UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 6420 / December 20, 2018

Administrative Proceeding
File No. 3-15446

In the Matter of

J.S. Oliver Capital Management, L.P.,
Ian O. Mausner, and
Douglas F. Drennan

Order Denying Respondents' Rule 250(c) Motion

On December 14, 2018, Respondents J.S. Oliver Capital Management, L.P., and Ian O. Mausner filed a motion to dismiss or for summary disposition pursuant to Rule of Practice 250(c). The motion is denied because it raises no meritorious arguments.

Only two points warrant discussion. First, at the initial prehearing conference on October 3, 2013, Respondents waived their statutory right to a hearing commencing between 30 and 60 days after service of the order instituting proceedings. Prehr'g Tr. at 7-10 (Oct. 3, 2013); *see* 15 U.S.C. §§ 78u-3(b), 80b-3(k)(2). And the Commission's internal deadlines "confer no substantive rights on respondents." 17 C.F.R. § 201.360(a)(2)(ii); *see also* 17 C.F.R. § 201.360(a)(2) (2013) (identical, insofar as prior rule applicable following *Pending Administrative Proceedings*, Securities Act of 1933 Release No. 10536, 2018 WL 4003609, at *2 (Aug. 22, 2018)).

Second, Respondents' arguments regarding administrative law judges' removal protections do not adequately address the government's position on the issue. The relevant statute permits only the Merit Systems Protection Board to take certain adverse employment actions against an ALJ, and only "for good cause established and determined by the [MSPB] on the record after opportunity for hearing before the [MSPB]." 5 U.S.C. § 7521(a). The Solicitor General argued in *Lucia v. SEC* that, to avoid constitutional infirmity, this language should be read to require that the MSPB merely find "that factual evidence exists to support the agency's proffered, good-faith grounds" for the

adverse employment action. Brief for Respondent Supporting Petitioners at 52, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130), 2018 WL 1251862, at *52. But Respondents cite only the statutory language, and ignore the Solicitor General's proposed interpretation. *See* Motion at 17.

That interpretation, from the advocate for the entire executive branch of the United States government, is necessarily the Commission's official position. To be sure, the interpretation is currently nothing more than a litigating position and therefore probably not binding on anyone.[1] But I fully expect any Commission opinions on this topic to mirror the Solicitor General's brief, and there is no pressing need for the Division to weigh in on it. Therefore, Respondents' argument, that a different statutory interpretation would be unconstitutional, is presently beside the point.

SO ORDERED.

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Cameron Elliot
Administrative Law Judge

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[1] *Cf., e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 485 n.3 (1991) ("The EEOC's position is not embodied in any formal issuance from the agency, such as a regulation, guideline, policy statement, or administrative adjudication. Instead, it is merely the EEOC's *litigating* position in recent lawsuits. Accordingly, it is entitled to little if any deference."); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (declining to accept a statutory interpretation that was not articulated through rulemaking but advanced for the first time in litigation). Certainly it is not binding on a federal ALJ in his or her capacity as a respondent before the MSPB. But in my capacity as an agency adjudicator, I must account for it insofar as it represents the government's position, no matter how ill-considered it may be.