

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

NYPPEX, LLC (CRD No. 47654),
Laurence Allen (CRD No. 1063970), and
Michael Schunk (CRD No. 732595),

Respondents.

Disciplinary Proceeding
No. 2019064813801

Hearing Officer– DRS

**SUPPLEMENTAL ORDER REGARDING DENIAL
OF RESPONDENTS' REQUEST FOR POSTPONEMENT**

I. Introduction

The hearing in this disciplinary proceeding began on March 1, 2022. After the luncheon recess that day, counsel for Enforcement announced that he had just learned that during the break, one of the hearing panelists—Kent Lund—had participated in a telephone call with FINRA staff about a FINRA cycle examination of his member firm. A staff member on that call included a person on Enforcement's witness list in this proceeding. I then heard recommendations from the parties about how to proceed in light of this development. After that, I informed the parties that Mr. Lund was withdrawing as a panelist and that the Office of Hearing Officers ("OHO") would notify the parties when a replacement panelist had been selected so that the hearing could resume. I then adjourned the hearing.

Later that day, the Chief Hearing Officer issued a notice informing the parties that Larry Hayden was appointed to serve as an Extended Hearing Panelist in this proceeding, replacing Mr. Lund, who had withdrawn.¹ The OHO email transmitting the notice advised the parties that the hearing would resume on March 3, 2022, at 9:30 a.m. (ET).

On March 2, 2022, Respondents moved to postpone the resumption of the hearing ("Motion").² The Motion asserted that OHO had replaced Mr. Lund "with another Panelist who does not have the profile that would make him as sympathetic and understanding of the situation as would Mr. Lund."³ They argued that Mr. Lund's "profile" and that of his firm "matches up

¹ Notice of Appointment of Replacement Extended Hearing Panelist.

² Respondents' Motion for a Postponement.

³ Motion 4–5.

very well with” them, thus he was well-suited to understand the issues in the case and appreciate Respondents’ defenses.⁴ As a result, Respondents announced, they “were thrilled to have Mr. Lund on our hearing Panel.”⁵

They did not, however, show the same enthusiasm for Mr. Hayden. Respondents complained that Mr. Hayden had “apparently been retired from the business for over 20 years, and [his] firm has not been in existence for over 20 years, when FINRA wasn’t even in existence. . . . [T]he fact is,” they continued, “he will not have the sympathy and understanding that a Panelist like Mr. Lund would have had” because Mr. Lund, unlike Mr. Hayden, would have “current, intimate knowledge of FINRA’s at-times overbearing tactics and erroneous positions.”⁶ For these reasons, Respondents requested that I postpone the hearing and replace Mr. Hayden “with a Panelist with a profile as similar as possible to that of Mr. Lund.”⁷

I held a videoconference in the afternoon on March 2 to hear arguments on the Motion. Later that day, I denied the Motion in an abbreviated order. I explained in my order that I issued it “now, so the parties can plan accordingly,” given that in the order, I scheduled the hearing to resume the next day.⁸ The order also informed the parties that I would explain in a supplemental order why I denied the Motion. I now do so below.

II. Discussion

The Motion represented that it was made under FINRA Rule 9222, which governs extensions of time, postponements, and adjournments. When considering a motion to postpone the start of a hearing or adjourning a hearing once it begins, the rule required that I consider the following factors:

- (A) the length of the proceeding to date;
- (B) the number of postponements, adjournments, or extensions already granted;
- (C) the stage of the proceedings at the time of the request;
- (D) potential harm to the investing public if an extension of time, adjournment, or postponement is granted; and
- (E) such other matters as justice may require.⁹

⁴ Motion 2.

⁵ Motion 3.

⁶ Motion 3

⁷ Motion 5.

⁸ Order Denying Respondents’ Motion for a Postponement.

⁹ FINRA Rule 9222(b)(1).

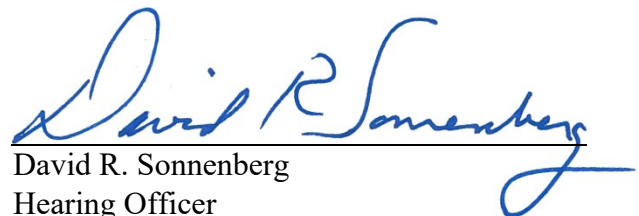
Several of these factors weighed against granting the Motion. The proceeding had been pending for a long period (nine months); Respondents made the request at a late stage in the proceedings (after the hearing started); and there was substantial potential harm to the investing public had I granted the Motion, given that the Complaint contains fraud allegations. On the other hand, I had granted no prior postponements, and the issue giving rise to the Motion had just occurred. Balancing these factors, however, did not resolve whether to grant the Motion; the key issue was whether the asserted basis for the Motion had merit. I concluded that it did not.

The grounds for the Motion were that Mr. Hayden should be replaced by another panelist who fit a particular profile, and the hearing should be postponed until that occurred. Essentially, Respondents moved for the disqualification of a panelist, although the Motion did not invoke FINRA Rule 9234, which provides the mechanism for disqualifying an extended hearing panelist. According to Rule 9234(b)(1), if a party files a motion to disqualify an extended hearing panelist, the motion must be “based upon a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the Panelist’s fairness might reasonably be questioned.” Further, the disqualification motion must “be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification, and the dates on which the Party learned of those facts.” Once a party files a disqualification motion, “the Hearing Officer shall promptly investigate whether disqualification is required and shall issue a written ruling on the motion.”

I reviewed the Motion and considered the parties’ arguments. I also investigated whether disqualification was required. As a result, I found no basis to disqualify Mr. Hayden and replace him with another panelist. The request to disqualify was deficient as it lacked the required supporting affidavit. Moreover, the request was devoid of any facts suggesting—let alone proving—that Mr. Hayden had a conflict of interest or bias or that circumstances otherwise existed where his fairness might have reasonably been questioned. Respondents merely assumed, without support, that they are entitled to a panelist who they believe is favorably inclined to accept their defenses. Going a step further, they then speculated, based on scant information about Mr. Lund and Mr. Hayden’s backgrounds, that Mr. Hayden likely lacked that receptiveness. None of these arguments established a basis under FINRA Rule 9234 for disqualifying Mr. Hayden and replacing him with someone else.

Because the request for disqualification and replacement was the sole basis for the Motion, I found that Respondents had not established good cause for a postponement, and I denied it.

SO ORDERED.


David R. Sonnenberg
Hearing Officer

Dated: March 8, 2022

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