing conference by illegally participating in ex parte communications with _____.” The Deputy Chief Hearing Officer has investigated the allegation.

¹ Respondent received a copy of _____ motion, but not a copy of the e-mail referenced in the motion.

Legal Standard

The standard for disqualifying a hearing officer in an NASD Regulation disciplinary proceeding is found in Rule 9233(b). NASD Rule 9233(b) allows a party to move for the disqualification of a Hearing Officer provided a “... *good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the Hearing Officer’s fairness might reasonably be questioned ...*”

The standard provided in Rule 9233 borrows heavily from the conflict of interest standard applicable to federal judges found in Section 455(a) of Title 28 of the United States Code.² Section 455(a) of the United States Code provides: “[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”³

NASD Regulation relies on judicial decisions interpreting the statutory standard applicable to federal judges when interpreting Rule 9233(b).⁴ When proposing the disqualification provisions, the NASD specifically noted:

[Rule 9233(b) will] be interpreted in a manner that accords with the operation of a self-regulatory disciplinary system in which members of the industry are intended to serve as Adjudicators. The judicial interpretation of 28 U.S.C. 455(a) provides a basis for such an interpretation because the judicial interpretation relies upon additional objective factors used to determine a disputed claim of bias. The Association intends to rely on such judicial interpretation of the clause “in which his impartiality might reasonably be

² See Exchange Act Release No. 38545 (April 24, 1997), 1997 SEC LEXIS 959, at *34 (1997).

³ Courts have interpreted the language of Section 455(a) to require parties to demonstrate a factual basis to support a claim of disqualification. Pepsico v. McMillen, 764 F.2d 458 (7th Cir. 1985), 1985 U.S. App. LEXIS 19878, at *35 (1985).

⁴ See Exchange Act Release No. 38545 (April 24, 1997), 1997 SEC LEXIS 959, at *35 (1997). The NASD’s proposed rule change, as amended, was approved by the Securities Exchange Commission on August 7, 1997. See Exchange Act Release No. 38908 (August 7, 1997), 1997 SEC LEXIS 1617 (1997).

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questioned,” in 28 U.S.C. 455(a), in interpreting the proposed clause, “if circumstances otherwise exist where ... [the Adjudicator’s] fairness might reasonably be questioned.”⁵

Although the NASD uses the word “fairness” in Rule 9233(b), rather than the word “impartiality” used in Section 455(a), the NASD emphasized in its rule filing with the SEC that “[t]he notions of impartiality and fairness are inextricably linked in an analysis of whether an Adjudicator fairly judges a proceeding.”⁶ In Pepsico v. McMillen, the Court found that the test for 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.”⁷

In addition, courts have held that the judge is presumed to be impartial and there is a substantial burden on the moving party to show that a judge is not impartial.⁸ “Section 455(a) was not meant to require disqualification every time one party can make some argument, no matter how unreasonable, that the appearance of prejudice could result.”⁹ Otherwise, such challenges would be used improperly to select judges of a party’s choosing rather than to disqualify biased judges.

⁵ See Exchange Act Release No. 38545, (April 24, 1997) 1997 SEC LEXIS 959, at *35 (1997).

⁶ Id.

⁷ Pepsico, 764 F.2d at 460 (citing SCA Securities, Inc. v. Morgan, 557 F. 2d 110, 116 (7th Cir. 1977)), 1985 U.S. App. LEXIS 19878, at *4 (1985).

⁸ United States v. International Business Machines Corp., 475 F. Supp. 1372, 1379 (S.D.N.Y. 1979), 1979 U.S. Dist. LEXIS 9906, at *13 (1979), aff’d, 618 F.2d 923 (2d Cir. 1980).

⁹ Lamborn v. Dittmer, 726 F. Supp. 510, 516 (S.D.N.Y. 1989), 1989 U.S. Dist. LEXIS 14713, at *14 (1989).

Discussion

Respondent does not explain how conducting an *in camera* review of a copy of the e-mail gives rise to a reasonable, good-faith belief that Hearing Officer Witherspoon is biased.

Nonetheless, giving him the benefit of every possible argument, he is either alleging that the participation in an alleged ex parte communication is evidence of Hearing Officer Witherspoon's prior bias against him or that the information contained in the copy of the e-mail has so inflamed Hearing Officer Witherspoon that she has become biased against him. Neither argument is supported by facts or law.

A. No Ex parte Communication.

Hearing Officer Witherspoon did not participate in ex parte communications with _____. _____ is not a party to the proceeding, and _____ did not provide Hearing Officer Witherspoon with a copy of the e-mail. _____ Motion for Protective Order, filed on March 15, 1999, indicates that in support of the Motion for Protective Order, the Department of Enforcement will provide, under seal for *in camera* inspection a copy of the e-mail message. The Department of Enforcement's Motion Concurring with _____ Motion for Protective Order, filed on March 17, 1999, provided the alleged documents. Hearing Officer Witherspoon has not yet reviewed the underlying e-mail.

Even if Hearing Officer Witherspoon had reviewed the documents, the receipt of documents for *in camera* review in order to determine whether the documents can be legally withheld from Respondent does not constitute ex parte communications. To the contrary, Rule 9251(c) specifically authorizes hearing officers to order the Department of Enforcement to submit to the hearing officer documents being withheld in order to make a determination whether such

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documents should be disclosed. Consequently, Hearing Officer Witherspoon's receipt of the copy of the e-mail is not illegal and cannot be viewed as evidence of prior bias.

B. Inflammatory Material

The words bias or prejudice connote an unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not possess, or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts). Respondent has stated no facts that support a claim that the information in the copy of the e-mail has inflamed Hearing Officer Witherspoon so that she displays a deep-seated antagonism toward Respondent making fair judgment impossible.

Respondent's motion fails to set forth any specific facts that identify any conflict of interest, bias, or other basis that would provided a reasonable basis for disqualification under Rule 9233(b). Accordingly, Respondent's motion to disqualify Hearing Officer Witherspoon is denied.

SO ORDERED.

Joseph M. Furey
Deputy Chief Hearing Officer

Dated: Washington, DC
April 1, 1999