

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	Disciplinary Proceeding
Complainant,	:	No. C9A980032
	:	
v.	:	Hearing Panel Order
	:	
	:	Hearing Officer - JN
	:	
	:	December 22, 1998
Respondent.	:	

ORDER DENYING RESPONDENT’S MOTION TO DISMISS FOR LACK OF JURISDICTION

By motion received on November 24, 1998, Respondent seeks to dismiss this case for lack of jurisdiction. In a submission received on December 9, 1998, the Department of Enforcement opposed such relief.

The relevant facts are not disputed. Respondent’s association with a member firm came to an end on August 15, 1996. By letter dated the next day, his counsel wrote to the Regional Counsel for NASD District 9 (which had been seeking to interview him), stating, *inter alia*, that “[respondent] has terminated his association with [the firm] effective August 15, 1996, and is not associated with any NASD member firm at this time” (Motion, Ex. I). The Department does not dispute Respondent’s counsel’s statement that District 9 received the letter that same day. Respondent’s CRD record shows that the NASD received the firm’s Form “U-5” (“Uniform

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Termination Notice for Securities Industry Registration”)¹ on August 22, 1996, and that his registration was terminated on that date (Complainant’s Opposition, Ex. A). The Complaint which began this disciplinary proceeding was filed on August 21, 1998.

Under Article V, Section 4 (a) of the NASD By-Laws, persons whose association with members has been terminated remain subject to the Association’s jurisdiction (for conduct occurring before the termination) for two years “after the effective date of termination of registration pursuant to Section 3....” The instant motion raises a question as to what is the “effective date of termination of registration.” If the two-year period is measured from the date on which the Association learned from counsel that Respondent was no longer an associated person (August 16, 1996), the Complaint is beyond NASD’s retained jurisdiction. If the period runs from the date on which the Association received the Form U-5 and reflected the termination on its records (August 22, 1996), the August 21, 1998 Complaint is timely.

The Hearing Panel concludes that the latter is the correct date and that the Complaint was, therefore, filed within the two-year period. Article V, Section 4 refers to the “effective date of termination of registration pursuant to Section 3.” Article V, Section 3(a) provides:

Following the termination of the association with a member of a person who is registered with it, such member shall, not later than 30 days after such termination, give notice of the termination of such association to the NASD via electronic process or such other process as the NASD may prescribe on a form designated by the NASD....

Under that language, counsel’s August 16 letter could not reasonably constitute “termination of registration pursuant to Section 3.” That Section specifically requires the use of an NASD-prescribed form, and neither mentions nor authorizes any other form of notice. See NASD Notice to Members No. 92-19 (April 1992) (explaining that retained jurisdiction is

¹ The form is reproduced in the NASD Manual at p. 483.

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measured from the “filing of ... a termination of registration”, and that members are “required to advise the Association of a termination of ... an associated person on form U-5”).

Nor should counsel’s letter be treated as satisfying the demands of Section 3 and 4. The critical events under those provisions are the termination of association and the resulting termination of registration, actions within the control of the member firm, not counsel for the employee. Moreover, the Form U-5 provides important regulatory information about the circumstances of the termination. A letter from counsel does not. In short, there are valid reasons for reading Section 3 as meaning what it plainly seems to say: that termination of registration is effective when the member files the Form U-5 with the NASD. See Donald M. Bickerstaff, Exchange Act Release No. 35607, 58 SEC Docket 237, 238 (April 17, 1995), rejecting the contention that a period of retained jurisdiction (then one year) should be calculated from termination of association:

[U]nder the NASD’s By-Laws, the termination upon which the NASD’s continuing jurisdiction is predicated is not termination of employment or association, but termination of registration. As we have previously pointed out, the By-Laws formerly provided that termination of registration did not become effective until 30 days after the NASD’s receipt of the Form U-5 notice from a member terminating an associated person’s employment. However, in 1985, the By-Laws were amended to make termination of registration effective (absent a pending complaint or an examination in process) upon the NASD’s receipt of the termination U-5 notice. [Emphasis in original; footnotes omitted.]

Respondent emphasizes a 1992 rule amendment, substituting a “fixed two-year jurisdictional period” for the “staff’s previous practice of extending that retention period by placing a hold upon the effectiveness of termination of association” (Motion, pp. 6-7). Nothing in the present case clashes with abolition of that “holding” practice. The jurisdictional period is measured from receipt of the Form U-5, an act which is under the control of the firm, not the prosecution. Article IV, Section 3(a) gives the firm thirty days to make that filing; here the firm

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filed seven days after termination, well within the prescribed time. There is no support in this record for any claim that the prosecution held up the effectiveness of Respondent's termination to serve its own purposes.

The argument that Enforcement should have filed the Complaint earlier, especially because it completed the investigation well before August 21, 1998 (Motion, pp. 8-11), has no merit. Insofar as the contention assumes that the two year period runs from counsel's notification of the termination of association, it is erroneous for the reasons set out above. Nor does this challenge provide any other basis for dismissing the proceeding. Nothing in the By-Laws or the Code of Procedure requires that the prosecution file a Complaint within any particular time following completion of its investigation. Nor is there any basis on the present record for findings of prosecutorial misconduct or particularized prejudice.

The Department filed its Complaint within two years following receipt of the Form U-5 and termination of Respondent's registration. NASD, therefore, retains jurisdiction over this Respondent.

SO ORDERED
Hearing Panel

Jerome Nelson
Hearing Officer

Dated: Washington, DC
December 22, 1998