

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

FRANK PETER QUATTRONE
(CRD No. 1312126),

Respondent.

Disciplinary Proceeding
No. CAF030007

Hearing Officer – DMF

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

FRANK PETER QUATTRONE
(CRD No. 1312126),

Respondent.

Disciplinary Proceeding
No. CAF040060

Hearing Officer – DMF

**ORDER DISMISSING COMPLAINT IN PROCEEDING NO. CAF040060, WITH
PREJUDICE, AND DIRECTING PARTIES TO TAKE ADDITIONAL
STEPS IN PROCEEDING NO. CAF030007**

Background

The Department of Enforcement filed the Complaint in Case No. CAF030007 (the 07 case) in March 2003. The 07 Complaint charges that Respondent violated NASD Rules 3060 and 2110 through the “spinning” of initial public offering (IPO) shares, and violated NASD Rules 3010 and 2110 by failing to establish an appropriate supervisory structure and failing to supervise. Respondent denied the charges and requested a hearing, which was scheduled to

begin in October 2004 and continue off and on through mid-December 2004. The parties identified nearly 100 potential witnesses and more than 1500 potential exhibits for the hearing.

Enforcement filed the Complaint in Case No. CAF040060 (the 60 case) on August 5, 2004. The 60 Complaint charges that Respondent violated Rule 2110, and rests on Respondent's May 2004 conviction on two counts of obstruction of justice and one count of witness tampering.

On August 9, 2004, Respondent requested a stay of the 60 case pending the outcome of his appeal of his criminal conviction. In response, Enforcement moved to stay the 07 case, as well as the 60 case, pending the outcome of Respondent's appeal. In support, Enforcement represented that if Respondent's conviction were affirmed, it would proceed against Respondent only on the charges in the 60 Complaint, and would move to dismiss the 07 case, with prejudice. On the other hand, if Respondent's conviction were set aside, Enforcement stated that it would pursue only the 07 case, and would move to dismiss the 60 case, with prejudice.

On August 24, 2004, Respondent filed his response to Enforcement's motion to stay the 07 case. Respondent argued that the 07 case should be dismissed, rather than stayed, but, in the alternative, urged the Hearing Officer to impose certain conditions if the 07 case were stayed, in order to reduce the risk of prejudice to Respondent. In particular, Respondent argued that the stay should extend until final resolution of Respondent's criminal case, including any further proceedings if his conviction were reversed on appeal. In that regard, Respondent argued that if his conviction were set aside and the case remanded for retrial, it would be unfair to require him to defend himself in the 07 hearing at the same time he was defending himself in a retrial. On the other hand, in response to the Hearing Officer's order requiring it to clarify its position, Enforcement represented: "If the conviction is reversed on appeal and the criminal action remanded for retrial, the Department would resume prosecution of case number CAF030007. The Department would dismiss case number CAF040060 with prejudice because there would no

longer be a predicate criminal conviction on which to base a follow-on disciplinary proceeding based upon collateral estoppel.”

Having considered the parties’ arguments, the Hearing Officer found that it was appropriate to stay both proceedings pending the outcome of the appeal. With respect to Respondent’s argument that he was likely to be prejudiced by the delay in hearing the 07 case, the Hearing Officer noted that Enforcement recognized that, when and if it sought to reinstitute the 07 case, Respondent would be entitled to raise that issue.¹ The Hearing Officer concluded that it would be appropriate to resolve the prejudice issue at that time, in a concrete context, rather than on the basis of speculation.

With regard to whether the stay should be extended if Respondent’s criminal conviction was reversed and the case remanded for retrial, the Hearing Officer concluded that this issue, too,

¹ During the August 25, 2004, pre-hearing conference convened for the purpose of hearing the parties’ arguments regarding the proposed stays, the following colloquy occurred:

[HEARING OFFICER]: I want to be clear on a couple of points with you, Mr. Flynn.

[ENFORCEMENT]: Yes, sir.

[HEARING OFFICER]: First, you understand, that Enforcement understands, that if the ’07 Case is stayed and the criminal conviction set aside and Enforcement comes back and says we would like to lift the stay and proceed now --

[ENFORCEMENT]: Yes, sir.

[HEARING OFFICER]: --you understand that the Respondent may argue that the delay has been prejudicial.

[ENFORCEMENT]: Understood.

[HEARING OFFICER]: You are willing to take that risk?

[ENFORCEMENT]: Yes, sir.

would be best addressed when and if it arose.² Therefore, the Hearing Officer stayed both proceedings until Respondent's appeal was resolved, without prejudice to either or both parties seeking to extend the stay at that time.

On March 20, 2006, Respondent's conviction was reversed and the case remanded for retrial. United States v. Quattrone, 441 F.3d 153 (2d Cir. 2006). As a result, the stay expired, without prejudice to the parties seeking a continuance. On March 31, 2006, the Hearing Officer issued an order directing the parties to file any motion requesting such a continuance by April 20, 2006.

On April 20, Respondent filed a request that the Hearing Officer extend the time for the parties to respond to the March 31 order regarding the continuation of the stays "until the United States Attorney for the Southern District of New York determines whether to file a petition for certiorari with respect to the Second Circuit's decision, and if not, whether to try the criminal case a third time... While Mr. Quattrone does not seek a stay of the 07 matter (and the 60 matter should be dismissed), that matter cannot proceed simultaneously with a retrial of the criminal case. Mr. Quattrone will promptly notify the Hearing Officer when he is informed about these decisions."

² During the August 25, 2004, pre-hearing conference, the Hearing Officer explained:

[HEARING OFFICER]: ... I think what happens on appeal is unpredictable. Then I think the past history did show that when it was time to try the case it happened pretty quickly, but, as I recall, there was some gap between the first trial and the second trial as, I guess, the Prosecutors decided whether they were going to do a retrial, and God knows whether they would want to try the case three times.

All I want to do is make sure that we are not kind of locked into something that when you look at it a year from now you will go and say: "Well, this doesn't make any sense at all given the way things have actually spun out."

[RESPONDENT'S COUNSEL]: That makes sense.

[HEARING OFFICER]: But I do not under any circumstances think that this case is going to go forward in such a way that Mr. Quattrone is going to say: "Now I've got a criminal trial and an NASD trial and I have to try to defend both of them simultaneously." That wouldn't make any sense.

Also on April 20, Enforcement filed a motion seeking to withdraw the Complaint in the 60 case pursuant to Rule 9212(c). In a footnote, Enforcement argues, in effect, that the withdrawal would be without prejudice under the provisions of Rule 9212(c), but suggests: “Whether the withdrawal ... is with or without prejudice is a moot point” Enforcement also requests that the 07 case be stayed until the Justice Department decides whether to retry Respondent on the criminal charges, “and if it determines to retry the case, continuing the stay at least through the entry of judgment therein.”

On May 1, 2006, Respondent filed a response to Enforcement’s filing. First, Respondent opposed Enforcement’s request that it be allowed to withdraw the 60 case Complaint, pointing out that in order to obtain the original stay Enforcement had agreed to dismissal of the 60 case with prejudice if Respondent’s conviction was reversed and the case remanded. In addition, in contrast to his April 20 filing, Respondent urged that the stay of the 07 case should be lifted immediately and the case set for hearing “by mid-July at the latest.”

Discussion

In seeking a stay, Enforcement agreed unequivocally that the 60 case would be dismissed with prejudice in the event that Respondent’s criminal conviction was reversed and the case remanded for retrial, and the Hearing Officer granted Enforcement’s motion in reliance on that commitment. Enforcement is estopped from attempting to recast the terms of dismissal now that those events have come to pass. Whether dismissal with prejudice is “a moot point” under res judicata principles, as Enforcement contends, will be for another adjudicator to determine when and if Enforcement initiates some future proceeding against Respondent. Therefore, the 60 case will be dismissed with prejudice.³

³ This dismissal is not intended to preclude Enforcement from moving to reopen the 60 case in the unlikely event that the Justice Department successfully petitions for certiorari and the Supreme Court reinstutes Respondent’s conviction.

With regard to the 07 case, Respondent argues that he is entitled to a prompt hearing, pointing out that the charges have been pending for several years and affect his ability to work in the securities industry. Moreover, because these charges (unlike most NASD disciplinary charges) have been made public, they have a continuing adverse effect on his reputation. Most significantly, he argues that further delay may impede his ability to defend himself. Indeed, he argues that the case should be dismissed based on the prejudice he has already suffered.

Respondent explains that his previous request that the 07 case be stayed until the completion of the criminal matter was based upon concern that he could not defend himself at an NASD hearing at the same time he was being retried on the criminal charges. Respondent represents, however, that he “now understand[s] that any retrial likely would not occur for some time and therefore would not conflict with a prompt hearing in 07.”

Enforcement, on the other hand, now argues that the stay of the 07 case should continue because it “is a massive matter that will, if it proceeds to hearing, consume enormous resources on the part of the parties and weeks, if not months, of the Hearing Panel’s time.” But that, of course, was true from the outset. Enforcement argues, however, that there would be no need to expend those resources if Respondent “is again convicted on criminal charges and is thereafter permanently barred from the securities industry on that basis.” In August 2004, this argument was more convincing because Respondent had been convicted and the only question was whether the conviction would be set aside on appeal. Now it is unknown whether Respondent will be retried, or, if so, when that will happen, and whether he will be convicted if retried is a matter of speculation.

Notwithstanding the parties’ somewhat peculiar shifts in position on the issue, the Hearing Officer concludes that this case should proceed to a hearing, if the hearing can occur prior to any retrial. Considering the delay that has already occurred, if the hearing does not take

place as quickly as reasonably possible, it will likely never happen, and both the investing public and Respondent will be deprived of a resolution of the charges on their merits.⁴

Thus, the key question is whether, as Respondent now suggests, the hearing can take place before any retrial. Because the 07 case was stayed shortly before the hearing was to begin, the parties had already identified their intended witnesses and proposed exhibits. But that does not mean the hearing can begin as soon as mid-July. As explained above, the charges are complex and the parties had identified more than 100 potential witnesses and 1500 proposed exhibits. Some 20 months have elapsed since the stay, and Enforcement is entitled to a reasonable opportunity to prepare again for the hearing. In that regard, the Hearing Officer notes that Enforcement's lead attorney is also lead counsel in a disciplinary hearing that commenced on May 2 and is scheduled to continue through May 19. Moreover, Respondent suggests that he may wish to file "new motions based on prejudice and on recent legal developments" that would have to be resolved before the hearing could begin, since, if granted, they might obviate the need

⁴ During the August 24, 2004, pre-hearing conference, Enforcement offered the following objection to continuing the stay if Respondent's conviction were reversed and the case remanded for retrial:

[ENFORCEMENT]: With respect to staying the '07 Case until the criminal case is done in its completion, that we oppose. We think that for the reason that the predicate for the stay is Mr. Quattrone's conviction. In the unlikely event, but you never know what is going to happen, that his appeal, his conviction, is reversed Mr. Quattrone would like our case stayed, not just until that decision comes out, but would also in the event that the case is remanded for a new trial he would like it stayed for the length of the new trial. If he decides to take that up on appeal again our case would still be stayed, if it gets remanded again it would still be stayed. This could take years. The practical effect of that would just be to kill our case.

With that said, [Respondent's counsel] called me up the other day and when we were chatting about this he expressed some concerns that if the criminal case was reversed and a new criminal trial was ordered that he was concerned about getting jammed up by having to do two cases at the same time. I acknowledged that concern.

I said that I understood his concern and said that we could work something out, and, if necessary, with the Hearing Officer's input as far as a new scheduling order that got put in place in this case so as to take away that concern, but I don't think that the case should be stayed until the criminal case runs its full course whenever that might be. That could be years.

The Hearing Officer is in full agreement with this assessment. Now that the criminal appeal has been resolved and the 60 case dismissed, the 07 case must move forward to a resolution as quickly as possible, provided that can be done without interference from a retrial of the criminal case.

for a hearing. And Respondent's representation that "any retrial likely would not occur for some time" is far too vague to support either the highly expedited hearing schedule Respondent seeks or his conclusion that a retrial "would not conflict with a prompt hearing in 07."

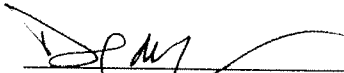
To accommodate these varied concerns, the Hearing Officer will direct the parties to proceed as follows in the 07 case:

1. Respondent shall conduct a good faith inquiry to determine, insofar as possible, the likely course and timing of any further criminal proceedings and file a report with the Office of Hearing Officers by May 15, 2006, with sufficient concrete detail to permit a determination as to whether there is, in fact, a window of opportunity that would make it feasible to hold a hearing in the 07 case without conflicting with a possible retrial in the criminal case. Enforcement is encouraged to conduct its own inquiry and to submit its own report.
2. Respondent shall file any motion for summary disposition based upon alleged prejudicial delay or recent legal developments by June 5, 2006.
3. Enforcement shall begin promptly to determine and implement the steps necessary for it to proceed to a hearing as quickly as reasonably possible, and shall file a report with the Office of Hearing Officers by June 5, 2006, detailing its efforts and conclusions in that regard.
4. By June 12, 2006, the parties shall discuss potential hearing dates and file a joint report, or separate reports, setting forth options.
5. The Hearing Officer will convene a pre-hearing conference on June 15, 2006, at 1:00 p.m., *Eastern Time*, by telephone conference call. At the scheduled date

and time, each of the parties shall call the MCI conference operator at (210) 234-0000. To join the conference call, each party will be asked to provide a password, which is "FitzGerald." 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.

In addition, for the reasons set forth above, the 60 case is dismissed with prejudice.

SO ORDERED.



David M. FitzGerald
Hearing Officer

Dated: May 5, 2006

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