

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C10980070
	:	
	:	
	:	
v.	:	HEARING PANEL DECISION
	:	
	:	Hearing Officer - JN
JOHN J. LEE	:	
(CRD #1264054),	:	
West Babylon, NY	:	June 18, 1999
	:	
	:	
Respondent.	:	

Digest

The Department of Enforcement filed a Complaint alleging that Respondent, John J. Lee, violated NASD Rules 8210 and 2110 by failing to respond to requests for information. The Hearing Panel found that Lee did fail to respond. As sanctions, the Hearing Panel imposed a fine of \$25,000, a one-year suspension, and a requirement that Respondent re-qualify. The Panel also ordered that Respondent pay hearing costs of \$750 and transcript costs of \$563.

Appearances

Gene E. Carasick, Esq., Regional Counsel, Atlanta, GA, for the Department of Enforcement.

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

John J. Lee, pro se.

DECISION

I. Introduction

The Department of Enforcement filed its Complaint against Respondent Lee on September 9, 1998, alleging that he violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by failing to respond to staff requests for information. A Hearing Panel, composed of an NASD Hearing Officer and a current and former member of the District Business Conduct Committee for District 10, conducted hearings in New York on April 8, 1999 and May 12, 1999. The Department presented one witness and nine exhibits (CX-1 through CX-9). Respondent testified and introduced one exhibit (R-1).

The Panel finds that Respondent failed to respond to NASD staff requests, in violation of Rules 2110 and 8210, and that a fine of \$25,000, suspension in all capacities for a period of one year, and a re-qualification requirement are appropriate sanctions.

II. Liability

Respondent Lee was registered as a general securities principal with Island Securities, Inc. (Tr. 16). The firm terminated his affiliation in March of 1997, stating in the Form U-5 that he had been named in “arbitrations or customer complaints” (Tr. 15). Thereafter, Island terminated its own membership on July 24, 1997 (Tr. 17, 28). It is undisputed that Respondent received and failed to make written responses to NASD staff requests for information, which stemmed from a review of the Form U-5 filed after he left Island. The requests, dated July 30, 1997 and January 13, 1998, were issued pursuant to Rule 8210 (CX-4, 6). Although Respondent testified that he responded telephonically, a contention discussed infra in the Sanctions section, there is no dispute that the requests called for a written response. As Respondent acknowledged, “[a]nd I, you know, I should have obviously responded in writing, but I never did” (Tr. 49).

Respondent's liability is thus clear. His failure to respond to the staff's Rule 8210 inquiries constitutes a violation of that Rule and of NASD Conduct Rule 2110.

III. Sanctions

A. The alleged telephonic response

Mr. Lee testified repeatedly that he had responded by telephone to the first request - and possibly to the second, as well (Tr. 41, 44, 49, 51-52, 101, 105).

The NASD staff investigator who allegedly received the call had no recollection of it, and went on to explain that her records would normally reflect such a call, but did not do so in Lee's case (Tr. 22-25; CX-8, CX-9). She did not deny receiving the call, stating "[i]t's possible that he did call. I don't recall" (Tr. 27, 34). Her best judgment was that although one call "might have" occurred and "slipped through" her records, several or "numerous" calls, as Respondent originally contended, would have resulted in notations (Tr. 35).

When Respondent testified that he was experiencing difficulty with the telephone company in obtaining records, the Panel, on its own motion, gave him an additional thirty days for that purpose (Tr. 54-56). Lee later produced records (Exhibit R-1), which purportedly corroborated his testimony about the call, and the Panel re-convened the hearing to explore them. At the re-convened hearing, Respondent identified an entry showing a call to the main NASD New York number as reflecting his call in response to the staff's Rule 8210 inquiry (Tr. 100-101).

On this record, the Panel is unable to reach a conclusion as to whether the call in question did or did not occur. Certainly Respondent believes that he made such a call, and the staff's witness could not rule out the possibility.¹ In the Panel's view, however, he failed to prove such a

¹ Enforcement's counsel recognized that such a call, if made, would have constituted mitigation, as reflecting "some effort to respond" (Tr. 77).

call. Respondent received the first Rule 8210 request on August 2, 1997 (CX-4, 5), but the call relied upon occurred on October 7, 1997, two months after that inquiry. Second, this call went to NASD's main number, and not the investigator's telephone number, as set out in the Rule 8210 request (Tr. 100; Exhibit R-1; CX-4). Third, he testified that "I made one phone call to her and spoke to her for about five or ten minutes on all the items that she was requesting" (Tr. 41), but agreed that the call shown on Exhibit R-1 could not have lasted more than one minute (Tr. 103).

B. Other considerations

The Panel begins with the recognition that an associated person's duty to respond to Rule 8210 requests is especially critical for a self-regulatory organization which lacks subpoena power.² Indeed, the NASD Sanction Guidelines (1998) recommend a bar as a "standard" sanction for failures to respond (at p. 31). But that recommendation is not mandatory in every case. The Guidelines themselves recognize that in appropriate cases, sanctions may be "below the recommended range" (*Id.*, at 1, 5). Moreover, the particular guideline pertaining to Rule 8210 violations states that "[w]here mitigation exists, ... consider suspending the individual in any and all capacities for up to two years" (*Id.*, at 31). For the reasons set out below, the Panel believes that several mitigating circumstances make this such a case. Accordingly, the Panel imposes a one-year suspension, instead of a bar.

One of the principal considerations pertaining to sanctions for violations of Rule 8210 is the "[n]ature of the information requested" (Guidelines, at 31). The arbitration proceedings about which the staff sought information apparently involved no personal wrongdoing by Respondent, who testified, without contradiction, that those cases concerned matters which occurred before he

² See, e.g. In re Joseph Patrick Hannan, Exchange Act Rel. No. 40438, 68 S.E.C. Docket 24 (September 14, 1998).

joined Island (Tr. 40, 47-48). None of those cases produced an award against Respondent. One was “pending,” as of the hearing; a second proceeding was “withdrawn w/o prejudice” or “withdrawn, settled etc.,” and the third arbitration was “dismissed” as to “all claims against Lee” (CX-1 at 8, 9, 11, 18). There is no evidence in this record that Respondent’s conduct inflicted injury on the investing public or other market participants, or resulted in improper monetary or other gain for him. See Principal Considerations #11 and #17, NASD Sanction Guidelines (1998) at p. 9. Nor did the investigation appear to be a high priority matter. The response to the first Rule 8210 request was due on August 11, 1997; the staff did not issue its second request until five months later, on January 13, 1998 (CX-4, CX-6).

The record reflects further mitigating circumstances.

First, Respondent acknowledged his mistake, stating “I should have obviously responded in writing, but I never did” (Tr. 49). Second, his failure, while certainly not forgivable, was understandable, considering his state of mind at the time. After the firm and its clearing agent closed (in July of 1997)³, “everything we had was gone. So I basically hit skid row a day after that. And by the time when this letter first originally came to me, I was - depressed isn’t even the word. I was lost in a very bad situation” (Tr. 49). Lee said that thereafter, “I’ve been trying to get my act back together to see if I can either get back in the industry or go find another industry to get into, then I started to respond to my correspondence” (Tr. 49-50). Nor was Lee hiding from or totally ignoring the Association. His telephone records, while failing to reflect a response to the July 30, 1997 request, nevertheless show that in October of 1997, he twice called NASD’s office, apparently on other matters (Exhibit R-1; Tr. 100, 103, 107). Finally, Respondent, who

³ Tr. 28.

was in the securities industry for about fourteen years, has no disciplinary history (Tr. 16, 72-73).

For all of these reasons, the Panel concludes that a one-year suspension, rather than a bar, is appropriate. The Panel also accepts Enforcement's recommendation of a \$25,000 fine (Tr. 80). In order to impress upon Lee the significance of registration and his responsibilities thereunder, the Panel also requires that he re-qualify by examination.

IV. Conclusion

Respondent failed to respond to staff requests made pursuant to Rule 8210, in violation of Rules 2110 and 8210. Accordingly, Respondent is fined \$25,000, suspended for one year, and required to re-qualify by examination in all capacities prior to associating with a member firm. In addition, he is ordered to pay costs of \$1,313, which include an administrative fee of \$750 and the hearing transcript cost of \$563.⁴

HEARING PANEL

BY: Jerome Nelson
Hearing Officer

Dated: Washington DC
June 18, 1999

Copies to:

John J. Lee (via certified and first class mail)
Gene E. Carasick, Esq. (via electronic and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)

⁴ The Hearing Panel has 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.