

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

Department of Enforcement,

Complainant,

vs.

Robert Fitzpatrick
Clifton Park, NY,

Respondent.

DECISION

Complaint No. C10970176

Dated: June 14, 1999

Respondent was found to have failed to provide requested information in a timely fashion. Held, findings affirmed and sanctions modified.

Robert Fitzpatrick ("Fitzpatrick") has appealed an October 20, 1998 decision of a Hearing Panel of NASD Regulation, Inc. ("NASD Regulation") pursuant to NASD Procedural Rule 9310. In addition, the Department of Enforcement ("Enforcement") of NASD Regulation cross-appealed the Hearing Panel's decision pursuant to Procedural Rule 9311. After a review of the entire record in this matter, we find that Fitzpatrick violated Procedural Rule 8210 and Conduct Rule 2110 by failing to respond timely to Enforcement's requests for information. Furthermore, we order that Fitzpatrick be censured, fined \$2,500 and suspended in all capacities for five business days. We also uphold the Hearing Panel's imposition of \$709.15 in hearing costs.

Background

Fitzpatrick entered the securities industry in 1977 as a general securities representative. At all times relevant to the complaint, Fitzpatrick was registered with member firm SFI Investments, Inc. ("SFI") in a number of different capacities, including as a general securities representative, a registered options principal, a general securities principal, a financial and operations principal ("FINOP"), and a municipal securities principal. Fitzpatrick also worked as

SFI's director of compliance. Fitzpatrick currently is registered with member firm Merit Capital Associates, Inc., in the same capacities.

Factual and Procedural History

Enforcement filed the original complaint in this matter on November 21, 1997. Enforcement subsequently filed a revised complaint, entitled "Revised Sixth Cause of the Complaint" ("Revised Complaint"), on July 27, 1998. The Revised Complaint alleged that Fitzpatrick failed timely to provide staff with the following three categories of SFI documents: (1) commission runs; (2) payroll records; and (3) sales confirmations.¹ Fitzpatrick filed an answer denying that he should be held responsible for the untimely submission of the aforementioned documents. The Hearing Panel held proceedings on the merits of the case on August 3, 1998.

During the Hearing Panel proceedings, a compliance director for Enforcement, Blair Mathies, Jr. ("Mathies"), explained that the current matter arose, in part, from an investigation into whether two SFI employees, Christopher David Chu ("Chu") and Peter Steven Haynes ("Haynes"), were functioning as general securities representatives without being registered as such, in violation of NASD Membership and Registration Rule 1031(a) and Conduct Rule 2110. As chronicled below, Enforcement sent Fitzpatrick a series of requests for information related to its investigation into the activities of Chu and Haynes.

Enforcement's February 14, 1996 Letter. On February 14, 1996, Enforcement wrote to Fitzpatrick and requested the following documents: "Copies of all tickets and sales memoranda," "commission runs," and "payroll records" related to Chu and Haynes. The letter stated that the request for the production of documents was being made pursuant to Article IV, Section 5 of the NASD Rules of Fair Practice (now and hereinafter referred to as "Procedural Rule 8210"). The letter required Fitzpatrick to produce the information to Enforcement on or before February 29, 1996.

Enforcement's March 1, 1996 Letter. Enforcement wrote to Fitzpatrick on March 1, 1996, reminding him that the information requested in the February 14, 1996 letter had not been timely produced. Enforcement requested that such information, as well as additional information, be provided on or before March 15, 1996. The March 1 letter also advised Fitzpatrick that his failure timely to respond to the request could result in formal disciplinary action being taken against him.

¹ The original complaint asserted various charges against Fitzpatrick and seven other respondents. The Revised Complaint alleged that both Fitzpatrick and SFI violated Procedural Rule 8210 and Conduct Rule 2110 by failing timely to provide the information discussed above. The hearing on the Revised Complaint was severed, however, and the current appeal relates only to Fitzpatrick.

Enforcement's March 19, 1996 Letter. By letter dated March 19, 1996, Enforcement wrote to Fitzpatrick informing him that it had received no response to the March 1, 1996 letter. Enforcement requested that Fitzpatrick provide the information outlined in the March 1 letter on or before March 27, 1996. Enforcement also warned Fitzpatrick a second time that his failure timely to respond could result in disciplinary action being taken against him.

Fitzpatrick's March 20, 1996 Letter. Fitzpatrick wrote to Enforcement on or about March 20, 1996, and stated that SFI was doing its best to gather the requested documents. Fitzpatrick also explained that the documents were not filed by the names of individual representatives and that, as a result, the firm's employees had to "go through documents for the entire firm in order to comply with this request." Fitzpatrick's letter enclosed certain documents, not directly pertinent to the allegations in the Revised Complaint, that Enforcement had previously requested.

Enforcement's April 9, 1996 Letter. On April 9, 1996, Enforcement wrote to Fitzpatrick and emphasized that it had not received the following information, which the letter stated had previously been requested: "[C]opies of all tickets and confirmations for sales made by [Chu and Haynes], as well as all commission runs (disclosing gross commissions) with respect to sales made by such employee[s] and payroll records as evidence of payment of such commissions to such employee[s]. . . ." Enforcement's April 9 letter requested that Fitzpatrick provide the aforementioned documents, and others, on or before April 17, 1996.

Fitzpatrick's April 18, 1996 Letter. Fitzpatrick wrote to Enforcement on April 18, 1996, stating that the only information regarding Chu and Haynes that had not been delivered was SFI's payroll records, which Fitzpatrick characterized as being voluminous. Fitzpatrick also stated that the "information [was] readily available but not readily separable from all of [the] other employees [sic]" and that Enforcement could "come to [the] office and inspect those records if [it wished]."²

Enforcement's May 1, 1996 Letter. On May 1, 1996, Enforcement wrote to Fitzpatrick and SFI's president, Frank J. Fasano ("Fasano"), stating that, despite repeated requests, SFI had failed to provide "[c]opies of all tickets and confirmations for sales made by [Chu and Haynes], as well as all commission runs (disclosing gross commissions) with respect to sales made by [Chu and Haynes] and payroll records as evidence of payment of such commissions to" Chu and Haynes. Enforcement reminded Fitzpatrick and Fasano that it had requested such information in prior letters to SFI dated February 14, March 1, and April 9, 1996. Enforcement's May 1 letter acknowledged that Fitzpatrick had delivered some information previously requested, but emphasized that he had not satisfied the balance of Enforcement's requests. The May 1 letter concluded by stating that, in light of SFI's continued failure to respond completely to previous requests, Enforcement would present the matter to the District Business Conduct Committee for District No. 10 ("DBCC") with a recommendation that a formal disciplinary complaint be filed

² During the Hearing Panel proceedings, Mathies testified that Fitzpatrick's statement in his April 18 letter that "the only information [he had] not been able to deliver to [Enforcement was SFI's] payroll records" was false at the time the statement was made.

against SFI and Fitzpatrick. Finally, the May 1 letter invited Fitzpatrick and Fasano to submit a written statement addressing the issues for the DBCC's consideration.

Enforcement's Facsimile Transmission Dated May 7, 1996. On May 7, 1996, Enforcement sent a facsimile transmission to SFI's outside legal counsel, forwarding to counsel a copy of Enforcement's May 1, 1996 letter.

Enforcement's June 3, 1996 Letter. On June 3, 1996, Enforcement sent a letter to SFI's outside legal counsel explaining that SFI had not completely responded to Enforcement's numerous requests for information. This letter enclosed Enforcement's May 1, 1996 letter, which summarized the outstanding requests. Enforcement sent a copy of the June 3 letter to Fasano and Fitzpatrick, along with the enclosure.

Enforcement's July 19, 1996 Letter. On July 19, 1996, Enforcement wrote to SFI's outside legal counsel reminding him that SFI had not completely responded to Enforcement's repeated requests for information. Enforcement demanded that SFI provide the requested information on or before July 30, 1996. Enforcement sent a copy of the July 19 letter to Fasano.

On July 29, 1996, SFI's outside legal counsel delivered the commission runs and payroll records for Chu and Haynes to Enforcement. On August 19 and 21, 1996, SFI's outside legal counsel delivered the sales confirmations for Chu and Haynes to Enforcement.

During the Hearing Panel proceedings, Fitzpatrick admitted that he had received the letters that Enforcement had addressed to him. He also acknowledged that the three categories of documents that related to Chu and Haynes were not produced in accordance with the various deadlines Enforcement had imposed. Fitzpatrick asserted, however, that he should not be held responsible for the untimely production of the requested documents. He argued that the person acting as SFI's designated FINOP was the individual responsible for maintaining SFI's financial records and that it was the designated FINOP who was thus obligated to produce the records in question.³ Fitzpatrick also claimed that SFI's delivery of relevant documents to outside counsel had relieved him of responsibility to respond to the requests for information. He further maintained that it was difficult to produce the materials that Enforcement sought because they were voluminous. With regard to the sales confirmations, Fitzpatrick explained that the first three letters that Enforcement had sent to him -- dated February 14, March 1 and 19, 1996 -- did not request such documents. Instead, the letters referred to "sales memoranda." Fitzpatrick testified, moreover, that he had called Mathies after receiving the first request for information and had specifically asked him whether he wanted sales confirmations rather than sales memoranda. According to Fitzpatrick, Mathies replied that he wanted sales memoranda. As a result, when Mathies subsequently stated that he wanted sales confirmations in the April 9, 1996 letter, Fitzpatrick believed that Mathies really meant "sales memoranda" because of their earlier telephone conversation.

³ Although Fitzpatrick was registered as a FINOP with SFI, he claimed that he did not act in such a capacity and that another individual was designated as SFI's FINOP.

Although Enforcement acknowledged that Fitzpatrick eventually had produced all three categories of documents discussed in the Revised Complaint, Enforcement argued during the Hearing Panel proceedings that the delay in providing the documents constituted a violation of Procedural Rule 8210 and Conduct Rule 2110. Enforcement also asserted that Fitzpatrick, as the person to whom the requests were directed, and not SFI's FINOP or outside counsel, was primarily responsible for ensuring that the documents were timely produced. Additionally, Mathies testified that he viewed the documents in question as being essential to Enforcement's investigation of Chu and Haynes. As to the sales confirmations, however, Mathies admitted that he originally had told Fitzpatrick that he was not requesting such documents. Enforcement indicated during the Hearing Panel proceedings that the April 9, 1996 letter properly should be considered the first request for sales confirmations.

On October 20, 1998, the Hearing Panel issued its decision. The Hearing Panel held that Fitzpatrick had violated Procedural Rule 8210 and Conduct Rule 2110 by failing timely to produce the commission runs and payroll records. The Hearing Panel, however, dismissed the allegation related to sales confirmations. The Hearing Panel imposed a fine of \$2,500 and a suspension of 15 business days in all capacities. The Hearing Panel also imposed hearing costs of \$709.15. This appeal and cross-appeal followed.⁴

Discussion

Procedural Rule 8210 authorizes NASD Regulation, in the course of its investigations, to require persons associated with an NASD member to "provide information orally [or] in writing . . . with respect to any matter involved in the investigation. . . ." That rule also provides that NASD Regulation shall have the right to "inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation." As the Securities and Exchange Commission ("SEC") has emphasized, because NASD Regulation lacks subpoena power over its members, a "failure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate." In re Brian L. Gibbons, Exchange Act Rel. No. 37170, at 5 (May 8, 1996), aff'd, 112 F.3d 516 (9th Cir. 1997) (table format).

Here, there is no dispute that Enforcement made numerous requests to Fitzpatrick to produce the commission runs and payroll records regarding Chu and Haynes. There also is no dispute that Fitzpatrick failed to provide such materials in a timely manner. Accordingly, we find that Fitzpatrick violated Procedural Rule 8210 and Conduct Rule 2110 by failing timely to produce these two categories of documents.

⁴ Fitzpatrick appealed the Hearing Panel's findings of violation with regard to the commission runs and payroll records. He also appealed the sanctions imposed by the Hearing Panel. Conversely, Enforcement cross-appealed on the basis that the Hearing Panel erred by not finding Fitzpatrick in violation of the NASD's rules for failing timely to produce the sales confirmations.

In so finding, we reject Fitzpatrick's various legal arguments. First, Fitzpatrick's claim that only a firm's designated FINOP can be required to produce financial materials is without merit. Indeed, as pointed out by the Hearing Panel, the SEC has rejected similar arguments in past cases. See, e.g., In re Barry C. Wilson, Exchange Act Rel. No. 37867, at 5 n.12 (Oct. 25, 1996) ("To the extent we understand [respondent's] argument to be that others were responsible for compliance with NASD requests, it must be rejected."); In re Richard J. Rouse, 51 S.E.C. 581, 585 (1993) ("The duty to respond is in no way dependent upon one's status or title within in [sic] a firm but falls upon any associated person to whom a request is directed."); In re Michael David Borth, 51 S.E.C. 178, 180-81 (1992) ("[Respondents], as registered representatives, each had a clear obligation to supply the information that the NASD requested."). In any event, we find that it was perfectly reasonable for Enforcement to send the requests for information to Fitzpatrick as SFI's director of compliance. Mathies, in fact, testified that he had been told by Fasano, the firm's president, that requests for information should be directed to Fitzpatrick.⁵ Fasano, moreover, testified during an on-the-record interview that Fitzpatrick was responsible for responding to inquiries made by NASD Regulation. In addition, Fitzpatrick admitted that he was the person at SFI who was generally responsible for responding to requests for information.⁶

Second, we reject Fitzpatrick's argument that he was somehow relieved of his duty to comply with Enforcement's request for information after the relevant documents were turned over to SFI's outside legal counsel. An associated person may not abdicate his responsibility to respond fully and promptly to an NASD Regulation request for information simply by turning over relevant records to outside legal counsel. See, e.g., In re Michael Markowski, 51 S.E.C. 553, 557-58 (1993) ("Markowski knew or should have known that he could not delegate to counsel the ultimate responsibility for complying with the NASD's request."), aff'd, 34 F.3d 99 (2d Cir. 1994); Michael David Borth, supra, at 180 (rejecting respondent's claim that he was not responsible for untimely production "because he was following the Firm's policy that all responses to requests for information were to be made by its law firm.").⁷

⁵ Mathies also testified that it was his general practice to send requests for information to a firm's compliance director.

⁶ We are in accord with the Hearing Panel's observation that, although Fitzpatrick "may not have been responsible for maintaining the financial records of the firm, . . . he was responsible for producing such records or for ensuring that others did."

⁷ To the extent that Fitzpatrick relies on the "advice of counsel" defense, we note that such a claim provides no defense to an action premised on a respondent's failure to provide requested information. See, e.g., Markowski, supra, at 557 (advice of counsel to refuse an NASD request for information is no defense because, when respondent registered with the NASD, he agreed to abide by its rules, which are "unequivocal with respect to the obligation to cooperate with the NASD."); In re Darrell Jay Williams, 50 S.E.C. 1070, 1072 (1992) (reliance on advice of counsel provided no excuse for failure to provide requested information); cf. In re John Thomas Gabriel, 51 S.E.C. 1285, 1292 n.31 (1994) (advice of counsel is usually not available as a defense where intent is not an element of the violation).

Third, we find no merit in Fitzpatrick's assertion that he is somehow absolved from responsibility for failing timely to produce the requested documents because he had invited Enforcement to SFI's premises to review the documents. As the SEC has explained, NASD Regulation has the "right to require the submission of the requested materials or to examine them at [the firm's] office." In re Saul H. Cutter, 45 S.E.C. 127, 128 (1972). A respondent, moreover, cannot second-guess an NASD Regulation request for information. See Michael David Borth, *supra*, at 181. A respondent also cannot impose conditions under which he or she will provide the requested information. See Richard J. Rouse, *supra*, at 585; Michael Markowski, *supra*, at 558 n.16. Finally, a respondent cannot shift to others (including a regulatory authority like NASD Regulation) his or her obligation to comply with applicable rules. See, e.g., In re Ashton Noshir Gowadia, Exchange Act Rel. No. 40410, at 6 (Sept. 8, 1998); In re Thomas C. Kocherhans, Exchange Act Rel. No. 36556, at 6 (Dec. 6, 1995); Michael David Borth, *supra*, at 181. Fitzpatrick's claim thus fails because he was not entitled to refuse to provide the information in the manner requested by Enforcement or to shift the burden of locating the relevant materials to Enforcement.⁸

Fourth, we reject Fitzpatrick's assertion that he should not be found in violation of the NASD's rules because Enforcement's request for information involved voluminous records that were not well organized at SFI. In In re Wedbush Secs., Inc., 48 S.E.C. 963 (1988), the respondent argued that it should not be found in violation of the NASD's rules because the NASD's requests for information were burdensome, the firm's records were in disarray due to flooding, and the firm's compliance department had numerous duties in addition to complying with the NASD's request. *Id.* at 971-72. The SEC found that the burdensome nature of the requests was not "adequate justification for [the firm's] lengthy delays in supplying information requested by the NASD." *Id.* at 972. Furthermore, as the United States Court of Appeals for the Second Circuit remarked in another case, "the disarray of business records does not argue forbearance on the part of regulators." Markowski v. SEC, 34 F.2d 99, 104 (2d Cir. 1994).

⁸ Mathies testified during the Hearing Panel proceedings that he had declined Fitzpatrick's invitation to inspect the records at SFI because Enforcement needed copies of the documents. In addition, Mathies stated that Fitzpatrick was more familiar with the documents and the firm's filing system and that, therefore, it would not have been cost effective for him (Mathies) to have attempted to sort through the firm's records to locate the relevant documents. We note as well that Fitzpatrick's invitation was made only after several deadlines had already passed for the submission of the requested materials.

In brief, we find that Fitzpatrick violated Procedural Rule 8210 and Conduct Rule 2110 by failing timely to produce the commission runs and payroll records related to Chu and Haynes. However, we also find, as did the Hearing Panel, that Fitzpatrick's failure timely to produce the sales confirmations for Chu and Haynes was excusable under the facts of this case. As discussed above, the first few requests for information that Mathies sent to Fitzpatrick requested "sales memoranda," not "sales confirmations." Additionally, when Fitzpatrick originally asked Mathies if he had intended to request sales confirmations, Mathies replied that he had not. Although Mathies eventually did ask for sales confirmations in subsequent correspondence, Fitzpatrick testified that he thought those requests were mistakes in light of his previous conversation with Mathies. Finally, we note that the time that elapsed between Enforcement's initial request for sales confirmations and Fitzpatrick's delivery of those items was not especially lengthy. Accordingly, we uphold the dismissal of the cause of action against Fitzpatrick as it related to sales confirmations.

Sanctions

The relevant NASD Sanction Guideline for failure timely to respond to a request for information recommends imposing a fine of \$2,500 to \$25,000 and a suspension in any or all capacities for up to two years. NASD Sanction Guideline (1998 ed.) at 31. Fitzpatrick's failure timely to provide information requested by NASD Regulation is a serious offense. Nonetheless, we find that there are certain mitigating factors present in this case that, although not providing a defense to the findings of violation, militate in favor of imposing more lenient non-monetary sanctions than those ordered by the Hearing Panel.

The requests for information that are the subject of the revised complaint called for the production of voluminous records. These records, moreover, were not kept in an extremely organized fashion by SFI, and Fitzpatrick was not the person principally responsible for maintaining them. In addition, Fitzpatrick did attempt to explain to Enforcement his difficulty in producing the requested information in a timely manner. We also note that Fitzpatrick timely responded to other requests for information by NASD Regulation during the relevant period.⁹

We affirm the Hearing Panel's imposition of a \$2,500 fine. Further, we affirm the Hearing Panel's assessment of \$709.15 in hearing costs. We determine, however, that the 15-business-day suspension imposed by the Hearing Panel should be reduced. Finally, we find that imposition of a censure is appropriately remedial in this case.

⁹ Additionally, Fitzpatrick has been associated with members of the NASD since 1977 and he does not have any relevant disciplinary history.

Accordingly, we order that Fitzpatrick be censured, fined \$2,500, suspended in all capacities for five business days,¹⁰ and assessed \$709.15 in hearing costs.¹¹

On Behalf of the National Adjudicatory Council,

Alden S. Adkins
Senior Vice President and General Counsel

¹⁰ The suspension shall begin 30 days after the date of this decision.

¹¹ We have 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.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanctions, after seven days' notice in writing, will summarily be revoked for non-payment.