

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

District Business Conduct Committee  
For District No. 10,

Complainant,

vs.

Andrew Fensmark Harris  
Bronx, New York,

Respondent.

DECISION

COMPLAINT NO. C10960149

District No. 10 (NY)

Dated: December 22, 1998

The December 1, 1997 decision of the District Business Conduct Committee ("DBCC") for District No. 10 regarding Andrew Fensmark Harris ("Harris") was called for review pursuant to NASD Procedural Rule 9312.<sup>1</sup> After a review of the entire record in this matter, we affirm the DBCC's finding that Harris violated Membership Rule 1080 and Conduct Rule 2110 by removing from a Series 7 examination a piece of scratch paper on which he had written several exam questions and answers. We increase the sanctions imposed on Harris by ordering a six-month suspension instead of a two-month suspension, and we affirm the DBCC's sanctions of a censure, a \$5,000 fine, the requirement that Harris requalify by examination as a general securities representative before reassociating with a member firm, and the imposition of hearing costs for the DBCC hearing.

Background

Harris entered the securities industry in 1994, registering with Stratton Oakmont, Inc., as a general securities representative in April 1995. Since November 1995, Harris has been registered

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<sup>1</sup> The National Business Conduct Committee ("NBCC") of NASD Regulation, Inc. ("NASD Regulation") called this case for review to determine whether the sanctions imposed by the DBCC for District No. 10 were too low in light of the findings of violations. 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.

with the Association as a general securities representative of Biltmore Securities, Inc. ("Biltmore Securities").

The central issue we consider in this matter is whether Harris, who admits that he removed from the Series 7 examination a piece of paper on which he had written several exam questions, violated the rule forbidding such removal of questions inadvertently or intentionally.

### Facts

On April 26, 1995, NASD Regulation administered the Series 7 Qualification Examination ("Series 7 exam") at its Proctor Certification Testing Center ("Test Center") in Melville, New York. Eileen Amoroso ("Amoroso") was working as an NASD proctor at the Test Center on that day. Amoroso had 11 years of experience as an NASD proctor. Harris had previously taken, and failed, the Series 7 exam twice, in February and March of 1995.

The Series 7 exam that Harris took on April 26, 1995 was split into two parts, with a total of 260 multiple-choice questions. The testing candidates had three hours and five minutes to complete the morning exam session, had a lunch break, and then had another three hours and five minutes to complete the afternoon exam session. When the candidates arrived for the Series 7 exam, the proctors handed to them the "Rules of Conduct."

When Harris arrived at the Test Center, he signed and dated a one-page copy of the "Rules of Conduct," which stated:

I understand that:

1. I must not take *any* notes, formulas, or study materials into the examination room. . . .
7. I must not remove any written, printed, or recorded materials from the Test Center. The examination questions remain the property of the National Association of Securities Dealers, Inc. (NASD) and/or developing organization(s) and I shall maintain the confidentiality of the questions and my answers to them.
8. **Any violation of these rules will subject me to possible disciplinary action by an NASD District Business Conduct Committee or other regulatory body and normally would result in my being barred from employment/association with any securities dealer.**

(emphasis in original).

Amoroso testified that after the candidates arrived, she gave all of them an orientation, during which she discussed the rules for taking the exam. The candidates then entered the exam room. The Series 7 exam that Harris took was given on a computer. The candidates were assigned to carrels, in which they took the exam. The exam questions and multiple answers were displayed on a monitor and candidates used the computer to enter their answers. Before the beginning of the exam, the

Rules of Conduct were displayed on Harris' monitor and he had to agree to comply with the rules in order to take the test.

Once a candidate completed the morning session of the exam, he could not change any of the answers that he had given to those exam questions. During an exam session, however, a candidate could initially answer a question and return to it later to change his answer.

Before the candidates entered the testing area, the proctors distributed an exhibit book and three pieces of 8 ½ by 11 inch scratch paper to each candidate. In the carrels, the proctors placed two additional pieces of scratch paper. All five pieces of scratch paper were colored pink. At the top of each piece of paper, a warning is printed:

<i>This is a closed book test. Only materials issued or approved by the center staff may be taken into the testing area.</i>	<i>This scratch paper must be returned to the center staff upon completion of this examination. DO NOT write your scores on <u>this</u> paper. The center staff will provide you with paper on which to write your scores.</i>
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(italics and underscoring in original).

Harris signed in for the morning session of the exam at 8:30 a.m. He took two restroom breaks during the morning session of the exam. The first was from 11:02 to 11:06 and the second was from 11:35 to 11:37. Harris signed out of the morning session at 11:38.

Harris testified about taking the Series 7 exam as follows. During the morning session he used at least one page of scratch paper to write down exam questions and answers. Harris explained that he wrote out the questions and answers to increase his focus on these items. He wrote down the questions and each of the answer choices that he considered possibly correct. In some cases, he wrote down all four answer choices. His approach was to solve one question, erase the question and the answer choices, and then move on.

Harris further testified that, after finishing the morning session, he walked down one flight of stairs to a cafeteria for lunch. Although he had removed one piece of scratch paper, he stated that he did not realize what he had done. In the cafeteria, he threw a tissue and the scratch paper into a trash bin. He then purchased a bagel and went to his car.

At the end of the morning exam session, Amoroso was collecting materials and scratch paper from candidates. She testified about her actions as follows. At the end of the morning session, two candidates approached her desk to sign out and turn in their materials, including their scratch paper. While Amoroso was helping these two candidates, Harris approached her desk, signed out, and left the Test Center before she could check his materials. When she counted Harris' pages of scratch paper, she found that one page was missing. She quickly asked another employee to catch Harris

before he went to lunch. The employee told Amoroso that she had gone into the hallway outside the Test Center, but she did not see Harris.

Amoroso further testified that when Harris returned for the afternoon session, she informed him that one page of his scratch paper was missing and that he could not be seated for the afternoon session until he returned the page. Harris left the Test Center and returned shortly thereafter with the missing scratch paper.

Harris testified that he had retrieved the scratch paper from the trash bin in the cafeteria. Amoroso then allowed Harris to take the remainder of the Series 7 exam. Harris signed in for the afternoon session of the exam at 12:45 p.m. He received a passing score of 85 on the Series 7 exam.

The piece of scratch paper that Harris returned to Amoroso had words written in pencil on it that had subsequently been erased. The paper had been neatly folded into a small square, approximately two inches by two inches. It did not appear to have been crumpled and did not have any food or other stains on it. Amoroso testified that there is only one garbage bin in the cafeteria and that the cafeteria is crowded from noon to 3 p.m.

As part of NASD Regulation's investigation of this matter, Peter Murray ("Murray"), Lead Qualifications Analyst in the NASD's Testing Qualification Department, examined the scratch paper that Harris had removed from the Test Center. He compared the writing on the scratch paper to the questions in the Series 7 exam taken by Harris on April 26, 1995. Murray testified that although several of the words on the paper were illegible, he concluded that the paper contained portions of four questions, including portions of the possible answers, from the morning session of the exam that Harris took. Murray testified that Harris answered three of the copied questions correctly and answered the fourth incorrectly.

Also during NASD Regulation's investigation, Harris participated in an on-the-record interview, conducted by District No. 10 staff. During the interview, Harris stated that during his lunch break he "crushed" up his scratch paper and threw it away in the cafeteria.

### Procedural Issues

Harris argues that the NAC is prevented from calling this case for review because written notice of the call for review was not served on him "promptly." Procedural Rule 9312 provided that a DBCC decision could be called for review by the Review Subcommittee within 45 days after the date of service of the decision. The rule also provided that "a written notice of review shall be served promptly on each Party to the proceeding." Procedural Rule 9312(c)(1) (NASD Manual 1997 ed.).

We reject Harris' argument.<sup>2</sup> The DBCC decision was issued and served on December 1, 1997. The Review Subcommittee called this case for review on December 22, 1997. The Office of General Counsel communicated the call for review in a letter dated January 26, 1998. Under the 45 days allowed in the rule, the Review Subcommittee had until January 15, 1998 to call this case for review. The Review Subcommittee exercised its authority on December 22, 1997, well within the 45 days. The parties were notified 11 days after the end of the 45 day period. In the context of an appellate proceeding such as this case, we find that the notice given to the parties was prompt. Accordingly, this call for review proceeding was valid at its inception.

Harris asserts that he began serving his suspension shortly after December 12, 1997 and that the NAC should not be allowed to impose any additional suspension on him in this proceeding. We disagree. Harris was not authorized to begin and end his own suspension. Harris, like every other respondent, must follow the procedural rules regarding serving a suspension. Harris' proceedings before the DBCC were governed by the rules that were in effect at the time. See Code of Procedure Rules 9100-9420 (NASD Manual 1996 ed.).<sup>3</sup> The 1996 code specified that for Offers of Settlement the order accepting such an offer served as the DBCC's decision and if a suspension was ordered, the suspension would be effective on a date to be set by the President of the Association. Rule 9226(f) (1996 ed.).<sup>4</sup> In this case, Harris never received any notification from the NASD concerning when his suspension would begin because his case was called for review. We do not grant Harris any credit for his alleged, self-imposed suspension.

Harris also states that he submitted a check for \$5,000 to the NASD in payment of the fine imposed by the DBCC. He asserts that the NASD's acceptance of his check should preclude this call for review. We have already decided that the Review Subcommittee had the authority to call this case for review. The fact that Harris submitted payment of the fine does not divest the NAC of jurisdiction. Harris will, of course, be given full credit for the \$5,000 payment that he has already made.

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<sup>2</sup> Harris' brief also argues that the NAC is "estopped" from calling this case for review. An equitable estoppel argument by Harris fails because, among other flaws, the NBCC/NAC did not misrepresent any material facts to Harris. See, e.g., Carneiro Da Cunha v. Standard Fire Ins. Co., 129 F.3d 581, 587 (11th Cir. 1997); FDIC v. Rayman, 117 F.3d 994, 1000 (7th Cir. 1997).

<sup>3</sup> Under Rule 9225, the DBCC's decision did not become final until the "next business day following the expiration of a 45 calendar day period from the date of the decision." Therefore, the DBCC's decision regarding Harris could not become final until January 16, 1998. If the DBCC's decision had become final, then the NASD would have notified Harris about the start of his suspension.

<sup>4</sup> The current Procedural Rules continue the NASD's practice of setting the start of a suspension. Decisions issued by Hearing Officers must include a statement describing any sanction imposed and the date upon which such sanction shall become effective. Procedural Rule 9268(b)(6).

## Discussion

The Association's rule regarding confidentiality of qualification examinations, Membership and Registration Rule 1080, provides:

The Association considers all of its Qualification Examinations to be highly confidential. The removal from an examination center . . . of any portion of such Qualification Examination, whether of a present or past series, or any other use which would compromise the effectiveness of the Examinations and the use in any manner and at any time of the questions or answers to the Examinations are prohibited and are deemed to be a violation of Rule 2110.

Initially, we note that there is no dispute that Harris knew that removing scratch paper from the Test Center was in violation of the NASD rules. Harris testified that he knew that he was required to return the scratch paper to the proctors at the end of the test session. Indeed, the Rules of Conduct plainly stated this requirement. Harris both signed the Rules of Conduct and agreed to abide by them when he started the exam on the computer. Also, the scratch paper contains a legend which states that it must be returned to the Test Center staff.

After seeing Harris testify, observing his demeanor, and reviewing the exhibits, the DBCC made a credibility determination that Harris intentionally removed the scratch paper from the Test Center. The DBCC concluded that the evidence was inconsistent with Harris' explanation of how he removed the scratch paper from the Test Center. In these circumstances, we uphold the credibility finding of the initial finder of fact. See In re Christopher J. Benz, Exchange Act Rel. No. 38440, at 6 (Mar. 26, 1997) aff'd, Benz v. SEC, 97-3257, 1998 U.S. App. LEXIS 29728 (3d Cir. Oct. 6, 1998); In re Frank J. Custable, 51 S.E.C. 643, 648 (1993); In re Jonathan Garrett Ornstein, 51 S.E.C. 135, 137 (1992).

In addition, we agree with the DBCC's conclusion that the physical evidence refutes Harris' testimony. Harris' testimony that he threw away the scratch paper while throwing away tissue paper lacks credibility. The scratch paper is colored pink and is much heavier and larger than tissue paper. There is no reason to confuse the two. In addition, the folds on the scratch paper are consistent with Harris putting it into one of his pockets. The scratch paper does not have the markings of having been wadded up and thrown away with tissue paper. Based on all these factors, we conclude that Harris intentionally removed the scratch paper from the Test Center. We therefore affirm the DBCC's finding of a violation of Membership Rule 1080 and Conduct Rule 2110.

## Sanctions

The most relevant NASD Sanction Guideline for this case concerns cheating on qualification exams or possessing unauthorized materials.<sup>5</sup> The Guideline states that:

A bar is standard where cheating or possession of unauthorized materials is demonstrated and supported by the record; if mitigation is documented (only in cases of unauthorized possession that do not rise to the level of cheating), the Committee may consider a lesser sanction, such as a suspension plus a monetary sanction.

We conclude that Harris' misconduct is not the same as cheating on the Series 7 exam. Once Harris had finished the morning exam session, he was unable to change any of his answers to those questions. Therefore, Harris could not have cheated by finding the correct answers during the lunch break to the questions that he had written down.

Harris' violation of the Series 7 exam rules does, however, raise concerns similar to unauthorized possession of materials during an exam. Just as the NASD's prohibition on unauthorized possession of materials protects the fairness of the exam results, the NASD's policy of maintaining the secrecy of exam questions protects the integrity of future exams. Consequently, we formulate Harris' sanctions by comparison to the above Guideline. The record in this case does not contain any proof of what Harris did with the scratch paper before he returned it. Because we are unable to conclude that Harris communicated the substance of the exam questions and answers to anyone, we find that his misconduct is similar to unauthorized possession of materials that did not rise to the level of cheating.

Harris argues that his lack of a disciplinary history is a factor that should mitigate the severity of his misconduct. We do not credit this argument. Similar to many respondents who have violated the rules of taking qualification exams, Harris has only a short period of employment in the securities industry. Therefore, his lack of a disciplinary history is hardly remarkable and does not qualify as a mitigating circumstance.

The DBCC imposed on Harris a censure, a \$5,000 fine, a two-month suspension, a requalification requirement, and costs. We seek to impress more concretely on Harris the seriousness of his misconduct by imposing a substantial suspension from associating with any member of this Association. Therefore, we impose a six-month suspension on Harris in addition to affirming all the remaining sanctions ordered by the DBCC.<sup>6</sup>

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<sup>5</sup> As discussed infra, the recommended sanctions are consistent with the most analogous NASD Sanction Guideline ("Guidelines"). See Guidelines (1996 ed.) at 39 (Qualification Exams—Cheating On Exams (Including Use Of An Impostor) Or Possessing Unauthorized Materials).

<sup>6</sup> 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.

(continued...)

Accordingly, we order that Harris be censured, suspended for six months from associating with any member firm in any capacity, fined \$5,000, required to requalify by examination as a general securities representative before reassociating with a member firm, and assessed costs of \$1,057. The suspension will begin on a date to be set by the Chief Hearing Officer.

On Behalf of the National Adjudicatory Council,

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Joan C. Conley, Corporate Secretary

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(...continued)

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.

December 22, 1998

**VIA CERTIFIED MAIL: RETURN RECEIPT REQUESTED**

Steven Paradise, Esq.  
Squadron, Ellenoff, Plesent & Sheinfeld, LLP  
551 Fifth Avenue  
New York, New York 10176-0001

**Re:** Complaint No. C10960149: Andrew Fensmark Harris

Dear Mr. Paradise:

Enclosed herewith is the Decision of the National Adjudicatory Council in connection with the above-referenced matter. Any fine and costs assessed should be made payable and remitted to the National Association of Securities Dealers, Inc., Department #0651, Washington, D.C. 20073-0651.

You may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the Commission within thirty days of your receipt of this decision. A copy of this application must be sent to the NASD Regulation, Inc. ("NASD Regulation") Office of General Counsel as must copies of all documents filed with the SEC. Any documents provided to the SEC via fax or overnight mail should also be provided to NASD Regulation by similar means.

Your application must identify the NASD Regulation case number, and set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor. You must include an address where you may be served and phone number where you may be reached during business hours. If your address or phone number changes, you must advise the SEC and NASD Regulation. If the applicant is represented by an attorney, he or she must file a notice of appearance.

Steven Paradise, Esq.  
December 22, 1998  
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The address of the SEC is:  
Office of the Secretary  
U.S. Securities and Exchange  
Commission  
450 Fifth Street, NW, Stop 6-9  
Washington, DC 20549

The address of NASD Regulation is:  
Office of General Counsel  
NASD Regulation, Inc.  
1735 K Street, NW  
Washington, DC 20006

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is 202-942-7070.

Very truly yours,

Joan C. Conley  
Corporate Secretary

Enclosure

cc: Anita Zigman, Esq.