

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54840 / November 30, 2006

Admin. Proc. File No. 3-11062r

In the Matter of the Application of

CALVIN DAVID FOX
P.O. Box 7900
Jupiter, Florida 33468

For Review of Disciplinary Action Taken by the

NEW YORK STOCK EXCHANGE, INC.

ORDER DISMISSING APPEAL

Calvin David Fox appeals from disciplinary action taken against him by the New York Stock Exchange, Inc. ("NYSE" or "Exchange"). An NYSE hearing panel found that Fox violated NYSE Rule 476(a)(6) by engaging in conduct inconsistent with just and equitable principles of trade. ^{1/} This proceeding has previously been before us; on October 31, 2003, we remanded the decision of the NYSE for clarification and explanation of its findings. ^{2/} In the remand decision, we asked the NYSE to address whether Fox's alleged conduct was in bad faith or unethical. ^{3/} Following remand, an NYSE hearing panel found in a March 27, 2006 decision ("Hearing Panel Decision") that Fox's alleged conduct was in bad faith and unethical. Evidence submitted by the Exchange, including copies of a postmarked envelope and certified mail receipts, establishes that the NYSE mailed the Hearing Panel Decision to Fox on March 31, 2006. Fox acknowledges that he received it on April 6. The accompanying transmittal letter informed Fox that, if he were aggrieved by the Hearing Panel Decision, he could,

^{1/} NYSE Rule 476(a)(6).

^{2/} Calvin David Fox, Securities Exchange Act Rel. No. 48731 (Oct. 31, 2003), 81 SEC Docket 2017.

^{3/} Cf. Robert J. Jautz, 48 S.E.C. 702, 703-04 (1987) (holding that if only violation alleged by NASD is failure to observe just and equitable principles of trade, there must be a finding of bad faith).

"pursuant to Exchange Rule 476, a copy of which is enclosed, request a review of the determination and/or penalty within 25 days of the date of this letter." The NYSE further advised Fox that "[f]ailure to exhaust your administrative rights at the Exchange may affect your right to SEC review." Fox filed his request for review of the Hearing Panel Decision with the NYSE Board of Directors on April 27, 2006. The Board of Directors denied Fox's request for review as untimely on May 12, 2006. Fox requested Commission review of the NYSE proceeding on May 24, 2006.

We must first determine whether Fox's request to the NYSE Board of Directors was timely under the NYSE's rules. NYSE Rule 476(e) provides that a hearing panel decision becomes final twenty-five days after "notice thereof has been served upon the respondent in the manner provided in [Rule 476] paragraph (d)" ^{4/} NYSE Rule 476(f) provides that a request for review by the NYSE Board of Directors shall be made by filing a written request within twenty-five days after notice of the hearing panel decision is served on the respondent. ^{5/} NYSE Rule 476(d) provides that "[s]ervice shall be deemed effective . . . upon mailing . . . to the respondent at [respondent's last known office address] or place of residence." ^{6/} By application of NYSE Rule 476(d), notice of the Hearing Panel Decision was served on Fox on March 31, 2006, and the twenty-five-day time limit began to run as of that date, as the transmittal letter stated. As a consequence, Fox was required to file his request for review no later than April 25, 2006. Fox, therefore, was two days late when he filed his request on April 27, 2006.

Fox argues that the NYSE's rules for service of documents, properly interpreted, provide that service is complete only upon delivery of the documents. Fox states that he received the letter on April 6, 2006, and that, therefore, his April 27 filing was within the twenty-five-day limit specified in NYSE Rule 476. Fox argues that the NYSE's rules on service of process are based on our Rules of Practice and "federal rules." He specifically claims that it "would be a denial of fundamental due process and equal protection" if the term "service" in NYSE Rule 476(d) is not construed to mean "actual receipt" (emphasis deleted), citing to our Rule of Practice 141(a)(2). ^{7/} That Rule provides that service to an individual of an Order Instituting Proceedings shall be made "by delivering" a copy of such order.

Fox's argument is inconsistent with the plain language of NYSE Rule 476(d) which states that service is effective upon mailing, not actual delivery. Moreover, Fox was specifically notified in the March 31, 2006 letter that he must file any request for review by the NYSE Board of Directors within twenty-five days "of the date of this letter." Fox offers no support for the proposition that NYSE rules "are based" on our

^{4/} NYSE Rule 476(e).

^{5/} NYSE Rule 476(f).

^{6/} NYSE Rule 476(d).

^{7/} 17 C.F.R. § 201.141(a)(2).

Rules of Practice. He offers no explanation for why the unambiguous words "[s]ervice shall be deemed effective . . . upon mailing" in NYSE Rule 476(d) should be construed differently to mean "by delivering" as provided in our Rule 141(a)(2). Indeed, our Rules 141(b) and 150(d) provide that, for written decisions by a hearing officer, documents that are analogous to NYSE Hearing Panel Decisions, service may be "complete upon mailing." 8/

Given the clarity of the governing NYSE rule, the notice given to Fox in the plainest possible terms in the March 31, 2006 letter itself, and the ample time between Fox's April 6 receipt of the March 31 letter and Hearing Panel Decision and the due date of April 25, overlooking his late filing would be inappropriate. Accordingly, we sustain the NYSE's determination that Fox's request for review was untimely.

Fox's failure to exhaust his remedies at the NYSE precludes our consideration of his application for review. 9/ The precedent on this issue is well settled: "It is clearly proper to require that a statutory right to review be exercised in an orderly fashion, and to specify procedural steps which must be observed as a condition to securing review." 10/ Here, Fox did not follow the clear steps provided by NYSE. Fox's appeal must, therefore, be dismissed.

Accordingly, IT IS ORDERED that the above-captioned proceeding be, and it hereby is, dismissed.

By the Commission.

Nancy M. Morris
Secretary

8/ 17 C.F.R. §§ 201.141(b), 201.150(d).

9/ MFS Secs. Corp., Exchange Act Rel. No. 47626 (Apr. 3, 2003), 79 SEC Docket 3612 (appeal dismissed for failure to exhaust NYSE remedies), aff'd, 380 F.3d 611 (2d Cir. 2004); cf. David I. Cassuto, Exchange Act Rel. No. 48087 (June 25, 2003), 80 SEC Docket 1775 (NASD); Gary A. Fox, 55 S.E.C. 1147 (2002) (NASD); Datek Secs. Corp., Exchange Act Rel. No. 32306 (May 14, 1993), 54 SEC Docket 199 (late filing of request for review by NASD National Business Conduct Committee); Royal Secs. Corp., 36 S.E.C. 275 (1955) (late filing of request for review by NASD Board of Governors).

10/ Royal Secs. Corp., 36 S.E.C. at 277.