ADMINISTRATIVE PROCEEDINGS
FILE NO. 3-2113

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
PAUL M. KAUFMAN
Rule 2(e) of the Rules of Practice

FILED
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SECURITIES & EXCHANGE COMMISSION

INITIAL DECISION

(Private Proceedings)

Warren E. Blair
Hearing Examiner

Washington, D.C.
December 19, 1969

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In the Matter of	:	
	:	Private Proceedings
PAUL M. KAUFMAN	:	
	:	
Rule 2(e) of the Rules of Practice	:	Initial Decision
	:	

Appearances: Paul Gonson and Richard S. Seltzer, of the Office of the General Counsel, for the Office of the General Counsel.

Barry Ivan Slotnick, Raymond F. Narral, and Arnold E. Wallach, of Slotnick & Narral, for Paul M. Kaufman.

Before: Warren E. Blair, Hearing Examiner.

These private proceedings were instituted by an order of the Commission dated August 13, 1969, pursuant to Rule 2(e) of the Rules of Practice to determine whether Paul M. Kaufman, an attorney-at-law, has been convicted of violations of Sections 17(a) and 24 of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. 77q(a) and 77x, and if so, whether he should be temporarily or permanently disqualified from and denied the privilege of appearing or practicing before the Commission.

Counsel appeared on behalf of respondent and participated in the hearing of this matter. As part of the post-hearing procedures, proposed findings, conclusions, and supporting briefs were filed by the parties. The findings and conclusions herein are based upon the record, including the arguments of counsel.

The basic facts are not in dispute. Respondent was admitted to practice before the Bar of the State of New York, has offices in New York City, and has appeared and practiced before the Commission for 11 or 12 years. He is not admitted to practice before the Bar of any other State nor in any Federal court.

Respondent was indicted with others in the United States District Court for the Southern District of New York on 17 counts; the first count charged a conspiracy to violate Sections 17(a) and

24 of the Securities Act of 1933, and the remaining counts, being substantive counts, charged various violations of the same sections of that Act. On June 19, 1969, after a trial by jury, respondent was found guilty as charged in the conspiracy count and eleven of the substantive counts. Judgment of conviction was entered against him by the United States District Court for the Southern District of New York on July 29, 1969, and sentences of nine months in prison and a fine of $2,000 on each count imposed, the prison sentences to run concurrently. Execution of the sentences and fines was stayed pending disposition of the appeal of the conviction, notice of which was duly filed by respondent on July 31, 1969.

The Office of the General Counsel ("OGC") contends that the judgment of criminal conviction of respondent for violation of an anti-fraud provision of the federal securities laws is sufficient to show that respondent should be disqualified from appearing or practicing before the Commission. Respondent's position is that the judgment of conviction is not final by reason of his appeal therefrom, and that the appeal stayed the consequences of that judgment.

The record establishes adequate basis under Rule 2(e) of the Rules of Practice to deny respondent the privilege of appearing and practicing before the Commission. It is further concluded that the nature of the offenses for which respondent was convicted requires that respondent be permanently disqualified from and denied that

privilege until such time as the Commission, after application for reinstatement by respondent, may decide otherwise.

Under the Rules of Practice an attorney admitted to practice before the Supreme Court of the United States, the highest court of any State or Territory of the United States, or the Court of Appeals or the District Court of the United States for the District of Columbia, is permitted to appear and practice before the Commission without need for prior formal admission to that privilege.[1/] The Rules of Practice further provide that the privilege may be denied, temporarily or permanently, if a person is found "(1) not to possess the requisite qualifications to represent others, or (2) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct."[2/]

Under the settled law of New York, an attorney admitted to practice in that State is ipso facto disbarred upon a conviction of a felony, and no action, judicial or otherwise, is necessary to accomplish that disbarment.[3/] But before that consequence

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1/ Rule 2(b) of the Rules of Practice.

2/ Rule 2(e) of the Rules of Practice.

3/ Barash v. Association of Bar of City of New York, 20 N.Y. 2d 154, 228 N.E. 2d 896 (1967).

flows from a conviction of a federal felony, the federal felony must also be cognizable as a felony under New York law.[4/] The crime of conspiracy of which respondent was convicted, although a felony under federal law, amounts only to a misdemeanor under the laws of New York,[5/] but the other counts of the indictment of which respondent was convicted charge the equivalent of the New York felony of grand larceny in the second degree.[6/]

As noted by OGC, securities frauds charged as such under New York's so-called Martin Act are misdemeanors,[7/] and convictions of federal felonies which are no more than Martin Act offenses under New York law would not cause respondent's disbarment from practice in that State. However, the substantive counts of the indictment on which respondent was convicted charged, inter alia, that he "unlawfully, wilfully and knowingly, in the offer and sale of securities . . . (b) did obtain money and property by means of untrue statements of material facts and omissions to state

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4/ In re Donegan, 282 N.Y. 285, 26 N.E. 2d 260 (1940).

5/ N.Y. Penal Law § 105.05 (McKinney 1967).

6/ Id. § 155.35.

7/ N.Y. General Business Law § 352-c (McKinney 1968).

material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; . . . ." If so charged under New York law, the conduct would fall within the definition of larceny by obtaining property by false pretenses,[8/] and when considered in the light of the other allegations in the indictment, amounts to grand larceny in the second degree.[9/] Accordingly, it would appear that respondent has been disbarred from practice in New York by operation of law[10/] and is therefore not qualified to represent others before the Commission.

But if New York courts should take a different view of the effect of the federal felony convictions upon respondent's status as an attorney, the federal convictions would nonetheless establish that respondent did not possess the requisite character or integrity to appear and practice before the Commission. And this is so even though the convictions are the subject of a pending

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8/ N.Y. Penal Code § 155.05, 2(a) (McKinney 1967).

9/ Enactment of §352-c (Article 23-A, commonly known as the Martin Act) of N.Y. General Business Law did not repeal and supersede the penal law relating to larceny by false pretenses with respect to security transactions. Application of Bradford Audio Corporation, 214 N.Y.S. 2d 200 (Sup. Ct. 1961).

10/ Barash v. Association of Bar of City of New York, supra.

appeal to the United States Court of Appeals for the Second Circuit.

As indicated, Rule 2(e) speaks in broad terms, rather than specifying conduct which is to be considered adequate to evidence an attorney's lack of character or integrity. But violations of securities laws which have involved moral turpitude have been recognized as grounds for taking disciplinary action against an attorney,[11/] and the federal judiciary has held that conviction of a felony or serious criminal offense is reason to disbar an attorney.[12/] The Commission has cited the conviction for violation of Section 5 of the Securities Act of 1933 as one of the bases for permanently denying an attorney the privilege of appearing or practicing before it.[13/]

It appears, therefore, that respondent's felony convictions are sufficient to demonstrate that he lacks the requisite character

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11/ See e.g. In re Langford, 50 Cal. Rptr. 661, 413 P. 2d 437 (1966); Cincinnati Bar Association v. Shott, 10 Ohio St. 2d 117, 226 N.E. 2d 724 (1967).

12/ Ex Parte Wall, 107 U.S. 265 (1882); In re Tinkoff, 95 F. 2d 651 (1938).

13/ Arnold D. Naidich, Securities Act Release No. 4372 (1961).

or integrity. Further, the indictment on which the convictions were based portrays a premeditated fraud involving manipulation of securities prices and details offenses of such number and gravity that respondent should be permanently barred from appearing or practicing before the Commission. The proposal of OGC that a permanent order of disbarment be entered subject to suspension upon submission by respondent of proof of a reversal or vacation of the judgment of conviction is not acceptable under the circumstances. The respondent's appeal from his convictions may succeed without the facts which led to his convictions being placed in question. On the other hand, respondent's readmission should not be predicated solely upon a reversal or vacation of his felony convictions. He may well be able to satisfy the Commission at some future date that he is entitled to its renewed confidence even if the appeal from the convictions proves unavailing. It would be preferable for reinstatement to depend not upon whether respondent's convictions are reversed or vacated, but upon respondent making application therefor, and requiring that he submit therewith, by affidavit or otherwise, acceptable indicia of satisfactory character and integrity.

Respondent contends that the Commission does not have jurisdiction to suspend or disbar him, and also that proof of respondent's unfitness to appear or practice before the Commission is lacking. Neither of these arguments is found to have merit.

Respondent asserts that the jurisdiction of the Commission over this type of proceeding is defective, and in support cites Camp v. Herzog, 104 F. Supp. 134 (D.D.C. 1952), aff'd 190 F. 2d 605 (D.C. Cir. 1951), and Schwebel v. Orrick, 153 F. Supp. 701 (D.D.C. 1957), aff'd 251 F. 2d 919 (D.C. Cir. 1958). But he does not indicate the manner in which either of the cited cases is of help to his argument, nor does a reading of those decisions.

In the Herzog case the lower court held that an administrative agency's power of control, by admission and disciplinary action, of persons who appear before it in a representative capacity was found not to be an inherent power but one which must be given by the legislative authority creating the agency. It was further held that the National Labor Relations Board, the agency involved, had been given the necessary statutory authority to adopt an appropriate disciplinary rule but because it had not exercised that authority could not bar an attorney's appearance before it.[14/]

Whether the Commission's jurisdiction to discipline respondent rests on inherent power or statutory authority need not

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14/ On appeal, the question of whether the Board possessed inherent power to discipline practitioners before it or derived it from its governing statute was not considered.

be here determined because the Securities Act of 1933 grants ample authority to the Commission to adopt appropriate disciplinary rules and it has done so in the promulgation of Rules 2(b) and 2(e). Respondent's purpose in citing the Schwebel case is even more obscure, for it clearly indicates that a challenge to the Commission's jurisdiction over respondent would not prevail.

Nor do the cases relied upon by respondent to bolster his argument that no proof of unfitness has been educed serve that purpose. At best, he has called attention to the lack of unanimity on whether in disbarment actions an appeal suspends the effect otherwise attendant upon a felony conviction.

As respondent points out, California has interpreted its disbarment statute providing for removal where an attorney is convicted of a felony as requiring a judgment of conviction that has become final,[15/] but though adhering to that interpretation in the case of In re Réccardi, cited by respondent, the Supreme Court of California was critical of the failure of the statute to provide for interim suspension of an attorney during the appeal period, stating:

15/ People v. Treadwell, 66 Cal. 400, 5 P. 686 (1885); In re Riccardi, 182 Cal. 675, 189 P. 694 (1920).

> "It may freely be conceded that it would be advisable to provide for the suspension of an attorney as to whom a judgment on conviction of felony or misdemeanor involving moral turpitude has been given pending appeal or other review of such judgment. . . . All that is suggested as to the necessity of safeguarding the public, as well as the profession itself, so far as is practicable, against the admission or retention as members of the profession of unfit persons, is something upon which there can be no difference of opinion, and probably it would assist to some extent in the endeavor to attain this ideal if the law was so framed as to exclude an attorney from practice pending review of a judgment of his conviction pronounced in a superior court or by a justice of the peace." 16/

Maine and Missouri take a view similar to that of California with respect to the finality which must attach to a conviction in order to satisfy the intent of statutes which include a conviction as a basis for disciplinary action.[17/] A differing approach is taken by a number of other States.[18/] In the case of In re Kirby,[19/]

16/ Id. at 677, 189 P. at 696.

17/ Donnell v. Board of Registration of Medicine, 128 Me. 523, 149 A. 153 (1930); State v. De Bery, 150 Me. 28, 103 A. 2d 523 (1954); State v. Sale, 188 Mo. 493, 87 S.W. 967 (1905).

18/ See 113 A.L.R. 1181.

19/ 10 S.D. 322, 73 N.W. 92 (1897).

South Dakota's Supreme Court specifically declined to follow the California rule, and the Supreme Court of Kansas in interpreting the Kansas statute refused to delay the order of disbarment, observing that the statute provided for reinstatement of the attorney if his conviction were reversed.[20/]

The noted decisions suffice to demonstrate the polarity of the views of the several States regarding the effect that an appeal from a conviction will have on the operation of a disbarment statute. The Commission does not specifically provide in its rules that a conviction of a federal felony automatically disbars a practitioner before it, but Rule 2(e) certainly contemplates that a felony conviction is proof of unfitness.[21/] The Commission has not heretofore spoken on the question of whether a conviction must be final before being accepted as sufficient, and it may therefore adopt a view that will best serve the public interest and that of the Commission. As earlier indicated, the better approach from the standpoint of the Commission is to consider a felony conviction, whether on appeal or not, as being, ipso facto, proof of lack of character or integrity.

20/ In re Minner, 133 Kan. 789, 3 P. 2d 473 (1931).

21/ Cf. Arnold D. Naidich, supra.

Accordingly IT IS ORDERED that respondent be, and hereby is, permanently disqualified from and denied the privilege of appearing or practicing before the Commission, including, but not limited to, the preparation, review or filing of any papers submitted to the Commission.

This order shall become effective in accordance with and subject to the provisions of Rule 17(f) of the Rules of Practice.

Pursuant to Rule 17(f) of the Rules of Practice, this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen days after service of this initial decision upon him, filed a petition for review thereof pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.

Warren E. Blair

Warren E. Blair, Hearing Examiner

Washington, D.C.
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