

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Paul Zdzieblowski
Sterling Heights, MI,

Respondent.

DECISION

Complaint No. C8A030062

Dated: May 3, 2005

Respondent willfully failed to disclose material information concerning a criminal charge on a Form U4. Held, Hearing Officer's finding of violation is affirmed and sanctions are modified.

Appearances

For the Complainant: Kevin G. Kulling, Esq., NASD Department of Enforcement.

For the Respondent: Brian D. O'Keefe, Esq.

Opinion

Pursuant to NASD Procedural Rule 9311, respondent Paul Zdzieblowski ("Zdzieblowski") appeals a March 2, 2004 Hearing Officer default decision. After thoroughly reviewing the record in this proceeding, we find that the Hearing Officer's entry of default was proper, and Zdzieblowski did not establish good cause for his failure to participate in the proceedings before the Hearing Officer. We also find that Zdzieblowski violated NASD Conduct Rule 2110 and Membership and Registration Rules Interpretive Material ("IM") 1000-1 by willfully failing to disclose on the Uniform Application for Securities Industry Registration or Transfer ("Form U4") that he had been charged with a misdemeanor involving the wrongful taking of property. We suspend Zdzieblowski for one year in all capacities and fine him \$5,000.

I. Background

Zdzieblowski entered the securities industry in 1998 as an investment company products/variable contracts limited representative. Zdzieblowski has been associated with several NASD member firms since 1998. USAllianz Securities, Inc. ("USAllianz" or "the Firm") employed Zdzieblowski from January 2002 until April 2002 when the Firm terminated him for failing to disclose required information on a Form U4. Zdzieblowski is not currently employed in the securities industry.

II. Factual and Procedural History

Zdzieblowski was arrested on March 24, 1998, in Michigan and charged with larceny under \$100.¹ Zdzieblowski pleaded guilty to the crime on July 29, 1998. The court took Zdzieblowski's plea under advisement for one year and ordered Zdzieblowski to pay court costs of \$300. Zdzieblowski paid those costs on August 25, 1998. The court closed the case on July 20, 1999.

On December 30, 2001, Zdzieblowski completed and signed a Form U4 in connection with his registration as an investment company products/variable contracts limited representative for USAllianz. Question number 23B(1)(a) on the Form U4 asked Zdzieblowski, "[h]ave you ever . . . been convicted of or pled guilty . . . to a misdemeanor involving . . . wrongful taking of property?" Question 23B(1)(b) on the Form U4 asked Zdzieblowski, "[h]ave you ever . . . been charged with a misdemeanor specified in 23B(1)(a)?" Zdzieblowski answered "no" to both questions.

On August 1, 2003, NASD's Department of Enforcement ("Enforcement") filed a complaint against Zdzieblowski. The complaint alleged that Zdzieblowski willfully failed to disclose required information concerning a criminal charge and resulting guilty plea in Michigan for misdemeanor retail fraud on a Form U4 in violation of Conduct Rule 2110 and IM-1000-1. Enforcement sent a copy of the complaint and notice of complaint via certified mail, return receipt requested, and by first class mail to Zdzieblowski at his current residential address as reflected in the Central Registration Depository ("CRD"®). The Postal Service returned the receipt to NASD with a signature evidencing that the certified mailing had been delivered. The signature on the return receipt appeared to be "Zdzieblowski" and was dated August 4, 2003. The first class mailing was not returned.

¹ In February 2002, NASD obtained an investigatory report from the United States Department of Justice pursuant to processing Zdzieblowski's fingerprint cards for registration with USAllianz. NASD and the Firm learned from this report that state authorities had charged Zdzieblowski with a misdemeanor involving the wrongful taking of property. The Justice Department report labeled the crime "Retail Fraud."

After the time for Zdzieblowski to file an answer had passed, on September 8, 2003, Enforcement sent another copy of the complaint and a second notice of the complaint to Zdzieblowski's residential address as listed in CRD via certified mail, return receipt requested, and by first class mail. The Postal Service returned the certified mailing to NASD marked "unclaimed." The first class mailing was not returned.

On November 4, 2003, Enforcement filed a motion for default supported by a declaration of counsel for Enforcement, and six exhibits. Enforcement sent a copy of the motion for default and supporting documentation to Zdzieblowski's residential address via FedEx Express overnight delivery service. Enforcement received a confirmation from FedEx Express that the mailing had been delivered on November 5, 2003. The signature on the delivery confirmation was "S. Zdzieblowski."

Zdzieblowski filed no response to the motion for default. On November 24, 2003, the Hearing Officer issued a decision, which found that Zdzieblowski had defaulted by failing to answer the complaint. The decision accepted the allegations contained in the complaint as true, found that Zdzieblowski admitted the allegations by way of his default, and ordered Zdzieblowski barred from associating with any NASD member in any capacity.

On December 18, 2003, Zdzieblowski's attorney filed a notice of appearance, a motion to vacate the default decision, and a notice of appeal. The NASD Office of General Counsel notified Zdzieblowski that the National Adjudicatory Council ("NAC") would not consider the appeal while the Office of Hearing Officers considered the motion to vacate the default. In the motion to vacate the default, Zdzieblowski argued that he was uninformed "of the time and place of the hearing," not represented by counsel at the time, and unaware of the consequences of the proceedings and potential sanctions imposed. In addition, Zdzieblowski argued that the Hearing Officer's order of sanctions, barring Zdzieblowski, was unnecessarily severe. Enforcement filed a response to the motion to vacate the default on January 6, 2004. Enforcement's response included a copy of the November 5, 2003 delivery confirmation from FedEx Express.

On January 8, 2004, the Hearing Officer denied Zdzieblowski's motion to vacate the default, finding that he had failed to show good cause for his failure to participate in the proceedings before the Hearing Officer. In light of Zdzieblowski's intent to appeal, however, the Hearing Officer ordered that Enforcement supplement its motion for a default decision with evidence independently establishing the violation alleged in the complaint and vacated the November 24, 2003 default decision.² On January 29, 2004, Enforcement filed its supplement to

² On January 16, 2004, Zdzieblowski attempted to file an answer to the complaint with the Hearing Officer. The Hearing Officer's January 8, 2004 order, however, expressly had precluded Zdzieblowski from introducing evidence into the record as a result of his default. Accordingly, on January 23, 2004, the Hearing Officer issued an order rejecting Zdzieblowski's answer.

the motion for entry of a default decision supported by seven exhibits. These exhibits consisted of: (1) a copy of the motion for entry of a default decision and supporting declaration; (2) a copy of the Certification of Court Disposition from the Michigan District Court for District 41-A; (3) a copy of the United States Department of Justice investigatory report for Zdzieblowski; (4) a copy of Zdzieblowski's Form U4 completed on December 30, 2001; (5) a copy of correspondence from Zdzieblowski to USAllianz's compliance department dated April 12, 2002; (6) a copy of correspondence from Zdzieblowski to NASD District 8 dated April 30, 2002; and (7) a copy of correspondence from Zdzieblowski to NASD District 8 dated June 11, 2002.

The Hearing Officer issued an amended default decision on March 2, 2004. The Hearing Officer found that Zdzieblowski received valid constructive notice of the proceedings and that he defaulted by failing to answer the complaint. The Hearing Officer also found that the independent evidence submitted by Enforcement substantiated the allegations of the complaint; therefore, the Hearing Officer found that Zdzieblowski failed to disclose required information on a Form U4 in violation of Conduct Rule 2110. The Hearing Officer barred Zdzieblowski. This appeal followed. We have considered this appeal based upon the written record.

III. Discussion

We first address whether the Hearing Officer below properly determined that Zdzieblowski was in default. We find that the determination was correct. We next consider whether Zdzieblowski demonstrated good cause for his failure to participate in the proceedings before the Hearing Officer. We find he has not. Finally, we consider the merits of this appeal and conclude that Zdzieblowski failed to disclose requisite information on a Form U4 in violation of Conduct Rule 2110 and IM-1000-1.

A. Hearing Officer's Entry of Default

NASD Procedural Rule 9269 allows a Hearing Officer to enter a default after Enforcement serves a first and second notice of complaint and a respondent fails to file an answer or otherwise respond after a specified time. We find that Enforcement properly served Zdzieblowski with the first and second notices of complaint to his residential address listed in CRD. See NASD Procedural Rule 9134(b)(1) (allowing for service at address listed in CRD). We therefore find that Zdzieblowski had notice of the complaint. See Dep't of Enforcement v. Verdiner, Complaint No. CAF020004, 2003 NASD Discip. LEXIS 42, at *5 n.1 & 6 (NAC Dec. 9, 2003) (finding respondent received constructive notice when complaint was mailed to respondent's CRD address). It is undisputed that Zdzieblowski failed to file an answer to the complaint. Thus, the Hearing Officer's entry of default was proper.

B. Zdzieblowski's Failure to Show Good Cause

NASD Procedural Rule 9344(a) governs when a respondent appeals a default decision. Rule 9344(a) states that the NAC will consider the appeal on the basis of the written record without the opportunity for oral argument unless the respondent demonstrates good cause for his

failure to participate in the proceedings below. If the NAC determines that a respondent establishes good cause, then it is NASD's policy to remand the case for an evidentiary hearing.

On appeal to the NAC, Zdzieblowski is silent regarding his failure to participate in the proceedings before the Hearing Officer. Moreover, the record reflects that Enforcement served all the correspondence in this matter properly to Zdzieblowski's address listed in CRD. Cf. Lance E. Van Alstyne, 53 S.E.C. 1093, 1099 (1998) (dismissing appeal of motion to set aside NASD default decision and finding complaint properly served upon respondent at CRD address was sufficient notice of the action). NASD received a signed receipt for the certified mailing of the first notice of complaint, and the Postal Service returned none of the first class mailings to NASD.

We find that Zdzieblowski has not demonstrated good cause for his failure to participate in the proceedings before the Hearing Officer. Accordingly, we have considered this appeal on the basis of the written record and without oral argument from the parties.

C. Evidentiary Basis for the Findings of Violation

The Hearing Officer considered the evidence submitted by Enforcement in its original motion for a default decision and in its supplemental filing and concluded that the evidence was sufficient to substantiate the allegations of the complaint.³ After a review of the evidence, we affirm the Hearing Officer's finding that Zdzieblowski failed to disclose required information on a Form U4 in violation of NASD rules.

NASD Rule 2110 and IM-1000-1 require associated persons to disclose accurately and fully information required in the Form U4 and to observe the high standards of commercial honor and just and equitable principles of trade.⁴ The accuracy of an applicant's Form U4 "is critical to the effectiveness" of a self-regulatory organization's ability to screen and monitor the

³ The complaint alleged that Zdzieblowski willfully failed to disclose his criminal history on a Form U4. The complaint alleges the following: On or about March 28, 1998, Michigan law enforcement charged Zdzieblowski with retail fraud, a misdemeanor. On July 29, 1998, Zdzieblowski pleaded guilty to the charge. The court placed him on probation for 12 months and ordered that he pay a fine and court costs. On or about December 30, 2001, Zdzieblowski submitted a Form U4 in connection with his registration as an investment company/variable contracts representative for USAllianz. On the Form U4, Zdzieblowski willfully failed to disclose that he had been charged with and convicted of a misdemeanor involving theft or wrongful taking of property.

⁴ IM-1000-1 provides that the filing of registration information that "is incomplete or inaccurate so as to be misleading . . . may be deemed to be conduct inconsistent with just and equitable principles of trade" in violation of Rule 2110.

professionals within the securities industry. Rosario R. Ruggiero, 52 S.E.C. 725, 728 (1996); see also Guang Lu, Exchange Act Rel. No. 51047, 2005 SEC LEXIS 117, at *19-20 (Jan. 14, 2005) (recognizing that "the candor and forthrightness of applicants is critical to the effectiveness of the screening process").

Based on the evidence in the record, we find that Zdzieblowski provided false information on a Form U4. "The violation of providing false information to the NASD requires only that the complainant prove that the information was false." Dep't of Enforcement v. Knight, Complaint No. C10020060, 2004 NASD Discip. LEXIS 5, at *8 (NAC Apr. 27, 2004) (internal quotation omitted). There is no dispute that on March 24, 1998, Michigan authorities charged Zdzieblowski with larceny under \$100, a misdemeanor. Therefore, Zdzieblowski should have answered "yes" to Question 23B(1)(b), whether he had ever been charged with a misdemeanor involving the wrongful taking of property, as alleged in the complaint, when he completed a Form U4 on December 30, 2001. Zdzieblowski's answer of "no" was false. Moreover, Zdzieblowski admitted in his brief to the NAC that he was required to give an affirmative response to Question 23B(1)(b).

Zdzieblowski disputes, however, that he improperly answered Question 23B(1)(a). He asserts that the court took his plea under advisement for one year, never accepted the plea, and dismissed the case in July 1999. See Mich. Ct. R. 6.302(C)(3), (F) (stating that a trial court may accept, reject, or take under advisement a defendant's plea). Thus, Zdzieblowski argues that, under Michigan law, his plea was not accepted and he was never convicted. Cf. Carr v. Midland County Concealed Weapons Licensing Bd., 674 N.W.2d 709, 712 (Mich. Ct. App. 2003) ("If the proceedings have been dismissed, then so has the acceptance of the guilty plea."). The Certification of Court Disposition from the Michigan District Court, District 41.A states that the court took Zdzieblowski's plea under advisement for one year and closed the case in July 1999. We do not believe the record supports a finding that the court accepted Zdzieblowski's plea or that Zdzieblowski was convicted when he completed the Form U4. See, e.g., SD 04017, 2004 WL 3210620 (N.A.S.D.R.) (construing Massachusetts law regarding acceptance of a guilty plea and finding that a plea held in abeyance pending completion of supervised release was not a conviction). In any event, the resolution of this case does not depend on whether Zdzieblowski's plea was formally accepted or if his plea resulted in a conviction. Zdzieblowski violated Conduct Rule 2110 and IM-1000-1 when he falsely answered "no" to Question 23B(1)(b) on a Form U4, because he was in fact charged with a misdemeanor involving the wrongful taking of property.

We also find that Zdzieblowski acted willfully by failing to disclose material information on a Form U4. A finding of willfulness causes a respondent to become statutorily disqualified from association with NASD pursuant to Section 15(b)(4)(A) of the Securities Exchange Act of 1934 and Article III, Section 4(f) of the NASD By-Laws. We have previously found that failing to disclose a specified criminal charge on a Form U4 was material information. See Knight, 2004 NASD Discip. LEXIS 5, at *13-14. A willfulness finding is predicated on Zdzieblowski's intent to commit the act that constitutes the violation—completing the Form U4 inaccurately. See Jacob Wonsover, 54 S.E.C. 1, 18 & n.36 (1999), aff'd, Wonsover v. SEC, 205 F.3d 408

(D.C. Cir. 2000). We need not find that Zdzieblowski intended to violate NASD rules. See Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965) (stating that there is "no requirement that the actor . . . be aware that he is violating one of the Rules or Acts" to uphold a finding of willfulness); Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949) ("Generally, [willfulness] means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.").

Zdzieblowski argues that he did not act willfully when he failed to disclose the larceny charge because he believed when he completed the Form U4 that the arrest was no longer part of his criminal history. In correspondence with NASD investigative staff in April 2002, Zdzieblowski stated, "I believed that only arrests resulting in felony or misdemeanor convictions with permanent record[s] had to be disclosed on a U-4 form. I am ashamed and completely embarrassed about the incident that occurred." These explanations illustrate that Zdzieblowski intended not to report the criminal charge on the Form U4 in hopes that his arrest would remain undiscovered by the Firm and NASD. The unambiguous language of Question 23B(1)(b), however, does not allow for such machinations. Zdzieblowski had a duty to provide accurate information to his prospective employer and in turn to NASD. See Thomas R. Alton, 52 S.E.C. 380, 382 (1995). Article V, Section 2 of the NASD By-Laws requires all applicants to fully and accurately disclose all requested information on the Form U4. Zdzieblowski had an obligation to inquire about the charge against him if he was unsure how to answer accurately any question on the Form U4. See James Alan Schneider, 52 S.E.C. 840, 843 (1996) (holding that applicant misrepresented information on a Form U4 and that he should have checked with proper authority if unsure how to accurately respond to a question), aff'd, 118 F.3d 1577 (3d Cir. June 30, 1997) (table format). He did not and elected instead to report nothing to the Firm and NASD about the arrest and charge filed against him.

In sum, we find that Zdzieblowski willfully failed to disclose on a Form U4 that he had been charged with a misdemeanor involving the wrongful taking of property, in violation of Conduct Rule 2110 and IM-1000-1. As a result, Zdzieblowski is statutorily disqualified.

IV. Sanctions

The Hearing Officer barred Zdzieblowski from associating with any member firm in any capacity for failing to disclose on a Form U4 that he was charged with and pleaded guilty to a misdemeanor involving the wrongful taking of property. We find it appropriate under the circumstances to eliminate the bar and instead to suspend Zdzieblowski from associating with any member for one year and to impose a \$5,000 fine.

The NASD Sanction Guideline ("Guideline") for filing a false or inaccurate Form U4 provides for fines ranging from \$2,500 to \$50,000 and a suspension in any or all capacities for 5

to 30 business days or, in egregious cases, a suspension up to two years or a bar.⁵ The Guideline for submission of a false Form U4 provides three considerations in determining the appropriate sanctions: (1) whether the information at issue was significant and the nature of that information; (2) whether the respondent's failure to disclose information resulted in a statutorily disqualified individual associating with a firm; and (3) whether the respondent's misconduct resulted in harm.⁶

The Hearing Panel found that two of these considerations applied to Zdzieblowski's misconduct: that the information was significant and that Zdzieblowski's failure to disclose the information resulted in a statutorily disqualified individual associating with the Firm. We agree that the undisclosed larceny charge may have had a serious consequence upon Zdzieblowski's employment in the securities industry; therefore, the nondisclosure is significant and an aggravating factor. Because we find that the record does not support that the court accepted Zdzieblowski's guilty plea, however, the misdemeanor charge itself would not have resulted in Zdzieblowski's statutory disqualification.⁷ There is no evidence in the record that Zdzieblowski's nondisclosure resulted in any customer harm.

Full and accurate disclosure is vital, not only to NASD and other self-regulatory organizations, but also to state regulators and broker-dealers who use the information to determine the fitness of an applicant for registration as a securities professional. See David B. Harman, 48 S.E.C. 950, 952 (1988). "The NASD, which cannot investigate the veracity of every detail in each document filed with it, must depend on its members to report to it accurately and clearly in a manner that is not misleading." Robert E. Kauffman, 51 S.E.C. 838, 839 (1993). Given the utmost importance of complete and truthful disclosures on the Form U4, we find Zdzieblowski's concealment egregious.

⁵ NASD Sanction Guidelines (2001 ed.) at 77-78 (Forms U4/U5—Filing of False, Inaccurate, or Misleading Forms).

⁶ Id. at 77.

⁷ Moreover, the record does not demonstrate that Zdzieblowski was convicted of misdemeanor larceny of funds or securities, which would have resulted in a statutory disqualification. See NASD By-Laws Article III, Section 4(g)(1)(iii). Zdzieblowski is statutorily disqualified because he willfully failed to disclose a misdemeanor charge involving the wrongful taking of property on a Form U4. Absent this failure to disclose, Zdzieblowski would not have been statutorily disqualified by the charge.

Accordingly, Zdzieblowski is fined \$5,000 and suspended in all capacities for one year.⁸ Zdzieblowski is also statutorily disqualified. In order for Zdzieblowski to seek readmission to NASD, a firm must sponsor him through the process known as the Membership Continuation Application or the MC-400.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

⁸ We also have considered and reject without discussion all other arguments of the respondent.

Pursuant to NASD Procedural Rule 8320, any member that 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 nonpayment. 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 nonpayment.