

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF MARKET
REGULATION,

Complainant,

v.

and

Respondents.

Disciplinary Proceeding
No. CMS020143

Hearing Officer—Andrew H. Perkins

ORDER DENYING COMPLAINANT'S MOTION IN LIMINE

On April 14, 2003, the Department of Market Regulation (the "Department") moved to preclude the Respondents from introducing evidence of the following:

1. Trading in Minnesota American, Inc. ("MNAC") stock by RP and HJ, including the circumstances that gave rise to their trading.
2. Discovery of RP's and HJ's trading by _____, Inc. ("BFFI") as well as the reasons for, and circumstances of, their departure from BFFI.
3. The Department's investigation of RP and HJ, including the decision not to charge them in connection with this case.

The Department contends that all such evidence from any witness, and any documents offered in support thereof, are irrelevant. In the Department's view, the Respondents will offer such

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evidence to show that although RP and HJ also traded in MNAC stock, the Department did not charge them with insider trading. The Department argues that its decision to charge or not charge others is irrelevant to the issue of the Respondents' guilt.

At the Final Pre-Hearing Conference on April 30, 2003, the Hearing Officer heard argument of counsel on the Department's Motion. The Respondents pointed out that the Department intends to call HJ and others to testify regarding the trading at BFFI in MNAC stock. Accordingly, they argued that it was premature to grant the Department's Motion and preclude them from further developing the same general facts. Moreover, the Respondents contend in their Memorandum in Opposition that evidence regarding others' knowledge of the proposed merger between MNAC and BFFI, and their use of that knowledge, is relevant to the central determination of whether the Respondents improperly traded on "confidential and material" information.

Evidence of RP's and HJ's knowledge, trading, and compliance with the applicable securities rules and laws is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Indeed, the standard for finding relevance "is not high." *See, e.g., United States v. Southland Corp.*, 760 F.2d 1366, 1375 (2d Cir. 1985), *cert. denied*, 474 U.S. 825, 88 L. Ed. 2d 67, 106 S. Ct. 82 (1985).

Here, based on a review of the papers filed by the Parties and counsel's arguments at the Final Pre-Hearing Conference, the Hearing Officer cannot conclude that the evidence the Department seeks to preclude is irrelevant. From the Parties' proffers, it appears that the relevancy of at least some of the challenged evidence will depend upon the scope of the

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Department's proof.¹ Accordingly, the Motion in Limine is denied as premature. The Department may renew the Motion when the Respondents seek to introduce the challenged evidence.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

April 30, 2003

¹ In so ruling, the Hearing Officer does not suggest that the Respondents may defend by arguing that the Department declined to charge others who traded in MNAC stock. Typically, the reason behind the Department's decision to bring or not bring a disciplinary proceeding against another is not relevant to a determination of the issues in a disciplinary proceeding.