

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

Department of Enforcement,

Complainant,

vs.

James Henry Bond, III  
New York, NY,

Respondent.

DECISION

Complaint No. C10000210

Dated: April 4, 2002

**In a default decision, the Hearing Officer found that the respondent executed 12 unauthorized transactions in the accounts of two customers and was barred. Held, findings and sanctions affirmed.**

Respondent James Henry Bond, III ("Bond") has appealed an August 9, 2001 Hearing Officer default decision pursuant to Procedural Rule 9311. After a review of the entire record in this matter, we find that Bond violated Conduct Rule 2110 by executing 12 unauthorized transactions in the accounts of two customers. We order that Bond be barred from associating with any member firm in any capacity and pay appeal costs of \$1,000.

Background

Bond entered the securities industry in 1989 as an investment company products/variable contracts limited representative. He was not employed in the industry from December 1990 through September 1995. Bond reentered the industry as a general securities representative in 1995 and was also registered as a general securities principal from February 24, 2000 to July 20, 2000.

During the time of the alleged violations, Bond was employed by Renaissance Financial Securities Corp. ("Renaissance"). He is not currently employed in the industry in any capacity.

Factual and Procedural History

The Department of Enforcement ("Enforcement") filed the complaint in this matter on November 22, 2000, alleging that Bond executed 12 unauthorized transactions

while employed at Renaissance in the accounts of customers JD and TP, in violation of NASD Conduct Rule 2110. The complaint further alleged the following: From October 30, 1997 to December 17, 1997, Bond effected seven unauthorized transactions in the account of JD. JD wrote a letter to Bond requesting that Bond liquidate his account. Bond persuaded JD to keep the account open. In a letter dated November 12, 1997, JD wrote that he would allow Bond to keep the account open for a month or so "to see if any progress is being made," but "[i]t must be understood that there will be no unauthorized trades." Bond earned approximately \$1,695 in commissions from the unauthorized transactions. The total amount of the unauthorized purchases was \$19,375 and the unauthorized sales amounted to \$21,856.

From February 2, 1998 to February 5, 1998, Bond effected five transactions in the account of customer TP. The complaint alleges that TP did not authorize these transactions. Enforcement provided information that after opening his account with Renaissance, TP warned Bond not to "do anything" without his permission. After TP learned of the unauthorized transactions, he telephoned Bond. Bond allegedly stated that the money was "just sitting there and he thought he would move it around."

The complaint and notice of complaint were served on Bond on November 21, 2000, via certified and first class mail to Bond's most current residential address on record in the Central Registration Depository ("CRD Address") and to an additional address obtained by the staff ("Astoria Address").<sup>1</sup> Bond did not respond. On January 2, 2001, Enforcement sent a second complaint and notice of complaint to Bond at his CRD Address and Astoria Address. Bond again did not respond.

On January 29, 2001, the Hearing Officer issued an order setting a deadline for the filing of a motion for entry of default decision. Prior to this motion being filed, Bond faxed a handwritten letter, dated January 31, 2001, to Enforcement stating that he completely denied any wrongdoing. Enforcement contended that the letter should not be treated as an answer. On March 2, 2001, Enforcement's motion for entry of default decision was denied and the Hearing Officer ruled that Bond's letter constituted an answer.

On April 2, 2001, the Hearing Officer issued an order scheduling a pre-hearing conference for April 18, 2001. The order was sent to Bond's CRD Address and Astoria Address. At the pre-hearing conference, Dan Brecher ("Brecher"), an attorney, appeared on behalf of Bond, but stated he had not reviewed the complaint or the answer because he was only recently retained. As a result, the parties agreed to reschedule the conference on May 1, 2001.

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<sup>1</sup> The CRD Address is New York, NY. The Astoria address is Astoria, NY.

On April 19, 2001, the Hearing Officer issued an order scheduling a pre-hearing conference for May 1, 2001. On April 30, 2001, Brecher requested a postponement of the hearing. Enforcement consented and the Hearing Officer issued an order postponing the conference until May 3, 2001. On May 3, 2001, Brecher filed a notice of withdrawal stating "I do not represent Mr. Bond." Neither Brecher nor Bond appeared for the conference.

On May 8, 2001, the Hearing Officer issued an order scheduling a pre-hearing conference for May 17, 2001. The order was served on Bond by sending it via first class mail to Bond's CRD Address, Astoria Address and an address provided by Brecher at the April 18, 2001 pre-hearing conference ("P.O. Box Address").<sup>2</sup>

Bond failed to appear at the pre-hearing conference. On May 17, 2001, the Hearing Officer issued an Order to Show Cause. This order required Bond to demonstrate by May 31, 2001 why he should not be found in default. The order was served on Bond by sending it via first class mail to his CRD Address, Astoria Address and P.O. Box Address. Bond failed to respond. On June 4, 2001, the Hearing Officer found that Bond failed to appear at a pre-hearing conference of which he had notice. The Hearing Officer issued an order holding Bond in default and deemed the allegations in the complaint admitted.

The Hearing Officer found that Bond executed 12 unauthorized transactions in the accounts of two customers in violation of Conduct Rule 2110. The Hearing Officer found that Bond's conduct was "quantitatively egregious" because he intentionally effected 12 separate unauthorized transactions in accounts of two customers over a three-month period. In addition, the Hearing Officer cited aggravating misconduct. Specifically, the Hearing Officer noted that Bond executed unauthorized transactions after being specifically told by the customers not to do so. The Hearing Officer found that Bond's continued participation in the securities industry presented a risk to the public. Consequently, the Hearing Officer imposed a bar.

### Discussion

Bond has appealed the Hearing Officer's decision on the grounds that he was without legal representation and that he had good cause for failing to participate in the proceedings below. We address each of these arguments below.

#### A. Lack of Legal Representation

In his appeal brief, Bond argues that he did not have legal representation. He states that he attempted to retain counsel, but was unsuccessful because of insufficient funds. Bond argues that because he could not obtain counsel, he was under the

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<sup>2</sup> This address was New York, NY.

impression that he was unprepared for a hearing. This, however, is not a valid reason for missing a pre-hearing conference. Under Procedural Rule 9141(a), a respondent may appear on his or her own behalf. A respondent does not have a right to counsel in NASD disciplinary proceedings. See Phyllis J. Elliot, 51 S.E.C. 991, 996 n.17 (1994); Richard R. Perkins, 51 S.E.C. 380, 386 n.35 (1993). Further, the NASD is not required to supply an attorney to a respondent if the respondent cannot afford one. See Lake Securities Inc., 51 S.E.C. 19, 23-24 (1992); Jerry L. Marcus, 47 S.E.C. 72, 74 (1979). As a result, Bond's inability to retain legal counsel for the proceeding is not a reason to overturn the Hearing Officer's default decision.

#### B. Entry of Default Decision

Bond's appeal brief challenges the entry of the default decision against him. Under Procedural Rule 9269(a), a Hearing Officer may issue a default decision against a respondent that fails to appear at a pre-hearing conference. It is undisputed that Bond did not appear for the rescheduled pre-hearing conference on May 17, 2001. The respondent must, however, receive due notice. Procedural Rule 9134(b)(1) states that "[p]apers served on a natural person may be served at the natural person's residential address, as reflected in the Central Registration Depository, if applicable." When the person responsible for serving the papers has actual knowledge that a respondent's CRD address is out of date, "duplicate copies shall be served on the [respondent's] last known residential address and business address." Procedural Rule 9134(b)(1). The notice setting the May 17 pre-hearing conference and the order to show cause were sent to Bond's CRD address, as well as two other addresses. Even though actual notice does not need to be shown,<sup>3</sup> here actual notice was given because Bond used his CRD address in filings with the Hearing Officer. In addition, Bond stated that he asked Enforcement to send any notices to the P.O. Box Address. The notice of a pre-hearing conference and order to show cause were sent to the CRD Address, Astoria Address and P.O. Box Address. As a result, Bond received notice and the default decision was validly entered under Procedural Rule 9269(a).

In order to prevail on appeal, a respondent who defaulted must show good cause for failing to participate below. Notice to Members 99-77 (Sept. 1999) states that "[i]f a respondent against whom a default decision has been validly entered under Rule 9269(a) makes a timely appeal or motion to set aside the default and also establishes good cause for not having participated in the proceeding below, he or she will be given the

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<sup>3</sup> Service by mailing to a party's most recent CRD address constitutes constructive notice. Proof of actual notice is not required. See Eric M. Diehm, 51 S.E.C. 938, 942 n.14 (1994) (rejecting argument that NASD sent notice to the wrong address because notice was sent to respondent's last known CRD address); Department of Enforcement v. Sylvester Cannon, Complaint No. C8A980054, 1999 NASD Discip. LEXI 33 (NAC Nov. 15, 1999).

opportunity to participate in a hearing before a Hearing Panel." The default decision against Bond was validly entered. Bond, however, has not shown good cause.

In evaluating good cause, the NAC will take into account such factors as: whether the respondent notified CRD of any address changes; the length of time that has passed between the issuance of the default decision and the respondent's appeal; and the reasons for the respondent's failure to participate in the proceeding before the Hearing Officer. See Notice to Members 99-77 (Sept. 1999). Bond has not presented good cause for his failure to participate in the proceedings below. In Bond's appeal brief, he argues that he was out of town for long periods of time because of deaths in his family. Nevertheless, Bond was aware of the proceedings against him. At one point, Bond retained counsel to represent him and filed an answer to the complaint. Bond could have requested a stay of the proceedings, but failed to do so. We find that Bond failed to show good cause for his failure to participate in the proceedings below. We therefore affirm the Hearing Officer's issuance of a default decision.

Even though the Hearing Officer properly entered the default decision against Bond, we have conducted an independent review of the record. We find that there is sufficient evidence in the record to support the default decision. The record establishes that Bond executed or caused to be executed 12 transactions in the accounts of two customers. None of these transactions were authorized. The record also establishes that Bond engaged in the 12 unauthorized transactions after failing to obey specific orders not to do so by his customers. Accordingly, we affirm the findings of the Hearing Officer. We find that Bond effected 12 unauthorized transactions in violation of Conduct Rule 2110.

### Sanctions

The Hearing Officer found Bond's conduct to be egregious and barred Bond from association with any NASD member firm in any capacity.

The NASD Sanction Guidelines ("Guidelines") for unauthorized transactions suggest a fine of \$5,000 to \$75,000. See Guidelines (2001 ed.) at 102. The Guidelines state that for cases involving customer losses, the NAC should consider suspending the individual for 10 to 30 business days. In egregious cases, however, the Guidelines suggest a longer suspension (of up to two years) or a bar. The Guidelines identify the following three categories of egregious unauthorized trading: (1) quantitatively egregious trading, i.e., unauthorized trading that is egregious because of the sheer number of unauthorized trades executed; (2) unauthorized trading accompanied by aggravating factors, such as, efforts to conceal the trading, attempts to evade regulatory investigative efforts, customer loss, or a history of similar misconduct (this list is illustrative, not exhaustive); and (3) qualitatively egregious unauthorized trading. See District Bus. Conduct Comm. v. Daniel S. Hellen, Complaint No. C3A970031, 1999 NASD Discip. LEXIS 22 (NAC 1999).

We find that Bond's conduct was egregious. Bond engaged in repeated unauthorized trading accompanied by aggravating factors. Unauthorized trading is a

serious violation. The SEC has characterized unauthorized trading as "a fundamental betrayal of the duty owed by a salesman to his customers." Keith L. DeSanto, 52 S.E.C. 316, 323 (1995), aff'd, 101 F.3d 108 (2d Cir. 1996) (unpublished table decision). The NAC has also noted the seriousness of this misconduct. See District Bus. Conduct Comm. v. Ted D. Wells, Complaint No. C07970045, 1998 NASD Discip. LEXIS 32 (NAC July 24, 1998) ("A registered representative's obligation to follow his customer's instructions serves as an essential foundation for the customer/registered representative relationship."). Bond entered into 12 unauthorized transactions over the course of three months. In addition, customer JD ordered Bond, in writing, not to make any unauthorized trades. Customer TP warned Bond not to do anything without his permission. Bond completely disregarded these instructions. Considering Bond's unauthorized trades together with his failure to follow his customers' instructions, we conclude that Bond's misconduct was egregious. As a result, we affirm the Hearing Officer's imposition of a bar.<sup>4</sup>

Accordingly, we order that Bond be barred from association with any NASD member firm in any capacity. The bar will be effective as of the date of this decision. In addition, we order that Bond pay appeal costs of \$1,000.

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney, Senior Vice President  
and Corporate Secretary

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<sup>4</sup> We have also considered and reject without discussion all other arguments advanced by the respondent.