

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision ARB010016.

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	Non-Summary Suspension
	:	Consolidated Proceeding No. ARB010016
	:	(Consolidating Proceeding No. ARB010016
Complainant,	:	and Proceeding No. ARB010017)
	:	
v.	:	
	:	
	:	DECISION
	:	
	:	Hearing Officer - SW
	:	
	:	
Respondent.	:	January 28, 2002

Pursuant to Article VI, Section 3 of the NASD By-laws and Procedural Rule 9514(g), the Hearing Officer suspended the registrations of Respondents _____ and _____ for failing to pay a joint arbitration award. The Hearing Officer determined that the Respondents failed to demonstrate a *bona fide* inability to pay the award or to make some meaningful payment toward the award.

Appearances

Pamela Shu, Esq., Chicago, Illinois, and Richard S. Schultz, Esq., Chicago, Illinois, for the Department of Enforcement.

_____, pro se.

_____, pro se.

Decision

Introduction

On April 11, 2001, an Arbitration Award was issued against Respondents ____ and _____ (the “Respondents”) in NASD Arbitration Proceeding No. 00-00183, entitled SII

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Investments, Inc. (formerly known as Secure Investments, Inc.) Claimant vs. _____ and

_____, Respondents. The Respondents failed to pay the Arbitration Award within 30 days of the issuance of the award. In June 15, 2001 letters, the NASD Dispute Resolution, Inc. (“Dispute Resolution”) staff notified the Respondents that their registrations would be suspended in fifteen days for failure to pay the award.

On June 22, 2001 and July 2, 2001,¹ the Respondents filed separate requests for hearings, indicating that they would present evidence showing financial hardship and an inability to pay the Arbitration Award. On July 25, 2001, the Hearing Officer consolidated the two suspension proceedings, Department of Enforcement v. _____, Proceeding No. ARB010016 and Department of Enforcement v. _____, Proceeding No. ARB010017, with the consent of the Parties.

The Hearing Officer (acting as a Hearing Panel under Rule 9514(b)) conducted a telephonic hearing on October 3, 2001.² The Respondents and the Department of Enforcement

¹ At a July 20, 2001 pre-hearing conference, the Hearing Officer found that the suspension notice as drafted, permitted Respondent _____ to conclude that the deadline was July 3, 2001. Accordingly, the Hearing Officer deemed Respondent _____’s request as timely filed, although it was filed more than seven days after receipt of the suspension notice.

² “Tr.” refers to the transcript of the October 3, 2001 Hearing. At the Hearing, Respondent _____, who previously had been represented by counsel at the pre-hearing conferences, specifically waived having counsel present and expressed his wish to proceed pro se. (Tr. pp. 6-7). In addition, Respondent _____ indicated his desire to continue to proceed pro se. (Id.).

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(“Enforcement”) offered joint stipulations of facts.³ The Parties also offered a total of nine exhibits.⁴

Facts

Respondent ____ stipulated that, from June 22, 1992 through and including the period relevant to this matter, he was registered with the NASD as a general securities representative. (CStip. at ¶1). Respondent ____ was registered as a general securities representative with the Claimant from October 1997 to November 1999. (JCX-4, p. 6). Since February 22, 2001, Respondent ____ has been registered as a general securities representative with Interfirst Securities, Inc.⁵ (JCX-4, p. 2).

Respondent _____ stipulated that, from April 24, 1996 though and including the period relevant to this matter, he was registered with the NASD as a general securities representative. (OSTip. at ¶1). Respondent _____ was registered as a general securities representative with the Claimant from October 1997 to October 1999. (JOX-8, p. 4). Since September 17, 1999, Respondent _____ has been registered as a general securities principal and general securities representative with Harbour Investment, Inc. (JOX-8, p. 3).

On April 11, 2001, the Arbitration Award in NASD Arbitration Proceeding No. 00-00183 was issued. (CStip at ¶2; OSTip. at ¶2). The Arbitration Award provided that Respondents ____

³ “CStip.” refers to the joint stipulation of facts of Enforcement and Respondent _____. “OSTip.” refers to the joint stipulation of facts of Enforcement and Respondent _____.

⁴ “JX” refers to the joint exhibits of Enforcement and the Respondents. “JCX” refers to the joint exhibits of Enforcement and Respondent _____. “JOX” refers to the joint exhibits of Enforcement and Respondent _____.

⁵ Between November 1999 and January 2001, Respondent ____ was registered as a general securities representative with Harbour Investments, Inc. (JCX-4, p. 3).

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and _____ were jointly and severally liable and should pay the Claimant \$20,923.73 in compensatory damages, plus interest at the rate of 6% per annum accruing from January 14, 2000 until the sum is paid in full. (JX-1, p. 3).

On April 13, 2001, the Respondents received the award notice letter, notifying them of the award issued against them and enclosing a copy of the Arbitration Award. (CStip. at ¶3; OStip. at ¶3; JX-2). On May 14, 2001, counsel for the Claimant submitted a letter to Dispute Resolution stating that the Respondents had not paid the award. (CStip. at ¶4; OStip. at ¶4; JX-3).

On June 16, 2001, Respondent _____ received the suspension notice, dated June 15, 2001, from Dispute Resolution. (CStip. at ¶5; JCX-5). On June 18, 2001, Respondent _____ received a similar suspension notice, dated June 15, 2001, from Dispute Resolution. (OStip. at ¶5; JOX-7). The June 15, 2001 suspension notices informed the Respondents that their registrations would be suspended, in accordance with Article VI, Section 3 of the NASD By-Laws and Rule 9510 et seq., for their failure to comply with the Arbitration Award issued in NASD Arbitration Proceeding No. 00-00183. (JCX-5; JOX-7).

The suspension notices explained that the Respondents would not be suspended if: (1) they had made full payment of the award; (2) the parties had agreed to a settlement; (3) the award had been modified or vacated by court or an action to vacate or modify the award was pending in a court; (4) a bankruptcy petition was pending in a United States Bankruptcy Court, or the award had been discharged by a United States Bankruptcy Court; or (5) they had a bona fide inability to pay the award. (Id.).

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The Respondents stipulated that they had not fully satisfied the award. (CStip. at ¶7; OStip. at ¶7). They also stipulated that they had neither challenged the award by making a motion to vacate it, nor filed for bankruptcy. (CStip. at ¶6; OStip. at ¶6). They claimed, however, that they were financially unable to pay the award.

Discussion

Arbitration proceedings are designed to settle disputes efficiently and to avoid expensive litigation.⁶ NASD Rule 10330(h) provides that “All monetary awards shall be paid within thirty (30) days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction.” Under the Rule 9510 Series, the NASD may issue a written notice suspending or canceling the registration of a person who has failed to comply with an arbitration award. Within seven days after the date of service of a notice issued under Rule 9513, the person served with such notice may file a written request for a hearing with the Office of Hearing Officers.

As indicated in the suspension notices that the Respondents received, only a few defenses are available in this proceeding. The only defense raised by the Respondents was that they had an inability to pay the award.

Respondent _____ offered a Financial Disclosure Statement as of August 16, 2001 and testimony that he could not obtain a loan from his family members or banks to support his claim of an inability to pay the award. (JCX-6; Tr. pp. 9-10). Respondent _____ offered a Financial Disclosure Statement as of August 1, 2001 and testimony that he could not obtain a loan from his

⁶ See In re Peter Thompson Higgins, Exchange Act Release No. 33325, (December 10, 1993), 1993 SEC LEXIS 3439 (1993).

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family members or banks to support his claim of an inability to pay the award. (JOX-9; Tr. p. 18).

A respondent who claims an inability to pay bears the burden of proof.⁷ An inability to pay defense will be rejected if it appears that the respondent has the ability to divert funds from other expenditures to pay the award, or could borrow the funds, or could make some meaningful payment toward the award from available assets or income, even if he could not pay the full amount.⁸

In this proceeding, Respondent ____'s financial disclosure statement indicated that he had a positive net worth of \$177,500 as of August 16, 2001 and income of \$63,211 for 2000.⁹ (JCX-6, pp. 33, 35). At the Hearing, Respondent ____ testified that his financial disclosure statement overstated his actual net worth because (i) the value of his partnership was actually \$306,000 versus the \$350,000 shown on the financial disclosure statement, (ii) his second mortgage loan amount was actually \$77,000 rather than \$70,000, (iii) the current amount of his cash was \$1,000 rather than \$3,100, (iv) his IRA account was currently valued at \$3,100 rather

⁷ District Bus. Conduct Comm. for Dist. No. 7 v. Bruce M. Zipper, Complaint No. C07910138, 1994 NASD Discip. LEXIS 194 (1994), aff'd, Exchange Act Release No. 35606, (April 17, 1995).

⁸ District Bus. Conduct Comm. for Dist. No. 1 v. Glen McKinley Richards, III, Complaint No. C01970017, 1998 NASD Discip. Lexis 48 (1998) (The National Advisory Counsel found that, based on his personal and combined family income of \$19,709.75 for Richards and \$27,940 for his wife for 1996, Richards was not without means to satisfy the \$5,500 arbitration award.).

⁹ Respondent ____ estimated that his expenses of \$70,300 exceeded his income. (JCX-6, p. 36). Respondent indicated that the expenses did not include an anticipated \$3,000 insurance deductible to cover the birth of his second child. (Id.). Respondent ____ also presented a commission run showing total year to date commissions of \$4,446.57 through August 17, 2001. (JCX-6, p. 32).

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than \$4,800, and (v) the current value of his marketable securities was \$500 rather than \$1,000.¹⁰

(Tr. p. 42). However, even if his revised numbers are accepted, after subtracting the \$44,000 for the partnership, the \$7,000 for the second mortgage, and the other amounts mentioned,

Respondent ____ admitted that his net worth remained a positive \$90,000 to \$95,000.¹¹ (Tr. p.

44). The \$90,000 to \$95,000 positive net worth includes \$35,000 in his wife's pension and

retirement plan. (Tr. p. 45). Accordingly, Respondent ____ appears to have assets that he could

tap to make some meaningful payment toward the award, even if he could not pay the full

amount.

In addition to having a positive net worth, in the last 12 months, Respondent ____ made

\$12,000 in debt payments on credit card loans and other loans. (JCX-6, p. 36). The debt

payments support the inference that Respondent ____ chose to pay credit card bills, while paying

nothing to the Claimant. (JCX-6, p. 36).

Respondent _____'s financial disclosure statement indicated that he had a negative net worth of (\$36,600), but, in 2000, he had income of \$94,713.78 compared to expenses of

\$51,000.¹² (JOX-9, pp. 11, 14). At the Hearing, Respondent _____ testified that he had not

included his business expenses of approximately \$20,000 or his \$2,000 in college expenses. (Tr.

p. 25). However, Respondent _____ admitted that, even if the additional business expenses of

¹⁰ The change in the value of the partnership was based on a recent bank appraisal; the change in the loan amount was necessary to correct a mistake; the decline in marketable securities and the IRA account was the result of a downturn in the market rather than early withdrawal. (Tr. pp. 50-51).

¹¹ Respondent ____ also testified that his home was collateral on a business loan in the total amount of \$400,000. (Tr. p. 48). Respondent ____'s portion of the \$400,000 loan is \$200,000, which is included when calculating the net worth. (Tr. p. 44; JCX-6, p. 35).

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\$20,000 and college expenses of \$2,000 were added to the \$51,000 expenses shown on his financial statement, he had \$21,000 in income available. (Id.). Accordingly, Respondent _____ appears to have income that he could tap to make some meaningful payment toward the award.¹³

Further, Respondent _____ made \$9,000 in debt payments, not including automobile expenses of \$10,164 in the last twelve months, which suggests that he chose to pay credit card bills and automobile expenses, while paying nothing to the Claimant. (JOX-9, p. 14).

The Hearing Officer finds that both Respondents failed to satisfy their burden of proof. The evidence presented by Respondents _____ and _____ indicated that they have the means to satisfy the \$20,923.73 plus interest award or a substantial part of the award. The financial disclosure statements, even as modified by the Respondents' testimony, indicate that Respondent _____ appears to have sufficient assets, and Respondent _____ appears to have sufficient income to make substantial payments on the award. The Hearing Officer finds that the Respondents failed to prove that their failure to pay the award or substantial part of the award was the result of a genuine inability to pay the award, rather than their own asset-allocation decisions.¹⁴

¹² Respondent _____ provided no documentary evidence concerning his current 2001 income.

¹³ In addition, Respondent _____ testified that at one point in time, he had the opportunity to borrow \$10,000 from a family member to make a payment to the Claimant. (Tr. p. 27). Because the Claimant refused to accept the \$10,000 as full satisfaction of his debt, Respondent _____, on advice of counsel, refused to make the payment. (Tr. pp. 27-29).

¹⁴ Herbert Garrett Frey, Exchange Act Release No. 39007, 1997 SEC LEXIS 1796 (1997); District Bus. Conduct Comm. for Dist. No. 7 v. Bruce M. Zipper, Complaint No. C07910138, 1994 NASD Discip. LEXIS 194 (1994), aff'd, Exchange Act Release No. 35606, (April 17, 1995).

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Conclusion

In light of the foregoing, pursuant to Article VI, Section 3 of the NASD By-Laws and Procedural Rule 9514(g), Respondents' registrations are suspended effective upon service of this decision.¹⁵ Under Rule 9516, the Respondents may file a written request with Enforcement for reinstatement on the ground that (1) the award has been paid in full; (2) the claimant has agreed to installment payments of the amount awarded or has otherwise agreed to settle the action; (3) an action to vacate or modify the underlying arbitration award is pending in court or the arbitration award has been vacated or modified by a court; or (4) there is a pending bankruptcy petition or the underlying arbitration award and fees have been discharged by a United States Bankruptcy Court.

SO ORDERED.

Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
January 28, 2002

¹⁵ The Hearing Officer 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.