

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

District Business Conduct Committee
For District No. 8,

Complainant,

vs.

Herbert L. Davis, Jr.
Milwaukee, Wisconsin,

Respondent.

DECISION

Complaint No. C8A970040

District No. 8

Dated: October 22, 1998

Pursuant to Procedural Rule 9310, Herbert L. Davis, Jr. ("Davis") has appealed a November 24, 1997 decision issued by the District Business Conduct Committee for District No. 8 ("DBCC"). After a review of the entire record in this matter, we find that Davis signed a customer's name to a \$945.58 check without the customer's authorization, knowledge, or consent and used the proceeds for some purpose other than for the customer's benefit; and also failed to respond to NASD Regulation, Inc. ("NASD Regulation") requests for information. We hereby impose a censure and \$20,000 fine, and bar Davis from associating with any member firm in all capacities.

Background. Davis was employed by Metropolitan Life Insurance Company and MetLife Securities, Inc. ("MetLife") in a Menomonee Falls, Wisconsin agency from May through December 1996. On June 10, 1996, Davis filed a Uniform Application for Securities Industry Registration or Transfer ("Form U-4"). On September 27, 1996, Davis took and passed the Series 63 examination (North American Securities Administrators Association ("NASAA") uniform state law examination). On October 24, 1996, Davis took and failed the Series 6 examination (investment company/variable products examination). He did not take the Series 6 examination again. Davis is not presently employed in the securities industry.

Facts

This matter came to the attention of NASD Regulation staff as the result of a Uniform Termination Notice ("Form U-5") filed by MetLife on January 8, 1997. The Form U-5 indicated Davis' apparent misappropriation of funds as the reason for his termination.

The following facts are undisputed: On approximately November 12, 1996, MetLife issued a death benefit check in the amount of \$945.58 made payable to OOC, the beneficiary, and sent the check to Davis' office. The check was issued in response to a death claim submitted by OOC on November 5,

1996. When, approximately three weeks after he filed the claim, OOC still had not received the check, he complained to MetLife, and MetLife began an investigation. MetLife discovered that Davis had endorsed OOC's check to the order of "Herbert L. Davis."

Davis spoke to his manager about this matter on December 11, 1996. It is not clear from the record whether he did so in response to MetLife's investigation, or because OOC refused to accept a December 11, 1996 cashier's check for \$945.58 that Davis had attempted to give him. Nonetheless, Davis' manager reported to MetLife's Auditing Division that on December 11, 1996, Davis "was waiting to speak with [him]" and told him that his wife had inadvertently deposited the check into their personal checking account, and that he had discovered the error after determining that the balance was too high. Davis gave the check to MetLife, and MetLife issued OOC a replacement check. On December 12, 1996, Davis' manager reported that Davis told him that he had purposely deposited the check himself, and realizing that he had made a terrible mistake, had withdrawn the money from his account and had the cashier's check issued. Davis told his manager that he had lied to him, and that he had deposited the check into his account on November 29, 1996 because he was frustrated that he was not able adequately to support his family.

In a letter dated December 31, 1996, Davis admitted to having received OOC's check. He stated:

In my frustration with being unable to support my family adequately financially I signed the check over to myself and deposited the check into my personal checking account. After a couple days of feeling terribly guilty, ethically incorrect and downright sick I knew it was wrong so I took the money out of my account and got a cashier's check for the client.

Davis stated that he had attempted to pay OOC, but that OOC refused to accept the check because it had not been issued by MetLife.

On January 24, February 18, March 6, and April 21, 1997, NASD Regulation staff sent Davis requests for information regarding this incident. Although properly served with these requests, Davis failed to respond.

Discussion

After a thorough review of the record, including submissions on appeal, we affirm the DBCC's findings. It is undisputed that Davis endorsed the \$945.58 death benefit check issued by MetLife to OOC over to himself and deposited it into his checking account on November 29, 1996. It is also undisputed that NASD Regulation staff sent Davis four separate requests for information at his Central Registration Depository ("CRD") address of record, and that Davis failed to respond to any of these requests.¹

Sanctions

¹The record shows that the requests were sent by certified and first class mail to Davis' CRD address of record, which is still Davis' address. Davis failed to claim the certified letters, and the first class letters were not returned to NASD Regulation. Therefore, we conclude that Davis was properly served with these requests and that he failed to respond to these requests as alleged.

We also affirm the sanctions imposed by the DBCC. After considering the entire record, including Davis' submissions on appeal, we have concluded that a censure, \$20,000 fine, and bar in any capacity are appropriately remedial. It is our determination that each cause of action, standing alone, is sufficient to warrant a \$20,000 fine.

We have also concluded that the bar is appropriate for a number of reasons. Based upon the NASD Sanction Guidelines (1996 ed.), each of Davis' violations is sufficient to warrant a bar. Davis' deliberate conversion of customer funds was an egregious abuse of his customer's trust and confidence. As the Securities and Exchange Commission stated in In re Joel Eugene Shaw, Exchange Act Rel. No. 34509 at 4 (Aug. 10, 1994), "[s]uch conduct is extremely serious and patently antithetical to the 'high standards of commercial honor and just and equitable principles of trade' that the NASD seeks to promote."

We note that Davis converted these funds after being associated with MetLife for only six months, and only two months after his unsuccessful attempt to pass the Series 6 examination. That Davis converted customer funds during the early months of his employment with a member firm, and during the time that he was attempting to become an investment company and variable products representative, further demonstrates to us that it is appropriately in the public interest that Davis be barred from association with any member of the NASD. See In re Joseph H. O'Brien II, Exchange Act Rel. No. 34105 (May 25, 1994) (conversion of customer funds found to warrant a bar on the ground that respondent abused the trust that is the cornerstone of the relationship between a securities professional and his customer).

We do not credit Davis' contention on appeal that he did not convert the money because he did not intend permanently to deprive OOC or MetLife of the money. The customer did not lend Davis this money, and Davis knew that the funds were not his. Davis endorsed the check over to himself without the customer's permission and deposited the check into his account because he wanted to use the money for his own purposes. The fact that he appears to have suffered immediate remorse for his actions and attempted to repay the customer within two weeks does not change the fact that he converted the check. We note that notwithstanding his professed remorse over his actions, Davis did not immediately accept responsibility for his actions. When MetLife instituted an investigation in response to the customer's inquiry, Davis initially blamed the deposit on an inadvertent error by his wife.

Further, after confessing his actions to MetLife, Davis failed to cooperate with NASD Regulation's investigation of the matter. As the Securities and Exchange Commission stated in In re Mark Allen Elliott, Exchange Act Rel. No. 34194 at 4 (June 10, 1994), "[i]n order for the NASD to carry out its regulatory functions, it must have the full and prompt cooperation of persons subject to its jurisdiction when requests for information are made." Davis had a clear obligation to respond to NASD Regulation staff's requests, and he failed to do so.

Accordingly, Davis is censured, fined \$20,000, and barred from associating with any member firm in all capacities.² The bar is effective upon service of this decision.

²The recommended sanctions are within the NASD Sanction Guidelines (1996 ed.) for conversion or improper use of funds or securities and failure to respond.

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Corporate Secretary

We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.

Joan C. Conley
Corporate Secretary
Direct: (202) 728-8381
Fax: (202) 728-8894

October 22, 1998

VIA FIRST CLASS/CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Herbert L. Davis, Jr.
Milwaukee, Wisconsin

Re: **Complaint No. C8A970040: Herbert L. Davis, Jr.**

Dear Parties:

Enclosed herewith is the Decision of the National Adjudicatory Council in connection with the above-referenced matter. Any fine and costs assessed should be made payable and remitted to the National Association of Securities Dealers, Inc., Department #0651, Washington, D.C. 20073-0651.

You may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the Commission within thirty days of your receipt of this decision. A copy of this application must be sent to the NASD Regulation, Inc. ("NASD Regulation") Office of General Counsel as must copies of all documents filed with the SEC. Any documents provided to the SEC via fax or overnight mail should also be provided to NASD Regulation by similar means.

Your application must identify the NASD Regulation case number, and set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor. You must include an address where you may be served and phone number where you may be reached during business hours. If your address or phone number changes, you must advise the SEC and NASD Regulation. If you are represented by an attorney, he or she must file a notice of appearance.

The address of the SEC is:
Office of the Secretary
U.S. Securities and Exchange
Commission
450 Fifth Street, N.W., Stop 6-9
Washington, D.C. 20549

The address of NASD Regulation is:
Office of General Counsel
NASD Regulation, Inc.
1735 K Street, N.W.
Washington, D.C. 20006

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is 202-942-7070.

Very truly yours,

Joan C. Conley
Corporate Secretary

Enclosure

cc: Kerry E. Cunningham, Esq.
NASD Regulation, Inc.
10 S. LaSalle Street
Chicago, Illinois 60603-1002