

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. CLI050007

Hearing Officer—Andrew H. Perkins

**ORDER PRECLUDING EVIDENCE
AND DENYING RESPONDENT'S MOTION TO CONTINUE HEARING**

I. Enforcement's Motion to Preclude Evidence

On March 14, 2006, the Department of Enforcement filed a motion requesting entry of an order precluding the Respondent from introducing any evidence at the hearing other than his own testimony because he failed to file and serve a witness list, an exhibit list, and copies of his proposed exhibits in accordance with the schedule set by the Hearing Officer. The case is set for hearing on April 4, 2006.

Rule 9280(b)(2) provides that:

A Party that without substantial justification fails to disclose information . . . required by order of the Hearing Officer . . . shall not, unless such failure is harmless, be permitted to use as evidence at a hearing . . . any witness or information not so disclosed.

By Order dated July 15, 2005, the parties were to file on or before March 6, 2006, the documents they intend to offer into evidence and a list of the witnesses they intend to call to testify at the hearing. The Respondent did not file either.

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 06-28 (CLI050007).

Upon receipt of Enforcement's motion to preclude evidence, the Hearing Officer issued an order requiring the Respondent to appear at a pre-hearing conference on March 24, 2006, to show cause why Enforcement's motion should not be granted. The Respondent failed to appear. Accordingly, Enforcement's motion is granted.

To the extent that Enforcement calls witnesses at the hearing, the Respondent will be afforded the opportunity to cross-examine those witnesses. Further, the Respondent will be allowed to rely upon any exhibits on Enforcement's Exhibit List. However, the Respondent will not be allowed to call any other witnesses or introduce into evidence any other documents.

The orderly conduct of the hearing under NASD Rules of Procedure does not allow parties to "hide the ball" and then produce surprise evidence at the hearing. Accordingly, Enforcement's motion to preclude Respondents from offering evidence at the hearing is granted, to the extent consistent with this Order.

II. Respondent's Motion to Postpone Hearing

On March 22, 2006, the Respondent submitted a letter request to postpone the hearing for 90 days so that he could have additional time to retain replacement counsel. Enforcement filed its opposition the same day. For the reasons discussed below, the Respondent's request for a continuance is denied.

Under Code of Procedure Rule 9222, the Hearing Officer may, for good cause shown, extend any time limits prescribed by the Code, and postpone the commencement of a hearing for a "reasonable period of time." Further, pursuant to Rule 9222(b)(2), a Hearing Officer may not postpone a hearing or grant extensions of time in excess of 28 days, without providing reasons why a longer period is necessary.

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In determining whether to grant a motion for the continuance of a hearing, Rule 9222(b)(1) specifies that the Hearing Officer shall consider the following five factors: (1) the length of the proceeding to date; (2) the number of postponements, adjournments, or extensions already granted; (3) the stage of the proceedings at the time of the request; (4) potential harm to the investing public if an extension of time, adjournment, or postponement is granted; and (5) such other matters as justice may require.

While the Rule undoubtedly is intended to give Hearing Officers the ability to manage their dockets, the Rule primarily is intended to ensure prompt resolution of the NASD's disciplinary proceedings, which is necessary to enable NASD to carry out its regulatory mandate and fulfill its responsibilities in protecting the public interest. Upon careful consideration of the Respondent's argument, and balancing the foregoing factors, the Hearing Officer has concluded that there is no basis to grant the relief requested.

The Hearing Officer gives primary consideration to the nature and extent of the misconduct alleged in the Complaint, which raise a legitimate concern of the potential for future harm to investors. As the Department of Enforcement points out in its opposition, the Complaint charges serious misconduct—unauthorized activity in a customer's account. Moreover, the Respondent remains registered as a General Securities Representative and employed by an NASD member firm. These factors weigh heavily in favor of a quick resolution of this case. Accordingly, the Hearing Officer finds that it would be counter to the public interest to delay the hearing.

The Hearing Officer further notes that this case has been pending for a considerable time—11 months—although there have not been previous requests for a

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postponement. And the hearing schedule was set eight months ago. These factors also weigh in favor of denying the Respondent's request for an adjournment.

Moreover, when the Respondent's counsel withdrew on March 1, 2006, the Hearing Officer issued an order confirming that the hearing and pre-hearing schedules remained unchanged. Nonetheless, the Respondent waited three weeks before requesting an adjournment of the hearing. During this time, the complaining witness has made arrangements to take off time from work to travel from Washington State to New York City to testify at the hearing. In addition, Enforcement has purchased the customer's ticket and made other travel arrangements on his behalf. Any postponement of the hearing will require that the complaining witness again make arrangements to be absent from work to attend the hearing.¹

In conclusion, the Hearing Officer finds that the Respondent had adequate time to retain new counsel if he had desired to do so and that he has ample time to prepare for the hearing. On the other hand, the Respondent has shown a lack of diligence. Not only did he fail to file any pre-hearing submissions, but he failed to attend the pre-hearing conference on March 24, 2006.

¹ Cf. *Falcon Trading Group, LTD v. SEC*, 102 F.3d 579 (D.C. Cir. 1996) (noting that NASD had good cause to proceed with a hearing in part because an adjournment would have required hearing panel members and witnesses to cancel their travel plans and rearrange their schedules).

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Balancing all of the foregoing factors, the Hearing Officer finds that the Respondent failed to show good cause to adjourn the hearing. Accordingly, the Respondent's motion for an adjournment is denied.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

March 24, 2006