

BEFORE THE NATIONAL BUSINESS CONDUCT COMMITTEE

NASD REGULATION, INC.

In the Matter of

District Business Conduct Committee
For District No. 9,

Complainant,

vs.

Nicholas A. Rudi
Haddonfield Mews, New Jersey,

Respondent.

DECISION

Complaint No. C9A970019

District No. 9

Dated: December 22, 1997

This matter was appealed by respondent Nicholas A. Rudi ("Rudi") pursuant to Procedural Rule 9310. For the reasons discussed below, we find that Rudi violated Article III, Section 1 and Article IV, Section 5 of the Association's Rules of Fair Practice (now known and hereinafter referred to as "Conduct Rule 2110" and "Procedural Rule 8210") by not appearing for an on-the-record interview. We order that Rudi be censured; fined \$20,000; and barred from association with any NASD member in any capacity.

Background

Rudi was registered with the Association as a municipal securities principal and financial operations principal with Armacon Securities, Inc. ("Armacon"), from February, 1991 to May 2, 1995. During that same period, Rudi was president of, and owned one-half interest in, Armacon.

Rudi has not been registered with any member of the Association since his termination from Armacon. Armacon ceased being a member of the Association on November 10, 1995.

Facts

Association staff initiated an investigation to determine whether member firms or associated persons made payments to Armacon between 1991 and 1993 in violation of the federal securities laws or Association rules. After numerous attempts to schedule Rudi's on-the-record

interview in connection with that investigation, the Association went forward with the scheduled investigatory hearing on April 21, 1997, without Thomas Puccio ("Puccio") or Rudi in attendance,¹ and introduced into evidence correspondence the Association had sent to Rudi and his attorney.²

The first request for an on-the-record interview with Rudi was dated March 3, 1997. It was sent by letter via certified and regular mail to Rudi's place of business (Armacon), at 211 Gibbsboro Road, Clementon, New Jersey 08021. The record contains a signed return receipt bearing a signature that appears to be that of Nicholas A. Rudi. The letter scheduled Rudi for an on-the-record interview for March 26, 1997 at 10:30 a.m. at the District No. 9 offices of NASD Regulation, Inc. ("NASD Regulation") and stated that his appearance was being requested pursuant to Rule 8210.

On March 24, 1997, Thomas B. Lawson ("Lawson"), an NASD Regulation Enforcement staff attorney, sent a letter by facsimile and regular mail to Puccio at the address of his law office. His letter stated, in part:

In response to a voice mail I left at your office on Friday, March 14, 1997, I received a voice mail from you on Monday, March 17, 1997, indicating that you had a conflict with the March 26, 1997, date for Mr. Rudi's testimony but also wished to speak with me about the matter before proceeding further. Since that time, however, although I have left a number of messages for you at your office, I have not heard back from you."

Mr. Rudi's testimony is currently scheduled for March 26, 1997. If you wish to obtain an extension of that date or discuss this matter further, please call me at your earliest convenience

¹ The Association issued a complaint against Rudi on April 30, 1997, alleging that he failed to respond to the Association's requests for an on-the-record interview. The record shows that Rudi failed to answer the complaint and that a decision was issued on August 1, 1997.

On August 14, 1997, Rudi filed a request for an appeal and further requested that an immediate hearing be granted in connection with the appeal. By letter dated August 15, 1997, NASD Regulation Inc. ("NASD Regulation") advised Puccio, the respondent's attorney, that because Rudi had failed to answer the complaint, he had waived his right to participate in a hearing before the NBCC and, therefore, the matter would be considered on the basis of the written record with consideration of any written submission that Rudi wished to make. See Article III, Section 2(f) of the Code of Procedure (now known as Procedural Rule 9344).

² Although NASD Regulation Enforcement attorney Thomas P. Lloyd ("Lloyd") included in the record a document entitled "Declaration of Thomas P. Lloyd," we have not relied on this document in making our findings. See Gary L. Greenberg, 50 S.E.C. 242 (1990).

In a letter to Puccio dated March 25, 1997, Lawson confirmed that he had agreed during a conversation on that same date to extend the date for Rudi's testimony for two weeks, from March 26, 1997 to April 8, 1997. In a letter to Puccio dated April 4, 1997, Lawson stated that staff was not interested in speaking with Rudi off the record, as Puccio had suggested in a March 24 telephone conversation with Lawson. Lawson's letter also stated, in relevant part, that:

If Mr. Rudi does not intend to provide testimony to the staff, I would appreciate your informing me of that. If Mr. Rudi does intend to provide testimony, but needs to extend for several days the date of the testimony, please call me and we can discuss possible dates.

In a letter to Puccio dated April 8, 1997, and sent to Puccio's office the morning of April 8, Lloyd stated that he had received a call from Puccio's office the previous morning (on April 7) indicating that Puccio was in trial and that he would be unavailable for the on-the-record testimony that had been scheduled for that day (April 8, 1997). Lloyd's letter advised Puccio that the previous day he had spoken to someone from Puccio's office and agreed to extend the date of the testimony for a short time, but that Rudi's testimony would have to occur prior to April 18, 1997. The letter further stated that although Lloyd had left a voice mail message for Puccio at approximately 6:15 p.m. on the evening of April 7, indicating that Puccio should leave a message on his or Lawson's voice mail with a date "in the next two weeks for Mr. Rudi's testimony," Puccio had not responded by the next morning. The letter went on to state that:

Accordingly, we have rescheduled Mr. Rudi's testimony for Friday, April 12, 1997 at 10:30 a.m. at the NASD's offices As you understand from your discussions with Mr. Lawson, if Mr. Rudi does not appear for testimony he may face disciplinary action, possibly including but not limited to being barred from association with all NASD members.

Lloyd also sent a second letter to Puccio dated April 8, 1997, in which Lloyd stated that he had received a voice mail from Puccio's secretary indicating that Rudi and Puccio would be available for testimony on Monday, April 28, 1997. Lloyd stated in this letter that he had called Puccio's secretary, after receiving her message, and explained to her that the testimony could be taken on that date only if Rudi signed a tolling agreement, "tolling for a month or two the time during which the Association would have jurisdiction over him." After checking Puccio's schedule, his secretary asked whether the on-the-record interview could be scheduled for April 21, 1997.³ According to Lloyd's letter, he (Lloyd) agreed to the April 21 date, "with the qualification that [it was] the absolute latest that the testimony [could] be scheduled without a tolling agreement." Lloyd concluded by stating that:

³ Lloyd testified that Puccio's secretary explained to him that the reason April 28 or April 21 would be acceptable dates for Rudi's testimony was because Mondays were days during which Puccio was not in trial in the case in which he was involved at that time.

[he had] rescheduled Mr. Rudi's testimony for Monday, April 21, 1997 at 10:30 a.m. at the NASD's offices at 11 Penn Center, 1835 Market Street, Suite 1900, Philadelphia, Pennsylvania. If Mr. Rudi does not appear for testimony on that date, in the absence of a signed tolling agreement, he may face disciplinary action, possibly including but not limited to being barred from association with all NASD members.

Lloyd testified that before leaving the Washington, D.C. area on April 21 to go to the NASD's office in Philadelphia for the on-the-record interview that was scheduled for that day, he checked his voice mail (at approximately 7:00 a.m.) to ascertain if there were any messages from Puccio's office. Lawson also had checked his voice mail and had advised Lloyd that there were no messages from Puccio's office. Lloyd and another NASD staff person then traveled to the NASD offices in Philadelphia for the on-the-record-hearing. When he arrived in Philadelphia, Lloyd stated that he again checked his voice mail and learned that Puccio's office had left a voice mail message for Lawson at 9:24 a.m. that morning, asking that someone call Puccio's office. At a few minutes after 10:00 a.m., the morning of April 21, Lloyd called Puccio's office and spoke to his secretary who asked whether Puccio had an appointment with Lloyd for that date. Lloyd responded that, "[y]es, there was, as we had talked about last week and as our letter to Mr. Puccio of April 8 described." According to Lloyd's testimony at the investigatory hearing, he then advised Puccio's secretary to inform Puccio that the Association would proceed in the manner appropriate for a witness who did not appear for testimony.

Discussion

We find that Rudi failed to respond to NASD Regulation staff's requests for an on-the-record interview, in violation of Conduct Rule 2110 and Procedural Rule 8210. Procedural Rule 8210 authorizes the Association, in the course of its investigations, to require Association members to "report, either informally or on the record, orally or in writing with regard to any matter involved in any such investigation." Because the NASD lacks subpoena power over its members, a "failure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate." In re Brian L. Gibbons, Exchange Act Rel. No. 37170 (May 8, 1996); In re Michael David Borth, 51 S.E.C. 178, 180 (1992). Accordingly, a failure to abide by Procedural Rule 8210 is a serious violation. In re John A. Malach, 51 S.E.C. 618, 621 (1993). When Rudi became a person associated with a member of the Association, he agreed to abide by the NASD's rules.

As demonstrated by the evidence, NASD Regulation staff attempted to arrange an on-the-record interview with Rudi. Rudi received the first request for an on-the-record interview at his place of business. Thereafter, Rudi's attorney received subsequent notices scheduling the interview for a specific date and time. The evidence is uncontroverted that Rudi was on notice about the dates he was required to appear for the on-the-record interviews and that he failed to appear for those interviews. Nevertheless, Rudi made the following arguments on appeal.

We do not credit Rudi's argument that NASD Regulation had abused its discretion by requiring him to be interviewed separate from the deposition that the SEC had scheduled in connection with its investigation of Rudi. NASD Regulation, a self-regulatory organization, is not obligated to consolidate its enforcement efforts with state or federal governmental entities, and was therefore under no obligation to postpone its on-the-record interview until after Rudi had been deposed by the SEC.

We also do not credit Rudi's argument that his NASD Regulation on-the-record interview should have been postponed until his counsel became available. The record shows that NASD Regulation staff diligently worked with Rudi's attorney to ascertain when he would be available for the interview. Moreover, NASD Regulation staff extended the date of the interview a number of times to accommodate Puccio's trial schedule. On one occasion Puccio's office postponed the interview one day before it was scheduled to go forward, and on a second occasion, his office called the day of the scheduled interview to advise staff that Rudi was unavailable because he was involved in a trial. NASD staff already had arrived in Philadelphia from the Washington D.C. area on the date of the scheduled interview when they learned that Puccio would be unavailable for the interview that day. Puccio's unavailability notwithstanding, as an individual registered with the NASD, Rudi agreed "to abide by its Rules of Fair Practice, which are unequivocal with respect to the obligation to cooperate with the NASD." In re Michael Markowski, 51 S.E.C. 553, 557 (1993). See also In re Michael David Borth, 51 S.E.C. 178, 181 (1992). Accordingly, we affirm the DBCC's finding that Rudi violated Conduct Rule 2110 and Procedural Rule 8210.

Sanctions

We affirm the DBCC's censure; \$20,000 fine; and bar in all capacities. In reaching these sanctions, we have considered the applicable NASD Sanction Guideline for failure to respond. We find that the sanction is remedial and consistent with the recommendation in the Guideline to impose a \$20,000 fine and bar in cases where individuals fail to respond to requests for information.

In support of our sanctions, we also have considered the following aggravating factors from the Guideline for failure to respond: (1) that there is evidence of willful attempts by Rudi and his attorney to delay the investigation;⁴ (2) that Rudi provided no reasonable explanation as to

⁴ The NASD retains jurisdiction over associated persons who have been terminated and are no longer associated with a member firm for two years after the date of termination. Article IV, Sec. 4 of the NASD's By-Laws. In this case, Rudi was terminated from Armacon on May 2, 1995. Thus, in order to retain jurisdiction over Rudi, the NASD was required to file a complaint against him two years from the date of his termination, or by May 2, 1997. The evidence demonstrates that NASD Regulation Enforcement staff had advised Rudi's attorney that the April 21 date for Rudi's on-the-record interview would have to be the "absolute latest that the testimony [could] be scheduled without a tolling agreement." Given that NASD Regulation had

why he failed to appear for the scheduled on-the-record interviews; (3) that the information sought from Rudi was of significant regulatory importance; and (4) that although Rudi has no prior NASD disciplinary history, he entered into a settlement in January 1997 with the SEC in which he neither admitted nor denied the SEC's allegations that he and his firm, Public Capital Advisors, Inc., had committed securities fraud by soliciting and receiving over \$200,000 in kickbacks from First Fidelity Securities Group in connection with a Camden County Municipal Utilities Authority's February, 1990 offering, which resulted in an agreement to pay \$86,331.40 (\$49,131.63 of which was disgorgement and \$37,199.77 of which was prejudgment interest).

Thus, we order that Rudi be censured; fined \$20,000; and barred from associating with any member firm in any capacity.⁵ The bar imposed herein is effective immediately upon the issuance of this decision.

On Behalf of the National Business Conduct Committee,

Joan C. Conley, Corporate Secretary

to issue any complaints against Rudi by May 2, 1997 to retain its jurisdiction over him, the April 21 date set by NASD Regulation Enforcement staff appears to have been a reasonable deadline for Rudi's on-the-record interview. The evidence shows that the complaint was filed on April 30, 1997, only days before the NASD's jurisdiction was due to expire on May 2, 1997.

⁵ 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.