

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 40411 / September 8, 1998

Admin. Proc. File No. 3-8951

In the Matter of	:	ORDER DENYING
	:	PETITION FOR REVIEW
PATRICIA ANN BELLOWS	:	AND DECLARING
	:	INITIAL DECISION
	:	FINAL

The Division of Enforcement ("Division") has petitioned for review of the July 23, 1998 initial decision of an administrative law judge. */ For the reasons set forth below, we deny that petition and declare the initial decision final.

The Division initiated this proceeding against respondent Patricia Ann Bellows pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"). The order instituting the proceeding alleged, as relevant here, that from May 1992 through August 1993 Bellows failed reasonably to supervise a registered representative with a view to preventing his violations of the antifraud provisions of the securities laws. The law judge concluded, among other things, that Bellows did not fail reasonably to supervise because the registered representative was not subject to Bellows' supervision. As a result, the law judge dismissed the proceeding.

In its petition, the Division expressly states that it does not seek "general review" of the findings of fact and conclusions of law set forth in the initial decision. Rather, the Division takes exception solely to the carry-over paragraph appearing on pages eight and nine of the initial decision. The Division requests that we modify the initial decision by deleting the carry-over paragraph in its entirety. The carry-over paragraph reads as follows:

The Division's contention, that [respondent] Bellows' position in 1992 and 1993 as compliance officer created supervisory responsibility over [registered representative] Moses, is not well taken. Indeed, this idea that any compliance department personnel acts as supervisor has been rejected by the Securities Industry

*/ Patricia Ann Bellows, Initial Decision Release No. 128 (July 23, 1998), ___ SEC Docket ___.

Association. Task Force on Broker-Dealer Supervision and Compliance of the Committee on Federal Regulation of Securities of the American Bar Association, Broker-Dealer Supervision of Registered Representatives and Branch Office Operations, 44 Bus. Law. 1361, 1373 n.58 (Aug. 1989). The fact that Bellows later in 1993 and 1995 was promoted to executive vice president and to a membership in the executive committee does not per se create supervisory responsibility either. "The public is well protected by state, federal, and common law without subjecting employers to insurer liability for acts they did not commit and could not have reasonably anticipated or guarded against." Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1583 (9th Cir. 1990) (Hall, Rymer, JJ., dissenting). The broker-dealer as personified by Bellows is not an insurer of Moses and she cannot be made vicariously liable for his nefarious deeds. See id. at 1575.

The Division contends that this paragraph reflects the law judge's mistaken view of its litigating position regarding the basis for imposing supervisory responsibilities on compliance personnel. The Division advises that its position was that Bellows failed to act reasonably under the circumstances, not that she had absolute liability for her alleged failure to supervise. The Division further contends that this paragraph "misstates" the law on failure to supervise insofar as it suggests that "compliance personnel can never act as supervisors subject to Section 15(b)(6)." Bellows has not responded to the Division's petition.

Our Rule of Practice 411(b) states, in pertinent part, that in determining whether to grant review of an initial decision, we must consider whether the petition for review

makes a reasonable showing that: (i) a prejudicial error was committed in the conduct of the proceeding; or (ii) the decision embodies: (A) a finding or conclusion of material fact that is clearly erroneous; or (B) a conclusion of law that is erroneous; or (C) an exercise of discretion or decision of law or policy that is important and that the Commission should review.

We conclude that the petition for review fails to make the required showing. The Division's essential claim is that the law judge mischaracterized its legal theory. Such a claim does not constitute grounds for review under Rule 411(b), unless it is coupled with a claim -- not made here -- that the asserted mischaracterization caused the law judge to reach erroneous factual or legal conclusions.

The Division's other claim is that the paragraph at issue misstates the law and holds that "compliance personnel can never act as supervisors subject to Section 15(b)(6)." Such a holding would embody an erroneous legal conclusion. However, we do not read the paragraph in this manner. The paragraph does not contradict the well-established principles -- found in both federal court and our own precedents -- that (1) one who exercises compliance responsibilities in a brokerage firm may be subject to liability under Section 15(b) of the Exchange Act for failing reasonably to supervise the activities of the firm's employees, and (2) determining if a particular person is a "supervisor" depends on whether, under the facts and circumstances of a particular case, that person has a requisite degree of responsibility, ability, or authority to affect the conduct of the employee whose behavior is at issue. See, e.g., Patrick v. SEC, 19 F.3d 66 (2d Cir. 1994); Castle Securities Corporation and Michael T. Studer, Exchange Act Rel. No. 39523 (Jan. 7, 1998), 66 SEC Docket 796, petition for reconsideration and stay denied, Exchange Act Rel. No. 39999 (May 18, 1998), 66 SEC Docket ____, appeal filed, No. 98-4058 (2d Cir.); Rita H. Malm, Exchange Act Rel. No. 35000 (Nov. 23, 1994), 58 SEC Docket 121; John H. Gutfreund, Thomas W. Strauss and John W. Meriwether, 51 S.E.C. 93, 113 (1992) (consent order and Exchange Act Section 21(a) report). While the law judge's citations to a dissenting opinion and to the views of a trade group are not controlling authority, their inclusion in the decision does not amount to a prejudicial or other error under Rule 411(b).

Under these circumstances, we decline to review the initial decision of the law judge pursuant to Rule 411(b). We also have determined in accordance with Rule 411(c) not to order review of the initial decision on our own initiative.

Accordingly, IT IS ORDERED that the Division's petition for review be, and it hereby is, denied. Notice is hereby given that, under Rule 360(d) of our Rules of Practice, the initial decision of the law judge has become the final decision of the Commission. The order contained in that decision dismissing the proceedings against Patricia Ann Bellows hereby is declared effective.

By the Commission.

Jonathan G. Katz
Secretary.