

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Hugh Vincent Murray III
St. Louis, MO,

Respondent.

DECISION

Complaint No. 2008016437801

Dated: December 17, 2013

Respondent failed to supervise the filing of Forms U4 by two registered representatives, in violation of NASD Rules 3010 and 2110, and FINRA Rule 2010. Held, findings and sanctions affirmed; costs sustained.

Appearances

For the Complainant: James M. Stephens, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

Decision

Hugh Vincent Murray III (“Murray”) appeals a single aspect of an October 25, 2012 Hearing Panel decision. The Hearing Panel found that Murray failed to supervise the filing of Uniform Applications for Securities Industry Registration or Transfer (“Forms U4”) by two registered representatives, in violation of NASD Rules 3010 and 2110, and FINRA Rule 2010.¹ For this misconduct, the Hearing Panel suspended Murray in all supervisory capacities for 90 days and ordered him to requalify by examination as a principal. The Hearing Panel further assessed costs of \$3,600.

Murray did not appeal to the National Adjudicatory Council (“NAC”) either the Hearing Panel’s findings that he violated FINRA rules or the sanctions that it imposed for his misconduct. Instead, Murray requests solely that we vacate the Hearing Panel’s order that he bear the costs of

¹ The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

the proceedings below. We therefore affirm the Hearing Panel's findings and sanctions. After careful consideration of Murray's arguments, we also sustain the Hearing Panel's decision to assess costs.

I. Background

This case concerns Murray's activities while he was associated with Forsyth Securities, Inc. ("Forsyth" or the "Firm").² Beginning in 2004, he served as the Firm's president and chief compliance officer.

On June 21, 2011, the Department of Enforcement ("Enforcement") filed a one-cause complaint against Murray.³ Enforcement alleged that Murray failed to supervise two employees' Form U4 filings and one other employee's trading in two discretionary accounts. After conducting a two-day hearing, the Hearing Panel issued its decision. The Hearing Panel found, and Murray does not dispute on appeal, that while at Forsyth, Murray was the direct supervisor of Joseph Dale Frost ("Frost"), John Charles Reilly, Jr. ("Reilly"), and Russell Philip Macke ("Macke"), and that Murray submitted all Forms U4 for Forsyth and was responsible for all Form U4 filings for both Frost and Reilly. Specifically, the Hearing Panel found that Murray's failure to supervise Frost stemmed from his failure to timely update Frost's Form U4 to disclose Frost's felony charge and eventual guilty plea for failure to pay child support. The Hearing Panel also found that Murray failed to supervise Reilly when he failed to timely update Reilly's Form U4 to disclose Reilly's felony charge of driving while intoxicated. The Hearing Panel concluded, however, that Enforcement failed to prove that Murray did not properly supervise Macke's trading in the two discretionary accounts.

Based upon these facts, the Hearing Panel found that Murray failed to supervise Frost and Reilly with respect to updating their Forms U4, in violation of NASD Rules 3010 and 2110, and FINRA Rule 2010. For this misconduct, the Hearing Panel suspended Murray in all supervisory capacities for 90 days and ordered that he requalify by examination as a principal.

In imposing these sanctions, the Hearing Panel found that Murray was aware of Frost's and Reilly's legal troubles and that there were red flags suggesting that the Forms U4 should be updated, but that Murray failed to take the necessary action to ensure that the Forms U4 were updated within the time required by FINRA's By-Laws and rules. The Hearing Panel also noted that Murray's failure to report Frost's conviction resulted in a statutorily disqualified individual

² Murray entered the securities industry in 1976. He was registered with Forsyth as a financial and operations principal, general securities principal, general securities representative, investment banking representative, municipal securities principal, and options principal from July 1985 until December 2011. Murray has not since been associated or registered with another FINRA member firm.

³ The complaint not only named Murray as a respondent, but also the individuals he allegedly failed to supervise. The individual employees settled with Enforcement prior to the hearing, leaving Murray as the only respondent to proceed.

remaining associated with Forsyth. Based on his disregard for his supervisory duties, the Hearing Panel found it appropriate to require a suspension in excess of the 30 days recommended by the FINRA Sanction Guidelines and suspended Murray in all supervisory capacities for 90 days. The Hearing Panel further assessed costs totaling \$3,600.⁴

As we noted above, Murray did not appeal to the NAC the Hearing Panel's findings or the sanctions it imposed, choosing instead to limit his appeal to a challenge of the Hearing Panel's decision to assess costs. We therefore affirm, without further discussion, these findings and sanctions, and we limit our decision instead to a discussion of the issues raised by Murray's appeal of costs.⁵

II. Discussion

The sole basis of Murray's appeal is a request that we vacate the Hearing Panel's order that he bear the costs of the proceedings below. We reject Murray's claim that he should not be assessed costs and sustain the costs assessed by the Hearing Panel.⁶

A. The Hearing Panel Assessed Fair and Appropriate Costs

FINRA Rule 8330 provides that members and associated persons "disciplined pursuant to [FINRA] Rule 8310 shall bear such costs of the proceeding as the Adjudicator deems fair and appropriate under the circumstances." This rule's "fair and appropriate" language provides FINRA adjudicators with "broad discretion" to impose costs in disciplinary proceedings. *John M. W. Crute*, 53 S.E.C. 1112, 1116 (1998) (upholding the imposition of costs under former Article IV, Section 2 of NASD's By-Laws), *aff'd*, 208 F.3d 1006 (5th Cir. 2000).

⁴ The amount of costs assessed by the Hearing Panel represents the cost of the hearing transcript and a \$750 administrative fee.

⁵ To the extent the NAC makes specific findings in this decision, we base those findings on an independent review of the record, except with respect to issues that were not challenged by either party on appeal. We thus summarily affirm, and adopt as our own for purposes of any further review proceedings permitted under the federal securities laws, the Hearing Panel's findings and the sanctions that it imposed. *See* FINRA Rule 9311(e) ("The National Adjudicatory Council may, in its discretion, deem waived any issue not raised in the notice of appeal or cross-appeal.").

⁶ Murray has knowingly waived his right to appeal the Hearing Panel's findings and sanctions—he explicitly states in his Notice of Appeal and throughout his briefs that he is only appealing the assessment of costs. However, his "First Brief" contains what appear to be arguments related to his supervisory violations. Accordingly, we asked the parties for additional briefing as to the merits of the Hearing Panel's decision. Murray's supplemental brief again did not challenge the Hearing Panel's findings or sanctions, but instead made vague and immaterial attacks on FINRA's policies and rule-making process. Those arguments were not germane to the issues of Murray's disciplinary case or appeal, and thus we have considered and rejected those arguments.

Murray did not prevail below in the proceedings before the Hearing Panel, and thus, pursuant to FINRA rules, Murray *shall* bear the costs. FINRA Rule 8330. The Hearing Panel found that Murray violated FINRA's rules, and it assessed the amount of costs that it deemed appropriate under the circumstances presented. *See E. Magnus Oppenheim & Co.*, Exchange Act Release No. 51479, 2005 SEC LEXIS 764, at *20-21 (Apr. 6, 2005) ("NASD acted well within its discretion in assessing the costs following the decision."). Our review of the Hearing Panel's imposition of costs is *de novo*.⁷ In light of the fact that Murray was not the prevailing party, was found in violation of FINRA rules and sanctioned, and was only assessed costs equal to the amount of the hearing transcript plus the standard \$750 administrative fee, we concur with the Hearing Panel that an assessment of \$3,600 in costs is fair and appropriate.

B. Murray Has Not Demonstrated an Inability to Pay Costs

Murray maintains that he is currently in poor health, unemployed, in "financial crisis," and therefore unable to pay the assessed costs. Murray did not demonstrate to the Hearing Panel below, and has not demonstrated to the NAC on appeal, that he would be unable to pay the costs imposed.

The Commission has held that an individual asserting an inability to pay has the burden of producing evidence in support of such a claim and of proving bona fide insolvency. *See Dep't of Enforcement v. Cipriano*, Complaint No. C07050029, 2007 NASD Discip. LEXIS 23, at *43-44 (NASD NAC July 26, 2007) (citing *Toney L. Reed*, 52 S.E.C. 944, 947 n.12 (1996), *recons. denied*, 53 S.E.C. 343 (1997)). The "ability to pay is peculiarly within [the individual's] knowledge, and it is appropriate that he bear the burden of demonstrating his inability." *B.R. Stickle & Co.*, 51 S.E.C. 1022, 1026 (1994).

While Murray states that his "financial situation is currently in crisis," he also notes that he is "living a reasonably comfortable life" and acknowledges that he has a "small asset base."⁸ Furthermore, and most importantly, Murray has not provided any documentation that would support a claim of inability to pay. *See Guang Lu*, Exchange Act Release No. 51047, 2005 SEC LEXIS 117, at *32 n. 45 (Jan. 14, 2005), *aff'd*, 179 F. App'x 702 (D.C. Cir. 2006). Without any evidence of bona fide insolvency, and in light of his representations that he is living a "comfortable life," we cannot rely on Murray's protestations of financial hardship to waive the imposition of costs.

⁷ *See Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 SEC LEXIS 3936, at *19 (Nov. 4, 2009) (stating that the NAC's review is *de novo*, and the NAC has the authority to make an independent finding), *aff'd*, 416 F. App'x 95 (2d Cir. 2011).

⁸ Evidence of an individual's negligible net worth and income alone is insufficient to prove bona fide insolvency. *See Dist. Bus. Conduct Comm. v. Schiff*, Complaint No. C10970156, 1999 NASD Discip. LEXIS 15, at *22 (NASD NAC Apr. 9, 1999). An individual claiming an inability to pay must also show that he or she is incapable of cutting expenses or raising additional capital. *See Dist. Bus. Conduct Comm. v. Escalator Sec., Inc.*, Complaint No. C07930034, 1998 NASD Discip. LEXIS 21, at *12-13 (NASD NBCC Feb. 19, 1998).

C. Murray's Reliance on *Fiero Brothers v. FINRA* Is Misplaced

Murray relies on the Second Circuit's decision in *Fiero Bros. v. FINRA, Inc.*, 660 F.3d 569 (2d Cir. 2011), to argue that FINRA does not have the authority to assess costs. This reliance is misplaced. In *Fiero*, the Second Circuit held that FINRA lacks the power to bring judicial actions to enforce the fines it imposes against its members and their associated persons in disciplinary proceedings. The court's ruling in *Fiero*, however, does not address the ability of FINRA adjudicators to assess costs for conducting a disciplinary hearing that results in a final disciplinary sanction. FINRA adjudicators may impose costs upon disciplined members and their associated persons, and *Fiero* does not provide otherwise.

D. Murray's Settlement Negotiations Are Irrelevant

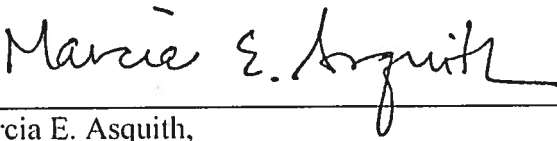
Murray also argues that, but for Enforcement's inflexibility in its settlement negotiations with him, there would not have been a hearing for which costs were assessed. Settlement negotiations and related materials, however, generally are not relevant to a FINRA disciplinary proceeding. *See* FINRA Rule 9270(h) (stating that rejected offers and proposed orders of acceptance do not constitute a part of the record "in any proceeding against the [r]espondent making the offer"); FINRA Rule 9270(j) (stating that rejected offers of settlement "may not be introduced into evidence in connection with the determination of the issues involved in the pending complaint"). FINRA "is not obligated to accept an offer [of settlement] once made." *Clyde J. Bruff*, 53 S.E.C. 880, 886 (1998), *aff'd*, 198 F.3d 253 (9th Cir. 1999). Enforcement's decision not to accept Murray's settlement terms during their negotiations is irrelevant and has no bearing on our decision to sustain the costs assessed by the Hearing Panel.

III. Conclusion

The Hearing Panel concluded that Murray failed to supervise the filing of Forms U4 by two registered representatives, in violation of NASD Rules 3010 and 2110, and FINRA Rule 2010, suspended Murray for 90 days in all supervisory capacities, and required that he requalify as a principal. In light of the fact that neither party appealed the findings or sanctions, we summarily affirm and adopt as our own the Hearing Panel's findings and the sanctions with respect to these violations. The Hearing Panel also assessed costs that it deemed fair and appropriate under the circumstances presented. After an independent review, we agree that the costs are fair and appropriate and find no reason to waive or overturn their imposition. We therefore affirm the Hearing Panel's assessment of \$3,600 in costs.⁹

⁹ Pursuant to FINRA Rule 8320, 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. We have considered and reject all other arguments advanced by the parties.

On Behalf of the National Adjudicatory Council,

A handwritten signature in black ink that reads "Marcia E. Asquith". The signature is written in a cursive style with a prominent loop at the end of the last name.

Marcia E. Asquith,
Senior Vice President and Corporate Secretary