

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

District Business Conduct Committee
For District No. 5

Complainant,

vs.

Donald R. Gates
Cabot, Arkansas,

Respondent.

DECISION

Complaint No. C05930020

District No. 5

Dated: November 03, 1998

Respondent Donald R. Gates ("Gates") has appealed a January 8, 1998 decision of the District Business Conduct Committee for District No. 5 ("DBCC") pursuant to NASD Procedural Rule 9311. For the reasons discussed below, we hold that Gates engaged in 25 securities transactions while not registered with the Association or with the state where the customer was domiciled (the State), in violation of Membership and Registration Rule 1031 and Conduct Rule 2110 (formerly known as Schedule C of the Association's By-Laws and Article III, Section 1 of the Association's Rules of Fair Practice). We impose sanctions of a censure, a \$53,261.05 fine, a six-month suspension in all capacities, requalification by examination before acting in any capacity requiring registration, and \$1,736 in DBCC hearing costs.

Background

During the period relevant to the complaint, Gates, who entered the industry in 1983, was registered as a general securities representative and was associated with the Little Rock, Arkansas branch office of Prudential Bache Securities, Inc. ("Prudential"). On April 28, 1992, Gates was terminated by Prudential for "failing to cooperate with an internal investigation" which related to events that are the subject of this proceeding.¹ He currently is registered as a general securities representative with another NASD member firm.

¹ The NASD investigated this matter after having received Gates' Uniform Termination Notice for Securities Industry Registration ("Form U-5") from Prudential.

Gates first contacted GW, the City Treasurer, by "cold call" in 1989 while Gates was associated with another firm.² In June 1990, Gates was hired by Prudential, and the City opened a Prudential margin account.³ The City invested with Prudential approximately \$1.1 million which was comprised of the City's police force pension and which consisted of slightly more than one-half of the City's liquid assets.

Although Gates filed a Form U-4 with the Association to register with Prudential in June 1990, he was not effectively registered with the Association until August 1, 1990. Gates was not registered with the State until August 7, 1990.

Beginning in June 1990, the City engaged in short-term trading of government securities. According to the City's treasurer, Gates was the City's sole representative at Prudential and conducted all of the City's trades. Because Gates had not yet been assigned a Prudential "Financial Advisor" ("FA") production number, the trades were effected through the FA production number of Perry A. Prince ("Prince"), a Prudential general securities representative, at the instruction of Frank Hiegel ("Hiegel"), Prudential's Arkansas branch office manager. Prince then remitted payments by personal check to Gates or had amounts journaled out of his account to a Prudential account assigned to Gates. In August through November of 1990, Prince remitted four personal checks totaling \$25,967.70 to Gates. In addition, Prince's account statement for the period of July 25 to August 24, 1990, reflects that \$25,000 was ledgered out of his account to an account for Gates.⁴

Procedural History

This matter is before us for a second time on appeal. The National Business Conduct Committee ("NBCC") remanded this case to the DBCC on October 22, 1996, following an order of remand by the Securities and Exchange Commission ("Commission"). The procedural history of this case is as follows: On January 29, 1993, the DBCC issued a three-cause complaint relating to Gates' involvement with the City's account. Cause two, the subject of this instant action, alleged that from approximately August 6 until November 19, 1990, Gates accepted payments based on commissions earned from transactions in the account when he "knew or should have known that, at the time of the transactions, which occurred prior to August 1, 1990, he was not properly registered with the Association or approved as an agent in the state where the customer was domiciled," as more fully

² GW subsequently transferred the City's account to follow Gates to three other firms before opening an account with Prudential.

³ Although the City's account was opened in the name of Mark George ("George"), a Prudential registered representative who was registered in the State, George did not conduct trades for the account.

⁴ Gates apparently was assigned a Prudential account at that time, but he did not receive a Prudential "FA" production number until October 1991.

detailed in Exhibit A to the complaint; and that Gates thereby violated Membership and Registration Rule 1031 and Conduct Rule 2110. Causes one and three alleged that Gates engaged in excessive and unsuitable trading, that he imposed excessive mark-ups, and that he failed to respond to the Association's request for information.

The DBCC sustained all of the complaint's allegations except the excessive mark-up allegation. In a November 3, 1993 decision, the DBCC directed that Gates be censured, barred, fined \$50,000, required to disgorge \$281,000, and assessed costs.⁵ Gates appealed to the NBCC, which, in a November 22, 1994 decision, affirmed the DBCC's finding that Gates engaged in transactions prior to being registered. The NBCC, however, dismissed the DBCC's findings as to causes one (excessive and unsuitable trading) and three (failure to respond). The NBCC reduced Gates' bar to a six-month suspension, ordered him to requalify by examination, and set aside the DBCC's order of disgorgement of \$281,000. In addition, the NBCC increased Gates' fine from \$50,000 to \$50,967.70, to reflect a \$25,000 fine, plus \$25,967.70 in commissions that were rebated by personal checks from Prince to Gates. Gates appealed to the Commission.

By order dated August 16, 1995, the Commission remanded the case. Although the Commission's decision stated that "it was clear that a violation occurred," the Commission also stated:

[W]e are uncertain about the NASD's conclusions. The District Committee found that Gates had received commissions for an unspecified number of transactions before he was properly registered. Twenty-five trades appear on the schedule to the complaint. The [NBCC] characterized the [DBCC's] opinion as finding that Gates engaged in "at least nine" transactions before registration. We are unable to determine whether this is a correct interpretation of the [DBCC's] opinion or the [NBCC's] independent evaluation of the evidence. Nor did the [NBCC] indicate any basis by which it might have distinguished among the trades. In addition, the [NBCC] increased the fine, specifically stating that the increase more precisely reflected the amount of commissions received during the unregistered period, plus \$25,000. It is unclear whether the [NBCC] has thereby included in this computations [sic] commissions on the sixteen transactions not found to be violative.

Exchange Act Rel. No. 36109, at 3-4 (August 16, 1995) ("Remand Order").

On October 22, 1996, the NBCC remanded the case to the DBCC and took official notice of the record in DBCC v. Perry A. Prince, Complaint No. CO5930027 (February 11, 1994) ("Prince Decision"), the NASD's disciplinary action against Prince regarding the use of his production number for

⁵ The DBCC decision ordered disgorgement of \$281,000, which represented the commissions for trading that Gates earned during the nearly two years that the City maintained its account at Prudential. The DBCC ordered this amount remitted to the NASD because the City had already been compensated \$700,000 by Prudential in a settlement following the City's filing of a civil action against it.

the City's trades and off-the-books payments to Gates.⁶ The NBCC noted inconsistencies in the Prince record and the Gates record, and it remanded the case for the DBCC to determine with precision the number of violative trades and the compensation received for those trades. Specifically, the NBCC noted that in Gates, the DBCC did not make a specific finding as to the number of violative transactions. In Prince, however, the DBCC determined that "in June and July 1990, before he was registered with the Association, at least nine transactions were conducted by Gates. Three additional transactions, one each on August 1, August 3, and August 6, 1990 were conducted by Gates prior to his registration in the State where the customer was domiciled. All but two of the total transactions were for the City." Prince Decision at 4.⁷ The NBCC remanded for the DBCC to consider and resolve this difference. The NBCC also requested that the DBCC determine whether the \$25,967.70 in personal checks that Gates received from Prince represented commissions that Gates earned while he was unregistered.⁸

The DBCC's January 9, 1998 Amended Decision

In its amended decision, the DBCC determined that Gates engaged in 25 violative transactions in the City's account prior to being registered with the Association.⁹ The DBCC also stated that it was "still unable to determine with specificity the amount of commissions earned" by Gates from the violative trades. The DBCC noted that although the record contained four checks from Prince to Gates totaling \$25,967.70, the record did not establish that those payments represented commissions earned before Gates was registered. In addition, the DBCC noted that because Gates was not journaled any amounts from Prince's account until after Gates was registered, the DBCC was unable to determine whether the journaled amounts were for commissions earned before he was registered. The DBCC therefore reduced the fine by the \$25,967.70. The DBCC also reduced Gates' suspension from six months to three months after a "review of the entire record and the mitigation presented" by Gates. The DBCC, however, did not explain what factors it had considered in mitigation. This appeal followed.¹⁰

⁶ On December 17, 1996, the NBCC issued an amended order of remand. The original order dated October 22, 1996 was amended to reflect Gates' correct address on record.

⁷ The NBCC noted that attached to both the Gates and Prince complaints were copies of the same "Exhibit A," which indicated that 25 purchase and sale transactions occurred in the City's account in June and July (when Gates was not registered), and that three transactions occurred before Gates was registered in the State. The NBCC pointed out that in the Prince decision, however, the DBCC found 12 violative transactions (nine while Gates was not registered, and three while he was not registered in the State; two of which were executed for customers other than the City).

⁸ The NBCC noted that the Commission's remand order questioned whether the \$25,967.70 that Prince had paid to Gates by personal checks in August 1990 through November 1990 represented only commissions that Gates had earned before he was registered, or also included commissions earned thereafter.

⁹ The DBCC determined that the NBCC decision which described "at least nine transactions" apparently batched the trades by date, and also omitted one trade which was out of sequence on

Discussion

Violation of Registration Requirement. Gates continues to dispute the finding that he violated the NASD registration rules. Specifically, he argues that he was merely Prince's sales assistant and that he "was not compensated for trades before his effective registration date."

On remand, the DBCC determined that the Commission remanded this case not for a reconsideration of the registration violation, but for clarification as to the number of violative trades and the amount of commissions. We agree. Before this case was remanded by the Commission, we found that Gates violated Membership and Registration Rule 1031.¹¹ This ruling was effectively affirmed by the Commission, which recognized in its remand order that "[i]t [was] undisputed that Gates effected transactions in the [City's] account prior to the time his registration was effective with the NASD or the [s]tate." The Commission's remand order also stated that it was "clear that a violation occurred," but it requested additional analysis and articulation from the Association with respect to the specific acts the Association found violative and the amount and source of the fine.

Based on the testimony of the customer and Prince,¹² Gates was the only representative who handled the City's account.¹³ Gates therefore engaged in the purchasing and selling of securities in the

Exhibit A. The DBCC, without citing the number of trades evidenced in the Prince record, determined that this number need not be reconciled with the trades found in the Prince record. In the DBCC's view, both the NBCC decision and the Prince Decision "referenced an incorrect number of violative trades."

¹⁰ This matter was decided by the National Adjudicatory Council ("NAC"), which, as approved by the Securities and Exchange Commission ("SEC"), became the successor to the NBCC on January 16, 1998. See 62 Fed. Reg. 67, 927 (Dec. 30, 1997).

¹¹ Membership and Registration Rule 1031(a) states that "[a]ll persons engaged or to be engaged in the investment banking or securities business of a member who are to function as representatives shall be registered as such with the Association in the category of registration appropriate to the function to be performed." Rule 1031(b) defines "representative" as "[p]ersons associated with a member, including assistant officers other than principals, who are engaged in the investment banking or securities business for the member including the functions of supervision, solicitation or conduct of business in securities." It is clear from the record that Gates, as the sole Prudential representative who handled the City's account, was engaged in the purchasing and selling of securities.

¹² When GW was asked whether he dealt with anyone else at Prudential, he testified that he "may have spoke[n] with a couple people at Prudential, [but that he] never dealt with anybody outside of Mr. Gates." GW also testified that he spoke with Gates "[a]t least once, if not twice, a day" and that he "relied upon [Gates' investment] advice quite frequently." When GW was asked whether he ever dealt with Prince, he responded: "As far as making a security transaction, no. I did talk to Mr. Prince on occasion when Mr. Gates was out of the office." Likewise, at Prince's disciplinary hearing, Prince

City's account while he was not registered with the Association or with the State, from June 27, 1990 through July 31, 1990, as evidenced by the Prudential account statement and the Prince commission runs. Accordingly, Gates violated Membership and Registration Rule 1031 and Conduct Rule 2110.¹⁴

Number of Violative Transactions. The Commission's order of remand sought clarification as to the number of trades that Gates effected prior to his registration. Although Exhibit A to the complaint listed the City's transactions, the initial DBCC decision did not specify the number of violative transactions it found. The NBCC affirmed the DBCC's determination and specified that Gates engaged in "at least nine" violative trades, but did not identify which trades listed on Exhibit A were violative trades.

Our review of the record indicates that Gates engaged in 25 transactions prior to being registered with the Association. We have determined that the schedule of 25 trades listed in the DBCC's amended decision, which comports with Exhibit A to the complaint, is correct. In making this determination, we have relied on the City's account statements and the Prince commission runs. We note that the City's account statement was submitted into evidence by Gates at the initial DBCC hearing and that at no point has Gates disputed the number of violative trades.¹⁵

testified that he was not responsible for the City's account, nor had he ever executed any trades for the account. When Prince was asked whether he worked with Gates on the City's account, Prince testified: "Never one time did I ever have anything to do with the City's account."

¹³ We note that the record contains a January 9, 1992 letter from Gates to Prudential, in which he complained of not having been credited for his production and therefore not considered for certain Prudential awards or bonuses. In this letter, Gates stated: "[A]ll the gross I did from June 1990 until October 1991 was credited to Andy Prince FA #18." (emphasis added). Gates also listed his production by month, and noted that beginning on June 14, 1990, he produced \$54,488, and that in July 1990, he produced \$58,420.

¹⁴ We reject Gates' assertion that he was merely Prince's sales assistant and that he was not compensated for any trades prior to the effective date of his registration. Although we recognize that Prudential has stated that Gates was hired as a sales assistant, this has no bearing on whether he in fact acted in a capacity requiring registration. Gates, by engaging in purchasing and selling of securities for the City, was required to be registered. See, e.g., In re Ashvin R. Shah, Exchange Act Rel. No. 37954 (Nov. 15, 1996) (receipt of commissions in connection with customer's mutual fund purchases required registration), aff'd, No. 97-1065 (7th Cir. Nov. 27, 1997); Voss & Co., Inc., 47 S.E.C. 626, 630 (1981) (individuals who received orders for securities and ultimately derived compensation from those orders acted in capacity requiring registration). Cf. In re Exchange Services Inc., 48 S.E.C. 210, 213 (1985) (finding that associated persons acting as order takers must be registered as representatives).

¹⁵ On remand from the Commission, the NBCC requested reconciliation of the Prince record (which found 12 violative trades -- nine trades before Gates was registered with the Association, and three more trades before he was registered in the State), and Exhibit A listing 25 transactions (before Gates was registered with the Association). The DBCC was unable to determine why the Prince

We also note, however, that the DBCC made no findings in its amended decision as to whether Gates engaged in additional transactions after he was registered with the Association on August 1, 1990, but before he was registered in the State on August 7, 1990. We uphold this determination. We note that the complaint alleged that Gates "knew or should have known that, at the time of the transactions, which occurred prior to August 1, 1990, he was not properly registered with the Association or approved as an agent in the state where the customer was domiciled." (emphasis added). Accordingly, because the allegation in the complaint is limited to misconduct prior to August 1, 1990, we likewise decline to make any finding as to whether Gates engaged in any transactions while not registered in the State after August 1, 1990.¹⁶

Amount of Commissions. The Commission's remand order requested clarification of the amount and source of the \$50,967.70 fine. It also questioned whether the \$25,967.70 that Prince paid to Gates represented only commissions that Gates earned before he was registered, or also included commissions earned thereafter. On remand, the DBCC determined that it was unable to conclude that the four Prince checks represented commissions earned while Gates was not registered. It reduced the fine by the \$25,967.70 previously recognized as commissions, but it retained the \$25,000 fine previously imposed by the NBCC.

We are likewise unable to conclude that the four checks, which are dated after Gates was registered, in fact represented commissions earned from the violative trades. Similarly, we make no finding as to what portion of \$25,000 that was ledgered out of Prince's account to Gates' account for the earning period July 25 to August 24, 1990 represented commissions from the violative trades. We nevertheless find that, based on a preponderance of the evidence before us, Gates in fact received commissions from the 25 violative transactions. This finding is supported by the testimony of Prince,¹⁷ Hiegel,¹⁸ and Prudential,¹⁹ all of whom stated that Gates received all commissions on the City's trades.

decision referenced only nine trades. We are likewise unable to do so. Based on our review of the entire record including the Prince record, however, we are satisfied that our finding that Gates engaged in 25 violative transactions is correct. We note that the schedule of trading on Exhibit A was included in both the Prince and Gates records.

¹⁶ We find, however, that Gates effected the 25 trades while he was not registered with the State prior to August 1, 1990, in violation of Conduct Rule 2110.

¹⁷ At the Prince DBCC hearing, Prince testified that he retained none of the commissions on the City's trades. Likewise, in Prince's affidavit, he stated: "At no time and under no circumstances was my compensation tied to Donny Gates directly or indirectly. I was not supposed to and never did receive any benefit from any of [Gates'] production, directly or indirectly."

¹⁸ In an affidavit contained in the Prince record, Hiegel stated that "[a]ll commissions on the [City's account] were paid to Gates and not to Prince." He also stated that: "Mr. Gates assured himself monthly that he got every dime coming to him by reviewing the calculations prepared by [a Prudential sales assistant who calculated the transfer amounts]."

In addition, Gates himself has admitted as much in certain documentary evidence contained in the record and in testimony before the DBCC.²⁰ Accordingly, we have determined by a preponderance of the evidence that Gates in fact received commissions from the 25 violative transactions. See, e.g., In re Gerald James Stoiber, Exchange Act Rel. No. 39565 at 3 & n.8 (Jan. 22, 1998) (stating that preponderance of the evidence standard applies to NASD disciplinary actions (citing Steadman v. SEC, 450 U.S. 91, 101 (1981)).²¹

In order to determine the exact amount of commissions that Gates earned, we have examined the commission runs under Prince's production number for the City's account, which list the amount of net commissions earned for each of the 25 transactions. We thus have calculated that for the period

¹⁹ The record contains a June 25, 1992 letter from Eric Sussman, Assistant General Counsel of Prudential, to the Arkansas Security Department, which stated:

At the end of the production period, [Hiegel] would have the commission dollars generated by Donnie Gates, but credited to Andy Prince's production number, ledged over to Donnie Gates. For at least the first two weeks of this arrangement the system did not work. This resulted in Andy Prince writing a check to Donnie Gates for an amount equivalent to the commissions generated by the City's account Andy Prince executed no trading for the [account] and he never received compensation for the trades done for the [City] which were credited to his production number. . . . Gates received 100% of the commissions generated by the [City's account].

In addition, Robert Brunton ("Brunton"), a Senior Vice President and Senior Counsel at Prudential who supervised Prudential's investigation of the City's account, corroborated this in testimony before the DBCC.

²⁰ In response to the Association's request for information, Gates, through his attorney in a letter dated September 23, 1992, admitted that Hiegel had advised Gates that "he would have a problem getting an immediate reply to his registration because he had a yes on his Form U-4." Gates' attorney stated: "As a result, Mr. Hiegel advised Mr. Gates to file as Mr. Prince's sales assistant. Mr. Gates would make sales and Mr. Prince would receive the 45% sales commissions which he would then remit to Mr. Gates." In addition, Gates in effect admitted that he received commissions prior to his registration. He testified that Hiegel had instructed that Prince would handle the City's account until he (Gates) was licensed, and that Prince would then pay the commissions to him (Gates).

²¹ We note that the DBCC fined Prince \$30,000 based on sums he was suspected to have received during the entire 15-month period that his production number was used by Gates for the City's trading. We also note that on review, the NBCC criticized the DBCC's decision and stated that Prince should not be fined an "arbitrary quantification of the ill-gotten gains that he may or may not have received." The NBCC also determined that "the record evidence indicate[d] that Prince did not, in fact, retain any of those commissions." We agree and take official notice of the NBCC's July 28, 1994 decision.

from June 27, 1990 to July 31, 1990,²² Gates earned \$28,261.05 in net commissions for the 25 transactions while he was not registered.²³

Procedural Issues

Gates argues that he was denied a hearing before the DBCC on remand and that he was therefore denied due process. We reject this argument.

Following the NBCC's October 22, 1996 remand order, on January 9, 1997, the District staff sent a proposed amended decision to Gates. Gates objected to the amended decision and requested a new hearing before a Committee composed of members from other districts. He also requested "any and all evidence" against him. On April 4, 1997, the staff filed a Motion to Issue the Amended Decision to the DBCC. On May 8, 1997, a panel of DBCC members was appointed to review the matter and make recommendations to the full DBCC. On May 14, 1997, Gates filed an opposition to the District's motion in which he argued that he was entitled to a full hearing. The panel reviewed the motions and ruled that, based on its review of the remand order, the Commission had sustained the finding that Gates had violated the registration rules. The panel concluded that the only issues on remand were the number of transactions, the amount of compensation, and appropriate sanctions. Thus, the panel instructed the parties to brief these remaining issues.²⁴

On July 15, 1997, the staff filed a brief addressing those issues, and on August 6, 1997, Gates filed a response consisting of excerpts of the Prince transcript with Gates' handwritten annotations. On

²² Gates' attorney stated in the September 23, 1992 letter that Gates received a 45 percent sales commission. Likewise, Hiegel confirmed in his affidavit that Gates received a 45 percent commission rate. We note that the Prince commission runs reflect a net pay-out of 45 percent per transaction. We have calculated the net commissions that Gates earned for each of the 25 transactions, as set forth in Attachment A to this decision. The transactions listed on Attachment A conform to the schedule of transactions in the DBCC's amended decision and on Exhibit A to the complaint.

²³ Finally, we nevertheless note that we are not required to find that Gates received commissions in order to find that he violated Rule 1031 and Conduct Rule 2110. See In re Voss & Co., 47 S.E.C. 626, 630 n.9 (1981) (recognizing that for registration violations, "payment of compensation is not necessary to a finding of violation").

²⁴ The panel also denied Gates' request to have a DBCC other than District No. 5 hear this matter, and it instructed the staff to send Gates a copy of the Prince record. By letter dated June 13, 1997, the staff sent Gates a copy of the Prince record. In addition, in response to Gates' request for "any and all evidence against him," the staff enclosed a May 26, 1993 letter with copies of exhibits that were sent to Gates' counsel prior to the initial DBCC hearing. We note that by letters dated December 21, 1993 and January 19, 1994, the staff advised Gates that it was willing to make its files available to Gates at the District office. Finally, we affirm the DBCC hearing panel's decision to not supply Gates with the home and business addresses of the District staff and the DBCC members.

September 8, 1997, the DBCC panel issued a letter ruling that permitted the parties to supplement the record with relevant documentary evidence. The panel also requested that Gates address the question of whether a hearing would provide additional information relevant to the issues on remand. Neither the staff nor Gates responded to the panel's request.

We find that Gates was not denied a hearing on remand. Instead, he chose not to respond to the DBCC panel's request for the parties' views as to whether a hearing would provide additional information relevant to the issues on remand. Moreover, Gates was not denied due process. Due process requires that a respondent be given adequate notice of the specific charges against him, an opportunity to defend against those charges, and the opportunity to confront and cross examine adverse witnesses. See, e.g., In re Richard W. Perkins, 47 S.E.C. 847, 849 (1982). Gates has always had notice of the specific charges against him. The complaint specifically alleged that Gates received commissions prior to being registered with the Association and with the State. The issues on remand were a subset of the issues alleged in the complaint, i.e., quantification of the commissions that Gates received and the number of registration violations.

Gates also has had a fair opportunity to defend against the charges and to confront witnesses. During the first phase of the DBCC proceedings, he was given a full evidentiary hearing and the opportunity to cross-examine and confront any adverse witnesses. He likewise could have called any witnesses, including Prince and Hiegel, to testify at that hearing. Due process did not require that he be given a second full hearing on the same charges, but only that he be given a fair opportunity to address the issues on remand. This he received and ignored; instead, on remand and now on appeal, Gates has attempted to relitigate the issue of whether he violated the registration rules, an issue that had already been adjudicated.²⁵ Accordingly, we find that Gates was given sufficient due process on remand. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner," quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

Procedural Issues On Appeal. Gates raises a number of procedural issues on appeal. We adopt the rulings on these matters made by the NAC subcommittee ("Subcommittee") that convened to hear argument in this case.

²⁵ We note that a copy of the Prince DBCC record was provided to Gates on remand and that Gates indeed did comment on that record in submissions. Gates thus was not only given the opportunity to explain why a hearing was necessary on remand, but also he was given the opportunity to file briefs and to supplement the record with additional relevant documents. In Gates' May 14, 1997 response to the staff's motion to issue the amended decision, however, he attempted only to relitigate whether he violated the registration rules. In this motion, he stated: "All the transactions in question were not done by me, they were done by Perry Prince. I did no transactions until after my registration was approved by both the NASD and [the State]."

In Gates' opening brief, he requested that Prince and Hiegel be permitted to testify at the appellate hearing. Under Procedural Rule 9346, a party may apply to the Subcommittee for leave to introduce additional evidence by motion filed not later than 30 days after service of such Party's notice of appeal. The motion "shall describe each item of proposed new evidence, demonstrate that there was good cause for failing to introduce it below, [and] demonstrate why the evidence is material to the proceeding." Gates failed to identify specifically what testimony Prince and Hiegel would provide or how the testimony would be material to the limited issues that were remanded.²⁶ Rather, Gates apparently sought to adduce the testimony to relitigate the issue of whether he violated the registration rules, an issue that has already been adjudicated. In addition, Gates failed to demonstrate good cause for not introducing the evidence below. Finally, his request was received more than two months after his notice of appeal and was therefore untimely.²⁷ The Subcommittee determined to deny that request and we thus adopt the Subcommittee's ruling on this issue.

We also affirm the Subcommittee's rulings in response to Gates' requests regarding the scheduling of the appeal hearing. Three days before the appellate hearing, Gates requested a postponement of the hearing date. The Subcommittee denied this request, but offered to conduct the hearing at an earlier time on the scheduled hearing date, or to permit Gates to participate by telephone at the scheduled time. Gates telephoned the NASD offices at the time of the hearing, but stated at the outset that he was calling from an airport and that he would not be able to be present for the full hearing. Gates participated in almost all of the hearing, including closing statements, but he was not available for

²⁶ In Gates' opening brief, he argues against the finding of violation and states that "in the record of both Mr. Frank Hagle [sic] and Mr. Andy Prince it is stated Mr. Gates was paid by Mr. Prince as a sales assistant, solely at the request of [Hiegel]." Gates requests that Prince and Hiegel testify at the appellate hearing to "allow [him] to fully prove [his] case." He states: "If I would not have been turned down for a new hearing 3 years ago these people could have substantiated the calculations in question and it would have allowed this to be in the current record, this in turn would have proven my case." Gates also requested on appeal that the record in the NASD's disciplinary action against Hiegel be adduced. We note that the record already contains information relating to Gates' assertion that he was hired as a sales assistant, and it specifically contains Hiegel's affidavit and Prince's testimony on this issue. We also note that the finding of violation has already been established, and that Gates has not demonstrated what, if any, evidence related to the limited issues on remand that he intended to adduce. Accordingly, we find that Gates has not specifically identified what the testimony of Hiegel or Prince would be if it were permitted and how this evidence would be material to the proceeding. Nor has he established good cause for not adducing this evidence below.

²⁷ Gates' notice of appeal was received in the Office of General Counsel ("OGC") on January 23, 1998. Gates was informed by letter dated January 23, 1998, that in accordance with Procedural Rule 9311(c)(4) and (5), he should specify the issues he was appealing and whether he requested oral argument. By letter dated February 9, 1998, Gates amended his notice of appeal to provide this information. His opening brief requesting that Hiegel and Prince testify at the appellate hearing was not received until April 13, 1998.

the remaining approximately 10 minutes consisting of the Subcommittee's questioning of regional counsel. The Subcommittee thus advised Gates at the hearing that he would be permitted the opportunity to submit post-hearing briefs on the issues raised at the hearing. Gates requested, however, that the hearing be reconvened at a later date. By letter dated July 14, 1998, the Subcommittee denied this request, established a post-hearing briefing schedule, and provided Gates with a copy of the hearing transcript. On July 28, 1998, the date on which Gates' post-hearing brief was due, Gates objected by facsimile to the filing of post-hearing briefs and to the Subcommittee's denial of his request for an adjournment of the hearing.

We adopt the Subcommittee's denial of Gates' request first for a postponement of the hearing date, and subsequently for an adjournment of the hearing.²⁸ In his request for a postponement made three days before the hearing, Gates stated that he was traveling to California on the day of the hearing to attend his son's graduation and another son's marriage. He thus requested a postponement until "July or August" as he intended "to attend in person with counsel." We note that Gates was given more than two months' advance notice of the hearing date. Gates waited, however, until three business days before the hearing date to request that the date be rescheduled. Moreover, we note that Gates twice was permitted extensions to file his opening brief.²⁹ Given the fact that Gates was granted two extensions and that this matter had been pending for quite some time, we find that a postponement of the hearing date would not have been judicious. In addition, we find that Gates failed to demonstrate

²⁸ Under Procedural Rule 9322, in considering a motion for a postponement of oral argument, we should consider, in addition to any other relevant factors: (1) the length of time the disciplinary proceeding has been pending to date, and the timeliness of the request for postponement, adjournment, or extension; (2) the number of postponements, adjournments, or extensions already granted; (3) the stage of the proceedings at the time of the request; (4) the prejudice to other parties; (5) the potential harm to the investing public if an extension of time, an adjournment, or a postponement is granted; and (6) any other matter that justice may require. In addition, a respondent must show "good cause" for any postponement, adjournment, or extension.

²⁹ By facsimile dated February 12, 1998, which was forwarded to the OGC from regional counsel on February 28, 1998, Gates requested an extension of 29 days to file his opening brief and stated that he was in the process of retaining counsel. By letter dated March 2, 1998, the OGC granted Gates' request for the extension to March 31, 1998 to file his opening brief. By facsimile dated March 25, 1998, Gates requested a second extension of time of one month to file his opening brief and claimed that his attorney was in trial and had not been able to "review and respond" to his opening brief. By letter dated March 30, 1998, regional counsel advised that he would not object to this request, but stated that he had advised that Gates' attorney should submit a notice of appearance, and should explain any request for extension made on behalf of his client. By letter dated March 30, 1998, the OGC granted Gates a two-week extension of time. On April 3, 1998, the parties were sent notice of the time and date of the hearing. Gates' request for a postponement of the hearing date was received on May 29, 1998. The OGC, however, did not receive any notices of appearance from counsel nor was Gates represented by counsel at the hearing.

"good cause" under Rule 9322(a) to warrant a postponement. Under the circumstances, we approve the Subcommittee's decision and find that it attempted to accommodate Gates by permitting oral argument by telephone and by offering to conduct the hearing at an earlier time that day.

We also find that the Subcommittee's ruling not to adjourn the hearing, but to permit Gates to submit post-hearing briefs was proper. Gates was present for nearly the entire hearing, and was also given the opportunity to fully brief any issues raised at the hearing. Moreover, at no time did Gates identify any additional argument he wished to present at any later hearing. Thus, Gates failed to demonstrate good cause for an adjournment of the hearing under Procedural Rule 9322.

Sanctions

The requirement that an associated person's registration receive NASD approval before that person engages in any securities business is an "important safeguard in protecting public investors." See In re Ashvin R. Shah, Exchange Act Rel. No. 37954, at 8; In re Michael Kormos, Exchange Act Rel. No. 35823, at 4 (June 8, 1995). Indeed, the Commission has repeatedly emphasized that "strict adherence" to that requirement is "essential." Id.; see also In re First Capital Funding, Inc., 50 S.E.C. 1026, 1029-30 (1992); In re Gary Cohee, 48 S.E.C. 917, 919 (1987).

We have determined that higher sanctions than those imposed by the DBCC in its amended decision are warranted. As a disciplinary matter, we think it would not be appropriate to permit Gates to keep the fruits of his misdeeds. Such a result would undermine rather than encourage "strict adherence" to the registration requirement.³⁰

Gates knowingly and deliberately circumvented the registration requirements by selling and purchasing securities through Prince's production number. Although we recognize that the applicable Sanction Guideline recommends consideration of whether a registration application was pending at the

³⁰ The Commission has generally recognized that a wrongdoer should not be permitted to retain the fruits of his misdeeds. For example, with respect to disgorgement orders, the Commission has stated:

As a general proposition, we believe that disgorgement should be ordered in all cases in which the NASD can identify direct financial gain obtained by a wrongdoer as a result of his or her wrongful activities. In order to maximize the effectiveness of disgorgement orders in remedying past wrongs and future misconduct, the NASD must make every reasonable effort to ensure that the full gain generated by violative conduct is disgorged.

In re Michael David Sweeney, 50 S.E.C. 761, 768 (1991) (excessive trading case). In this instance, because the Sanction Guideline recommends fining away commissions, we are not specifically ordering disgorgement, but are converting the ill-gotten commissions earned on the 25 violative trades to a fine.

time of the violations, we think Gates was fully aware that he was not registered when he engaged in the misconduct. We note that Gates had in the past registered as a representative with a number of firms prior to his association with Prudential. We thus do not find the fact that he had an application pending to be mitigating.

We also have considered that Hiegel instructed that the transactions should be funneled through Prince's production number and that Prince should remit the commissions to Gates. Although we note that circumvention of registration requirements and off-the-books payments apparently were firm-wide problems, and that Prudential and Hiegel were disciplined for such, we do not think this absolved Gates of his responsibility to ensure that he was properly registered. He cannot attempt to shift responsibility for his own lapses to his supervisor or the firm. See, e.g., In re Michael Kormos, Exchange Act Rel. No. 35823, at 4 ("[W]e have repeatedly held that a respondent cannot shift responsibility for compliance with an applicable requirement to a supervisor"); In re Thomas C. Kocherhans, Exchange Act Rel. No. 36556, at 6 (Dec. 6, 1995). Finally, we note the significant nature and extent of Gates' engagement in the securities business. He was the sole representative for a substantial client on an account worth more than \$1.1 million. While unregistered, he engaged in 25 short-term purchases and sales resulting in substantial commissions.

The applicable Sanction Guideline recommends a \$2,500 to \$50,000 fine, plus fining away commissions earned by the unregistered representative. Where an associated person recklessly or knowingly violates the registration requirements, the Sanction Guideline recommends a suspension of no less than 30 days or a bar, and requalification by examination.³¹ We have calculated Gates' net commissions to be \$28,261.05 as set forth on Attachment A, and we therefore fine Gates his net commissions. We also affirm the \$25,000 fine imposed by the DBCC for the 25 registration violations; thus, we impose a total fine of \$53,261.05.

We also increase the DBCC's three-month suspension to a six-month suspension in all capacities. The DBCC's amended decision apparently reduced the six-month suspension that we previously imposed to three months based on "its review of the record and the mitigation presented by Gates." The DBCC's amended decision, however, does not describe what factors it considered mitigating. Because we find no mitigating factors present here, we impose a six-month suspension.

Thus, given the substantial nature of Gates' deliberate unregistered trading activity, we find that the censure, the \$25,000 fine plus the \$28,261.05 fine for Gates' net commissions, the six-month suspension, and the order of requalification by examination are fitting and are an appropriate deterrent.

Accordingly, we order that Gates be censured, fined \$53,261.05, and assessed DBCC hearing costs of \$1,736.³² We also order that Gates be suspended for six months in all capacities, following which time he must requalify by examination before acting in any capacity requiring registration.

³¹ See Guidelines (1993 ed.) at 34 (Registration Violations (Schedule C)).

³² We note that Gates is assessed only for the initial DBCC hearing held on November 3, 1993.

Pursuant to Rule 9360, the Chief Hearing Officer shall set the date on which the suspension shall begin.³³

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Corporate Secretary

³³ 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 sanction, after seven days' notice in writing, will summarily be revoked for non-payment.