

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

District Business Conduct Committee
For District No. 3,

Complainant,

vs.

Otto M. Bruun
Marysville, Washington,

Respondent.

DECISION

Complaint No. C3B960004

District No. 3

Dated: January 23, 1998

Otto M. Bruun ("Bruun") has appealed, pursuant to NASD Procedural Rule 9310, a January 30, 1997 decision of the District Business Conduct Committee for District No. 3 ("DBCC"). We find that, as alleged in the complaint, Bruun received reimbursement for expenses he had not incurred, in violation of Article III, Section 1 of the Rules of Fair Practice (now known and hereinafter referred to as "Conduct Rule 2110"). For the reasons discussed below, we affirm the decision of the DBCC that Bruun be censured and barred from associating with any member of the Association in any capacity.

Background

Bruun first entered the securities industry in May 1986 as an investment company and variable contracts products representative and was registered in that capacity with Pruco Securities Corporation ("Pruco") from February 1992 to July 1994. After leaving Pruco, Bruun was registered as an investment company and variable contracts products representative with Hornor, Townsend & Kent, Inc. ("Hornor") from July 1994 to August 1997. Bruun has not been associated with a member firm since leaving Hornor on August 29, 1997.

Facts

The complaint alleged that while Bruun was employed by Pruco he requested and received reimbursement for \$6,095 in expenses he had claimed in connection with the purchase of a seminar package from Successful Money Management Seminars. The complaint alleged that Bruun had not incurred the expenses and that the claim was therefore false. In his answer, Bruun requested a hearing and stated that he intended to reveal at the hearing certain fraudulent practices that purportedly had occurred at Pruco during his employment. During the DBCC hearing, which occurred on September 11, 1996, Bruun argued that there was a discrepancy between the information contained in the electronically filed version of his Uniform Notice of Termination ("Form U-5") and the hard copy of that same document, which was not available at the hearing. Bruun further argued that it was necessary for the DBCC hearing panel to review the hard copy of his Form U-5 in order to reach a decision in the case. The DBCC hearing panel determined to adjourn the hearing to allow District No. 3 staff to obtain a hard copy of the Form U-5.¹ When the DBCC hearing resumed on October 28, 1996, Bruun did not appear, even though he had been given adequate advance notice of the hearing date.²

The material facts are not in dispute. While Bruun was employed by Pruco, Prudential Insurance and Financial Services ("Prudential") offered a Program known as the Marketing Support Program ("Program" or "MSP") that entitled qualified registered representatives to receive reimbursement for certain business-related expenses. Under the terms of the Program, registered representatives had to incur an expense before submitting a receipt to Pruco. Thereafter, Pruco would reimburse the registered representatives for the expense. Once the reimbursement had been paid,³ the Program permitted the registered representatives to spend the money any way they chose.

¹ Although the DBCC hearing panel adjourned the hearing to allow Bruun to produce the Form U-5, the DBCC found that the document was not material to the proceeding. We concur with the DBCC that the document is not material to the issue under consideration. Moreover, we find that there are no material discrepancies between the electronically filed Form U-5 and the hard copy of the Form U-5.

² On the morning of October 28, Bruun telephoned the Seattle district office of NASD Regulation Inc. ("NASD Regulation") to advise the office that because he had no money with which to pay the parking fee, he would be unable to attend the hearing. The DBCC hearing panel advised Bruun that he had to attend the hearing in person, rather than by telephone, which he declined to do. The DBCC hearing panel determined to proceed with the hearing despite Bruun's absence.

³ The record reflects that the reimbursement was processed by Pruco and funded by Prudential.

Bruun was entitled to participate in the Program in 1994 based on the commissions that he generated during 1993. The record shows that Bruun requested reimbursement of \$6,095 sometime in April or May 1994, for a seminar package that he claimed to have purchased from Successful Money Management Seminars. After submitting an invoice with the notation "BALANCE PAID IN FULL ON 04-13-94," Bruun received a check from Pruco in the amount of \$6,095 in May 1994, which he endorsed and cashed. Bruun testified that, although he had not paid for the seminar when he submitted his request for reimbursement, he caused "PAID IN FULL" to be written on the invoice in order to obtain the MSP money.

The evidence demonstrates that Pruco had discontinued its practice of allowing its registered representatives to use seminars to sell securities in January 1994. The evidence further demonstrates that Bruun was aware of this fact⁴ when he submitted a reimbursement claim for the seminar package.⁵ Bruun admitted in a letter to an NASD Regulation examiner that after he learned that Pruco had no plans to permit its registered representatives to use the seminar package at issue, he "[d]ecided that [he would] take the funds [he] had earned through the MSP program (the \$6095) and [use the funds] to get [himself] going with other companies in July."

In June 1994, Pruco learned of a problem with Bruun's reimbursement request when William Decker ("Decker"), a former district manager for Pruco, received a call from one of his employees advising him that the invoice that Bruun had submitted was false and that Bruun had used the money from Pruco to pay off some bills. As a result, Decker initiated an investigation.

In the course of his investigation, Decker learned that Successful Money Management Seminars had issued Bruun a false invoice. Decker sent a copy of the invoice by facsimile to Gordon Root ("Root"), vice president of Successful Money Management Seminars, and asked him to verify its authenticity. Decker also asked Root whether Bruun, in fact, had purchased the seminar package. Root advised Decker that he had to discuss the matter with Jeff Franz ("Franz"), the salesperson who had been working with Bruun. Root subsequently advised Decker that Successful Money Management Seminars had not received payment from Bruun for the seminar packet. On June 15, 1994, Decker had a conference call with Root and Franz. Decker summarized that conversation in a June 15, 1994 letter to Mike Hendrickson ("Hendrickson") (Decker's former supervisor and a Pruco vice president):

⁴ In a letter to an NASD examiner, Bruun acknowledged knowing that "[d]uring the first 6 months of 1994 Prudential had stopped all sales activity of the kind I was involved in"

⁵ The record is not clear why Pruco reimbursed Bruun for the expense in question, given Pruco's policy, during the relevant period, of not allowing representatives to use seminars to sell Pruco products.

[Franz] said that on April 13 he received a call from [Bruun] who told him he wanted to purchase the Successful Retirement Seminar Package with his MSP credits, but could not get the Company to release the money without a receipt showing that he had paid it in full. [Franz] accommodated [Bruun] with the understanding that once he received the money he would forward it on to Successful Money Management Seminar who would in turn send the package to him. [Franz] had some reservations about what he had done and on April 14 sent [Bruun] [a memo] stating, "Per our conversation, please forward this invoice instead of the one stating paid in full. Although you signed off on the other being incorrect, I prefer you use this one as to not mislead."

Bruun did not deny submitting the false invoice to Pruco. Bruun testified that he had been aware that the Program required him to incur an expense before requesting reimbursement from Pruco. He also testified that he had submitted the false reimbursement claim with the full knowledge and approval of Decker. In addition, Bruun testified that he, Decker, and others at Pruco had utilized MSP money in the past for "whatever [they] wanted."

Decker denied Bruun's charge that he (Decker) had known and approved of the false reimbursement claim. Joseph Clancy ("Clancy"), Bruun's partner, testified that he had no reason to believe that Decker had approved of Bruun's actions or had suggested that Bruun use the false invoice. Steve Kendig ("Kendig"), Bruun's and Clancy's immediate supervisor, also testified that he had no basis to believe that Decker had advised Bruun to submit a false sales order. The record also contains a Declaration by Hendrickson, Decker's supervisor, which supports Kendig's and Clancy's opinion that Decker appeared to have no prior knowledge of Bruun's false reimbursement claim.

Discussion

It is undisputed that Bruun submitted a false reimbursement claim to Pruco in the amount of \$6,095, that he received and negotiated a check for the full amount from Pruco in reimbursement for those expenses, and that he retained the funds. Bruun would have us believe that he submitted the false claim on instructions from Decker;⁶ however, Clancy (Bruun's former

⁶ The record also demonstrates that when Bruun was asked by Pruco during its initial investigation for an explanation of his conduct, he never suggested that he had been acting with Decker's approval.

partner) and Kendig (Bruun's immediate supervisor) both testified consistently that they had no reason to believe that Decker had advised Bruun to submit a false reimbursement claim.

The record shows that Bruun submitted no evidence to rebut the assertions by Clancy, Kendig, and Hendrickson⁷ that Decker did not have prior knowledge or approve of Bruun's false reimbursement claim. After an independent consideration of the testifying witnesses' demeanor and character, the DBCC hearing panel concluded that Decker had not authorized Bruun's use of the false invoice. We see no reason to disturb this assessment.⁸

We find that Bruun presented a false reimbursement claim to Pruco in the amount of \$6,095, in violation of Conduct Rule 2110. Although the subject matter of this complaint does not concern securities, the NASD properly exercised its jurisdiction over Bruun's conduct under Conduct Rule 2110. See In re Thomas E. Jackson, 45 S.E.C. 771, 772 (1975) (finding that the NASD has jurisdiction over misconduct that violates the NASD's rules even though the misconduct did not arise from securities-related activities); see also In re Leonard John Ialeggio, Exchange Act Rel. No. 37910 (Oct. 31, 1996) (finding that although Ialeggio's misconduct did not involve securities or customer funds, his actions cast doubt on his commitment to the fiduciary standards demanded of registered persons in the securities industry and thus properly were the subject of NASD disciplinary action). At the time that Bruun submitted the false reimbursement claim to Pruco, he was associated with a "member" of the NASD and was thus subject to the requirements of Conduct Rule 2110, *i.e.*, that "a member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."

⁷ Hendrickson supplied the Declaration because he was unavailable to testify on the date of the DBCC hearing. Hendrickson asserted in his Declaration that "[a]t no time during my conversations with [Decker] concerning this investigation did he appear to have any prior knowledge of the incident. Rather, he was very conscientious about conducting a thorough investigation, and kept me informed during the process." We conclude that the Declaration is reliable. See Gary L. Greenberg, 50 S.E.C. 242 (1990).

⁸ As the Securities and Exchange Commission ("SEC") has repeatedly held, the credibility determinations of an initial fact finder are entitled to considerable weight and deference, since they are based on hearing the witnesses' testimony and observing their demeanor. See In re Ashvin R. Shah, Exchange Act Rel. No. 37954 (Nov. 15, 1996); In re Daniel Joseph Alderman, Exchange Act Rel. No. 35997 (July 20, 1995); In re Jonathan Garrett Ornstein, 51 S.E.C. 135 (1992). The initial fact finder's credibility determinations should only be rejected when the record contains "substantial evidence" to the contrary. In re Helene R. Schwartz, 51 S.E.C. 1207, 1208 n. 5 (1994).

Thus, we affirm the DBCC's findings.

Procedural Issues

Bruun appealed the DBCC decision to the National Business Conduct Committee ("NBCC")⁹ and requested a hearing. The hearing was scheduled for August 6, 1997 at 8:30 a.m. (Mountain Time), in Denver, Colorado. Bruun failed to participate in the appeal hearing, and the hearing proceeded in his absence.

By letter dated July 22, 1997 ("July 22 Letter"), Bruun requested a change of venue for the appeal hearing. Bruun stated in the July 22 Letter that he had assumed that the appeal hearing would be held in Seattle, Washington. Bruun argued that he would be disadvantaged if the appeal hearing were held in Denver because he would be unable to attend in person. Bruun argued that it was necessary to conduct the hearing in Seattle because of his plans to have two individuals and legal counsel attend with him. By letter dated July 23, 1997 ("July 23 Letter"), the subcommittee that considered this appeal denied Bruun's request for a change in venue, citing the fact that Bruun had received notice in March 1997 that the matter tentatively had been scheduled for consideration by the subcommittee during the week of June 3, 1997, and that neither the exact date, nor the location of the hearing had yet been determined. Bruun also had been notified in April 1997, that, for administrative reasons, the hearing had been rescheduled to the week of August 5, 1997, and that once the date, location, and time of the hearing had been determined, he would receive notification. By letter dated July 9, 1997, Bruun had been notified of the date (August 6) and location (Denver) of the appeal hearing. The July 23 Letter also informed Bruun that if he wanted to supplement the record with additional witness testimony, he had to apply to the NBCC for leave to adduce additional evidence, as required by Procedural Rule 9312(a). Bruun failed to submit such a request.

The record also contains a letter, dated August 1, 1997 ("August Letter"), from NASD Regulation's Office of General Counsel ("OGC") to Bruun, reminding him that the appeal hearing had been scheduled at his request and that he had been advised by letters dated July 9 and July 23 that he could participate in the appeal hearing by telephone. The August Letter confirmed that the hearing would be held on August 6 in Denver, as scheduled. OGC staff sent the August Letter by Federal Express and first class mail to Bruun's old address as well as to his new address (which Bruun had indicated in the July 22 Letter would be his new address as of August 4, 1997). The record further reflects that the August Letter (sent to Bruun's new address) was not returned as undeliverable by Federal Express or first class mail.

⁹ Although the subcommittee that heard this appeal operated as a subcommittee of the NBCC, this matter was decided by the National Adjudicatory Council ("NAC"), which, as approved by the SEC, became the successor to the NBCC on January 16, 1998.

Thus, we conclude that Bruun received adequate notice that the appeal hearing would be held in Denver, as scheduled, on August 6, 1997, and that the subcommittee acted appropriately by proceeding in Bruun's absence.

Sanctions

As to sanctions, we affirm the censure and bar in all capacities.¹⁰ In reaching this decision, we have considered the fact that Bruun intentionally violated the terms of the Program by submitting to Pruco a false invoice for Successful Money Management Seminars. While Bruun's unethical actions did not involve securities activities this time, we conclude that "on another occasion it might." See Thomas E. Jackson, supra, at 772 (finding that Conduct Rule 2110 was applicable to a registered representative who had been hired to sell mutual funds and insurance on a monthly payment basis, based upon the fact that he had forged insurance applications in an attempt to receive commissions for those insurance policies). In addition, we consider Bruun's attempts to shift the blame for his misconduct to his supervisor to be an aggravating factor.

We conclude that a bar in all capacities is necessary because of the gravity of the violation. Bruun did not misunderstand the terms of the Program for which he received \$6,095. On the contrary, Bruun knew that under the terms of the Program he was not entitled to the money paid to him by Pruco since he had incurred no expenses with respect to the seminar. We find that Bruun's fraudulent actions and his subsequent attempts to shift the responsibility for his misconduct to his supervisor warrant the sanctions imposed.¹¹

¹⁰ Although the NASD Sanction Guidelines ("Guidelines") do not specifically address the violation at issue, we have relied on the Guideline for Conversion or Improper Use of Funds or Securities to assess sanctions. The recommended sanctions are consistent with that Guideline. See Guidelines (1993 ed.) at 11 (Conversion or Improper Use of Funds or Securities). We concur with the DBCC's decision not to impose monetary sanctions, in light of Bruun's previous discharge in bankruptcy.

¹¹ 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.

Accordingly, Bruun is censured and barred from associating with any member firm in any capacity. The bar shall be effective immediately upon issuance of this decision.

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Corporate Secretary

Direct: (202) 728-8381
Fax: (202) 728-8894

Joan C. Conley
Corporate Secretary

January 29, 1998

VIA FIRST CLASS/CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Otto M. Bruun
Marysvill, Washington

Re: Complaint No. C3B960004: Otto M. Bruun

Dear Mr. Bruun:

Enclosed herewith is the Decision of the National Business Conduct Committee in connection with the above-referenced matter. Any fine and costs assessed should be made payable and remitted to the National Association of Securities Dealers, Inc., Department #0651, Washington, D.C. 20073-0651.

You may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the Commission within thirty days of your receipt of this decision. A copy of this application must be sent to the NASD Regulation, Inc. ("NASD Regulation") Office of General Counsel as must copies of all documents filed with the SEC. Any documents provided to the SEC via fax or overnight mail should also be provided to NASD Regulation by similar means.

Your application must identify the NASD Regulation case number, and set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor. You must include an address where you may be served and phone number where you may be reached during business hours. If your address or phone number changes, you must advise the SEC and NASD Regulation. If you are represented by an attorney, he or she must file a notice of appearance.

The address of the SEC is:
Office of the Secretary
U.S. Securities and Exchange
Commission
450 Fifth Street, N.E., Stop 6-9
Washington, D.C. 20549

The address of NASD Regulation is:
Office of General Counsel
NASD Regulation, Inc.
1735 K Street, N.E.
Washington, D.C. 20006

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC.
The phone number of that office is 202-942-7070.

Very truly yours,

Joan C. Conley
Corporate Secretary

Enclosure

cc: Lewis Taylor Egan, Esq.