

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

The Department of Enforcement,

Complainant,

vs.

Bret Steinhart

Fort Lauderdale, FL,

Respondent.

DECISION

Failure to Provide
Information Proceeding

No. FPI020002

Dated: August 11, 2003

Respondent failed to respond to NASD requests for information and on-the-record testimony in violation of Conduct Rule 2110 and Procedural Rule 8210. Held, findings affirmed and sanctions modified.

Appearance

For the Complainant: William (Brice) La Hue, Esq., NASD Department of Enforcement.

For the Respondent: M. David Sayid, Esq., Sayid and Associates, LLP.

Opinion

I. Introduction

The Review Subcommittee of the National Adjudicatory Council called this matter for review to determine the appropriateness of the sanctions imposed by the Hearing Panel. The Hearing Panel found that Bret Steinhart ("Steinhart") failed to respond to NASD requests for information and on-the-record testimony in violation of Conduct Rule 2110 and Procedural Rule 8210. The Hearing Panel suspended Steinhart in all capacities for two years and fined him \$25,000. We affirm the findings of violation, but modify the sanctions imposed by increasing Steinhart's suspension to a bar and eliminating the fine.

II. Background

Steinhart first entered the securities industry in April 1999 by working in an unregistered capacity for an NASD member firm. Following this association, another member employed Steinhart as a general securities representative from August 1999 to October 1999. Steinhart then became registered as a general securities representative with JW Genesis Financial Services, Inc. ("Genesis") in October 1999. His association with Genesis ended in February 2000, when Steinhart was 23 years old. Steinhart is not currently registered with any NASD member firm.

III. Facts

This matter involves Steinhart's failure to provide NASD staff with information and on-the-record testimony requested pursuant to Procedural Rule 8210. The facts leading to a finding of violation are not disputed.

NASD's requests for information and on-the-record testimony originated from four customer complaints. These complaints included allegations of misrepresentations and unauthorized trading. In response to the customer complaints, on August 14, 2000, NASD examination staff issued a request for information to Steinhart at his address listed in the Central Registration Depository ("CRD"). The request listed questions to be answered by Steinhart and specifically stated that NASD issued the request pursuant to Procedural Rule 8210. In response to this request for information, William Nortman, Esq. ("Nortman"), sent a letter dated September 15, 2000 to NASD staff stating that Steinhart had retained him as counsel in connection with NASD's request for information. In this letter, Nortman also stated, "Please be advised that Mr. Steinhart has no information to provide with respect to the questions you have asked at this time."

On October 23, 2000, NASD staff sent Nortman a letter requesting that Steinhart appear for an on-the-record interview. Staff also sent a copy of the letter to Steinhart. In this letter, NASD examination staff gave Nortman the opportunity to participate in scheduling the interview. The letter, however, noted that if NASD staff did not hear from Nortman or Steinhart by a certain date and time, NASD staff would schedule the interview without the benefit of Nortman's input. In a letter to NASD staff dated November 3, 2000, Nortman stated that because of the pendency of a related investigation, Steinhart would be asserting his Fifth Amendment privilege and, as such, "it would be an unnecessary waste of time" to schedule an interview. Nortman acknowledged in the letter that the Fifth Amendment does not apply to NASD proceedings because NASD is a private organization, but asserted nonetheless that Steinhart would not testify.

On November 9, 2000, NASD staff sent Steinhart a notice requesting his appearance for an on-the-record interview on November 27, 2000 at NASD's Atlanta District Office. Staff sent the letter to Steinhart's CRD address, provided a copy to Nortman, and indicated that NASD had issued the request pursuant to Procedural Rule 8210. On November 20, 2000, Nortman sent a letter to NASD staff stating that the time

of the interview was not convenient, requesting that the interview be moved to NASD Dispute Resolution's Boca Raton Office, and stating that Steinhart will assert his Fifth Amendment privilege. Nortman provided Steinhart with a copy of the letter. On November 22, 2000, NASD staff sent Nortman a letter informing him that the testimony would be taken as scheduled on November 27, 2000 in Atlanta, Georgia because his November 3, 2000 letter had not indicated that Atlanta was not a convenient location, and because Nortman had failed to provide a list of alternate dates for testimony.

Steinhart did not attend the on-the-record interview on November 27, 2000. Nortman, however, participated by telephone and stated that his client was asserting his Fifth Amendment privilege and would not answer any questions. Following Steinhart's refusal to give testimony and pursuant to Procedural Rule 9541(b), NASD's Department of Enforcement ("Enforcement") sent Steinhart a notice of suspension dated December 21, 2001 to his CRD address. The notice gave Steinhart 20 days to take corrective action for his failure to provide information. The notice also stated that Steinhart could request a hearing within five days after service of the notice and that he could make a motion for reinstatement within six months of service. Steinhart did not respond to the notice and did not take corrective action within the 20-day period. As a result, in a notice of suspension dated January 14, 2002, NASD notified Steinhart that he was suspended effective immediately.

In a letter dated April 30, 2002, Steinhart, through his new counsel, M. David Sayid, Esq. ("Sayid"), submitted a motion for reinstatement. On August 20, 2002, a Hearing Panel conducted a hearing in this matter.

IV. Discussion

The Hearing Panel found that Steinhart failed to respond to NASD's requests for information and on-the-record testimony. Steinhart does not contest this finding. Nevertheless, we have reviewed the entire record in this matter and affirm the Hearing Panel's findings.

Procedural Rule 8210 authorizes NASD, in the course of its investigations, to require members to provide information orally, in writing, or electronically "with respect to any matter involved in [an] investigation." A preponderance of the evidence establishes that Steinhart violated Procedural Rule 8210 and Conduct Rule 2110. The evidence demonstrates that Steinhart received NASD's requests for information and on-the-record testimony and that he refused to comply with them.

First, we find that NASD had jurisdiction over Steinhart. Article V, Section 4 of the NASD By-Laws allows NASD to retain jurisdiction over a formerly associated person for two years following his or her date of termination. Moreover, Article V, Section 4 of the NASD By-Laws specifically grants NASD the power to request information from formerly registered persons during this time period. Steinhart resigned from Genesis on February 14, 2000, and NASD staff's initial request for information from Steinhart was dated August 14, 2000. In a letter dated November 9, 2000, NASD staff also requested that Steinhart give on-the-record testimony on November 27, 2000.

NASD's requests for information and on-the-record testimony fall squarely within the required two-year period following termination, and we therefore find that NASD had jurisdiction over Steinhart.

Second, we find that Steinhart received notice of the NASD requests for information and on-the-record testimony. Steinhart admitted that he received the August 14, 2000 letter from NASD staff requesting that he respond to a series of questions about the alleged customer complaints. We therefore find that Steinhart received actual notice of this request. In addition, even if Steinhart had not admitted that he received the request, we find that he received constructive notice of the request for information because it was sent to his current CRD address pursuant to Procedural Rule 8210(d). We also find that Steinhart received constructive notice of the November 9, 2000 request for oral testimony. While it is arguable that Steinhart received actual notice of this letter because his counsel received and responded to the letter, we need not make this finding because it is clear that Steinhart received constructive notice. The November 9, 2000 request was sent to Steinhart's address as listed in CRD. NASD staff did not have knowledge of a more current address and it was Steinhart's responsibility to notify NASD of any changes to his address. See NASD By-Laws, Art. V, Sec. 2; NASD Notice to Members 99-77 (Sept. 1999). Furthermore, Steinhart's attorney responded in writing to NASD's request for Steinhart's testimony and provided Steinhart with copies of each of these responses. We therefore find that Steinhart had notice of the requests for information and on-the-record testimony.

Finally, we find that Steinhart failed to respond to the requests for information and on-the-record testimony. Steinhart did not answer any of the questions in the August 14, 2000 letter, nor did he appear for on-the-record testimony on November 27, 2000.¹ Steinhart's failure to respond to NASD's requests for information and on-the-record testimony prevented NASD from performing a proper investigation into the alleged customer complaints. As the SEC has emphasized, because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines

¹ Steinhart states that he did not comply with the requests for information and on-the-record testimony because he relied on the advice of counsel. While reliance on counsel may mitigate his misconduct, it is not a defense to a failure to respond to NASD requests for information. See Michael Markowski, 51 S.E.C. 553, 557 (1993), aff'd, 34 F.3d 99 (2d. Cir. 1994); Department of Enforcement v. Dennis Sturm, Complaint No. CAF000033, 2002 NASD Discip. LEXIS 2, at *8-9 (NAC Mar. 21, 2002).

Furthermore, Steinhart's initial reason for refusing to comply with the requests for information and on-the-record testimony, namely his attempt to exercise his Fifth Amendment privilege, was not a valid reason not to comply with an NASD request for information. Numerous courts have held that NASD is a private entity, and the Fifth Amendment does not apply to NASD investigations and proceedings. See e.g., D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc., 279 F.3d 155, 161-163 (2d. Cir. 2002). Steinhart's current counsel conceded this point.

NASD's ability to carry out its regulatory mandate. See Brian L. Gibbons, 52 S.E.C. 791, 794 (1996), aff'd 112 F.3d 516 (9th Cir. 1997) (unpublished table case).

Accordingly, we find that Steinhart violated Conduct Rule 2110 and Procedural Rule 8210 by failing to respond to NASD's requests for information and on-the-record testimony.

V. Sanctions

For Steinhart's violation of Conduct Rule 2110 and Procedural Rule 8210, the Hearing Panel imposed a two-year suspension and a fine of \$25,000. The Hearing Panel found two factors mitigating: (1) Steinhart's reliance on counsel; and (2) Steinhart's lack of experience. The NASD Sanction Guideline ("Guideline") for a failure to respond to requests for information states that if an individual does not respond in any manner, a bar should be standard.² Where mitigation exists, the Guideline suggests a suspension for up to two years.³ Unlike the Hearing Panel below, we do not find any mitigating factors. We therefore impose a bar for Steinhart's failures to respond.

Among other things, the Principal Considerations in the Guideline state that the adjudicator may consider whether "the respondent demonstrated reasonable reliance on competent legal or accounting advice."⁴ Steinhart failed to meet this requirement because his purported reliance on counsel was not reasonable. In order to determine whether Steinhart's reliance was reasonable, we must examine the facts and circumstances surrounding his reliance. See e.g., Luther A. Hanson, Complaint No. C9A000027, 2001 NASD Discip. LEXIS 41, at *21 (NAC Dec. 13, 2001). We find that it was not reasonable for Steinhart to rely on advice to take action that he admittedly knew was a violation of NASD rules. Following the first NASD request for information, Steinhart sought legal advice regarding his compliance with the request. Steinhart, however, did not show that he received advice that his refusal to comply was legal. In fact, Nortman stated in his correspondence with NASD staff that the applicable case law showed that his position was incorrect. Furthermore, Steinhart testified that Nortman had informed him that there could be some regulatory action for his failure to respond. Reliance on advice to engage in conduct that is in violation of NASD rules cannot be considered reasonable, especially when the legal counsel or client has knowledge that the advice violates the applicable rule. See Sturm, 2002 NASD Discip. LEXIS 2, at *22. We therefore find that Steinhart's reliance was not reasonable.

We also find that Steinhart's lack of experience does not mitigate his conduct. Again, because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD's ability to carry out its regulatory

² See Guidelines (Failure to Respond) (2001 ed.) at 39.

³ See id.

⁴ See Guidelines (2001 ed.), Principal Consideration No. 7, at 9.

mandate. See Gibbons, 52 S.E.C. at 794. Consequently, without this compliance, NASD cannot conduct meaningful investigations into alleged misconduct. Because of the essential nature of these requests for information, Steinhart's lack of experience should not and cannot mitigate his misconduct.⁵

Even though he refused to comply with the requests for information and on-the-record testimony, Steinhart argues that he did respond to both requests because his former attorney replied to the requests. We reject this argument. A refusal to comply with an NASD request for information is tantamount to a complete failure to respond. See e.g., Sturm, 2002 NASD Discip. LEXIS 2; DBCC v. Roger Harry Chlowitz, Complaint No. C02980025, 1999 NASD Discip. LEXIS 31 (NAC Nov. 4, 1999). As such, an associated person cannot avoid his responsibility to comply with NASD requests for information by stating that he refuses to comply.

Moreover, Steinhart states that he is currently willing to answer all questions about the customer complaints. NASD, however, should not have to bring disciplinary proceedings to obtain responses to its requests for information. See Edward C. Farni, II, 51 S.E.C. 1118, 1120 (1994). Furthermore, at this point, NASD would be unable to bring disciplinary action against Steinhart if it suspected misconduct because NASD no longer has jurisdiction to file a new complaint against Steinhart. Steinhart therefore has undermined NASD's ability to carry out its regulatory mandate.

Accordingly, we order that Steinhart be barred in all capacities from associating with any member firm. In light of our imposition of a bar, however, we find that no further remedial purpose is served by the additional imposition of a monetary sanction, and we therefore eliminate the \$25,000 fine. See NASD Notice to Members 99-86 (Oct. 1999). We also order Steinhart to pay hearing costs for the proceeding below.⁶

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney
Senior Vice President and Corporate Secretary

⁵ We also note that a failure to comply with a request for information does not involve a duty or responsibility that experience will cure. A registered person's experience therefore is not relevant to his or her duty to provide NASD information upon request. We do not address the general issue of when lack of experience may constitute appropriate mitigation.

⁶ We also have considered and reject without discussion all other arguments advanced by Steinhart.