

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS¹**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. E8A2003084806

Hearing Officer — LBB

HEARING PANEL DECISION

February 6, 2008

Respondent violated NASD Conduct Rules 3030 and 2110 by failing to disclose in writing to his employer that he participated in an outside business activity. Respondent is fined \$7,100 and ordered to pay costs.

Appearances

Marcletta Kerr, Esq., Regional Attorney, and Dale A. Glanzman, Esq., Regional Counsel, FINRA, Chicago, Illinois, for the Department of Enforcement.

Charles J. Hertel, Esq., for Respondent.

DECISION

I. Introduction and Procedural History.

The Department of Enforcement filed this one-cause complaint on July 31, 2006, charging Respondent with failing to give written notice to his firms that he was engaged in outside business activities, in violation of NASD Conduct Rules 3030 and 2110. Respondent

¹ As of July 30, 2007, NASD consolidated with the member firm regulation functions of NYSE and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD.

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filed an Answer on August 24, 2006. A hearing was held in Milwaukee, Wisconsin, on November 1, 2007, before a Hearing Panel consisting of two current members of the District 8 Committee and a Hearing Officer.

II. Findings of Fact.

A. Respondent.

Respondent was registered in 1999 as an Investment Company and Variable Contracts Products Representative with FINRA members Metropolitan Life Insurance Company and MetLife Securities, Inc. ("MetLife"). Tr. 103; CX-1.² He remained registered with MetLife until May 2003. In June 2003, Respondent became registered with FINRA member Banc One Securities Corporation, predecessor to member firm Chase Investment Services Corporation ("Chase"), where he is currently registered and employed as a personal banker. Tr. 102-103; CX-1. Respondent has no disciplinary history. Tr. 120-121. Before he began his employment in the securities industry, Respondent was a machinist for 20 years. Tr. 140.

B. Respondent's Referrals and Commissions.

While Respondent was employed at MetLife, he referred customers to S.V., a former MetLife representative, who sold annuities to these customers. Tr. 11. The total of the sales resulting from the referrals to S.V. was \$166,000. Tr. 11. Respondent received \$7,087.17 as compensation from S.V. for these referrals. Tr. 11. Respondent has not made any other referrals. Tr. 130. As discussed below, Respondent did not submit written notice to MetLife of these referrals because he believed that the verbal approval he had received from his immediate supervisor was all that was required. When one of these referrals led to the receipt of compensation from S.V. while Respondent was employed by Chase, Respondent did not report

² References to the testimony set forth in the transcripts of the Hearing will be designated as "Tr. __," with the appropriate page number. References to the exhibits provided by the Department of Enforcement are designated as "CX-__," and Respondent's exhibits are designated as "RX-__." Exhibits CX-1 – CX-18, CX-20, CX-21, RX-1, and RX-2 were admitted into evidence.

the receipt of the funds to Chase because he did not believe he was required to report the receipt of funds arising from an activity that took place before he was employed at Chase.

1. Respondent Referred Business and Received Commissions While Employed at MetLife After Receiving Verbal Approval from His Manager but Without Informing MetLife in Writing.

Respondent was employed as a Financial Services Representative by MetLife in a small office in Wisconsin, where there were approximately 10 representatives in 2003. Tr. 23, 24-25, 33, 103; CX-1. Until December 30, 2002, the day-to-day supervisor of the office was T.B., the Agency Director; however, the formal supervisor of the office was E.D., who was located in another MetLife office about 30 minutes away and was rarely at Respondent's office. Tr. 16-17, 25, 29-30, 98, 103. Respondent was instructed that T.B. was his supervisor, and when something needed approval he went to T.B. CX-20 at 26 [OTR Tr. 56]. When the other representatives had questions about proper procedures, they also turned to T.B. Tr. 148-149.

S.V. began working at MetLife in about 1989, and continued there until about 2002, when he left to work with his father in an independent agency. Tr. 73-74, 112. S.V. had worked for T.B. in the local MetLife office. Tr. 19, 23-24. After S.V. left MetLife, he regularly went to the MetLife office to meet with the representatives there. Tr. 106, 112-113. These meetings were for both social and business purposes. S.V. encouraged the MetLife representatives to refer business to him. Tr. 106, 136, 149-150. Approximately seven of the ten representatives in the office referred business to S.V., and none of them notified MetLife in writing. Tr. 27-28, 31-32.

In late 2002, Respondent answered a telephone call from an unhappy MetLife customer, G.V. Tr. 105; CX-20 at 14-15 [OTR Tr. 35-36]. Respondent and W.G., another representative in Respondent's office, met with G.V., and both felt that the products that MetLife had sold to the customer were performing poorly and failed to meet his needs. Tr. 81-83, 105-106.

Respondent and W.G. then met with T.B. to inform him that the customer was unhappy and to

discuss MetLife products that might better meet the customer's needs. Tr. 84-85, 92-93, 106, 109-110. At T.B.'s suggestion, they also checked with MetLife headquarters to try to find a MetLife product that was more appropriate for G.V., but they were unable to identify one that adequately met his needs. Tr. 82, 86-87, 109-110; CX-20 at 15 [OTR Tr. 36]. Additionally, Respondent checked to see if there was a suitable product available through the MetLife General Agency, a system that permitted the representatives to sell certain approved non-MetLife products.³ Tr. 17, 42 – 43, 108.

While the specific ING annuity involved in this case was not on the General Agency list (Tr. 108-109, 128), certain ING annuities were on it. Tr. 55-57. However, S.V. offered a product that was superior to any offered by MetLife, including those on the General Agency system. Tr. 109-110. Respondent and W.G. again met with T.B., informed him of the situation, and told him that they intended to refer G.V. to S.V. Tr. 85-86, 92. T.B. told Respondent that he was also unaware of any General Agency products that were equivalent to S.V.'s product. Tr. 109-110. T.B. told Respondent and W.G. to "do what you have to do," which both Respondent and W.G. understood as T.B.'s approval of the proposed referral to S.V. Tr. 87, 92-93; 110-111, 128. T.B. did not reference any MetLife or NASD rules or otherwise advise Respondent and W.G. that they were required to submit written notice to MetLife. Tr. 87-88, 110-111.

After checking with T.B., Respondent and W.G. referred customer G.V. to S.V. because it was in the best interest of the customer. Tr. 112, 132; CX-20 at 14-16 [OTR Tr. 35-37].

³ If a product was already on the General Agency list, the representative could sell it to his customers after filling out certain paperwork. Tr. 17-18, 43. If a product was not on the list, the representative could seek to have it added to the General Agency list. Tr. 17-18, 57-58. Respondent had used the General Agency system on at least three occasions prior to the events that are the subject of the Complaint, selling health insurance and term life insurance to customers. Tr. 45. In total, Respondent received \$1,159.78 from policies sold using the MetLife General Agency system. Tr. 46.

Respondent expected to receive compensation from S.V. for the referral. Tr. 113-114; CX-20 at 38 [OTR Tr. 84]. Although Respondent did not explicitly inform T.B. that he would receive such a fee, T.B. would have known that he would. Tr. 174-175; CX-20 at 43 [OTR Tr. 91].

Respondent did not provide written notice to MetLife concerning the referral of business to S.V. Tr. 104. Respondent believed that he had given sufficient notice when T.B., who was his manager, gave his verbal approval. Tr. 111; CX-20 at 13, 28 [OTR Tr. 34, 60]. W.G. did not believe that he had an obligation to give notice to MetLife. Tr. 89-90. Respondent did not believe that he was violating any MetLife or NASD rules. Tr. 118-119, 121. Moreover, if anything more than providing oral notice to T.B. were required, he would have expected T.B. to inform him. Tr. 130-131.

While T.B. denies that the discussions took place (Tr. 19-20), the Hearing Panel finds the testimony of Respondent and W.G. to be more credible.⁴ Aside from the conflict with the testimony of Respondent and W.G., the Hearing Panel found it to be incredible that the manager of a small office would not have known that most of the representatives in the office referred business to S.V. T.B.'s ignorance was especially unlikely because he knew that S.V. was regularly in the office after he had left MetLife to work with his father at an independent agency. Furthermore, in observing the demeanor of W.G., T.B., and Respondent, the Hearing Panel found that W.G. and Respondent were more credible witnesses than T.B. The Hearing Panel believed that T.B. was evasive, defensive, and self-serving, both in the content of his answers and his demeanor. T.B. appeared to be attempting to "sell" a story to the Hearing Panel rather

⁴ T.B. attempted to bolster the credibility of his denial by asserting that he would have received overrides on commissions if the representatives had sold MetLife products or products or sold through the General Agency system, and therefore would have advised the representatives that they should not refer customers to S.V. Tr. 20. The Hearing Panel considered this testimony and did not find it persuasive compared to the evidence that T.B. was actually informed, both because of the greater credibility of Respondent and W.G., and because of the circumstances of the referral of business to S.V. Additionally, it is not clear that T.B. would have received overrides because he was no longer the Agency Director when Respondent received the commissions. T.B. resigned as Agency Director effective December 30, 2002. Tr. 17, 36. Respondent received the commissions in 2003. CX-10 – CX-12.

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than testifying as to his genuine recollection of events, while W.G. and Respondent both appeared to be testifying candidly.

Respondent also referred two other customers to S.V., and received commissions from him for the referrals. Tr. 11, 115. Respondent had informed T.B. that he would be referring other customers to S.V. Tr. 116, 128-129.

MetLife's rules prohibited the representatives from engaging in outside business activities without providing written notice to MetLife. Tr. 48; CX-4. While the MetLife rules were available to the representatives (Tr. 50-51), the representatives in this office were generally unfamiliar with them. Tr. 80; CX-20 at 11 [OTR Tr. 32].⁵ MetLife's outside business activity procedures required submission of a MetLife "Form EP 2" and approval from the Company headquarters; local approval was insufficient. Tr. 41-42.

Each MetLife representative was required to fill out a certification form each year that related to compliance with a number of MetLife requirements, including outside business activity rules. The form referenced a requirement that MetLife representatives report, using Form EP 2, "any insurance company appointments and employment or compensation from entities other than MetLife and affiliated companies." CX-6. The annual form required the representative to respond to specific compliance questions by checking boxes, including a box that refers to Form EP 2 and the requirement of written notice. CX-6, CX-9. Respondent was familiar with Form EP 2. He submitted a Form EP 2 in 2001 to disclose his ownership of a rental property. CX-7.

The registered representatives received minimal training on MetLife or NASD rules. Tr. 95-96. There were weekly meetings, but the emphasis in those meetings was on sales and

⁵ T.B. testified that "we went through [the policies in CX-4] every single year." Tr. 22. As with much of T.B.'s testimony, the Hearing Panel did not find this testimony credible.

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discussions of MetLife products. Tr. 97-98.⁶ None of the three representatives who testified was aware that they were required to submit written notice to MetLife of their intention to refer business to S.V. or of their receipt of commissions from the sale. Tr. 68-70, 72, 89-90, 118-119. Respondent did not recall receiving training in the outside business activity requirements. Tr. 120; CX-20 at 11 [OTR Tr. 32]. W.G., another representative in the office, similarly did not recall any such training. Tr. 97. The representative whom Enforcement called to testify did not know until the end of 2003, after Respondent had left MetLife, that it was not proper to refer business to S.V. without notifying MetLife in writing. Tr. 68-70.⁷

Respondent did not know that he might be required to notify MetLife of the referrals to S.V. in writing until March 2005, when he received a letter from FINRA requesting information concerning the referral of business to S.V. Tr. 133, 135, 145; CX-15, CX-16. He had understood that MetLife Form EP 2 was for activities that were not investments. Tr. 130. As noted above, Respondent’s testimony was consistent with the actions of the other representatives in the office who also did not provide written notice to MetLife, which supports the credibility of Respondent’s assertion that he did not know that T.B.’s verbal approval provided insufficient notice to MetLife.

2. Respondent Received Commissions While Employed at Chase Without Informing Chase in Writing.

While Respondent was at Chase, in about June and August 2003, he unexpectedly received two checks in the mail from S.V. Tr. 139-140, 145; CX-13, CX-14. The checks were for referring business to S.V., but Respondent did not know this until he asked, because neither

⁶ T.B. testified that “selling away,” i.e., outside business activities, was discussed at compliance meetings. Tr. 20. The Panel did not find this testimony credible. T.B.’s testimony conflicted with the testimony and actions of other witnesses.

⁷ The witness testified that the written notice requirement is probably part of the Series 6 examination, but he did not recall the requirement. Tr. 72.

check was for a customer whom Respondent had even met, let alone referred to S.V. CX-20 at 45-46, 48-49 [OTR Tr. 94, 96, 98-99]. Rather, both were compensation for sales by S.V. to members of the family of a customer whom Respondent had referred to S.V. Until he received the compensation from S.V., Respondent had been totally unaware of the family members. Tr. 139-140; CX-20 at 16-17 [OTR Tr. 37-38]. Respondent did not notify Chase that he had received the checks. Tr. 126; CX-20 at 23, 51 [OTR Tr. 52,103].

Chase's policies required its representatives to obtain permission from Chase prior to engaging in outside business activities "either as proprietor, partner, officer, director, employee, trustee, agent or otherwise." CX-17. While Respondent received training in Chase's policies and procedures when he began his employment, he did not remember receiving training with respect to outside business activities. CX-20 at 18-19 [OTR Tr. 45-46]. In May and December 2003, Respondent certified to Chase that he was not "currently engaged in any other business either as a proprietor, partner, officer, director, employee, trustee, agent or otherwise." CX-21, CX-18. Because the commissions related to work he had done prior to joining Chase, Respondent did not believe that he was required to report the commissions to Chase. Tr. 139, 144-145; CX-20 at 44-47 [OTR Tr. 93, 94, 96, 97].

C. Origin of the Investigation.

Enforcement's investigation of this matter began as an investigation of the activities of S.V. CX-15. S.V.'s testimony during the Staff's investigation of him led the Staff to investigate Respondent. CX-15. By letter of March 14, 2005, the Staff submitted questions to Respondent concerning his relationship with S.V. and possible involvement in outside business activities. CX-15. Respondent cooperated with this investigation, providing prompt written responses to the Staff's letter. CX-16.

III. Respondent Engaged in an Outside Business Activity Without Giving Proper Notice to His Firm, in Violation of Conduct Rules 3030 and 2110.

Respondent and the Department of Enforcement have stipulated that Respondent engaged in outside business activities in violation of Conduct Rules 3030 and 2110. Tr. 8, 11.

Conduct Rule 3030 provides that “[n]o person associated with a member shall be employed by, or accept compensation from, any other person as a result of any business activity ... outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member ... in the form required by the member.” The purpose of Rule 3030 is to provide member firms with prompt notice of outside business activities so that the member’s objections, if any, to such activities can be raised at a meaningful time and the member can exercise appropriate supervision as necessary under applicable law. Proposed Rule Change by NASD Relating to Outside Business Activities of Associated Persons, Exchange Act Release No. 26,063, 1988 SEC LEXIS 1841 (Sept. 6, 1988), adopted at Exchange Act Release No. 26,178, 1988 SEC LEXIS 2032 (Oct. 13, 1988). Rule 3030 requires disclosure of all outside business activity, not just securities-related activity. Dist. Bus. Conduct Comm. v. Cruz, No. C8A930048, 1997 NASD Discip. LEXIS 62, at *96 (Oct. 31, 1997).

Respondent engaged in an outside business activity while at MetLife. He referred business to someone with the expectation of receiving compensation for the referrals, and received the expected compensation. While Respondent provided verbal notice to his immediate supervisor, he did not provide written notice to MetLife as required by Rule 3030 and MetLife’s procedures. The Hearing Panel finds that Respondent violated Rules 3030 and 2110 while he was at MetLife by referring customers to S.V. with the expectation of receiving commissions for those referrals.

Although Respondent did not actively engage in any outside business activity while at Chase, he received \$1,703 while at Chase as the indirect result of his unauthorized outside business activity while at MetLife. Under these circumstances, the Hearing Panel finds it unnecessary to decide whether the Respondent's failure to notify Chase of the receipt of income from business activity that took place prior to employment at Chase would have been a separate, independent violation of Rule 3030. Furthermore, the Hearing Panel finds that Respondent's understanding that the terms of Chase's written policy on notification with respect to outside business activities did not encompass receipt of funds relating to activities that occurred prior to his employment at Chase was reasonable. The Chase policy required notice prior to engaging in outside business activities "either as proprietor, partner, officer, director, employee, trustee, agent or otherwise." CX-17. Respondent did not act in any of those capacities with respect to the referral of business to S.V. while at Chase. Similarly, it would have been reasonable for Respondent to interpret Conduct Rule 3030 as not applicable to the receipt of income for activities that occurred prior to his employment at Chase because it was not "a result of any business activity ... outside the scope of his relationship with his [current] employer firm," but the result of business activity that occurred prior to his relationship with Chase.

IV. Sanctions.

The Hearing Panel finds that an appropriate sanction is a fine of \$7,100. The Sanction Guidelines recommend a fine of \$2,500 to \$50,000. FINRA Sanction Guidelines at 14. The fine is within the amount recommended by the Sanction Guidelines and would deprive Respondent of the revenue he received as a result of the outside business activities. The amount exceeds Respondent's actual financial benefit from the referrals, because Respondent could have listed the products that were sold to the customers on the General Agency system and received a commission for the sale of these annuities to the customers who were referred to S.V. Tr. 43-44.

The Hearing Panel has considered the Principal Considerations under the Sanction Guidelines, and finds that there are mitigating factors but not aggravating factors. Respondent's violation of the rules was not the result of intentional or reckless conduct, but rather of negligence in not understanding what the rules required. Respondent's conduct was not intentional because Respondent believed that T.B.'s verbal approval was adequate. Representatives in Respondent's office received minimal training, and several of the ten representatives there also believed that T.B.'s verbal approval was sufficient. Given this pervasive belief in the office, Respondent's conduct cannot be characterized as reckless. Respondent was negligent for not understanding the requirements of the NASD rules and MetLife's policies.

The number of referrals was small and the duration of the violations was short. While customers of the firm were involved, Respondent did his best to identify suitable MetLife products for at least one of the customers before referring him to S.V., and any injury to MetLife from not receiving commissions on potential sales was minimal. The first customer Respondent ultimately referred to S.V. had informed him that he wanted to leave MetLife, yet Respondent attempted to identify MetLife products that would satisfy the customer. Two of the five people for whom Respondent received commissions were not customers of the firm, but were children of a customer who had purchased policies from S.V. without Respondent's knowledge. Similarly, Respondent's financial gain was quite small, especially since he could have received commissions from MetLife by selling the same products through the General Agency system.

The un rebutted testimony is that the customers benefited from Respondent's activity. They were able to buy products from S.V. that better suited their investment objectives than MetLife's products. The fact that Respondent did not refer additional customers to S.V. while at

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MetLife and Chase shows that Respondent was genuinely trying to help a small number of customers rather than making referrals to earn commissions outside the MetLife system.

Additional un rebutted testimony is that the customers did not think that MetLife had approved the product or service. The customers knew they were being referred to someone in a separate agency who was not part of MetLife. There is no reason to believe that the customers believed that they had bought MetLife products. CX-20 at 36 [OTR Tr. 68]. In fact, at least one of the customers was unhappy with MetLife and said that he did not want a MetLife product. CX-20 at 34 [OTR Tr. 66].

Respondent did not attempt to conceal his activities from MetLife. Although Respondent indicated on his MetLife annual certification form that he was not engaged in outside business activity, Respondent's response was the result of his failure to understand what was required rather than an intent to mislead. Had Respondent intended to engage in the covert referral of business to S.V., he would not have discussed his intention with T.B.

The Hearing Panel finds that a suspension would serve no remedial purpose. Respondent's outside business activity occurred for a short time and was done in a good-faith belief that it was not improper. For more than two years after these referrals, Respondent did not refer any business to S.V. or engage in any other outside business activity. Respondent has no history of disciplinary problems. The Hearing Panel believes that Respondent is contrite and sincere in his stated intention to comply with all applicable rules in the future. The imposition of a fine is a sufficient sanction to impress upon Respondent, and others in similar circumstances, the importance of providing prompt written notice of outside business activities.

The Hearing Panel does not impose any separate sanction for Respondent's failure to notify Chase of the receipt of commission income while at Chase that resulted from

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Respondent's activities that occurred prior to his employment at Chase. Respondent's belief that he was not required to notify Chase of the receipt of this income was a reasonable understanding of the text of Chase's policy and its notification forms. The compensation received from S.V. while Respondent was at Chase was the result of Respondent's activities while at MetLife, and the Hearing Panel has considered all the income that Respondent received from S.V., including the income he received while at Chase, in determining the amount of the fine.

V. Conclusion

Respondent is fined \$7,100 for engaging in unauthorized outside business activities, in violation of NASD Conduct Rules 3030 and 2110. In addition, he is ordered to pay costs in the amount of \$1,801, which includes a \$750 administrative fee and the costs of the hearing transcript. The fine and the costs shall become payable on a date set by FINRA, but not less than 30 days after this Decision becomes the final disciplinary action in this matter.⁸

HEARING PANEL

By: Lawrence B. Bernard
Hearing Officer

⁸ 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.