

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Darren M. Kubiak
(CRD No. 1239086),

Respondent.

Disciplinary Proceeding
No. 2018060897302

Hearing Officer–DRS

DEFAULT DECISION

January 23, 2024

Respondent is barred from associating with any FINRA member firm in any capacity for failing to appear for on-the-record testimony that FINRA requested in connection with an investigation.

Appearances

For the Complainant: Vaishali Shetty, Esq., Adam Balin, Esq., and Kay Lackey, Esq.,
Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: No appearance

DECISION

I. Introduction

The Department of Enforcement filed a Complaint against Respondent Darren M. Kubiak, a former registered representative, alleging that he failed to appear for on-the-record testimony that FINRA requested as part of an investigation into the suitability of his recommendations to several customers. As a result, the Complaint alleged Kubiak violated FINRA Rules 8210 and 2010. When Kubiak failed to answer the Complaint, I ordered Enforcement to file a motion for entry of default decision. On October 20, 2023, Enforcement filed its motion (“Default Motion”), supported by a declaration from Enforcement counsel Vaishali Shetty, Esq. (“Shetty Decl.”) and 25 exhibits (Complainant’s Exhibit (“CX-”) 1 through CX-25). Kubiak did not respond to the Default Motion.

For the reasons set forth below, I find Kubiak in default, grant Enforcement’s Default Motion, and issue this decision barring Kubiak in all capacities from associating with any FINRA member firm.

II. Findings of Fact and Conclusions of Law

A. Kubiak's Background

Kubiak entered the securities industry in February 1984 as an Investment Company and Variable Contracts Representative (“IR”) of a former FINRA member firm.¹ Between February 1984 and January 2007, Kubiak was registered with FINRA as an IR through various member firms.² In January 2007, Kubiak registered with FINRA as an IR through Kalos Capital, Inc.³ In March 2008, Kubiak also registered with FINRA as a General Securities Representative through that firm.⁴ On October 10, 2019, Kalos Capital filed a Uniform Termination Notice for Securities Industry Registration (“Form U5”) terminating Kubiak’s registration through the firm.⁵ According to the filing, Kalos Capital terminated Kubiak for “[v]iolation of firm policy. Non sales practice related.”⁶ Since his termination, Kubiak has not been registered or associated with a FINRA member firm.⁷

On July 28, 2021, Kalos Capital filed an amendment to Kubiak’s Form U5 that disclosed Kubiak may have engaged in conduct actionable under an applicable statute, rule, or regulation.⁸ The amendment stated that a customer arbitration had been filed against Kalos Capital and Kubiak alleging “[b]reach of [c]ontract, breach of fiduciary duty, failure to supervise and violations of state securities statutes” in connection with direct investments, real estate investment trusts, and preferred stock.⁹

B. FINRA’s Jurisdiction

FINRA retains jurisdiction over Kubiak under Article V, Section 4(a) of FINRA’s By-Laws because: (1) Enforcement filed the Complaint on July 27, 2023,¹⁰ within two years after July 28, 2021, which was the date of an amendment to Kubiak’s notice of termination that Kalos Capital filed within two years of his original notice of termination; (2) that amendment disclosed that Kubiak may have engaged in conduct actionable under any applicable statute, rule, or regulation; and (3) the Complaint charges him with failing to appear for on-the-record testimony

¹ Complaint (“Compl.”) ¶ 2; Shetty Decl. ¶ 6; CX-1, at 5–10.

² Compl. ¶ 2; Shetty Decl. ¶ 6; CX-1, at 5–10.

³ Compl. ¶ 3; Shetty Decl. ¶ 7; CX-1, at 6.

⁴ Compl. ¶ 3; Shetty Decl. ¶ 7; CX-1, at 6.

⁵ Compl. ¶ 4; Shetty Decl. ¶ 8; CX-2, at 1.

⁶ Compl. ¶ 4; Shetty Decl. ¶ 8; CX-2.

⁷ Compl. ¶ 5; Shetty Decl. ¶ 8; CX-1, at 5.

⁸ Shetty Decl. ¶ 9; CX-3, at 10.

⁹ Shetty Decl. ¶ 9; CX-3, at 10.

¹⁰ Shetty Decl. ¶ 10; CX-4.

during the two-year period after the date on which Kalos Capital amended his notice of termination from registration with a FINRA member.¹¹

C. Origin of the Proceeding

This proceeding stemmed from Kubiak’s failure to appear for on-the-record testimony requested under FINRA Rule 8210 in connection with an investigation into the suitability of his recommendations that several customers purchase certain limited partnerships.

D. Kubiak’s Default

Under FINRA Rules 9131(b) and 9134(a)(2) and (b)(1), a Complaint may be served on a natural person by U.S. Postal Service (“USPS”) first class certified mail at the person’s residential address, as reflected in the Central Registration Depository (“CRD”). But if the serving party has actual knowledge that the person’s CRD address is outdated, then the serving party must serve duplicate copies at that person’s last known residential address and the business address in the CRD of the entity with which that person is employed or affiliated.

At all relevant times, CRD listed, and currently lists, two residential addresses for Kubiak (“First CRD Address” and “Second CRD Address,” collectively, the “CRD Addresses”).¹² When Enforcement served the Complaint, Enforcement identified two potential additional addresses for Kubiak (“Additional Addresses”).¹³ On July 27, 2023, Enforcement served Kubiak with the Complaint and Notice of Complaint by sending them via USPS first-class certified mail, return receipt requested, to the CRD Addresses and the Additional Addresses.¹⁴ The Notice of Complaint stated that Kubiak was required to answer the Complaint by August 24, 2023.¹⁵ Kubiak failed to answer the Complaint, or otherwise respond, by that date.¹⁶

The next day, August 25, Enforcement served Kubiak with the Complaint and Second Notice of Complaint by sending them via USPS first-class certified mail, return receipt requested, to the CRD Addresses and the Additional Addresses.¹⁷ The Second Notice of

¹¹ Compl. ¶ 5; Shetty Decl. ¶ 11.

¹² Shetty Decl. ¶ 12; CX-1, at 2.

¹³ Shetty Decl. ¶ 13; CX-1, at 2.

¹⁴ Shetty Decl. ¶ 15; CX-4, at 1.

¹⁵ Shetty Decl. ¶ 21; CX-4, at 2.

¹⁶ Shetty Decl. ¶ 22.

¹⁷ Shetty Decl. ¶ 23; CX-15.

Complaint stated that Kubiak was required to answer the Complaint by September 11, 2023.¹⁸ Kubiak failed to answer the Complaint, or otherwise respond, by that date.¹⁹

It appears that the CRD Addresses may have been outdated when FINRA staff served the Complaint and Notices of Complaint, although it is unclear when FINRA learned this. Regarding the First CRD Address, as discussed below, in connection with trying to deliver the two FINRA Rule 8210 requests that are the subject of this proceeding, the USPS notified FINRA that Kubiak had moved from that address and did not leave a forwarding address.²⁰ As for the Second CRD Address, the Complaint and First Notice of Complaint sent by certified mail to that address were returned by the USPS with the notations “NOT DELIVERABLE AS ADDRESSED” and “UNABLE TO FORWARD.” on the certified mail envelope.²¹ The record, however, does not reflect when FINRA received these USPS notifications about the CRD Addresses.

In any event, FINRA served the Complaint and Notices of Complaint not only on the CRD Addresses, but also on the Additional Addresses. And, when it did so, Kubiak was not registered through or associated with any FINRA member firm. So there was no business address in CRD to which Enforcement could also send duplicate copies of the Complaint and Notices of Complaint.²² Accordingly, Enforcement served the Complaint and the First and Second Notices of Complaint in accordance with applicable rules.²³ Because Kubiak has not answered, or otherwise responded to the Complaint, I find that he defaulted.²⁴ As a result, I deem the allegations in the Complaint admitted under FINRA Rules 9215(f) and 9269(a)(2).

E. Governing Law

The Complaint charges Kubiak with violating FINRA Rule 8210. This rule authorizes FINRA, with respect to any matter involved in an investigation, to: (1) “require a . . . person subject to FINRA’s jurisdiction to provide information orally, in writing, or electronically . . . and to testify at a location specified by FINRA staff . . .”²⁵ and (2) “inspect and copy the books, records, and accounts of such . . . person . . . that is in such . . . person’s possession, custody or control.”²⁶ Also, “[n]o . . . person shall fail to provide information or testimony . . . pursuant to”

¹⁸ Shetty Decl. ¶ 30; CX-15, at 2.

¹⁹ Shetty Decl. ¶ 31.

²⁰ Compl. ¶¶ 14, 18.

²¹ Shetty Decl. ¶ 17; CX-6, at 15.

²² Shetty Decl. ¶¶ 14, 24; CX-1.

²³ Shetty Decl. ¶¶ 16, 25.

²⁴ Kubiak is notified that he may move to set aside the default under FINRA Rule 9269(c) upon a showing of good cause.

²⁵ FINRA Rule 8210(a)(1).

²⁶ FINRA Rule 8210(a)(2).

that rule.²⁷ Kubiak is also charged with violating FINRA Rule 2010, which requires a FINRA member “in the conduct of its business” to “observe high standards of commercial honor and just and equitable principles of trade.” This Rule also applies to persons associated with a member, as they “have the same duties and obligations as a member under the Rules.”²⁸ “A violation of FINRA Rule 8210 constitutes a violation of FINRA Rule 2010.”²⁹

Constructive notice of the request, not actual notice of it, “is all that FINRA Rule 8210 demands.”³⁰ Under the Rule’s constructive service provision, FINRA Rule 8210(d), a formerly registered person is deemed to have received a FINRA Rule 8210 request if it was mailed or otherwise transmitted to their “last known residential address . . . as reflected in [CRD].”³¹ But if the FINRA staff responsible for mailing or otherwise transmitting the request actually knows that the address in CRD is outdated or inaccurate and knows of another more current address, then it must also mail or otherwise transmit a copy of the request to that other address.³²

F. Kubiak Failed to Appear for On-the-Record Testimony

FINRA staff investigated the suitability of Kubiak’s recommendations to at least ten of his customers to invest in four limited partnerships.³³ In connection with that investigation, the staff sent Kubiak two requests under FINRA Rule 8210 that he provide on-the-record testimony. He responded to neither request.

1. First Testimony Request

On May 18, 2023, FINRA staff sent Kubiak a letter pursuant to FINRA Rule 8210 requesting that he appear for testimony on June 21, 2023, in connection with FINRA’s investigation of the suitability of his recommendations to several customers that they purchase certain limited partnership interests (the “First Testimony Request”).³⁴ FINRA staff sent the First Testimony Request by certified mail, return receipt requested, and first-class mail, to the CRD Addresses.³⁵ The First Testimony Request sent by certified mail to the First CRD Address was

²⁷ FINRA Rule 8210(c).

²⁸ FINRA Rule 0140(a).

²⁹ *Dep’t of Enforcement v. DiPaola*, No. 2018057274302, 2023 FINRA Discip. LEXIS 4, at *37 n.18 (NAC Mar. 23, 2023) (citing *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *41 n.49 (Sept. 24, 2015)).

³⁰ *Dep’t of Enforcement v. Evansen*, No. 2010023724601, 2014 FINRA Discip. LEXIS 10, at *36 (NAC June 3, 2014).

³¹ FINRA Rule 8210(d).

³² FINRA Rule 8210(d).

³³ Compl. ¶ 11.

³⁴ Compl. ¶ 12.

³⁵ Compl. ¶ 13.

not delivered because the addressee had “[m]oved, [and] [l]eft no [forwarding] [a]ddress.”³⁶ The First Testimony Request sent by certified mail to the Second CRD Address was “returned to sender” because the address had “No Authorized Recipient Available” and went unclaimed.³⁷ The first-class mailings of the First Testimony Request to the CRD Addresses were not returned to FINRA.³⁸ Kubiak did not appear for testimony on June 21, 2023, nor did he request an extension of the testimony date.³⁹

2. Second Testimony Request

When Kubiak failed to appear for testimony on June 21, 2023, FINRA staff sent Kubiak a letter, that day, under FINRA Rule 8210, requesting that he appear for testimony on July 6, 2023, in connection with FINRA’s investigation (the “Second Testimony Request”).⁴⁰ FINRA staff sent the Second Testimony Request by certified mail, return receipt requested, and first-class mail, to the CRD Addresses.⁴¹ The Second Testimony Request sent by certified mail to the First CRD Address was not delivered, and was returned to the sender because the addressee “moved and left no forwarding address.”⁴² The Second Testimony Request sent by certified mail to the Second CRD Address was delivered to an individual at the address on June 26, 2023.⁴³ The first-class mailings of the Second Testimony Request to the CRD Addresses were not returned to FINRA.⁴⁴ Kubiak did not appear for testimony on July 6, 2023, nor did he request an extension of the testimony date.⁴⁵

G. Kubiak Violated FINRA Rules 8210 and 2010 By Failing to Appear for Testimony

Enforcement charged Kubiak with violating FINRA Rules 8210 and 2010 by failing to appear and provide testimony as requested under FINRA Rule 8210 in connection with an investigation. FINRA Rule 8210(a)(1) provides that FINRA staff may “require a . . . person subject to FINRA’s jurisdiction . . . to testify at a location specified by FINRA staff . . . with respect to any matter involved in [an] investigation.” FINRA Rule 8210(c) provides that “[n]o member or person shall fail to provide information or testimony . . . pursuant to this Rule.”

³⁶ Compl. ¶ 14.

³⁷ Compl. ¶ 14.

³⁸ Compl. ¶ 14.

³⁹ Compl. ¶ 15.

⁴⁰ Compl. ¶ 16.

⁴¹ Compl. ¶ 17.

⁴² Compl. ¶ 18.

⁴³ Compl. ¶ 18.

⁴⁴ Compl. ¶ 18.

⁴⁵ Compl. ¶ 19.

FINRA Rule 2010 requires member firms and associated persons to observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business.

FINRA's service of the First and Second Testimony Requests complied with FINRA Rule 8210(d). FINRA staff mailed both requests to the CRD Addresses. As noted above, at some point FINRA learned from the USPS that the First CRD Address was outdated or inaccurate. That said, the record does not indicate that at the time the staff sent the First and Second Testimony Requests to Kubiak, it had actual knowledge that either address was outdated or inaccurate. Moreover, the record does not reflect that at the time FINRA mailed the requests to Kubiak, it knew of another more current address for him. Accordingly, I find that Kubiak had constructive notice of both the First and Second Testimony requests,⁴⁶ and that by failing to appear for testimony as directed by those requests, Kubiak violated FINRA Rules 8210 and 2010.

III. Sanctions

Under FINRA's Sanction Guidelines ("Guidelines"), if an individual did not respond in any manner to a request made under FINRA Rule 8210, a bar is standard.⁴⁷ The Guidelines also recommend a fine of \$10,000 to \$50,000.⁴⁸ The sole principal consideration in determining sanctions for failing to respond is "[t]he importance of the information requested as viewed from FINRA's perspective."⁴⁹

According to Enforcement, it needed Kubiak's testimony to determine whether, in violation of FINRA rules, he made unsuitable recommendations to customers that they invest in certain limited partnerships.⁵⁰ More specifically, Enforcement stated that it needed Kubiak's explanations about how he considered the customers' investment profile information when making recommendations in alternative investments, and whether his recommendations were consistent with the investment profiles.⁵¹ Without this information, Enforcement claimed, it was unable to complete the investigation.⁵² Based on these representations, I find that the importance of the information requested is an aggravating factor here.⁵³ I also considered whether the record

⁴⁶ *Dep't of Enforcement v. Felix*, No. 2020065128501, 2022 FINRA Discip. LEXIS 13, at*16 (NAC Oct. 13, 2022) ("Because FINRA properly served the FINRA Rule 8210 requests, Felix is deemed to have received them. See FINRA Rule 8210(d).").

⁴⁷ FINRA Sanction Guidelines at 93 (2022), https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Shetty Decl. ¶ 35.

⁵¹ Shetty Decl. ¶ 35.

⁵² Shetty Decl. ¶ 35.

⁵³ It is an aggravating factor if "the customer is age 65 or older." Guidelines at 8 (Principal Considerations in Determining Sanctions No. 20). But while the Complaint alleges that two of the customers "were seniors," it did not allege that they were "age 65 or older." So I did not find this factor aggravating.

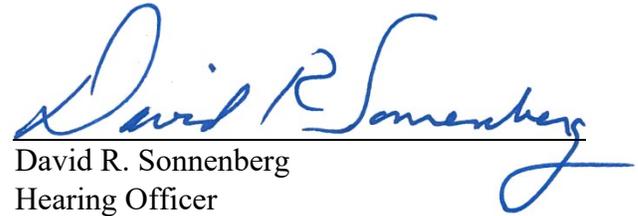
reflected any mitigation relevant to sanctions. Enforcement stated that there were no mitigating factors,⁵⁴ and I found none.

In light of the foregoing, I bar Kubiak from associating with any FINRA member firm in any capacity. But, in light of the bar, I do not also impose a fine.⁵⁵

IV. Order

Enforcement's Default Motion is **GRANTED**. For violating FINRA Rules 8210 and 2010 by failing to appear for on-the-record testimony as required by FINRA Rule 8210, Kubiak is barred from associating with any FINRA member firm in any capacity. The bar shall be effective immediately if this Default Decision becomes FINRA's final action.

SO ORDERED.


David R. Sonnenberg
Hearing Officer

Copies to:

Darren M. Kubiak (via first-class mail, overnight courier, and email)
Vaishali Shetty, Esq. (via email)
Adam Balin, Esq. (via email)
Kay Lackey, Esq. (via email)
Jennifer L. Crawford, Esq. (via email)

⁵⁴ Shetty Decl. ¶ 33.

⁵⁵ Guidelines at 9 (Technical Matters) (“Adjudicators generally should not impose a fine if an individual is barred and there is no customer loss.”). The record did not reflect customer loss.