UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:	:	
	:	CFTC Docket No. 97-12
In re Curtis McNair Arnold and London Financial Inc.	:	OPINION AND ORDER

William Sumner Scott ("Scott") appeals an Administrative Law Judge's ("ALJ") denial of his application for attorney fees and expenses pursuant to the Equal Access to Justice Act ("EAJA").[1] The ALJ denied the application because Scott represented himself during the underlying administrative proceeding rather than pay an independent attorney to represent his interests.

As explained below, we hold that EAJA does not authorize an award of fees or expenses incurred during the type of Commission proceeding at issue here. Additionally, even if we had jurisdiction to consider Scott's appeal, we would affirm the ALJ's denial of attorney fees on the ground that a *pro se* litigant may not recover fees under EAJA and find that Scott waived any claim that the ALJ erred by failing to separately analyze Scott's eligibility for an award of expenses incurred during the underlying administrative proceeding. Finally, as we explain below, were we to reach the issue, we would find that the Commission was substantially justified in the underlying administrative proceeding, which would serve as an independent basis for refusing Scott an EAJA award.

[1] The ALJ also denied an application that Scott filed on behalf of his law firm. Unless otherwise indicated, references to Scott or Scott's application should be understood as also referring to Scott's law firm and the firm's application.

BACKGROUND

I.

The procedural background pertinent to Scott's appeal must touch on court decisions arising out of the two Commission proceedings underlying Scott's EAJA application. Consequently, we begin with a review of both the two administrative proceedings and the related court proceedings.

Scott represented the parties named in the caption of this case - Curtis McNair Arnold ("Arnold") and London Financial, Inc. ("LFI") – in an enforcement action that the Commission initiated on July 30, 1997 (the "Enforcement Proceeding"). The Complaint underlying the Enforcement Proceeding alleged that Arnold and LFI violated the Commodity Exchange Act ("Act") by selling a commodity trading system to customers without obtaining registration as commodity trading advisors. It also alleged solicitation fraud.[2]

On the day the Commission issued the Complaint, the Commission's Office of Proceedings mailed copies of it to Arnold and LFI in accordance with commission Rule 10.22. On August 1, 1997, LFI staff sent Scott a facsimile transmission reporting that it had received certified documents from the Commission in that day's mail. In that transmission, LFI staff asked Scott to "file a request for an extension of time in this matter." Later that day, Scott sent a facsimile message to Division of Enforcement ("Division") counsel. The message asked whether the Division would consent to an extension of the deadline for responding to the Complaint to September 10, 1997. Scott attached a copy of his August 1, 1997 message from

[2] Arnold and LFI settled the underlying allegations in August 2000. *In re Arnold and London Financial, Inc.*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,217 (CFTC Aug. 14, 2000). In light of respondents' consent, the Commission concluded that they violated Sections 4b and 4o of the Act and Section 4.41 of the Commission's regulations. It imposed a cease and desist order, three-year trading prohibition, and $100,000 civil money penalty as sanctions. In addition, the Commission required respondents to comply with several undertakings specified in the order.

LFI staff requesting him to seek an extension. By August 6, 1997, Scott knew that the Division would not object to a request to extend the filing deadline to September 10, 1997. (Tr. at 44.)

On August 29, 1997, Scott filed a motion with the Commission's Office of Proceedings seeking an extension of the already lapsed deadline for answering the Complaint.[3] Later that day, the Division filed a response asserting that Scott had included misleading statements in his motion.[4] This prompted the ALJ presiding over the Enforcement Proceeding to schedule a telephonic hearing to determine whether Scott should be precluded from further representing the respondents due to his allegedly misleading statements (the "Debarment Proceeding").[5]

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[3] The respondents' answers were due on August 23, 1997.

[4] The two relevant statements were:

> The dates of service of the Complaint were not reported to counsel for respondents until August 25, 1997, which was after the time to respond, or otherwise plead, had lapsed.

and

> In response to a notice of unavailability of the Respondents, Counsel for the CFTC, reported, on or about August 20, 1997, to Counsel for the Respondents that the Commission would not oppose a Motion to Extend the time for a response to September 9, 1997.

[5] The order scheduling the hearing notified Scott that the ALJ intended to assess his conduct under the standards established by Commission Rules 10.11 and 10.12, which provide in relevant part:

> Whenever, while a proceeding is pending before him, the Administrative Law Judge finds that a person acting as counsel or representative for any party to the proceeding is guilty of contemptuous conduct, the Administrative Law Judge may order that such person be precluded from further acting as counsel or representative in such proceeding.

17 C.F.R. § 10.11;
and

> (2) *Effect*. The signature on a document of any person acting either for himself or as attorney or agent for another constitutes a certification by him that:
>
> (i) He has read the document subscribed and knows the contents thereof;. . . .
>
> (iii) To the best of his knowledge, information and belief, every statement contained in the document is true and not misleading; . . .
>
> . . . .
>
> (3) *Sham documents*. If a document is not signed or is signed with an intent to defeat the purpose of this rule, it may be stricken as sham and false. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action pursuant to §10.11(b).

17 C.F.R. § 10.12(f).

The ALJ conducted the telephonic hearing on September 10, 1997. He questioned the Division's attorneys, as well as Scott. At the close of the hearing, the ALJ issued an oral decision debarring Scott from further participation in the Enforcement Proceeding.

The Debarment Proceeding then continued before the Commission based on Scott's application for interlocutory review of the ALJ's ruling. ("Application for Interlocutory Review"). About one month after Scott filed his application, the Commission granted review and affirmed the ALJ's ruling. *In re Arnold*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,174 (CFTC Oct. 17, 1997).[6]

Thereafter, Scott sought judicial review of the Commission's October 17, 1997 decision in the United States Court of Appeals for the Eleventh Circuit. In September 1999, however, the Eleventh Circuit dismissed Scott's petition for review without reaching the merits. The court held that it lacked jurisdiction because the Commission's debarment order was an interlocutory decision rather than a final agency action, given that the Enforcement Proceeding was ongoing. *Arnold, et al. v. CFTC*, No. 97-5713, slip op. at 5 (11th Cir. Sept. 20, 1999).

After the Commission resolved the issues raised in the Enforcement Proceeding by issuing the settlement order, Scott filed a second petition with the Eleventh Circuit seeking review of the Commission's October 17, 1997 debarment decision. During the interim between the court's dismissal of Scott's first petition and Scott's submission of his second petition, however, the

[6] After the Commission's October 17, 1997 decision, Scott filed a motion for reconsideration and then a motion to "expand the record" of the proceeding. In January 1998, the Commission issued an order denying Scott's motion to expand the record. In February 1998, the Commission granted Scott's motion for reconsideration to the degree it sought a clarified explanation of the position he took before the ALJ, but otherwise denied his request for relief.

Commission had revised its interpretation of how the debarment rule should be applied.[7] Consequently, the Commission sought a remand from the court so that it could consider Scott's challenges in light of its new precedent. The Eleventh Circuit granted the Commission's request on November 20, 2000.

In response to the Eleventh Circuit's remand, Scott asked the Commission to vacate the ALJ's debarment order as well as its October 17, 1997 debarment decision and to remand the debarment issue to the ALJ for further proceedings consistent with its decision in *Global Minerals*. The Division urged the Commission to avoid remand by applying the *Global Minerals* standards and procedures on the existing record. In January 2001, the Commission declined to remand the matter for additional proceedings and instead vacated both the ALJ's debarment order and its own October 17, 1997 debarment decision. *In re Curtis McNair Arnold and London Financial, Inc.,* [2001-2002 Transfer Binder] Comm. Fut. L. Rep. ¶ 28,448 (CFTC January 9, 2001). This order resolved the Debarment Proceeding.

Thereafter, Scott commenced this EAJA Proceeding by filing an application for attorney fees and expenses arising out of the Debarment Proceeding.[8] The Division raised a variety of objections to the application and, in April 2001, the ALJ issued his decision denying it in light of federal decisions holding that attorneys acting as *pro se* litigants are not entitled to recover

[7] In July 2000, the Commission issued *In re Global Minerals and Metals Corp.*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,189 (CFTC July 13, 2000) ("*Global Minerals*"). This decision clarified the standards and procedures applicable when an ALJ considers whether to impose a debarment order under Commission Rule 10.11. For example, the decision indicated that: (1) debarment could not be imposed for conduct that took place outside the actual presence of the ALJ; (2) debarment could only be imposed when the record supported a finding that counsel's willful misconduct actually obstructed the administration of justice; and (3) material findings in a debarment proceeding must be supported by clear and convincing evidence. The Commission's decision specifically noted that "[t]o the degree [the Commission's] *Arnold* decision [was] contrary to any of the views expressed in [its] decision [in *Global Minerals*], it [should] no longer be treated as Commission precedent." *Id.* at 50,233.

[8] Arnold and LFI also filed an EAJA application, but did not appeal from the ALJ's decision denying it.

attorney fees under EAJA. *In re Arnold*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,519 (Initial Decision Apr. 16, 2001).

II.

On appeal, Scott challenges the ALJ's conclusion that he is ineligible for any award under EAJA because he represented himself rather than pay an independent attorney to represent him. In this regard, he argues that the Commission should look to state court decisions interpreting Florida law. As to substantial justification, Scott claims that the Commission denied him a fair hearing on factual issues material to his debarment.

The Division suggests that there are several flaws in Scott's EAJA application and urges us to affirm the result of the ALJ's decision.

DISCUSSION

I.

In evaluating Scott's EAJA application, the ALJ concluded that Scott's admission that he had not paid an attorney to represent his interests during the Debarment Proceeding was a sufficient basis for denial. The ALJ's analysis that Scott is barred from recovering attorney fees under EAJA because he acted as a *pro se* litigant is correct. *See Koortisky v. Herman*, 178 F.3d 1315 (D.C.Cir. 1999) (prohibiting the award of attorney fees to a *pro se* litigant-attorney under EAJA); *compare Celeste v. Sullivan*, 988 F.2d 1069 (11th Cir. 1992) (prohibiting the award of

attorney fees to a *pro se* litigant under EAJA).[9] The ALJ failed to address, however, Scott's application for expenses.[10] Although the ALJ's analysis was incomplete,[11] we agree that Scott was not entitled to any award under EAJA.

First, as discussed below, we find that EAJA does not authorize an award of fees or expenses incurred during Commission debarment proceedings. Second, Scott waived any argument regarding the ALJ's error by failing to raise the distinction between attorney fees and expenses in his appellate brief. Finally, the Commission's position during the Debarment Proceeding was substantially justified.

II.

While many EAJA decisions focus on the ultimate merits issue – whether the record establishes that the agency's position during the underlying proceeding was substantially justified – there are a significant number of cases that focus on what might be called preliminary

[9] Scott's claim that the ALJ's analysis is contrary to state law is immaterial because the state law is inconsistent with and frustrates the purpose of EAJA, a federal statute. First, the language of EAJA expressly provides for an award of "attorneys fees", which means that Congress necessarily contemplated an attorney-client relationship as a predicate for an award under this provision. *See Kay v. Ehrler*, 499 U.S. 432, 435-36 (1991) (holding a *pro se* litigant who was a lawyer not entitled to the recovery of attorney fees under the Civil Rights Attorney's Fees Award Act because "the word 'attorney' assumes an agency relationship"); *see also Koortisky*, 178 F.3d at 1319 (applying same reasoning to deny attorney fees to a *pro se* litigant who is also an attorney under EAJA). Second, one of the goals underlying EAJA was to encourage potential claimants to seek the assistance of competent, objective counsel to vindicate their rights. *Koortisky*, 178 F.3d at 1320. This goal would be frustrated if *pro se* litigant attorneys could recover attorney fees for their own work. *Id.* Thus, since state law authorizing an award of attorneys fees to Scott would be inconsistent with and frustrate the purposes of EAJA, it is inapplicable. *CSX Transportation v. Easterwood*, 507 U.S. 658, 664 (1993) (federal regulation covering same subject matter as state common-law preempts any state law that is inconsistent with, or frustrating to, the federal regulation).

[10] Scott's application listed $777.27 in expenses, but did not provide a precise breakdown of the expenditures. This is problematic because the application suggests that Scott may have included expenditures made during the proceedings before the Eleventh Circuit. Pursuant to 5 U.S.C. § 504(a)(1), the Commission has no jurisdiction to award fees or expenses that were incurred outside the administrative context.

[11] A party's *pro se* status is not a proper basis for refusing to award expenses under EAJA. *See March v. Brown,* 7 Vet.App. 163, 168-170 (Vet. App. 1994) (denying a *pro se* litigant attorney fees under EAJA but remanding matter to determine whether an award of expenses was appropriate).

coverage or "eligibility" issues.[12] For example, EAJA only authorizes agencies to award attorney fees and expenses incurred in an "adversary adjudication." EAJA defines an adversary adjudication as a proceeding governed by Section 554 of the Administrative Procedure Act ("APA") where the government's position is represented by counsel or otherwise. 5 U.S.C. § 504(b)(1)(C). The APA, in turn, provides that Section 554 applies when an adjudication is "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a).

In the EAJA context, most courts have ruled that Section 554's reference to "required by statute" necessitates the identification of a specific statute (other than the APA) that expressly requires the agency to conduct an on the record hearing prior to taking the action at issue. *See, e.g., St. Louis Fuel and Supply Co., Inc. v. FERC*, 890 F.2d 446 (D.C. Cir 1989) (finding that Congress intended a "bright-line" rule when it defined "adversary adjudications" and holding that certain Department of Energy proceedings fall outside of EAJA because no statute required such hearing to be held on the record); *Girard v. Klopfenstei*n, 930 F.2d 738, 741 (9th Cir. 1991) (holding that an Agricultural Stabilization and Conservation Service debarment proceeding was not an "adversary adjudication" for EAJA purposes because no statute required such a hearing to be held); *Smedberg Machine & Tool v. Donovan*, 730 F.2d 1089, 1092 (7th Cir. 1984) (holding

[12] Generally, EAJA applicants must show that they (1) meet specified financial requirements and incurred fees and expenses in the context of (2) an "adversary adjudication" where they were (3) prevailing parties. EAJA also requires an applicant to establish that his personal net worth was less than $2,000,000 *at the time the adversary adjudication was initiated*, not at some later date. 5 U.S.C. § 504(b)(1)(B). In like manner, EAJA requires proof that a firm's net worth was less than $7,000,000 at the time the adversary adjudication was initiated. *Id.* Because Scott and his firm's application only provides current net worth information, rather than information at the time the "adversary adjudication" commenced, the application is currently insufficient.

that Department of Labor certification review proceedings are not "adversary adjudications" for EAJA purposes because such proceedings are not statutorily mandated).[13]

Nothing in the Act specifically requires the Commission to conduct an on the record hearing prior to debarring an attorney from representing a party before the Commission. Moreover, Scott has not cited to any general federal statute that imposes such an obligation on the Commission.[14] In these circumstances, the precedent described above compels a conclusion that EAJA does not authorize us to award either attorney fees or expenses incurred during a Debarment Proceeding. Consequently, the ALJ's failure to consider Scott's eligibility for an award of expenses was harmless error.

III.

Scott also failed to raise any argument regarding the ALJ's denial of expenses in his appeal brief. Scott generally challenged the ALJ's denial of an EAJA award by arguing that state common law controls whether a *pro se* litigant might recover fees. He never argued, however, that the ALJ improperly extended federal case law addressing the recovery of fees by *pro se* litigants to apply to the recovery of expenses. Accordingly, because Commission Rule 148.28(e) authorizes us to treat issues not raised in a party's brief as "waived," we find that Scott waived this argument on appeal. *See* 17 C.F.R. § 148.28(e).

[13] These courts hold that even if an agency promulgates rules requiring a hearing to be held in specific instances, absent a specific statutory directive requiring such a hearing, the agency rules do not bring these adjudications within the category of interests that Congress considered eligible for EAJA relief. *See e.g., Smedberg,* 730 F.2d at 1092.

[14] Because EAJA involves a waiver of the federal government's sovereign immunity, most courts tend to focus on the express language Congress employed in defining coverage and eligibility. For example, the Supreme Court has emphasized that Congress intended only to authorize EAJA awards in an identifiable and discrete set of "adjudications," *i.e.*, adjudications that it has specifically required by law to be determined on the record after an agency hearing. *Ardestani v. INS*, 502 U.S. 129, 137 (1991).

IV.

Finally, for the sake of completeness in this protracted proceeding, as explained below, were we required to reach this issue on the merits, we would find that the Commission's factual and legal positions were substantially justified.

The Commission's factual position during the Debarment Proceeding was that Scott's August 29, 1997 motion to extend the time to respond to the Complaint in the Enforcement Proceeding included two statements that were willfully deceptive. The Commission interpreted the first of Scott's statements to have intentionally misrepresented to the ALJ that Scott did not learn that the Complaint had been served upon respondents until August 25, 1997. The Commission found this statement to be deceptive because the evidence showed that Scott knew that the Complaint had been received by respondents on August 1, 1997.

On appeal, Scott does not deny that he learned about respondents' receipt of the Complaint in early August, but argues that his statement referred to his uncertainty about the facts material to the quality or validity of service, which he asserts was not resolved to his satisfaction until August 25, 1997.

Scott's explanation for his statement is not reasonable. The information he purportedly learned on August 25th came from the Postal Service return receipt, or green card. However, the information contained on the green card does not bear upon the quality of service issues he now identifies as the basis for his statement in his motion that "[t]he dates of service of the Complaint were not reported to counsel for respondents until August 25, 1997." We conclude that it was reasonable to infer that Scott's first statement was willfully deceptive. *Cf. Siebert v. Servino,* 256 F.3d 648, 657 n. 5 (7th Cir. 2001) (holding an individual's inconsistent hearing testimony provided a reasonable basis for the court to infer that his original, out-of-court representation was

deceptive); *United States v. Callanan*, 450 F.2d 145, 147 (4th Cir. 1971) (defendant's false explanation for suspicious conduct provided a reasonable basis to infer an intent to deceive).

The second statement at issue was Scott's representation that Division counsel "reported on or about August 20, 1997" to Scott that the Division would not oppose his motion, which was eventually filed on August 29, 1997. The Commission interpreted the second statement to mean that the first time Scott learned the Division would not oppose an extension was on August 20, 1997. The Commission found this statement to be deceptive because Scott knew that the Division had consented to an extension of time no later than August 6, 1997.

Scott contends that the Commission's finding that his second statement was willfully deceptive is unreasonable because the statement was intended only to convey that the Division had agreed to an extension, and that the date of such an agreement was immaterial. EAJA Appeal at 5, ¶ F; Application for Interlocutory Review at 6. This attempted defense ignores an earlier explanation of this statement given by Scott,[15] reads the second statement out of context with the other statements contained in his Motion to File Out of Time, and contorts the statement itself. In these circumstances, we conclude that the Commission was substantially justified in finding the statement deceptive.

We also consider the Commission's legal position to have been substantially justified. Scott contends he was not allowed "to introduce relevant evidence in his defense and [the ALJ] arbitrarily refused to allow any testimony from the date the client first told Scott the Complaint had arrived to the date the Motion to File Out of Time was filed." EAJA Appeal at 2. Contrary to Scott's argument, the record shows that the ALJ permitted Scott to cross-examine Division counsel about conversations they had with each other on August 20, 1997 and August 25, 1997.

[15] This contention contradicts his earlier assertion that the August 20th date was included in his second statement because he had only been retained as counsel sometime around August 18th. (Tr. at 43-44.)

(Tr. at 20-24, 30-33, and 35-37.) The record further shows that the ALJ permitted Scott to testify about these conversations. (*Id.* at 44-47.) Moreover, review of the record shows that Scott never offered any material into evidence. Thus, we find Scott's alleged "due process" issues do not establish that the Commission's legal position lacked substantial justification.

Finally, we find the Commission's interpretation of Rule 10.11 in its October 17, 1997 decision was substantially justified. At the time of that decision, the Commission had never actually applied Rule 10.11 and there was no clear guidance to be distilled from the language of that Rule or its regulatory history. The ambiguous language of Rule 10.12 further complicated the Commission's task of interpretation. As a result, the Commission simply applied Rule 10.11 as it had applied a parallel debarment rule in a prior reparations case. *See Adey v. FCCB*, [1987-1990 Transfer Binder] Comm.Fut.L.Rep. (CCH) ¶24,331 at 35,427 (CFTC Sept. 17, 1988). That the Commission revisited that analysis in the subsequent *Global Minerals* opinion is not a sufficient basis to conclude its prior position was not legally justified.[16]

[16] Because Scott's conduct occurred in the administrative context, it was not unreasonable for the Commission to apply a standard different than that applicable to criminal contempt, which the Commission later adopted in *Global Minerals*. It was also not unreasonable for the Commission to consider, as it did, factors such as the likelihood that such conduct would discourage reliance upon future representations by counsel. *Cf. Okin v. S.E.C.*, 137 F2d 398. 402 (2d Cir. 1943) (SEC debarment of counsel for indecorous behavior was a proper exercise of its authority).

CONCLUSION

For the reasons stated above, we affirm the result of the ALJ's order denying Scott's EAJA application. [17]

IT IS SO ORDERED.

By the Commission (Chairman NEWSOME and Commissioners HOLUM, ERICKSON, LUKKEN, and BROWN-HRUSKA).

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Jean A. Webb
Secretary to the Commission
Commodity Futures Trading Commission

Dated: September 18, 2002

Concurring Opinion of Commissioner Sharon Brown-Hruska

I concur with the Commission's decision to affirm the ALJ's denial of Scott's EAJA application. I write separately, however, to express my views regarding changes that the Commission adopted in the *Global Minerals* matter for dealing with the problem of attorney misconduct during the course of a proceeding. These changes, in my opinion, precipitated the filing of this frivolous claim.

[17] To the extent that Scott's request for an evidentiary hearing relates to the merits of his debarment, EAJA Appeal at 3, 9, such request is untimely since he did not appeal the Commission's January 9, 2001 decision denying this request. To the extent that Scott's request relates to an evidentiary hearing relating to his EAJA application, we reject such request pursuant to Commission Rule 148.26(a), which states that "[o]rdinarily the determination of an [EAJA] award will be made on the basis of the written record." Scott has not established that an evidentiary hearing is "necessary for a full and fair resolution of the issues arising from the application."

Prior to *Global Minerals*, an ALJ could preclude an attorney who willfully lied in court filings from further participation in a case. Commission Rules 10.11(b) and 10.12(f) governed in these circumstances, providing the ALJ with clear authority to debar an attorney found to have been dishonest. In addition, the ALJ enjoyed "wide latitude" to employ this sanction against an attorney for such misconduct. Indeed, the Commission upheld the exercise of such discretion in this very case—unanimously affirming Scott's debarment for willfully lying in a motion that he filed in the *Arnold* proceeding. Furthermore, the rules provided essential safeguards by permitting an immediate appeal of the ALJ's order to the Commission and requiring the ALJ to submit a report to the Commission regarding facts and circumstances surrounding the issuance of his order.

Less than three years after *Arnold*, however, the Commission abruptly reversed course in a case involving a Commission lawyer. Declaring that its debarment decision in *Arnold* "shall no longer be treated as Commission precedent," the Commission in *Global Minerals* adopted a new standard, based upon the principles for sanctioning an individual for criminal contempt pursuant to 18 U.S.C. § 401 and Rule 42(a) of the Federal Rules of Criminal Procedure. Under this new standard, debarment could be imposed only where the alleged misbehavior occurred in the presence of the presiding officer and where it actually obstructed the administration of justice. Since the misconduct in *Global Minerals* did not satisfy either of these criteria, the Commission vacated the ALJ's debarment order against a Division attorney for allegedly filing a report containing a false statement.

The Commission, sensitive to the need to reconcile the dissimilar outcomes in the two cases, felt obliged to recall Scott's appeal of his debarment order, then pending before the Eleventh Circuit. This request was purportedly motivated by the need to evaluate Scott's misconduct under the new standard announced in *Global Minerals*. On remand, however, the Commission, with Commissioner Erickson dissenting, opted to avoid the issue, declaring that such an evaluation "would amount to a futile waste of time and resources."

Arriving at this late stage of the proceeding, my perspective, as mentioned above, goes beyond the immediate issue of Scott's application for EAJA fees. Moreover, I express no opinion as to the appropriateness of the ALJ's debarment order in the *Global Minerals* proceeding. It is my view, however, that in rendering an outcome in that matter different from that chosen by the ALJ, the Commission, however justified it may have been, nevertheless adopted an adjudicative approach that was inappropriate for the circumstances that it faced there.

What most concerns me about both of these matters are the implications they have for deterring dishonest conduct by attorneys in our proceedings. I strongly agree with Commissioner Erickson's view that the Commission should have attempted to have addressed Scott's misconduct on remand, and that its failure to do so "does little to discourage inappropriate conduct in the future."[1] Indeed, I would go further and assert that that failure emboldened Scott to file his baseless EAJA claim.

[1] Moreover, I am unpersuaded by the mootness rationale used by the Commission to justify letting Scott off, for reasons explained by the ALJ in note 49 of his decision below.

Where I depart with Commissioner Erickson, however, is with the premise that the *Global Minerals* standard could effectively have been applied to the type of misconduct at issue in this matter. For that decision essentially rendered the ALJ powerless to sanction an attorney for knowingly filing a false pleading, even a *forged* one. *See U.S. v. Oberhellmann,* 946 F.2d 50 (7th Cir. 1991) (attorney could not be found guilty of criminal contempt for forging another attorney's signature on document submitted to court). This follows from the fact that such misconduct, as Judge Richard Posner has observed, does not rise to the level of a criminal contempt.[2]

In holding that a presiding officer may impose a debarment order only in the circumstances that would warrant a proceeding for *criminal* contempt, the Commission, as the ALJ points out, has read § 10.12(f)(3) out of our rulebook, and moreover, has done so without acknowledgement. While I recognize that the Commission is free to change its rules, I am nevertheless troubled by the manner and scope of the change made in the *Global Minerals* case. In my opinion, the Commission should have determined whether the Division lawyer in that matter did in fact sign, certify and file a report that he knew to be false, as the ALJ found. Had the Commission taken this route, and had it come to a conclusion at odds with that of the ALJ, there would have been no need to create a new standard.

Moreover, even if such a significant change were desirable, one would have thought that it would have been implemented through formal rulemaking. Instead, the Commission took the unusual step of restructuring its standard for debarment by adjudication. Such an abrupt change does little, in my opinion, to promote clarity and predictability of our legal precedent.

I am also concerned with how the Commission chose to deal with what essentially was a matter concerning a breach of professional ethics. I would not have anticipated that an administrative agency lacking plenary criminal authority would be importing for this purpose a standard found in the Federal Rules of Criminal Procedure.[3] By contrast, the Commission has often regarded analogous areas of federal law, such as the Federal Rules of *Civil* Procedure, as not binding when they conflict with the Commission's Rules of Practice.[4]

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[2] To be considered contemptuous, the misbehavior must (1) actually obstruct the administration of justice and (2) occur in the "presence or so near thereto" of the court. 18 U.S.C. § 401(1). Neither condition is met by "the quiet filing of a piece of paper, albeit a fraudulent one," since such an action is not committed in the "presence" of the court. *Oberhellmann,* 946 F.2d at 52. Nor is such an action considered to be an "obstruction of justice." *Id.* at 53.

[3] Courts generally do not favor such wholesale attempts to transplant foreign legal doctrines to govern administrative proceedings. *See, e.g., Elliott v. CFTC*, 202 F.3d 926, 936 (7th Cir. 2000) (holding that doctrines that bind the courts in other legal areas cannot "be transposed unmodified to guide the regulation of the commodity exchanges").

[4] *See In re Ashman*, [1994-1996 Transfer Binder] Comm.Fut.L.Rep. (CCH) ¶ 26,221 at 41,980 n.20 (CFTC Aug. 4, 1994)(Commission not bound by Federal Rules of Civil Procedure); *In re Bilello* [1992-1994 Transfer Binder] Comm.Fut.L.Rep. (CCH) ¶ 26,032 at 41,311 (CFTC Mar. 25, 1994) (Administrative Procedure Act "subject to the published rules of the agency"); *In re Buckwalter,* [1990-1992 Transfer Binder] Comm.Fut.L.Rep. (CCH) ¶ 25,016 at 37,769 (CFTC Mar. 8, 1991) (Commission not bound by Federal Rules of Evidence).

So, I am somewhat perplexed as to why the Commission found it necessary to willingly bind itself to Federal Rule of Criminal Procedure 42(a), especially when that rule could not be reconciled with the plain language of Rules 10.11(b) and 10.12 (f). At least on the surface, the adoption of a standard based upon criminal procedure, albeit with a lower standard of proof, to deal with the problem of professional ethics does not seem appropriate. Indeed, the problem created by "the quiet filing of a piece of paper, albeit a fraudulent one" differs significantly from the type of disruptive behavior that the criminal standard sought to address. *See, e.g., In re Dellinger,* 461 F.2d 389 (7th Cir. 1972).

Finally, I also take exception to the Commission's suggestion in *Global Minerals* and in *In re Varner*, [Current Transfer Binder] Comm.Fut.L.Rep. (CCH) ¶ 29,006 at 53,392 & n.20 (CFTC Apr. 29, 2002) that the ALJ confine himself to Part 14 of the Commission's rules when confronted with this type of situation. Part 14 primarily provides procedures for denying an attorney or accountant the privilege of appearing or practicing before the Commission based upon some pre-existing disqualifying circumstance, such as a prior criminal conviction or having previously engaged in unethical or improper conduct during a Commission proceeding. It contemplates a full-blown APA-type of hearing before an ALJ, with prosecutorial responsibilities delegated to the Office of General Counsel, to determine whether a subject individual's privilege to practice before the Commission should be denied. As such, it is an unwieldy, inflexible tool for summarily dealing with the type of problem faced here—misconduct that occurs *during* the course of an ongoing proceeding.[5]

> As discussed, I see no reason to depart from established precedent originally arrived at in this case. By adopting an unworkable standard, the Commission created more problems than it solved, one of which was fostering the type of meritless claim that we have had to deal with here. In the future, I hope that if the Commission feels compelled to rewrite its Rules of Practice, it does so other than by adjudication.

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[5] Moreover, as with the Commission's handling of the debarment issue in *Global Minerals*, this suggestion ignores the interplay between Rule 10.11(b)'s explicit grant of authority to the ALJ to debar counsel for misconduct "*while* a proceeding is *pending before him*," and Rule 10.12(f)(3)'s authorization to subject an attorney to "appropriate disciplinary action *pursuant to § 10.11(b*)" for willfully filing a document containing a false or misleading statement. (emphasis added). Unlike the Commission in *Global Minerals* and in *Varner*, Rule 14.1 recognizes this distinction between current and past disqualifying conduct by cross-referencing to Rule 10.11(b), and by noting that an attorney "may *also* be excluded from *further* participation in a particular adjudicatory proceeding *in accordance with the provisions of § 10.11(b)* of this chapter . . ." (emphasis added). Nor do I share the Commission's view regarding the significance of the term "contemptuous conduct" within the body of Rule 10.11(b). If the drafters of this rule had really intended to limit the ALJ's sanctioning authority here to conduct that rises to the level of criminal contempt, they would not have subjected the mere filing of a false document in contravention of Rule 10.12(f)(3) to the ALJ's debarment authority under Rule 10.11(b).

Commissioner Sharon Brown-Hruska	Date: 9/11/02