

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,
Complainant
v.

Respondent.

Expedited Proceeding
No. ARB060005

Hearing Officer—RSH

DECISION

June 28, 2006

Respondent showed that he had a bona fide inability to pay the award issued against him in an NASD arbitration proceeding. The Hearing Officer therefore dismissed the proceeding.

Appearances

John S. Han, Esq., Regional Counsel, Los Angeles, CA; David A. Greene, Esq., Regional Counsel, Los Angeles, CA; Karrin J. Feemster, Esq., Regional Counsel, Los Angeles, CA; Rory C. Flynn, Esq., Chief Litigation Counsel, Washington, DC, for Complainant.

The Respondent represented himself.

DECISION

I. Introduction

By letter dated January 25, 2006, NASD's Office of Dispute Resolution notified the Respondent that his registration would be suspended in accordance with NASD Procedural Rule 9554 because of his failure to pay an arbitration award.¹ On January 29, 2006, the Respondent

¹ CX-5. "CX" refers to Enforcement's exhibits, and "RX" refers to the Respondent's exhibits.

requested a hearing. The Respondent claimed that he had a *bona fide* inability to pay the arbitration award.²

Pursuant to Procedural Rules 9559(d) (1) and 9559(d) (5), the Hearing Officer conducted a hearing by telephone on April 4, 2006. The Department of Enforcement (“Enforcement”) offered 8 exhibits, and the Respondent offered 28 exhibits. In addition, the Respondent testified at the hearing.³

After a review of the entire record, the Hearing Officer finds that the Respondent adequately established his *bona fide* inability to pay the arbitration award. Accordingly, the proceeding is dismissed.

II. Findings of Fact

A. Background

The Respondent, who has been employed in the securities industry since 1990, was associated with NASD member firm UBS Financial Services, Inc. (“UBS”) from May 2001 to July 2004.⁴ According to the Respondent’s Central Registration Depository record, the Respondent voluntarily terminated his employment with UBS.⁵ On June 10, 2005, UBS filed an arbitration claim against the Respondent, NASD Arbitration No. 05-03024. UBS alleged that the Respondent had breached his employment contract by failing to repay monies owed pursuant to the terms of a promissory note. The Respondent failed to answer and on November 15, 2005, an

² CX-6.

³ The hearing transcript is cited “Tr.” followed by the page number.

⁴ CX 1 at 4.

⁵ CX 1 at 4.

arbitrator awarded UBS the full amount of its claim: \$19,182.78 plus interest and \$1,050.00 in filing fees.⁶

The Respondent made no payments to UBS. Accordingly, by letter dated January 25, 2006, NASD's Office of Dispute Resolution notified the Respondent that he would be suspended for failing to comply with the award.⁷ On January 29, 2006, the Respondent requested a hearing, asserting his financial inability to pay the award.⁸ On February 21, 2006, Enforcement sent the Respondent a request for financial information and documentation.⁹ On March 20, 2006, the Respondent sent Enforcement information and documents responsive to the request.¹⁰

B. Respondent's Financial Condition

The Respondent lives in _____, New York with his wife and four children, ages 10, 8, 6 and 5.¹¹ His wife has been in and out of the hospital for the last year and a half and his family's healthcare has been covered by Medicaid.¹²

Since leaving UBS, the Respondent has been employed by Wachovia Securities Financial Network, LLC ("Wachovia").¹³ The Respondent is paid entirely on commission at Wachovia, and earned approximately \$35,000 in 2005.¹⁴ His wife works part-time as a real estate agent

⁶ CX 2.

⁷ CX-5.

⁸ CX-6.

⁹ CX-7.

¹⁰ CX-8.

¹¹ Tr. at 17.

¹² Tr. at 17-20.

¹³ CX-1 at 3.

¹⁴ RX-3.

when she is not ill, and earned approximately \$19,000 in 2005.¹⁵ Their total income for 2005 was approximately \$54,000. Their total income in 2004 was approximately \$30,000.¹⁶

The Respondent's main asset is the home he and his family live in. Although its assessed value is \$388,889,¹⁷ it is encumbered by a mortgage of \$186,640 and two \$40,000 lines of credit upon which the Respondent has fully drawn to pay living expenses.¹⁸ These figures indicate that the Respondent apparently has approximately \$125,000 of equity in his home;¹⁹ however, he is unable to obtain any additional lines of credit on it.²⁰ The Respondent's only liquid assets are approximately \$8,000 in his Individual Retirement Account, \$3,100 in his Roth IRA, \$17 in a brokerage account owned jointly with his wife, and \$1,000 in a joint checking account.²¹

The family's monthly expenses exceed their income—their mortgage payment is approximately \$2,375, and the minimum monthly payments on credit card and other debt total approximately \$2,400.²² The Respondent estimated other basic monthly living expenses to be approximately \$1,500.²³ The Respondent and his wife have exhausted all of their credit cards and lines of credit and are delinquent on several. The Respondent testified that he currently uses a \$40,000 home equity line of credit to pay living expenses, saying, “when I have a better month,

¹⁵ RX-3; Tr. at 20.

¹⁶ RX-2; RX-3.

¹⁷ RX-4.

¹⁸ CX-8 at 199, 262, 274.

¹⁹ Enforcement's claim that the Respondent's equity in his home is \$180,000 is based on the Respondent's overly optimistic valuation of his home at \$450,000. Neither party has submitted documentation to substantiate that figure, so the Hearing Officer used the most recent tax assessment as a valuation.

²⁰ Tr. at 12, 14.

²¹ CX-8 at 92, 80, 103, 121.

²² RX-21.

²³ RX-20.

I try to pay that down a little bit and try to keep that under the [\$40,000] so that I have that cushion of security until business turns around and things get better.”²⁴ He also has made withdrawals from his IRA to pay living expenses and plans to do so in the future.²⁵

III. Discussion

The purpose of Rule 9554 is to ensure that NASD members and associated persons do not disregard their obligations to pay awards issued by NASD arbitration panels; the rule is not intended to be punitive. The Respondent is not disregarding the award; he is simply unable to pay it at present. Indeed, the Respondent did not contest UBS’s claim in arbitration and has not appealed the award. He attempted to settle with UBS, but was unsuccessful.

Enforcement argues that the Respondent is not entitled to claim that he now has a *bona fide* inability to pay the award because he could have paid it in November 2005 by going further into debt or by selling his home. Enforcement contends that in November 2005, the Respondent could have paid the arbitration award by liquidating his IRAs and joint brokerage and bank accounts and utilizing the credit then available on his home equity line of credit and various credit cards. In short, Enforcement argues that instead of going into debt to support his family, the Respondent should have gone further into debt to pay the arbitration award to UBS. While this would have benefited UBS, the net result would simply have been to increase the Respondent’s indebtedness to his other creditors, in effect giving UBS an unwarranted preference.

Recognizing that the Respondent has now exhausted his credit, Enforcement argues that the Respondent should sell his family’s home to pay the arbitration award. The Respondent testified that he and his wife have investigated that possibility but found that rents for housing

²⁴ Tr. at 15.

²⁵ Tr. at 14, 29.

suitable for a family of six exceed his current mortgage payment.²⁶ The Hearing Officer declines to find that the Respondent must liquidate his family home and impoverish his family in order to pay a \$21,000 arbitration award to a large international brokerage firm that has the ability to pursue its own collection remedies, should it elect to do so.

IV. Conclusion

In summary, the Hearing Officer finds that the Respondent has established adequately his *bona fide* inability to pay the award and that, in light of this showing, his registration should not be suspended. Accordingly, the Hearing Officer dismisses this proceeding without prejudice. This does not mean that the Respondent is free from his obligation to pay the award. Moreover, Enforcement may reopen this proceeding at any time upon a showing that the information the Respondent provided to demonstrate his inability to pay the award was materially inaccurate or incomplete, and misrepresented his true financial condition.²⁷ Finally, nothing in this Decision shall preclude NASD from suspending or canceling the Respondent's registration in the future if his financial condition changes and he fails to satisfy the award.²⁸

Rochelle S. Hall
Hearing Officer

²⁶ Tr. at 15.

²⁷ See, e.g., *Brent Duane Green*, Exchange Act Release No. 39210, 1997 SEC LEXIS 2124 (Oct. 7, 1997).

²⁸ The Hearing Officer has considered all of the arguments made by the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.