SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54600 / October 13, 2006

Admin. Proc. File No. 3-12230

In the Matter of the Application of

LAWRENCE GAGE
c/o Steven B. Mirow, Esq.
249 South 12th Street
Philadelphia, PA 19107

For Review of Action Taken by the

PHILADELPHIA STOCK EXCHANGE, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE -- REVIEW OF EXCHANGE ACTION

Jurisdiction to Review Exchange Action

National securities exchange member sought Commission review of exchange's decision denying member's appeal of exchange's adoption of a proposed new rule. Held, the matter is not subject to Commission review because neither Section 19(b) nor Section 19(d) of the Securities Exchange Act of 1934 provides a basis for review of exchange's decision. Application for review is dismissed.

APPEARANCES:

Steven B. Mirow, for Lawrence Gage.

Stephen J. Kastenberg, Paul Lantieri III, and Adam Finkelstein, of Ballard Spahr Andrews & Ingersoll, LLP, for the Philadelphia Stock Exchange, Inc.

Appeal filed: March 3, 2006
Last brief received: June 16, 2006

I.

Lawrence Gage, a member of the Philadelphia Stock Exchange, Inc. (the "PHLX" or the "Exchange") seeks Commission review of a February 2006 decision of the PHLX's Board of Governors rejecting his challenge to the Exchange's 2004 adoption of Exchange Rule 651, which requires Exchange members to reimburse the Exchange for its legal expenses under certain circumstances. The PHLX contends that Gage's appeal to the Commission should be dismissed for lack of jurisdiction. Our findings are based on an independent review of the record.

II.

Background. On July 27, 2004, the Executive Committee of the PHLX's Board of Governors, acting pursuant to delegated authority under PHLX By-Law Article X, Section 10-14, authorized and approved for filing with the Commission proposed PHLX Rule 651. 1/ The Exchange notified its members of this action on July 28, 2004. Rule 651 provides that a member who brings legal proceedings related to the business of the Exchange against the Exchange or any of its board members, officers, committee members, employees, or agents shall pay to the Exchange all reasonable expenses, including attorneys' fees, incurred by the Exchange in defense of such legal proceedings where the member does not prevail in such proceedings and where the costs to the Exchange exceed $50,000. The rule does not apply to disciplinary actions by the Exchange, administrative appeals of Exchange actions, or in any specific instance where the Board grants a waiver of the rule. On August 4, 2004, the PHLX filed this proposed rule change with the Commission and notified its membership of the filing.

On August 5, 2004, we issued a release designating Rule 651 effective upon filing pursuant to Section 19(b)(3)(A) of the Securities Exchange Act of 1934 and Exchange Act Rule 19b-4(f)(6). 2/ In that release, which was made available at the Commission's website and in the SEC Docket and published in the Federal Register on August 12, 2004, we stated that Rule 651

1/ Article X, Section 10-14 of the PHLX By-Laws provides that, when the Board of Governors is not in session, the Executive Committee shall have and may exercise, subject to certain conditions, all the powers and authority of the Board of Governors. Article IV, Section 4-4 of the By-Laws provides that the Board of Governors shall have the power to adopt such rules as it may deem appropriate.

2/ Securities Exchange Act Rel. No. 50159 (Aug. 5, 2004), 83 SEC Docket 1768. On July 28, 2004, the PHLX, as required by Rule 19b-4(f)(6), pre-filed the proposed rule change with the Commission. We designated the proposed rule change effective upon filing because it did not significantly affect the protection of investors or the public interest, impose any significant burden on competition, or become operative for thirty days from the date on which it was filed. Id.; see also 15 U.S.C. § 78s(b)(3)(A); 17 C.F.R. § 240.19b-4(f)(6). At the PHLX's request, we waived the thirty-day operative delay.

was "consistent with existing precedent and [presented] no novel issues." 3/ We stated further that the purpose of the proposed rule change, according to the PHLX, was to "enable the Exchange to obtain reimbursement of legal costs incurred to defend litigation brought against the Exchange by member litigants where such persons or entities do not prevail in the litigation." 4/ As further noted in the release, the PHLX believed "that establishing a rule that may reduce non merit-based or vexatious legal proceedings against the Exchange by member litigants will help protect against Exchange resources being unnecessarily diverted from the Exchange's regulatory and business objectives, thus strengthening the overall organization." 5/ The release invited interested persons "to submit written data, views, and arguments concerning the [proposed rule change], including whether the proposed rule change is consistent with the [Exchange] Act." 6/ We also noted that, at any time within sixty days of its filing, the proposed rule change could be "summarily abrogate[d]" if such action was "necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the [Exchange] Act." 7/

Gage's Efforts to Challenge Rule 651. Gage did not submit comments to the Commission or request that the Commission abrogate the rule within the sixty-day period. Instead, on August 5, 2004, the same day we designated Rule 651 effective, Gage, in accordance with the PHLX's By-Laws, 8/ appealed to the PHLX's Board of Governors the Executive Committee's decision to file Rule 651 with the Commission. 9/ The Board appointed an Advisory Committee to review

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3/ 83 SEC Docket at 1769. We also noted in the release that the PHLX described Rule 651 as similar to rules adopted by the American Stock Exchange, the Chicago Board Options Exchange, and the Pacific Stock Exchange. Id.; see also Exchange Act Rel. No. 47842 (May 13, 2003), 80 SEC Docket 655 (AMEX); Exchange Act Rel. No. 37421 (July 11, 1996), 62 SEC Docket 853 (CBOE); Exchange Act Rel. No. 37563 (Aug. 14, 1996), 62 SEC Docket 1661 (PSE).

4/ 83 SEC Docket at 1768.

5/ Id.

6/ Id. at 1769.

7/ Id.; see also 15 U.S.C. § 78s(b)(3)(C) (authorizing summary abrogation within sixty days of filing of the proposed rule change).

8/ Article XI, Section 11-1(a) of the PHLX By-Laws provides that a member may appeal the decision of a Standing Committee to the Board of Governors within ten days.

9/ The PHLX did not file a copy of Gage's appeal with the Commission. Although our rules do not expressly require that the PHLX file with the Commission communications received after the Commission designates a rule effective upon filing, we encourage self-regulatory organizations in circumstances similar to those presented here to file with the

(continued...)

the appeal. 10/ At oral argument before the Advisory Committee, Gage explained that he "was under the understanding that once I filed the appeal, the rule wouldn't even be sent down to the SEC," that he "didn't find out it was sent down to the SEC until they noticed to the members that the SEC had approved the rule," and that he therefore "missed commenting at the SEC and that's the opportunity that we are really looking for." 11/ Counsel for the PHLX responded that Rule 651 "was sent down [to the Commission] before we were notified of an appeal," that "[a] memo was sent out [to the PHLX membership] on August 4th [stating] that, in fact, we filed [Rule 651] with the SEC," and that "[i]t wasn't until the 5th that Mr. Gage appealed the adoption of 651 by the Executive Committee." 12/ On February 23, 2006, after receiving and reviewing the Advisory Committee's written recommendation, the Board of Governors denied Gage's appeal.

The Advisory Committee "recommend[ed] upholding the decision of the Executive Committee" on the ground that "the Executive Committee's approval of the proposed rule filing was proper in light of the similar filings at other exchanges, procedures of the Exchange and application of Exchange rules and the Act." On February 23, 2006, after receiving and reviewing the Advisory Committee's recommendation, the Board of Governors "affirmed in whole the recommendation of the Advisory Committee." This appeal followed.

9/ (...continued)
Commission all written communications, such as Gage's appeal, concerning a rule change open to comment in some form. Cf. General Instruction D to Form 19b-4 (stating that if, "after the rule change is filed but before the Commission takes final action on it, the self-regulatory organization receives or prepares any correspondence or other communications reduced to writing (including comment letters) to and from such self-regulatory organization concerning the proposed rule change, copies of the communications shall be filed" with the Commission). As indicated, however, the Exchange's failure to file Gage's appeal with the Commission does not affect the outcome of Gage's appeal.

10/ Article XI, Section 11-2 of the PHLX By-Laws provides that on all appeals to the Board of Governors from a decision of a Standing Committee in accordance with Section 11-1 of the By-Laws, an advisory committee of three Governors shall examine the record on appeal and give an advisory opinion thereon to the Board of Governors.

11/ In his brief to the PHLX, Gage argued that the PHLX erroneously treated Rule 651 as one that could be effective upon filing and thereby "deprived persons of their right to comment upon and object to [the proposed rule] with the SEC." Gage contended further that the "only goal of this proposed rule is to intimidate persons who might otherwise proceed to prosecute a grievance against the PHLX" and thus the proposed rule was "in violation of public policy." Gage's brief before us substantially repeats these arguments.

12/ We also issued our release soliciting comments on the proposed rule on August 5, 2004. As noted, the Exchange had notified its members of its filing with the Commission on the previous day. Gage thus had the full sixty days to file an objection with the Commission.

III.

A. Review Pursuant to Section 19(b). Gage bases his appeal in part on Exchange Act Section 19(b)(3)(C). Section 19(b)(3)(C) states that "within sixty days of the date of filing" of a proposed rule change under Section 19(b)(3)(A), "the Commission summarily may abrogate the change . . . if it appears . . . that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act]." 13/ Gage contends that we retain our ability to summarily abrogate the rule, despite the expiration of this sixty-day period, because the PHLX filed the proposed rule change improperly. According to Gage, the "filing was improper because, as the PHLX itself admits, Applicant filed a timely objection to proposed Rule 651." Gage argues, therefore, that Section 19(b)(3)(C) gives us "the power and responsibility to act upon Rule 651" in response to his appeal.

We find no basis for Gage's contention that the PHLX filed Rule 651 improperly. Although Gage apparently believes that his appeal of the Executive Committee's action should have prevented the PHLX from filing the rule with the Commission, the PHLX had already filed the proposed rule change with the Commission, and so notified its members, at the time of Gage's appeal. The PHLX's By-Laws also contain no suggestion that such an appeal prevents the PHLX from executing the decision of the Executive Committee.

In our release notifying the public of the proposed rule change, we solicited comments to be received within twenty-one days of the release's publication in the Federal Register, or August 12, 2004. 14/ As noted by the PHLX, Gage chose not to "comment on Rule 651 to the Commission or request its abrogation by the Commission." Gage decided instead to appeal the PHLX's decision to adopt the rule. We are aware of no authority that supports Gage's contention that his appeal extended or tolled the sixty-day period for summary abrogation. Accordingly, we do not believe that, at this point, Section 19(b)(3)(C) provides a basis for us to abrogate summarily Rule 651 in response to Gage's appeal of the PHLX's action.

Gage also argues that we may review the PHLX's action in order to ensure compliance with Section 19(b)(3)(C)'s mandate that a self-regulatory organization may enforce an effective-upon-filing rule change "to the extent it is not inconsistent with the provisions of [the Exchange Act], the rules and regulations thereunder, and applicable Federal and State law." 15/ We find this argument similarly unpersuasive. Gage's appeal does not concern any PHLX enforcement proceeding; the PHLX is not enforcing Rule 651 against Gage. Indeed, no evidence exists that

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13/ 15 U.S.C. § 78s(b)(3)(C).

14/ See 83 SEC Docket at 1769; 69 Fed. Reg. 49,933.

15/ 15 U.S.C. § 78s(b)(3)(C).

Gage has acted, at this stage, in any way that implicates the rule. Thus, we see no basis for considering Gage's appeal pursuant to Section 19(b)(3)(C). 16/

B. Review Pursuant to Section 19(d). Gage argues further that Commission Rule of Practice 420(a), which discusses the availability of Commission review of the determination of a self-regulatory organization ("SRO"), authorizes our review of the PHLX's action. 17/ The grounds for Commission jurisdiction enumerated in Rule 420(a) are the same as those described in Section 19(d)(1) of the Exchange Act. 18/ Section 19(d)(1) authorizes our review of a self-regulatory organization action that i) imposes any final disciplinary sanction on any member or associated person; ii) denies membership or participation to any applicant; iii) prohibits or limits any person in respect to access to services offered by such organization or member; or iv) bars any person from becoming associated with a member. 19/

1. Denial of Membership or Participation. Gage argues that we have jurisdiction to hear his appeal because the PHLX's action constitutes "a condition placed upon membership by PHLX Rule 651." According to Gage, the adoption of the rule constitutes a condition on membership because, "if Applicant were not to agree to continue as a member of the PHLX under Rule 651, Applicant would have no alternative but to leave the PHLX." We have previously rejected similar arguments in decisions where we found that we lacked jurisdiction to review an SRO's denial of a rule exemption. In those cases, an SRO member sought relief from the operation of an SRO rule. We found, however, that the requirement that SRO members comply with SRO rules does not constitute a condition on membership providing a basis for jurisdiction.

In Joseph Dillon & Co., 20/ we found that we did not have jurisdiction to review an NASD decision denying a member firm an exemption from an NASD rule requiring that the firm adopt special supervisory procedures. The rule required that firms adopt such procedures if they employed a certain number of registered representatives associated, within the past three years,

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16/ We note that we have stated previously that a rule "requir[ing] members to pay [an] Exchange's costs of litigation under specified circumstances is consistent with the requirements of the Act and the rules and regulations thereunder." 62 SEC Docket at 854 (CBOE rule); 62 SEC Docket at 1663 (PSE rule).

17/ 17 C.F.R. § 201.420(a).

18/ Russell A. Simpson, 53 S.E.C. 1042, 1048 (1998).

19/ 15 U.S.C. § 78s(d)(1); see also Allen Douglas Secs., Inc., Exchange Act Rel. No. 50513 (Oct. 12, 2004), 83 SEC Docket 3570, 3575. Gage argues that "subsection 19(d) is not applicable to this matter" because this is not a "disciplinary type matter." As discussed below, we find that Section 19(d) does not provide a basis for jurisdiction. We note, however, that Section 19(d), as indicated, implicates more than disciplinary proceedings.

20/ 54 S.E.C. 960 (2000).

with member firms disciplined by NASD or the Commission. The firm argued that NASD's denial of an exemption from the rule constituted a denial of membership because its membership was "now expressly conditioned upon its compliance" with the rule. 21/ In rejecting this argument, we noted that, as here, the applicant was "seeking relief from the operation of the rule, not from any condition imposed on its membership by the NASD." 22/ The operation of the rule did not impose a condition on the firm's membership establishing a basis for jurisdiction because "[t]he membership of every NASD member is conditioned on the member's continued compliance with NASD rules." 23/ We lacked jurisdiction because "[t]he operation of the Rule and the NASD's exemption denial have no bearing on [the firm's] membership in the NASD, which continues unchanged whether or not an exemption is granted." 24/

We similarly found no jurisdiction to review an NASD decision denying a member firm an exemption from an NASD rule in Morgan Stanley & Co. 25/ In that case, the firm sought an exemption from a rule providing that "[n]o broker, dealer, or municipal securities dealer shall engage in municipal securities business . . . with an issuer within two years after any contribution to an official of such issuer made by . . . any municipal finance professional associated with such broker, dealer, or municipal securities dealer . . . ." 26/ We determined that NASD's denial of an exemption did not constitute a denial of membership because the firm's "inability to engage in certain aspects of the municipal securities business result[ed] . . . from the action of [its] own employee and the automatic operation of [the rule], not from any condition imposed by the NASD." 27/ We further held that "[t]he operation of [the rule] and the NASD's exemption denial ha[d] no bearing on [the firm's] membership in the NASD, which continue[d] unchanged whether or not an exemption [was] granted." 28/ We did not have jurisdiction because, as here, the firm sought "relief from the operation of the rule, not from any condition imposed on its membership by the NASD." 29/

21/ Id. at 965 (emphasis in original).

22/ Id. at 965 n.9 (quoting Morgan Stanley & Co., 53 S.E.C. 379, 384 (1997)).

23/ Id. at 965.

24/ Id.

25/ 53 S.E.C. 379 (1997).

26/ Id. at 380 (quoting the text of the rule).

27/ Id. at 384.

28/ Id.

29/ Id.

In Morgan Stanley, we found that our conclusion was "underscored by the instances in which, pursuant to Section 19(d) of the Exchange Act, we have reviewed the NASD's imposition of or refusal to modify a restriction agreement, under which a firm agrees to certain restrictions on its business activities as a condition of NASD membership." 30/ We noted that "Section 19(d) authorizes review of such NASD action because it relates to the NASD's membership process." 31/ In Joseph Dillon, we also contrasted the firm's appeal of NASD's denial of an exemption from a rule with those cases where we found jurisdiction on the basis that "NASD had imposed conditions or limited the firm's actions in permitting the firm's membership." 32/

We find the principles articulated in Joseph Dillon and Morgan Stanley analogous to this case. Although Gage does not seek an exemption from a rule, he does challenge a rule that applies generally to all PHLX members. The membership of every PHLX member is conditioned on the member's compliance with the PHLX's rules. As in Joseph Dillon and Morgan Stanley, the PHLX's action does not relate to its membership process and does not impose conditions on Gage's membership. Neither Rule 651 nor the PHLX's denial of Gage's appeal have any bearing on Gage's membership in the PHLX, which continues unchanged. We thus agree with the PHLX that "an action by a self-regulatory organization that merely subjects a member to a rule of general applicability does not constitute a denial of membership."

2. Other Bases of Jurisdiction. Gage does not argue, and we do not find, that any other provision of Section 19(d) provides a basis for jurisdiction. Section 19(d) authorizes our review when an SRO, through its disciplinary process, imposes a final disciplinary sanction on a member or person associated with a member. 33/ In a disciplinary action, however, a sanction is imposed following a determination of wrongdoing. 34/ The PHLX took no such action here. It "did not employ its disciplinary procedures, did not make a determination that [the appellant] had violated a statute or rule, and did not impose a final disciplinary sanction." 35/ The PHLX's action also does not constitute a denial of access to services offered by the PHLX. Our previous decisions have found jurisdiction based on a denial of access only when "an SRO had denied or limited the applicant's ability to utilize one of the fundamentally important services offered by the

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30/ Id.

31/ Id.

32/ Joseph Dillon, 54 S.E.C. at 965 n.9.

33/ Allen Douglas Secs., 83 SEC Docket at 3575.

34/ Morgan Stanley, 53 S.E.C. at 383.

35/ Allen Douglas Secs., 83 SEC Docket at 3576; see also Morgan Stanley, 53 S.E.C. at 383; Joseph Dillon, 54 S.E.C. at 963-64.

SRO." 36/ The PHLX's action does not prevent Gage from utilizing any service offered by the PHLX.

Nor does the PHLX's action have the effect of barring any person from becoming associated with a PHLX member. We have held previously that SRO action having the effect of "barring" an individual from association with the SRO's members -- whether the individual is formally barred or not -- is reviewable under Section 19(d). 37/ In Frank R. Rubba 38/ and Exchange Services Inc., 39/ we had jurisdiction because the SRO's action denying the applicants a waiver of examination requirements, although not constituting a formal bar from association, had the effect of barring individuals from becoming associated with an SRO member. 40/ No evidence exists that the PHLX's action has produced such an effect. The PHLX's action neither formally bars nor has the effect of barring any person from associating with a PHLX member, and thus does not implicate this, or any other, prong of Section 19(d).

* * *

We conclude, based on the foregoing, that no basis exists under either Exchange Act Sections 19(b) or 19(d) for us to review the PHLX's denial of Gage's appeal. To the extent Gage argues that we should consider his appeal despite Section 19's jurisdictional limitations on the ground that we have a "duty to consider [his] application," we note that we have previously rejected an applicant's claim of "compelling reasons" as a basis for review where, as here, the appeal did not satisfy the jurisdictional requirements set forth in Section 19. 41/ Nor do we believe that Gage's application presents compelling circumstances. As discussed above, our

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36/ Morgan Stanley, 53 S.E.C. at 385; see also Allen Douglas Secs., 83 SEC Docket at 3582 (finding that "[d]ecisions in which we have found jurisdiction based on this third prong of Section 19(d) have emphasized the impact that SRO decisions have on members' access to fundamentally important services provided by the SRO") (citing Tower Trading, L.P., Exchange Act Rel. No. 47537 (Mar. 19, 2003), 79 SEC Docket 3189 (finding Commission jurisdiction where exchange terminated member's status as a market maker); Scattered Corp., 52 S.E.C. 812, 813 (1996) (finding Commission jurisdiction where exchange refused to process member's application for registration as a market maker); William J. Higgins, 48 S.E.C. 713 (1987) (finding Commission jurisdiction where exchange limited member's access to "principal service" offered by exchange)).

37/ Joseph Dillon, 54 S.E.C. at 965-66.

38/ 53 S.E.C. 670 (1998).

39/ 48 S.E.C. 210 (1985).

40/ See Frank R. Rubba, 53 S.E.C. at 673; Exchange Services Inc., 48 S.E.C. at 210-11.

41/ Allen Douglas Secs., 83 SEC Docket at 3575 n.14; Joseph Dillon, 54 S.E.C. at 963 n.5.

release designating Rule 651 effective upon filing noted that Rule 651 was "consistent with existing precedent and [presented] no novel issues." 42/ This precedent included the approval of similar SRO rules and the designation of one such rule as effective upon filing. 43/ Under the circumstances, therefore, we have determined to dismiss Gage's application for review. 44/

An appropriate order will issue. 45/

By the Commission (Chairman COX and Commissioners ATKINS, CAMPOS, and CASEY; Commissioner NAZARETH not participating).

Nancy M. Morris
Secretary

42/ See Exchange Act Rel. No. 50159, supra note 2, and accompanying text.

43/ See Exchange Act Rel. No. 47842, supra note 3 (designating AMEX rule providing for reimbursement of legal fees by members effective upon filing); see also Exchange Act Rel. No. 37421, supra note 3 (approving similar CBOE rule); Exchange Act Rel. No. 37563, supra note 3 (approving similar PSE rule).

44/ The PHLX filed a motion on June 6, 2006, seeking dismissal of Gage's application for lack of jurisdiction. Gage filed a response to this motion, and the PHLX filed a reply. The PHLX also argued for dismissal based on lack of jurisdiction in its opposition brief to Gage's opening brief. Although our briefing schedule provided Gage an opportunity to file a reply to the PHLX's opposition brief, he did not do so.

45/ We have considered all of the parties' contentions. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54600 / October 13, 2006

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PHILADELPHIA STOCK EXCHANGE, INC.

ORDER DISMISSING APPLICATION FOR REVIEW OF ACTION OF NATIONAL SECURITIES EXCHANGE

On the basis of the Commission's opinion issued this day, it is

ORDERED that Lawrence Gage's application for review be, and it hereby is, dismissed.

By the Commission.

Nancy M. Morris
Secretary