

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 648/ January 25, 2010

ADMINISTRATIVE PROCEEDING
File No. 3-13481

In the Matter of	:	ORDER DENYING MOTIONS TO
	:	CORRECT MANIFEST ERRORS
DAVID G. GHYSELS,	:	OF FACT AND DENYING
KENNETH E. MAHAFFY, JR., and	:	MOTIONS TO STAY AND FOR
LINUS N. NWAIGWE	:	A FACT-FINDING HEARING
	:	

Background

The Securities and Exchange Commission (Commission or SEC) instituted this proceeding with its Corrected Order Instituting Administrative Proceedings (OIP) on May 21, 2009. On April 22, 2009, a jury found Respondents guilty on one count of conspiracy to commit securities fraud in the United States District Court in the Eastern District of New York (District Court). United States v. Mahaffy, No. 05-CR-613 (JG). Sentencing was scheduled for July 31, 2009, but continued several times. Thereafter, Respondents were sentenced on December 3, 2009.¹ An Initial Decision was issued on December 11, 2009.²

On December 22, 2009, Respondent Kenneth E. Mahaffy, Jr. (Mahaffy), filed a Declaration in support of his Motions to Correct Manifest Errors of Fact and For a Stay of This Proceeding Pending Appeal or Resolution of an Issue in the Criminal Case Related to the SEC's Disclosure of Its Documents (Mahaffy Motions). On December 28, 2009, Respondent David G. Ghysels (Ghysels) filed a Motion to Correct Manifest Errors of Fact, and a Declaration in support thereof (Ghysels Motion).³ On January 8, 2010, the Division of Enforcement (Division)

¹ On December 3, 2009, the District Court additionally denied Respondents' motions for acquittal and for a new trial and Respondent Kenneth E. Mahaffy, Jr.'s, motion to dismiss. Minute Entry, Mahaffy, No. 05-CR-613 (JG). On December 29, 2009, the District Court entered Judgments of Conviction against all three Respondents. Judgment, Mahaffy, No. 05-CR-613 (JG).

² Service of the OIP was effective on June 3, 2009; the deadline for issuing an Initial Decision was December 30, 2009. See 17 C.F.R. §§ 201.220(b) and .360(b); OIP at 3.

³ Rule 111(h) of the Commission's Rules of Practice allows a party to file a motion to correct a manifest error of fact within ten days of the Initial Decision. See 17 C.F.R. § 201.111(h).

filed its Opposition to Mahaffy and Ghysels' Motions to Correct Manifest Errors (Opposition).⁴ On January 20, 2010, Mahaffy filed a Reply Declaration to the Division's Opposition, and various Exhibits in support thereof (Mahaffy Reply), reiterating his request that the proceeding be stayed but also, in the alternative, requesting that a fact-finding hearing regarding the Division's production of documents be ordered.

In a letter, dated January 6, 2010, Respondent Linus N. Nwaigwe (Nwaigwe) requested that he be allowed to join in the Mahaffy Motions and in the Ghysels Motion. Nwaigwe's request, although untimely, is GRANTED. See 17 C.F.R. § 201.111(h).

Alleged Manifest Errors of Fact in the Initial Decision

A motion to correct manifest error of fact is properly filed only if the basis for the motion is "a patent misstatement of fact in the initial decision." (Id.) A patent misstatement is something that is "readily visible or intelligible: obvious." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 849 (10th ed. 2001).

Fact 1

Mahaffy alleges that, in the Background, the statement, "The Division of Enforcement (Division) has made its documents available for copying and inspection," on page 1 of the Initial Decision, is erroneous because the Division's obligation had not yet been fully satisfied.

Commission Rule of Practice 230(d) (Rule) requires, as relevant here, the Division to commence making documents available to a respondent for inspection and copying no later than seven days after service of the OIP. See 17 C.F.R. § 201.230(d). In October, when the Initial Decision was being written, the case file did not contain correspondence from the Division advising Respondents that the investigative file was available for inspection and copying.

Upon discovering this potential procedural deficiency, the undersigned sought to ensure that all Respondents had an opportunity to review the Division's investigative file and had the Division notify Respondents of such right.⁵ (Mahaffy Motions at 2-3; Opposition at 3.) At this time, Mahaffy was offered the opportunity to copy the documents or, in the alternative, to inspect them. Mahaffy chose to inspect them. (Opposition at 3-4.) The parties initially scheduled the document inspection for November 19th, then rescheduled it, at Mahaffy's request, for November 23rd. (Mahaffy Motions at 3; Opposition at 4 n.2; Mahaffy Reply, Ex. I at 1.)

Based upon their respective certificate of service dates, December 17, 2009, and December 19, 2009, the Ghysels Motion and the Mahaffy Motions were timely filed.

⁴ The Administrative Law Judge has twenty days from the filing date of the Division's Opposition, or until January 28, 2010, to rule on Respondents' motions. See 17 C.F.R. § 201.111(h).

⁵ The Division represents that it communicated to Respondents their opportunity to copy documents on October 22, 2009, and followed up with a letter, dated November 3, 2009. (Opposition at 4 n.2.) Only Mahaffy requested an opportunity to review the record. (Opposition at 3.)

Thereafter, at the Division's request, the inspection was rescheduled for December 1st, and then moved to December 7th, when Mahaffy began inspecting the Division's documents. (Mahaffy Motions at 3; Opposition at 4; Mahaffy Reply, Ex I at 2.) On December 10th, Mahaffy returned to the Division's offices to continue his inspection. (Id.) On December 17th, he arranged to have the documents copied on December 21st.⁶ (Mahaffy Motions at 4; Opposition at 4 n.3.) The Division states that it has fully complied with its discovery obligations, by making all documents available, as of January 7, 2010. (Opposition at 4.)

I DENY Mahaffy's Motion to Correct Manifest Errors of Fact relating to the production of documents. While not all documents had been made available at the time of the Initial Decision, Mahaffy has failed to establish that the failure to do so was not harmless error in the instant proceeding, as required by Commission Rule of Practice 230(h).

Facts 2, 3, and 4

Respondents allege that the statement, in the Findings of Fact on page 4 of the Initial Decision, "Nwaigwe, as an employee of Watley, agreed with Ghysels and Mahaffy, employees of Merrill Lynch, Citigroup/Smith Barney, or Lehman, to have the brokerage houses' squawk box information transmitted into Watley's offices," and the statement, in the Conclusions of Law on page 5 of the Initial Decision, that "Mahaffy and Ghysels wrongfully permitted Nwaigwe, and other day traders, to listen to transmissions made over squawk boxes," are erroneous because the Respondents had never met each other prior to the underlying criminal proceeding and the evidence at trial did not prove otherwise. (Mahaffy Motions at 17; Ghysels Motion at 2-3.)

Respondents further allege that the statement, on page 5 of the Initial Decision, "Such transmissions contained references to orders to buy/sell quantities of stock large enough to effect the market price of the affected stock" is incorrect because it was not proven at trial. (Mahaffy Motions at 17; Ghysels Motion at 3.)

The contentions set forth in Facts 2, 3, and 4 are not manifest errors of fact. They appear to be requests to comment on counsel's version of what was proven at trial or to weigh evidence that was presented to the jury in the criminal proceeding. I decline to do either. I DENY Respondents' Motions to Correct Manifest Errors of Fact 2 through 4.

Fact 5

Respondents allege that my conclusion of law, on page 6 of the Initial Decision, that the risk of Respondents' future violations is strong, is erroneous because Respondents enjoyed long careers that were otherwise unblemished and their choice to go to trial is "not evidence of bad character or bad propensity." (Mahaffy Motions at 17; Ghysels Motion at 3-4.)

⁶ The documents "consisted of about 65 cartons of paper documents, including one carton full of about sixteen transcripts of depositions taken by the SEC." (Mahaffy Motions at 3.) Mahaffy was advised that the Division's production "included hard and smart drives containing about 270,000 electronic documents and an additional four boxes containing CDs and DVDs," some of which may have been duplicative. (Mahaffy Motions at 3-4.)

The conclusion that there is a risk of future violations by the Respondents is based on the criminal convictions and cannot properly serve as the basis for a manifest error of fact within the meaning of Rule 111(h). Accordingly, Respondents' Motions to Correct Manifest Errors of Fact 5 is DENIED.

Motions to Stay Proceeding and For a Fact-Finding Hearing

Mahaffy moves for a stay to be granted pending his appeal in the underlying criminal case. (Mahaffy Motions at 1, 18.) Under Commission precedent, however, a pending appeal is not a valid reason for delaying the resolution of this matter. See Joseph P. Galluzzi, 55 S.E.C. 1110, 1116 n.21 (2002); Jon Edelman, 52 S.E.C. 789, 790 (1996). In the alternative, Mahaffy moves for a stay to be granted pending resolution of an issue in the underlying criminal case related to the Division's disclosure of its documents. (Mahaffy Motions at 1, 18.) Mahaffy contends that the inspected documents contain exculpatory evidence pertinent to his defense in the underlying criminal proceeding and further requests that, in the event a stay is not granted, that a fact-finding hearing, regarding the Division's production of documents, be ordered.⁷ (Mahaffy Motions at 7-16; Mahaffy Reply at 1, 5-11.) However, the criminal convictions provide grounds for the Administrative Law Judge to sanction Respondents, as it is in the public interest. If Respondents are successful in having their convictions vacated or reversed on appeal, they may ask the Commission to reconsider any sanctions ordered in this administrative proceeding at that time. See Jimmy Dale Swink, Jr., 52 S.E.C. 379 (1995); Michael T. Studer, 57 S.E.C. 890, 897 (2004), aff'd, 148 Fed. Appx. 58 (2d Cir. 2005).

Accordingly, Mahaffy's motions to stay the proceeding or, in the alternative that a fact-finding hearing be ordered, are DENIED.

SO ORDERED.

Robert G. Mahony
Administrative Law Judge

⁷ The undersigned does not have the authority to stay the twenty-one day time period Respondents have in which to file an appeal after ruling on Respondents' motions or to order a fact-finding hearing regarding document production. See 17 C.F.R. §§ 201.111, .410. The parties represent, however, that the United States Attorney's Office and Mahaffy are currently litigating, before the District Court, the issue of alleged exculpatory information in some of the transcripts the Division made available to Mahaffy. (Mahaffy's Motions at 5-6, 18; Opposition at 7; Mahaffy Reply at 1-5.)

