

I. INTRODUCTION

Pending before the Court is an appeal from an Opinion and Order issued September 15, 2006, by an administrative hearing officer (the “Hearing Officer”) appointed to act in a matter filed before (and by) Appellant James B. Ropp, the Securities Commissioner of the State of Delaware (the “Commissioner”). The Hearing Officer determined that Appellees Fletcher King (“King”) and Morgan Stanley DW, Inc. (“Morgan Stanley”), his employer, did not violate certain provisions of the Delaware Securities Act (the “Act”)¹ and corresponding rules and regulations adopted under the Act. The Commissioner now seeks to appeal that decision, and both King and Morgan Stanley have moved to dismiss the Appeal Complaint under Court of Chancery Rules 12(b)(1) and 12(b)(6). The question is whether the Commissioner can appeal an order that, in essence, is his own order. More precisely, the question is whether the Commissioner should be treated as “a person aggrieved by an order of the Commissioner” because appellate review is only available to “persons” satisfying that statutory standard.

II. BACKGROUND

The pertinent facts are undisputed. On February 17, 2005, the Division of Securities of the State’s Department of Justice (the “Securities Division”) initiated an administrative complaint pursuant to the Act against King, a broker-dealer, and

¹ 6 *Del. C.* ch. 73.

Morgan Stanley, his employer. The crux of the complaint was that King and Morgan Stanley had violated provisions of the Act by recommending and selling certain mutual fund shares to an unsophisticated Delaware investor. Specifically, the allegations in the complaint concerned the suitability of those investments based on the investor's risk profile, whether the risks of these funds had been communicated adequately by King and Morgan Stanley, and whether Morgan Stanley had failed to supervise King properly.²

A day after the complaint was filed, the Commissioner designated Deputy Attorney General Richard W. Hubbard as the Hearing Officer as authorized by Section 103 of the Rules and Regulations Pursuant to the Delaware Securities Act (the "Rules and Regulations"). The order by which the Commissioner delegated his authority expressly provided that, with respect to the proceeding against King and Morgan Stanley, the Hearing Officer would have "all powers and duties as are possessed by the Securities Commissioner" and, further, that "any order issued by the Hearing Officer" would serve as "an order of the Commissioner for purposes of judicial review."³

On September 15, 2006, following an evidentiary hearing, the Hearing Officer issued an opinion and order dismissing the Securities Division's charges as

² See Admin. Compl. ¶¶ 11, 14, App. to Appellant's Ans. Br. at A1.

³ Order Designating Administrative Hearing Officer, App. to Appellant's Ans. Br. at A5.

without merit.⁴ Dissatisfied with the Hearing Officer's conclusions, the Commissioner brought this appeal on November 9, 2006.

King and Morgan Stanley have moved to dismiss the Appeal Complaint under Court of Chancery Rules 12(b)(1) and 12(b)(6).

III. CONTENTIONS

The parties agree that this is a case of statutory construction. They agree that the essential questions before the Court are whether it has subject matter jurisdiction to hear the Commissioner's appeal of an order made under his authority and, relatedly, whether the Commissioner has standing to bring such an appeal. They do not agree, however, on how Section 7324 of the Act should be interpreted to answer these questions.

A. From the Commissioner's Perspective

As the Commissioner sees it, he wears multiple hats under the Act: investigator, prosecutor, and judge. The Commissioner may delegate his case adjudication authority over a particular proceeding to an administrative hearing officer, but he does not transfer all of the functions of his office. Despite conferring upon the Hearing Officer "all powers and duties as are possessed by the Securities Commissioner" with respect to the matter concerning King and Morgan Stanley, the Commissioner observes that he did not delegate the prosecutorial

⁴ See Administrative Hearing Officer's Opinion and Order, App. to Appellant's Ans. Br. at A6.

function of his office and argues that he retained the right to seek judicial review of the Hearing Officer's order because it has deprived the State of certain relief to which it is entitled. In short, the Commissioner argues that he is, in the words of the Act, a "person aggrieved" by the order and, accordingly, the Court has jurisdiction to hear his appeal and he has standing to take it.

B. *From the Perspective of King and Morgan Stanley*

According to King and Morgan Stanley, although the Act empowers the Court of Chancery to hear appeals of persons aggrieved by orders of the Commissioner, it cannot be said that the Commissioner, in his official capacity, is either a "person" under the statute or one who is "aggrieved" by a designee's order. Section 103 of the Rules and Regulations, as well as the very words of the Commissioner's designating order of February 18, 2005, recite that an administrative hearing officer's order constitutes an order of the Commissioner for purposes of judicial review. Thus, they say, the Court lacks subject matter jurisdiction to hear an appeal by the Commissioner of his own order and the Commissioner would lack standing to prosecute such an appeal.

IV. STANDARD OF REVIEW

Under Court of Chancery Rule 12(b)(1), the Court shall dismiss an action for lack of subject matter jurisdiction if it appears from the record that the Court does

not have jurisdiction over the claim.⁵ The burden of establishing the Court's subject matter jurisdiction rests with the party seeking the Court's intervention.⁶

On the other hand, Court of Chancery Rule 12(b)(6) empowers the Court to dismiss an action when it concludes that the facts, as plead, would fail to support a cause of action.⁷ The absence of a party with standing will require dismissal.⁸

V. ANALYSIS

This is a matter of statutory construction. A court may engage in statutory construction or interpretation only if the statute is ambiguous.⁹ Otherwise, the Court must give the words chosen by the legislature their plain meaning.¹⁰ A statute is ambiguous if it "is reasonably susceptible of different conclusions or interpretations" or "if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature."¹¹ The Commissioner and the Appellee sponsor plausible, but divergent readings of the phrase "person aggrieved by an order of the Commissioner." In one sense, the Commissioner is an individual unhappy with, and adversely affected by, the decision of the

⁵ See *E. Shore Envtl., Inc. v. Kent County Dep't of Planning*, 2002 WL 244690, at *3 (Del. Ch. Feb. 1, 2002).

⁶ See *Scattered Corp. v. Chicago Stock Exch.*, 671 A.2d 874, 877 (Del. Ch. 1994), *aff'd*, 633 A.2d 372 (1993).

⁷ See *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006).

⁸ Cf. *Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co.*, 2006 WL 2521426, at *2-*3 (Del. Ch. Aug. 25, 2006).

⁹ *Newtowne Vill. Serv. Corp. v. Newtowne Road Dev. Co., Inc.*, 772 A.2d 172, 175 (Del. 2001).

¹⁰ See, e.g., *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999).

¹¹ *Newtowne Vill. Serv. Corp.*, 772 A.2d at 175; see also *Palecki v. Gornik*, 920 A.2d 413, 415 (Del. Ch. 2007).

Commissioner. To the contrary, the Appellees, also plausibly, argue that a regulator cannot be aggrieved by a decision which, as a matter of definition and authority, is his very own decision.

The appellees contest this Court's subject matter jurisdiction over this action and the standing of the Commissioner to pursue it. A court may only exercise judicial power over an action if it comes within the scope of its subject matter jurisdiction. This Court, one of limited jurisdiction, may acquire subject matter jurisdiction in three ways: (1) if one or more of the plaintiff's claims for relief is equitable in character; (2) if the plaintiff requests relief that is equitable in nature; or (3) if subject matter jurisdiction is expressly conferred by statute.¹² The only source of subject matter jurisdiction over appeals from the Commissioner is found in Section 7324 of the Act which provides: "Any person aggrieved by an order of the Commissioner may obtain a review of the order in the Court of Chancery . . ."¹³

"The term 'standing' refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or to redress a grievance."¹⁴ Although, in the federal

¹² *Candlewood Timber Group, LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 997 (Del. 2004). In addition, the Court may exercise its so-called "clean-up" or ancillary jurisdiction over claims as to which it would not have had subject matter jurisdiction if the plaintiff brings related claims as to which it otherwise does have subject matter jurisdiction. See, e.g., DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 2-4, at 2-68 (2007).

¹³ See *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994) (stating that a party does not have a right of appeal from an administrative decision "unless the statute governing the matter has conferred a right to do so").

¹⁴ *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003).

system, it may have jurisdictional implications because of the case or controversy requirement, standing, in the courts of Delaware, is applied “as a matter of self-restraint to avoid the rendering of advisory opinions.”¹⁵

In order for the Commissioner to bring his appeal, he must demonstrate that he is “person aggrieved” within the meaning of Section 7324 of the Act. If he is not a “person aggrieved,” his appeal must be dismissed. Thus, the question of whether his status as a “person aggrieved” is a matter of subject matter jurisdiction or of standing is of little practical consequence. Because subject matter jurisdiction is a threshold inquiry,¹⁶ the Court turns to the question of whether it is presented with a question of jurisdiction or of standing.

In general terms, subject matter jurisdiction inquiries consider the nature of the claim.¹⁷ Standing addresses who may bring the claim.¹⁸ Appeals of decisions by the Commissioner must be brought in this Court; there is no other forum. The statute does not have a specific grant of subject matter jurisdiction; instead, it identifies those persons who may bring an appeal and then it prescribes the proper

¹⁵ *Gen. Motors Corp. v. New Castle County*, 701 A.2d 819, 824 (Del. 1997) (citing *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991)).

¹⁶ See *Dover Historical Soc’y*, 838 A.2d at 1110.

¹⁷ See, e.g., *Rozsnyai v. Svacek*, 723 N.W.2d 329, 333 (Neb. 2006) (“Subject matter jurisdiction is a court’s power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court.”).

¹⁸ See *Dover Historical Soc’y*, 838 A.2d at 1110 (quoting *Stuart Kingston, Inc.*, 596 A.2d at 1382 (“The issue of standing is concerned ‘only with the question of *who* is entitled to mount a legal challenge and not with the merits of the subject matter in controversy.’”) (emphasis in original)).

forum—in this instance, this Court. Although the statute perhaps may be read as conferring jurisdiction only if the appeal is brought by an aggrieved person, the better reading, one consistent with the thin line between jurisdiction and standing, is that this Court has subject matter jurisdiction over any appeal from the Commissioner, but that, as a statutory matter, only “person[s] aggrieved by an order of the Commissioner” have standing to appeal the decision.

A party seeking to establish standing must satisfy the test of whether: “(1) there is a claim of injury-in-fact; and (2) the interest sought to be protected is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question.”¹⁹ The Commissioner claims an “injury-in-fact” by virtue of his assertion that his enforcement powers were improperly thwarted by the actions of the Hearing Officer.²⁰ The interests which he seeks to protect, of course, are regulated by statute, but that statute defines who may pursue any claims. In this instance, the standing necessary to pursue appellate relief in this Court is limited to “person[s] aggrieved.”

The Court, thus, turns to the statutory question of whether the Commissioner is a “person aggrieved” and focuses initially on the “aggrieved” component. The Commissioner emphasizes the multifunctional nature of his duties. Under the Act,

¹⁹ *Gen. Motors Corp.*, 701 A.2d at 823-24 (quoting *Gannett Co. v. State*, 565 A.2d 895, 897 (Del. 1989)).

²⁰ See *infra* note 22 and accompanying text.

he has investigative, prosecutorial, and adjudicative functions. The Delaware Supreme Court has recognized this and suggested that these roles have largely been “commingl[ed].”²¹ The Commissioner, however, maintains that this blending of responsibilities does not preclude a specific inquiry into the Commissioner’s precise role at any point in time. He points out that he has delegated, in this instance, his adjudicative role while retaining his prosecutorial role. In other words, the Commissioner argues that because it was the Hearing Officer who made the decision that is under attack (and not the Commissioner), the Commissioner may be “aggrieved” by an adverse order and may, in the prosecutorial context, pursue relief to which the Commissioner (and, more particularly, the State whom he represents) is entitled (*e.g.*, fines that should have been imposed, costs that should have been reimbursed, restitution that should have been ordered).²² Adopting this argument, however, would require the Court to do two things: invent statutory authority and ignore the very language of the Commissioner’s own order designating the Hearing Officer.

Much is accomplished by the Act. Among other things, it empowers the Commissioner to investigate whether persons have engaged in proscribed conduct.²³ It enables the Commissioner to carry out remedial measures in

²¹ *Blinder, Robinson & Co. v. Bruton*, 552 A.2d 466, 472 (Del. 1989).

²² See Appellant’s Ans. Br. at 24-25; Oral Argument Transcript (“Tr.”) at 23-24.

²³ See 6 *Del. C.* § 7319.

furtherance of the public interest.²⁴ And, of course, it establishes a procedure for judicial review of the Commissioner's orders.²⁵ What the Act does not do, however, is envision or establish a scheme whereby the Commissioner's prosecutorial and adjudicative roles can be separated, with one function transferred to an administrative hearing officer and another retained by the Commissioner. Indeed, nothing in the Act expressly permits delegation of any function to an administrative hearing officer.²⁶ Instead, that practice is authorized by Section 103 of the Rules and Regulations, which provides:

Pursuant to Section 7325(b) of the Act, the Securities Commissioner hereby delegates to an administrative hearing officer the authority to preside in any administrative hearing brought under the [Act]. The administrative hearing officer shall have with respect to any such proceeding, all powers and duties as are possessed by the Securities Commissioner . . . *and any order issued by the administrative hearing officer shall constitute an order of the Commissioner for purposes of judicial review . . .* (emphasis added).

²⁴ See *id.* at § 7325.

²⁵ See *id.* at § 7324.

²⁶ The point is not to question the power to delegate; instead, it is to demonstrate that the General Assembly did not expressly contemplate a delegation and, thus, did not evaluate whether the Commissioner in that context should be entitled to take an appeal. Indeed, the Act suggests that it was not intended that the Commissioner could appeal. For example, the procedures for appeals to this Court are set forth in Section 7324(b) of the Act: "If, however, the complainant [*i.e.*, the Appellant] fails to pay the cost of transcription or the transcription is not completed, the Commissioner shall notify the Court" This provision indicates that it was not anticipated that the Commissioner would be a "complainant." Indeed, it suggests that the "complainant" (or appellant) would be someone other than the Commissioner.

The rule does not allude to any separation of prosecutorial and adjudicative functions. Furthermore, the Commissioner's designating order of February 18, 2005, contains, for the most part, the same language.²⁷ Significantly, neither the rule nor the designating order imposes any restriction, qualification, or condition on the grant of "all powers and duties as are possessed by the Securities Commissioner" to the Hearing Officer. The delegation, thus, is broad and unequivocal.

The Commissioner offers authority to support its argument that an administrative agency may, as a matter of law, seek review of its adverse decision, but the primary cases cited by the Commissioner are factually distinguishable.²⁸

²⁷ It provided that "any order issued by the Hearing Officer" would be an "order of the Commissioner for purposes of judicial review." See *supra* note 3 and accompanying text.

²⁸ One case, *Employment Security Division of North Carolina v. Peace*, 462 SE.2d 222 (N.C. 2002), involved a North Carolina employment commission which was ordered by a deputy commissioner (acting as an independent hearing officer) to pay certain benefits to a terminated employee. The employment commission eventually appealed the order to a North Carolina appellate court. The appellate court ruled that the employment commission lacked authority to appeal because decisions of deputy commissioners were deemed, statutorily, to be decisions of the employment commissioner. North Carolina's Supreme Court, however, reversed. It held that the employment commission had an appeal right as an "aggrieved party" because the appeal was motivated "not as an agency decision-maker, but as an employer aggrieved by the agency action." *Id.* at 224. Further, the Court reasoned that holding otherwise would ignore the fact that the employment commission had the same right as any other employer to seek review of an order requiring that it pay unemployment insurance. The Commissioner argues that his appeal is brought as a prosecutorial function—*i.e.*, to obtain relief to which the State is owed—not in his "adjudicatory capacity." His appeal, nonetheless, involves his unique and "commingled" regulatory functions that define his official role. In *Peace*, the Court acknowledged that the agency's appeal was because of its status as an employer, a function distinct from any of its specific regulatory or governmental purposes.

Another case raised by the Commissioner is *Motor Vehicle Administration v. Lytle*, 821 A.2d 62 (Md. App. Ct. 2003). This case, however, is factually inapposite and, indeed, illustrative of the general rule that a statute must explicitly authorize an agency to appeal from a matter its

More importantly, however, they do nothing to challenge the Court's understanding that, absent express statutory authorization, courts of other jurisdictions have generally not sanctioned the practice of agencies seeking judicial review of their own decisions.²⁹ Thus, the Commissioner cannot be "aggrieved"

designee originally adjudicated. In *Lytle*, it was held that the state's motor vehicle administration could obtain judicial review of an order made by an administrative hearing officer. This was because, even though the motor vehicle administration had delegated the responsibility of conducting an evidentiary hearing and making a final adjudicative decision, the state statute expressly permitted judicial review of the agency-level decision for those "aggrieved by the decision rendered in its name" and "a party to the administrative proceeding." No comparable provision may be found in the Act.

Finally, the Court considers *Utah Dept. of Bus. Regulation v. Pub. Serv. Comm'n*, 614 P.2d 1242 (Ut. 1980). There, one division of the Department of Business Regulation, the Division of Public Utilities, sought review of a decision by the Public Service Commission, another division of the Department of Business Regulation. The decision-maker and the adversely affected party were separate and distinct. Although the Commissioner does have several functions, he is, at most, but one "person," and it is incongruous to contend that regulator acting as a regulator, regardless of his particular concerns, can be aggrieved by that which must, by regulation and by his own order, be treated as his own action.

²⁹ *E.g.*, *State Comm'n on Human Rel. v. Anne Arundel County*, 664 A.2d 408 (Md. Spec. App. Ct. 1995) ("[I]t can be said that, absent statutory authority, an administrative agency that has itself supplied the final decision of the agency is not an aggrieved party or a proper party on appeal."); *Phila. Bd. of Pensions & Ret. v. Pearlman*, 586 A.2d 466, 468 (Pa. Commw. Ct. 1991) (providing that where a body acts in a judicial function, "it does not have authority or standing to participate as a party in appeals from matters that it originally adjudicated"); *Minn. State Bd. of Health v. Governor's Certificate of Need Appeal Bd.*, 230 N.W.2d 176, 178 (Minn. 1975) ("The decisions of our court, however, which follow the majority view, are to the effect that, where no statute provides otherwise, an agency which functions in a judicial or quasi-judicial capacity is without right to appeal since, in such a case, the agency is in no different position from a court or judge which has rendered the decision."); *Mortensen v. Pyramid Sav. & Loan Ass'n*, 191 N.W.2d 730, 731 (Wis. 1971) ("Unless the statute expressly so provides, an aggrieved party is one outside the decisional process who is affected."); *Kostman v. Pine Lawn Bank & Trust Co.*, 540 S.W.2d 72, 81 (Mo. 1976) ("The reasoning of the Wisconsin Supreme Court in *Mortensen* and the Minnesota Supreme Court in *Minn. Bd. of Health* is sound and in accordance with the prevailing law on the subject. There are no cases cited in the commissioner's brief nor has this court found any case where it was held that a person occupying a position similar to our commissioner of finance was an *aggrieved* party so as to give him standing to seek judicial review of the decision of the administrative board."); *see also* Frederick Davis, *Standing of a Public Official to Challenge Agency Decisions: A Unique Problem of State Administrative Law*, 16 ADMIN. L. REV. 163, 168 (1964) ("[W]ithout specific authorization for such a practice in the

within the meaning of Section 7324 of the Act and, therefore, he lacks standing to continue with this appeal.³⁰

VI. CONCLUSION

For the foregoing reasons, the Court concludes that, because the Commissioner cannot be “aggrieved” by his own order, the Commissioner cannot demonstrate standing. Accordingly, the Court will enter an order granting the Appellees’ motion to dismiss the Appeal Complaint.

statute, agency decisions may not be judicially challenged by the staff, the hearing examiner, or the legal division of the agency itself.”).

Case law, more or less consistently, although sometimes dependent upon specific statutory wording, draws the following line. If the adverse decision is received by the administrative authority in the context of performance of its regulatory function, the appellate option is generally not available. In contrast, if the adverse decision is received in the context of the day-to-day management of its internal affairs, there is no reason why the agency, just because of its assigned regulatory function, should have fewer rights than another agency assigned different powers and responsibilities.

³⁰ With this conclusion, it is unnecessary to determine whether the Commissioner is a “person” as that term is defined by Section 7302(12) of the Act. *See, e.g., New Castle County v. Chrysler Corp.*, 681 A.2d 1077, 1080-81 (Del. Super. 1995), *aff’d*, 676 A.2d 905 (Del. 1995).

The Commissioner properly points out that there is a “strong presumption” in favor of judicial review of administrative action. *See, e.g., McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 498 (1991). That “strong presumption” does not carry the day for three reasons. First, with a fair reading of the statute, it is reasonably clear that no appellate review by the Commissioner from a decision made his own was intended by the General Assembly. Second, the policy interests favoring judicial review have evolved largely out of a concern for the rights of regulated parties, not the interests of regulators. Finally, there is a statutory grant of appellate review; it simply is not as broadly encompassing as the Commissioner would prefer.