

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1349

September Term, 2004

2004 [856775]

Filed On: October 29,

ROBERT H. NELSON,
PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT

On Petition for Review of an Order of the
Securities and Exchange Commission

BEFORE: EDWARDS and RANDOLPH, *Circuit Judges*, and WILLIAMS,
Senior Circuit Judge

J U D G M E N T

This case was heard on the record from the Securities and Exchange Commission and on the briefs and arguments of counsel. For the reasons set out below, it is

ORDERED that the petition for review is denied.

The SEC issued a cease and desist order against Robert H. Nelson, an officer of an open-end management investment company or mutual fund, for violating antifraud provisions of the Securities Act, 15 U.S.C. § 77a *et seq.*, the Exchange Act, 15 U.S.C. § 78a *et seq.*, and the Investment Company Act, 15 U.S.C. § 80a-1 *et seq.*, and rules thereunder. Nelson's first contention amounts to a claim that in light of the

evidence, the SEC erred in finding that he knowingly participated in misrepresenting the fund's net asset value on April 4, 1994. The record, as the SEC viewed it, contains sufficient evidence to sustain the charge, although just barely. We therefore must sustain the SEC's findings as supported by substantial evidence even if we would have independently evaluated the evidence differently. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

Nelson also objects to the SEC's determination that there were omissions of material fact in connection with the pricing of shares of the fund on April 4. The SEC properly determined, however, that a reasonable investor would view as significant the fact that the fund was deliberately adjusting its stated net asset value for the purpose of "smoothing out" a sharp decline in the assets' value. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

As to the cease and desist order, the SEC considered all the "traditional factors," *see KPMG v. SEC*, 289 F.3d 109, 126 (D.C. Cir. 2002), and therefore did not abuse its discretion in issuing the order.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Deputy Clerk