

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-29 (C9B040098).

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

Respondent.

Disciplinary Proceeding  
No. C9B040098

Hearing Officer – AWH

**ORDER DENYING MOTION TO DISQUALIFY HEARING OFFICER**

On July 28, 2005, Respondent filed a motion seeking to disqualify the Hearing Officer assigned to this matter, Alan Heifetz, “for bias, prejudice and unfairness to Respondent,” as well as to “to change venue of the hearing and to stay the disciplinary hearing until this matter is heard by a replacement Hearing Officer appointed by the Chief Hearing Officer.” In support of the motion, Respondent filed a 61-page affidavit signed by his attorney, George L. Mahr, II; the transcripts of the hearing held in this matter on July 11 and 12, 2005; and various motions, orders and other papers filed or issued in this proceeding. Because the affidavit includes a number of assertions regarding the Chief Hearing Officer, she recused herself from consideration of the motion, so the motion was referred to me for determination, pursuant to a general delegation of authority covering matters in which the Chief Hearing Officer is recused. I have carefully reviewed all of the materials filed in support of the motion; for the reasons set forth below the motion is denied.

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Asserted Grounds for Disqualification

Respondent contends that Hearing Officer Heifetz has demonstrated bias against Respondent by making various rulings against Respondent during the pre-hearing process and during the hearing. Respondent argues that Hearing Officer Heifetz has shown his bias "since the inception of his appointment on November 15, 2004," and that in doing so he has "simply carried out the preconceived strategy of the Office of Hearing Officers and the [Department of Enforcement] to deprive the Respondent of his Constitutional Rights to an attorney, to due process and his right to a fair hearing by discriminating against him from the inception of the disciplinary action ...." Respondent charges that "the NASD, [Enforcement counsel] Michael Newman, [NASD Vice Chairman and Regulatory Policy & Oversight President] Mary L. Schapiro, [NASD Dispute Resolution President and Chief Hearing Officer] Linda Fienberg, Alan W. Heifetz, and [Enforcement Assistant Chief Counsel] Gregory Firehook, Esq., have conspired and collaborated with Merrill Lynch to retaliate against and intimidate [Respondent] in a scheme and artifice to cover-up the wrongdoings of the real culprits."

Respondent asserts that the fact that the Chief Hearing Officer is also the President of NASD Dispute Resolution constitutes a conflict of interest. In that regard, he cites a January 2005 letter from Ms. Fienberg, in her capacity as President of Dispute Resolution, to Respondent's counsel. The letter indicates that it was sent "in response to your December 30, 2004, letter to Mary Schapiro," and addresses various procedural issues regarding an arbitration proceeding that Respondent apparently had instituted against Merrill Lynch, Pierce, Fenner & Smith, Inc., and others. For reasons that are unclear, Respondent contends that in light of her role as President of Dispute Resolution,

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it was improper for the Chief Hearing Officer to have appointed Hearing Officer Heifetz to preside over this matter. This contention, however, is based on a faulty premise. As the Notice of Assignment in this matter plainly indicates, in accordance with the normal practice of the Office of Hearing Officers, and pursuant to a general delegation of authority, I, rather than the Chief Hearing Officer, appointed Hearing Officer Heifetz to preside in this matter.

Building from this faulty premise, and without any supporting evidence, Respondent asserts that the Chief Hearing Officer “apparently agreed with Officer Heifetz and de facto instructed and authorized Officer Heifetz” to make various pre-hearing rulings, including the hearing schedule, as well as rulings at the hearing. Again without any supporting evidence, Respondent asserts that this enabled NASD “to cover up the violations of Section 10(b) [of the Securities Exchange Act] and Rule 10b-5 by Merrill Lynch” and various individuals.

Respondent further contends, still without any supporting evidence, that various pre-hearing and hearing evidentiary rulings by Hearing Officer Heifetz “were made for the purpose of obstructing and interfering with [Respondent]’s claims brought by him against Merrill Lynch [and others], in his pending arbitration proceeding.” With respect to scheduling the hearing, Respondent argues that Hearing Office Heifetz “demonstrated his obvious bias against [Respondent] at the pre-hearing conference by specifically ‘asking’ the attorney for [Enforcement], Mr. Newman, when was the earliest date he (Mr. Newman) would be prepared to try the disciplinary case.” When “Mr. Newman supplied the next line in their script stating that the earliest he would be prepared to try the

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disciplinary case was in early July 2005," Hearing Officer Heifetz set the hearing for July 11-15, over Respondent's objection.

Respondent complains that Hearing Officer Heifetz subsequently refused to re-schedule the hearing when Respondent added another attorney to his defense team; that he unfairly limited the witnesses and evidence that Respondent was allowed to offer at the hearing; and that he improperly limited the scope of Respondent's cross-examination of an Enforcement investigator who testified at the hearing. Respondent argues that Hearing Officer Heifetz's bias is evident from an examination of the transcript of the hearing. Respondent also complains about various rulings made by Hearing Officer Heifetz concerning Enforcement's production of documents pursuant to Rule 9251(a), as well as his granting of a motion to strike Respondent's affirmative defenses.

#### Discussion

Motions to disqualify a Hearing Officer are governed by Rule 9233(b), which provides that such motions "shall be based upon 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, and shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification, and the dates on which the Party learned of those facts." The rule further requires that a motion to disqualify be filed not later than 15 days after the Party learns of the facts believed to constitute the disqualification.<sup>1</sup>

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<sup>1</sup> Therefore, insofar as Respondent's motion is based on Hearing Officer Heifetz's appointment and his pre-hearing rulings, it is untimely.

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In proposing Rule 9233(b), NASD explained that “the [Rule 9233(b)] standard borrows heavily from the conflict of interest standard applicable to federal judges,” stating:

The Association intends to rely on [the] 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 exist where ... [the Adjudicator's] fairness might reasonably be questioned.” The notions of impartiality and fairness are inextricably linked in an analysis of whether an Adjudicator fairly judges a proceeding.

62 Fed. Reg. 25255-56 (May 8, 1997).

Under Section 455(a), disqualification is appropriate only when there exists “‘a reasonable basis’ for finding an ‘appearance of partiality under the facts and circumstances’ of the case.”<sup>2</sup> 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.’”<sup>3</sup> These standards also apply to motions to disqualify Hearing Officers under Rule 9233(b).

Like a judge, a Hearing Officer must be presumed to be impartial; to overcome that presumption, the party seeking disqualification “‘must ‘show a true personal bias, and must allege specific facts and not mere conclusions or generalities.’”<sup>4</sup> Moreover, as the

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<sup>2</sup> Pepsico v. McMillen, 764 F.2d 458, 460 (7<sup>th</sup> Cir. 1985) (quoting SCA Securities, Inc. v. Morgan, 557 F.2d 110, 116 (7<sup>th</sup> Cir. 1977)).

<sup>3</sup> Id. at 460.

<sup>4</sup> United States v. International Business Machines Corp., 475 F. Supp. 1372, 1379 (S.D.N.Y. 1979), aff'd, 618 F.2d 923 (2d Cir. 1980) (quoting Brotherhood of Locomotive Firemen and Enginemen v. Bangor and Aroostook R. Co., 380 F.2d 570, 576 (D.C.Cir.), cert. denied, 389 U.S. 970 (1967). See also, e.g., Robert E. Gibbs, 51 S.E.C. 482 (1993), aff'd, 25 F.3d 1056 (10th Cir. 1994) (Table) (unsubstantiated allegations insufficient to establish bias of hearing panelist).

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Supreme Court has explained:

First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. ... In and of themselves (i.e., apart from surrounding comments or accompanying opinion) they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required ... when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Liteky v. United States, 510 U.S. 540, 555 (1994).

Applying these principles to the case at hand, it is clear that Respondent's motion lacks merit. Respondent has articulated no reasonable basis for believing that Hearing Officer Heifetz is biased, or established the existence of any circumstances that would cause an objective disinterested observer to question Hearing Officer Heifetz's fairness in this proceeding. Instead, Respondent's motion rests primarily on unsubstantiated accusations regarding an improbable conspiracy, which no objective, disinterested observer would find sufficient to require disqualification. Apart from the unsupported conspiracy allegations, Respondent's motion rests on his disagreements with Hearing Officer Heifetz's rulings. But these are potential grounds for appeal, should the Hearing Panel find against Respondent, not grounds for disqualification.

I have carefully reviewed the transcript to ascertain whether, as Respondent asserts, Hearing Officer Heifetz evinced bias or prejudice during the hearing. To the contrary, Hearing Officer Heifetz demonstrated great patience and restraint in the face of severe provocation from Respondent's counsel, who repeatedly challenged Hearing

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Officer Heifetz's rulings, used intemperate and inappropriate language, engaged in lengthy and repetitious tirades against NASD, Merrill Lynch and others, and was generally contemptuous of Hearing Officer Heifetz's authority and NASD's disciplinary process.<sup>5</sup> In spite of this, Hearing Officer Heifetz allowed Respondent's counsel great latitude to make his arguments. Based on the transcript, Hearing Officer Heifetz's rulings appear to have been based upon his interpretation of NASD's rules, and do not appear to have been influenced by any bias or prejudice, or by some conspiracy. Nevertheless, during the second day of the hearing, Respondent's counsel abruptly left the hearing and did not return, which amounted to a default under NASD's rules.

I find, therefore, that Respondent's motion to disqualify Hearing Officer Heifetz is utterly without merit, and it is hereby denied. Since the hearing has concluded and Hearing Officer Heifetz is not being disqualified, Respondent's requests for a "change of venue" and a stay pending appointment of a replacement Hearing Officer are moot.

**SO ORDERED.**

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David M. FitzGerald  
Deputy Chief Hearing Officer

Dated: August 4, 2005

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<sup>5</sup> Respondent himself did not even attend the hearing.