

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C10980008
	:	
v.	:	HEARING PANEL DECISION
	:	
	:	Hearing Officer - JN
	:	
	:	
	:	June 26, 2000
	:	
Respondent.	:	

Digest

The Department of Enforcement filed a Complaint alleging that Respondent, _____, failed to respond to requests for information, in violation of Rules 8210 and 2110. Respondent failed to answer the Complaint, and a Hearing Officer issued a default decision. Thereafter, The National Adjudicatory Council remanded the proceeding for a Hearing Panel to consider the fact that _____ firm overlooked her request to change her mailing address and failed to file an amended Form U-4 reflecting that change. The staff requests thus went to an old address and never reached her. The Panel concluded that Respondent, having made a good faith effort to cause the firm to file the amendment, should not be held liable for the firm's failure, over which she had no control. The Panel accordingly dismissed the Complaint with prejudice.

Appearances

Jay M. Lippman, Esq., Assistant Chief Counsel, New York, NY, for the Department of Enforcement.

Rory C. Flynn, Esq., Chief Litigation Counsel, Washington, DC, of counsel for the Department of Enforcement.

Respondent _____ appeared pro se.

DECISION

I. Introduction

The Department of Enforcement filed its Complaint against _____ on April 13, 1998, alleging that she violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by failing to respond to staff requests for information. Respondent did not answer the Complaint. The Department, acting pursuant to an order of Hearing Officer FitzGerald, filed a Motion for Entry of Default Decision. On July 6, 1998, Mr. FitzGerald issued a Default Decision in which he found that Respondent violated Rules 2110 and 8210 by her failure to answer staff inquiries and imposed sanctions.

On March 20, 1999, _____ wrote a letter to the Office of General Counsel, NASD Regulation, asking that the default decision be set aside because she requested her employer to change her mailing address, which the firm failed to record on an amended Form U-4 to be filed with the Association. As a result, her listing in the Association's Central Registration Depository (CRD) contained an out-of-date address. Under NASD Rules 8210(d) and 9134(b)(1), service at the CRD address constitutes effective constructive service. In the present case, the NASD staff sent the Rule 8210 requests to a CRD address which was no longer hers.

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Her letter to the General Counsel argued that the failure to file an updated Form U-4, which would have changed the CRD address, was the firm's fault, and not hers. Enforcement opposed her request to set aside the default, urging that _____ herself was responsible for notifying the Association of a change in her address.

Thereafter, on July 30, 1999, the National Adjudicatory Council (NAC), noting evidence that _____ new address was reflected in the firm's records and was used by the firm in communicating with her, issued an order remanding the proceeding to the Office of Hearing Officers "to conduct an evidentiary hearing ... to (1) determine whether there was constructive notice in light of the new evidence; and (2) review the findings in light of whether the complaint should be dismissed." (Order Remanding for Further Proceedings, at p. 2). After the remand, _____ answered the Rule 8210 requests. The instant prosecution thus involves the lesser offense of failing to respond timely.

A Hearing Panel, composed of NASD Hearing Officer Nelson and two current members of the District Committee for District 10, conducted hearings in New York on March 15, 2000 and April 28, 2000.¹ The Department presented one witness and five exhibits (CX-1 through CX-5). Respondent, appearing pro se, testified and introduced forty-four exhibits (RX-1 through R-25; RX II - 1 through RX II - 19).

¹ The transcripts of those hearing are cited as "I Tr." (March 15, 2000) and "II Tr." (April 28, 2000).

II. Discussion

A. The Failure to File an Amended Form U-4

1.) Background

Respondent, an insurance agent for the New York Life Insurance Company, was also a registered representative, selling variable products and mutual funds through New York Life Securities, Inc. (I Tr. 33). On January 26, 1995, Respondent executed a New York Life Inter Office Memo instructing a company computer manager to: “[p]lease change my mailing address to _____” (RX-3; I Tr. 19-20; II Tr. 76). She also wrote the new post office box address on a form which the office manager distributed early each year in order to keep track of address changes (II Tr. 95).² She believed that these steps would produce corrected records throughout the company and at the NASD, but, in fact, the firm did not file an amended U-4 reflecting the change (I Tr. 92). For that reason, she did not receive the staff’s Rule 8210 inquiries. After contacting the New York Life Securities Department to find out why her records had not been updated, she was told that “it was overlooked” or “somebody made a mistake” (I Tr. 66; II Tr. 88).

In executing her original Form U-4 (NASD’s “Uniform Application for Securities Industry Registration or Transfer”), Respondent signed an agreement “to update Form U-4 by causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported on the form.” (CX-6, p. 4). The question in this case is whether, as Enforcement contends, _____ failed to “cause” the amendment to be made, thus rendering her liable for not responding to staff inquiries sent to the old address.

2.) Respondent's actions to "cause" the amendment

_____ explained that New York Life, a large company with many departments, channeled record changes through a central computer, so that agents did not need to make separate visits to each unit in order to correct its respective records (II Tr. 56, 58-60). For this reason, she believed that submitting the updated annual form to the office manager and writing the memorandum to the computer manager would generate changes in all her New York Life records (II Tr. 59, 62, 98-99).

That was a reasonable belief. The office manager, addressee of the annual submission, was one of the firm's employees who was responsible for filing an amended U-4 (I Tr. 112). Moreover, the firm acknowledged that its "computer system does reflect a mailing address for business-related mail for _____ of ' _____'" and recognized that "someone" made that change (CX-3, p. 1; I Tr. 125). The record further shows that Respondent received mail from various New York Life departments, addressed to that post office box (RX-12, 17, 19).

_____ believed that submitting the amendments to the firm would lead it to notify NASD of the change of address, and when she received mail from New York Life addressed to _____, she assumed that such notification had occurred (I Tr. 72-73; II Tr. 98-99). She said that no one ever gave her a Form U-4 to update and that quarterly meetings with supervisors never mentioned U-4's (I Tr. 39-40). She believed that a registered representative cannot update a U-4 by herself, but must depend upon the firm for that purpose (I Tr. 59). In her view, she was to provide the information to New York Life, which then had the "responsibility to provide that information to the NASD" (Id.).

² An example of such a form, partially filled out by Respondent, appears in the record as RX-II-2.

3.) The joint nature of the U-4 amendment process

Respondent correctly perceived the CRD amendment process as involving joint responsibilities for the representative and her firm. To effect the amendment, each must perform a task. The effort begins with the representative, who must inform the firm of the change in the first place. But under the express terms of the U-4, her obligation is to “cause” the filing of the amendment, not to make it herself. Enforcement counsel agreed with a panelist’s statement that “the individual is not allowed to directly submit the U-4, it has to be through the firm” (I Tr. 84). The Form demonstrates the correctness of that assumption. Amendments must bear the signature of an “appropriate signatory” (CX-6), a term which means “the individual designated by the broker-dealer . . . who is authorized to execute Form U-4 on behalf of the broker-dealer” (CX-6, 7, 8). Amendments to a U-4 must, therefore, be signed by a person acting “on behalf of” the firm. The representative herself is not required to sign the amendment.

_____ duty to “cause [] the amendment to be filed” must be construed in light of reality. She cannot file it herself. Nor has she any power to compel the firm’s “appropriate signatory” to sign it, or, indeed, to compel the firm to file it. Representatives can take steps to “cause” the firm to file the U-4 amendment, but they cannot insure that such a filing will happen. Yet Enforcement’s approach creates a rule of absolute liability, holding the representative responsible for the firm’s failure - over which she has no control. The linguistic difficulty created by the Form’s provisions should be resolved in _____ favor. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995) (noting the “common law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it”). Applying that principle, the Panel concludes that the

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process cannot be the sole responsibility of one party or the other. Reading the provisions together creates joint responsibility.³

The conclusion that the U-4 amendment process is a joint effort (as shown by the U-4's language and definitions) also conforms to the Panel's understanding of industry practice. The prosecutor himself agreed with a panelist that an individual representative is not allowed to submit a U-4 directly, but must do so through the firm (I Tr. 84). As he stated, "I do recognize the fact that the practical reality is that individuals who work in the business rely on their member firms to do the processing in connection with correspondence with the NASD" (I Tr. 85).

In short, _____ correctly understood that she could not unilaterally file an amended U-4, but had to rely on the firm for that final step in the process. She took steps reasonably calculated to "cause" the firm to make the filing. The ultimate failure was attributable to the firm, not Respondent. The Panel, which saw and heard her extensively, concludes that she honestly believed that she was doing what was required to effect her change of address and finds that in these circumstances, it would be fundamentally unfair to punish _____ for her firm's error.

4.) Enforcement's contentions

a.) the excerpt from the handbook

Enforcement argues that _____ did not take the right steps concerning her change of address. For this purpose, the Department relies on the testimony of a New York Life official who said that a handbook supposedly distributed to representatives required that she obtain a blank U-4 from a

³ The Panel's finding in this regard is limited to the situation where, as here, a representative is associated with a firm at the time of the change of address. For those no longer associated, the updating responsibility is not joint.

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supervisor, fill in the change, and fax the document to the Compliance Department (I Tr. 92, 112, 114).

The Panel did not find his testimony persuasive.

_____ said repeatedly that she was not familiar with the handbook and had no recollection of seeing it (I Tr. 37, 106, 110). She had never seen a blank U-4 in the area where she worked or in the possession of her supervisor or of the office manager (II Tr. 85-86); she testified that the method described by the witness for amendments “was not the procedure that was in place for you to update any information. It was always given to your local office who then initiated whatever changes had to be done” (II Tr. 67).

The firm did not require representatives to acknowledge having received or read the handbook (I Tr. 123), and the prosecutor agreed that there was no testimony that _____ even saw it (II Tr. 46). There were also inconsistencies between the witness’ testimony and the language of the text. As he recognized, the words “copy” and “fax” were not in the excerpt relied upon (I Tr. 127).⁴ Moreover, the witness was not employed by New York Life at the relevant time and knew only what others had told him. In addition, Enforcement introduced only the excerpt and the Panel could not examine the statement in the context of the handbook as a whole. Considering all of these circumstances, the Panel was not persuaded that the alleged company requirement should be imputed to _____.

⁴ The excerpt states that “[I]t is the responsibility of each Registered Representative to update NASD records whenever changes occur Any such changes should be submitted to the Compliance Department on Form U-4” (CX-3, p. 00035).

b.) the asserted failure to “follow-up”

Enforcement next contends that _____ is liable for her failure to answer the staff requests because she failed to follow up on her effort to effect a change of address. Nothing in Form U-4 requires a follow-up, and the Department cites no rule requiring such action. Even the New York Life witness admitted that “I’m unaware of any procedure for following up, for them to follow up” (I Tr. 121). Imposing a follow-up requirement on _____ would be especially unfair. She knew that the company had received and effected the change of address - indeed, she was receiving New York Life mail at the new address. In these circumstances, she had no reason to suspect that the firm had not also forwarded the change to the NASD.

Enforcement cites In re Frank R. Rubba, Exchange Act Rel. No. 40238, 1998 SEC LEXIS 1499 (July 21, 1998), where the Commission said that Respondent, whose firm failed to update his U-4, “should have ensured that his Form U-4 contained the correct home address” (dictum at * 9). In that case, unlike the present one, there was no showing the Respondent requested his firm to change the address. In any event, the Panel declines to treat the word “ensure” as requiring some undefined follow-up procedure. Such a new mandate would not likely stem from one word in dictum. Moreover, even a follow-up would not guarantee the firm’s filing of an amended U-4; various human and technical errors could still intervene to prevent the submission. The only way for a representative to “ensure” the filing is to make it herself. Yet Enforcement agreed with a panelist’s opinion that “the individual is not allowed to directly submit the U-4, it has to be through the firm” (I Tr. 84). Finally, even if the word “ensure” was intended to impose some additional requirement, it would be manifestly unfair to hold _____ responsible for failing to perform a duty which was not

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articulated until three years after she told New York Life to change her address. For these reasons, the Panel declines to hold this Respondent liable under Rules 8210 and 2110 because she failed to follow up on her requested change of address.

c.) the cases

Enforcement cites various cases for the proposition that registered representatives have their own updating responsibility wholly apart from their firms (Complainant's Legal Memorandum, filed March 31, 2000). The Panel believes that none of these cases mandates a finding of liability in the circumstances of this case.

Several cases simply state the rule that representatives have a continuing duty to update their Form U-4's,⁵ a duty which _____ did not dispute or ignore, and, indeed, recognized in this case. Language in cases stating that the representative's updating responsibility cannot be shifted to the firm does not involve facts like those in issue here. In In re Frank R. Rubba, Exchange Act Rel. No. 40238, 1998 SEC LEXIS 1499 (dictum, July 21, 1998), there was no showing that the Respondent requested his firm to effect the change of address. _____, by contrast, sent a memorandum to the computer manager and a form to the office manager. In In re Nazmi C. Hassanieh, Exchange Act. Rel. No. 35029, 1994 SEC LEXIS 3862 (November 30, 1994), there was also no request by the representative to his firm regarding the change of address. Moreover, in that case there was evidence that the Respondent received the first Rule 8210 request at his supposedly outdated CRD address. In In re John A. Malach, Exchange Act

⁵ In re Richard J. Lanigan, Exchange Act Rel. No. 34272, 1995 SEC LEXIS 1899 (July 27, 1995); In re Jonathan Garrett Ornstein, Exchange Act Rel. No. 31557, 1992 SEC LEXIS 2972 (December 3, 1992); In re William T. Banning, Exchange Act Rel. No. 28588, 1990 SEC LEXIS 3453 (October 31, 1990); In re John H. Degolyer, Exchange Act Rel. No. 12326, 1976 SEC LEXIS 1939 (April 8, 1976); District Business Conduct Committee v. Eliezer Gurfel, 1998 NASD Discip. LEXIS 52 (NAC, June 12, 1998).

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Rel. No. 32743, 1993 SEC LEXIS 2026 (August 12, 1993), the representative received Rule 8210 requests, but relied on his firm to answer them. Malach does not involve the problems inherent in updating a Form U-4.

In District Business Conduct Committee v. Edwin H. Haw, Jr., 1993 NASD Discip. LEXIS 241 (NBCC, September 3, 1993), Haw notified his firm that his address had changed to one in St. Paul, and the firm failed to file an amended U-4 reflecting that change. In holding him liable for failing to answer staff requests for information, the NBCC stated that the burden of updating the U-4 was that of the “registered person, not the member firm” (at *16). The facts in Haw differed from those here. The St. Paul address was out of date by the time the staff submitted its Rule 8210 requests, and mail sent to that address shortly before the first request was returned as “Unclaimed” (at *6). Meanwhile, Mr. Haw moved to a Chicago residence (*2, *4), a change apparently not conveyed to the firm. The failure to file an amended U-4 reflecting the out-of-date St. Paul address thus had no practical significance. The instant case, by contrast, involves a valid and current notice. An amended U-4, showing the post office box (where _____ received mail then and now) would have channeled the staff’s requests to her, and this Complaint would never have been filed. It is one thing to find the representative responsible when he fails to update his own notice to the firm. Holding _____ responsible, despite a current and correct notice to her firm, is a more difficult step, which, in the Panel’s view, is not mandated by Haw.

In addition to distinctions, none of the cases reflects consideration by the Commission or the NBCC of the issues developed on this record concerning the language, instructions, and definitions of the U-4. As shown, those items support the conclusion that amending a Form U-4 is not, and cannot be, the sole responsibility of the representative. Although she has the duty of “causing” the amendment,

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she cannot file it. That task requires an “appropriate signatory,” signing “on behalf of” the firm. The cases do not address the dual roles implicit in that language.⁶

Finally, the Hearing Panel notes that Enforcement made precisely the same argument to the National Adjudicatory Council (citing some of the same cases) in resisting _____ request that the Council set aside the default.⁷ NAC nevertheless remanded the case, expressly directing the Hearing Panel to consider dismissal of the Complaint as a possible outcome. The Panel, like a trial court, “must implement both the letter and spirit of the mandate, taking into account the appellate court’s opinion and the circumstances it embraces.”⁸ If the precedents were clear and dispositive, as Enforcement argued before the NAC, that tribunal would not likely have remanded the case with such instructions.

B. The Use of a Post Office Box Address

Although there was brief discussion during the hearing as to whether a post office box could be a valid “residential” address for CRD purposes, the Panel believes that this record does not sufficiently present the issue. Enforcement made little of the matter and, indeed, had no consistent position about it (See I Tr. 80; II Tr. 26-28). The prosecution challenged _____ not because she used a post office box, but because she had not done enough to change her address to that box. The Department cited no authority proscribing the use of a post office box as a CRD address. Nor did it develop the record as to CRD policy or industry practice regarding the use of post office box addresses. Nothing in the U-4 form or in its instructions precludes such a box as a sole or alternative address. _____

⁶ District Business Conduct Committee v. Ashton N. Gowadia, 1997 NASD Discip. LEXIS 68 (NBCC, November 5, 1997) involved a representative’s duty to respond to Rule 8210 requests - not the U-4 amendment process, which, as shown, necessarily involves the firm.

⁷ Complainant’s Response to Respondent’s Request to Set Aside Default Decision, pp. 4, 5-6 (“a ruling favorable to Respondent would be contrary to established case precedent, which has held that the duty to respond to requests for information ... lies with the associated person and cannot be shifted to third parties, including member firms”).

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reasonably believed that a post office box address was the safest way to assure that her mail reached her, especially at a time when she had several temporary residential addresses (I Tr. 41, 76-78).

Moreover, a post office box (whose very function is to receive mail) may well be more reliable for service than a physical residence or office. Mail sent to such an address can have legal significance.⁹ _____, under prosecution for failing to answer a request mailed to an old residence, should not be faulted for choosing a more effective way of receiving mail. On this record, the Panel cannot conclude that her effort was doomed from the start because she used a post office box address.

C. Conclusion.

The Department of Enforcement has failed to prove that Respondent, _____, violated Rules 8210 and 2110. The complaint is hereby dismissed with prejudice.¹⁰

HEARING PANEL

By: Jerome Nelson
Hearing Officer

Dated: Washington, DC
June 26, 2000

⁸ In re Vizcaino v. United States District Court, 173 F.3d 713, 719 (9th Cir. 1999).

⁹ See Notice to Members 99-77, which provides that letters to NASD concerning certain address changes should be sent to “Central Registration Depository, National Association of Securities Dealers, Inc., P.O. Box 9495, Gaithersburg, MD 20898-9401.” See also District Business Conduct Committee v. James C. Arnold, 1997 NASD Discip. LEXIS 79 (NBCC, February 25, 1997) (Respondent’s failure to answer Complaint mailed to post office box address furnished by him was predicate for default); District Business Conduct Committee v. Toney L. Reed, 1999 NASD Discip. Lexis 26 (NAC, August 6, 1999) (requests sent to post office box supported sufficiency of staff’s efforts to communicate with Respondent).

¹⁰ The Hearing Panel 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.