FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. CALVIN B. GRIGSBY (CRD No.1123572), Respondent.	Disciplinary Proceeding No. 2012030570301 Hearing Officer—LOM **HEARING PANEL DECISION** December 2, 2014

Respondent violated FINRA Rule 2010 by continuing to act as a Financial and Operations Principal ("FINOP") when he was prohibited from doing so pursuant to an agreement to settle a prior disciplinary proceeding (commonly referred to as an "AWC"). For this misconduct, the majority of the Hearing Panel censures Respondent, imposes a $10,000 fine, and orders him to pay costs. The dissent would additionally impose a one-year suspension from operating as a FINOP.

Appearances

John S. Han and Meghan S. Bailey, San Francisco, California, representing the Department of Enforcement.

Calvin B. Grigsby, Blackhawk, California, and Lawrence D. Murray, San Francisco, California, representing Respondent.[1]

[1] Respondent, Calvin B. Grigsby, is an attorney licensed in California. At the hearing, Grigsby sought to act in a "joint representation" with his attorney, Mr. Murray, who first appeared at the hearing. The Hearing Officer said she would permit the joint representation, although it was unorthodox, "as long as it doesn't become unfair or confusing on the record." Hearing Tr. (introductory remarks) 11-12.

I. INTRODUCTION

Respondent, Calvin B. Grigsby, settled a previous Financial Industry Regulatory Authority ("FINRA")[2] disciplinary proceeding brought against him and the firm with which he was registered, Grigsby & Associates (the "Firm"), by entering into an Acceptance, Waiver and Consent ("AWC"). The AWC required Grigsby to requalify as a Financial and Operations Principal ("FINOP") within 90 days of FINRA's acceptance of the AWC. If he failed to requalify within 90 days, the AWC expressly prohibited him from acting as a FINOP until he did requalify. FINRA accepted the AWC and notified Grigsby by a letter sent to his Firm. Although Grigsby promptly ordered study materials upon signing the AWC, even before FINRA accepted the AWC, he failed to take the examination to requalify within the specified time period. He did eventually take and pass the requisite examination approximately five months after the deadline. During the intervening period, Grigsby continued to deal with FINRA staff as his Firm's only principal, and he acted as its FINOP. His Firm filed focus reports during the intervening period which were accepted by FINRA. However, during the next cycle examination, the staff discovered that the Firm had filed the focus reports without the required oversight by anyone authorized to act as the FINOP.

By acting as a FINOP during the interval when he was prohibited from doing so, Grigsby violated the high standards of commercial honor and just and equitable principles of trade required by FINRA Rule 2010. For this misconduct, the majority of the Hearing Panel imposes a censure and a $10,000 fine. He is also ordered to pay costs. The dissent would in addition impose a one-year suspension from acting as a FINOP.

[2] FINRA is a self-regulatory organization that is responsible for regulatory oversight of securities firms and associated persons who do business with the public. Members and their associated persons agree to comply with FINRA's Rules, as well as the securities laws and other applicable regulations, and with FINRA's rulings, orders, directions, and decisions. By-Laws, Art. IV, Sec. 1(a)(1); Art. V, Sec. 2(a)(1); and FINRA Rule 140. FINRA's Rules are available at www.finra.org/Rules.

II. FINDINGS OF FACT

A. Proceeding

The FINRA Department of Enforcement ("Enforcement") filed the original Complaint on December 5, 2013, and the Amended Complaint on May 22, 2014. A hearing was held on August 12, 2014. Post-hearing briefing was completed on October 15, 2014, after which the Hearing Panel conducted deliberations.[3]

B. Jurisdiction

FINRA has jurisdiction to bring the proceeding against Grigsby, although he is not currently in the industry. At the time of the alleged misconduct, which occurred from mid-November 2011 through April 25, 2012, Grigsby was registered in multiple capacities with the Firm, a FINRA member firm. His registrations were terminated by FINRA on November 7, 2012, when the Firm went out of business, and the original Complaint was filed less than two years after his termination (as was the Amended Complaint). Registered persons are subject to FINRA's jurisdiction and remain so for two years after termination of their registration.[4]

C. Respondent And His Firm

Grigsby became associated with his Firm in 1984,[5] and for many years he was the Firm's sole employee.[6] He was the Firm's president, chief executive officer, secretary, and treasurer, and was registered as a general securities representative (1984), general securities principal (1984),

[3] Testimony at the hearing is cited here as follows: Hearing Tr. (name of witness) page. Testimony from Grigsby, thus, would be cited as "Hearing Tr. (Grigsby) 43." Two people testified: Grigsby; Kathleen Hart, a FINRA examination manager.

Exhibits are referred to with a prefix identifying the proponent, as in CX-number for Complainant's Exhibit and RX-number for Respondent's Exhibit. Thus, an exhibit offered by Enforcement would be cited as "CX-15." An exhibit for Respondent would be cited as "RX-15."

[4] By-Laws, Art. IV, Sec. 1(a)(1); Art. V, Sec. 2(a)(1); and FINRA Rule 140.

[5] Hearing Tr. (Grigsby) 39; CX-1.

[6] Hearing Tr. (Grigsby) 44.

municipal securities principal (1984), investment banking representative (2010), and operations principal (2012). Starting in April of 1985, he was also registered as the Firm's FINOP.[7]

As Grigsby made clear at the hearing, he *was* the Firm. Grigsby volunteered that he "had responsibility for everything at the firm…. Anything that happened at the firm or didn't happen, if it wasn't done right, it's my fault."[8] He testified that "[i]f at any point that I'm suspended, our firm is out of business because I'm the only principal."[9] He testified that his Firm was a one principal firm.[10] He also said, "If I can't be the [FINOP] ….If I'm not the [FINOP] in my firm, there is no [FINOP]. And then there is no firm, because the firm has to have a [FINOP] to comply with [FINRA's] membership rules."[11]

FINRA canceled the Firm's registration on November 7, 2012, for the failure to pay outstanding fees.[12]

D. The Misconduct

In June 2011, after a FINRA cycle examination of the Firm in 2010, Grigsby entered into an AWC on behalf of the Firm and as to himself individually. The AWC stated that the Firm had conducted a securities business while failing to maintain the required minimum net capital, and that Grigsby had violated FINRA Rule 2010 by permitting the Firm to do so.[13] Grigsby was the Firm's FINOP during the time covered by the AWC. Without admitting or denying the charges, in June 2011 Grigsby signed the AWC, both on behalf of the Firm and for himself individually. FINRA

[7] Hearing Tr. (Grigsby) 39-42.

[8] Hearing Tr. (Grigsby) 62.

[9] Hearing Tr. (Grigsby) 120.

[10] Hearing Tr. (Grigsby) 134-35.

[11] Hearing Tr. (Grigsby) 144. Grigsby testified that at the time of the alleged misconduct he did not know that a firm could hire an outside person to perform the FINOP function. Hearing Tr. (Grigsby) 144-45.

[12] Hearing Tr. (Hart) 188; CX-5.

[13] CX-9. The AWC stated that the Firm was out of net capital compliance on December 31, 2009, and January 31, 2010. *Id.*

had not yet accepted the AWC when Grigsby signed it, and there was no specified date for it to do so.[14] Grigsby testified that he was unaware of how long it might take for FINRA to accept the AWC or what FINRA's process was for accepting an AWC and notifying a respondent of that acceptance.[15]

The AWC censured Grigsby and the Firm and imposed a $7,500 joint and several fine on them. It also required Grigsby to requalify as a FINOP by passing the Series 27 examination. It set a deadline for him to do so – 90 days from FINRA's acceptance of the AWC. The AWC further specified that if Grigsby did not requalify within 90 days, he was "prohibited from acting in any capacity requiring registration as a Financial and Operations Principal until such time as he passes the Series 27 examination."[16]

Grigsby testified that he signed up for a review course to prepare for the examination not long after signing the AWC, in July 2011.[17] Then he became busy. He dealt with other regulatory examinations, had a knee operation, had family obligations relating to his three college-age children, and traveled back and forth from California to his office in New York to address issues there. He testified that during the period following his signing of the AWC he was "overwhelmed."[18]

[14] Hearing Tr. (Grigsby) 45-50, 53; CX-9.

[15] Hearing Tr. (Grigsby) 55-58.

[16] Hearing Tr. (Grigsby) 54-55; CX-9.

[17] Hearing Tr. (Grigsby) 83-84, 152-53.

[18] Hearing Tr. (Grigsby) 82-85, 152-53, 155-56. Grigsby testified that he signed up to take the examination and then canceled and signed up again, perhaps several times. He said that there were issues with the study software and that the window for taking the examination, around November 23, 2011, was near the holidays and during a period when he had many other concerns. Hearing Tr. (Grigsby) 82-84. He portrayed the period in late 2011, when he should have taken the examination, as extraordinarily busy. Hearing Tr. (Grigsby) 83-85.

FINRA accepted the AWC on August 15, 2011, as reflected on the last page of the fully executed copy that FINRA sent to Grigsby at his Firm by certified mail on August 16, 2011.[19] The certified mailing was addressed to Grigsby as president and CEO of his Firm at the Firm's address. There is no genuine dispute that the mailing arrived. It was signed for by an office administrator at the Firm, RC.[20]

The notice that accompanied the fully executed AWC stated that the AWC had been accepted by FINRA's National Adjudicatory Council ("NAC"). The notice reminded Grigsby, the addressee, of his obligation to update the Form BD (for the Firm) and the Form U4 (for Grigsby individually) to reflect "the conclusion" of the disciplinary action underlying the AWC.[21] The notice was a form notice that indicated that FINRA's Registration and Disclosure Department would notify Grigsby if a suspension was imposed, and that the Finance Department would notify him if any fine had been imposed. Nothing on the face of the notice referred to the requirement to requalify.[22]

Grigsby did not take the examination to requalify as a FINOP in mid-November, within 90 days of FINRA's acceptance of the AWC on August 15, 2011. He did take the examination five months later, on April 26, 2012. His record in the Central Registration Depository ("CRD") shows that he passed.[23]

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[19] CX-9 at 6; CX-10.

[20] Hearing Tr. (Grigsby) 64-65; CX-11. Grigsby does not deny that the notice and fully executed AWC arrived at the Firm. As discussed below, he only denies that he saw the documents or that anyone called to his attention that the 90-day deadline had started to run. Hearing Tr. (Grigsby) 60-61, 90-93, 161-65.

[21] CX-10.

[22] *Id*.

[23] Hearing Tr. (Grigsby) 79-80, 114-15; CX-2.

The Firm paid the fine imposed by the AWC, but paid it late, after being reminded to pay it.[24]

After missing the 90-day deadline to requalify, Grigsby continued to act as the Firm's FINOP. Grigsby testified, "I have always acted as the financial and operations principal."[25] He further said, "I'm admitting to acting as the financial and operations principal during this so-called period you say I was prohibited. I'm admitting it."[26] He acknowledged that he gave "final approval to everything that happens in my firm. I run the firm. Always have. The buck stops here. If there's any approvals being given, I'm giving them."[27] He admitted that he gave final approval for the focus reports listed in the original complaint during the period he was prohibited from acting as a FINOP.[28]

The Firm filed eleven focus reports during the five months between the deadline for Grigsby to take the examination and the time that he actually took and passed the examination.[29] The Firm was required to have someone licensed as a FINOP overseeing that process during the interval that Grigsby was prohibited from acting as a FINOP.[30]

FINRA staff began a cycle examination in April 2012. The examiners knew that Grigsby had not requalified in the fall of 2011. During that examination, FINRA staff discovered that no

[24] Hearing Tr. (Grigsby) 121.

[25] Hearing Tr. (Grigsby) 73.

[26] Hearing Tr. (Grigsby) 74.

[27] Hearing Tr. (Grigsby) 71. Grigsby indicated in his testimony that he did not specifically examine and authorize the filing of a focus report each month. Hearing Tr. (Grigsby) 67-71.

[28] Hearing Tr. (Grigsby) 75-77, 104; CX-8A through CX-8K.

[29] CX-8A through CX-8K. The Complaint contains an indication that some of the reports initially filed had to be resubmitted because the system rejected the initial filings. Compl. ¶ 7; Am. Compl. ¶ 11. There was no evidence in the record to explain the reason there were so many filings.

[30] NASD Rule 1022 requires that every member firm shall designate a licensed FINOP to perform or supervise certain duties relating to the firm's financial responsibilities and reporting. The FINOP must be registered to perform those duties and have passed a qualifying examination. A FINOP's role is to "[ensure] investor protection by being responsible for the [f]irm's compliance with applicable net capital, recordkeeping and other financial and operational rules." Notice To Members 06-23.

one else licensed as a FINOP had been supervising the filing of the focus reports. They did not know whether Grigsby had been acting as a FINOP prior to requalifying.[31]

The original Complaint charged Grigsby with allowing one of his employees who had no FINOP license to file the focus reports and give final approval. In the course of the proceeding, Grigsby explained that he, not the employee, had acted as the FINOP. The Complaint was then amended to charge him with acting as a FINOP during a period when he was prohibited from doing so. The Amended Complaint listed the same eleven focus reports as in the original Complaint.

E. Context For The Misconduct

Grigsby does not dispute the facts that show he acted as a FINOP during the five-month gap between when he should have taken the examination to requalify and the time he actually took it and passed. He asserts other facts, however, that provide a context for his misconduct.

Although the notice of acceptance, accompanied by an executed copy of the AWC, arrived at the Firm, Grigsby testified that he did not see the executed copy of the AWC and no one told him about it. He explained that RC would have received the mail, opened it, and dealt with it. He believed she put it in a pile of mail that he reviewed every six months or so, without calling his attention to it. He said she was unaware that it established a deadline for taking the examination to requalify as a FINOP. Grigsby emphasized that the notice only said that the AWC had become effective and attached the fully executed AWC, without making the 90-day calculation and specifying a particular date by which he was required to requalify. He suggested that RC erroneously thought that the AWC was merely a counter-signed copy of what she had already sent to FINRA on his behalf. Grigsby expressed a sense that RC was unaware that she needed to call the

[31] Hearing Tr. (Hart) 179-81.

AWC to his attention, and she and his staff set about doing what they thought was necessary without alerting him of the 90-day deadline.[32]

Grigsby testified that, despite other evidence interpreted by Enforcement to show that he knew that the AWC had been accepted, he did not know the deadline for taking the examination to requalify as a FINOP. One of the pieces of evidence relied upon by Enforcement was that Grigsby was copied on an email that notified him that the fine imposed by the AWC was due and payable because the AWC had been accepted. He said he did not remember the email and rarely read the email he received. Someone else at the Firm was responsible for the arrangements to pay the fine.[33]

Another piece of evidence Enforcement relied upon was that Grigsby's Form U4 was updated. Grigsby's updated Form U4 stated that the AWC had become final on August 16, 2011 (using the date that the staff sent the notice and AWC to Grigsby, instead of the date on which the AWC was accepted and executed on behalf of FINRA, August15, 2011). The updated Form U4 stated that within 90 days of FINRA's acceptance Grigsby had to requalify as a FINOP or he would be prohibited from acting as a FINOP until he did.[34] The updated Form U4 had his electronic signature. Grigsby testified, however, that he did not place his signature on the document. He said that others had authorization to do so, and that he had never handled the details of updating and filing his Form U4.[35] Grigsby testified that he never had time to do "administrative stuff" such as looking at the details of his Form U4.[36] Grigsby gave the impression that he heavily relied on his staff to alert him when issues arose, and, otherwise, he focused on other aspects of his business.

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[32] Hearing Tr. (Grigsby) 90-93, 161-65.

[33] Hearing Tr. (Grigsby) 87-89; RX-20.6.

[34] Hearing Tr. (Grigsby) 98-101; Hearing Tr. (Hart) 187-90; CX-3 at 24-26.

[35] Hearing Tr. (Grigsby) 94-96.

[36] Hearing Tr. (Grigsby) 98. A FINRA examiner, Hart, testified that member firms are not permitted to file an amendment to a registered representative's Form U4 without the representative's knowledge or consent. Hearing Tr. (Hart) 190.

Grigsby testified that FINRA staff continued to deal with him the same as they always had.[37] He believed the deadline had not passed because the FINRA examiners who were in his office in April 2012 did not tell him that he had missed his deadline. He thought that the examiners were aware that he was acting as a FINOP throughout the time from the entry of the AWC until he requalified. They said nothing about it being improper for him to continue as he always had, and he implicitly relied on their failure to tell him he was doing anything improper.[38] Grigsby explained, "I'm dealing with FINRA every day – I view FINRA as one entity, so I'm thinking I'm dealing with these folks every day. They don't seem to have – that I have a problem, so I should still be okay."[39]

Grigsby testified that, although he was still unaware of the exact date by which he was supposed to take the examination in spring of 2012, he felt uneasy and assumed he must be getting close to the deadline.[40] Grigsby claimed that in spring 2012 he provided notice to FINRA that he was taking the FINOP examination later than the AWC required.[41] He testified at the hearing that he spoke to FINRA examiners a half dozen times about extending the time for taking the examination to requalify.[42] He asserted that FINRA examiners were in the office in April 2012 and he said to them, "I'm going to need some time on this exam." In April 2012, he sent an email saying he needed more time to take the test.[43] He said that no one told him his requests were

[37] Hearing Tr. (Grigsby) 84-85, 134-36, 148-49.

[38] Hearing Tr. (Grigsby) 84-85, 118-19, 134-37, 142, 148-49, 169-70. Grigsby testified at the hearing that FINRA staff never expressly told him the exact deadline for him to take the examination to requalify. Hearing Tr. (Grigsby) 116-18.

[39] Hearing Tr. (Grigsby) 162.

[40] Hearing Tr. (Grigsby) 168-69.

[41] Hearing Tr. (Grigsby) 78-79, 167-69; CX-14 ¶ 8.

[42] Hearing Tr. (Grigsby) 135.

[43] Hearing Tr. (Grigsby) 112-14.

denied.[44] Grigsby took the staff's silence as an implicit extension of time, because, in his experience, the staff was flexible and would commonly grant an extension of time.[45]

Grigsby summarized the critical facts explaining why he missed the deadline for taking the requalifying examination. The notice talked about the Form U4 but said nothing about the examination to requalify. He thought it was inconceivable that FINRA would not give him some notice before taking away his license.[46]

Grigsby was conscious that passing the examination to requalify was important, and there was no evidence that he intended to ignore the requirement to requalify. Grigsby testified that "[t]his is one of the most serious things that could ever happen to a firm," referring to his potential disqualification as the Firm's only FINOP. He described the firm as being "on a precipice."[47]

The evidence is inconclusive as to whether Grigsby actually knew the deadline for taking the examination to requalify, but, as discussed below, it is not necessary to make a definitive determination on this point for purposes of finding that he committed a violation. The majority and the dissent tend toward different views regarding the likelihood that Grigsby actually knew the deadline, and this affects their different views regarding sanctions.

III. CONCLUSIONS OF LAW

A. Applicable Law

FINRA Rule 2010 requires FINRA members and their associated persons to "observe high standards of commercial honor and just and equitable principles of trade" in the conduct of their business. Rule 2010 is an ethical Rule that applies whenever another violation of law or rule is

[44] Hearing Tr. (Grigsby) 135.

[45] Hearing Tr. (Grigsby) 158-59.

[46] Hearing Tr. (Grigsby) 225-26.

[47] Hearing Tr. (Grigsby) 170.

found.[48] It is a broad prohibition that also covers other misconduct regardless of whether another Rule violation is found.[49] Rule 2010 requires members of the securities industry not merely to conform to legal requirements but to conduct themselves with integrity, fairness, and honesty. Misconduct need not involve a security in order to constitute an ethical violation of Rule 2010.[50]

A violation of an AWC, which is a settlement of disciplinary charges that imposes duties on the entities and persons who enter into it, is analogous to a violation of FINRA rules and, on that basis, is likewise a violation of FINRA Rule 2010. Moreover, a violation of an AWC is, in fact, a violation of the duty imposed by FINRA's By-Laws on registered entities and persons to comply with FINRA Rules, orders, and directives.[51]

B. Grigsby Committed The Violation

The entire Hearing Panel concludes that Grigsby violated FINRA Rule 2010 by failing to

[48] "It is well settled that a violation of a rule promulgated by the Commission or by NASD [the predecessor of FINRA] also violates Conduct Rule 2110 [the identical predecessor of FINRA Rule 2010]." *Richard F. Kresge*, Exchange Act Rel. No. 55988, 2007 SEC LEXIS 1407, at *42 (June 29, 2007). For example, a failure to cooperate with an investigation is a violation of both FINRA Rule 8210 and FINRA Rule 2010. *See CMG Inst. Trading, LLC*, Exchange Act Rel. No. 59325, 2009 SEC LEXIS 215, at *30 (Jan. 30, 2009). *See also Stephen J. Gluckman*, 54 S.E.C. 175, 1999 SEC LEXIS 1395, at *22 (July 20, 1999).

[49] *Heath v. SEC*, 586 F. 3d 122, 132 (2d Cir. 2009) (citing with approval SEC decision rejecting argument that the ethical rule can only be violated if other rules of legal conduct have been violated). *See also Gluckman*, 1999 SEC LEXIS 1395; *Dep't of Enforcement v. Trende*, No. 2007008935010, 2011 FINRA Discip. LEXIS 54, at *11 and nn.12 & 13 (OHO Oct. 4, 2011).

[50] *Dep't of Enforcement v. Gallagher*, No. 2008011701203, 2011 FINRA Discip. LEXIS 40, at *17-18 and n.46 (OHO June 13, 2011) ("Rule 2110 is an ethical rule … FINRA's authority to pursue disciplinary action for violations of Rule 2110 is sufficiently broad to encompass any unethical business-related misconduct, regardless of whether it involves a security."), *aff'd*, 2012 FINRA Discip. LEXIS 61 (NAC Dec. 12, 2012) (respondent barred for acting as unregistered principal); *Dep't of Enforcement v. Mullins*, Nos. 20070094345, 20070111775, 2011 FINRA Discip. LEXIS 61, at *22 (NAC Feb. 24, 2011) ("FINRA's disciplinary authority under NASD Rule 2110 is also broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security.") (internal citations and quotations omitted), *aff'd in part, John Edward Mullins*, Exchange Act Rel. No. 66373, 2012 SEC LEXIS 464 (Feb. 10, 2012); *Dep't of Enforcement v. DiFrancesco*, No. 2007009848801, 2010 FINRA Discip. LEXIS 37, at *16 n.11 (NAC Dec. 17, 2010) (citing cases) ("There is a long line of cases stating that a member can be disciplined for "business-related conduct" that violates NASD Rule 2110, even when the activity does not involve a security."), *aff'd*, Exchange Act Rel. No. 66113, 2012 SEC LEXIS 54 (Jan. 6, 2012); *Dep't of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *12 (NAC June 2, 2000) (citing *Daniel Joseph Alderman*, 52 S.E.C. 366, 369 (1995), *aff'd*, 104 F.3d 285 (9th Cir. 1997)).

[51] FINRA Rule 140 (FINRA's Rules apply to all members and persons associated with a member); By-Laws, Art. IV, Sec. 1(a)(1) (members agree to comply with securities laws, FINRA Rules, and all rulings, orders, directions, and decisions issued, and sanctions imposed, under FINRA Rules); Art. V, Sec. 2(a)(1) (same).

comply with the AWC that he agreed to in the previous disciplinary proceeding. There is no genuine dispute of fact: Grigsby signed the AWC; FINRA gave him notice at his Firm address of FINRA's acceptance;[52] he failed to take the examination to requalify as a FINOP within 90 days of FINRA's acceptance; and he continued to act as a FINOP for five months when he was prohibited from doing so, until he finally passed the examination in late April 2012. There also can be no genuine dispute that this conduct violated the AWC and did not meet the high standards of commercial honor required by FINRA Rule 2010.[53]

IV. SANCTIONS

In considering the appropriate sanction for a violation, adjudicators in FINRA disciplinary proceedings look to FINRA's Sanction Guidelines. The Sanction Guidelines contain a range of sanctions for particular violations, depending on the circumstances. They also contain General Principles, applicable in all cases, and overarching Principal Considerations. The Sanction Guidelines are not absolutes. They are intended to be applied with attention to the regulatory mission of FINRA – to protect investors and strengthen market integrity.[54]

In this case, no Sanction Guideline applies to the specific violation. In similar circumstances, the Sanction Guideline that applies when a firm has allowed a disqualified person to

[52] The NAC has strongly rejected arguments that require Enforcement to show that a respondent actually saw a disciplinary order to prove a violation of such an order. *Dep't of Enforcement v. Usher*, No. CA980069, 2000 NASD Discip. LEXIS 5, at *6 (NAC Apr. 18, 2000) ("Enforcement was not required to prove that [respondent] read his suspension letter and deliberately acted in violation of his suspension [in order to prove an ethical violation]." *See also Dep't of Enforcement v. Perpetual Securities, Inc.*, No. C9B040059, 2006 NASD Discip. LEXIS 18, at *47 (NAC Aug. 16, 2006) (service of suspension notice on attorney is sufficient despite respondents' assertion they did not receive a courtesy copy).

[53] *Usher*, 2000 NASD Discip. LEXIS 5 (failure to comply with terms of suspension order was violation of identical predecessor to FINRA Rule 2010). *See also Dep't of Enforcement v. Kirsch*, No. CAF040025, 2005 NASD Discip. LEXIS 30, at *14 (OHO April 15, 2005) (When NASD (now FINRA) suspends a firm or registered person, "it is entitled to require complete and precise compliance with its directive.").

[54] FINRA Sanction Guidelines (2011) ("Sanction Guidelines"), available at www.finra.org/sanctionguidelines. *See* Sanction Guidelines, Overview, 1.

associate with the firm has been used as the starting point for sanctions analysis.[55] The Sanction Guideline for that kind of violation recommends a fine of $5,000 to $50,000 (either for the firm or for the disqualified person), and in egregious cases a suspension for up to two years for the firm, a suspension of the principal involved in all capacities for up to two years or a bar of the principal in any supervisory capacity, and in egregious cases the disqualified person may be barred.[56]

A. The Majority

The majority of the Hearing Panel has determined to censure Grigsby and impose a $10,000 fine, as ordered below. The majority does not view the violation, in light of all the facts and circumstances, as egregious. Furthermore, the majority views Enforcement's request for a principal bar as overreaching.[57] For a person who has run a one-principal firm for years, a bar in all principal capacities would operate as a penalty. It would be particularly so where, as here, there was neither an intent to harm nor any evidence of harm to customers as a result of Grigsby's misconduct.

Grigsby demonstrated an intention to comply with the terms of the AWC by ordering the study material immediately, even before FINRA accepted the AWC. He testified throughout the hearing that he always intended to pay the fine and requalify as required by the AWC, and, indeed, he did ultimately comply with the AWC by paying the fine and passing the requalifying examination. Grigsby explained the circumstances that led to his failure to take the examination within the 90-day window. Although those circumstances indicate that he did not apply best practices or the best judgment, the majority believes that his misconduct was an error arising from a

[55] *Perpetual Securities*, 2006 NASD Discip. LEXIS 18, at *43-49, 67-72 (firm conducted a securities business while it was suspended in violation of the ethical rule then in place, NASD Rule 2110) (NAC increased sanctions beyond the Sanction Guideline because of aggravating factors).

[56] Sanction Guidelines at 43.

[57] At the hearing, Enforcement requested a principal bar and a $10,000 fine. Hearing Tr. (answer to question from the Hearing Panel) 174-75. In post-hearing briefing, Enforcement asserted that the evidence would support a finding that Respondent made false statements at the hearing, in which case Enforcement indicated that a bar in all capacities would be appropriate. Enforcement's Post-Hearing Brief at 7.

misunderstanding. He misunderstood the nature of his obligation to take the examination—he thought the deadline was as flexible as, in his experience, other deadlines were. He was negligent, which, in the majority's view, should be taken into account for purposes of sanctions even if it does not constitute a defense to the violation.[58]

One of the Principal Considerations in connection with all sanctions in disciplinary proceedings is whether the misconduct is intentional, reckless or negligent. Negligence warrants much less severe sanctions than intentional or reckless misconduct.[59]

The majority believes that the remedial purposes of disciplinary sanctions are sufficiently served by the censure and fine. The censure signifies that the misconduct was serious and not a technical or inadvertent violation.[60] The fine serves to deter any repetition of the misconduct.

B. The Dissent

The Hearing Officer agrees with the majority insofar as they conclude that Grigsby intended to comply with the AWC, and that he may have misunderstood his flexibility to delay taking the examination to requalify. However, the Hearing Officer concludes that some of Grigsby's assertions of fact are not credible (although not sufficiently rebutted to draw conclusions as to the truth), that he improperly attempted to shift responsibility for his failure to comply with the AWC to FINRA staff, and that the violation is more serious than the majority concludes. As a consequence, the Hearing Officer believes more stringent sanctions would be appropriate, but sanctions tailored to be remedial, not to punish.

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[58] *Cf. Dep't of Enforcement v. White*, No C06030035, 2005 NASD Discip. LEXIS 21 (OHO Oct. 12, 2005) (one-year suspension and $50,000 fine would be appropriate where respondent actively managed firm for nearly two years without a principal's license, having taken the examination and failed several times).

[59] Principal Consideration 13, Sanction Guidelines at 7.

[60] The Sanction Guidelines set forth a policy regarding the imposition of a censure, which is not imposed in every case. The policy authorizes the imposition of a censure for a registration violation where a fine greater than $5,000 is imposed. Sanction Guidelines at 9, 106.

In light of Grigsby's acknowledgement that his potential disqualification as a FINOP was a potential "precipice" for his Firm, it is difficult to credit that he was unaware of the deadline set by the AWC. It seems more likely, in light of his comment that he commonly could obtain extensions of time (as he did when he paid the fine imposed by the AWC), and in light of his sense that no one at FINRA found it objectionable that he continued operating as his Firm's only principal (including acting as a FINOP), that Grigsby let the deadline go by but continued to study and planned to take the examination when he felt ready. However, the record does not contain sufficient evidence to make a finding in that regard.[61]

Nor is it possible to excuse or mitigate the seriousness of Grigsby's misconduct on the basis that he did not see the notice or that FINRA staff should somehow have done more to alert him to the deadline. The Hearing Officer finds this case similar to the NAC decision that Grigsby sought, unsuccessfully, to distinguish from his case, *Usher*.[62] In that case, a registered principal conducted a securities business while his and his firm's registrations were suspended. When he was later disciplined for conducting a securities business while suspended, he argued that the "form letter" he received indicating the suspension date was not clear and that he did not intentionally violate the suspension order. He also noted that he had been in contact with the staff about his failure to comply with the suspension, apparently implying that he should be sanctioned lightly. The NAC strongly rejected Usher's arguments and called them "untenable."[63] It affirmed the sanctions imposed by the hearing panel in that case. It barred Usher from acting as a general securities

[61] The Hearing Officer also cannot definitively conclude that Grigsby gave false testimony, as Enforcement argues. However, much of Grigsby's testimony was confused and contradictory. For example, Grigsby testified throughout the hearing that he did not know the deadline for taking the examination. At one point, however, he testified that he had signed up to take the examination and the window for taking it was around November 23, 2011, but then he cancelled because of the holidays and other distractions. That would suggest that he knew the deadline to be in the fall of 2011. Hearing Tr. (Grigsby) 82-84.

[62] *Usher*, 2000 NASD Discip. LEXIS 5.

[63] *Id*. at *6. *See also Dep't of Enforcement v. Trenham*, No. 2007007377801, 2010 NASD Discip. LEXIS 15 (OHO Mar. 18, 2010) (respondent cannot shift his burden of complying with suspension order to FINRA).

principal, imposed a $25,000 fine, ordered $3,914.70 plus interest as disgorgement, and ordered him to pay costs.[64]

By continuing to operate as a FINOP when he was prohibited from doing so under the AWC, Grigsby created financial risk to his Firm and to any investors involved with his Firm. He also undermined the system of self-regulation, which relies on members and their associated persons to comply with regulatory directives and orders and registration requirements. Such misconduct, if treated too lightly, casts doubt on market integrity and damages public confidence and trust in the securities markets.[65] Because FINRA's registration requirements provide "an important safeguard in protecting public investors," strict adherence to its registration requirements is essential.[66]

While the majority concludes that, at most, Grigsby was negligent, the Hearing Officer concludes that, even accepting Grigsby's testimony that he did not know the deadline for taking the examination, he was reckless. Given the importance of taking the examination to requalify, it was reckless for Grigsby not to discuss with FINRA staff how the 90-day period would be triggered and how he would receive notice of FINRA's acceptance. Even if he did not think to do it at the time he entered into the AWC, he could have checked with the staff at any time afterward. It was not reasonable to wait until April, some ten months after he entered into the AWC, to make any inquiry about obtaining an extension of time to take the examination. It was also reckless for Grigsby not to check with his staff, not to read his mail, and not to read his email to track FINRA's acceptance

[64] *Usher*, 2000 NASD Discip. LEXIS 5.

[65] The Sanction Guidelines provide that disciplinary sanctions have three overarching goals: to prevent recurrence of misconduct, to improve overall standards in the industry, and to protect the investing public. These ends are served by sanctions that are significant enough to prevent and discourage future misconduct by a respondent and to deter others from engaging in similar misconduct. Sanctions should encourage better business practices. Sanction Guidelines at 2, General Principle 1.

[66] *Eric J. Weiss*, Exchange Act Rel. No. 69177, 2013 SEC LEXIS 837, at *27 (Mar. 19, 2013) (*quoting Kevin D. Kunz*, Exchange Act Rel. No. 45290, 2002 SEC LEXIS 104, at *36 (Jan. 16, 2002)); *Dep't of Enforcement v. Hedge Fund Capital Partners*, No. 2006004122402, 2012 FINRA Discip. LEXIS 42, at *27 (NAC May 1, 2012).

of the AWC and the Firm's performance of its obligations under the AWC. If, as he testified, Grigsby was responsible for all significant decision-making at the Firm, then he was responsible for ensuring compliance with all the requirements of the AWC, including taking the examination to requalify as a FINOP. He should have modified his standard practice of relying on the staff to ensure that he was aware of the deadline for taking the examination.[67]

The Hearing Officer would impose the following sanction in addition to the censure, $10,000 fine, and costs imposed by the majority: a one-year suspension from acting as a FINOP. This additional sanction would permit Grigsby to reenter the business and to become a principal in a firm. However, he would be required to hire someone else licensed and qualified to perform the duties of a FINOP, either in-house or on a consulting basis, for one year.

The proposed sanctions meet the requirement that sanctions be tailored to the nature of the misconduct and the circumstances of the respondent.[68] They also take into account that Grigsby was already sanctioned in connection with the net capital violations underlying the AWC and did not comply with that sanction. That disciplinary history, which reveals a lax attitude toward compliance with disciplinary sanctions, is relevant for purposes of determining sanctions here. That history suggests that a more stringent sanction is necessary.[69]

V. ORDER

For the violation of FINRA Rule 2010 found as charged, Respondent Calvin B. Grigsby is censured and fined $10,000. In addition, Respondent is ordered to pay the costs of the hearing in

[67] As discussed above, on the basis of his own testimony Grigsby was reckless. Grigsby is a lawyer. He had the background to understand that the AWC would not be effective until his offer of settlement was accepted by FINRA. He also was sophisticated enough to be concerned about how he would be notified of when the 90-day period started running. It strains credulity that he would have been content in April 2012 with a hazy idea that it might be close to the end of the deadline, but, if he was content with that vague concern, he was reckless.

[68] Sanction Guidelines at 3, General Principle 3.

[69] Sanction Guidelines at 6, Principal Consideration 1.

the amount of $2,983.64, which includes a $750 administrative fee and the cost of the transcript.[70] The costs shall be payable on a date set by FINRA, but not less than 30 days after this decision becomes FINRA's final disciplinary action in this matter.

_____

Lucinda O. McConathy
Hearing Officer
For the Hearing Panel

[70] The Hearing Panel has considered and rejects without discussion any other arguments made by the Parties that are inconsistent with this decision.