

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MICHAEL J. GIOVANNELLI
(CRD No. 4989449),

Respondent.

Disciplinary Proceeding
No. 2019061941101

Hearing Officer–BEK

DEFAULT DECISION

November 19, 2021

Respondent is barred from associating with any FINRA member firm in any capacity for providing falsified documents and false testimony to FINRA staff and engaging in unauthorized trading in a customer account. For the unauthorized trading, Respondent also is ordered to pay \$1,494 in restitution, plus interest, to the customer. In light of the bars, no further sanctions are imposed for Respondent’s discretionary trading without written authorization in four additional customer accounts.

Appearances

For the Complainant: Robert Kennedy, Esq., and Matthew Minerva, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: No appearance

DECISION

I. Introduction

The Department of Enforcement properly served Michael J. Giovannelli with two Notices of Complaint and the Complaint alleging that he provided falsified documents and false testimony to FINRA staff, engaged in unauthorized trading in a customer account, and exercised discretionary trading in four additional customer accounts without the customers’ written authorization. Giovannelli did not file an Answer.

On October 8, 2021, Enforcement filed a motion for entry of default decision (“Default Motion”). The Default Motion is supported by the Declaration of Enforcement counsel Robert Kennedy (“Kennedy Decl.”) and nine supporting exhibits. Giovannelli did not respond to the Default Motion.

For the reasons set forth below, I find Giovannelli in default and grant Enforcement's Default Motion.

II. Findings of Fact and Conclusions of Law

A. Respondent's Background

Giovannelli first became registered with FINRA as a general securities representative in 2006. Between 2006 and April 2017, he was registered with FINRA through ten different member firms. From May 1, 2017, to April 26, 2019, Giovannelli was registered with Richard James & Associates, Inc. ("Richard James"). Between July 1, 2019, and August 28, 2020, Giovannelli was registered with Spartan Capital Securities, LLC ("Spartan").¹

On August 28, 2020, Spartan filed a Uniform Termination Notice for Securities Industry Registration (Form U5) terminating Giovannelli's registration. The Form U5 reported that Spartan had discharged Giovannelli because he had engaged in unauthorized trading in the account of a customer (Customer A).²

B. FINRA's Jurisdiction

Giovannelli was last registered with FINRA on August 28, 2020.³ Although Giovannelli is no longer registered or associated with a FINRA member firm, he remains subject to FINRA's jurisdiction for purposes of this proceeding pursuant to Article V, Section 4(a) of FINRA's By-Laws. This is because (1) the Complaint was filed within two years of the effective date of termination of Giovannelli's registration with his last FINRA member firm, and (2) the Complaint charges him with misconduct committed when he was registered or associated with a FINRA member.

C. Origin of the Investigation

In approximately March 2019, FINRA opened a high-risk registered representative examination of Giovannelli. In the course of its examination, FINRA staff identified evidence that Giovannelli had engaged in unauthorized trading in Customer A's account and exercised discretionary trading without written authorization in the accounts of four additional customers (Customers B, C, D, and E).⁴

¹ Complaint ("Compl.") ¶¶ 5-7; Exhibit ("Ex.") 1, at 5-13.

² Compl. ¶ 8; Ex. 2, at 1, 6.

³ Compl. ¶ 9; Ex. 1, at 5.

⁴ Kennedy Decl. ¶ 4.

D. Respondent's Default

Enforcement served Giovannelli with two Notices of Complaint and the Complaint in accordance with FINRA Rules 9131 and 9134. Enforcement served the First Notice of Complaint and Complaint on June 17, 2021, and an Amended Second Notice of Complaint and Complaint on August 18, 2021. In each case, Enforcement served Giovannelli by first-class certified mail, return receipt requested, at his last known residential address as reflected in the Central Registration Depository.⁵ Enforcement also sent copies to two email addresses for Giovannelli.⁶

Pursuant to FINRA Rule 9215, Giovannelli was required to file an Answer or otherwise respond to the Complaint by September 7, 2021. He has not done so. I thus find that Giovannelli defaulted.

On September 14, 2021, I issued an Order instructing Enforcement to file a Default Motion. Enforcement filed its Default Motion on October 8, 2021. Pursuant to FINRA Rules 9215(f) and 9269(a)(2), I grant the Default Motion and deem the allegations in the Complaint admitted.⁷

E. Giovannelli Engaged in Unauthorized Trading (Cause One).

Cause one of the Complaint alleges that Giovannelli violated FINRA Rule 2010 by making trades in the non-discretionary account of Customer A, an 87-year-old farmer, without the customer's authorization.⁸ Such unauthorized trading is "a serious breach of the duty to observe high standards of commercial honor and just and equitable principles of trade"⁹ and, thus, is a violation of FINRA Rule 2010.

Here, Customer A held a non-discretionary account at Spartan.¹⁰ Between February 4 and April 27, 2020, Giovannelli made 12 trades in this account without first obtaining Customer A's

⁵ *Id.* ¶¶ 16, 18, 24; Ex. 3; Ex. 7. On August 9, 2021, I ordered Enforcement to file a motion for entry of a default decision. Enforcement subsequently learned that service of the Second Notice of Complaint was deficient, so it filed and served Giovannelli with an Amended Second Notice of Complaint on August 18. On Enforcement's motion, I vacated my August 9 default Order. After Giovannelli failed to file an Answer, I ordered Enforcement to file its Default Motion by October 13, 2021.

⁶ Kennedy Decl. ¶¶ 18, 24; Ex. 3; Ex. 6; Ex. 7; Ex. 9.

⁷ Giovannelli is hereby notified that he may move to set aside the default pursuant to FINRA Rule 9269(c) upon a showing of good cause.

⁸ Compl. ¶¶ 11, 44-45.

⁹ *Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at *6 (July 1, 2008) (quoting *Bradley Kanode*, Exchange Act Release No. 26792, 1989 SEC LEXIS 825, at *3 (May 8, 1989)).

¹⁰ Compl. ¶ 44.

authorization.¹¹ The unauthorized trades generated \$1,380 in commissions and \$1,494 in realized losses.¹² Giovannelli's unauthorized trading violated FINRA Rule 2010.

F. Giovannelli Provided False Documents and False Testimony to FINRA

FINRA Rule 8210 requires anyone subject to FINRA jurisdiction to provide the information and testimony requested by FINRA staff and it "is at the heart of the self-regulatory system for the securities industry."¹³ Because FINRA lacks subpoena power, it relies on Rule 8210 to obtain information "necessary to carry out its investigations and fulfill its regulatory mandate."¹⁴ Providing false or misleading information violates FINRA Rules 8210 and 2010.¹⁵

1. Giovannelli Provided False Documents to FINRA (Cause Two).

The second cause of the Complaint alleges that Giovannelli provided false documents to FINRA in response to Rule 8210 requests.¹⁶ In connection with FINRA's investigation into Giovannelli's unauthorized transactions at Spartan, FINRA requested that Giovannelli provide telephone records showing all incoming and outgoing calls he made between January and July 2020.¹⁷ On November 29, 2020, in response to FINRA's request, Giovannelli provided copies of altered cellphone records that included calls made in February and April 2020.¹⁸ Giovannelli falsified his cellphone records to make it appear that he spoke to Customer A on five of the six dates of the unauthorized trades when he did not.¹⁹

By providing false information to FINRA in response to a Rule 8210 request, Giovannelli violated FINRA Rules 8210 and 2010.

2. Giovannelli Provided False Testimony to FINRA (Cause Three).

Cause three alleges that Giovannelli provided false testimony during his on-the-record interview ("OTR") on December 21, 2020, conducted pursuant to FINRA Rule 8210.²⁰ Giovannelli testified that he contacted Customer A to obtain authorization prior to each of the 12

¹¹ *Id.* ¶¶ 14-15, 45.

¹² *Id.* ¶¶ 16-17.

¹³ *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008), *petition for review denied*, 347 F. App'x 692 (2d Cir. 2009).

¹⁴ *CMG Inst'l Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *15 (Jan. 30, 2009).

¹⁵ *See Keilen Dimone Wiley*, Exchange Act Release No. 76558, 2015 SEC LEXIS 4952, at *22-23 (Dec. 4, 2015), *petition for review denied*, 663 F. App'x 353 (5th Cir. 2016).

¹⁶ Compl. ¶¶ 52-53.

¹⁷ *Id.* ¶¶ 23-25, 52.

¹⁸ *Id.* ¶¶ 26-27, 53.

¹⁹ *Id.* ¶¶ 15, 27-30, 53.

²⁰ *Id.* ¶ 57.

unauthorized trades he made in Customer A's account between February 4 and April 27, 2020.²¹ In fact, Giovannelli did not speak to Customer A or obtain his authorization before any of the 12 trades.²²

Giovannelli also testified that he did not alter any of the telephone records that he provided to FINRA.²³ To the contrary, Giovannelli had altered his cellular telephone records to make it appear that he spoke with Customer A on five of the six dates of the unauthorized trades when he did not.²⁴

By providing false testimony, Giovannelli violated FINRA Rules 8210 and 2010.

G. Giovannelli Exercised Discretionary Trading Without Written Authorization (Cause Four).

Cause four alleges that Giovannelli exercised discretion by trading in four customers' accounts without their written authorization in violation of NASD Rule 2510(b) and FINRA Rule 2010.²⁵ NASD Rule 2510(b) prohibits a registered representative from exercising discretionary authority in a customer's account unless the customer has given prior written authorization to the representative and the representative's member firm (1) has accepted the account as discretionary and (2) evidenced that acceptance in writing. A violation of NASD Rule 2510(b) is also a violation of FINRA Rule 2010.²⁶

Between September 2018 and March 2019, Giovannelli exercised discretion by executing 100 trades in the accounts of four Richard James customers—Customers B, C, D, and E—without first obtaining the customers' consent.²⁷ No customer gave Giovannelli prior written authorization to make discretionary trades and Richard James did not accept any of the four accounts as discretionary.²⁸ Giovannelli's misconduct violated NASD Rule 2510(b) and FINRA Rule 2010.

²¹ *Id.* ¶¶ 15, 35, 59.

²² *Id.* ¶¶ 35, 60.

²³ *Id.* ¶¶ 33, 58.

²⁴ *Id.* ¶¶ 27-30, 60.

²⁵ *Id.* ¶¶ 65-67.

²⁶ *See Michael Pino*, Exchange Act Release No. 74903, 2015 SEC LEXIS 1811, at *17-18, 35 (May 7, 2015) (finding that broker violated NASD Rule 2510(b) and FINRA Rule 2010 when he did not have customer written authorization to make trades).

²⁷ *Compl.* ¶¶ 37-39, 65.

²⁸ *Id.* ¶ 37, 66.

III. Sanctions

For the reasons stated below, and in the absence of any mitigating factors,²⁹ I find that a bar and restitution to be appropriate sanctions for Giovannelli's unauthorized trading in violation of FINRA Rule 2010. I find that a bar is appropriate for each of his violations of FINRA Rules 8210 and 2010. Finally, I find that a suspension of seven months and a fine of \$16,000 is appropriate for Giovannelli's discretionary trading in violation of NASD Rule 2510(b) and FINRA Rule 2010. In light of the bars, however, I do not impose this suspension and fine.

A. Engaging in Unauthorized Trading (Cause One)

For unauthorized transactions, FINRA's Sanction Guidelines ("Guidelines") recommend a fine of \$5,000 to \$116,000 and a suspension in any or all capacities for one month to two years.³⁰ Where aggravating factors predominate, the Guidelines recommend that an adjudicator "strongly consider" a bar.³¹ The Guidelines further provide that an adjudicator should not impose a fine if an individual is barred and there is no customer loss or the adjudicator orders restitution.³² Principal considerations specific to unauthorized transactions are (1) whether the respondent reasonably understood his or her authority or the terms of the customer's orders; (2) whether the respondent acted in bad faith, i.e., whether the respondent knew he or she was acting without authorization or was acting as a result of a reasonable misunderstanding; (3) the number of customers affected and the magnitude of the customers' losses; (4) the number and dollar value of the unauthorized transactions; (5) whether the respondent attempted to conceal the trading or to evade regulatory investigative efforts; and (6) whether the unauthorized transactions were made in furtherance of or in connection with another violation.³³

Here, Customer A was an 87-year-old farmer and Giovannelli made 12 unauthorized transactions in his account, resulting in a loss of \$1,494. Giovannelli also undertook efforts to evade regulatory investigative efforts when he lied about securing authorization and falsifying telephone records. In contrast, there are no mitigating factors. Because aggravating factors predominate, I find that a bar is appropriate.

The Guidelines also state that an adjudicator may provide for restitution when an identifiable person has suffered a quantifiable loss proximately caused by a respondent's

²⁹ Enforcement is not aware of any mitigation factors (*see* Kennedy Decl. ¶ 32), and I discern none from the record.

³⁰ FINRA Sanction Guidelines at 100 (2021), <http://www.finra.org/sanctionguidelines>.

³¹ Guidelines at 100.

³² Guidelines at 10.

³³ Guidelines at 100.

misconduct.³⁴ The record reflects that Customer A suffered a loss of \$1,494 that was proximately caused by Giovannelli's misconduct. I find that restitution in that amount is appropriate to remediate the loss suffered by Customer A.³⁵ In light of the bar and order to pay restitution, I am not imposing a fine.

B. Providing False Information and Testimony

For violations of FINRA Rule 8210, the Guidelines recommend a fine of \$25,000 to \$77,000 and/or a bar where the individual provides false responses or testimony pursuant to Rule 8210 requests.³⁶ Indeed, “[p]roviding false information to FINRA is a serious violation, which is routinely sanctioned with the imposition of a bar.”³⁷ In the absence of any mitigating factors, the principal consideration in determining sanctions is the importance of the information requested as viewed from FINRA's perspective.³⁸

1. Providing False Documents to FINRA (Cause Two)

Here, Giovannelli altered phone records that he provided to FINRA in response to a Rule 8210 request. He did this to make it appear that he spoke to Customer A on the dates of the unauthorized trades when he did not. FINRA was conducting a high-risk registered representative examination of Giovannelli, and his phone records were material and important to determining whether he had authorization from Customer A to place trades in the account. Giovannelli's altering of his phone records obstructed FINRA's investigation.

In light of the importance of the requested information to FINRA's examination, I find that the appropriate sanction is a bar in all capacities.

2. Providing False Testimony to FINRA (Cause Three)

In addition to submitting altered telephone records, Giovannelli lied under oath during his OTR about two key topics. He falsely testified that he spoke to Customer A by telephone to obtain authorization prior to each of 12 trades Giovannelli made in Customer A's account. He

³⁴ Guidelines at 4 (General Principle No. 5). Disgorgement also is recommended when a respondent has obtained a financial benefit from his or her misconduct. Guidelines at 100, n.2, and Guidelines at 5 (General Principle No. 6). Although the Complaint alleges that Giovannelli's unauthorized trades resulted in the customer's payment of commissions, the record does not provide the amount that Giovannelli received. Accordingly, I do not order disgorgement.

³⁵ For purposes of restitution, Customer A is identified in the Appendix to this Default Decision. The Appendix is served only on the parties.

³⁶ Guidelines at 33.

³⁷ See *Dep't of Enforcement v. Taddonio*, Nos. 2015044823501, 2015044823502, 2019 FINRA Discip. LEXIS 3, at *85 (NAC Jan. 29, 2019); see also *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *32 (Aug. 22, 2008) (“[F]ailure to provide truthful responses to requests for information renders the violator presumptively unfit for employment in the securities industry.”).

³⁸ Guidelines at 33.

also falsely testified that he did not alter his cellular telephone records before producing them to FINRA.

The information sought by FINRA was material and important to its high-risk registered representative examination and Giovannelli's false testimony impeded FINRA's examination. Accordingly, I find that a bar is appropriate.

C. Discretionary Trading Without Written Authorization (Cause Four)

For exercising discretion without a customer's written authority, the Guidelines recommend a fine of \$2,500 to \$16,000 and a suspension in any or all capacities for at least ten to 30 business days when aggravating factors predominate. Principal considerations specific to determining sanctions for engaging in unauthorized discretionary trading are (1) whether the customer's grant of discretion was express or implied; (2) whether the firm's policies or procedures prohibited discretionary trading; (3) whether the firm prohibited the respondent from exercising discretion in customer accounts; and (4) whether the respondent's exercise of discretion went beyond time and price discretion.³⁹ Relevant principal considerations applicable to all misconduct are (1) whether the respondent engaged in numerous acts and/or a pattern of misconduct; (2) whether the respondent engaged in the misconduct over an extended period of time; (3) whether the respondent attempted to conceal his misconduct from his firm; (4) whether the respondent attempted to conceal information from FINRA; and (5) the number, size, and character of the transactions at issue.⁴⁰

Here, Giovannelli had neither express nor implied authority to conduct discretionary trading in the accounts of Customers B, C, D, and E. His actions also violated Richard James's written procedures, which permitted discretionary accounts only upon written authorization from a client and only when also accepted by Richard James.⁴¹ Moreover, he exercised discretion in 100 trades in four customers' accounts over a period of seven months.

In light of the multiple aggravating factors, and in the absence of mitigating factors, I find that a seven-month suspension and a \$16,000 fine is appropriate.⁴² Such a sanction sends a strong message that FINRA will take appropriate action to protect investors and strengthen market integrity, which is the very core of FINRA's regulatory mission.⁴³ However, in light of

³⁹ Guidelines at 87.

⁴⁰ Guidelines at 7-8 (Principal Considerations Nos. 8-10, 17).

⁴¹ Compl. ¶ 36.

⁴² Adjudicators are instructed to "tailor sanctions to respond to the misconduct at issue" and they may consider sanctions above or below the recommended range. Guidelines at 3 (General Principle No. 3). *See also Dep't of Enforcement v. King*, No. 2015044444801, 2017 FINRA Discip. LEXIS 31, at *61 (NAC July 20, 2017) (noting that discretionary trading is "inherently susceptible to abuse") (quoting *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *27 (July 2, 2013), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014)).

⁴³ Guidelines at 1.

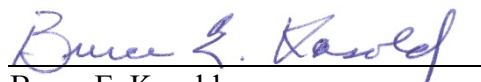
the bars for the violations of FINRA Rules 8210 and the unauthorized trading in Customer A's account, I do not impose this suspension and fine.

IV. Order

Respondent Michael J. Giovannelli is barred from associating with any FINRA member firm in any capacity for each of the following: (1) engaging in unauthorized trading in violation of FINRA Rule 2010, as alleged in cause one; (2) providing false documents to FINRA in violation of FINRA Rules 8210 and 2010, as alleged in cause two; and (3) providing false testimony during an OTR in violation of FINRA Rules 8210 and 2010, as alleged in cause three. Additionally, in connection with cause one, Giovannelli is ordered to pay restitution to Customer A in the amount of \$1,494, plus interest from April 27, 2020 (the date of the last unauthorized trade in Customer A's account), until paid in full.⁴⁴ Interest shall accrue at the rate set in 26 U.S.C. Section 6621(a)(2).⁴⁵

In light of the bars, no further sanctions are imposed for Giovannelli's discretionary trading without written authorization in violation of NASD Rule 2510(b) and FINRA Rule 2010, as alleged in cause four.

The bars shall become effective immediately if this Default Decision becomes FINRA's final disciplinary action. If this Decision becomes FINRA's final disciplinary action, payment of restitution shall be due within 60 days of the date of this Decision.


Bruce E. Kasold
Hearing Officer

Copies to:

Michael J. Giovannelli (via email, overnight courier, and first-class mail)
Robert Kennedy, Esq. (via email)
Matthew Minerva, Esq. (via email)
Kay Lackey, Esq. (via email)
Jennifer L. Crawford, Esq. (via email)

⁴⁴ Guidelines at 10 n.2 and 11. In the event that the customer cannot be located, unpaid restitution plus accrued interest should be paid to the appropriate escheat, unclaimed property, or abandoned-property fund for the state of the customer's last known address. Satisfactory proof of payment of the restitution, or of reasonable and documented efforts undertaken to effect restitution, shall be provided to staff of FINRA's Department of Enforcement, Rockville, Maryland.

⁴⁵ The interest rate set in Section 6621(a)(2) of the Internal Revenue Code is used by the Internal Revenue Service to determine interest due on underpaid taxes and is adjusted each quarter.