

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Non-Summary Suspension
	:	Proceeding
	:	
	:	No. ARB010032
v.	:	
	:	Hearing Officer - JN
	:	
	:	DECISION
	:	
	:	March 15, 2002
	:	
Respondent.	:	

Respondent failed to show that he had a bona fide inability to pay the award issued against him in an NASD arbitration proceeding. In accordance with Article VI, Section 3 of the NASD By-Laws and NASD Procedural Rule 9510 et seq., Respondent's registration suspended for failing to pay the award. Respondent assessed a total of \$1,410.50 in costs.

Appearances

For the Complainant: Thomas M. Huber, Esq.

For the Respondent: _____, Esq.

Decision

A. Introduction

By letter dated August 16, 2001, NASD Dispute Resolution notified Respondent that his NASD registration would be suspended, in accordance with Article VI, Section 3 of the NASD By-Laws and Rule 9510 et seq., as a result of his failure to pay the arbitration award rendered in NASD Arbitration No. 99-02935. On August 29, 2001,

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_____’s counsel requested a hearing. The Hearing Officer, acting as a Hearing Panel under Rule 9514(b), conducted a telephonic hearing on January 18, 2002. The Department of Enforcement offered twelve exhibits (CX-1 – CX-12).¹ Respondent offered eleven exhibits (DX-1 – DX-11) and testified on his own behalf. Respondent filed a post-hearing memorandum on February 13, 2002 and Enforcement filed its responsive post-hearing submission on February 20, 2002.

During the hearing, _____ admitted that he has not paid the full amount of the arbitration award, but contended that he is financially unable to do so. Enforcement argues that Respondent failed to establish his alleged inability to pay.

_____, who has been employed in the securities industry since 1953, was associated with and was a 75% owner of member firm _____. (“_____”) (Tr. 11, 55; CX-1; CX-2).² Respondent is no longer associated with that firm but retains an ownership interest in it (Tr. 11, 55, 60; CX-1).³ He is currently associated with another firm and is currently registered with the NASD through that association (Tr. 11-12; CX-1).

On January 29, 2001, an arbitration panel issued an award, holding _____, _____, and another party jointly and severally liable for the payment of

¹ “CX” refers to the Department’s exhibits; “DX” refers to the Respondent’s exhibits; and “Tr.” refers to the pages of the hearing transcript.

² A few of _____’s children held the remaining ownership interest in _____ (Tr. 55). The record does not reflect whether the children still have this interest.

³ There is nothing in the record to reflect the current percentage of this ownership interest.

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approximately \$194,000 to the arbitration claimants (Tr. 17-18; CX-5).⁴ Respondent failed to pay that amount (Tr. 18).

B. Discussion

Respondents in non-summary suspension proceedings may assert certain limited defenses, including a bona fide inability to pay the award, which was the only defense raised by Respondent in this proceeding.⁵ To establish that defense, a respondent must demonstrate that he is unable to make some meaningful payment toward the award from available assets or income.⁶ The Respondent has the burden of demonstrating the alleged inability to pay and, for this purpose, “the NASD is entitled to make a searching inquiry into the respondent's assertions.”⁷ An inability-to-pay defense may be rejected if it appears that the respondent either has the ability to divert funds from other expenditures to pay the award or has the ability to borrow the funds.⁸

Applying those principles to the instant facts, the Hearing Officer concludes that Respondent's case failed in several respects.

First, Respondent's Statement of Financial Condition, showing a negative net worth of some \$313,000, does not list his \$420,000 to \$430,000 home as an asset (DX-1; Tr. 30). Respondent claims that he no longer owns the home, having transferred the

⁴ Enforcement and Respondent agreed during the Hearing that \$194,000 was the amount owed for the arbitration at issue.

⁵ “Self-Regulatory Organizations; Order Granting Accelerated Approval to Proposed Rule Change” etc., Exchange Act Rel. No. 40026, 1998 SEC LEXIS 1154, at *7, n.14 (May 26, 1998) (citation omitted).

⁶ See OHO Redacted Decision, ARB980009 (Dec. 11, 1998), at http://www.nasdr.com/pdf-text/nonsum_01.pdf. and cases there cited.

⁷ Department of Enforcement v. Robert Tretiak, 2001 NASD Discip. LEXIS 1 at *10 (NAC, January 23, 2001), S.E.C. appeal pending.

⁸ Id.

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property to his children to whom he supposedly pays rent (Tr. 29-30, 69-70). But the record contains no documentation of the transfer of the property or of the asserted rental payments. Indeed, Respondent acknowledged that there was no rental agreement and that he had no documents to substantiate the payments – even though they were apparently made by checks which _____ thought he could find (Tr. 30-31, 55, 70).

These gaps are especially significant because _____ was well aware of the need for documentation. Enforcement's letter of September 19, 2001 requested that he submit “all documents supporting any reported expenses or disbursements” (CX-3). Yet he failed to corroborate the claimed annual rental expense of \$18,000 shown on his Financial Statement (DX-1, p. 4).

Respondent's Financial Statement has further weaknesses. His valuation of checking and savings accounts as zero (DX-1, p. 1) has two difficulties. First, it was concededly incorrect. When pressed for details during the hearing, _____ stated that his checking account had a balance of \$2,000 to \$3,000 (Tr. 90).

Second, _____ failed to submit any documentation as to the status of that account, claiming that he did not realize that the NASD wanted a checking account statement (Tr. 90). But the prosecution requested that he submit “all documents that support the information disclosed on the Statement [including] bank account...statements” (CX-3) and the Statement called for valuation of “checking, savings and bank money market accounts.” As noted, he entered a zero. In these circumstances, there is no basis for a conclusion that Respondent somehow misunderstood the word “checking” or the phrase “bank account statement.” The Hearing Officer concludes that

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Respondent knew or should have known of the need for accuracy and documentation with regard to the checking account and that his failures in that regard are inexcusable.

In addition, the record also contains evidence of assets sufficient to enable _____ to pay a substantial portion of the \$194,000 award. His Statement lists “pension/retirement funds” of \$124,000 and an IRA account value of \$7,000, which numbers he also endorsed during the hearing (DX-1, pp. 1, 2; Tr. 21-23). There is no showing (or contention) that a portion or all of these assets could not be used toward the unpaid arbitration award. In claiming an inability to pay the award, he cannot treat that retirement money as though it did not exist. His election to preserve retirement assets rather than pay the award, however understandable, is nevertheless the equivalent of a decision to accept the suspension of his registration. Here, as in prior cases, Mr. _____’s “financial position hinges more on his own asset – allocation choices than on a genuine inability to pay.”⁹

Respondent elected not to submit information as to his wife’s income (including their jointly-filed tax returns), arguing that she objected to such disclosures, which were supposedly protected under California law¹⁰ – an issue which need not be resolved here.¹¹ But, while excluding the wife’s income, Mr. _____ nevertheless treated the couple’s living expenses as his own for inability-to-pay purposes (DX-1, p. 4; Tr. 79-80, 91). The

⁹ Department of Enforcement v. Michael A Bronzino, 1998 NASD Discip. LEXIS 54 at *13 (NASD Regulation, Inc., June 29, 1998) (where Respondent chose to use gambling winnings for a purpose other than paying the award).

¹⁰ See Objection to Production of Tax Returns (December 17, 2001); Hearing Officer’s Order Following December 20, 2001 Conference; and Tr. 50-52, 82-83.

¹¹ As discussed above, there are several bases for concluding – wholly apart from matters involving the wife’s income – that Respondent failed to carry the burden of proving an inability to pay.

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Respondent's attempt to have it both ways, excluding spousal income while counting spousal expenses, casts further doubt upon the validity of his financial claims.

Finally, _____ failed to establish (or even mention) any reason why he could not borrow money to pay the award. That omission is also fatal to his defense. See Dist. Bus. Conduct Committee v. Bruce M. Zipper, 1994 NASD Discip. LEXIS 194 at *12 (NBCC, October 31, 1994) (respondent “failed to present to the NASD any information as to why he could not or would not borrow to pay the arbitration award, or any part thereof”); Dep’t of Enforcement v. Bronzino, 1998 NASD Discip. LEXIS 54, at *13 (NASD Regulation, Inc., June 29, 1998) (Respondent “has not shown that he is incapable of cutting expenses or raising additional capital.”)

Respondent’s post-hearing memorandum makes two arguments: that the claimants refused to settle their \$194,000 award by accepting monthly payments of \$1,000 and that they obtained some relief through garnishment of _____’s commissions and assignment of a note payable to his former firm. Neither contention constitutes a defense.

_____’s offer of \$1,000 per month cannot save the proposed suspension of his registration. For all that appears here, the effort apparently began and ended with one offer from _____ and one reply from the claimants. Compare In re James M. Bowen, 1994 SEC LEXIS 1768 at *5 (June 10, 1994) (“We would have expected Bowen to adduce evidence of a prompt, steady interchange of specific offers and counter offers”). Moreover, _____'s terms had inherent practical limitations. He is 77 years old (Tr. 11), and under his proposal, the claimants would not receive their final payment for 16 years, when Respondent would be 93 years old. Such a drawn-out schedule is

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especially aggravating because, as shown, _____ has assets which could be employed to make significantly larger payments. Nor do the claimants have to accept such an offer; Respondent's "duty to satisfy the Award was absolute" (Tretiak, supra at *15). The Hearing Officer concludes that _____'s offer to pay \$1,000 per month is not a basis for declining to suspend his registration.

Nor do the garnishment and the assignment constitute defenses. The record shows that the garnishment has produced only \$3,000 out of the \$194,000 due and that the assignment has produced nothing (Tr. 38, 57-58, 86-87). Under any view, _____ still owes the claimants at least \$191,000 on an award which should have been paid long ago. There is no evidence that the claimants agreed to accept the garnishment and an apparently worthless assignment in settlement of the award, and nothing in those events warrants excusing the Respondent from his obligations.

Respondent's counsel also contends that the present case is similar to a previous Non-Summary Suspension Proceeding, OHO Redacted Decision, ARB980009 (Dec. 11, 1998), at http://www.nasdr.com/pdf-text/nonsum_01.pdf, where the Hearing Officer found a bona fide inability to pay because the respondent had no assets, and owed so much to creditors that he could not obtain a loan to pay the award. In the instant case, _____ himself listed assets of \$143,675 (DX-1, p. 2), and, as noted, failed to show that he is unable to obtain a loan to pay this arbitration award.

C. Conclusion

It is hereby ordered, pursuant to Article VI, Section 3 of the NASD By-Laws and Rule 9514(g), that _____'s registration shall be suspended effective as of the date of the issuance of this decision, and that such suspension shall continue until he provides

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documentary evidence to NASD Regulation showing: (1) he has made full payment of the award; or (2) claimants have agreed to settle the award; or (3) he has filed a bankruptcy petition in a United States Bankruptcy Court or that the Award has been discharged by a United States Bankruptcy Court.

In addition, a total of \$1,410.50 in costs (\$660.50 for the transcript of the January 18, 2002 hearing¹² and a standard \$750.00 administrative fee) will be imposed on Respondent _____.¹³

SO ORDERED.

Jerome Nelson
Hearing Officer

Dated: Washington, DC
 March 15, 2002

¹² These costs are as follows: \$468.00 for the transcript; \$27.50 for delivery and handling; and \$165.00 for the court reporter's appearance fee.

¹³ The Hearing Officer 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.