

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 59550 / March 10, 2009

INVESTMENT COMPANY ACT OF 1940
Rel. No. 28644 / March 10, 2009

Admin. Proc. File No. 3-12753

In the Matter of

JOSEPH JOHN VANCOOK

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and

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ORDER DENYING
REQUEST FOR EXTENSION OF
TIME, POSTPONEMENT, OR
ADJOURNMENT

On July 18, 2008, Joseph VanCook, a registered representative formerly associated with broker-dealer Pritchard Capital Partners, LLC, filed a timely petition for review of an administrative law judge's initial decision finding that VanCook violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, 1/ and aided and abetted and caused other violations of the securities laws, based on allegations that VanCook engaged in late trading of mutual fund shares on behalf of hedge fund clients. 2/ On October 21, 2008, VanCook filed a reply brief and, with it, a motion to stay this proceeding.

1/ 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

2/ In his initial decision, the law judge defined "late trading" as "the practice of placing orders to buy or sell mutual fund shares after the time when the fund has calculated its [net asset value], but receiving the price based on the prior [net asset value] already determined as of 4:00 p.m."

VanCook notes that the Commission is currently prosecuting an enforcement action in federal court against Simpson Capital Management, Inc. (“Simpson”), an investment adviser alleged to have engaged in late trading. ^{3/} VanCook is not named as a defendant in the Simpson matter, but VanCook asserts the case shares factual and analytical similarities to his. The complaint in the Simpson case describes mutual fund trades that two registered representatives at Simpson placed with VanCook’s firm, and with other firms, and charges that the trading violated various provisions of the securities laws and rules.

In his motion, VanCook argues that the pendency of the Simpson matter “places the Commission in at least a temporarily conflicted position in which the Commission cannot rule favorably for VanCook without destroying the Commission’s position as party/advocate in the Simpson matter.” He asserts that, “[a]s a matter of due process, VanCook is entitled to have the Commission, as adjudicator, judge his case free from bias” and that, because of its prosecution of the Simpson matter, “the Commission cannot be unbiased in ruling on VanCook’s case.” VanCook therefore seeks a stay of the proceedings against him pending the resolution of the litigation against Simpson. The Division of Enforcement opposes VanCook’s motion. ^{4/}

VanCook fails to cite a particular Rule of Practice in support of his motion for a stay. Rule of Practice 401 governs our issuance of stays. ^{5/} Rule 401(c) permits motions for stays by persons aggrieved by a Commission order “who would be entitled to review in a federal court of appeals.” ^{6/} However, Rule 401(c) is inapplicable here because the Commission has not yet entered a final order, reviewable by an appellate court, that we could consider staying. ^{7/}

^{3/} SEC v. Simpson Capital Mgmt., Inc., No. 07-cv-6072 (JGK) (S.D.N.Y. filed June 27, 2007).

^{4/} On December 3, 2008, the Division of Enforcement (“Division”) filed an opposition to VanCook’s motion, at the same time moving for leave to file it out of time. The Division represents that VanCook consented to its request. Although we strongly disfavor requests for extensions of time, see Rule of Practice 161(b)(1), 17 C.F.R. § 201.161(b)(1), we have determined to grant the Division’s motion and accept their late-filed brief.

^{5/} 17 C.F.R. § 201.401.

^{6/} 17 C.F.R. § 201.401(c).

^{7/} See Michael J. Markowski, Order Denying Request for A Stay and Granting Extension of Time for Filing Briefs, Securities Exchange Act Rel. No. 40748 (Dec. 4, 1998), 68 SEC Docket 2156, 2159 (“Neither the initial decision of the law judge nor our order scheduling briefing in this proceeding is a Commission order entitling [respondent] to appellate review.”).

Although Rule 401 is inapplicable, we will consider VanCook’s motion as a request for an extension of time, postponement, or adjournment under Rule 161. 8/ That rule provides that “the Commission, at any time, . . . may, for good cause shown . . . postpone or adjourn any hearing” so long as any such postponement or adjournment meets certain requirements. 9/ When deciding whether to grant such a motion, we “adhere to a policy of strongly disfavoring such requests, except in circumstances where the requesting party makes a strong showing that the denial of the request or motion would substantially prejudice their case.” 10/ We find that VanCook has not made the requisite showing.

VanCook’s argument – *i.e.*, that “the position of the Commission as both party/advocate and adjudicator on exactly the same issues involving exactly the same parties is a direct conflict, is a recipe for a biased decision, and raises an appearance of impropriety” – is contrary to established precedent. As we have previously stated, “[c]ourts repeatedly have held that the mere fact that an agency both investigates and adjudicates alleged violations does not demonstrate bias or prejudice. Courts have permitted agencies to investigate, file complaints resulting from the investigation, receive evidence, and judge the resulting proceedings.” 11/

In Withrow v. Larkin, the Supreme Court held that combining investigative, prosecutorial, and adjudicative functions within a single state administrative agency did not violate due process. 12/ The Court noted that it is “very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or

8/ 17 C.F.R. § 201.161(a). In determining whether to postpone a proceeding under Rule 161, we consider such factors as the length of the proceeding to date, the number of postponements previously granted, the stage of the proceeding at the time of the request for a postponement, the efficient and timely administration of justice, and any other matters justice requires. 17 C.F.R. § 201.161(b)(1).

9/ Id.

10/ Id.

11/ John Montelbano, Order Denying Requests for Withdrawal of the Commission and for a Stay, Exchange Act Rel. No. 45107 (Nov. 27, 2001), 76 SEC Docket 1023, 1025.

12/ 421 U.S. 35 (1975) (holding that procedure whereby a state medical licensing board both investigated and adjudicated the suspension of a physician’s license did not violate due process). Accord Hilton-Laughlin v. NLRB, 148 F.3d 1166, 1174 (D.C. Cir. 1998) (“[W]e find dispositive the Supreme Court’s holding in [Withrow] that the combination of investigative and adjudicative functions does not, without more, constitute a violation of due process.”); Cousin v. Office of Thrift Supv., 73 F.3d 1242, 1250 (2d Cir. 1996) (finding that combination of authority over investigative, prosecutorial, and adjudicative functions “fall[s] well within the mandates of the Fifth Amendment [of the U.S. Constitution]”) (citing Withrow, 421 U.S. at 57-58).

formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate . . . due process of law.” ^{13/} The Court also noted that, where the same board both instituted proceedings against a person and then judged the outcome of those same proceedings, “the risk of bias or prejudice in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position.” ^{14/} The Court further explained that “legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons.” ^{15/} As a result, the Administrative Procedure Act requires that an employee of a federal administrative agency may not both investigate or prosecute a matter and also adjudicate it. ^{16/} However, as the Supreme Court recognized, that prohibition does not extend to “the member or members of the body comprising the agency.” ^{17/}

Further, in Blinder, Robinson v. SEC, the United States Court of Appeals for the District of Columbia Circuit specifically recognized that the structure of the Commission, as established by Congress, presumptively provides sufficient protection from the potential harm in combining prosecutorial and adjudicative functions; that court found that it would be a “strange rule indeed” that inferred bias in determining the sanction in an administrative proceeding on the ground that the Commission had previously rejected the respondent’s settlement offer. ^{18/} The court stated that finding such bias

would manifest profound disrespect for Congress’ deliberately structuring agencies as (typically) multi-member bodies, with staggered terms and with requirements that the President appoint a certain number of members from the political party other than his own. To give credence to [appellant’s] dark suspicion of bias notwithstanding this carefully crafted structure would flout what

^{13/} Withrow, 421 U.S. at 56.

^{14/} Id. at 57.

^{15/} Id. at 51.

^{16/} See 5 U.S.C. § 554(d).

^{17/} See id.; Withrow, 421 U.S. at 52.

^{18/} 837 F.2d 1099, 1106 (D.C. Cir. 1988).

Justice White, in writing for the Court in Withrow, called a “presumption of honesty and integrity” on the part of those who serve in office. 19/

Here, the alleged due process violation is even more attenuated than those presented in Withrow and Blinder, Robinson. VanCook’s claimed due process violation arises from the Commission’s role in prosecuting a related but different matter while adjudicating his own. We perceive no inherent “potential conflict” between the Commission presenting evidence of alleged violations of the securities laws in federal court in the Simpson matter and determining, based on the evidence presented in this administrative proceeding whether VanCook has himself engaged in any violations and, if so, what, if any, sanction is necessary to protect the public interest. 20/ The risk of bias in the instant case is not, therefore, sufficient to support postponing or adjourning these proceedings.

VanCook asserts that In re Murchison 21/ calls for an “examination of the shifting interrelationships among the parties [to litigation and adjudication] and the circumstances of potential conflict.” In Murchison, the Supreme Court held that due process was violated when the same judge presided over a contempt hearing after having presided over a “one-man grand jury” indictment proceeding out of which the contempt charges arose. 22/ However, the Withrow court specifically considered Murchison’s application to the sound functioning of administrative agencies and concluded that “Murchison has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications.” 23/

VanCook does not argue, and the record does not suggest, that there is actual bias on the part of any of the Commissioners adjudicating this matter, or that any Commissioner otherwise

19/ Id. at 1106-07 (citing Withrow, 421 U.S. at 47). Accord MFS Sec. Corp. v. SEC, 380 F.3d 611, 618-20 (2d Cir. 2004) (noting similarities between Blinder, Robinson and the case at issue and rejecting argument that Commission was biased).

20/ See Withrow, 421 U.S. at 57 (noting there is no “logical inconsistency” when a single administrative body files a complaint based on probable cause and then subsequently decides, “when all the evidence is in, that there has been no violation of the statute”). Cf. Michael T. Studer, 57 S.E.C. 890, 896-97 (2004) (noting the Commission’s authority to bring administrative proceeding for sanctions based on an injunction entered by district court, even when the Commission is still engaged in litigating an appeal of the underlying injunction) (citing Elliott v. SEC, 36 F.3d 86, 87 (11th Cir. 1994)), aff’d, 148 Fed. Appx. 58 (2d Cir. 2005).

21/ 349 U.S. 133, 136 (1955).

22/ Id. at 139.

23/ Withrow, 421 U.S. at 53.

has a personal interest in the outcome of this proceeding. Barring a showing that the “special facts and circumstances present” in this case demonstrate that “the risk of unfairness is intolerably high,” there is no basis for postponing or adjourning the proceedings against VanCook because the combination of investigative, prosecutorial, and adjudicative functions does not, without more, constitute a due process violation. 24/ VanCook’s motion is therefore appropriately denied.

Accordingly, IT IS ORDERED that Joseph VanCook’s October 21, 2008 motion for a stay of these proceedings be, and hereby is, denied.

By the Commission.

Elizabeth M. Murphy
Secretary

24/ Withrow, 421 U.S. at 56-58.