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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF MARKET REGULATION, Complainant, v. RESPONDENT 1 and RESPONDENT 2, Respondents.	Disciplinary Proceeding No. 2005000323905 Hearing Officer – DMF

ORDER DENYING MOTION TO (1) REASSIGN, (2) FOR ADDITIONAL INFORMATION REGARDING PANELISTS, (3) TO PERMIT DISCOVERY AND (4) FOR A DELAY IN THE HEARING

On November 21, 2007, Respondent 1 filed a motion requesting that this proceeding be reassigned to the original Hearing Officer or to another Hearing Officer selected on a rotational basis, or in the alternative for discovery regarding the reasons this proceeding was previously reassigned. In addition, the motion asks that the hearing, which is scheduled to begin on December 3, be postponed to accommodate the original Hearing Officer's schedule. Respondent 1 also requests additional information regarding the backgrounds of the two individuals who have been appointed as Extended Hearing Panelists in this proceeding, and discovery as to the method of appointment of Extended Hearing Panelists. For the reasons set forth below, the motion is denied.

Background

The Department of Market Regulation filed the Complaint in this proceeding with the Office of Hearing Officers (OHO) on March 22, 2007. On March 26, 2007, as Deputy Chief

Hearing Officer, pursuant to Rule 9213(a) and authority delegated to me by the Chief Hearing Officer, I issued a Notice of Assignment of Hearing Officer advising the parties that I had assigned Hearing Officer Sharon Witherspoon to preside over this proceeding. Hearing Officer Witherspoon subsequently held an initial pre-hearing conference, after the Respondents filed their Answers; issued a scheduling order in which she adopted the schedule proposed by the parties; and ruled on two preliminary procedural issues—on July 2, 2007, she issued an order denying Respondent 1's motion for a more definite statement, and on August 9, 2007, she issued an order denying requests by Respondent 2 that she take official notice of an SEC order and an arbitration award. On November 8, 2007, I issued a Notice of Reassignment of Hearing Officer and Order Amending Caption advising the parties that I had reassigned this matter from Hearing Officer Witherspoon to myself "due to the current size of the Hearing Officer's case load."

Following the reassignment, I convened a telephone pre-hearing conference with the parties on November 16, 2007, to discuss the upcoming hearing. At the outset of the conference, Respondent 1's counsel objected to the reassignment. In response, I explained that, as set forth in the notice, the reassignment was attributable to Hearing Officer Witherspoon's workload. I also advised the parties that such reassignments are common during the pre-hearing phase of cases, to facilitate the prompt and efficient resolution of disciplinary proceedings. When Respondent 1's counsel expressed the view that assignments and reassignments must be made on a strict rotational basis, I pointed out that there is no such requirement in the applicable NASD rules, and I advised them that I reassigned this proceeding to myself, rather than to another Hearing Officer, based simply on availability—the other Hearing Officers had conflicting hearing schedules, while I did not. When Respondent 1's counsel expressed concern that the reassignment might have been influenced by a letter that Respondent 2's counsel sent to a

Department of Market Regulation attorney concerning a different disciplinary proceeding that is not before the Office of Hearing Officers, I advised the parties that I was unaware of the letter, and that the only person with whom I discussed the reassignment was Hearing Officer Witherspoon.

During the conference, Respondent 1's counsel also requested additional background information regarding the persons who have been appointed as Extended Hearing Panelists in this proceeding, similar to the information regarding arbitrators that parties receive under NASD arbitration rules. I pointed out that the applicable NASD rules do not provide for the disclosure of such information regarding disciplinary Hearing Panelists or Extended Hearing Panelists. I also advised the parties of OHO's practices in selecting Panelists, and, in response to a question as to who had contacted the persons who have been appointed as Panelists in this case, I explained that under OHO's standard practices, with the approval of the Chief Hearing Officer, Hearing Officer Witherspoon, or an OHO staff member at her direction, would have contacted prospective Panelists in this case. I also explained that as part of OHO's regular procedures, Panelists are provided with available information about the case and asked to confirm that they are unaware of any conflicts or disqualifying circumstances.

Reassignment

The motion reiterates the same arguments raised by Respondent 1's counsel during the conference. Respondent 1 contends that the case should not have been reassigned from Hearing Officer Witherspoon, and that if the case was reassigned, OHO was required to make the reassignment on a strict rotational basis. Respondent 1, however, has cited no authority that supports either proposition.

In the Affirmation of his counsel filed in support of the motion, Respondent 1 concedes that "[a]n examination of FINRA's rules and bylaws reveals that there do not appear to be any written procedures to restrict or direct what appears to be complete discretion on the part of [OHO] to reassign cases at will to the hearing officer of FINRA/OHO's selection." Therefore, the motion relies on a provision of the Administrative Procedure Act (APA), 5 U.S.C. § 3105, which provides that Administrative Law Judges "shall be assigned to cases in rotation, so far as practicable …." While Respondent 1 "concede[s] that the APA does not directly apply here," he suggests that the principle underlying the APA provision is applicable here based on the mandate in Section 15A(b)(8) of the Securities Exchange Act that FINRA provide "a fair procedure for the disciplining of members and persons associated with members …."

The simple response to this argument is that the NASD Code of Procedure, which governs this proceeding, including the provisions concerning the assignment and reassignment of Hearing Officers, has been approved by the SEC as fully satisfying the Exchange Act's "fair procedure" requirement. The fairness of the assignment and reassignment process is assured by the fact that OHO is an independent office, the only function of which is to act as an adjudicator. In that regard, OHO is completely "walled off" from the various FINRA departments responsible for prosecuting disciplinary charges against FINRA members and associated persons.

But even if one were to accept Respondent 1's argument that OHO is required to follow the requirements of the APA provision on which he relies, that would not preclude the reassignment of this proceeding from Hearing Officer Witherspoon to me. This is clear from the very cases applying the APA provision cited by Respondent 1. For example, in Sykes v. Bowen, 854 F.2d 284, 288 (8th Cir. 1988), the court explained that, as construed by the Supreme Court, the APA "allows assignments to be determined by more than just the mere mechanical rotation

of giving the next case on the docket to the top name on the list of available examiners. … Factors to be considered include the complexity of the case as well as the experience and ability of the ALJ." [1] In another case that Respondent 1 relies on, Aaacon Auto Transport Inc. v. ICC, 792 F.2d 1156, 1163 (D.C. Cir. 1986), the court upheld the ICC's reassignment of an administrative proceeding, stating that as a general matter the ICC is "authorized to delegate matters to ALJs and to change or rescind such delegations at any time." In a third case cited by Respondent 1, Tractor Training Service v. FTC, 227 F.2d 420, 423 (9th Cir. 1955), cert. denied, 350 U.S. 1005 (1956), the court upheld a reassignment over the same sort of objection lodged by Respondent 1, noting with approval that the FTC "gave as its reason for the substitution of Examiner Haycroft that other hearings were to be held by him in the western part of the United States where future hearings in the instant case were scheduled, hence the substitution was in the interests of economy" (emphasis added). Indeed, the court sustained the agency's reassignment for efficiency purposes even though it occurred after the hearing in the matter had begun.

In fact, Respondent 1 has not cited a single case in which any court has found that a reassignment violated the APA provision, much less the Exchange Act's "fair procedure" requirement. While several courts have noted in dictum that reassignments should not be "made with the intent or effect of interfering with the independence of the ALJ or otherwise depriving a party of a fair hearing,"[2] Respondent 1 has not cited any case in which a court found such an improper purpose. More important, as I explained during the pre-hearing conference, the reassignment in this case was for the sake of efficiency, without any intent or effect of interfering

[1] Citing Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 139 (1953).
[2] Sykes, 854 F.2d at 288.

with the independence of the Hearing Officer or depriving Respondents of a fair hearing in this case.

Respondent 1 argues that he is prejudiced by the reassignment because Hearing Officer Witherspoon gained some familiarity with the case by ruling on preliminary motions, as noted above, but those issues have been resolved. As far as the merits are concerned, the record before her contained nothing but the bare allegations of the Complaint and the responses to those allegations in the Answers; the hearing had not begun and the parties had not even filed their pre-hearing submissions when the case was reassigned.

Respondent 1 also argues that the reassignment is somehow tainted because it apparently took place a short time after Respondent 2's counsel sent a letter to a Market Regulation attorney regarding a different disciplinary proceeding that is not pending in the Office of Hearing Officers. According to an Affirmation of Respondent 2's counsel submitted in support of Respondent 1's motion, after the SEC remanded the other proceeding, in which Respondent 2 is also a Respondent, to the National Adjudicatory Council (NAC), Market Regulation submitted a brief to the NAC that contained "two material falsehoods," and Respondent 2's counsel wrote a letter to Market Regulation counsel on November 4 regarding the brief. But neither Respondent 1 nor Respondent 2's counsel has offered evidence of any nexus between the letter and the reassignment. This is particularly troubling because I advised the parties that I was unaware of the letter until they disclosed it during the pre-hearing conference, and that the only person with whom I discussed the reassignment was Hearing Officer Witherspoon.

Finally, and most disturbingly, the motion argues that the transfer is somehow improper based on an article published in BNA's Securities Regulation & Law Report in May 2005. The authors of the article reviewed Hearing Panel decisions issued by OHO during a limited time

period and based simply on the outcomes of those cases drew unwarranted conclusions about the various Hearing Officers who presided. Relying on the article, Respondent 1 complains that "Officer Witherspoon's rulings have been significantly more favorable to respondents and Officer FitzGerald's rulings have been significantly more favorable to the NASD (now FINRA)."

The analysis on which Respondent 1 relies is significantly flawed in many respects, most notably by failing to account for the fact that all Panel decisions are rendered by three-member Panels, not by individual Hearing Officers. Ignoring this both denigrates the preeminent role of the industry Panelists in the disciplinary hearing process and grossly overestimates the influence of the Hearing Officer, the only member of each Panel who does not have substantial hands-on industry experience. In any event, Respondent 1 is entitled to a fair hearing, which he will unquestionably receive from the entire Panel, not to the Hearing Officer of his choice.

Panelist Information

As in all cases, when the Panelists were appointed in this case, the parties were notified of their names and industry affiliations, if any, but were given no detailed information regarding their backgrounds. Citing no authority whatsoever, Respondent 1 simply argues that this is "not fair."

The applicable rules do not provide for the disclosure of background information regarding Panelists, and as noted above, the SEC has approved those rules as consistent with the Exchange Act's "fair procedure" requirement. Respondent 1 points out that in arbitrations the parties receive detailed information about prospective arbitrators, but in those proceedings the parties select the arbitrators themselves and the information they receive facilitates that process. In contrast, in disciplinary proceedings the parties do not select the Panelists.

This does not mean FINRA has no procedures to ensure that disciplinary hearing Panelists have no conflicts of interest. Under Rule 9234(a), each Panelist has an independent duty to determine whether "he or she has a conflict of interest or bias or circumstances otherwise exist where his or her fairness might reasonably be questioned." If such circumstance exist, the Panelist must "notify the Hearing Officer," whereupon "the Hearing Officer shall issue and serve on the Parties a notice stating that the Panelist has withdrawn from the matter." Hearing Officers routinely remind Panelists of their obligations and provide case information to help them determine whether they should disqualify themselves. Moreover, pursuant to Rule 9234(b)(3), the Chief Hearing Officer has authority to disqualify a Panelist sua sponte if she determines that a conflict of interest or bias exists or that circumstances otherwise exist where the Panelist's fairness might reasonably be questioned. Finally, Rule 9234(b) provides that a party that becomes aware of any disqualifying circumstance may move for disqualification of a Panelist. In light of all these safeguards, Respondent 1 has not shown that the absence of background information on the Panelists renders FINRA's disciplinary process unfair.

Conclusion

For the reasons set forth above, Respondent 1's request that this proceeding be reassigned to Hearing Officer Witherspoon or to another Hearing Officer chosen by rotation and his request for additional information about the Panelists are denied. His request that the hearing in this matter "be continued to accommodate Ms. Witherspoon's schedule" is moot. His requests for "discovery on the reasons for the reassignment" and for discovery on "the method of the appointment of Extended Hearing Panelists" are denied, because he has already received

substantial information on both topics and neither the applicable rules nor any general notions of fairness require more. [3]

SO ORDERED.

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David M. FitzGerald
Deputy Chief Hearing Officer

Dated: November 26, 2007

[3] Because the motion raises issues concerning the overall policies and procedures of OHO, the Chief Hearing Officer reviewed this order and concurs in the disposition of the motion as set forth herein.