

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 06-56 (DFC060004).

NASD OFFICE OF HEARING OFFICERS

NASD TREASURER,

Complainant,

v.

Respondent.

Expedited Proceeding
No. DFC060004

Hearing Officer – SW

ORDER SETTING A PRE-HEARING CONFERENCE

Article VI, Section 1 of the NASD By-Laws provides that NASD “shall fix and levy the amount of admission fees, dues, assessments, and other charges to be paid by members of the NASD . . . and any other persons using any facility or system which the NASD, . . . or NASD Dispute Resolution operates or controls.”

Through an expedited proceeding, pursuant to Rule 9553, NASD issued a written notice of intent to suspend the registration of Respondent based on his having allegedly failed to pay a fee, due, assessment, or other charge (“Suspension Notice”). The Suspension Notice indicates that NASD assessed the fees against Respondent pursuant to NASD’s Code of Arbitration Procedure in connection with an NASD arbitration case.

The issues to be determined in this type of proceeding are uncomplicated, i.e., (i) were the fees imposed consistent with the Code of Arbitration Procedure, and (ii) are the fees unpaid. The defenses that may be raised in this expedited proceeding are also uncomplicated and limited because similar to suspension proceedings for failing to pay

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arbitration awards, the Hearing Officer is not permitted to scrutinize the ruling of the underlying arbitration panel.¹

In this case, in response to the Suspension Notice, Respondent filed a request for a hearing on December 1, 2006, but he failed to state with specificity why the Suspension Notice should be set aside. On December 15, 2006, Respondent refiled a request for hearing with the Office of Hearing Officers. Respondent's December 15, 2006 request, however, again failed to cite with specificity that Respondent (i) has an inability to pay the fees, or (ii) meets the requirements of one of the four defenses listed in the Suspension Notice.²

Accordingly, the Parties are hereby notified that a pre-hearing conference in this matter is scheduled for Wednesday, January 10, 2007, at 2:00 p.m., Eastern Time (11:00 a.m., Pacific Time). At the scheduled date and time, each party shall call the MCI conference operator at [] and give the conference call operator the password, []. Any party who is unable to connect to the conference call using these instructions shall immediately contact the Office of Hearing Officers at (202) 728-8008.

¹ For example, in a case involving a respondent's failure to pay an arbitration award, the issue presented is whether the member or person has paid the award. A respondent cannot collaterally attack the actual arbitration award. See John G. Pearce, 52 S.E.C. 796, 798, 1996 SEC LEXIS 1329, at *5 (1996) ("To permit a party dissatisfied with an arbitral award to attack it collaterally for legal flaws in a subsequent disciplinary proceeding would subvert the salutary objective that the NASD's [arbitration] resolution seeks to promote.")

² Examples of Non-Summary Suspension Decisions (failure to pay arbitration awards, settlement agreements, or fees) issued by the Office of Hearing Officer are available at "www.nasd.com," then click on "Regulatory Enforcement," then "Adjudication," then "Office of Hearing Officers Decisions and Proceedings," and then "Non Summary Suspension Decisions."

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The matters to be discussed at the January 10, 2007 pre-hearing conference are (i) which of the limited defenses Respondent will assert at a hearing, and (ii) when to schedule the hearing.

If Respondent is unable to assert either an inability to pay the fees or any of the other valid defenses specified in the Suspension Notice, the Hearing Officer will consider a motion from the Department of Enforcement that Respondent has effectively withdrawn his request for a hearing and that the suspension should become effective immediately.

Any questions regarding this proceeding should be directed to Nicholas Laliberté, the Case Administrator assigned to this proceeding. His telephone number is (202) 728-8460.

SO ORDERED.

Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
December 20, 2006