

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

District Business Conduct Committee
For District No. 8,

Complainant,

vs.

Theodore L. Pittman, III
McFarland, WI,

Respondent.

DECISION

Complaint No. C8A970070

District No. 8 (CHI)

Dated: January 13, 1999

Theodore L. Pittman, III ("Pittman") has appealed the April 20, 1998 decision of Deputy Chief Hearing Officer Joseph M. Furey (the "Hearing Officer") pursuant to Procedural Rule 9310. We find that he failed to respond to requests for information from staff of NASD Regulation, Inc. ("NASD Regulation"), and we order that he be censured, barred, and fined \$20,000.

Background

Pittman entered the securities industry when he became associated with American Express Financial Advisors, Inc. ("American Express") in December of 1986. He was registered as a general securities representative with American Express between February of 1987 and August of 1995, and he has not been registered since then.

Discussion

Pittman's Failure to Respond to Staff Requests for Information. On August 23, 1996, NASD Regulation staff sent Pittman a letter pursuant to Procedural Rule 8210 requesting information about alleged unauthorized mutual fund exchanges in customer accounts.¹ Staff sent the letter to Pittman at his address of record in the Central Registration Depository ("CRD") ("CRD Address") by first-class mail. Staff requested that Pittman respond by September 6, 1996, and specifically noted that failure to respond could result in disciplinary action. Staff did not receive any response.²

On September 9, 1996, staff sent Pittman a second request for information, which was also issued pursuant to Procedural Rule 8210. Attached to the September 9 letter was a copy of the August 23 letter. The September 9 letter stated that Pittman's failure to respond could result in disciplinary action and advised Pittman that the deadline for the requested information was September 20. Staff sent the September 9 letter via certified mail, return receipt requested, and regular first-class mail to Pittman's CRD Address.³ The Postal Service delivered to staff a receipt from the mailing bearing the signature "Theodore Pittman." The Postal Service did not return the first-class mailing that staff had sent to the same address. Staff did not receive any response to the second request for information.

On September 24, 1996, staff sent a third request to Pittman. The September 24 request, which was made pursuant to Procedural Rule 8210 and enclosed a copy of the first two requests, sought the requested information by October 4, 1996. Staff mailed this third request to the CRD Address via certified and regular first-class mail. The Postal Service returned the certified mailing stamped "Unclaimed." The first-class mailing was not returned. Staff did not receive any response to the request.

Service of the Complaint. On November 20, 1997, the NASD Regulation Department of Enforcement filed the complaint, which alleged that Pittman had violated Conduct Rule 2110 and Procedural Rule 8210 by failing to respond to the

¹ Staff's investigation of this matter began after American Express filed an amended Notice of Termination for Pittman in April of 1996.

² A former NASD Regulation examiner executed a declaration as to the lack of response to this and subsequent requests.

³ Staff also sent the second letter to a Donofrio Drive, Madison, Wisconsin address that staff had obtained from Equifax. Staff sent subsequent mailings to two other addresses obtained from Equifax. The mailings to the CRD Address, however, were the only ones that resulted in the return of receipt cards signed by Pittman, and therefore, only the mailings to the CRD Address are discussed in the text.

three written requests for information. Staff served the complaint and Notice of Complaint on Pittman at the CRD Address via certified mail, return receipt requested, and regular first-class mail. The Postal Service returned the certified mailing marked "Unclaimed," but did not return the first-class mailing. Pittman did not file an answer to the complaint.

On December 22, 1997, staff, acting pursuant to an order of the Hearing Officer, served Pittman with a Second Notice of Complaint, together with a copy of the Notice of Complaint and complaint, at his CRD Address. Staff mailed the Second Notice of Complaint via certified mail, return receipt requested, and regular first-class mail. On January 5, 1998, staff received a return receipt bearing the signature "Ted Pittman" denoting delivery to Pittman's CRD Address on December 31, 1997. The first-class mailing was not returned. Pittman did not file an answer.

Hearing Officer Decision. On February 23, 1998, the Enforcement Department, acting pursuant to an order of the Hearing Officer, filed a motion for entry of a default decision. The motion was served on Pittman at his CRD Address by certified and first-class mail. Pittman did not respond to it. Thereafter, the Enforcement Department, acting pursuant to an order of the Hearing Officer, adduced evidence of Pittman's CRD Address.

The Hearing Officer granted the motion for entry of a default decision. The Hearing Officer found that staff had properly served Pittman with the complaint and the Second Notice of Complaint; that Pittman, by failing to file an answer, had defaulted; and that the allegations in the complaint were to be deemed admitted. Nonetheless, the Hearing Officer also relied upon the evidence presented by staff.

The Hearing Officer found that Pittman received adequate notice of the requests for information and that there was adequate evidence to conclude that Pittman received the requests for information and failed to respond. The Hearing Officer noted that staff had mailed all requests by certified and first-class mail to Pittman's CRD Address, as required by NASD Procedural Rule 8210, as well as to other addresses at which he may have resided. The Hearing Officer reasoned that Pittman had actually received the information requests, because a certified mail receipt for a mailing to the CRD Address was returned bearing the signature "Theodore Pittman" and a first-class mailing to the CRD Address was not returned. The Hearing Officer also noted that the receipt from the certified mailing of the Second Notice of Complaint was signed by "Ted Pittman," demonstrating that he was living at an address -- the CRD Address -- to which all of the mailings had been sent.

NAC Findings. We find that the Hearing Officer properly ruled both that Pittman had defaulted and that the evidence establishes that he failed to respond to requests for information. On appeal, Pittman continues to use the address that is his CRD Address. We find, therefore, that he received proper service of the information requests and the complaint in this matter.

Pittman's argument on appeal was that although he did receive the requests for information, he: (1) responded to the original request for information on August 26, 1996 via a letter of that date addressed to an NASD examiner; (2) responded to a subsequent request by sending an additional copy of the same letter to the same examiner on approximately October 1, 1996; and (3) sent a third copy of the same letter to an NASD Regulation attorney on approximately January 4, 1998. Pittman attached to his appeal statement a copy of the letter that he purportedly had sent repeatedly. Pittman also claimed that he has been the victim of a "witch hunt" conducted by employees of American Express who wanted to "dig up dirt" on him and that he has been denied access to his files by American Express.

Pittman attached to his appeal brief an affidavit -- which was offered after the deadline for requests to adduce new evidence -- attesting that he had mailed his August 26, 1996 letter to the NASD by first-class mail on at least three occasions and had left voice-mail messages for the examiner on three or four occasions inquiring about the status of the matter. He requested that the NAC remand the case to permit him to respond to the NASD inquiries.

We grant Pittman's request to adduce the affidavit regarding his claims to have responded to the requests for information. Although the request was untimely, we find that this evidence should be admitted because it is highly material to this case and contains assertions of the sort that respondents typically are permitted to make on appeal. We deny, however, his request for a remand of this matter to the Hearing Officer. We find that Pittman has presented no basis for such action.⁴

We affirm the Hearing Officer's findings that Pittman violated Conduct Rule 2110 and Procedural Rule 8210 by failing to respond to NASD requests for information. We note, first, that Pittman appears to have lived at his CRD Address continuously to date and acknowledges having received the information requests, the complaint, and the motion for entry of a default judgement. Thus, there is no question but that he has been given fair notice.

We do not find credible Pittman's claim to have sent his August 1996 letter to the NASD repeatedly and to have left three or four telephone messages for the examiner. This case strikes us as one in which Pittman was spurred to action only

⁴ We reject Pittman's untimely request to adduce evidence of his financial status. On appeal, Pittman argued that he could not afford to pay the \$20,000 fine imposed by the Hearing Officer and attached to his brief a financial affidavit, which apparently had been prepared for some other proceeding and which contained inconclusive evidence of his financial status at some earlier point in time. The NASD Regulation Office of General Counsel asked him to execute the NASD's form for evidence of inability to pay disciplinary fines, but he did not submit this evidence or otherwise respond to the request.

after sanctions were imposed for his failure to respond. It strains credulity to postulate that Pittman responded to the requests, but failed to follow up to ensure their receipt, given the repeated mailings to him. Even assuming for purposes of argument that Pittman's assertions are true, however, we find that Pittman violated the NASD's rules by failing to take further steps to provide information to the NASD. If he in fact received notice repeatedly that his submissions to the NASD were not being received, and if he in fact never received any response from multiple telephone messages inquiring as to the status of this matter, then he should have followed up. Just as he was not entitled to ignore the NASD's initial request, he was not entitled to ignore the follow-up requests by the NASD, the issuance of the complaint, the second notice of the complaint, or the service of the motion for a default judgment, all of which constituted notice to him that his information had not been received.

Sanctions

The Hearing Officer ordered that Pittman be censured, fined \$20,000, and barred from association with any NASD member in any capacity. The Hearing Officer noted, under the NASD Sanction Guidelines ("Guidelines"),⁵ that the following factors were relevant to sanctions: (1) the lack of response by Pittman; (2) the regulatory importance of the information sought by the Enforcement Department; and (3) Pittman's lack of disciplinary history.⁶

The Hearing Officer found it significant that Pittman completely failed to respond. The Hearing Officer reasoned, citing In re Richard J. Rouse, 51 S.E.C. 581 (1993), that such a total lack of response is the equivalent of a willful refusal to comply and is a very serious matter due to NASD Regulation's inability to subpoena required information. In addition, the Hearing Officer considered the nature of the

⁵ See Guidelines (1996 ed.) at 22 (Failure to Respond or Respond Truthfully or Completely).

⁶ Although the Enforcement Department's draft default decision and the Hearing Officer's decision stated that Pittman lacked any disciplinary history, CRD entries that were entered as an exhibit in this case indicate that in February of 1988, the State of Wisconsin's Division of Securities entered a summary order of prohibition and revocation of exemptions against Pittman. According to the CRD summary, between 1993 and 1997, Pittman offered and sold evidences of indebtedness to at least nine persons on behalf of himself and his business, Capital View Holdings Inc., on which he defaulted, after which time, and after being warned by Securities Division staff, he offered and sold more evidences of indebtedness to at least two persons in Wisconsin, without disclosing material facts, and he was also alleged to have misrepresented his business as being incorporated when it was not. We find that this disciplinary history is irrelevant to our assessment of the sanctions, because we believe that very serious sanctions should be imposed on Pittman for the conduct alleged in the NASD complaint, standing alone.

information requested and noted that it related to the investigation of allegations of unauthorized mutual fund exchanges in customers' accounts. The Hearing Officer found that there were no mitigating factors warranting a reduced sanction. We find that the Hearing Officer analyzed the misconduct appropriately under the Guidelines and that the censure, \$20,000 fine, and bar are appropriately remedial.

Accordingly, we order that Pittman be censured, fined \$20,000, and barred from association with any NASD member in any capacity. The bar will be effective upon service of this decision.⁷

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Corporate Secretary

⁷ 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.

Pursuant to NASD Procedural Rule 8320, any member who 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.