

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 00-13 (CMS000015).

**NASD REGULATION, INC.  
OFFICE OF HEARING OFFICERS**

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DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. CMS000015
v.	:	
	:	Hearing Officer - GAC
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	:	
	:	
	:	
	:	
	:	
Respondents.	:	

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**NOTICE OF WITHDRAWAL OF HEARING OFFICER**

On May 26, 2000, Respondents \_\_\_\_\_ (“\_\_\_\_\_”) and \_\_\_\_\_ Securities, Inc. (“\_\_\_\_\_”)(together as “Respondents”) filed a Motion for an Order of Disqualification of the Hearing Officer (“Motion”), wherein the Respondents requested that Gary A. Carleton be disqualified, pursuant to Rule 9233(b). The Motion was accompanied by a supporting affidavit of \_\_\_\_\_, counsel for the Respondents. Under Rule 9233(c), a motion for disqualification is decided by the Chief Hearing Officer. The Motion requested, in the alternative, that Gary A. Carleton recuse himself as the Hearing Officer pursuant to Rule 9233(a). The Respondents represent that the Department of Enforcement (“Enforcement”) takes no position with regard to the Motion.

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After carefully reviewing the Motion, and considering all relevant facts, the Hearing Officer determined that it would be in the interest of justice for him to withdraw from this matter, and so notified the Chief Hearing Officer, pursuant to Rule 9233(a).

The Motion alleges three “sets of circumstances” that Respondents argue disqualify the Hearing Officer from serving on this case. Two of the “sets of circumstances” clearly do not form any legal or ethical basis for a disqualification or withdrawal of the Hearing Officer, and are rejected. First, the Hearing Officer is not required to withdraw based on his previous adjudication of Respondent \_\_\_\_\_.<sup>1</sup> The presumption is that an adjudicator is impartial until proven otherwise.<sup>2</sup> Absent a basis for concluding that a Hearing Officer harbors a “deep-seated favoritism or antagonism that would make fair judgment impossible,” there is no need to disqualify a judge from hearing a subsequent trial for the same Respondent.<sup>3</sup>

In this case, there has been no showing of favoritism or antagonism toward Respondent \_\_\_\_\_, and the Chief Hearing Officer has found none. A review of the non-summary suspension proceeding in which the Hearing Officer previously served as the adjudicator for Respondent \_\_\_\_\_ shows that the Hearing Officer did not “completely [reject]” Respondent \_\_\_\_\_’s testimony (\_\_\_\_\_ Affidavit, 9), but rather determined, based on the evidence presented, not to rule in favor of Respondent \_\_\_\_\_.

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<sup>1</sup> Concerning a similar disqualification issue, the Office of Hearing Officers previously explained that, “...even if there were some ‘correlation’ between the two proceedings, the Panelist’s service on the [Respondent’s] prior case would not require that he be disqualified from this proceeding.” OHO Order, 99-02 (CAF980002), at 4. Thus, there is no *automatic* disqualification for panelists who have previously adjudicated a Respondent in another matter.

<sup>2</sup> See id. at 3.

<sup>3</sup> Liteky v. United States, 510 U.S. 540, 550, 555 (1994). The Supreme Court also noted here that it is “normal and proper for a judge ... to sit in successive trials involving the same defendant.” See id. at 550.

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Second, the Hearing Officer is not required to withdraw based on the fact that he was previously employed by the Complainant Department of Enforcement or worked with the individual who signed the Complaint in this case.<sup>4</sup> Contrary to the allegations in the Motion, the person who signed the Complaint was not the Hearing Officer's "former boss;" the Hearing Officer did not work with him for "many years;" and they did not have a personal relationship outside of the work environment.

The third circumstance alleged by the Respondents dealt with the relationship between the Hearing Officer and JF, who the Respondents state will be a key fact witness for them. In considering that relationship, the Hearing Officer has exercised his discretion to withdraw from the proceeding based on his previous extensive contacts with JF. The Hearing Officer noted that, while employed as an attorney with Enforcement, he conducted an extensive investigation that included a review of certain of JF's securities business activities. During the course of the investigation, the Hearing Officer interviewed, or attempted to interview JF on more than one occasion. The Hearing Officer also represented Enforcement in an NASD disciplinary hearing and its appeal to the National Business Conduct Committee, which named JF as a respondent.<sup>5</sup>

Given the Hearing Officer's extensive investigative regulatory involvement with an individual who Respondents assert will be a key factual witness, the Hearing Officer decided to

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<sup>4</sup> See OHO Order 97-4 (CMS960105), at 7. The Order notes that, "[the Hearing Officer's] prior association with NASD Enforcement does not automatically or inferentially support disqualification".

<sup>5</sup> That disciplinary action, in which JF was charged with failing to cooperate with the NASD, was eventually dismissed by the U.S. Court of Appeals for the Second Circuit. The court noted that, at the time JF's cooperation was requested, the NASD's Market Surveillance Committee lacked the requisite authority under Rule 8210 to require such cooperation.

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avoid any appearance of bias by withdrawing from the proceeding. The Parties will receive a separate notice appointing a new Hearing Officer.

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Linda D. Fienberg  
Chief Hearing Officer

Dated: Washington, DC  
June 13, 2000