UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1665/July 31, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15858

In the Matter of	:	
	:	
STANLEY JONATHAN	:	ORDER
FORTENBERRY (A/K/A S.J.	:	
FORTENBERRY, JOHN	:	
FORTENBERRY, AND	:	
JOHNNY FORTENBERRY)	:	

The Division of Enforcement has moved to admit into evidence the sworn testimony of Sherman Brooks Halsey on the grounds that Mr. Halsey died in 2013. Respondent Stanley Jonathan Fortenberry opposes the motion. For the reasons stated below, I GRANT the Division's motion, subject to the Division demonstrating that Mr. Halsey's testimony is relevant.

Ruling

The Commission's Rules of Practice provide for the exclusion of evidence that is "irrelevant, immaterial or unduly repetitious." 17 C.F.R. § 201.320. There is no *per se* bar to the admission of hearsay evidence in the Commission's administrative proceedings. *See*, *e.g.*, *Guy P. Riordan*, Securities Act of 1933 Release No. 9085 (Dec. 11, 2009), 97 SEC Docket 23445, 23469, *pet. denied*, 627 F.3d 1230 (D.C. Cir. 2010); *Edgar B. Alacan*, 57 S.E.C. 715, 729 (2004). Rather, the fact that evidence constitutes hearsay goes to its weight, not its admissibility. *Guy P. Riordan*, 97 SEC Docket at 23469.

Rule of Practice 235 provides, in relevant part:

> At a hearing, any person wishing to introduce a prior, sworn statement of a witness, not a party, otherwise admissible in the proceeding, may make a motion setting forth the reasons therefor. If only part of a statement is offered in evidence, the hearing officer may require that all relevant portions of the statement be introduced. If all of a statement is offered in evidence, the hearing officer may require that portions not relevant to the proceeding be

> excluded. A motion to introduce a prior sworn statement may be granted if:
>
> (1) The witness is dead[.]

17 C.F.R. § 201.235(a)(1).

By showing that Mr. Halsey has died, a fact Mr. Fortenberry does not contest, the Division has demonstrated that the admission of Mr. Halsey's prior sworn testimony falls within the terms of Rule 235. As a result, the question is whether the Division has demonstrated that I should exercise my discretion to admit Mr. Halsey's testimony.

In this regard, the Commission has directed that administrative law judges "should be inclusive in making evidentiary determinations." *City of Anaheim*, 54 S.E.C. 452, 454 (1999). When "in doubt," the evidence should be admitted. *Id*. at 454 n.7.

Without specific explanation, the Division avers that "Mr. Halsey's testimony is highly relevant" and "a critical part of [its] allegations against Mr. Fortenberry." Motion to Admit at 3. "[M]erely saying [something] does not make it so," however. *GTE Service Corp. v. FCC*, 205 F.3d 416, 426 (D.C. Cir. 2000). Nonetheless, I have reviewed Mr. Halsey's testimony and the allegations listed in the Order Instituting Proceedings and will accept the Division's assertions for purposes of this Order. Subject to the Division demonstrating the relevance of Mr. Halsey's testimony, I will admit his testimony, without prejudice to Mr. Fortenberry demonstrating that the testimony is irrelevant. Because the Division did not file a reply to Mr. Fortenberry's opposition, I direct that no later than twenty days before the start of the hearing in this matter, the Division shall identify in writing the specific portions of Mr. Halsey's testimony that it contends are relevant to this proceeding. Mr. Fortenberry may respond in writing no less than seven days before the start of the hearing in this matter. At or before the hearing, I may require that portions not relevant to this proceeding be excluded. *See* 17 C.F.R. § 201.235(a).

For his part, Mr. Fortenberry opposes the Division's motion, arguing that Rule 235 does not apply to the hearing I will hold in this matter. Opposition at 1-2. By its terms, Rule 235 applies "[a]t a hearing" conducted by a "hearing officer." 17 C.F.R. § 201.235(a). As used in Rule 235, a "hearing officer means an administrative law judge." 17 C.F.R. § 201.101(a)(5). As a result, Rule 235 applies.

Mr. Fortenberry also argues that the hearsay rule found at Federal Rule of Evidence 804(b)(1) should be applied in this matter. Opposition at 2. The Federal Rules of Evidence, while useful as guidance, do not apply in this proceeding. *See City of Anaheim*, 54 S.E.C. at 454. And, unlike in district court, relevant hearsay evidence is admissible here. *Guy P. Riordan*, 97 SEC Docket at 23469.

Mr. Fortenberry additionally argues that Mr. Halsey's testimony is suspect and that it "contains numerous objectionable statements." Opposition at 3. Among these objections are irrelevance, speculation, improper rendition of expert testimony, lack of foundation, and improper character evidence. *Id.* Of these, only the question of relevance weighs on admissibility, and this issue will be dealt with by the Division's showing on relevance prior to the hearing. Mr. Fortenberry also argues that the testimony should "be given less weight and

credibility" because he cannot cross-examine Mr. Halsey. *Id*. Along with his other objections, this point does not relate to the admissibility of Mr. Halsey's testimony. The hearing will afford Mr. Fortenberry the opportunity to present evidence to counter Mr. Halsey's testimony.

For the foregoing reasons, I GRANT the Division's motion, subject to the Division's showing that Mr. Halsey's testimony is relevant. No later than twenty days before the start of the hearing in this matter, the Division shall identify in writing the specific portions of Mr. Halsey's testimony that it contends are relevant to this proceeding. Mr. Fortenberry may respond in writing no less than seven days before the start of the hearing in this matter.

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James E. Grimes
Administrative Law Judge