

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

KENNETH CHRISTOPHER SHELLEY
(CRD No. 4478307),

Respondent.

Disciplinary Proceeding
No. C3A050003

Hearing Officer—Andrew H. Perkins

HEARING PANEL DECISION

December 7, 2005

Respondent attempted to cheat on Series 24 examination and violated the Rules of Conduct governing securities examinations, in violation of NASD Conduct Rule 2110. The Respondent is barred from association with any member firm in any capacity.

Appearances

For the Department of Enforcement: Helen G. Barnhill, Regional Counsel, Denver, CO, and Gene Carasick, Regional Counsel, Atlanta, GA (Rory C. Flynn, NASD Chief Litigation Counsel, Of Counsel).

For Kenneth Christopher Shelley: Thomas D. Birge, BIRGE & MINCKLEY, P.C., Denver, CO.

DECISION

I. INTRODUCTION

The Department of Enforcement (“Enforcement”) filed the Complaint in this proceeding on January 25, 2005. The Complaint charges that Respondent Kenneth Christopher Shelley (“Shelley” or “the Respondent”), violated NASD Conduct Rule 2110 by attempting to cheat on a General Securities Principal qualification examination and by failing to turn all of his notes and

study materials over to the examination center staff at the time he signed in for the examination. The testing center personnel discovered notes and study materials belonging to Shelley behind the trashcan in the candidates' bathroom while Shelley was at the center taking the NASD Series 24 qualification examination.

On February 17, 2005, Shelley filed an Answer denying the charges and requesting a hearing. A hearing was held on September 27 and 28, 2005, in Mobile, Alabama, before a Hearing Panel consisting of the Hearing Officer and two current members of the District 5 Committee. Enforcement introduced 21 exhibits into evidence, and Shelley introduced four.¹ At the hearing, the Parties also submitted stipulations as to certain facts and as to the authenticity and admissibility of most of the Parties' exhibits.²

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Respondent

Shelley is a graduate of Auburn University with an engineering degree. Following graduation from college, he worked as a professional engineer in the paper industry for approximately 10 years.³ In 2001, CA recruited Shelley to join him as a Financial Advisor with Allmerica Financial. CA had his own office in his hometown, Thomasville, AL. CA wanted to have Shelley join him because a large segment of CA's business was variable annuity sales, and Shelley was from Dothan, AL, where there was a nuclear power plant with a substantial number of highly paid workers.⁴ CA believed that Shelley could help develop that potential market.

¹ The hearing transcript is cited as "Tr.," followed by the page and line numbers. Enforcement's exhibits are referred to as "CX," and Shelley's are referred to as "RX."

² The Stipulations dated September 27, 2005, are cited as "Stip." followed by the applicable paragraph number.

³ Tr. 168:2-170:4.

⁴ Tr. 230:1-11.

Shelley joined VeraVest in November 2001, and he became registered as a General Securities Representative in March 2002.⁵

Shelley and CA worked together on a 50/50 basis until they had a falling out over commissions.⁶ In approximately October 2003, Shelley left and started his own office in Thomasville.⁷ The split between Shelley and CA was quite bitter; neither has spoken to the other since Shelley's departure.⁸ Eventually, Shelley associated with United Planners' Financial Services of America ("United Planners").⁹

B. The Underlying Investigation

Shortly after CA and Shelley split, CA called NASD and provided an anonymous tip to Linda Harris ("Harris"), an NASD customer service representative, that Shelley might cheat on an upcoming Series 24 qualification examination. CA testified that he drew this conclusion because Shelley had boasted of cheating on past exams by secreting his notes and study materials in the bathroom at the test center.¹⁰ CA further claimed that Shelley had explained how he had printed his study notes on colored paper matching the colored scratch paper distributed at the test center, which enabled him to retrieve the notes and return to the exam room without their detection. Shelley knew about the colored paper used at the Mobile test center because he had taken the Series 7 and Series 66 examinations on multiple occasions.¹¹ CA told Harris about his

⁵ CX 1, at 7, 8; Stip. ¶ 1.

⁶ Tr. 27:3-8; 174:14-175:7; 222:24-224:6.

⁷ Tr. 175:8-15.

⁸ CA and Shelley had a fistfight over commissions earned on business with Shelley's uncle. The fight was so serious that they both were hospitalized. Tr. 175:20-176:6.

⁹ Stip. ¶ 4.

¹⁰ Tr. 31:3-11.

¹¹ Tr. 28:5-29:17.

conversation with Shelley and the methods Shelley claimed he used to cheat on NASD examinations.¹²

Harris corroborated CA's testimony. She testified that she received an anonymous tip on March 9, 2004, from a man that said he had a co-worker named Kenneth C. Shelley who intended to cheat on the Series 24 examination.¹³ She further testified that the caller told her about the methods his co-worker had used to cheat in the past, including using a programmable calculator and hiding notes in the test center bathroom.¹⁴

Harris further testified that the same person called a second time on March 24, 2004, to remind her that Shelley was going to take the Series 24 examination "soon" and that he would likely hide study materials in the test center bathroom.¹⁵ On this call, CA identified himself. Harris said she recognized the caller as the same person that had given her the anonymous tip on March 9, 2004.¹⁶ Harris provided all of this information to her supervisor, and NASD, in turn, alerted the test center about the tip.

C. Shelley's Conduct at the Test Center

Shelley was scheduled to take the Series 24 examination for the third time on March 25, 2004, at the Sylvan Learning and Thomson Prometric testing center in Mobile, Alabama.¹⁷ Shelley was the only candidate scheduled to take the Series 24 examination that morning.

¹² Tr. 31:12-15.

¹³ Tr. 72:7-73:2; CX 17, at 1. Exhibit CX 17 contains Harris's notes of her conversations with CA.

¹⁴ CX 17, at 2.

¹⁵ Tr. 73:18-74:5; CX 17, at 3. The evidence is not clear on how CA learned of Shelley's test date. CA claimed that Harris told him, which Harris denied. In her notes, Harris wrote that CA reminded her that Shelley would be taking the test on the following day, whereas in her testimony she emphasized that he had simply said "soon." On the other hand, Shelley theorized that CA used Shelley's social security number to get his scheduled date directly from the test center.

¹⁶ Tr. 74:1-19.

¹⁷ The Prometric testing center that administers NASD examinations in Mobile is co-located with the Sylvan Learning Center. Tr. 89:3-8.

Although Shelley was not scheduled to take the examination until 11:45 a.m., he arrived at the center before 10:00 a.m.¹⁸ Shelley testified that he arrived early because he planned to study before the examination began.¹⁹

Upon his arrival, Shelley went straight to the bathroom with his study materials. He testified that he had an upset stomach from some fast food he had eaten on the way and needed to use the restroom.²⁰ When Shelley finished in the bathroom, he came out into the waiting area at which time Jennifer Humphreys (“Humphreys”), the testing center administrator, recognized Shelley and asked him if he would like to start his examination early.²¹ Although he had not studied as planned, he agreed and promptly signed in.

At the time he signed in for the examination, Shelley was required to read and sign a form specifying the rules of conduct governing the examination.²² Among other prohibitions, the form requires all candidates for securities examinations to acknowledge their understanding that they must give any notes and study materials to the center staff before entering the testing room and that they are prohibited from having any such materials in their possession during restroom breaks. Shelley signed the form and placed some personal belongings in a locker before he started the Series 24 examination.²³

The testing center records reflect that Shelley began the examination at 10:05 a.m., took a bathroom break from 12:05 to 12:10,²⁴ and finished the examination at 12:20 p.m.²⁵ Shelley then

¹⁸ Tr. 148:21-25; 102:1-7.

¹⁹ Tr. 221:8-17.

²⁰ Tr. 196:9-21.

²¹ TR. 197:9-13. Humphreys recognized Shelley, as this was the ninth time he took an NASD qualification examination at the center.

²² CX 2.

²³ Tr. 99:15-19; Stip. ¶¶ 10, 11.

²⁴ Tr. 103:13-18.

²⁵ CX 5, at 3.

signed out, retrieved his personnel belongings from the locker, received his score, and left.²⁶ He failed the examination.²⁷

Humphreys testified that on the morning of March 25 she heard someone enter the center just before 10:00 a.m. and walk straight to the candidates' bathroom.²⁸ She also heard the person come out of the bathroom. Thereafter, the first person she saw in the check-in area was Shelley. The only other person present was a woman waiting for her child.²⁹ Humphreys did not see any unaccounted for people at the center that day.³⁰

D. Discovery of Shelley's Study Materials in the Candidates' Bathroom

On the morning of Shelley's examination, Carolyn Alsop ("Alsop"), the owner of the testing center, arrived before 8:30 a.m. and cleaned the candidates' bathroom. In the process, she dumped the trashcan. She found no study materials in the bathroom.

At Humphreys' request, Alsop checked the bathroom a second time around 10:15 a.m. and discovered Shelley's notes and study materials stacked behind the trashcan. Alsop retrieved the materials and turned them over to Humphreys.³¹ Humphreys then sent the materials to the security department at Prometric with an Irregularity Report regarding their discovery.³²

The materials Alsop found in the candidates' bathroom were a Dearborn Passtrak Series 24 General Security Principal License Exam Manual (CX 3), nine white papers of practice questions and notes (CX 8), and eight sheets of typed notes on colored paper (CX 7), which were

²⁶ Tr. 104:14-18.

²⁷ See Stip. ¶¶ 6-9.

²⁸ Tr. 95:17-23.

²⁹ Tr. 97:8-15.

³⁰ Tr. 113.

³¹ Tr. 140:10-141:17.

³² CX 6.

inside the manual. Shelley admitted that these materials belong to him, but he denied that he left them in the bathroom.

Shelley admitted that he brought some of his study materials to the testing center and into the bathroom on the morning of his examination, but not the materials Alsop found hidden behind the trashcan. Shelley testified illogically that he could not have had the Passtrak manual with him because he did not put it in the bathroom. He reasoned: “There is no way I brought that with me to the testing center because I did not stick it behind the trash can. So they could not have been in my possession.”³³

To explain how his notes ended up behind the trashcan in the bathroom, Shelley hypothesized that CA stole the materials from Shelley’s unlocked automobile and planted them in the bathroom as an act of vengeance.³⁴ Shelley testified that CA knew that Shelley had some of his notes printed on colored paper because CA had seen them when Shelley returned CA’s Passtrak exam manual, which Shelley had borrowed before he received his own.³⁵ Shelley also testified that he kept his study materials in his automobile, which he never locked.³⁶

Shelley further denied that he printed his notes on colored paper so that he could use them for cheating in the examination. Shelley testified that his five-year-old daughter actually printed the notes by accident.³⁷ He explained that she regularly would come to his office and play on the computer. One of her favorite activities was to print pages from a children’s Internet site onto colored paper. Shelley testified that on one occasion she accidentally printed his notes

³³ Tr. 158:15-19.

³⁴ Tr. 215:22–216:10.

³⁵ Tr. 227:7–228:4.

³⁶ Tr. 194:25–195:15. Shelley and another witness testified that it was common practice in Thomasville for people to leave their automobiles unlocked. Hence, Shelley concluded, it is likely that CA knew that he easily could get the study materials out of Shelley’s automobile.

³⁷ Tr. 154:8–155:8.

instead. Each sheet of paper contained the same notes.³⁸ When Shelley saw the notes, he picked them up and put them into the Passtrak manual, which he used as a “file cabinet” for his notes.³⁹ Shelley denied that he ever considered using the notes to cheat on an NASD examination. Shelley could not recall when he last saw the notes before the examination date.

E. Shelley’s Credibility

The Hearing Panel did not find Shelley’s testimony credible. First, the Hearing Panel does not believe that Shelley would not have noticed that the Passtrak manual—in which he stored all of his study notes—had been missing for some time before the examination. Shelley makes no mention of needing to reprint his notes because they were missing. In addition, the Passtrak manual, at more than 400 pages, is by far the largest of the books he was using to prepare for the Series 24 examination. The Hearing Panel finds it unlikely that its absence would have gone unnoticed for a substantial period, as Shelley claims.

Second, Shelley’s conduct at his on-the-record interview on May 3, 2004, was inconsistent with his claim that he realized he was missing the Passtrak manual shortly after he completed the examination. The Director of Compliance for United Planners accompanied Shelley to the on-the-record interview. She testified that when Shelley came out of the interview he was in disbelief about the nature of the accusations. She testified that Shelley told her that he had shown up at the testing center early and that he must have left some books in the bathroom, but he had no recollection of doing so.⁴⁰ Significantly, however, Shelley did not protest that his Passtrak manual and notes had been missing. Nor did Shelley mention in his on-the-record interview that his Passtrak manual and notes were missing. To the contrary, Shelley testified at his on-the-record interview that he brought all of his “testing material” with him to the testing

³⁸ Tr. 154:3-7.

³⁹ Tr. 155:9-20; 185:25–186:1; CX 9, at 6.

⁴⁰ TR. 277:21–279:17.

center.⁴¹ Shelley specifically stated that these materials included the Dearborn book and notes in the book, sample tests, and the Dearborn review book.⁴²

Finally, with respect to Shelley's accusation that CA planted the materials in the bathroom, Enforcement called JP, CA's office assistant in March 2004. She testified that CA was in the office on the morning of March 25, the day Shelley took the examination. In addition, she testified that the office telephone records reflected that CA placed a call from the office at 8:05 a.m. and again at 9:35 a.m. Mobile is 90 miles from Thomasville. Accordingly, it would not have been possible for CA to have placed the first call, driven to Mobile to plant the manual in the bathroom at the testing center, and then return to his office in time to place the second call at 9:35.⁴³

Based on all the evidence, the Hearing Panel concludes that Shelley brought the study materials and notes to the testing center with the intent to cheat on the examination and that he hid the materials in the bathroom so that he could gain access to them during the examination. Accordingly, the Hearing Panel finds that Shelley violated NASD Conduct Rule 2110 as alleged in the first and second causes of the Complaint.

Conduct Rule 2110 is a broad ethical principle designed to protect the overall integrity of the securities industry.⁴⁴ Violations of Conduct Rule 2110 have been sustained where there is no specific violation of any NASD rule, but where there has been unethical conduct.⁴⁵ Here,

⁴¹ CX 9, at 6.

⁴² *Id.* At other points, he testified that he could not be sure if he had all of his materials that day. But at no point does he mention that they were missing.

⁴³ When confronted with this evidence for the first time at the hearing, Shelley's attorney argued in closing that CA must have hired someone to plant the manual at the testing center. Shelley presented no evidence to support this theory.

⁴⁴ See *Timothy L. Burkes*, 51 S.E.C. 356, 359 (1993); *Benjamin Werner*, 44 S.E.C. 622, 624-25 (1971).

⁴⁵ See, e.g., *Department of Enforcement v. Aleksandr Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *11 (N.A.C. June 2, 2000) (holding that NASD's authority under Conduct Rule 2110 to impose sanctions is not limited to violations of conduct rules, but also to violations of ethical standards).

although Shelley was unsuccessful in his attempt to cheat on the Series 24 examination, his attempt nonetheless demonstrates a lack of integrity and character that is inconsistent with the high standards of commercial honor and just and equitable principles of trade mandated by Conduct Rule 2110.⁴⁶

III. SANCTIONS

There is no specific sanction guideline for attempted cheating. The most analogous guideline, “Cheating, Using an Imposter, or Possessing Unauthorized Materials in Qualifications Examinations or in the Regulatory Element of Continuing Education,” provides that a bar is standard.⁴⁷

Enforcement argues that the Hearing Panel should impose a bar under both causes of the Complaint because the facts demonstrate Shelley’s “manifest intent to cheat” on the Series 24 examination.⁴⁸ The Hearing Panel agrees. The credible evidence shows that Shelley hid his notes and the Dearborn Passtrak manual in the testing center bathroom to cheat on the examination. Further, Shelley knew that the Rules of Conduct governing the examination required that he surrender all study materials to the testing center staff. Shelley intentionally violated the Rules of Conduct. Finally, the Hearing Panel finds no mitigating factors that would justify allowing Shelley to remain in the securities industry. Accordingly, the Hearing Panel concludes that a bar is warranted under each cause of the Complaint.

⁴⁶ Cf., *Department of Enforcement v. Davenport*, No. C05010017, 2003 NASD Discip. LEXIS 4, at *9 (N.A.C. May 7, 2003).

⁴⁷ NASD SANCTION GUIDELINES 43 (2005 ed.).

⁴⁸ See *District Bus. Conduct Comm. v. Michael P. Stevens*, No. C9A930033, 19994 NASD Discip. LEXIS 224 (D.B.C.C. July 1994), *aff’d* *District Bus. Conduct Comm. v. Michael Stevens*, No. 9A930033, 1994 NASD Discip. LEXIS 226 (N.B.C.C. Oct. 1994) (sanctions modified) (manifest intent to cheat shown by having notes on arm covered by shirt sleeve).

IV. ORDER

Kenneth Christopher Shelley is barred from associating with any member firm in any capacity for attempting to cheat on the Series 24 examination, as alleged in the first cause of Complaint, and for violating the Rule of Conduct governing the securities examinations, as alleged in the second cause of the Complaint, in violation of NASD Conduct Rule 2110.⁴⁹ The bars shall become effective immediately if this Hearing Panel Decision becomes NASD's final disciplinary action in this proceeding.

Andrew H. Perkins
Hearing Officer
For the Hearing Panel

Copies to:

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Helen Barnhill, Esq. (by facsimile and first-class mail)
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⁴⁹ The Hearing Panel has considered all of the arguments of the Parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.