

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

Department of Enforcement,

Complainant,

vs.

Robert Fitzpatrick
C/O Merit Capital Associates
1221 Post Road East
Westport, Connecticut 06611,

Respondent.

ORDER ON REMAND

Complaint No. C10970176

Dated: November 13, 2000

On remand from the Securities and Exchange Commission, National Adjudicatory Council found no evidence that improper ex parte communications occurred during the original proceedings before a Hearing Panel.

Robert Fitzpatrick ("Fitzpatrick") appealed a June 14, 1999 decision of the National Adjudicatory Council ("NAC") of NASD Regulation, Inc. ("NASD Regulation") to the Securities and Exchange Commission ("SEC"). Fitzpatrick alleged on appeal before the SEC that, among other things, the Hearing Panel that presided over the original disciplinary proceedings might have had improper ex parte discussions with staff members from the Department of Enforcement ("Enforcement") of NASD Regulation who were prosecuting the case. As a result of Fitzpatrick's allegation, the SEC remanded the matter for additional proceedings to determine whether such communications occurred just prior to the original hearing below. After a review of the entire record in this matter, including newly submitted affidavits, we find that Fitzpatrick's allegation is without merit. We also reaffirm and incorporate by reference our previous decision, dated June 14, 1999, familiarity with which is presumed.

Background

Fitzpatrick entered the securities industry in 1977 as a general securities representative. At all times relevant to the complaint, Fitzpatrick was registered with member firm SFI Investments, Inc.

("SFI") in a number of different capacities, including as a general securities representative, a registered options principal, a general securities principal, a financial and operations principal ("FINOP"), and a municipal securities principal. Fitzpatrick also worked as SFI's director of compliance. Fitzpatrick currently is registered with another member firm in the same capacities.

Factual and Procedural History

Enforcement filed the original complaint in this matter on November 21, 1997. Enforcement subsequently filed a revised complaint, entitled "Revised Sixth Cause of the Complaint" ("Revised Complaint"), on July 27, 1998. The Revised Complaint alleged that Fitzpatrick failed timely to provide staff with the following three categories of SFI documents: (1) commission runs; (2) payroll records; and (3) sales confirmations.¹ Fitzpatrick filed an answer denying that he should be held responsible for the untimely submission of the aforementioned documents. The Hearing Panel held proceedings on the merits of the case on August 3, 1998.

On October 20, 1998, the Hearing Panel issued its decision. The Hearing Panel held that Fitzpatrick had violated Procedural Rule 8210 and Conduct Rule 2110 by failing timely to produce the commission runs and payroll records. The Hearing Panel, however, dismissed the allegation related to sales confirmations. The Hearing Panel imposed a fine of \$2,500 and a suspension of 15 business days in all capacities. The Hearing Panel also imposed hearing costs of \$709.15. Fitzpatrick appealed the Hearing Panel's decision, and Enforcement cross-appealed the decision.²

In a decision dated June 14, 1999, after considering the record on appeal, the parties' legal briefs and oral argument, we upheld the Hearing Panel's findings.³ We also upheld the Hearing Panel's imposition of a \$2,500 fine, although we reduced the suspension from 15 business days in all capacities to five business days in all capacities.

On June 29, 1999, Fitzpatrick appealed our June 14, 1999 decision to the SEC. On September 28, 1999, NASD Regulation filed a brief in opposition to Fitzpatrick's application for review

¹ The original complaint asserted various charges against Fitzpatrick and seven other respondents. The Revised Complaint alleged that both Fitzpatrick and SFI violated Procedural Rule 8210 and Conduct Rule 2110 by failing timely to provide the information discussed above. The hearing on the Revised Complaint was severed, however, and the current appeal relates only to Fitzpatrick.

² Fitzpatrick appealed the Hearing Panel's findings of violation with regard to the commission runs and payroll records. He also appealed the sanctions imposed by the Hearing Panel. Conversely, Enforcement cross-appealed on the basis that the Hearing Panel erred by not finding Fitzpatrick in violation of the NASD's rules for failing timely to produce the sales confirmations.

³ Specifically, we found that Fitzpatrick had violated Procedural Rule 8210 and Conduct Rule 2110 by failing to respond timely to Enforcement's requests for information.

in this case. On March 22, 2000, the SEC remanded the matter to us for further proceedings to determine whether any improper ex parte communications occurred just prior to the start of the original disciplinary hearing in this case. See In re Robert Fitzpatrick, Exchange Act Rel. No. 42560 (Mar. 22, 2000).

On May 8, 2000, a NAC Subcommittee ordered the parties and the Hearing Panel members to submit individual sworn affidavits describing their recollection of the events in question. In addition, the NAC Subcommittee's order stated that the parties could file briefs after the affidavits had been submitted.

By letter dated May 9, 2000, Fitzpatrick wrote to the Office of General Counsel ("OGC") for NASD Regulation demanding an evidentiary hearing. Fitzpatrick did not send a copy of this letter to the other parties or the hearing panel, even though he had previously been instructed that all communications with OGC regarding this case must be in writing, with copies provided to all parties. In addition, Fitzpatrick called OGC on May 9 to confirm that his letter had been received by OGC and to reiterate his belief that the SEC's order required the NAC to hold an evidentiary hearing. During the May 9 telephone conversation that Fitzpatrick initiated, OGC informed Fitzpatrick that he could address the issue of whether an evidentiary hearing was necessary in his brief after the exchange of affidavits.

By letter dated May 9, 2000, OGC, on behalf of the NAC Subcommittee, informed the parties and the hearing panel of Fitzpatrick's letter to and telephone conversation with OGC. OGC's May 9 letter also encouraged the parties to participate in the proceedings on remand and to address in their briefs whether a hearing was required. In addition, the letter indicated that the NAC Subcommittee had not taken any position on whether a hearing might be necessary in the future.

On May 10, 2000, Fitzpatrick filed an Application for Emergency Relief ("Application") with the SEC. In his Application, Fitzpatrick asked the SEC to "issue a temporary order restraining the NASD from going forward with its request for affidavits and briefs. This order to remain in effect until such time as the Commission can issue a more formal order directing the NASD to hold a hearing(s) with regard to the remand order at hand." On May 16, 2000, NASD Regulation filed a brief in opposition to Fitzpatrick's Application. By letter dated May 16, 2000, the Office of the Secretary of the SEC denied Fitzpatrick's Application.

Between May 23 and 26, 2000, the parties and the Hearing Panel members submitted individual affidavits describing their recollection of the events in question. The substance of the affidavits is discussed in detail below. Because none of the affidavits indicated that any improper communications occurred during the proceedings below, the NAC Subcommittee determined not to hold an evidentiary hearing. (The parties chose not to submit briefs after the affidavits were submitted even though, as discussed above, they were given the opportunity to do so.)

Discussion

In his brief to the SEC, Fitzpatrick alleged as follows:

Respondent showed up approximately forty minutes early for the hearing before the DBCC. The only person in the room at the time was [the Hearing Officer]. The Respondent introduced himself. [The Hearing Officer] . . . told Respondent he could not come into the hearing room. [The Hearing Officer] told Respondent he would be summoned at the appropriate time. Respondent then waited for almost an hour in the reception area at the NASD offices. Prior to someone coming to get Respondent, the NASD brought four lawyers into the room and had at least a ten minute discussion with the hearing officer outside of the presence of the Respondent. Clearly in a fair forum, such ex parte (sic) communication would be illegal.

Although Fitzpatrick did not raise this issue during the original proceedings, and therefore arguably waived it,⁴ the SEC remanded the matter to us for further proceedings to determine "1) whether the chronology of events alleged by Fitzpatrick occurred in the manner described by him; and 2) if they did occur, whether any communications occurred that are prohibited by NASD Procedural Rule 9143."

Procedural Rule 9143, entitled "Ex Parte Communications," states in pertinent part as follows:

Unless on notice and opportunity for all Parties to participate . . . (1) [n]o Party, or counsel to or representative of a Party, or Interested Association Staff shall make or knowingly cause to be made an ex parte communication relevant to the merits of a proceeding to an Adjudicator who is participating in a decision with respect to that proceeding, or to an Association employee who is participating or advising in the decision of an Adjudicator with respect to that proceeding; and (2) [n]o

⁴ See, e.g., Trident Seafoods, Inc. v. NLRB, 101 F.3d 111, 116 (D.C. Cir. 1996) (holding that the defendant waived its argument where it raised the issue for the first time in a post-hearing brief to an administrative law judge); In re Ashvin R. Shah, 52 S.E.C. 1100, 1104 n.16 (1996) (holding that the respondent's failure to object at the District Business Conduct Committee ("DBCC") hearing to insufficient notice of the identity of a witness resulted in a waiver of his objection), aff'd, 132 F.3d 36 (7th Cir. 1997) (table format); In re Mayer A. Amsel, 52 S.E.C. 761, 767 (1996) (holding that the respondent waived his objection to a panel member and emphasizing that "it is inappropriate for a party to 'suppress his misgivings while waiting anxiously to see whether the decision goes in his favor.' In a similar vein, we have stated that 'a respondent cannot be permitted to gamble on one course of action and, upon an unfavorable decision, to try another course of action.'" (citation omitted).

Adjudicator who is participating in a decision with respect to a proceeding, or no Association employee who is participating or advising in the decision of an Adjudicator with respect to a proceeding shall make or knowingly cause to be made to a Party, a counsel or representative to a Party, or Interested Association Staff an ex parte communication relevant to the merits of that proceeding.

The focus of Rule 9143 is on any "communication relevant to the merits of that proceeding." The Rule, therefore, does not reach communications such as the exchange of greetings (or similar pleasantries) or any other discussions unrelated to the merits of a case. Our review of the affidavits that were submitted on remand, discussed separately below, failed to disclose any improper communications between the Hearing Panel and Enforcement.

Fitzpatrick Affidavit. In his affidavit, Fitzpatrick reiterated his recollection of the conversation that he had with the Hearing Officer just prior to the start of the original hearing in this matter, as discussed above. Fitzpatrick stated that, after this initial conversation with the Hearing Officer, he waited in the lobby reception area for the hearing to begin. He then stated as follows:

Approximately fifteen minutes after my conversation with [the Hearing Officer] a party of five persons, including a large black man, went down the hall toward the hearing rooms. Since several hearings go on simultaneously, and I was expecting three persons not five, none of whom I believed was a black man, I did not give it a second thought.

At least ten minutes later, maybe as much as twenty minutes later, some one (sic) came out to the lobby to tell me I could now enter the hearing room. Upon entering the room I found the following persons comfortably seated around the table: [the Hearing Officer], [another Hearing Panel member], Blair Mathies, Andrew Reich, Leonard Amoruso, William St. Louis (who I found out was the large black man I had seen, but had never met before), and two other persons.

I was then told that [another Enforcement attorney] had been in the room, but left, since there was only room for three NASD attorneys not four. I remember thinking that they thought that statement would somehow scare me.

Fitzpatrick's affidavit does not indicate that any, let alone improper, communications occurred outside of his presence.

Hearing Panel Affidavits. Each of the three Hearing Panel members submitted an affidavit stating that he or she has no specific recollection of whether the chronology of events alleged by Fitzpatrick (regarding the order in which the parties entered the hearing room) is accurate. Each affidavit also states, however, that there were no ex parte or improper contacts between any member of the Hearing Panel and attorneys or staff for Enforcement.

Andrew Reich Affidavit. Andrew Reich ("Reich") was the lead Enforcement attorney prosecuting the case. He submitted an affidavit in which he denied that any ex parte communications occurred. Reich stated:

I am unaware concerning: the time Fitzpatrick first entered the hearing room; any conversations he may have had; and any observations he may have made from outside the hearing room. I do not recall whether I entered the hearing room with or without other colleagues from NASD Regulation, Inc.; whether Fitzpatrick was in the hearing room at the time I entered or whether he entered later. . . .

The only recollection I have concerning the period before the Hearing began is that there was a discussion, the specifics of which I do not recall, concerning the need to accommodate the large number of people at the Hearing around the table in the room. In addition to those people listed in Fitzpatrick's affidavit as having been present, the transcript of the Hearing indicates that [another Hearing Panel member], and Scott Silver, of the law firm Gusrae, Kaplan & Bruno (which represented other respondents in the SFI proceeding) were also present. . . .

In addition, while I do not specifically recall the following, it is likely that, after I entered the room, I required at least a few minutes to set up my exhibits and other materials for the Hearing.

I am certain that no ex parte communications prohibited by NASD Procedural Rule 9143 occurred in my presence. I know that I would not engage in such activity, and I would certainly remember if any of the Hearing Panel Members, or my colleagues in Enforcement or Member Regulation, had done so. . . .

I also note that the presence of the Hearing Officer and two other Hearing Panel Members, plus an observer from the industry . . . and an adversary attorney (Mr. Silver), significantly eliminated even the possibility of any improper communications.

I further note that the parties presented both opening and closing statements at the Hearing, and Fitzpatrick said nothing about any alleged improper communications. The first I learned of these allegations was in papers submitted by Fitzpatrick months after the conclusion of the Hearing.

William St. Louis Affidavit. William St. Louis ("St. Louis"), an Enforcement attorney, was present as an observer at the hearing on the day in question. He stated that he did not recall whether Fitzpatrick was in the hearing room when he entered or whether Fitzpatrick entered later. St. Louis also stated that he was "certain that [he] did not engage in any ex parte communications prohibited by NASD Procedural Rule 9143, and that [he] did not observe anyone else do so in [his] presence."

Blair Mathies Affidavit. Blair Mathies, a Deputy District Director for District 10 of NASD Regulation, was present at the hearing at issue. Mathies stated that he did not engage in any improper ex parte communications and that he did not observe anyone else do so in his presence.

Leonard J. Amoruso Affidavit. Leonard J. Amoruso ("Amoruso") was the Chief Counsel for NASD Regulation's District No. 10 office at the time of the hearing in question, at which he was present. Amoruso is no longer employed by NASD Regulation. He is currently the Chief Compliance Officer and Assistant General Counsel at a member firm. He submitted an affidavit in which he stated that he was unaware of any ex parte or improper contacts between any member of the Hearing Panel and attorneys or staff of Enforcement.

After reviewing the aforementioned affidavits, the NAC Subcommittee appointed to handle this matter (both before and after the remand) determined that there was insufficient evidence of any improper communications to require further evidentiary hearings. We concur not only with the NAC Subcommittee's ruling but also with the procedures it implemented on remand.

The NAC Subcommittee appropriately ordered the parties and the Hearing Panel members to submit individual sworn affidavits regarding whether any improper ex parte communications occurred during the proceedings below and then to brief the legal and factual issues involved. These initial procedures allowed the Subcommittee to assess whether, and/or to what extent, further action was required. This approach fully complied with the SEC's remand order. The Subcommittee's procedures on remand were also fair and were not only consistent with, but actually went beyond the requirements of, Procedural Rule 9143. Subsection (b) of Rule 9143, entitled "Disclosure of Prohibited Communication," requires only that the adjudicator place in the record any ex parte written communications or memoranda discussing any ex parte oral communications. Here, the Subcommittee went farther, requiring the submission of affidavits as to alleged ex parte communications.

Fitzpatrick erroneously argues that the SEC's order requires that we hold an evidentiary hearing on remand. Contrary to Fitzpatrick's claim, however, the SEC's order does not state, or even imply,

that an evidentiary hearing must be conducted.⁵ The SEC's order requires only that we engage in proceedings to gather additional information about the alleged events so that we, and ultimately the SEC, can render an informed decision regarding Fitzpatrick's claim. The initial procedures ordered by the NAC Subcommittee clearly achieved that purpose.

If the affidavits had provided some scintilla of proof indicating that improper ex parte communications occurred, we would have ordered an evidentiary hearing or taken further action as justice and fairness required. The affidavits, however, overwhelmingly show that no improper communications occurred between the Hearing Panel and Enforcement. Subjecting the parties and the Hearing Panel to an evidentiary hearing under these circumstances is simply not warranted.⁶

⁵ When, in the past, the SEC has determined that additional evidentiary hearings may be appropriate, it has used clear language to that effect. See, e.g., In re David N. Snider, 47 S.E.C. 771, 773 (1982) (Remanding "proceedings to the NASD for further exploration of this issue, including, if necessary, the holding of additional hearings."); In re P. Lynn Dixon, 47 S.E.C. 378, 379-80 (1980) (same); In re Allen Mansfield, 46 S.E.C. 356, 359-60 (1976) (remanding case to NASD to allow introduction of additional evidence and offering the assistance of a Commission administrative law judge to any party requiring the issuance of subpoenas to compel customer testimony at a hearing on remand). Moreover, Commission Rule of Practice 101(a)(9) does not define the term "proceeding" as necessarily involving a hearing.

⁶ The parties and the panel members are located in various regions across the United States. It would be inappropriate to require them to be subjected to cross-examination based on the information currently available. See, e.g., United States v. Lewis, 40 F.3d 1325, 1332 (1st Cir. 1994) (A defendant has neither an absolute nor a presumptive right to insist that a court take testimony on every motion without alleging "facts that are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that a substantial claim is presented."); United States v. Shvarts, 90 F. Supp. 2d 219, 223 (E.D.N.Y. 2000) ("The Court dismissed the suppression motions as meritless without an evidentiary hearing, which it held was not required absent a meaningful and factual showing of an improper purpose by the agency."); United States v. \$1.5 Million Letter of Credit, No. 90 Civ. 4450, 1992 U.S. Dist. LEXIS 11837, at *22 (S.D.N.Y. Aug. 6, 1992) ("[T]o obtain the right to an evidentiary hearing, [defendant's] challenge must 'be more than conclusory and must be supported by more than a mere desire to cross examine.'") (quoting Franks v. Delaware, 438 U.S. 154 (1978)); United States v. Gel Spice Co., 601 F. Supp. 1214, 1218 (E.D.N.Y. 1985) (evidentiary hearings not automatic); In re Stratton Oakmont, Inc., 52 S.E.C. 1170, 1176 (1997) (upholding hearing panel's decision not to compel NASD staff members to testify regarding alleged, but unsubstantiated, contacts between those members and the DBCC); cf. In re Henry James Faragalli, 52 S.E.C. 1132, 1145 n.40 (1996) (no right to confront authors of complaint letters).

Fitzpatrick further argues that evidence in the form of affidavits is somehow unreliable and would not be permitted in other NASD proceedings.⁷ We reject Fitzpatrick's argument. It is axiomatic that NASD "proceedings are 'informal' when compared to 'formal' proceedings in federal and state courts where rules of evidence and procedure apply. For example, in [NASD] proceedings, hearing panels have great latitude in permitting evidence and testimony from witnesses that might be excluded on relevance and hearsay grounds before other tribunals." In re Rita H. Malm, 52 S.E.C. 64, 75 n.37 (1994). The SEC, moreover, has routinely upheld our reliance on affidavits in support of findings in disciplinary proceedings. See, e.g., In re Harry Glikzman, Exchange Act Rel. No. 42255, at 10 (Dec. 20, 1999) (finding customer's affidavit to be probative, reliable and admissible), appeal filed, No. 70258 (9th Cir. Mar. 7, 2000).⁸ In fact, even in federal litigation, courts have relied on affidavits as persuasive evidence under certain circumstances. See, e.g., FTC v. Kitco, Inc., 612 F. Supp. 1282, 1294 (D. Minn. 1985) (admitting affidavits even though affiants were not deposed and did not testify at trial); SEC v. General Refractories Co., 400 F. Supp. 1248, 1255 (D.D.C. 1975) (affidavits properly admitted in evidence at preliminary injunctive hearing).⁹ In short, affidavits are probative and reliable, and their use here was appropriate.

We find that the procedures used on remand were fair, reasonable, and designed to obtain reliable and probative evidence regarding whether any improper ex parte communications occurred during the original disciplinary hearing. Based on this evidence, we also find that no improper communications occurred in violation of Procedural Rule 9143. We find, therefore, that Fitzpatrick's assertion is unsubstantiated by the record and without merit. See In re Rafael Pinchas, Exchange Act Rel. No. 41816, at 16-17 (Sept. 1, 1999) (rejecting unsupported claim of improper ex parte communications between panel member and opposing counsel); In re Mayer A. Amsel, 52 S.E.C. 761,

⁷ Prior to the submittal of any of the affidavits, Fitzpatrick also claimed that two of the individuals whom the NAC Subcommittee ordered to submit sworn affidavits have already committed perjury regarding this matter. He did not elaborate on how they allegedly committed perjury. His assertion, hence, is unsubstantiated and appears to be spurious. Moreover, Fitzpatrick's claim is belied by the facts. He did not object to any ex parte communications below and, at the time when Fitzpatrick made the claim, neither the Hearing Panel members nor any of the Enforcement attorneys had made statements under oath or in sworn affidavits on this topic. It is therefore difficult to discern how these individuals could have committed perjury.

⁸ See also In re Carlton Wade Fleming, Jr., 52 S.E.C. 409, 411-12 (1995) (finding affidavit probative and reliable); In re Charles D. Tom, 50 S.E.C. 1142, 1145 (1992) (written declaration admissible).

⁹ See also Haupt v. International Harvester Co., 582 F. Supp. 545, 547-48 (N.D. Ill. 1984) (exhibits considered where party's affidavit referred to materials); E.H. Boerth Co. v. LAD Properties, 82 F.R.D. 635, 647 n.7 (D. Minn. 1979) (affidavit was "probative evidence" of reasonable fee award); FED. R. CIV. P. 56(e) (discussing use of affidavits).

767 (1996) (rejecting unsubstantiated claim of hearing panel bias); In re G.K. Scott & Co., 51 S.E.C. 961, 972 n.50 (1994) (rejecting unsubstantiated claim that improper ex parte communications occurred between panel and staff attorney), aff'd sub nom, G.K. Scott & Co. v. SEC, 56 F.3d 1531 (D.C. Cir. 1995).

Accordingly, we reject Fitzpatrick's claim and uphold our previous decision in its entirety. We order the Office of General Counsel for NASD Regulation to provide a copy of our decision, along with the newly created portion of the record, to the SEC on the date that the decision is issued to the parties.

On Behalf of the National Adjudicatory Council,

Alden S. Adkins
Senior Vice President and General Counsel