

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	
	:	
v.	:	Disciplinary Proceeding
	:	No. C10990121
NELSON C. ONYEJIKA	:	
(CRD #2864207)	:	Hearing Panel Decision
Southbound Brook, NJ,	:	on Remand
	:	
	:	Hearing Officer - EBC
Plainfield, NJ,	:	
	:	
	:	October 20, 2000
Bloomfield, NJ,	:	
	:	
	:	
East Orange, NJ,	:	
	:	
	:	
Sommerville, NJ,	:	
	:	
	:	
and	:	
	:	
Newark, NJ,	:	
	:	
	:	
Respondent.	:	

Digest

The Department of Enforcement’s Complaint alleges that Respondent Nelson C. Onyejiaka (“Onyejiaka” or the “Respondent”), a former registered representative, violated NASD Conduct Rule 2110 by failing to disclose that he had been convicted of a felony on a Uniform Application for

Securities Industry Registration (Form U-4). After a hearing, the majority of the Hearing Panel issued a Decision finding that Onyejiaka violated Rule 2110, as alleged in the Complaint, and suspending him from associating with any NASD member in all capacities for eighteen months and fining him \$5,000 (which shall not become due and payable unless and until he seeks to re-enter the securities industry). The National Adjudicatory Council (“NAC”) called the Decision for review and remanded the case to the Hearing Panel for it to make various credibility determinations or, in its discretion, to hold an additional hearing, and to clarify the use of the term “willful” in the Decision. The Hearing Panel recognizes the concerns articulated by the NAC and would have preferred to adduce additional evidence, which may have allowed the Panel to reach a unanimous conclusion on the open credibility issues. As a practical matter, however, the only witnesses who might have relevant information are no longer in the industry and not subject to the Association’s Rule 8210 powers.

The majority of the Hearing Panel continues to find that, notwithstanding the lack of agreement on these credibility issues, Enforcement proved, by a preponderance of the evidence, that Onyejiaka committed the violations alleged in the Complaint. The majority also concludes that Enforcement has not demonstrated that his misconduct was so egregious as to warrant a bar and reaffirms the sanctions it imposed in its prior Decision. Finally, the Hearing Panel has re-considered the question of whether Onyejiaka is subject to a statutory disqualification by “willfully” causing the Form U-4 to be false and concludes that he is not.

Appearances

William A. St. Louis, Esq., Senior Regional Attorney, New York, New York (Rory C. Flynn, Chief Litigation Counsel, (Of Counsel) Washington, DC, for the Department of Enforcement.

Nelson C. Onyejiaka, *pro se*.

DECISION ON REMAND

I. Procedural History

On August 2, 1999, Enforcement filed a one cause Complaint against Onyejiaka alleging that he violated NASD Conduct Rule 2110 by failing to disclose on a Form U-4 that he had been convicted on charges of importing heroin, which is a felony. Onyejiaka filed an Answer to the Complaint on August 27, 1999, in which he claimed that he “did not willfully file any false application with an intent to deceive any one or association.” In his Answer, Onyejiaka also asserted that the case should be “closed” because he would not be able to obtain documentary evidence or contact potential witnesses, given that his employer firm was no longer in business. Although Onyejiaka did not request a hearing in his Answer, he did so at the Initial Pre-Hearing Conference in this proceeding.

Following the hearing, the majority of the Hearing Panel issued its Decision holding that Onyejiaka violated NASD Conduct Rule 2110 as alleged. For sanctions, the majority of the Hearing Panel suspended Onyejiaka from associating with any NASD member in all capacities for 18 months and fined him \$5,000, which was not to become due and payable unless and until he sought to re-enter the securities industry.¹

¹ The majority of the Hearing Panel also ordered Onyejiaka to pay costs in the amount of \$1,680, which included an administrative fee of \$750 and hearing transcript costs of \$930.

On August 2, 2000, the NAC advised the Parties and the Office of Hearing Officers that the proceeding had been called for review by the NAC's Review Subcommittee; that the Review Subcommittee had ordered that the matter be remanded to the Hearing Panel; and that an order remanding the proceeding would follow. On August 30, 2000, the NAC issued an Amended Remand Order directing the Hearing Panel primarily to: (1) make determinations as to the credibility of certain aspects of Onyejiaka's testimony; and (2) clarify its understanding of the term "willful" in rejecting Enforcement's argument that Onyejiaka is subject to statutory disqualification, pursuant to Article III, Section 4(f) of the NASD By-Laws, for willfully making or causing to be made false or misleading statements in the February 1997 Form U-4.

II. Prior Decision

In its prior decision, the Hearing Panel found that there is no dispute that, on September 27, 1989, Onyejiaka was arrested on charges of importation of heroin (which is a felony), and that, on or about November 8, 1990, he was convicted on this charge in federal court and sentenced to six months imprisonment, fined \$50, and subject to ten years of supervision. Approximately six years thereafter, on or about November 2, 1996, Onyejiaka completed portions of a Form U-4 (the "November 1996 Form U-4") as part of the employment application process used by Meyers Pollock Robbins, Inc. ("Meyers Pollock" or the "Firm"), a former NASD member firm. The November 1996 Form U-4 was not filed with the NASD. On or about February 26, 1997, in anticipation of taking the Series 7 qualification examination, Onyejiaka completed portions of a second Form U-4 (the "February 1997 Form U-4"); the February 1997 Form U-4 was filed with the NASD. Neither the November 1996 Form U-4 nor the February 1997 Form U-4 included any disclosure of Onyejiaka's felony conviction. On or about August 19, 1997, after Onyejiaka became registered through Meyers Pollock, the Firm

received a Federal Bureau of Investigation Report, which disclosed Onyejiaka's felony conviction, and then filed a Form U-5 discharging Onyejiaka for his alleged failure to disclose this information on his Form U-4.

The majority of the Hearing Panel noted, in its prior decision, that: (1) the explanations for the non-disclosures that Onyejiaka gave during his investigative testimony and at the Initial Pre-Hearing Conference were different from the explanations for the non-disclosures he gave in response to Enforcement's motion for summary disposition and at the hearing; (2) Onyejiaka implied and "it is no doubt possible" that someone else (presumably a Meyers Pollock employee) completed the portions of the February 1997 Form U-4 that he did not complete, based on the information he provided in the November 1996 Form U-4; and (3) given that a Form U-4 is in booklet form, it was "puzzled" about the circumstances that may have led the Respondent to complete pages 1, 2, and 4, but not page 3, of the November 1996 Form U-4.² The Hearing Panel did not resolve these issues in its prior Decision or indicate whether it found Onyejiaka's testimony on these issues to be credible.

In its prior Decision, the Hearing Panel also noted that, according to the Respondent, when he advised the Firm about his criminal conviction (some time before it received the FBI Report), the Branch Office Manager advised him that there was no need to "worry about it" The Hearing Panel did not indicate whether it found this testimony to be credible.

Notwithstanding these open issues, the majority of the Hearing Panel concluded, based on relevant SEC and NASD precedent that, because Onyejiaka admitted signing the February 1997 Form

² The NAC's Amended Remand Order inadvertently indicates that this comment related to the February 1997 Form U-4.

U-4 and because that Form did not disclose his felony conviction, that Enforcement had proved that Onyejiaka violated Rule 2110.³

III. Hearing Panel's Consideration on Remand

A. Credibility Issues

The NAC has directed the Hearing Panel to resolve the open issues identified above and to explain, based on Onyejiaka's demeanor during the hearing and otherwise, whether it found Onyejiaka's testimony on these issues to be credible. The Hearing Panel appreciates the NAC's concerns in this regard. However, while the Hearing Panel is able to reach consensus that Onyejiaka's investigative testimony and hearing testimony were inconsistent, and that there were certain aspects of Onyejiaka's testimony that were "puzzling," simply put, the members of the Hearing Panel are not in agreement as to Onyejiaka's credibility or the inferences to be drawn from his demeanor.⁴ The members of the Hearing Panel do not agree on the extent to which, if at all, Meyers Pollock completed the February 1997 Form U-4 or assured Onyejiaka that there was no need to worry about the non-disclosures on the Form U-4.

Absent testimony from Meyers Pollock employees, including the Branch Office Manager, the Hearing Panel remains unable to determine the circumstances surrounding Respondent's completion of the November 1996 and February 1997 Form U-4s, including what, if any, instructions he was given

³ See, e.g., In re Robert E. Kauffman, Exchange Act Release No. 33219, 1993 SEC LEXIS 3163, at *5 (Nov. 18, 1993) (construing former Rule 2110, Article III, Section 1) (applicant has an obligation to ensure the accuracy of the information on the Form), aff'd, 40 F.3d 1240 (3d Cir. 1994) (table); District Business Conduct Committee No. 1 v. Kark, 1995 NASD Discip. LEXIS 212 (NBCC May 18, 1995) (concluding that the respondent, by signing a Form U-4 "was responsible for verifying that the personal information on it was correct" even if his employer firm prepared the Form). See also, e.g., District Business Conduct Committee No. 7 v. Prewitt, 1998 NASD Discip. LEXIS 37, at *6 (NAC Aug. 17, 1998) ("[t]he violation of providing false information to the NASD requires only that the complainant prove the information was false.").

about the completion of the Forms or what he was told after he disclosed his criminal conviction to the Firm. Of course, it would be preferable to obtain answers to these questions and, in fact, the Respondent had indicated an interest in calling three former Meyers Pollock employees as witnesses at the hearing. And, in light of the concerns articulated by the NAC, were these individuals still employed in the securities industry and subject to the Association's jurisdiction, the Hearing Panel would have determined to take additional testimony.

There is no doubt that Enforcement bears the burden of proving its case by a preponderance of the evidence. However, based on the relevant SEC and NASD precedent, the majority of the Hearing Panel concludes that Enforcement satisfied its burden and reaffirms its prior decision. If scienter were required to find a violation of Rule 2110 – which, of course, is not the case,⁵ the Hearing Panel would reach a different conclusion.

B. Statutory Disqualification

The NAC also has directed the Hearing Panel to clarify its understanding of the term “willful” in rejecting Enforcement's argument that Onyejiaka is subject to statutory disqualification, under Article III, Section 4(f) of the NASD By-Laws, for willfully making or causing to be made false or misleading statements in the February 1997 Form U-4. Article III, Section 4(f) of the By-Laws, provides:

⁴ For this reason, the Hearing Panel did not include ultimate findings as to Respondent's credibility in its prior Decision.

⁵ Rule 2110 articulates a “broad ethical principle” and empowers the NASD to discipline its members and associated persons for violations of just and equitable principles of trade, irrespective of whether the misconduct rises to the level of fraud. In re Timothy L. Burkes, 51 S.E.C. 356 (1993), aff'd mem., Burkes v. SEC, 29 F.3d 630 (9th Cir. 1994). See also District Business Conduct Committee No. 3 v. Aspen Capital Group, Complaint No. C3A940064, 1997 NASD Discip. LEXIS 53, at * 7 (NBCC Sept. 19, 1997).

[a] person is subject to a “disqualification” with respect to . . . association with a member, if such person: . . . has willfully made or caused to be made in any application . . . to become associated with a member of a self-regulatory organization . . . any statement which was at the time, and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application . . . any material fact which is required to be stated therein. (Emphasis added.)

It is well-settled that, under Section 15(b)(4) of the Securities Exchange Act of 1934, which authorizes the SEC to impose sanctions against broker-dealers and registered persons, a finding of willfulness does not require an intent to violate the law or a specific rule, but only an intent to commit the act that constitutes the violation. See, e.g., In re Jacob Wonsover, Exchange Act Release No. 41123, 1999 SEC LEXIS 430, at *34 & n.36 (March 1, 1999), aff’d, Wonsover v. SEC, 205 F.3d 408 (D.C. Cir. 2000); Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976), cert. denied, 434 U.S. 1009 (1978); Tager v. SEC, 344 F.2d 5,8 (2d Cir. 1965); Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949). The Hearing Panel applies this standard in determining whether Onyejiaka is subject to a statutory disqualification under Article III, Section 4(f) of the NASD By-Laws. Based on the evidence in the record, however, the Panel cannot conclude that Onyejiaka intentionally failed to

disclose his criminal conviction on the February 1997 Form U-4 and, therefore, reaffirms the Decision of the majority of the Hearing Panel in this regard.⁶

Majority of Hearing Panel.

By: _____

Ellen B. Cohn
Hearing Officer

Copies to:

William A. St. Louis, Esq. (electronically and via first class mail)

Rory C. Flynn, Esq. (electronically and via first class mail)

Mr. Nelson C. Onyejiaka (via overnight courier and first class mail)

⁶ One member of the Hearing Panel continues to dissent from the majority decision for the reasons previously articulated in the “Statement of Dissenting Panelist.”