

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,		
	Complainant	Disciplinary Proceeding No. C9B040059
v.		
Respondent 1		Hearing Officer – SW
Respondent 2		
Respondent 3		
	Respondents.	

**ORDER DENYING MOTION TO DISQUALIFY
HEARING OFFICER WITHERSPOON**

On February 21, 2005, the Respondents filed a second motion, pursuant to Rule 9233(b), to disqualify Hearing Officer Witherspoon.¹ Citing orders that Hearing Officer Witherspoon issued denying various motions filed by them, the Respondents allege that Hearing Officer Witherspoon has exhibited a “deep-seated favoritism or antagonism that would make a fair judgment impossible.”

Rule 9233(b) provides that a party may move to disqualify a Hearing Officer “based upon a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the Hearing Officer’s fairness might reasonably be questioned . . .”

¹ In a January 24, 2005 motion, the Respondents initially requested that Hearing Officer Witherspoon be disqualified. The Respondents’ January 24, 2005 motion to disqualify was denied in a January 26, 2005 order.

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NASD has explained that “the [Rule 9233(b)] standard borrows heavily from the conflict of interest standard applicable to federal judges,” stating:

The Association intends to rely on [the] judicial interpretation of the clause “in which his impartiality might reasonably be questioned” in 28 U.S.C. 455(a), in interpreting the proposed clause, “if circumstances exist where . . . [the Adjudicator's] fairness might reasonably be questioned.” The notions of impartiality and fairness are inextricably linked in an analysis of whether an Adjudicator fairly judges a proceeding.

62 Fed. Reg. 25,255-256 (May 8, 1997).

The majority of the rulings cited by the Respondents in their February 21, 2005 disqualification motion as displaying personal bias were cited in their January 24, 2005 disqualification motion. In the January 26, 2005 order denying the Respondent's disqualification motion, I ruled that such rulings did not exhibit favoritism or antagonism, let alone the sort of favoritism or antagonism that would make it impossible for Hearing Officer Witherspoon to render a fair judgment on the issues in this proceeding.

The new rulings cited in the Respondents' February 21, 2005 disqualification motion relate to Hearing Officer Witherspoon's granting of Enforcement's oral motion for a default, which motion was made during the January 27, 2005 pre-hearing conference, at which the Respondents failed to appear.

The following facts or events are relevant to my decision in this order again denying Respondents' disqualification motion. On December 21, 2005, Hearing Officer Witherspoon issued an order scheduling a pre-hearing conference on January 27, 2005. The January 27, 2005 date was a date agreed to by the Respondents. The December 21, 2005 order specifically stated “Each Party is reminded that a failure to appear at the Conference, in person or through counsel, or to remain throughout the entire Conference, without the prior filing of a doctor's opinion that

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explicitly substantiates the Party's assertions regarding his or her inability to participate in telephone call, may be deemed a default."

On January 26, 2005, Respondent 3 filed a motion requesting a postponement because of the alleged illness of Respondent 2, but failed to supply documents that substantiated Respondent 2's inability to participate in the pre-hearing conference or to offer any reason why Respondent 3 could not participate in the conference.² The January 26, 2005 motion also failed to suggest alternative dates when Respondents would be available for the pre-hearing conference. The Respondents failed to appear at the January 27, 2005 pre-hearing conference.

At the duly scheduled January 27, 2005 pre-hearing conference, Enforcement made an oral motion to hold the Respondents in default. Accordingly, on January 28, 2005, Hearing Officer Witherspoon issued an order deeming the Respondents in default for their failure to appear.

On January 28, 2005, the Respondents filed doctors' notes stating that the Respondents would not be available to work for a few days until after February 4, 2005. Accordingly, in a February 1, 2005 order, Hearing Officer Witherspoon scheduled a pre-hearing conference on February 8, 2005. In the February 1, 2005 order, she stated that the purpose of the pre-hearing conference was to determine whether the January 28, 2005 order deeming the Respondents in default should be vacated.³

On February 3, 2005, the Respondents sent a letter indicating that February 8, 2005 was a Chinese holiday, and they therefore could not participate in a pre-hearing conference.⁴ The

² This was not the first time that the Respondents have alleged ill health as an explanation for their request to postpone a pre-hearing conference.

³ The February 1, 2005 order also stated that the medical information previously provided to the Office of Hearing Officers did not substantiate the medical conditions alleged by the Respondents.

⁴ The February 3, 2005 motion also included two doctors' notes regarding treatment of Respondent 2 in December 2004, but the notes did not substantiate Respondent 2's alleged January 2005 illness.

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Respondents' February 3, 2005 motion again failed to list alternative dates or times when they would be available for a pre-hearing conference.

On February 4, 2005, Hearing Officer Witherspoon issued an order re-scheduling the pre-hearing conference to February 14, 2005 after the Chinese holiday, and providing the Respondents with the option of proceeding on the papers rather than holding a hearing.

On February 10, 2005, a week after the February 4, 2005 order was issued, the Respondents filed a letter requesting a postponement of the February 14 conference. The Respondents stated that they had scheduled medical appointments on February 14, 2005 about a month previously. The Respondents did not suggest alternative dates or times for the pre-hearing conference. In Hearing Officer Witherspoon's absence, but with her approval, the Deputy Chief Hearing Officer denied the Respondents' request to postpone the pre-hearing conference in an order dated February 11, 2005.

On February 14, 2005, the day of the pre-hearing conference and the day that the Respondents represented that they had medical appointments, the Respondents filed an additional request that the pre-hearing conference be postponed. The Respondents again failed to suggest any alternative dates or times for the pre-hearing conference. The Hearing Officer denied the request.

At the February 14, 2005, pre-hearing conference, Enforcement made an oral motion to extend the deadline for filing its default motion. In an order dated February 14, 2005, Hearing Officer Witherspoon granted Enforcement's motion.

On February 17, 2005, upon receipt of additional medical information from the Respondents, the Hearing Officer Witherspoon directed her case administrator to contact the

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Respondents via telephone to obtain from them a date during the week of February 28, 2005 through March 4, 2005 that they would be available to participate in a pre-hearing conference. Respondent 2 directed the case administrator to call back on Tuesday, February 22, 2005. On Tuesday, February 22, 2005, Respondent 2 directed the case administrator to speak to her husband, Respondent 3, who stated that he was unwilling to provide a date for a pre-hearing conference until such time as the Hearing Officer "corrected" her rulings.

Based on the above information, I do not deem Hearing Officer Witherspoon's rulings to demonstrate any favoritism or antagonism that would warrant that she be disqualified. To the contrary, Hearing Officer Witherspoon has shown utmost patience with the Respondents and their repeated attempts to avoid participating in pre-hearing conferences. She has repeatedly given them opportunities to explain their failures to comply with her orders. The Respondents have demonstrated over and over again their clear refusal to abide by the procedures set forth in the NASD Rules and in the Hearing Officer's orders.

It is clear that Respondents disagree with Hearing Officer Witherspoon's rulings, but their disagreements do not afford a basis for disqualifying Hearing Officer Witherspoon. Therefore,

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the Respondents' motion to disqualify Hearing Officer Witherspoon is denied.

SO ORDERED.

Linda D. Fienberg
Chief Hearing Officer

Dated: Washington, DC
February 28, 2005