

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of	<u>DECISION</u>
Department of Enforcement,	Complaint No. C10000165
Complainant,	
vs.	Dated: December 13, 2001
Stephen D. Carcaterra Seabright, NJ,	
Respondent.	

Former registered representative engaged in a private securities transaction, in violation of NASD Conduct Rules 2110 and 3040 and failed to appear for an on-the-record interview requested by NASD Regulation staff, in violation of NASD Conduct Rule 2110 and Procedural Rule 8210. Held, findings affirmed and sanctions modified.

Respondent Stephen D. Carcaterra ("Carcaterra") has appealed an April 16, 2001 Hearing Officer default decision pursuant to NASD Procedural Rule 9310. After a review of the entire record in this matter, we find that Carcaterra violated NASD Conduct Rules 2110 and 3040 by engaging in a private securities transaction and violated NASD Conduct Rule 2110 and Procedural Rule 8210 by failing to appear at an on-the-record interview with the Department of Enforcement ("Enforcement") for NASD Regulation, Inc. ("NASD Regulation"). We order that Carcaterra be barred from associating with any member firm and be suspended for 30 business days. The suspension is to be served concurrently with the bar.

Background

Carcaterra entered the securities industry in 1995 as a general securities representative. From approximately August 27, 1997 to August 24, 1998, Carcaterra was employed by J.P. Turner & Company, L.L.C. ("Turner" or "the Firm"). On September 24, 1998, Turner filed a Uniform Termination Notice for Securities Industry Registration ("Form U-5") with the Association that documented the Firm's termination of Carcaterra. Carcaterra has not been associated with a member since that time.

Procedural and Factual History

Enforcement filed the complaint in this matter on September 7, 2000, alleging that Carcaterra engaged in a private securities transaction in violation of NASD Conduct Rules 2110 and 3040, and that he failed to appear for an on-the-record interview requested by NASD Regulation staff, in violation of NASD Conduct Rule 2110 and Procedural Rule 8210. The complaint alleged that, from approximately February 1998 through approximately April 1998, Carcaterra, without first providing his employer with written notice of his participation in the transactions, sold shares of Cartoon Saloon, Inc. to customer JV. By letter dated November 1, 1999, sent to Carcaterra's last known residential address in the Central Registration Depository ("CRD") ("CRD Address") and to an additional address obtained through Equifax ("Equifax Address"), the staff requested Carcaterra to appear for an on-the-record interview on November 7, 1999, at the Association's District 10 office. On November 2, 1999, counsel for Carcaterra requested that the interview be rescheduled. Both parties agreed to reschedule the interview for November 10, 1999. NASD Regulation staff sent a letter to reschedule the interview, dated November 3, 1999, via first-class mail to the CRD Address and the Equifax Address. The letter sent to the CRD Address was returned to staff, but the letter sent to the Equifax Address was not. By letter dated November 8, 1999, Carcaterra, through his counsel, informed NASD Regulation staff that he would not be appearing for the interview on November 10, 1999. Carcaterra did not appear on November 10, 1999.

The complaint and notice of complaint were first served on September 7, 2000, by mailing them to Carcaterra by first-class and certified mail to two addresses listed in CRD and two additional addresses obtained through LEXIS and Equifax. Carcaterra failed to respond to this complaint. Enforcement sent a second notice of complaint to the same four addresses, by first-class and certified mail, on October 9, 2000. Carcaterra and his counsel responded to the second notice by contacting Enforcement and entering into settlement negotiations beginning in October 2000. These negotiations were unsuccessful. Counsel for Carcaterra filed a notice of appearance on December 4, 2000, and requested additional time to file an answer. The Hearing Officer granted the request. On December 18, 2000, counsel for Carcaterra filed an answer.

The Hearing Officer directed the parties to appear at a pre-hearing conference on January 9, 2001. Prior to this conference, counsel for Carcaterra contacted Enforcement to inform the department that Carcaterra had terminated counsel's representation and that counsel would not attend the pre-hearing conference. Neither Carcaterra nor his counsel appeared. Based on the termination of Carcaterra's counsel, the Hearing Officer adjourned the conference until January 16, 2001. An order rescheduling the pre-hearing conference for January 16, 2001 was sent to Carcaterra by Federal Express and by first-class mail. The pre-hearing conference was held as scheduled, but Carcaterra again failed to appear.

On February 19, 2001, Enforcement filed a motion for entry of a default decision. The motion was served on Carcaterra by first-class and certified mail on February 20, 2001 to the CRD addresses, Equifax address, and LEXIS address. Carcaterra did not respond. As a result of Carcaterra's failure to appear and pursuant to NASD Code of Procedure Rules 9215(f) and

9241(f), the Hearing Officer granted Enforcement's motion, held Carcaterra in default, and deemed the allegations in the complaint admitted.

The Hearing Officer found that Carcaterra participated in a private securities transaction without giving Turner the required written notice. The NASD Sanction Guideline for private securities transactions recommends a fine of \$5,000 to \$50,000 and a suspension of up to two years or, in egregious cases, a bar. The Hearing Officer, however, found that the allegations of the complaint failed to establish the relative seriousness of Carcaterra's misconduct. As a result, the Hearing Officer found no basis to enter a sanction greater than what he characterized as the "minimum" for a private securities transaction. Accordingly, the Hearing Officer found that Carcaterra violated NASD Rules 2110 and 3040, and he imposed a \$5,000 fine and a suspension in all capacities for 30 business days.

The Hearing Officer also found that Carcaterra failed to appear for an on-the-record interview. The NASD Sanction Guideline for failure to respond to a NASD Rule 8210 request provides that if the individual did not respond in any manner, a bar should be standard. The Hearing Officer ruled that the record did not demonstrate the existence of any mitigating factors that would justify a lesser sanction. As a result, the Hearing Officer barred Carcaterra in all capacities for failing to appear for an on-the-record interview in violation of NASD Conduct Rule 2110 and Procedural Rule 8210.

Carcaterra appealed the sanctions imposed by the Hearing Officer in a notice of appeal filed by his counsel on May 10, 2001. On July 27, 2001, counsel for Carcaterra filed a brief in support of the appeal. Specifically, the brief stated that "the sanction imposed is at the extreme of the parameters set forth in the NASDR guidelines and the Complaint has failed to demonstrate how this draconian punishment fits the crime." Enforcement filed a brief opposing Carcaterra's appeal on August 16, 2001.

Discussion

We note that Carcaterra has not contested any of the factual findings set forth in the Hearing Officer's decision. In light of Carcaterra having waived any objections to the Hearing Officer's findings of violation, and based upon our review of the record, we find no reason to disturb the Hearing Officer's factual findings.

The record establishes that NASD Regulation staff began an investigation of Carcaterra based on the Form U-5 filed by Turner. The Form U-5 indicated that Carcaterra had engaged in a private securities transaction involving a Turner customer. An investigation revealed that from February 1998 to April 1998, Carcaterra sold \$10,000 worth of Cartoon Saloon, Inc. shares to a customer without providing prior written notice to Turner or receiving written approval from Turner. The record further establishes that Carcaterra did not attend the on-the-record interview requested by NASD Regulation staff on November 10, 1999, pursuant to NASD Procedural Rule 8210.

Carcaterra's appeal is limited to the sanctions imposed by the Hearing Officer's decision. Carcaterra was fined \$5,000 and suspended in all capacities for 30 business days for engaging in a private securities transaction in violation of NASD Rules 2110 and 3040. In addition, Carcaterra was barred from association with any NASD member firm in any capacity for failing to appear for an on-the-record interview.

NASD Rule 3040 governs an individual's responsibility to his firm when engaging in a private securities transaction. NASD Rule 3040 provides that a person associated with a member who participates in a private securities transaction must, prior to participating in the transaction, provide written notice to the member with which he is associated. If the associated person has received or may receive selling compensation, the member must respond to the notice in writing indicating whether it approves or disapproves of the person's participation in the proposed transaction. If the member approves the transaction, the member must record the transaction in its books and records and supervise the associated person's participation in the transaction as if the transaction had been executed by the member firm. The purpose of NASD Rule 3040 is to ensure that a member firm adequately supervises the suitability and due diligence responsibilities of its associated persons. See Zester Herbert Hatfield, 48 S.E.C. 958, 960-1 (1988). The rule also serves to protect employers against investor claims arising from an associated person's private transactions and to prevent customers from being misled as to the employing firms' sponsorship of their associated person's transactions. See id.

The NASD Sanction Guideline for private security transactions suggests a minimum fine of \$5,000 to a maximum fine of \$50,000 and a suspension in any or all capacities for a period of 10 days to one year. See NASD Sanction Guidelines (2001 ed.) at 19. Five main considerations are taken into account when examining a case involving a private securities transaction: 1) whether the respondent has a proprietary or beneficial interest in, or was otherwise affiliated with, the selling enterprise or issuer; and whether respondent disclosed the interest to customers; 2) whether the respondent attempted to create the impression that his employer (member firm) sanctioned the activity; 3) whether the respondent sold away to customers of his employer (member firm); 4) whether the respondent provided the employer firm with verbal notice of all relevant factors; and 5) whether the respondent sold the product at issue after prior rejection by the firm, a warning from a supervisor to stop sales, or some other prohibition of sales by the member firm.

The Hearing Officer imposed a fine of \$5,000 and a suspension of 30 business days, which is at the low end of the range suggested by the Sanction Guidelines. We agree with the Hearing Officer that the complaint fails to develop fully the facts indicating the relative seriousness of the misconduct. Accordingly, we find that the sanctions imposed for the private securities transaction were appropriate.

NASD Procedural Rule 8210 authorizes NASD Regulation, in the course of its investigations, to require NASD members and their associated persons:

to testify at a location to be specified by Association staff, under oath or affirmation administered by a court reporter or a notary public if requested, with respect to any matter involved in the investigation, complaint, examination, or proceeding.

Because the NASD lacks subpoena power over its members, a "failure to provide information fully and promptly [pursuant to Rule 8210] undermines the NASD's ability to carry out its regulatory mandate." Michael David Borth, 51 S.E.C. 178, 180 (1992). Accordingly, members may not take it upon themselves to determine whether information requested is material to the NASD's investigation. See General Bond & Share Co. v. S.E.C., 39 F.3d 1451, 1461 (10th Cir. 1994); Mark Allen Elliot, 51 S.E.C. 1148, 1151 (1994) (respondents cannot "second guess" the NASD's need for information; nor may they place conditions upon their responses to NASD Regulation inquiries); Brian L. Gibbons, 52 S.E.C. 791, 794 (1996); Borth, 51 S.E.C. at 181; Darrell Jay Williams, 50 S.E.C. 1070 (1992) (associated person's failure to respond to NASD request for information not excused where person, acting on advice of counsel, informed NASD he would cooperate fully once any related litigation was resolved).

The NASD Sanction Guideline for a failure to respond states that "[i]f the individual did not respond in any manner, a bar should be standard." NASD Sanction Guidelines (2001 ed.) at 39. However, "[w]here mitigation exists, or the person did not respond in a timely manner, consider suspending the individual in any or all capacities for up to two years."

We affirm the Hearing Officer's imposition of a bar on Carcaterra for failing to appear for an on-the-record interview on November 10, 1999. We find no mitigating factors to lessen the standard penalty of a bar. Although the original interview date was scheduled for November 7, 1999, NASD Regulation staff attempted to reschedule the interview at a time more convenient to Carcaterra. Carcaterra agreed to an on-the-record interview to be held on November 10, 1999. His subsequent failure to attend the interview on November 10, 1999 is in direct violation of Rule 8210.

Accordingly, we order that Carcaterra be barred from association with any NASD member firm in any capacity. The bar will be effective as of the date of this decision. As to our findings under cause one that Carcaterra engaged in a private securities transaction, we find that an appropriate sanction would be to impose a 30-business-day suspension and a \$5,000 fine. We order that Carcaterra be suspended for 30 business days and that his suspension be served concurrently with his bar. In light of our 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. See NASD Notice to Members 99-86 (Oct. 1999).¹

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President and Corporate Secretary

¹ 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.