

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

JUSTIN FENSTERMAN

v.

STEVEN H. JOSEFF and
UNIVERSAL COMMODITY CORP

CFTC Docket No. 09-R033

ORDER LIFTING STAY AND
REASSIGNING CASE

Office of
Proceedings
Proceedings Clerk

2011 JAN 13 PM 4:36

Received
C.F.T.C.

On May 14, 2010, the Judgment Officer denied respondent Steven H. Joseff's ("Joseff") requests that the Judgment Officer disqualify himself as the presiding official in this case. The Judgment Officer found no evidence of bias or other grounds for recusal. We disagree and reassign the case.

FACTS

On May 5, 2010, the Commission, acting by delegated authority, stayed the proceeding before the Judgment Officer¹ and directed the Judgment Officer to rule on Joseff's pending motions to reassign the case.² On May 14, 2010, the Judgment Officer issued a Ruling on Steven Joseff's Petition to Disqualify ("May 14 Ruling") that denied Joseff's motions. On May 26, 2010, complainant Justin Fensterman ("Fensterman") filed a motion to lift the stay. On June 7, 2010, Joseff filed an untimely motion for interlocutory review of the May 14 Ruling. Commission Rule 12.309(b), 17 C.F.R. § 12.309(b) (interlocutory review must be sought within ten days after service of the ruling in question). We take sua sponte review of the May 14

¹ The Commission ordered the matter stayed on May 5, 2010 through an Order Pursuant to Delegated Authority. 17 C.F.R § 12.408.

² Joseff filed a Motion to Stay, an Emergency Motion to Stay and an Ethics Complaint against the Judgment Officer. These substantially similar pleadings allege that the Judgment Officer exhibited bias against Joseff and ask that the case be reassigned to another presiding official.

Ruling. Rule 12.309(e), 17 C.F.R § 12.309(e) (the Commission may act on its own motion to review on an interlocutory basis any ruling of a presiding officer).

DISCUSSION

Joseff contends that the Judgment Officer interfered with settlement negotiations and exhibited bias against him. We find that the record reveals conduct by the Judgment Officer that creates the appearance of partiality: during a telephone call on February 18, 2010, the Judgment Officer advised Fensterman not to sign a settlement agreement with Joseff. May 14 Ruling at 13.

The call was the Judgment Officer's first contact with any party to the case. After being assigned to the case and reviewing the file, he called the parties to see if they would be willing to participate in a pre-discovery conference, and called Fensterman first. *Id.* at 11. The Judgment Officer stated that he "explained generally how the case would procedurally progress, and approximately how long it would take, through discovery, telephonic hearing, decision, and any appeal to the Commission." *Id.* at 12.

Various statements by Fensterman "suggested [to the Judgment Officer] that he was operating under some misconceptions," including the assumption "that he somehow would be constrained by his mom's settlement [in a separate reparations case], in which she had received 2½ cents on the dollar." *Id.* at 12. The Judgment Officer stated that he "did not explore the source of these misconceptions." *Id.* Subsequently, Fensterman stated that Joseff, through his attorney, "had offered to settle for \$350 which Fensterman had accepted, and had sent an agreement to sign which Fensterman had not yet signed." *Id.* at 13 (emphasis in original). The Judgment Officer stated that "[w]hen I asked Fensterman if he understood that [the] offer represented between 2½ cents on the dollar (based on a claim around \$12,000) and 5 cents on the dollar (based on a claim around \$7,000), Fensterman expressed reluctance about settling." *Id.* at

13-14.” The Judgment Officer said that he then “affirmed that Fensterman should continue to refrain from signing until he was certain about the deal.” *Id.* at 14.

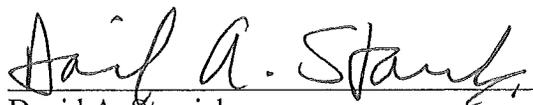
The Commission encourages presiding officers to provide parties who are not represented by counsel procedural guidance and to afford such parties leeway in complying with procedural rules. *See, e.g.,* Commission Guidance Concerning the Rules of Practice Relating to Reparations, 75 Fed. Reg. 3371 (Jan. 21, 2010). Such guidance and leeway does not extend to the Judgment Officer’s statement in this case regarding the ratio of the offered settlement amount to Fensterman’s claim. It was error to discuss the substance of the proposed settlement when both parties were not represented. Rule 12.206(b), 17 C.F.R. § 12.206(b) provides that discussions encouraging settlement may be conducted *ex parte* with the consent of all parties, but the record is clear that no consent was given. The Judgment Officer permissibly initiated an *ex parte* call to Fensterman to gauge his interest in a pre-decision conference and to explain the procedures of the reparations forum, but when the conversation drifted into substantive, rather than procedural matters, the Judgment Officer should have re-directed or terminated the call.

We find that good cause exists to grant Joseff’s motion to reassign the case. The stay is lifted as of the date of this order. The Director of Proceedings shall reassign this case to an attorney on the staff of the Commission. Rule 12.2, 17 C.F.R. § 12.2 (defining “Commission

decisional employee” as contemplating that Commission employees other than a Judgment Officer or an Administrative Law Judge “may be assigned to hear or to participate in the decision of a particular matter”).³

IT IS SO ORDERED.

By the Commission (Chairman GENSLER and Commissioners DUNN, SOMMERS, CHILTON and O’MALIA).



David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: January 13, 2011

³ Reassignment to an Administrative Law Judge is not possible in this case because the record indicates that the staff of one judge engaged in separate telephone discussions with each party before the case was assigned to the Judgment Officer and the other judge is on leave.