

NEW YORK STOCK EXCHANGE, INC.

EXCHANGE HEARING PANEL DECISION 03-176

October 21, 2003

X

FORMER REGISTERED REPRESENTATIVE

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**Charged with having violated Exchange Rule 477 in that he failed to comply with a request by the Exchange that he testify – Not Guilty.**

**Appearances:**

For the Division of Enforcement  
Steven J. Brostoff, Esq.  
Daniel M. Labovitz, Esq.  
Aida Vernon, Esq.

For the Respondent  
Jeffrey L. Liddle, Esq.  
Ira Lee Sorkin, Esq.  
David I. Greenberger, Esq.

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An Exchange Hearing Panel conducted a hearing on a charge brought by the Exchange's Division of Enforcement against X, a former registered representative with a member organization (the "Firm"). X was charged with having violated Exchange Rule 477 in that he failed to comply with a request by the Exchange that he testify fully regarding certain matters that had occurred prior to the termination of his status as a registered employee of a member organization. X submitted an Answer in which he admitted certain of the facts contained in the Charge Memorandum and denied others. X denied the specific charge. After a hearing, the Hearing Panel found that:

**Background and Jurisdiction**

1. X was born on October 30, 1952. He entered the securities industry in 1979 as a registered representative with Firm A, where he worked until 1982. From 1982 to 1984, X was employed by Firm B. From 1984 to 2002, X was employed by the Firm as a registered representative. The Firm terminated X's employment on or about February 4, 2002.
2. X is not currently employed in the securities industry.
3. From 1998 to 2002, the Firm administered the employee stock option plan ("ESOP") of XYZ, Inc. During this period, X worked at a Firm branch office and was a broker in the group that handled the XYZ ESOP for the Firm.
4. Between October 19, 2000 and September 12, 2002, the Exchange received numerous notifications from the Firm, including Submission of Required Information Pertaining

to ... Registered and Non Registered Employees (“Form RE-3”) and Uniform Securities Industry Notices of Termination and amendments thereto (“Form U-5” and “Form U-5A”), informing the Exchange that X had been the subject of numerous customer complaints. The complaints related to the Firm and X’s administration of the XYZ ESOP.

5. By letter dated June 21, 2001, which he received, Enforcement notified X of its investigation into these matters.

### **Failure to Cooperate**

6. On May 23 and May 24, 2002, X appeared with his attorneys and gave testimony regarding the matters under investigation. At the conclusion of his testimony on May 24<sup>th</sup>, Enforcement staff advised X that the on-the-record interview (“OTR”) was being adjourned and that Enforcement did expect to ask him to return to give additional testimony at a later date in the investigation.

7. On May 23, 2002, X first appeared at the offices of the Division of Enforcement to give testimony. At that time, the Division of Enforcement gave X a number of standard warnings at the commencement of the testimony. The first warning was

“At this time I wish to advise you that under the provisions of the Exchange Rules you are required to testify truthfully during this on-the-record interview and that you may be subject to formal disciplinary action under Exchange Rule 476 if you fail to do so.”

8. A second warning was as follows:

“If the investigation discovers that you have engaged in conduct in violation of Exchange Rules or the federal securities laws, the Division may, where appropriate, take formal or informal disciplinary action against you.”

9. Just a few minutes later, an Enforcement attorney said to X and his attorneys:

“To clarify that, the [Firm] in fact is our subject, [X] is here in connection with his prior employment with that firm and at this time he has not been denoted as a subject.”

10. At the end of two days of testimony, Enforcement counsel thanked X for his willingness to cooperate and agreed that he had provided information beyond what he was asked for.
11. On or about October 15, 2002, pursuant to telephone conversations between Enforcement staff and X’s attorneys, the continuation of X’s OTR was scheduled for November 15, 2002.

12. On or about November 13, 2002, Enforcement was informed that one of X's attorneys had a medical emergency and would be unable to appear on November 15th. At counsel's request, Enforcement agreed to re-schedule the OTR. By mutual agreement, the OTR subsequently was re-scheduled to December 9, 2002.
13. On December 9, 2002, X appeared with his attorneys at Enforcement's offices. Prior to the commencement of questioning, X's counsel quoted the statement found in paragraph 9 above. He stated that he wanted to make sure that the status had not changed.
14. An Enforcement attorney responded that the status has changed. This answer surprised X's counsel. X did not testify on December 9.
15. While still at the Exchange on December 9, X's counsel offered to have X testify if no charges were brought against him. The Enforcement counsel spoke with their superiors and advised X's counsel that Enforcement was not prepared to offer any concession in exchange for X's testimony.
16. X's counsel then asked to make an attorney's proffer to Enforcement as to what X could do for their case against the Firm. Later that day, Enforcement agreed to hear the proffer and a date was scheduled later in December.
17. After Enforcement heard a portion of the proffer by X's counsel, they determined not to grant X's request for consideration in exchange for testimony.
18. In May 2003 prior to the commencement of the hearing in this matter, X returned to the Exchange with his counsel and completed his testimony.

### **DECISION**

The Hearing Panel, by unanimous vote, determined that X was not guilty of the charge. The Division of Enforcement argues that X's changed status, as a subject, did not justify his failure to testify on December 9, 2002. They base this on warnings contained in two jurisdiction letters sent to him in 2001 and the warning given to him at the commencement of his testimony, which is quoted in paragraph 8 above.

However, all three warnings were issued prior to the statement contained in paragraph 9 above that X was not a subject of the investigation. Enforcement counsel went out of their way to tell X that he was not the subject of the investigation. It was reasonable for X to rely on this representation. In addition, they thanked him for his testimony and for the production of material, some of which was beyond even what they asked for.

Enforcement counsel were unable to say when X's status changed to a subject of their investigation, but it was clearly before December 9, 2002. Having made such a representation to X when they changed his status to a subject, Enforcement was obligated under principles of

fairness and due process to inform X and his counsel. Had Enforcement informed X a week or so before December 9 of the change of status, this Panel would have reached the opposite result. X was entitled to be told of Enforcement's change of position. Because he was not told in a timely manner, he was not obligated to testify on December 9. He was still obligated to conclude his testimony and he did so in May 2003.

For the Hearing Panel

Vincent F. Murphy  
Hearing Officer