

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of	<u>DECISION</u>
Department of Enforcement,	Disciplinary Proceeding No. C10010005
Complainant,	Dated: March 27, 2002
vs.	
Jeffrey B. Hodde Cedar Grove, NJ,	
Respondent.	

In a decision on default, the Hearing Officer found that a former registered representative effected an unauthorized transaction and failed to respond to three requests for information from NASD Regulation staff. Held: findings affirmed and sanctions modified.

Respondent Jeffrey B. Hodde ("Hodde") has appealed an April 27, 2001 Hearing Officer default decision pursuant to NASD Procedural Rule 9311. After a review of the entire record in this matter, we find that Hodde violated Conduct Rule 2110 by effecting an unauthorized transaction and violated Conduct Rule 2110 and Procedural Rule 8210 by failing to respond to three requests for information from staff of NASD Regulation, Inc. We order that Hodde be barred from associating in any capacity with any member firm.

Background

The Central Registration Depository ("CRD") shows that Hodde was employed by Janssen-Meyers Associates, LP ("Janssen"), now known as Roan-Meyers Associates, LP, an NASD member firm, from April 15, 1998, until May 21, 1999. Hodde's CRD record further shows that on June 2, 1999, Janssen filed a Uniform Termination Notice For Securities Industry Registration ("Form U-5") on Hodde's behalf with the NASD, and the NASD terminated his registrations as a general securities representative and a general securities principal effective June 4, 1999. Hodde has not been associated with a member firm since that time.

Procedural and Factual History

The Department of Enforcement ("Enforcement") filed the complaint in this proceeding on January 9, 2001, alleging that Hodde effected an unauthorized transaction in a customer account, in violation of Conduct Rule 2110, and failed to respond to three requests for information sent to him by NASD Regulation staff, in violation of Conduct Rule 2110 and Procedural Rule 8210.¹

On that same date, Enforcement sent a copy of the complaint and notice of complaint to Hodde at his residential address listed in the CRD (67B New England Avenue, Summit, NJ 07901) (the "CRD Address") by certified mail, return receipt requested, and by first-class mail. The U.S. Postal Service returned to Enforcement the return receipt for the certified mailing to the CRD Address signed by "C. Hodde." The Postal Service did not return the first-class mailing to Enforcement.²

Pursuant to Procedural Rules 9215(a) and 9138(c), Hodde was required to serve his answer to the complaint on or before February 6, 2001. Having received no response, Enforcement sent another copy of the complaint and a second notice of complaint to Hodde at both his CRD Address and the LEXIS Address via certified mail, return receipt requested, and by first-class mail on February 6, 2001. The Postal Service did not return the first-class mailings. The Postal Service returned both certified mailings marked "Unclaimed" and "Return to Sender."

On March 30, 2001, Enforcement filed with the Hearing Officer a motion for entry of a default decision ("Default Motion") and a declaration supporting the Default Motion. Enforcement sent a copy of the Default Motion to Hodde at both the CRD and the LEXIS Addresses by certified mail, return receipt requested, and by first-class mail. Hodde did not respond to the Default Motion.

On April 27, 2001, the Hearing Officer issued a default decision, finding Hodde in violation of Conduct Rule 2110 and Procedural Rule 8210, as alleged in the complaint.

¹ The complaint resulted from an investigation begun by Enforcement after its receipt of a letter from customer JD on April 6, 1999, alleging that Hodde had effected an unauthorized transaction in JD's account on August 21, 1998.

² NASD Regulation staff also mailed the complaint and notice of complaint to Hodde using the following variation of the CRD Address, which staff obtained through a LEXIS search: 67 New England Avenue, Apt. B, Summit, NJ 07901 ("the LEXIS Address"). The certified mailing sent to the LEXIS Address was returned with the notation "Unclaimed" and "Return to Sender." The Postal Service did not return the first-class mailing to the LEXIS Address.

The default decision ordered that Hodde be fined \$5,000 and suspended in all capacities for 10 business days for the unauthorized trade, and barred from association in all capacities for failing to respond to the requests for information.

Hodde appealed the default decision on May 22, 2001. By letter dated May 24, 2001, the Office of General Counsel of NASD Regulation advised the parties that, unless Hodde could demonstrate good cause for his failure to participate below, pursuant to NASD Procedural Rule 9344(a), the appeal would be decided on the basis of the record and the briefs filed. Moreover, the May 24 letter advised Hodde that he could file a motion with the Office of Hearing Officers to set aside the default decision. Hodde did not file such a motion. In his opening brief on appeal, Hodde purported to state his "Answer" to the complaint, as well as appeal the default decision.

In his appeal, Hodde contends that the default decision should be set aside because he never received the complaint, and because he denies the allegations set forth in the complaint.

Discussion

We will first address the question as to whether Hodde has demonstrated good cause for his failure to participate in the proceeding before the Hearing Officer.³ We will

³ Enforcement has objected to Hodde's inclusion of "unsupported factual statements" in his brief and the attachment of a handwritten memorandum dated March 2, 1999, that purportedly was sent by Hodde to Janssen regarding the situation with JD's account. In assessing whether Hodde has demonstrated good cause for his failure to participate below, we find it necessary for us to consider the statements made by Hodde as to his alleged whereabouts from September 1999 through April 2001. As set forth above, we have concluded that whether or not those statements are true, Hodde has not demonstrated good cause for his failure to participate in the proceeding before the Hearing Officer.

As to the handwritten memorandum, we have determined not to admit it on appeal because Hodde failed to meet the requirements set forth in NASD Procedural Rule 9346(b) for adducing new evidence: 1) a timely motion to adduce; 2) a showing of the materiality of the evidence; and 3) a showing of good cause as to why the evidence was not produced at the proceeding below. See Department of Enforcement v. Gerace, No. C02990022, 2001 NASD Discip. LEXIS 5, at *17 (NAC May 16, 2001). Even if we treat Hodde's attachment of the memorandum to his initial appeal brief as a timely motion to adduce, the other two factors are not present. As Hodde has failed to establish why he did not participate below, there is also no showing of good cause as to why he could not have produced this document earlier in the proceeding. Further, there is no showing that

next consider whether the Hearing Officer properly determined that Hodde was in default. Finally, we will review the findings of violation and the sanctions imposed.

A. Hodde's Failure to Show Good Cause

Procedural Rule 9344(a) provides that if an appealing party "did not participate in the disciplinary proceeding before a Hearing Officer . . . and fails to show good cause for the failure to participate, the matter shall be considered . . . on the basis of the record and other documents . . ." We find that Hodde has not demonstrated good cause for his failure to answer or otherwise respond to the complaint.

The NASD Code of Procedure does not provide a definition of "good cause" for purposes of Rule 9344. NASD Notice to Members 99-77 (September 1999) ("NASD Regulation Modified Default Procedures"), however, sets forth some parameters for assessing good cause:

[T]he NAC will consider such factors as: (i) whether the respondent notified . . . CRD of any change of address; (ii) the length of time that has passed between the issuance of the default decision and the respondent's appeal; and (iii) the reasons for the respondent's failure to participate in the proceeding before the Hearing Officers.

We acknowledge that Hodde filed his appeal timely after issuance of the April 27, 2001 default decision. We find, however, that Hodde admittedly concedes that he did not notify CRD of any change of address, and that he has not presented justification for his failure to participate in the proceeding before the Hearing Officer.

Hodde argues that he did not participate in the proceeding below because he moved to California and his estranged wife and their daughter did not forward to him any correspondence mailed to the CRD Address after September 1999. We note, however, that Hodde admits that he did receive the default decision in a timely manner, and that the default decision also was mailed to the CRD Address on April 27, 2001.

More significantly, even if Hodde had moved from the CRD Address, he had a continuing duty to update that address. Pursuant to Article V, Sections 3 and 4 of the NASD's By-Laws, the NASD may request information from, or file a formal disciplinary action against, persons who are no longer registered with a member for at least two years

[con't]

this document is material. It alleges that Hodde requested that Janssen cancel the transaction because of a misunderstanding, but it does not establish that the transaction about which JD complained was actually authorized.

after their termination from their last member firm. As set forth in Notice to Members 99-77, such persons must update their residential addresses:

Requests for information and disciplinary complaints issued by the NASD during this two-year period will be mailed to such a person's last address in the NASD's records, and are considered to have been received at that address, whether or not the individual has actually received them. Thus, in order to receive mailings from the NASD, individuals must keep their address in CRD current during the two years after they end their association or they may have a default decision issued against them.

See also Ashton Noshir Gowadia, 53 S.E.C. 786, 790 (1998) (it was the respondent's responsibility "to provide the CRD with a current address at which he could receive documents mailed to him. Otherwise an association member could avoid liability simply by moving without leaving a forwarding address."); Nazmi C. Hassanieh, 52 S.E.C. 87, 90 (1994) (holding that "[a]ll registered representatives are required to sign and file with the NASD a Form U-4, which obligates them to keep a current address on file with the NASD at all times.").

In addition to Hodde's failure to update his residential address with CRD, he made no effort to inform Enforcement staff of his alleged new address. Hodde failed to contact Enforcement staff even though he knew, as evidenced by the September 27, 1999 letter that he sent via facsimile transmission to staff seeking an extension of time to respond to a staff request for information, that he was the subject of an ongoing NASD Regulation investigation.

Hodde admits that he did not provide CRD with any updated residential address. Therefore, his argument that he did not receive the complaints because of his alleged move to California, even if true, does not constitute good cause for his failure to answer the complaint. Cf. Brown v. American Futures Group, No. 98-R111, 1998 CFTC LEXIS 339 (Aug. 7, 1998) (respondent failed to demonstrate good cause to vacate a default that was based on an old, last known address reflected in records of the National Futures Association as respondent had a continuing duty to notify that association of any address changes).

Accordingly, because Hodde has failed to demonstrate good cause for his failure to answer the complaint, we have considered this appeal solely on the basis of the record below and the briefs submitted on appeal.

B. Hearing Officer's Entry of a Default Decision

Procedural Rule 9215(f) provides that, if a respondent does not file an answer or otherwise respond within the time required after a second notice of complaint has been sent, the Hearing Officer may "(1) treat as admitted by the respondent the allegations in

the complaint; and (2) enter a default decision against the respondent pursuant to Rule 9269." We find that the record supports the Hearing Officer's entry of the default decision against Hodde.

The record shows that Hodde received actual service of the complaint in this action. The certified mailing return receipt for the first notice of complaint bearing the signature "C. Hodde" was returned to Enforcement by the Postal Service. In the default decision, the Hearing Officer found that this certified mailing receipt was "strong evidence . . . that Hodde's CRD [A]ddress was his current address." NASD Procedural Rule 9134, which governs methods of service, implicitly reflects that receipt of mail by a person of suitable age and discretion who resides at a respondent's dwelling constitutes actual service. Hodde has presented no evidence to demonstrate that "C. Hodde" was not of suitable age or discretion.

Even assuming, arguendo, that actual service of the complaint on Hodde was not made, the record is clear that constructive service was made. It is well settled that NASD Procedural Rule 9134(b)(1) provides for constructive notice by mailing a complaint to the respondent's most recent CRD address. See Lubeck v. SEC, 156 F.3d 1237 (9th Cir. 1998) (finding that the NASD complied with notice requirements by mailing complaint to respondent's last known address); Eric M. Diehm, 51 S.E.C. 938, 941 n.14 (1994) (rejecting argument that NASD sent notice to the wrong address because notice was sent to respondent's last known CRD address); Department of Enforcement v. Liu, No. C04970050, 1999 NASD Discip. LEXIS 32, at *15 (NAC Nov. 4, 1999) (affirming default decision based on determination that mailing to respondent's last known address constituted valid service under Procedural Rule 9134).

In this case, both complaints and notices of complaint were served upon Hodde at two addresses: his CRD Address and the LEXIS Address. Enforcement had no reason to believe that these addresses were incorrect because Hodde had not supplied any information to NASD Regulation regarding a change of address. Moreover, Enforcement staff previously had sent requests for information to Hodde at the CRD Address, after which: (1) Hodde responded to one such request with the September 27, 1999 letter, requesting additional time, and listing the CRD Address as his return address,⁴ and (2) Enforcement staff received a certified mailing return receipt, signed "J. Hodde," for one information request.

⁴ Hodde's opening brief on appeal states that he was "simply unaware that Enforcement sought his cooperation." Yet the record does not support this contention as, clearly, Hodde knew enough about Enforcement's inquiries to send the September 27 letter to Enforcement staff. That letter also references at least four previous telephone calls by him to staff in response to the request for information, and acknowledges that he had received two written requests for information.

It was Hodde's responsibility to provide CRD with any new address even after he left the industry. This responsibility is particularly acute in a situation such as this one, where Hodde was fully aware of the fact that Enforcement staff was seeking information from him, as evidenced by the September 27, 1999 letter requesting additional time to respond. District Bus. Conduct Comm. v. Gurfel, No. C9B950010, 1998 NASD Discip. LEXIS 52, at *15-16 (NAC June 12, 1998) (holding that a respondent could not purposefully evade NASD's jurisdiction "simply by moving without leaving a forwarding address."), aff'd Exchange Act Rel. No. 41229 (Mar. 30, 1999), petition for review denied, 205 F.3d 400 (D.C. Cir. 2000). See also Ashton Noshir Gowadia, 53 S.E.C. 786, 790 (1998) (respondent has responsibility to update CRD with a current address, "[o]therwise an association member could avoid liability simply by moving without leaving a forwarding address.").

We find that Hodde failed to file an answer to the complaint and that, therefore, the Hearing Officer properly found that Hodde was in default.

C. Findings of Violation

The first cause of the complaint alleged that on August 21, 1998, while Hodde was employed by Janssen, he effected an unauthorized purchase of 2,000 shares of Data Race Inc. stock in JD's account. At that time, JD was one of Janssen's customers. Conduct Rule 2110 requires that a member "shall observe high standards of commercial honor and just and equitable principles of trade." The Commission and the NASD have repeatedly held that unauthorized trading in a customer's account violates Conduct Rule 2110. See District Bus. Conduct Comm. No. 10 v. Hellen, No. C3A970031, 1999 NASD Discip. LEXIS 22 (NAC June 15, 1999). See also District Bus. Conduct Comm. v. McNeil, No. C3B960026, 1999 NASD Discip. LEXIS 3 (NAC Jan. 21, 1999); District Bus. Conduct Comm. v. Kesilica, No. C9B910033, 1994 NASD Discip. LEXIS 46, at *15 (NBCC Jan. 10, 1994) ("[e]ffecting unauthorized trading for the purpose of personal gain is a fundamental breach of the duties owed by a representative to his customers."). In addition, NASD IM-2310-2(b)(4)(iii) specifically lists the execution of unauthorized transactions among those practices "that have resulted in disciplinary action and that clearly violate this responsibility for fair dealing."

Pursuant to Procedural Rule 9215(f) and NASD Notice to Members 99-77, the Hearing Officer deemed the foregoing allegations against Hodde to be admitted and found the unauthorized transaction to be in violation of Conduct Rule 2110. We affirm that finding of violation.

The second cause of complaint alleged that Hodde failed to respond to three requests for information about the unauthorized trade in JD's account. The first two requests were dated August 30 and September 16, 1999. On September 27, 1999, Hodde telephoned Enforcement staff and requested additional time to respond. Hodde also sent

the September 27, 1999 letter by facsimile to Enforcement on that date, confirming his extension request. Enforcement granted the extension request, but Hodde did not submit a response. Accordingly, on November 19, 1999, Enforcement staff sent him another written request for information pursuant to Procedural Rule 8210. Hodde also did not respond to this request.

Procedural Rule 8210 authorizes the NASD to require persons associated with a member or any person subject to the Association's jurisdiction to provide information "orally or in writing with regard to any matter" under investigation. Because the NASD lacks subpoena power, Rule 8210 is a "key element in the NASD's effort to police its members." Richard J. Rouse, 51 S.E.C. 581, 584 (1993).

The Hearing Officer deemed the foregoing allegations to be admitted by Hodde and stated that Hodde had received actual notice of the staff's requests for information. The Hearing Officer found that Hodde had violated Conduct Rule 2110 and Procedural Rule 8210 by failing to respond to the requests. We affirm that finding of violation.

Sanctions

The NASD Sanction Guideline for unauthorized transactions recommends a fine of \$5,000 to \$75,000 and a suspension of between 10 business days and one year or, in egregious cases, a suspension of up to two years or a bar.⁵ The record in this matter does not contain any allegations or evidence that Hodde's misconduct was egregious. See Hellen, 1999 NASD Discip. LEXIS 22. For example, the record does not show that JD suffered a loss or that Hodde profited from the trade. There also are no allegations in the complaint regarding Hodde's motive in effecting the trade or showing that this was part of a pattern of similar misconduct.

We agree with the Hearing Officer that the complaint fails to develop the facts indicating the relative seriousness of the misconduct. As a result, the Hearing Officer imposed a fine of \$5,000 and a suspension of 10 business days, which is at the low end of the range suggested by the Sanction Guidelines. Accordingly, we find that the sanctions imposed for the unauthorized transaction were appropriate.

The Sanction Guideline for a failure to respond to requests for information states that "[i]f the individual did not respond in any manner, a bar should be standard."⁶ The record here does not demonstrate the existence of any mitigating factors that would justify a lesser sanction. Accordingly, we affirm the Hearing Officer's imposition of a

⁵ NASD Sanction Guidelines (2001 ed.) (Unauthorized Transactions) at 86.

⁶ NASD Sanction Guidelines (2001 ed.) (Failure to Respond) at 31.

bar in all capacities on Hodde for his failure to respond to Enforcement staff's requests for information.

As to our finding under cause one that Hodde engaged in one unauthorized transaction, we find that an appropriate sanction would be to impose a 10-business-day suspension and a \$5,000 fine. In light of our imposition of a bar under cause two, however, we consider the suspension redundant and do not impose it. In light of our previous policy determination that, in certain cases involving the imposition of a bar, no further remedial purpose is served by the additional imposition of a monetary sanction, we do not impose a fine for cause one.⁷ See NASD Notice to Members 99-86.

Accordingly, we order that Hodde be barred from association with any NASD member firm in any capacity. We also assess appeal costs of \$1,000 against Hodde. The bar will be effective as of the date of this decision.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

F:\Depts\Ogc\NASDR Appellate Group\McilroyD\Hodde\Final Hodde NAC dec.doc

⁷ We have also considered and reject without discussion all other arguments advanced by respondent.