

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Brad A. Roethlisberger,
Green Bay, Wisconsin,

Respondent.

DECISION

Complaint No. C8A020014

Dated: December 15, 2003

Complainant appealed sanctions imposed by Hearing Panel in case involving registered representative who engaged in day trading, and who: (1) caused his firm to extend him credit (in violation of Regulation T); and (2) purchased securities that were paid for by the sale of the same securities in violation of Section 7(f) of the Exchange Act and NASD Rules 2110 and 2520(f)(9). The Hearing Panel fined the registered representative \$1,000, suspended him for one month (with credit for a three-month suspension imposed by his firm), directed him to requalify in all capacities and ordered him to pay \$2,457.94 in hearing costs. Held, findings affirmed and sanctions modified.

Appearances

For Complainant: Dale A. Glanzman, Esq., Department of Enforcement.

For Respondent: James J. Moylan, Esq., Law Offices of James J. Moylan, Chicago, IL.

DECISION

The NASD Department of Enforcement ("Enforcement") has appealed a Hearing Panel decision pursuant to Procedural Rule 9311. The Hearing Panel ruled, in a decision dated January 30, 2003, that Brad A. Roethlisberger ("Roethlisberger"): (1) caused his firm to extend him credit in violation of Regulation T; and (2) purchased securities with funds obtained from the sale of the same securities in violation of Section 7(f) of the Securities Exchange Act of 1934 ("Exchange Act") and NASD Rules 2110 and 2520(f)(9). After reviewing the record in this matter, we affirm the Hearing Panel's findings and modify the sanctions imposed by the Hearing Panel.

I. Background

Financial Network Investment Corporation ("Financial Network") has been an NASD member since 1984. Roethlisberger has been a registered representative of Financial Network and has associated with Financial Network since 1999.¹ During the relevant period, Roethlisberger was a registered representative for Associated Investment Services, Inc ("AIS" or "the Firm").

II. Procedural History

On March 18, 2002, Enforcement filed a two-cause complaint against Roethlisberger. The first cause alleged that Roethlisberger wrongfully caused his firm to extend him credit in purchasing securities, in violation of Section 7(f) of the Exchange Act, Federal Reserve Board Regulations T and X, and NASD Conduct Rule 2110. The second cause alleged that he wrongfully used his cash account for day trades, in which he met the cost of purchased shares by selling the same stock ("free riding"), in violation of NASD Rules 2110 and 2520(f)(9). Roethlisberger admitted the transactions at issue and submitted a lengthy statement in mitigation and extenuation. A hearing was held before a Hearing Panel in Chicago, Illinois on November 14, 2002. On January 30, 2003, the Hearing Panel issued its decision, finding that Roethlisberger engaged in the misconduct alleged in both causes of the complaint. The Hearing Panel, however, found that Roethlisberger's misconduct was not willful and therefore did not violate Regulation X.²

The Hearing Panel suspended Roethlisberger for one month for his misconduct. The Hearing Panel, however, credited Roethlisberger with a three-month suspension previously imposed by his firm for the same misconduct. The Hearing Panel also ordered Roethlisberger to requalify by examination within six months in all capacities before associating with a member firm. Finally, the Hearing Panel fined Roethlisberger \$1,000 and assessed a total of \$2,457.94 in administrative costs against him.

III. Facts

A. Roethlisberger's Day-Trading Activity

The facts of this case are straightforward. From April of 1996 through August of 1998, Roethlisberger was a registered representative of AIS, where he maintained his own cash

¹ Roethlisberger entered the securities business in 1992.

² Regulation X prohibits borrowers from willfully causing broker-dealers to extend credit in violation of Regulation T. Regulation T is designed to prevent the purchase of securities on excessive credit and imposes margin restrictions limiting the amount of credit that a broker-dealer can offer to a customer. Under Regulation T's margin restrictions, the amount of credit that may be offered by a broker-dealer to a customer for the purchase of a security may not be greater than a certain percentage of the current market price of that security.

discount brokerage account. Roethlisberger's cash discount brokerage account was linked to his bank account at Associated Bank (an affiliate of AIS) via "Banklink." Banklink is a system through which payment for stock purchases or proceeds from stock sales can be automatically debited or credited to a bank account. Roethlisberger testified that he intended to pay for his day trades with the proceeds of the sales and to meet any shortfall through the line of credit opened at Associated Bank.³

On July 2, 10, 13, 15, and 16 of 1998, Roethlisberger engaged in day trades, involving purchases and sales in his cash discount brokerage account.⁴ Roethlisberger's overall day trades involved 12 purchases and 14 sales. The net result of these transactions was a \$5,829 loss, which Roethlisberger paid back to the Firm.⁵ Roethlisberger's stock purchases from July 2 to July 16, 1998, totaled more than one million dollars. In each instance, he did not pay for the stock, but instead met the purchase price through the proceeds of a same-day sale. Roethlisberger, however, established a \$26,000 line of credit at Associated Bank that he intended to use if the proceeds from a sale of stock were insufficient to cover the purchase price. Roethlisberger used his line of credit to pay for an \$11,470 shortfall resulting from his first day trades on July 2, 1998. Roethlisberger first learned that his line of credit was insufficient for his day-trading activities on July 16, 1998, when his checking account was overdrawn by more than \$300,000 as a result of his purchase of 2,000 shares of Yahoo stock on July 13, 1998.

B. Roethlisberger's Communication with Other AIS Employees

Roethlisberger did not ask his supervisor or anyone in AIS's compliance department whether his day-trading activities were permissible.⁶ Roethlisberger, however, testified that he asked Brad Hansen ("Hansen"), a registered representative in the Firm's discount division, if Roethlisberger would be allowed to buy and sell on the same day, utilizing the \$26,000 line of credit to make up any shortfall, and Hansen told Roethlisberger that he could make day trades in this manner.⁷ Hansen was Roethlisberger's contact person for the day-trading transactions in issue and the Firm later reprimanded Hansen for processing the trades in issue.

³ Roethlisberger's background was primarily in insurance and mutual funds. Before the events at issue, he had no experience whatsoever with day trading.

⁴ On July 2, 10, 13, 15 and 16 of 1998, Roethlisberger bought and sold: (1) 5,000 shares of Infoseek stock, (2) 3,000 shares of Yahoo stock, (3) 3,000 shares of Yahoo stock, (4) 4,000 shares of Egghead stock, and (5) 2,000 shares of Egghead stock, respectively.

⁵ As a result of Roethlisberger's transactions, NASD censured and fined the Firm \$2,500. The record does not show whether Roethlisberger compensated the Firm for the \$2,500 fine.

⁶ The record, however, suggests that several brokers in the discount division took Roethlisberger's orders, and their supervisor, a Series 24 principal, reviewed the trades without raising objections.

⁷ Hansen testified that he did not remember advising Roethlisberger that he could go forward with day trades. Hansen also testified that he did not have any recollection of any

[Footnote continued on next page]

C. Admitted Violations

The essential facts are undisputed and, without exception, liability is admitted. The parties agree that Roethlisberger's purchases in his cash account caused AIS to extend credit to Roethlisberger in violation of Regulation T. The parties further agree that Roethlisberger therefore violated Section 7(f) of the Exchange Act,⁸ as well as NASD Rule 2110's general ethical mandate.⁹ It is also undisputed that Roethlisberger violated NASD Rule 2520(f)(9),¹⁰ which prohibits free riding, and that such misconduct also violates Rule 2110.

D. Roethlisberger's Firm-Imposed Discipline

On July 20, 1998, the Firm placed Roethlisberger on administrative leave and initiated an investigation into his day-trading activities. On July 24, 1998, AIS suspended Roethlisberger without pay for 90 days, specifying that he would not be eligible for reinstatement until he had completed a remedial training program. Roethlisberger resigned from AIS on August 14, 1998 without serving the full 90-day suspension. Roethlisberger testified that he was "disgruntled" after receiving the Firm's 90-day suspension and decided to take some time off after questioning whether or not he should remain in the securities business. In September 1999, Roethlisberger took a job with another NASD member firm.

IV. Discussion

The Hearing Panel found that Roethlisberger caused his firm to extend him credit in violation of Regulation T, and purchased securities that were paid for by the sale of the same securities in violation of Section 7(f) of the Exchange Act and NASD Rules 2110 and 2520(f)(9). The Hearing Panel suspended Roethlisberger for one month, crediting him with a three-month suspension previously imposed by his firm. The Hearing Panel also ordered Roethlisberger to requalify by examination within six months in all capacities before associating with a member

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conversations with Roethlisberger prior to July 1998 about buying and selling securities on the same day.

⁸ Section 7(f) of the Exchange Act does not allow borrowers to "obtain, receive, or enjoy the beneficial use of a loan or other extension of credit from any lender . . . for the purpose of . . . purchasing or carrying . . . securities," unless the loan or credit complies with regulations promulgated by the Board of Governors of the Federal Reserve.

⁹ NASD Rule 2110 requires NASD members and associated persons to observe high standards of commercial honor and just and equitable principles of trade.

¹⁰ NASD Rule 2520(f)(9) prohibits "free riding" in cash and margin accounts whereby the "free riding" purchaser buys a security, expecting to pay for it through the sale of the same security before payment is due with little or no risk of his or her own capital.

firm, fined Roethlisberger \$1,000 and assessed a total of \$2,457.94 in costs. After reviewing the record, we affirm the Hearing Panel's findings as to the violations alleged against Roethlisberger.¹¹ We, however, find that the Hearing Panel's sanctions were inadequate and modify them as follows.

A. Regulation T and Free-Riding Sanctions

NASD Sanction Guidelines ("Guidelines") recommend a suspension of up to 30 calendar days and a fine of \$1,000 to \$50,000 for Rule 2520 violations, with repeated violations carrying the possibility of additional fines per violation.¹² In egregious cases, the Guidelines also suggest a suspension of up to two years, or an expulsion or bar.¹³

For the violations committed by Roethlisberger, Enforcement recommended that Roethlisberger be suspended for six months, fined \$20,000, and ordered to requalify by examination before reentering the securities industry. The Hearing Panel, however, concluded that lower sanctions were appropriate after considering that: (1) the violations were all rooted in the same series of July 1998 trades; (2) the trades were not extensive in number or duration; and (3) the trades did not result in any losses for Roethlisberger's firm or customers.

After reviewing the record, however, we find very little basis for imposing such lenient sanctions on Roethlisberger.¹⁴ In contrast, we find that Roethlisberger's failure to accept responsibility for his actions supports harsher sanctions against him. We therefore modify the Hearing Panel's sanctions by: (1) suspending Roethlisberger for 30 calendar days with no credit toward his suspension; (2) requiring Roethlisberger to requalify in all capacities within six months; and (3) increasing Roethlisberger's fine from \$1,000 to \$5,000. We also order Roethlisberger to pay \$3,663.52 in hearing costs.

B. Roethlisberger Did Not Accept Responsibility for His Conduct

The Guidelines state that when imposing sanctions, we should consider whether an individual has accepted responsibility for and acknowledged his or her misconduct.¹⁵ We have

¹¹ Neither Roethlisberger nor Enforcement contests the Hearing Panel's findings of violation. Enforcement's appeal instead focuses entirely on the sanctions imposed below. Thus, our review of this matter does not include a review of findings where the Hearing Panel dismissed part of an allegation.

¹² See Guidelines at 35 (Regulation T and Margin Requirements – Violations of Regulation T And/Or NASD Margin Requirements).

¹³ Id.

¹⁴ See Guidelines at 9.

¹⁵ Id.

reviewed the record and find that Roethlisberger failed to accept responsibility for his inappropriate day-trading activities.

Roethlisberger's attempts to assign responsibility for his illegal day trades to the Firm due to certain "procedural failures" illustrate his refusal to accept responsibility for his misconduct. For example, Roethlisberger emphasized that the Firm's registered representatives in charge of his account did not adequately perform their duties and therefore allowed him to execute the illegal day trades. In addition, Roethlisberger cited flaws in AIS's compliance and internal controls as a cause of the day-trading violations. Roethlisberger also suggested that he was not responsible for the violations since a principal at AIS reviewed each of his transactions.

Roethlisberger, however, not only faults AIS for allowing him to violate the securities laws, he also blames AIS's clearing firm, Pershing L.L.C. ("Pershing") for allowing the illegal transactions to occur. Roethlisberger claims that the majority of the violations would have been avoided if Pershing's Banklink system properly flagged his transactions for a compliance investigation. Roethlisberger ignores the fact that it was his inappropriate day trading, and not the Banklink system's inability to prevent the trades, that triggered the securities violations. Roethlisberger's numerous attempts to shift the blame show his lack of appreciation for his role in causing the day-trading violations. Thus, we find that Roethlisberger has failed to accept responsibility for his misconduct.¹⁶

C. Roethlisberger Did Not Fully Comply with the Firm-Imposed Sanctions

The NAC has long recognized the principle that the determination of appropriate sanctions depends on the facts and circumstances of each case.¹⁷ The Guidelines state that sanctions should be designed to discourage future misconduct by a respondent.¹⁸ If an individual can violate the securities laws without having to face discipline, he or she will not be discouraged from committing future violations. Thus, giving credit in an NASD disciplinary proceeding to individuals for firm-imposed sanctions when these individuals can voluntarily

¹⁶ Roethlisberger testified that he felt "disgruntled" with how the whole process took place and that he was especially upset that the Firm suspended him for 90 days for his day-trading activities. Roethlisberger's firm-imposed suspension, however, is consistent with NASD's policy of encouraging member firms to discipline their employees who violate the securities laws. We find that Roethlisberger's disdain for the Firm's disciplinary process and subsequent sanctions against him, even though he clearly violated the securities laws, supports our conclusion that he does not acknowledge his own wrongdoing or accept responsibility for his misconduct.

¹⁷ See Roger A. Hanson, Complaint No. C8A000059, 2002 NASD Discip. LEXIS 5 at *12 (NAC March 28, 2002).

¹⁸ See Guidelines at 3.

leave the industry or change firms to avoid such sanctions is inconsistent with the objectives of NASD's disciplinary process.¹⁹

Roethlisberger voluntarily left the industry after serving only a few days of a 90-day firm-imposed suspension. We have never credited an individual's time away from the industry where that individual voluntarily left the industry after refusing to comply with a firm-imposed suspension, and we decline to do so in this case.

D. Roethlisberger Should Not Be Credited for Time Out of the Industry

The NAC has credited respondents for time served under firm-imposed suspensions where the respondent actually served the full term of the suspension. Firms that take the initiative and discipline their employees for misconduct help support NASD's regulatory objective of protecting investors. This is because firm-imposed sanctions, like NASD-imposed sanctions, discourage securities law violations by acting as a deterrent to potential violators. Firm-imposed sanctions are not effective as a deterrent, however, if there are no consequences for failing to comply with these sanctions. In this case, Roethlisberger would face no consequences for his failure to comply with AIS's sanctions because he neither served the full suspension imposed by AIS nor completed the remedial training required under AIS's sanctions.²⁰ We therefore find that Roethlisberger should not receive credit for the firm-imposed sanctions.²¹

¹⁹ Under certain circumstances, however, it is consistent with NASD's policy of encouraging firms to discipline their employees who violate the securities laws to give an individual respondent credit for a firm-imposed sanction in disciplinary proceedings involving the same misconduct. Compare Dep't of Enforcement v. Prout, Complaint No. C01990014, 2000 NASD Discip. LEXIS 18, at *9 (NAC Dec. 18, 2000) (arguing that an individual should receive credit for a firm-imposed suspension if the suspension serves an NASD objective such as investor protection or establishing high standards or commercial honor).

²⁰ Compare Dep't of Enforcement v. Walsh, Complaint No. C01010018 (Hearing Panel decision Oct. 7, 2002) (granting credit for firm-imposed suspension where respondent had fully complied with all of the firm-imposed sanctions, including the requirement that he undergo additional training and one year of special supervision).

²¹ See, e.g., James S. Davenport, Complaint No. C05010017, 2003 NASD Discip. LEXIS 4, at *13 (NAC May 7, 2003) (finding that the Hearing Panel erred by giving respondent credit against a nine-month suspension for the time he was out of the industry); John L. Greer, Complaint No. C05990035, 2001 NASD Discip. LEXIS 34, at *12 (NAC Aug. 6, 2001) (concluding that respondent should not receive credit for time out of the industry where his return to the industry was delayed by his failure to make adequate disclosures to the state licensing authorities).

E. Roethlisberger's Day-Trading Transactions Involve Separate Violations

The Hearing Panel found the violations alleged against Roethlisberger to be closely related and viewed Roethlisberger's series of inappropriate day trades in July 1998 as a single violation. We disagree. It is undisputed that each of Roethlisberger's day-trading transactions involved a separate purchase and sale of securities without the required cash and without complying with the margin restrictions of Regulation T. For example, on July 2, 1998, Roethlisberger bought and sold 5,000 shares of Infoseek stock, but in a completely different transaction on July 16, 1998, Roethlisberger bought and sold 2,000 shares of Egghead stock. We therefore find that the day-trading violations in this case arose from multiple discrete transactions and should not be considered one violation for the purpose of determining an appropriate sanction.

F. Roethlisberger's Lack of a Disciplinary History Is Not a Mitigating Factor

Roethlisberger contends that his lack of a disciplinary history should mitigate the severity of the sanctions imposed. It is clear that the existence of disciplinary history can be an aggravating factor in determining appropriate sanctions.²² A lack of a disciplinary history, however, should not be considered a mitigating factor.²³ Under NASD Rule 2110, registered individuals are required as part of the terms of their admission to the securities industry to observe high standards of conduct and should not be rewarded merely because they have acted in a manner consistent with those standards.²⁴ We therefore do not consider Roethlisberger's lack of a disciplinary record to be a mitigating factor in determining sanctions.

V. Conclusion

After reviewing the record in this matter and considering the parties' arguments, we uphold the Hearing Panel's findings that Roethlisberger (1) violated Exchange Act Section 7(f) and NASD Rules 2110 and 2520(f)(9); and (2) caused his firm to violate Federal Reserve Board Regulation T. We reject the Hearing Panel's conclusion that Roethlisberger's series of inappropriate day trades should be treated as a single violation. We also find that the Hearing Panel erred in granting Roethlisberger credit toward his suspension.²⁵ We therefore modify the sanctions imposed by the Hearing Panel to reflect these findings.

²² See Guidelines at 3 (stating that "[a]djudicators should consider a respondent's relevant disciplinary history in determining sanctions).

²³ See Tammy S. Kwikkel-Elliot, Complaint No. C04960004, 1998 NASD Discip. LEXIS 4, at *16 (NBCC Jan. 16, 1998) (finding that a respondent's lack of disciplinary history was not mitigating, particularly when respondent has not been registered for very long).

²⁴ See Dep't of Enforcement v. Fergus, 2001 NASD Discip. LEXIS 3 (NAC May 17, 2001).

²⁵ We have also considered and reject without discussion all other arguments advanced by respondents and Enforcement.

Accordingly, Roethlisberger is suspended for 30 calendar days, and required to requalify in all capacities within six months. In addition, we increase Roethlisberger's fine from \$1,000 to \$5,000 and order Roethlisberger to pay a total of \$3,663.52 in hearing costs.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President and
Corporate Secretary

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Pursuant to NASD Procedural Rule 8320, any member that 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.