

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

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DEPARTMENT OF ENFORCEMENT,	:	Disciplinary Proceeding
	:	No. C10990172
Complainant,	:	
	:	
v.	:	<b>HEARING PANEL</b>
	:	<b>DECISION</b>
	:	
JOHN L. BAUER (CRD #2412311)	:	
	:	Hearing Officer - JN
Bronx, New York,	:	June 12, 2000
	:	
	:	
Respondent.	:	

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*Digest*

The Complaint charged Respondent John L. Bauer with cheating on a General Securities Representative Series 7 Qualification examination, in violation of NASD Conduct Rule 2110 and NASD Membership and Registration Rule 2110, and with lying to the Enforcement staff during an on-the-record interview, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. Bauer filed an Answer denying the allegations, and requested a hearing. The Hearing Panel found that the Respondent committed the violations charged in the Complaint. As sanctions, the Hearing Panel imposed a bar for each violation and ordered that Respondent pay costs in the amount of \$972 for transcripts and \$750 as a general administrative fee.

## *Appearances*

Jay M. Lippman, Esq., Regional Counsel, Department of Enforcement, New York, NY.

William St. Louis, Esq., Senior Regional Attorney, Department of Enforcement, New York, NY.

Daniel A. Druz, Esq., Manasquan, NJ, for Respondent John L. Bauer.

## **DECISION**

### **I. Introduction**

The Department of Enforcement filed its Complaint against the Respondent on September 29, 1999. The First Cause of Complaint alleges that the Respondent cheated on the Series 7 examination by having an impostor take the examination in his place on December 1, 1993, in violation of NASD Rules 2110 and 1070.<sup>1</sup> The Second Cause, resting on Rules 8210 and 2110, alleges that Respondent failed to respond truthfully to questions about the examination in testifying that he signed the examination sign-in logs and took the examination. Respondent filed an Answer denying the charges.

A hearing was held on April 17, 2000, before a Hearing Panel, composed of an NASD Hearing Officer and two current members of the District Committee for District 10.

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<sup>1</sup> Suspicions about the examination came to light during the staff's 1999 investigation of a customer complaint on other matters. The focus of the investigation shifted to the examination when the investigator "noticed what appeared to be an inconsistency in Mr. Bauer's test scores" (Tr. 11). As explained *infra*, "Bauer" supposedly passed the Series 7 with a high score, while later failing the easier Series 63 examination on four separate occasions.

Enforcement introduced testimony (“Tr.”) from four witnesses and offered 33 Complainant’s Exhibits (CX-1-33) during the hearing.<sup>2</sup> Respondent did not testify and presented no witnesses and no exhibits.

After considering the evidence presented at the hearing, the Hearing Panel finds that Respondent arranged for an impostor to take the December 1993 Series 7 examination in his name and gave false investigative testimony to the NASD Regulation staff about various aspects of the examination, including insistence that he took the examination himself. The Panel, therefore, finds that Enforcement proved the allegations of the Complaint. As sanctions for each offense, the Panel bars Respondent from associating with any NASD member in any capacity. In addition, the Panel orders that he pay costs in the amount of \$972 (transcript) and \$750 (administrative fee).

## **II. Discussion**

### **A. Jurisdiction**

Article V, Section 4 of the NASD By-Laws creates a two-year period of retained jurisdiction over formerly registered persons, covering conduct which began before the registration terminated and failures to provide information requested by the Association while subject to its jurisdiction. Bauer’s registration terminated in March of 1999 (Stipulation, par. 3). Enforcement filed its Complaint on September 29, 1999, within two years after that termination. The alleged cheating occurred in 1993 and the alleged false statements were given in February of 1999, when NASD Regulation investigated the matter. Both counts of the Complaint allege

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<sup>2</sup> Enforcement’s Exhibits were admitted into evidence without objection. Tr. 30.

conduct which began before the termination, and NASD thus has jurisdiction over this proceeding.

## B. The Evidence

### 1. The Examination

On December 1, 1993, a “John Bauer” took and passed the NASD’s Series 7 examination (CX-1, p. 5; CX-14). This one-day test involved two sessions, separated by a break. Each applicant was required to sign in upon arrival at each session (Tr. 36-37). On the sign-in sheet for December 1, 1993, “John Bauer” signed in for the first session of the examination at 9:05 a.m. and signed out at 10:04 a.m. (CX-14, at 53). The same person signed in to the second session at 10:47 a.m. and signed out at 11:43 a.m. (Id., at 54).

A handwriting expert testified that the writing on the sign-in sheets for that examination was not that of Respondent Bauer (CX-20, 31). After comparing the signatures on the sign-in sheets with those on other documents containing Respondent’s genuine signature, the expert had “no doubt whatsoever” that the questioned signatures were not written by Bauer (Tr. 91; CX-20 at 93). Using comparative charts, he detailed the differences (CX-20, CX-31; Tr. 88-90) and concluded that the true Bauer signatures were “completely inconsistent” with those on the examination sign-in sheets, and that the latter “bore no resemblance to the known signatures” (Tr. 85). This expert had years of experience, and his credentials were unquestioned by Bauer’s counsel. The Panel found him to be careful, forthright, and persuasive.

Moreover, the Panel’s own comparison of the writings also leads inevitably to the conclusion that the writer of “John Bauer” on the sign-in sheets was not the Respondent. See

District Business Conduct Committee v. Donnell George Vaughn, 1995 NASD Discip. LEXIS 233 at \*33-34 (NBCC, October 24, 1995), where, even without expert testimony, the NBCC concluded that a purported signature “appears markedly different from” the genuine one. The expert testimony in this case, confirmed by the Panel’s own comparison, establishes that a “John Bauer” impostor took the examination in question.

This conclusion is further supported by other factors.

Respondent’s version of his purported test-taking was significantly inconsistent with the actual facts. The examination in question was given at a testing facility on 42<sup>nd</sup> Street in New York (Tr. 16; CX-20, CX-31, p. 1). Respondent testified before NASD investigators that he took the test in December of 1993 at Penn Plaza, “somewhere in the thirties” (CX-25, p. 155). At that time, NASD had only two test facilities, one at 42<sup>nd</sup> Street and the other at 33 Whitehall Street; the Penn Plaza test facility (on 34<sup>th</sup> Street and Eighth Avenue) did not open until approximately 1996 (Tr. 35-36). In addition, Bauer’s description of the Penn Plaza facility, where he supposedly took the examination, was inaccurate (CX-25, p. 159-160; Tr. 24).

Respondent further testified that he arrived at the test facility between 7:30 a.m. and 8:30 a.m. - “a little early ... [t]hey made me wait a couple minutes” (CX-25, p. 156). But the sign-in sheet for the examination in question shows that the purported “John Bauer” signed in at 9:05 a.m., thirty-five minutes after the starting time (CX-14, CX-20, p. 00096). The testing manager explained that a person who signed in at 9:05 a.m. “was probably running a little late” (Tr. 40).

Respondent testified that it took him about two hours to complete the first part of the examination, and two to two and one half hours to complete the second part (CX-25, pp. 178, 181). The sign-in record shows that “John Bauer” completed each part in approximately one hour (CX-14).

In addition to these inconsistencies, other circumstances also support Enforcement’s case. The purported “John Bauer,” passed the December 1993 Series 7 examination with a grade of 84 (CX-1), a score (14 points above passing) which the Assistant Director of NASD’s Testing and Continuing Education Department described as “fairly high” (Tr. 76). The real John Bauer took and failed the Series 63 examination on several occasions over the next three months (CX-1; Stipulation, par. 8). The pass rate for that examination is historically higher than that for the Series 7 (Tr. 75-76), and the Assistant Director believed that “[I]n my experience [twenty years with the Department] anyone who would pass the 7 with 84 percent, would also pass the Series 63 on the first attempt” (Tr. 77).

The purported “John Bauer” successfully finished the Series 7 examination in two hours (CX-14), a performance which the testing manager believed to be “very unique” because that examination was designed to last six hours (Tr. 46). But, as noted, after this “very unique” achievement on the harder Series 7 test, the real John Bauer failed the easier Series 63 examination on four separate occasions.

## 2. The Rule 8210 Interview

The parties agreed that “[o]n February 9, 1999, Respondent participated in an on-the-record interview that the District 10 staff of NASD Regulation, Inc., conducted pursuant to

NASD Procedural Rule 8210” (Stipulation, par. 7). During that interview, Bauer repeatedly testified that he had signed the sign-in logs for the Series 7 examination given in December of 1993 and that he had passed the examination (CX-24, p. 10; CX-25, pp. 167, 179, 183, 185, 186, 188). As shown, the evidence demonstrates the falsity of these answers.

### C. Respondent’s Argument for Dismissal

Respondent’s counsel sought dismissal of the proceeding, arguing that Enforcement should have called the proctor of the Series 7 examination as a witness (Tr. 118-124, 129). The issue arose when the testing manager for the contractor who administered the test volunteered on cross-examination that the proctor had, at the time of that examination, expressed a concern about this applicant: “that the person who took the Series 63 ... was not the same person who took the Series 7” (Tr. 51).

The proctor’s absence was wholly understandable. Her name was unknown to Enforcement until the day of the hearing (Tr. 132). The prosecutor had not asked the testing manager to inquire about the proctor’s identity and she had not told him that the proctor was still employed by the contractor (Tr. 49-50). The NASD examiner made no effort to contact the proctor, believing that an effort to find such a person would be futile because of high turnover and the passage of years (Tr. 105). Nothing in these circumstances remotely suggests prosecutorial misconduct or supports dismissal as necessary “to protect the integrity of the system” (Tr. 124).

Nor can Enforcement be faulted for not seeking to produce this witness once she was identified. Her observations, as reported by the testing manager, would have been cumulative

and, indeed, would have confirmed the Department's position that the persons who took the two examinations were not the same. There is nothing in the record to suggest that the proctor would have offered exculpatory testimony.

Respondent's counsel argued that the proctor evidently failed to detect a discrepancy between Bauer and the person who appeared for the examination and said that he would thus have cross-examined her on the circumvention of the identification checks (Tr. 119, 129-130). At the time, NASD required applicants to provide a photo identification and it compared the applicant's face and signature to the tendered identification. The check of the picture and signature on the applicant's identification (Tr. 52-53, 56-57) could have been evaded, however, through use of a counterfeit driver's license, containing the impostor's photo and signature as "Bauer." In any event, the issue is not how the impostor slipped through the safeguards, but whether the real "John Bauer" took and passed the Series 7 examination in December of 1993. As shown above, the record overwhelmingly establishes that he did not. In these circumstances, the Panel concludes that the absence of the newly-identified proctor had no significance.

#### D. Conclusion

The Panel is persuaded by the totality of the evidence that Bauer arranged for an impostor to take and pass the Series 7 examination, in violation of Rules 2110 and 1070. The Panel also finds that Respondent was untruthful in testifying during his interview that he signed the logs and took the Series 7 examination, and that he thus violated Rules 8210 and 2110.

### III. Sanctions

The NASD Sanction Guidelines (1998) for “Cheating, Using an Impostor, or Possessing Unauthorized Materials - On Qualifications Examinations” state that “[a] bar is standard” (at p. 38). In certain cases, adjudicators may consider a suspension “if mitigation is documented” (Id.). This case contains no mitigation of any kind; indeed, Respondent put in no case on his own behalf. There is convincing evidence that Respondent had an impostor take the examination in question and (in several respects) lied about his conduct to an NASD investigator. In these circumstances, the Panel follows the Guideline and bars Bauer from associating with any member in any capacity.

As to the Rule 8210 violation, the Guideline states that “a bar should be standard” if Respondent did not respond in any manner (Id., at 31). In the instant case, Bauer failed to respond truthfully, and there are no mitigating circumstances. Here, as in Department of Enforcement v. Marlowe Robert Walker, 2000 NASD Discip. LEXIS 2, at \*30 (NAC, April 20, 2000), “untruthful responses [are] as harmful as a complete failure to respond and, as such, ... a bar is the appropriate sanction.”

Finally, the Hearing Panel orders Respondent to pay costs in the amount of \$972 for transcripts and \$750 as a general administrative fee.<sup>3</sup> Pursuant to Notice to Members 99-86, no fines will be assessed. These sanctions shall become effective on a date set by the Association, but not earlier than 30 days after this decision becomes the final disciplinary action

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<sup>3</sup> The Panel declines Enforcement’s request (Tr. 116) to add the expert’s fees as additional costs. In the circumstances of this case, it is sufficient that Respondent pay the standard transcript and administrative fees.

of the Association; however, the bar shall become effective on the date this Decision becomes the final disciplinary action of the Association.<sup>4</sup>

**HEARING PANEL**

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By: Jerome Nelson  
Hearing Officer

Dated: Washington, DC  
June 12, 2000

Copies to:

John L. Bauer (via overnight delivery service and first class mail)  
Dan A. Druz, Esq. (via facsimile and first class mail)  
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<sup>4</sup> 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.