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NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondents.	Disciplinary Proceeding No. CAF010028 Hearing Officer—Andrew H. Perkins

ORDER DENYING MOTION TO DISQUALIFY HEARING OFFICER

On January 11, 2002, the Respondents filed a Motion for Disqualification of Hearing Officer Andrew H. Perkins, pursuant to Procedural Rule 9233(b). For the following reasons, the motion is denied.

A. RESPONDENTS' ALLEGATIONS

The Respondents rest their motion on four grounds arising from the Hearing Officer's Order dated December 13, 2001 ("Order"), which directed the Respondents to file an Amended Answer. First, they state that the Hearing Officer must have "collaborated with the NASD staff in an inappropriate, biased manner" because he

concluded that Mr. ____, the individual who submitted the Respondents' Answer, was not a licensed attorney at law and therefore not qualified to represent the individual Respondents. See Mot. for Disqualification at 4. Second, the Respondents claim that the Hearing Officer exceeded his authority and thereby demonstrated bias by requiring them to amend their Answer to specifically correspond to the numbered paragraphs in the Complaint. Third, the Respondents claim that the Hearing Officer demonstrated bias by stating in the Order that the Answer did not specifically address the allegations in the Complaint. See Mot. for Disqualification at 4-5. Finally, the Respondents claim that the Hearing Officer acted unfairly by providing them with only six business days in which to submit an Amended Answer. See Mot. for Disqualification at 4.

B. Legal Standard

The general standard for disqualification or recusal applied in NASD Regulation disciplinary proceedings is found in Rule 9160. Rule 9160 provides that "[n]o person shall participate as an Adjudicator in a matter governed by the Code as to which he or she has a conflict of interest or bias, or circumstances otherwise exist where his or her fairness might reasonably be questioned." Likewise, Rule 9233(b) applies this standard to motions to disqualify a Hearing Officer. The standard provided in Rules 9160 and 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.[1]

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*

[1] See Exchange Act Release No. 38,545, 64 S.E.C. Docket 862, 909 (Apr. 24, 1997).

impartiality might reasonably be questioned"(emphasis added).[2] NASD Regulation relies on judicial decisions interpreting the statutory standard applicable to federal judges when interpreting Rules 9160 and 9233(b).[3] More specifically, when proposing the recusal and disqualification provisions set forth in Rules 9160, 9233, 9234, and 9332, 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 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."*[4]

Although the NASD uses the word "fairness" in Rules 9160 and 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."[5]

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[2] Courts have interpreted the language of Section 455(a) to require parties to demonstrate a factual basis to support a claim of disqualification. United States v. Lovalgia, 954 F.2d 811, 815 (2d Cir. 1992); United States v. Walker, 920 F.2d 513 (8th Cir. 1990); Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir.), reh'g denied, 864 F.2d 795 (11th Cir.), cert. denied, 490 U.S. 1066 (1988); Pepsico v. McMillen, 764 F.2d 458 (7th Cir. 1985).

[3] See Exchange Act Release No. 38,545, 64 S.E.C. Docket at 909. The NASD's proposed rule change, as amended, was approved by the Securities Exchange Commission on August 7, 1997. See Exchange Act Release No. 38,908, 65 S.E.C. Docket 237 (Aug. 7, 1997). The NASD also looks to §556(b) of the Administrative Procedure Act for guidance. 62 Fed. Reg. at 25,226, 25,255 (1997) (quoting 5 U.S.C. § 556(b)). Like Rule 9233(b), §556(b) requires a party to have a "good faith" belief when filing a motion to disqualify an adjudicator. 5 U.S.C. § 556(b).

[4] See Exchange Act Release No. 38545, 64 S.E.C. Docket at 909 (emphasis added).

[5] Id.

Courts have interpreted Section 455(a) to require parties to establish a factual basis that demonstrates a judge's inability to act in a fair and impartial manner before ordering disqualification. In Pepsico v. McMillen, the Seventh Circuit interpreted Section 455(a) to require recusal whenever there exists "'a reasonable basis' for finding an 'appearance of partiality under the facts and circumstances' of the case."[6] 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] Several other circuits have adopted similar interpretive language when construing this statutory standard.[8]

In addition, courts have held that there is a substantial burden on the moving party to show that a judge is not impartial.[9] "A judge should not recuse himself on unsupported, irrational, or highly tenuous speculation."[10] And a judge need not accept as fact mere conclusory speculation that lacks any factual support.[11] "Section 455(a) was not meant to require disqualification every time one party can make an argument, no matter

[6] Pepsico, 764 F.2d at 460 (citing SCA Securities, Inc. v. Morgan, 557 F.2d 110, 116 (7th Cir. 1977).

[7] Id. at 460.

[8] See, e.g., Lovalgia, 954 F.2d at 815 ("Would a reasonable person, knowing all the facts, conclude that the trial judge's impartiality could reasonably be questioned?"); Walker, 920 F.2d at 517 (asking would a "reasonable, uninvolved observer question the judge's impartiality … [and] [whether] an objective, disinterested observer fully informed of the facts underlying the ground on which recusal is sought would entertain significant doubt that justice would be done."); Parker, 855 F.2d at 1524 ("Whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality.").

[9] United States v. Int'l. Bus. Machines Corp., 475 F.Supp. 1372, 1379 (S.D.N.Y. 1979), aff'd, 618 F.2d 923 (2d Cir. 1980).

[10] Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987).

[11] United States v. Greenough, 782 F.2d 1556, 1558 (11th Cir. 1986).

how unreasonable, that the appearance of prejudice could result."[12] Otherwise, such challenges would be used improperly to select judges of a party's choosing rather than to disqualify biased judges.

These cases illustrate a consistent approach to interpreting Section 455(a) requiring parties to detail specific facts to support a motion for disqualification or recusal.[13] The provisions in Rules 9160 and 9233(b) for the disqualification or recusal of a Hearing Officer are substantially similar to the standard set forth in Section 455(a). They require that the moving party show that there is a "… reasonable, 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."

C. DISCUSSION

The Chief Hearing Officer, as required by Rule 9233(c), has investigated the Respondents' allegations and has determined that the motion is baseless. The Respondents fail to demonstrate how the Hearing Officer's conduct gives rise to a reasonable, good-faith belief that he is biased, which bias would preclude him from making a fair judgment in this proceeding. With regard to the Respondent's first allegation, the investigation determined that the Hearing Officer did not participate in any *ex parte* communications. Mr. ____ filed the Answer on his letterhead that clearly identifies him as a "Compliance Consultant," not an attorney at law. The Hearing Officer

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[12] Lamborn v. Dittmer, 726 F.Supp. 510, 516 (S.D.N.Y. 1989).

[13] See, e.g., Rita H. Malm, 58 S.E.C. Docket 131, (Nov. 23, 1994), 1994 WL 665963, at *8 (stating conclusory allegation that a panelist's prior working relationship with respondent is insufficient to establish bias); Robert E. Gibbs, 54 S.E.C. Docket 504 (June 3, 1993), 1993 WL 190913, at *2 finding (fact that DBCC panelist testified against respondent's employer in an unrelated matter was insufficient to establish claim of bias); Arthur J. Lewis, 49 S.E.C. Docket 1487, 1489 (Oct. 8, 1991), 1991 WL 294317, at *3

relied on that representation in finding that Mr. ____ was not qualified to represent the individual Respondents. The Respondents have produced no reasonable basis for their accusation that the Hearing Officer engaged in impermissible *ex parte* communications.[14]

Likewise, the Respondents' two claims that the Hearing Officer exceeded his authority, thereby demonstrating bias against them, are without merit. Rule 9235(a) defines the powers of the Hearing Officer and gives him broad authority regarding the conduct of disciplinary proceedings. The Hearing Officer is vested with the power to do all things "necessary and appropriate" to discharge his duties, which includes the power to specify the format of documents filed with the Office of Hearing Officers. Thus, the Hearing Officer did not exceed his authority by directing the Respondents to amend their Answer to the Complaint; nor did he demonstrate a bias by stating that the Respondents' Answer did not specifically address the allegations set forth in the Complaint. It is within the authority of the Hearing Officer to require the parties appearing before him to state succinctly their position on the allegations in the Complaint to remove any doubt as to the factual and legal grounds for each respondent's defense.

Finally, the Respondents' also have not demonstrated a reasonable basis to conclude the Hearing Officer is biased because he required that they file their Amended Answer within two weeks. Indeed, the record reflects that the Hearing Officer promptly

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(holding that respondent failed to produce evidence demonstrating that panel member had any improper bias or interest that would affect ability to render impartial decision).

[14] The Chief Hearing Officer further notes, however, that even if the Hearing Officer had contacted the Department of Enforcement to confirm Mr. ____'s status, such contact would not violate the prohibition against *ex parte* communications and would not constitute grounds for the Hearing Officer's disqualification. NASD Conduct Rule 9143 prohibits communications outside the presence of all parties regarding the merits of the proceeding. An inquiry regarding the status of a respondent's representative does not relate to the merits of the proceeding. Moreover, the remedy for an *ex parte* communication is disclosure of the content of the communication to all parties to the proceeding. See Rule 9143(c).

granted the Respondents' motion requesting that their time to file their Amended Answer be extended to January 10, 2002. Thus, the Respondents had a total of four weeks to amend their Answer.

In conclusion, there is nothing in the record or the Respondents' Motion that supports their claims that the Hearing Officer is biased. Accordingly, the Respondents' Motion is denied.

IT IS SO ORDERED.

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Linda Fienberg
Chief Hearing Officer

January 28, 2002