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In the Supreme Court of the United States

OCTOBER TERM, 1989

ADRIAN ANTONIU, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether due process was violated by the procedures used by the Securities and Exchange Commission in directing the National Association of Securities Dealers to disapprove a brokerage firm's proposed employment of a person convicted of securities fraud.

2. Whether the court of appeals, having concluded that a Commission decision to bar petitioner from the securities business did not comport with the appearance of impartiality because of a speech given by one of the Commissioners, permissibly declined to vacate the Commission proceedings that had occurred prior to the speech.

3. Whether petitioner was "associated or seeking to become associated with a broker or dealer" within the meaning of the Securities Exchange Act of 1934, and thereby was subject to the Commission's disciplinary authority.

4. Whether the court of appeals correctly concluded that it was premature to determine whether petitioner was a "prevailing party" for purposes of the Equal Access to Justice Act.

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No. 89-835

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v.

SECURITIES AND EXCHANGE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 877 F.2d 721. The opinions of the Commission (Pet. App. A35-A42, A49-A71) are not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A76-A77) was entered on June 19, 1989, and a petition for rehearing was denied on July 31, 1989 (Pet. App. A72-A73). The petition for a writ of certiorari was filed on October 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pled guilty to criminal charges of insider trading in 1980. In the court of appeals, he challenged two subsequent orders of the Securities and Exchange Commission.

(1)

The first order (*Antoniou 1*), entered September 3, 1985, directed the National Association of Securities Dealers, Inc. (NASD), to disapprove petitioner's proposed employment with a Minneapolis member brokerage firm. Pet. App. A35-A42. The second order (*Antoniou 2*), entered December 3, 1987, barred petitioner from association with any securities broker or dealer. Pet. App. A49-A71.

1. The events giving rise to petitioner's conviction occurred during the course of his employment with Morgan Stanley & Company and Kuhn Loeb & Company, broker-dealer firms registered with the Commission. Petitioner stole market-sensitive information from those firms and their clients and, together with co-conspirators, used it to trade in securities. Pet. App. A2-A3.¹ On November 18, 1980, petitioner pled guilty to two representative counts of a criminal information for securities fraud in violation of Sections 10(b) and 32 of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b), 78ff; Rule 10b-5, 17 C.F.R. 240.10b-5, and 18 U.S.C. 2. Pet. App. A3 & n.1. Ultimately, on March 31, 1983, he received a suspended sentence of 39 months, unsupervised probation for 39 months, and a \$5,000 fine. A1 R. 11-13; A2 R. 1606-1613.²

2. Under the Securities Exchange Act of 1934, convictions for certain crimes—including those committed by petitioner—may disqualify persons from association with

¹ This conspiracy was the subject of criminal and civil cases. See *United States v. Newman*, 664 F.2d 12 (1981), *aff'd* after remand, 722 F.2d 729 (2d Cir.) (Table), cert. denied, 464 U.S. 863 (1983); *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5 (2d Cir. 1983), cert. denied, 465 U.S. 1025 (1984).

² "A1 R." refers to the administrative record certified to the court of appeals in No. 85-5384 (*Antoniou 1*). "A2 R." refers to the administrative record certified to the court of appeals in No. 88-1095 (*Antoniou 2*).

a brokerage firm. See Section 3(a)(39), 15 U.S.C. 78c(a)(39); see also Section 15(b)(4)(B), 15 U.S.C. 78o(b)(4)(B).³ The Act provides that where a person is subject to such a disqualification, the NASD may (and must, if the Commission so directs) bar him from becoming associated with a member firm. See Section 15A(g)(2), 15 U.S.C. 78o-3(g)(2).⁴ In exercising this responsibility, the NASD required member firms to apply for consent to employ disqualified persons. See NASD Bylaws, Art. I, § 13, NASD Manual (CCH) ¶ 1113, at 1067 (Dec. 1984 reprint).

In 1984, petitioner sought to return to employment with a brokerage firm. Petitioner and M.H. Novick & Company—a registered broker-dealer and NASD member firm located in Minneapolis—submitted an application to the NASD seeking consent to petitioner's proposed employment at the firm. Pet. App. A4. Under the proposal, petitioner would assist Novick's clients and prospective clients in financing and structuring mergers, acquisitions and divestitures (A1 R. 42)—the same area of the securities business from which petitioner had perpetrated the insider-trading scheme underlying his conviction.

³ A person is subject to a statutory disqualification under Section 3(a)(39) if such person has, among other things, been convicted of any felony set forth in Section 15(b)(4)(B) of the Exchange Act; Section 15(b)(4)(B) refers in pertinent part to a conviction for any felony which "(i) involves the purchase or sale of any security, * * *; [or] (ii) arises out of the conduct of the business of a broker [or] dealer * * *."

⁴ Section 15A(g)(2) vests a registered securities association (such as the NASD) with initial responsibility for determining whether a proposed employment of a disqualified person is consistent with the public interest. The Section, in turn, vests the Commission with broad discretion to review and overturn, if appropriate, a decision to permit the employment. To facilitate the exercise of this oversight authority, the statute requires the registered securities association, if it proposes to permit an employment, to file a notice with the Commission not less than 30 days prior to permitting the proposed association.

Pursuant to the NASD bylaws, petitioner and Novick were afforded an evidentiary hearing before a committee of the NASD. A1 R. 68-130. Petitioner appeared with counsel (A1 R. 72), testified personally (A1 R. 75-97), and presented other evidence pertaining largely to his character, his asserted rehabilitation, and the proposed supervision of his employment (A1 R. 98-126). The NASD decided to permit the employment, subject to various conditions. Pet. App. A25-A34.

As required by Section 15A(g)(2) and Commission Rule 19h-1 (17 C.F.R. 240.19h-1) – which establishes the review mechanism by which the Commission exercises its oversight authority – the NASD's decision, together with the record of the proceedings, was forwarded to the Commission. Pet. App. A33-A34. The Commission reviewed the record, and, assessing uncontested facts differently than had the NASD, concluded that it was in the public interest to disapprove the particular proposed employment. Pet. App. A35-A42 (*Antoniou 1*).

The Commission determined that the proposed conditions on petitioner's employment were not adequate to protect against a repetition of the type of misconduct in which petitioner had previously engaged. Pet. App. A40. In addition, the Commission stressed the egregious nature of petitioner's crime, the short time period between his conviction and the proposed employment, and the fact that he would remain on criminal probation for an additional year. *Id.* at A41.

3. Two weeks after the *Antoniou 1* order, on September 19, 1985, the Commission instituted the proceedings resulting in the second of the challenged orders, *Antoniou 2*. The Commission brought these proceedings pursuant to Section 15(b)(6) of the Exchange Act, 15 U.S.C. 78o(b)(6), to determine whether it was in the public interest for the Commission to impose a remedial sanction on petitioner. Pet. App. A43-A48. Section 15(b)(6) authorizes the Com-

mission to institute a proceeding against a person associated or seeking to become associated with a broker-dealer who, *inter alia*, has been convicted of a crime involving the purchase or sale of any security. The Section authorizes imposition of remedial sanctions on such a person, including a bar from association with any broker or dealer. After an evidentiary hearing, an Administrative Law Judge rendered an extensive initial decision, concluding that petitioner should be barred from association with any broker or dealer. A2 R. 470-495. The Commission affirmed the ALJ's decision. Pet. App. A49-A71 (*Antoniu 2*).

In its decision, the Commission concluded, among other things, that petitioner was a person associated with a broker-dealer by virtue of his employment with Kuhn Loeb, and was seeking to become so associated, as demonstrated by the application filed with the NASD concerning proposed employment with Novick. Therefore, the Commission concluded that it was empowered to proceed against petitioner under Section 15(b)(6). Pet. App. A53-A55.

Because Commissioner Charles Cox, following the institution of the *Antoniu 2* proceedings, had referred to petitioner in a speech, petitioner argued that Commissioner Cox should be disqualified from participating in *Antoniu 2*. Stating that Commissioner Cox had "recused himself from all participation in the decision of this matter," the Commission found it unnecessary to address this argument. Pet. App. A58 n.14.

4. In the court of appeals, petitioner challenged both Commission orders on numerous grounds. With regard to *Antoniu 1*, the court, noting that petitioner had raised a "number of challenges to the * * * proceedings," found "no fundamental error of law." Pet. App. A16. The court added that the "specific sanction imposed * * * was well within the discretion of the Commission." *Ibid*. Accordingly, as to *Antoniu 1*, the court affirmed. *Ibid*.

As to *Antoniou 2*, the court stated: "After careful consideration [of the arguments raised by *Antoniou*], we find that only one of them merits our attention." Pet. App. A9. The court went on to address the speech of Commissioner Cox.

The court determined that certain words in the speech could "only be interpreted as a prejudgment" of the pending proceedings. Pet. App. A6-A7. Although the court noted that the Commissioner had recused himself "prior to the filing of the SEC's final decision" (*id.* at A17), the court nonetheless concluded that the Commissioner's "post-speech" participation in *Antoniou 2* did not comport with the "appearance of justice" required by due process. Pet. App. A11, A17. According to the court, there was "no way of knowing how Cox's participation affected the Commissioner[s'] deliberations." *Id.* at A17.⁵ For this reason, the court "nullif[ied] all Commission proceedings * * * in which Commissioner Cox participated occurring after Commissioner Cox's speech was given" and remanded for a de novo review of the evidence, without any participation by Commissioner Cox. *Ibid.*

5. Following entry of the court of appeals' judgment affirming *Antoniou 1* and remanding *Antoniou 2* for further

⁵ The court of appeals stated that "Commissioner Cox did finally recuse himself, on December 3, 1987, the day the *Antoniou II* opinion of the Commission was handed down." Pet. App. A7-A8. The Commission subsequently proffered evidence, in connection with its opposition to petitioner's application for attorney's fees under the Equal Access to Justice Act, to show that Commissioner Cox's recusal took place in early June, 1987, six months before the Commission's December 3, 1987 *Antoniou 2* order. This evidence also showed that Commissioner Cox's "post-speech" participation in the matter consisted of only two acts: the rejection of a proposed settlement offer and his later recusal. Thus, Commissioner Cox did not participate in any aspect of the adjudicatory process—such as hearing argument, deliberating, or formulating or issuing the decision. See Proffer of Evidence in Support of Commission's Opposition to Application for Attorney's Fees.

consideration (Pet. App. A76-A77), petitioner filed an application in the court of appeals for attorney's fees, arguing, among other things, that he was a prevailing party within the meaning of the Equal Access to Justice Act. The court of appeals denied the application, without prejudice, as "premature since it has not been determined that the [petitioner] at this time is a prevailing party." *Id.* at A74.

ARGUMENT

The court of appeals correctly decided the questions raised by petitioner, and its decision does not conflict with any decision of this Court or any other court of appeals. Moreover, nothing in petitioner's claims justifies granting review, particularly given the fact that the case has been remanded to the Commission for further consideration. See *Brotherhood of Locomotive Firemen v. Bangor & A. R.R.*, 389 U.S. 327, 328 (1967).

Petitioner raises four issues: (1) the *Antoniu 1* proceeding violated due process; (2) the court of appeals should have invalidated both *Antoniu* proceedings in their entirety because of Commissioner Cox's speech; (3) the Commission lacked the authority to proceed against him in the *Antoniu 2* proceeding; and (4) petitioner was entitled to attorney's fees before the remand. None of these claims has merit.

1. Petitioner first challenges (Pet. 10-20) the court of appeals' affirmance of *Antoniu 1*, arguing that the procedures employed by the Commission violated due process. As an initial matter, petitioner's claim is premature because the disposition of the remand may render *Antoniu 1* moot.⁶ In any event, petitioner's contention is meritless.

⁶ Although only *Antoniu 2* has been remanded, the proceedings on remand could render *Antoniu 1* moot. If, after de novo review of the evidence by the Commission on remand, the Commission again bars petitioner from the securities industry, the more limited order in *Antoniu 1* would become moot and thus not susceptible to judicial review. See

Petitioner asserts that the Commission's order deprived him of property rights, but he is ambiguous about the source of these rights. Although petitioner refers to his "contract employment right" with Novick (Pet. 11), the record contains no support for the assertion of such a claim. In fact, petitioner was never employed by nor did he have an enforceable employment contract with Novick.⁷ Petitioner's further assertion that the Commission created "property rights (by permitting petitioner's employment with Novick)" (Pet. 14) is also incorrect.⁸ Accordingly, his reliance on

generally *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983) (per curiam).

⁷ Petitioner relies (Pet. 11) on the court of appeals' statement that he "went to work for Novick" in the summer of 1985. Pet. App. A4. Even if he had gone to work for Novick — while the issue of his statutory disqualification was being resolved — this would not necessarily amount to a contract right. However, the court of appeals' statement (in a description of the background on which the court did not rely in affirming *Antoniou 1*) was mistaken. Although petitioner held himself out as employed by Novick in certain submissions supporting his 1984 application (see, e.g., A1 R. 64), in fact, at no time was he employed by Novick nor was such employment contemplated absent the requisite approval (see, e.g., A1 R. 92, 93, 131; A2 R. 760-764, 832-834). Indeed, when asked in 1986, in the *Antoniou 2* proceeding, whether he "ever work[ed] for Novick," petitioner replied "[n]o" (A2 R. 833) and stated further, "I was not ever employed by Mr. Novick, no" (A2 R. 834) and "I never associated with Mr. Novick because I was not allowed to." *Ibid.*

⁸ Apparently petitioner is referring to Commission Rule 19h-1(a)(7). This Rule specifies that, during an extended period of Commission deliberation, the Commission will neither institute proceedings against a member firm or associated person under Section 15(b) or 15B nor direct the NASD to bar association if the NASD permits temporary employment. In this case, the NASD gave no such permission. Even if it had, the temporary employment authorized by the Rule clearly does not create a protected property interest in continued employment. See Exchange Act Release No. 18,278 (Nov. 20, 1981), 24 SEC Dkt. 45, 51 (Dec. 8, 1981) (emphasizing that temporary employment is "required to terminate if the Commission determines to exercise its veto power").

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985), is misplaced. Since petitioner cannot demonstrate an interest in property sufficient to trigger due process constraints,⁹ the cases cited as conflicting are readily distinguishable. To the extent that petitioner claims an intra-circuit conflict (Pet. 11-12), moreover, his claim does not provide a basis for this Court's review. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

Even assuming petitioner could demonstrate a property interest, it is "axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands.'" *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); see also *Cafeteria Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). In this case, the requirements of due process were met.

Before the NASD, petitioner appeared with counsel¹⁰ and was afforded a hearing with opportunity to submit relevant testimony and other evidence in support of the application.¹¹

⁹ See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (a constitutionally cognizable interest must be founded on a legitimate claim of entitlement, not merely on an abstract need or desire or unilateral expectation).

¹⁰ Contrary to assertions raised for the first time in this petition (Pet. 16), counsel represented not just Novick but also petitioner (see, e.g., A1 R. 56, 58, 707, 708; A2 R. 815), and the counsel's advocacy was in keeping with his clients' shared goal of realizing the proposed association (e.g., A1 R. 88, 129). See also Pet. App. A27 (petitioner "appeared and was accompanied by counsel").

¹¹ Petitioner raises six specific objections to the procedure employed by the NASD (Pet. 15-17), only two of which were raised in the court of appeals. Review of the other four is therefore unwarranted. *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

The two previously raised objections are meritless. Petitioner renews his argument that the NASD proceedings were flawed because the

The NASD's written decision was subject to Commission review. The record on review consisted largely of undisputed facts contained in the submissions in support of the application and in the NASD hearing transcript, together with matters of public record relating to petitioner's conviction.

These procedures provided petitioner with notice and an opportunity to respond. No more was required. Contrary to petitioner's contention, due process did not require a second evidentiary hearing, this one before the Commission. Due process ensures that a decision is made on the basis of proper and accurate facts. See *Addington v. Texas*, 441 U.S. 418, 425 (1979). Trial-type hearings serve little purpose where, as here, the essential facts are not in dispute and a statute vests broad discretion in the agency to render a decision "in the public interest." *Coppenbarger v. FAA*, 558 F.2d 836, 840 (7th Cir. 1977). In cases such as this, where a decision does not turn primarily on the determination of what occurred in the past but upon an assessment of the future implications of past conduct, the procedural safeguards may permissibly reflect that purpose. The pro-

NASD panel "started its work from [the] premise" that petitioner was subject to a statutory disqualification. Pet. 15. However, reference to the criminal information and judgment of conviction readily disclosed that petitioner was subject to such a disqualification and, in any event, petitioner conceded that he was subject to a disqualification (*e.g.*, A1 R. 52, 73). Petitioner's renewed contention that the NASD proceeding and the Commission proceeding involved different issues and different records (Pet. 17; see also Pet. 7 n.1) is also incorrect. The record was the same, except that petitioner himself supplemented the record with letters from his counsel regarding his activities following the NASD hearing. A1 R. 704-705, 707-710. See also Pet. App. A38 (Commission decision "based upon an independent review of the record"). Moreover, both the Commission and the NASD considered the question whether petitioner's proposed employment should proceed notwithstanding his insider trading conviction. See Pet. App. A25-A26, A41-A42.

cedures in *Antoniou 1* fully satisfied applicable due process requirements.

2. Petitioner next challenges (Pet. 20-30) the court of appeals' choice of remedy regarding Commissioner Cox's speech. Petitioner argues that the court of appeals, having concluded that Commissioner Cox had prejudged the *Antoniou 2* proceedings, should have vacated not only "post-speech" Commission actions, but also all Commission actions in which Commissioner Cox participated prior to his speech, including the Commission's order instituting the *Antoniou 2* proceedings, as well as all Commission actions in *Antoniou 1*. Pet. 23.¹² Contrary to petitioner's argument, the court of appeals committed no error in declining to vacate pre-speech Commission action.

The court of appeals' remedy is consistent with the remedies fashioned in the cases relied on by petitioner. Pet. 27-30. Where courts of appeals have vacated agency orders because one member prejudged a case, the agency member, unlike here, had refused to recuse himself. Yet even in such cases, the courts invalidated only those actions that occurred subsequent to the event disqualifying the agency member, and did not invalidate all prior administrative proceedings.¹³

¹² Petitioner's additional assertion that the entire Commission is biased against him (Pet. 25 n.6) because the Commission printed and distributed Commissioner Cox's speech is without foundation. The Commission's Office of Public Affairs, as a routine matter, disseminated the speech, which contained a disclaimer on the cover: "The views expressed herein are those of Commissioner Cox and do not necessarily represent those of the Commission, other Commissioners or the staff." A2 R. 1619.

¹³ Thus, in cases where courts "invalidate[d] the proceedings in their entirety" (Pet. 27), the disqualification preceded the institution of the proceedings. See *Staton v. Mayes*, 552 F.2d 908 (10th Cir.) (court invalidated school board action relating to superintendent, where board

3. Petitioner also argues (Pet. 30-37) that the Commission lacked the authority in *Antoniu 2* to proceed against him because he was not "associated or seeking to become associated with a broker or dealer," as required by Section 15(b)(6), 15 U.S.C. 78o(b)(6).¹⁴ Petitioner is incorrect.

members had made statements about superintendent prior to institution of proceedings), cert. denied, 434 U.S. 907 (1977); *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962) (court ordered institution of new proceedings, including issuance of a new charging order, without the participation of a Commissioner who earlier, as a staff member, had participated in the preliminary investigation of the case).

In contrast, where the disqualifying event occurred, as here, while the proceedings were pending, courts have invalidated only the actions following the event. See, e.g., *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970) (court remanded case to FTC for de novo review without participation of Chairman who made speech while matter was pending before the agency; court vacated final decision after Chairman's speech but did not invalidate entire administrative proceeding, including filing of initial complaint); *Texaco, Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964) (where new FTC Chairman made speech while matter was pending before hearing examiner, court would have remanded subsequent proceedings for de novo review without his participation, but other matters required dismissal), vacated on other grounds, 381 U.S. 739 (1965).

Petitioner further asserts (Pet. 25-26) a conflict with the statement in *NLRB v. Phelps*, 136 F.2d 562, 563-564 (5th Cir. 1943) that "when the fault of bias and prejudice in a judge first raises its ugly head, its effect remains throughout the whole proceeding." Nothing in this language supports the proposition that a court must vacate agency actions which precede an agency member's disqualification. Moreover, although petitioner also relies (Pet. 29-30) on *Liljeberg v. Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988), a case involving the judicial disqualification statute, *Liljeberg* itself holds that the question of remedy requires an exercise of judicial discretion concerning the particular case. *Id.* at 2203-2207.

¹⁴ Petitioner asserts that the court of appeals failed to decide this issue. Pet. 30, 37. It is apparent, however, that the court of appeals considered and rejected the contention, finding it lacking in merit. See Pet. App. A9.

Until its recent amendment, the language of Section 15(b)(6) was ambiguous. The Commission consistently interpreted that language as authorizing proceedings against persons who, like petitioner, were associated with a broker-dealer at the time of their misconduct.¹⁵ In 1987, Congress ratified this Commission construction of the statute. As stated in the Senate Report: "These amendments would codify the Commission's interpretation that it has jurisdiction * * * [under Section 15(b)(6)] to bring administrative proceedings against persons who were associated with * * * a broker-dealer * * * at the time they committed an alleged violation of the federal securities laws, regardless of their current employment or association status." S. Rep. No. 105, 100th Cong., 1st Sess. 22 (1987).¹⁶ Under these circumstances, the Commission's consistent interpretation is entitled to deference. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-381 (1969).¹⁷

¹⁵ See, e.g., *John Kilpatrick*, Exchange Act Release No. 23,251 (May 19, 1986), 35 SEC Dkt. 1231, 1238-1239 (June 3, 1986); *Don A. Williams*, Exchange Act Release No. 21,325 (Sept. 14, 1984), 31 SEC Dkt. 568 (Oct. 2, 1984); *Robert Berkson*, Exchange Act Release No. 16,753 (Apr. 17, 1980), 19 SEC Dkt. 1231 (Apr. 29, 1980).

At the time of the fraud that led to petitioner's conviction, he was employed by Kuhn Loeb, a firm registered with the Commission as a broker-dealer. Pet. App. A45-A46.

¹⁶ In accordance with this consistent Commission construction, the provision was clarified to read in relevant part: "any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with a broker or dealer * * *." Securities and Exchange Commission Authorization Act of 1987, Pub. L. No. 100-181, § 317(3), 101 Stat. 1256. The amendments made "clear Congress' original intent that misconduct during a *past* association or attempt at association, as well as during a *present* or *prospective* association, subjects a person to administrative proceedings" under Section 15(b)(6). S. Rep. No. 105, *supra*, at 23.

¹⁷ Petitioner's interpretation would enable persons who perpetrate securities fraud while employed in the securities industry to avoid ad-

In any event, petitioner's claim does not warrant this Court's review. As noted, Section 15(b)(6) has been amended in a manner which will prevent this issue from arising in the future.

4. Finally, petitioner argues that the court of appeals erred in denying his application for attorney's fees. Pet. 38-47. The court of appeals, however, held that the application was "premature" because it had "not been determined that the [petitioner] at this time is a prevailing party." Pet. App. A74. Particularly because the court of appeals did not finally resolve petitioner's application, but merely denied it without prejudice, the issue does not merit review. In any event, when a court vacates an administrative decision and remands to an agency for further consideration, leaving the agency free on remand to reinstate the vacated decision, the party who obtains the remand is not necessarily deemed to have "prevailed" within the meaning of the Equal Access to Justice Act (28 U.S.C. 2412(d)(1)(A)). Since a party who has obtained a remand has ordinarily achieved only an interim "procedural" victory, he has not yet "prevailed." See *Hanrahan v. Hampton*, 446 U.S. 754 (1980).¹⁸ Petitioner's claim is thus unavailing.

ministrative sanction simply by leaving the business. Such a result "would clearly be contrary to the purposes" of Section 15(b)(6). S. Rep. No. 105, *supra*, at 23.

¹⁸ See also *National Wildlife Fed'n v. FERC*, 870 F.2d 542, 545 (9th Cir. 1989); *Brewer v. American Battle Monuments Comm'n*, 814 F.2d 1564, 1567-1568 (Fed. Cir. 1987). Petitioner claims that the court of appeals' decision conflicts with *Kopunec v. Nelson*, 801 F.2d 1226 (10th Cir. 1986). In *Kopunec*, however, the fee applicant's "avoidance of immediate deportation by obtaining a reversal of the * * * automatic revocation of his visa and a preliminary injunction against deportation constitute[d] a substantial victory of his position significantly discrete from the ultimate conclusion to warrant separate treatment." *Id.* at 1229. Here, in contrast, petitioner sought reversal of the Com-

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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mission's decision and termination of the Commission's proceedings;
the court remanded for further Commission consideration which might
result in the same sanction previously imposed by the agency.