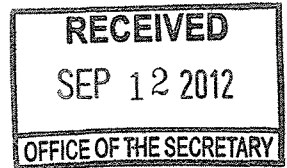


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



In the Matter of	:	
	:	
GREGORY BARTKO, ESQ.	:	RESPONDENT'S PETITION FOR REVIEW
	:	OF INITIAL DECISION OF HEARING
	:	OFFICIER
	:	

Gregory Bartko, ("Respondent") hereby files this Petition for Review of the Hearing Officer's Initial Decision filed in this proceeding on August 21, 2012 ("Initial Decision"). This Petition is filed pursuant to 17 C.F.R. 201.360, 201.410-411. The purpose of this Petition is to request the Commission to review the Initial Decision and to vacate or modify the Initial Decision to comport with the relief requested herein. Respondent explains below that Commission review is warranted due to the fact that: (i) there are findings and conclusions of material fact that are clearly erroneous; (ii) there are conclusions of law that are clearly erroneous; and (iii) there are decisions of law or policy in the Initial Decision that are important not only to the public, the Commission, but also to persons who are licensed to conduct a securities business and/or conduct themselves as investment advisers.

I. Procedural History of Proceeding

Respondent believes that the Procedural History outlined in the Initial Decision is essentially accurate with one exception. Respondent's filings in this proceeding consist of his Answer, with Exhibit A attached, filed on February 14, 2012 and his Memorandum of Law in Response to the Division's Motion for Summary Disposition, with Exhibits A through H attached ("Respondent's Memorandum"), filed on May 9, 2012. The Procedural History makes no mention of Respondent's Exhibits A through H, so it is

unclear whether the Hearing Officer considered those documents as part of the record for purposes of the Division's Motion for Summary Disposition.

II. Summary of Reasons Warranting Commission Review

This Administrative Proceeding was commenced by the Division solely to determine the extent to which any remedial sanction should be entered by the Commission against the Respondent. To make that determination, a Hearing Officer is charged with the authority and the responsibility to determine what sort of sanction, if any, is in the public interest in light of the nature of the OIP issued by the Commission. In this case, the Hearing Officer completely ceded this responsibility in this proceeding by accepting, *carte blanche*, the factual and legal conclusions reached by Respondent's trial judge in the criminal proceeding which gave rise to Respondent's prosecution and conviction. These factual and legal conclusions, which Respondent views as clearly erroneous, were reached in Respondent's criminal case in the context of the court's rulings on four new trial motions necessitated by the Respondent's discovery, seven months after his conviction, of a series of intentional prosecutorial errors commonly referred to as "Brady/Giglio/Napue" violations.

Respondent had no bench trial in his criminal case; rather he was tried by a jury. As Respondent has readily conceded since the filing of his Answer to the OIP, the jury reached guilty verdicts as to the charges contained in the indictment. A judgment of conviction following the jury's verdict was entered, which evidences the convictions to be felonies. The entry of a conviction does not as a matter of law determine what remedial sanction the Commission should enter in a "follow-on" proceeding. If that was the law, there would be no reason that would compel the Hearing Officer to make any determination of what sanction is in the public interest pursuant to *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979). What the Hearing Officer did in this case is simply take the findings of another judge who was called upon to decide whether Respondent should be granted a new trial due to a number of constitutional due process violations that were admitted by the government in the criminal case. The actions by the federal

prosecutors giving rise to the alleged due process violations were admitted as having occurred. In other words, the prosecutors were compelled to admit that certain exculpatory material in the government's possession was suppressed from the Respondent's lawyers pretrial. The debate giving rise to the trial court's opinion dated January 17, 2012 was the extent to which the Respondent was prejudiced by the prosecutorial misconduct. All of these issues and more will be addressed in Respondent's appeal of his criminal conviction now pending before the United States Court of Appeals.

This is not a distinction without a difference. The proceeding at issue here deals with what sanction is in the public interest. The Hearing Officer, perhaps tempted to accept and rely upon what appears to the casual reader to be an "egregious, overwhelming, shameless" array of unlawful conduct, wholly failed to make specific findings of facts on each of the six "Steadman factors." *Steadman v. SEC*, Id., at 1140. Instead of a detailed examination of Respondent's complete history as a licensed securities professional from 1999 to the present date, the Initial Decision focuses solely on another judge's work in denying a new trial in Respondent's criminal case. The stratagem adopted by the Hearing Officer to simply block out any other mitigating information bearing on the Steadman factors is the conclusion in the Initial Decision that, "even assuming the truth of these allegations in Bartko's pleadings, which, as stated previously, are taken as true pursuant to Rule 250(a) of the Commission's Rules of Practice....a permanent bar...is in the public interest." In practical effect, this is just a creative way of concluding that no matter what must be accepted in Respondent's pleadings, the conclusions would be the same. However, none of the above which is found in the Initial Decision is compliant with Section 203(f) of the Adviser's Act or Section 15(b)(6)(A) of the Securities Exchange Act. In fact, the basis of the Initial Decision is so noncompliant that it essentially just incorporates by reference other findings, but none of which were made in the context of what remedial sanctions would be appropriate in the public interest. Respondent's Memorandum explains the remedial sanction that the Respondent advocates to be in the public interest. The Respondent is and has been incarcerated since November 18, 2010. No professional or business activities may be conducted during Respondent's incarceration. A Form BDW was filed some time ago

for Respondent's broker-dealer and as noted in the Initial Decision, Respondent's investment adviser registration has never been renewed. In short, Respondent has no licensing privileges so one can only presume that the Division's pursuit of a permanent associational bar is punitive in nature--nothing else. This is one more reason that the Hearing Officer erred in dispensing with the issue of prosecutorial misconduct and erred by not mentioning one word about the relevance of the SEC enforcement staff's gross misconduct, all of which was set forth in the record made available to the Hearing Officer.

The Initial Decision is fundamentally flawed legally and factually for one additional compelling reason. First, as required by Rule 201.250 of the Commission's Rules of Practice, the Hearing Officer must assume the facts to be true for purposes of the Division's Motion for Summary Disposition. The facts which are most relevant to the Respondent's Answer in opposition to the Division's motion were again recited on pages 2-3 of Respondent's Memorandum. (See paragraphs 1-8, pages 2-3 of Memorandum). Rule 250(a) allows the parties' pleadings to be modified by stipulation, admissions or uncontested affidavits or facts officially noticed pursuant to Rule 323 of the Commission's Rules of Practice. The parties submitted no stipulations, admissions or uncontested affidavits. None of the eight paragraphs recited in Respondent's Memorandum were in anyway contradicted, altered or amplified by any facts the Hearing Officer may have deemed to be judicially noticed. For purposes of this Petition, the facts stated in Respondent's Answer and restated in his Memorandum should again be deemed to be true. Since these factual assertions go to the very heart of the propriety of the Commission's actions taken by certain Division staff members in the Atlanta Regional Office of the Commission, the Initial Decision in reality means that the unlawful conduct of the Division's staff during the inquiry that was informally conducted by Division staff member Alex Rue has no bearing on the sanctions imposed on the Respondent. Nor would the collusive relationship between Mr. Rue and the federal prosecutor that handled Respondent's criminal prosecution have any bearing on the issue of sanctions. Fortunately, this is not the law. The misconduct of Division staff and that of Respondent's federal prosecutors goes directly to the heart of the Respondent's state of mind during the period of time that the government alleged that Respondent's

conduct was unlawful. "Respondent's state of mind is highly relevant in determining the remedy to impose" [in follow-on proceedings]. *Steadman v. SEC*, Id. at page 1140. Contrary to *Steadman*, the Hearing Officer determined that nothing else mattered when it came to determining what sanction would be in the public interest.

The Initial Decision also materially fails to comply with two other well established principals espoused in *Steadman v. SEC*, Id. *Steadman* requires the Commission to articulate carefully the grounds for its decision and when the Commission imposes the most drastic sanctions, such as a lifetime bar, the Commission also must explain why lesser sanctions will not suffice. *Steadman*, Id. at 1143. The Hearing Officer wholly failed to do so even though Respondent's Memorandum and Answer specifically raise the specter of alternative remedial sanctions. (See Exhibit E to Respondent's Memorandum). Moreover, the Initial Decision wholly fails to address the last three *Steadman* factors, the sincerity of the Respondent's assurances against future violations, Respondent's recognition of the wrongful nature of his conduct, and the likelihood of future violations. Instead, the Hearing Officer seems to belittle the Respondent's claim of innocence. How can Respondent offer assurances against future violations and recognize the wrongful nature of his conduct when he committed no violations to begin with nor was his conduct unlawful.

The final basis advanced by the Petitioner which weighs heavily in favor of review of the Initial Decision is found in the final paragraph on page 2 of the Initial Decision. There are two legal conclusions and one factual conclusion that are erroneous and these conclusions materially impact all other findings by the Hearing Officer. These erroneous conclusions include:

1. "Thus, the district court's findings, discussed and relied upon throughout this Initial Decision are binding."
2. "Preponderance of the evidence has been applied as the standard of proof", in reliance in *Steadman v. SEC*, *supra*.

3. "All arguments and proposed findings and conclusions that are inconsistent with this Initial Decision have been considered and rejected."

As explained above, the Hearing Officer clearly ceded his duties explained in Rule 250 of the Commission's Rules of Practice by specifically finding that Respondent's factual assertions in his Answer were deemed true, but then expressly repudiating the same factual assertions. The 120-page new trial decision dated January 17, 2012 that is relied upon by the Hearing Officer mentions not one word with respect to the substance of paragraphs 1 through 8 of pages 2-3 of the Memorandum.

A prerequisite to the application of collateral estoppel, as relied upon by the Division and the Hearing Officer, is that the disputed issue(s) must have actually been litigated in the prior proceeding. *General Teamsters, Auto Truck Driver's and Helpers Local 162 v. Mitchell Brothers Truck Lines*, 682 F.2d 763, 768 (9th Cir. 1982) and *Hinkle Northwest, Inc. v. Securities and Exchange Commission*, 641 F.2d 1304 (9th Cir. 1981). None of the factual assertions raised in Respondent's Answer to the OIP were actually litigated in any prior proceeding. There is simply no basis whatsoever for the Hearing Officer to have concluded that Respondent's factual assertions in his Answer are true and then relying on support drawn out of thin air, making a finding rejecting Respondent's factual allegations.

With respect to the Hearing Officer's reliance on *Steadman v. SEC, Id.*, as to the appropriate standard of proof to be applied in this proceeding, two points should be emphasized. *Steadman* addressed the appropriate standard of proof in determining whether the antifraud provisions of the federal securities laws had been violated. Respondent's criminal case did not involve violation of any antifraud provisions of the federal securities laws. The government alleged the sale of unregistered securities violative of Section 5 of the Securities Act of 1933. The only other fraud-related allegations made against the Respondent were four counts of mail fraud, which Respondent contends is not subject to the holding in *Steadman v. SEC*, 450 U.S. 91 (1981). Accordingly, the correct standard of proof that the Hearing Officer was compelled to apply in this proceeding is set forth in 5 U.S.C. Section 556(a), which requires "reliable,

probative and substantial evidence." However vague this standard may be, it is not consistent with the preponderance of the evidence standard of proof.

III. Public Policy Considerations Warranting Commission Review

Respondent urges the Commission to carefully consider the issues raised by Respondent's Answer and Memorandum that were not decided or even reviewed by the Hearing Officer. Registered securities professionals and members of the public at large need to know that the disciplinary process undertaken by the Commission is fair and accords due process to all respondents. The Initial Decision filed in this proceeding serves only to perpetuate a raft of misconduct by government lawyers that robbed the Respondent of a fair trial and his factual innocence.

Division staff misconduct involving the Respondent was not mentioned in the Initial Decision. The complete absence of consideration of this mitigating factor is reprehensible. The failure of the Hearing Officer to even tangentially make inquiry of the wrongful and unlawful staff conduct of Alex Rue and David McLellan that is chronicled in Respondent's Answer is inexcusable. Government agency employees have a duty to report nonfrivolous allegations of agency employee misconduct to either the relevant office of inspector general or other professional responsibility designate. This misconduct which Respondent contends is relevant to this proceeding, if determined to be true, would be clear disciplinary violations of the Georgia Rules of Professional Conduct and violations of Rule 16 of the Federal Rules of Criminal Procedure as well as the corollary Local Rules of the Eastern District of North Carolina.

Unless further review of the Initial Decision is accepted by the Commission, the message that will be sent to registrants and the general public is "none of this matters." Respondent believes these facts do matter and relate directly to the determination of appropriate sanctions in this proceeding. For sanctions purposes, the Commission arguably should be deemed to be in pari delicto with the Respondent. Finally, Respondent asserted a number of other mitigation factors that the Hearing Officer failed to consider in rendering the Initial Decision. The Division refused to produce documents in this proceeding as required

by Rule 230 of the Commission's Rules of Practice and the Hearing Officer enabled that refusal. The Hearing Officer also failed to consider or even rule upon Respondent's Motion for Stay of Proceedings filed shortly after the Division's motion was filed.

Summarizing, the Respondent seeks Commission Review of the Initial Decision. At a minimum, the Respondent seeks relief from the Commission in the nature of a remand to the Hearing Officer to enable a full and complete decision on the merits of Respondent's Answer and Memorandum, which should include consideration of all facts accepted as true for purposes of Rule 250 of the Commission's Rules of Practice. Remand should also require the Hearing Officer to meaningfully consider all mitigating factors raised in defense of this proceeding in the context of the Division's motion. Alternatively, Respondent suggests a more logical and less draconian remedy in this proceeding that would be in the public interest, yet not permanently disenfranchise Respondent from the securities business when his wrongful conviction is vacated.

Dated this 6th day of September, 2012.

Respectfully Submitted,


Gregory Bartko