UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9583 / May 8, 2014

SECURITIES EXCHANGE ACT OF 1934
Release No. 72133 / May 8, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3832 / May 8, 2014

INVESTMENT COMPANY ACT OF 1940
Release No. 31041 / May 8, 2014

Admin. Proc. File No. 3-15024

In the Matter of WALTER V. GERASIMOWICZ, MEDITRON ASSET MANAGEMENT, LLC, and MEDITRON MANAGEMENT GROUP, LLC	ORDER DENYING MOTION FOR PERMISSION TO FILE LATE PETITION FOR REVIEW

Walter V. Gerasimowicz requests permission to file a late petition for review of an initial decision of an administrative law judge, which was issued on July 12, 2013.[1] The Division of Enforcement opposes Gerasimowicz's motion. For the reasons set forth below, we deny the motion.

I. Background

On May 3, 2013, we issued an order making findings and imposing remedial sanctions on Gerasimowicz and two affiliated investment advisers, Meditron Asset Management, LLC and Meditron Management Group, Inc., pursuant to an Offer of Settlement.[2] We found, among other things, that the respondents "misappropriate[ed] and misus[ed] client assets and repeatedly

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1 *Walter V. Gerasimowicz, et al.*, Initial Decision Release No. 496, 2013 WL 3487073 (July 12, 2013).

2 *Walter V. Gerasimowicz, et al.*, Securities Exchange Act Release No. 69506, 2013 WL 1856014 (May 3, 2013).

[made] material misrepresentations and omissions to clients," in violation of antifraud provisions of the federal securities laws.[3] Based on these findings, we ordered that Gerasimowicz be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. We further ordered that he and the other respondents pay disgorgement and third-tier civil money penalties "in amounts to be determined by additional proceedings" before an administrative law judge. A law judge subsequently issued an Initial Decision ordering Gerasimowicz and the other respondents to pay, jointly and severally, disgorgement of $3,143,029.41, plus prejudgment interest, and a penalty of $1,950,000.

The Initial Decision stated that any appeal had to be filed within twenty-one days. Gerasimowicz did not appeal the Initial Decision[4] and, on September 17, 2013, we issued an order declaring the Initial Decision final.[5] Thereafter, Gerasimowicz neither filed a motion for reconsideration of the order of finality, nor sought judicial review, as he was permitted to do.[6] On March 25, 2014, a district court entered an opinion and order directing Gerasimowicz to comply with the Initial Decision by paying the required amounts.[7]

II. Gerasimowicz seeks review six months after decision became final.

On March 19, 2014, Gerasimowicz filed this motion seeking review, citing Commission Rule of Practice 100(c).[8] That rule permits us to disregard a party's failure to comply "with an otherwise applicable rule" where doing so "would serve the interests of justice and not result in prejudice to the parties to the proceeding." Gerasimowicz does not directly address why Rule 100(c) should apply here but, instead, blames his failure to file an appeal earlier on his former

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[3] Exchange Act Section 10(b) and Rule 10b-5 thereunder, 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5, respectively; Advisers Act Sections 206(1), (2), and (4) and Rules 206(4)-1, 2, and 8 thereunder, 15 U.S.C. § 80b-6(1), (2), and (4) and 17 C.F.R. § 206(4)-1, 2, and 8, respectively; and Securities Act Section 17(a), 15 U.S.C. § 77q(a).

[4] The other respondents, which Gerasimowicz wholly owned, also did not appeal.

[5] *Walter V. Gerasimowicz, et al.*, Exchange Act Release No. 70430, 2013 WL 5230822 (Sept. 17, 2013).

[6] *See* 17 C.F.R. § 201.470 (permitting aggrieved parties to file a motion for reconsideration within ten days of a final order issued by the Commission); 15 U.S.C. § 78y(a) (permitting aggrieved parties, within sixty days after entry of the order, to request review by a United States Court of Appeals of a final order issued by the Commission).

[7] *SEC v. Gerasimowicz*, 14-MC-30, ECF No. 1:14-mc-00030-P1 (S.D.N.Y. Mar. 25, 2014) (finding, among other things, that district court lacked jurisdiction to review the law judge's decision, that Gerasimowicz had not offered any valid defense to the enforcement of the Commission's final order, and requiring the respondents to comply with the order by paying the disgorgement and penalty amounts).

[8] 17 C.F.R. § 201.100(c).

attorney, who withdrew after the issuance of the Initial Decision.[9] According to Gerasimowicz, his former attorney failed to advise him that Gerasimowicz could appeal *pro se* and that, had he known "that this method was available to [him] . . . [he] would certainly have done so."

Gerasimowicz also claims that he has "meritorious defenses to the Commission's Disgorgement Order." He asserts that these defenses were included in a "sur-reply" brief that the law judge wrongfully refused to consider. Additionally, Gerasimowicz argues that he lacks the funds to pay the amounts assessed against him, but was not previously aware that he could seek "a waiver of the amounts to be paid on the basis of [his] inability to pay."[10]

In response, the Division argues that "the time to seek review has long since passed," which, in its view, "is sufficient reason to deny the petition."[11] The Division also contends that Gerasimowicz's sur-reply "was untimely, being filed almost a month after the close of briefing; violated the Court's scheduling order on the issue of damages, which did not provide for a sur-reply; and ignored Rule of Practice 154, which does not provide for sur-replies."[12] The Division further asserts that Gerasimowicz's ability to seek a waiver of the obligation to pay the disgorgement and civil penalty amounts ordered by the law judge "was discussed at length with

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[9] Gerasimowicz represents that the lawyer withdrew because Gerasimowicz was unable to pay him "a retainer of an additional $50,000."

[10] Gerasimowicz attaches to his motion information in support of his claim of inability to pay the disgorgement and civil penalty amounts.

Gerasimowicz further complains that he filed his request based on "written guidance" he received from a Division lawyer following a hearing before the district court in connection with the Division's efforts to enforce the Commission's order in this case. Gerasimowicz states that it was his "presumption" that the staff member provided this guidance "with the intent that [Gerasimowicz] act on the information he provided." We find nothing improper in the staff member's conduct. As his letter to Gerasimowicz makes clear, the staff member was not providing legal advice or recommending a course of action, but merely explaining two options Gerasimowicz had if he wished to seek a reduction, at this stage, in the amounts assessed against him and the other respondents by the law judge. The other option presented by the staff was to "request a compromise of the amount due based on inability to pay" supported by a sworn financial statement (the form of which the staff provided to Gerasimowicz). It is unclear whether Gerasimowicz has also pursued this option. We express no view as to whether such a waiver would be warranted.

[11] The Division's opposition brief to Gerasimowicz's motion was filed two days late, and Gerasimowicz's reply to that opposition was filed one day late. Although we generally disfavor extension requests, we have determined, in our discretion, to consider both late-filed briefs. *See* 17 C.F.R. § 201.161 (providing the Commission authority to extend filing deadlines).

[12] 17 C.F.R. § 201.154.

Respondents' counsel," but that the respondents "failed to submit any sworn financial statements."[13]

III. The Rules of Practice do not provide for late appeals.

As a result of Gerasimowicz's failure to appeal and our determination not to review the case on our own initiative, the decision is now final.[14] Rule of Practice 410,[15] which is applicable to these proceedings, makes no provision to challenge a final order once the period for seeking reconsideration has, as here, expired.[16] As noted, Gerasimowicz argues that we should permit his late appeal pursuant to Rule 100(c). That rule would allow us to waive the filing deadline here, but only if doing so "would serve the interests of justice and not result in prejudice to the parties to the proceeding." There is no basis for making such a finding here. Gerasimowicz had several opportunities to appeal the Initial Decision within the various applicable time periods specified by rule and statute, but he failed to do so.

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[13] *See* 17 C.F.R. § 201.630(b) (requiring respondents who assert an inability to pay disgorgement, interest or penalties to file a sworn financial disclosure statement).

[14] *See* 17 C.F.R. § 201.411(c) (permitting the Commission to order review of an initial decision on its own initiative within 21 days after the end of the period established for filing a petition for review pursuant to Rule 410(b)); 17 C.F.R. § 201.360(d)(2) (stating that, if a party fails to file a petition for review and the Commission does not call the matter for review on its own initiative, the Commission will issue an order that the decision has become final).

[15] 17 C.F.R. § 201.410.

[16] We note that Rule of Practice 420(b), which provides the "exclusive" procedure for seeking an extension of the deadline for filing an appeal to the Commission of determinations by self-regulatory organizations, mandates that we will grant an extension only on a showing of "extraordinary circumstances." *See* 17 C.F.R. § 201.420(b); *see also Lance E. Van Alstyne*, Exchange Act Release No. 40738, 53 SEC 1093, 1998 WL 830817, at *4 (Dec. 2, 1998) ("In the interests of finality, only under extraordinary circumstances will we authorize the filing of a late appeal from an SRO action that is subject to the Section 19(d)(1) filing requirement.").

That rule does not apply here because this was not a self-regulatory organization proceeding, but even if it did, we would deny Gerasimowicz's request because of the absence of such circumstances. *See, e.g., Orbixa Tech., Inc.*, Exchange Act Release No. 70893, 2013 WL 6044106, at *4 (Nov. 15, 2013) (finding that applicant had not shown "extraordinary circumstances" necessary to permit a late appeal where applicant waited over a year from the NYSE actions for which it sought review), *appeal docketed*, No. 13-4636 (2d Cir. Dec. 6, 2013); *Julio C. Ceballos*, Exchange Act Release No. 69020, 2013 WL 772515, at *3 (Mar. 1, 2013) (finding no extraordinary circumstances where applicant failed to file an application for review until almost two months after the applicable deadline, notwithstanding numerous communications from FINRA).

Indeed, Gerasimowicz took no action to challenge the sanctions and effectively ignored the proceeding following issuance of the Initial Decision, until efforts were instituted to enforce the decision in district court. Rewarding such conduct, by permitting this late appeal, would not serve the interest of justice. Gerasimowicz seeks to blame his former attorney for his failure to file *pro se*, but we have rejected similar claims.[17] Moreover, we have previously emphasized the need for finality in administrative proceedings. As we have noted, "[c]ourts have recognized that strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief."[18] Unmet deadlines may cut off substantive rights to review, but this is their function.[19] Given the circumstances, we see no basis for granting Gerasimowicz's request.

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[17] *See, e.g., Perpetual Sec., Inc.*, Exchange Act Release No. 56613, 2007 WL 2892696, at *7 (Oct. 4, 2007) (rejecting applicant's defense that it failed to comply with NASD suspension order because its attorney had failed to inform applicant of the suspension order).

To the extent that Gerasimowicz is arguing that his former counsel did not provide effective representation because that attorney did not inform him that he could file a *pro se* appeal, we note that administrative proceedings generally do not trigger a specific right to the effective assistance of counsel. *Kevin Hall, CPA*, Exchange Act Release No. 61162, 2009 WL 4809215, at *21 n.84 (Dec. 14, 2009) (citing *Hammon Capital Mgmt. Corp.*, Investment Advisers Act Release No. 989, 48 SEC 264, 1985 WL 548332, at *2 (Sept. 24, 1985); *Williams & Wynne*, 533 F.3d 360, 369 (5th Cir. 2008) (finding Sixth Amendment inapplicable to an administrative hearing); *Father & Sons Lumber & Bldg. Supplies v. NLRB*, 931 F.2d 1093, 1096-97 (6th Cir. 1991) (finding that neither the Fifth Amendment nor the APA conferred a separate right to effective assistance of counsel in an administrative hearing)). Gerasimowicz made the same argument to the district court, which also rejected it. Further, there is nothing in the Rules of Practice that would suggest that *pro se* appeals are unavailable. Indeed, respondents frequently file Commission appeals *pro se*, which are entirely permissible. *See* Rule of Practice 102(a), 17 C.F.R. § 201.102(a) ("In any proceeding, an individual may appear on his or her own behalf.").

[18] *Pennmont Sec.*, Exchange Act Release No. 61967, 2010 WL 1638720, at *4 n.21 (Apr. 23, 2010) (citing *Taylor v. Freeland & Kronz*, 503 U.S. 638, 644 (1992) ("Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality."); *French Hosp. Med. Ctr. v. Shalala*, 89 F.3d 1411, 1420 (9th Cir. 1996) (noting "policy of finality embodied in [agency's] appeal deadline"); *In re GAC Corp.*, 640 F.2d 7, 8 (5th Cir. 1981) ("The time requirements contained in [the federal appellate rule for taking an appeal] derive from the need for finality of judgments and an end to litigation."); *In re Bushnell*, 273 B.R. 359, 369 (Bankr. D. Vt. 2001) (rejecting untimely appeal and acknowledging that the certainty created by appellate deadlines is essential to expedient resolution of appeals and an even playing field for all parties)).

[19] *Cf. Carter v. Wash. Metro Area Transit Auth.*, 764 F.2d 854, 857 (D.C. Cir. 1985) ("[F]inality of outcome, regardless of the merits of the claim, is exactly the purpose of the statute of limitations that the legislature has enacted."); *Kavanagh v. Noble*, 332 U.S. 535, 539 (1947) (explaining that limitations "periods are established to cut off rights, justifiable or not, that might otherwise be asserted") (citations omitted).

Accordingly, IT IS ORDERED that Walter V. Gerasimowicz's motion for permission to file a late petition for review be, and it hereby is, denied.

By the Commission.

Lynn M. Powalski
Deputy Secretary