SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 55987 / June 29, 2007

ACCOUNTING AND AUDITING ENFORCEMENT
Rel. No. 2627 / June 29, 2007

Admin. Proc. File No. 3-12208

In the Matter of KEVIN HALL, CPA and ROSEMARY MEYER, CPA	CORRECTED ORDER DENYING RESPONDENTS' MOTIONS FOR SUMMARY DISPOSITION AND ORAL ARGUMENT

Kevin Hall and Rosemary Meyer move for summary disposition. Respondents assert that the Commission should dismiss this proceeding without prejudice because they did not have effective representation of counsel during the investigation and Wells process and that, in part as a result, the Division overlooked exculpatory evidence in recommending that we institute this proceeding. Respondents also complain that the Division was tardy in producing to them certain portions of its investigatory file. They further ask for an extension of time to review these late-produced documents.

Summary disposition does not lie. Rule of Practice 250(b) provides that a "hearing officer may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." 1/ Rule of Practice 250(a) further provides that "[i]f the interested division has not completed presentation of its case in chief, a motion for summary disposition shall be made only with leave of the hearing officer." 2/ Respondents have failed to demonstrate that there is no genuine dispute with respect to any material fact alleged in the Order Instituting Proceedings or that they are entitled to an order as a matter of law.

Moreover, a motion for summary disposition generally should be made to the hearing officer, and, in any event, cannot be made before the Division finishes its case in chief, absent leave of the hearing officer. Respondents have not sought such leave. Respondents suggest that

1/ 17 C.F.R. § 201.250(b).

2/ 17 C.F.R. § 201.250(a).

the law judge stated in a pre-hearing conference that they would have to file this motion with the Commission. However, our review of the transcript indicates the law judge observed that she did not have the power to dismiss the proceeding prior to a hearing.

Most critically, Rule of Practice 400(a) states that the "exclusive remedy for review of a hearing officer's ruling prior to Commission consideration of the entire proceeding" is a petition for interlocutory review. 3/ Rule 400(a) further states that "[p]etitions by parties for interlocutory review are disfavored, and the Commission ordinarily will grant a petition to review a hearing officer ruling prior to its consideration of an initial decision only in extraordinary circumstances." 4/ Rule of Practice 400(c) requires that a "ruling submitted to the Commission for interlocutory review must be certified in writing by the hearing officer." 5/

Respondents did not seek or obtain certification of any of the law judge's rulings. Nor have they demonstrated extraordinary circumstances warranting acceptance of their petition. Moreover, we see no basis for the Commission to take the matter up on its own motion. Respondents' motions with respect to efficacy of counsel during the investigation and their complaints about production of documents do not warrant our interference with the orderly hearing process. We believe that it would be inappropriate to separate these issues from any future consideration of the entire proceeding. 6/

In particular, once we have exercised our prosecutorial discretion to institute a proceeding, the appropriate remedy for any challenge to that exercise of discretion is to litigate the proceeding to a final decision. None of the authorities cited by Respondents contradicts that view; they affirm the unremarkable principle that agency decisions to institute enforcement proceedings may be subject to review without conceding that any such review may be sought prior to the issuance of a final order by the agency in that proceeding.

Beverly Health & Rehab. Servs., Inc. v. Feinstein, 7/ cited by Respondents, supports our determination here. In that case, plaintiff brought an action in district court challenging the decision of the General Counsel of the National Labor Relations Board ("NLRB") to institute an administrative proceeding against the plaintiff while that proceeding was still pending before the

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3/ 17 C.F.R. § 201.400(a).

4/ Ibid.

5/ 17 C.F.R. § 201.400(c).

6/ See Trautman Wasserman & Co., Inc., Order Denying Petition for Interlocutory Review, Exchange Act Rel. No. 55989 (June 29, 2007), __ SEC Docket __ (with respect to representation by counsel during investigations).

7/ 103 F.3d 151 (D.C. Cir. 1996).

NLRB. In affirming the district court's dismissal of the action, the court stated that the issuance of the complaint at issue

> is a quintessential example of a prosecutorial decision. It involves a balancing of culpability, evidence, prosecutorial resources, and the public interest. The weighing of all those considerations factors into the issuance of a complaint. The formulation of the proper contours of a complaint is a critical first step in the prosecutorial journey and Beverly's attempt to segregate the framing of the complaint from the enforcement process does not wash. 8/

The court ultimately concluded that plaintiff would be entitled to challenge the decision to bring the complaint in the course of defending against it, and in any ensuing appeal to a Court of Appeals, observing that the plaintiff would, if necessary, "have its day in court on the charging issue, but not today." 9/

We further do not believe that review of the law judge's decision not to postpone the proceeding is appropriate. Rule of Practice 111(d) grants the hearing officer broad authority to "regulate the proceeding." 10/ The law judge has concluded that no postponement of the hearing date is warranted, a determination that a hearing officer must make as part of the regulation of the course of the proceeding. We do not believe that Respondents have shown extraordinary circumstances justifying review of this decision. 11/

We believe that Commission review benefits from having the entire record developed before the law judge. We stress that, absent extraordinary circumstances, we will not entertain motions, no matter how styled, for interlocutory review.

Respondents have requested oral argument. Our Rule of Practice 154(a) states that "[n]o oral argument shall be heard on any motion unless the Commission or the hearing officer

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8/ Id. at 153.

9/ Id. at 156.

10/ 17 C.F.R. § 201.111(d).

11/ Respondents have further asked that, pursuant to Rule of Practice 322, 17 C.F.R. § 201.322, their motion and the accompanying submissions be kept under seal. We will consider this request by separate order. Pending a determination of this motion, the documents will be kept under seal pursuant to Rule of Practice 322(d).

otherwise directs." 12/ We have determined that the presentation in the briefs and the decisional process would not be significantly aided by oral argument. 13/

Accordingly, it is ORDERED that Respondents' Motion for Summary Disposition be, and it hereby is, denied; and it is further

ORDERED that Respondents' Motion for Oral Argument be, and it hereby is, denied.

By the Commission.

Nancy M. Morris
Secretary

12/ 17 C.F.R. § 201.154(a).

13/ See 17 C.F.R. § 201.451(a) (stating that "[t]he Commission will consider appeals, motions and other matters properly before it on the basis of the papers filed by the parties without oral argument unless the Commission determines that the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument").