

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Expedited Proceeding
No. ARB040033

Hearing Officer—Andrew H. Perkins

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

The Respondent has filed a motion to dismiss this proceeding on two grounds. First, the Respondent contends that this expedited proceeding should be dismissed because, by Order dated May 26, 2004, the Hearing Officer granted the Complainant's motion to dismiss a prior Non-Summary Suspension Proceeding involving the Respondent's failure to pay the same arbitration awards that underlie the present proceeding.¹ The Complainant requested that the Non-Summary Suspension Proceeding be dismissed because the Complainant had determined that the Respondent had demonstrated to the Complainant's satisfaction that he had an inability to pay the arbitration awards. In sum, the Respondent argues that the dismissal of the earlier proceeding was granted "with prejudice" to the ability of the Complainant to proceed anew. Second, the Respondent contends that this proceeding should be dismissed because the Complainant filed

¹ *Department of Enforcement v. _____*, Non-Summary Suspension Proceeding No. ARB040019. The Non-Summary Suspension Proceeding arose from a Notice of Suspension dated May 5, 2004.

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certain documents a day after the deadline set by the Hearing Officer in the Order Setting Pre-Hearing and Hearing Schedule dated September 10, 2004 ("Scheduling Order"). For the reasons set forth below, the Hearing Officer denies the Respondent's Motion.

Discussion

I. Voluntary Dismissal of the Earlier Non-Summary Suspension Proceeding does not Preclude this Proceeding

Contrary to the Respondent's contention, the voluntary discontinuance of the earlier Non-Summary Suspension Proceeding does not preclude the Complainant from re-instituting proceedings to suspend the Respondent for failure to pay the underlying arbitration awards. The Hearing Officer's May 26, 2004 Order did not make any findings regarding the Respondent's financial resources; the Order recites the grounds the Complainant gave for its uncontested motion to dismiss the proceeding. Accordingly, there is no basis for the Respondent's contention that the Order was a final determination of the Respondent's claim of financial inability to pay the awards.

II. Complainant's Late Filing does not Warrant Dismissal of this Proceeding

The Respondent seeks to have the Complainant sanctioned for its failure to meet a filing deadline by one day. Due to a computer systems problem, the Complainant was unable to file timely proof of service of the suspension notice on the Respondent and evidence showing that the underlying debt is not subject to the automatic stay of the Bankruptcy Court. When counsel for the Complainant realized that she would be unable to meet the deadline, she notified both the Office of Hearing Officers and counsel for the Respondent. Significantly, the Respondent did not object to the one-day delay at that time, nor has the Respondent pointed to any prejudice he suffered due to the delay. Nevertheless, the Respondent requests this extreme sanction because the Scheduling Order states:

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Any failure by Respondent to appear at the hearing or to comply with the pre-hearing schedule may be deemed an abandonment of the Respondent's defenses to the notice and a waiver of any opportunity for a hearing, in which case the notice will be deemed to be final NASD action.

In essence, the Respondent argues that fairness requires that the same strict standard be applied to the Complainant. However, neither the Scheduling Order nor the Code of Procedure supports the Respondent's argument. Because these are expedited proceedings, Procedural Rule 9559(m) mandates the dismissal of a respondent's hearing request where the respondent fails to comply fully with all orders and make all required appearances. The Rule does not apply to the Complainant. Moreover, absent a strong showing of prejudice to the Respondent, the extreme sanction of dismissal of the proceeding would be unwarranted.

Accordingly, the Hearing Officer denies the Respondent's Motion to Dismiss.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

October 19, 2004