

On March 28, 2000, Firm A filed a Uniform Termination Notice for Securities Industry Registration ("Form U-5") disclosing Respondent's discharge on January 15, 2000 for "possible statutory disqualification." NASD staff subsequently began an investigation that resulted in the Department of Enforcement ("Enforcement") filing the complaint in this matter. During that investigation, according to a declaration executed by an NASD attorney, Respondent answered at least one request for information and notified NASD staff that the street number listed in CRD for him was inaccurate. According to the complaint, however, Respondent did not respond to six subsequent NASD information requests sent to him at various addresses between September 2000 and February 2001.

II. Procedural History

On November 15, 2001, Enforcement filed the two-cause complaint. Cause one alleged that Respondent had provided on his Form U-4 a false response to the question whether he had ever been charged with a felony, and cause two alleged that he had failed to respond to six NASD requests for information.

On November 15, 2001, Enforcement served the complaint on Respondent, via first-class and certified mail, at three different addresses.² The Postal Service returned all of the certified mailings marked "Unclaimed." The Postal Service did not return any of the first-class mailings.

On December 19, 2001, Enforcement served the complaint and Second Notice of Complaint by certified mail and first-class mail on Respondent at the same three addresses. Again, the Postal Service returned each of the certified mailings marked "Unclaimed" but did not return any of the first-class mailings.

On February 15, 2002, Enforcement filed a Motion for Entry of Default Decision.³ In support of the Motion, Enforcement submitted documentary evidence consisting of Respondent's CRD abstract, his Form U-4, his Form U-5, and documents relating to the mailing of the complaint. Enforcement also submitted a declaration executed by an Enforcement attorney. The declaration indicated that staff had learned from court records various facts relating to an October 1996 arrest of Respondent (the subject of Respondent's alleged misrepresentation on the

² First, Enforcement served the complaint on Respondent's current residential address as reflected in the CRD ("CRD Address"), an apartment at Address 1. Enforcement also sent the complaint to Respondent at two other addresses. During the investigation, staff had learned from an Equifax report and from correspondence with Respondent that the street number in the CRD Address was incorrect. Thus, staff sent the complaint to the corrected address, which lists the same apartment number, but at Address 2. Finally, staff also sent the complaint to a City 1 post office box address that staff had obtained from an Equifax report.

³ Enforcement served the motion on Respondent at the same three addresses.

Form U-4). The attorney also noted that the complaint alleged that Respondent had failed to respond to NASD's six requests for information. The attorney stated:

Complainant has sufficient evidentiary support for the allegations and factual contentions set forth in the Complaint. If the Hearing Officer determines that any further information or documents are necessary to aid in the decision of this motion, Complainant respectfully requests that it be so advised.

On April 19, 2002, the Hearing Officer issued a default decision holding that Respondent had received effective constructive service of the complaint and had failed to respond to it. The Hearing Officer ruled, pursuant to Procedural Rule 9215(f), that the allegations of the complaint were deemed admitted. The Hearing Officer ordered that Respondent be barred under both causes of action.

This appeal followed. Respondent requested oral argument, and the NASD Office of General Counsel notified him by letter dated July 12, 2002 that unless he could demonstrate good cause for his failure to participate below, the appeal would be decided on the basis of the written record pursuant to NASD Procedural Rule 9344(a).

III. Discussion

We first consider whether Respondent has demonstrated good cause for his failure to participate in the proceedings before the Hearing Officer. Because we find that he has not, we next consider the merits of this appeal on the basis of the written record. We conclude that the Hearing Officer properly determined that Respondent was in default, but we nonetheless remand this matter for the limited purpose of allowing the introduction of evidence to support the findings of violation.

A. Whether Respondent Has Established Good Cause for His Failure to Answer the Complaint

As announced in NASD Notice to Members 99-77 (September 1999), if an individual appealing a default decision establishes in a timely manner that there was good cause for his or her failure to participate in the proceedings below, our policy is to remand the matter for an evidentiary hearing. On the other hand, if such an individual does not establish good cause, Procedural Rule 9344(a) dictates that we consider the matter on the basis of the record without a hearing. See Rule 9344(a) (if an appealing party "did not participate in the disciplinary proceeding before a Hearing Officer . . . and fails to show good cause for the failure to participate, the matter shall be considered . . . on the basis of the record and other documents"). We find that Respondent did not demonstrate good cause for his failure to answer the complaint, and therefore we both decline to remand on that basis and deny Respondent's request for oral argument on appeal.

According to Respondent, he failed to answer the complaint because he did not receive it, and he did not receive it because NASD did not send it to his then-current address. Respondent, however, was responsible for correcting and updating his CRD Address, and he did not do so. Thus, Respondent's default is not excused. See Notice to Members 99-77 (listing considerations for assessing good cause, including "whether the respondent notified . . . CRD of any change of address"); Department of Enforcement v. Jeffrey B. Hodde, Complaint No. C10010005, 2002 NASD Discip. LEXIS 4 (NAC Mar. 27, 2002) (finding "good cause" lacking where respondent failed to receive complaint because he failed to keep his CRD address up to date).

Respondent argues that because he never became registered as a representative, he was unaware of any duty to keep his CRD Address current. We find this argument to be without merit. Respondent signed the Form U-4, which stated:

I consent that notice of any investigation or proceeding by any self-regulatory organization against applicant may be given by personal service or by regular, registered, or certified mail or confirmed telegram to applicant at his/her most recent business or home address as reflected in this Form U-4, or any amendment thereto, or by leaving notice of the investigation or proceeding at such address.

Respondent thus agreed in the Form U-4 that complaints could be served on him at the address listed in the Form U-4.

Moreover, the NASD By-Laws required Respondent to keep his CRD Address updated.⁴ Under Article V, Section 4(a) of NASD's By-Laws, an unregistered person whose association

⁴ Respondent was subject to the NASD By-Laws for three reasons. First, he executed the Form U-4, which stated that he "submit[ted] to the authority of the [NASD] and agree[d] to comply with all provisions, conditions and covenants of the . . . by-laws and rules and regulations of [NASD] as they are or may be adopted, or amended from time to time," "in consideration of [NASD's] receiving and considering [his] application."

Second, under the definitions in the By-Laws, Respondent became an "associated person" by signing and submitting the Form U-4. When Respondent signed the Form U-4 (in March 1999), Article 1(ee) of the NASD By-Laws defined "associated person" as, among other things, "(1) a natural person registered under the Rules of the Association." As amended on December 1, 1999, that provision (now Article 1(dd)) explicitly defines "associated person" as "(1) a natural person who is registered or has applied for registration under the Rules of the Association." (Emphasis added.) As noted in Notice to Members 99-95 (November 1999), this change clarified that any person who signs and submits a Form U-4 is an associated person. Thus, Respondent, by signing the Form U-4, became an associated person.

with a member has been terminated continues to be subject to the filing of a complaint for two years after the date upon which the associated person ceased to be associated with the member, i.e., in this case, for two years after January 15, 2000, the termination date given on the Form U-5. Under Article V, Section 2(c), applications for registration must be kept current. See Ashton Noshir Gowadia, 53 S.E.C. 786, 790 (1998) (it was the respondent's responsibility "to provide the CRD with a current address at which he could receive documents mailed to him. Otherwise an association member could avoid liability simply by moving without leaving a forwarding address."); Nazmi C. Hassanieh, 52 S.E.C. 87, 90 (1994) (holding that "[a]ll registered representatives are required to sign and file with the NASD a Form U-4, which obligates them to keep a current address on file with the NASD at all times.").

Accordingly, because Respondent has failed to demonstrate good cause for his failure to participate, we decline to remand on such a basis, and we have considered this appeal solely on the basis of the written record, including the briefs submitted on appeal.

B. Whether the Hearing Officer Properly Deemed Respondent In Default

Procedural Rule 9215(f) provides that if a respondent does not file an answer or otherwise respond within the time required after a second notice of complaint has been sent, the Hearing Officer may "(1) treat as admitted by the respondent the allegations in the complaint; and (2) enter a default decision against the respondent pursuant to Rule 9269." The Hearing Officer found that Respondent received constructive notice of this proceeding and defaulted by failing to answer the complaint. The Hearing Officer concluded that Enforcement complied with Procedural Rule 9134(b)(1), which specifies the procedures for proper service, because Enforcement, believing that the CRD Address likely contained a typographical error, had sent the complaint not only to Respondent's CRD Address but also to two other addresses. Therefore, the Hearing Officer deemed the allegations of the complaint admitted.

Because the record establishes proper service of the complaint⁵ and Respondent's failure to answer the complaint, the Hearing Officer properly found that Respondent was in default.

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Moreover, Respondent worked for Firm A in an unregistered capacity (the Form U-5 indicated that his termination date was in January 2000). The definition of "associated person" in Article 1 of the By-Laws includes "(2) . . . a natural person engaged in the investment banking or securities business who is . . . controlled by a member, whether or not any such person is registered." Thus, Respondent fell within subsection (2)'s definition of "associated person."

⁵ It is well settled that NASD Procedural Rule 9134(b)(1) provides for constructive notice by mailing a complaint to the respondent's most recent CRD address. See Lubeck v. SEC, 156 F.3d 1237 (9th Cir. 1998) (finding that NASD complied with notice requirements by mailing

C. Whether the Record Contains An Evidentiary Basis for the Findings of Violation

We find that even though Respondent defaulted, this matter must be remanded to the Office of Hearing Officers. The Securities and Exchange Commission reviews NASD findings in cases appealed to the SEC. The SEC has indicated that when a default decision is appealed, the record should contain independent evidence supporting the findings of violation so that the SEC can discharge its review function under Section 19 of the Securities Exchange Act of 1934. See James M. Russen, Jr., 51 S.E.C. 675, 678 n.12 (1993) (noting approvingly in default case that NASD, rather than simply basing its conclusions on the complaint's allegations, had reviewed the record evidence and determined that it supported a finding of violation); Troy A. Wetter, 51 S.E.C. 763, 767-68 (1993) (ruling in default case that the SEC could "conclude, on this record, that [firm] effected only 5, rather than 30, securities transactions" and reducing the sanctions); see also DBCC v. Nancy H. Martin, Complaint No. C02970027, 1999 NASD Discip. LEXIS 28 (NAC July 28, 1998) (NAC remanded default case to District Business Conduct Committee based on lack of evidentiary basis supporting the allegations of the complaint).

At present, the Respondent record contains the Forms U-4 and U-5, a CRD report on Respondent, and documentary evidence relating to the service of the complaint. An Enforcement attorney's declaration indicates that Enforcement has evidentiary support for the complaint's allegations, but the record presently does not contain this evidence. There is no record evidence establishing that Respondent was ever charged with a felony (the matter about which he allegedly lied on the Form U-4), nor is there record evidence establishing that NASD staff sent him the information requests described in the complaint.

Thus, we remand this matter for the introduction of evidence independently establishing the violations. The Hearing Officer should allow Enforcement to introduce evidence establishing that Respondent was charged with a felony (the matter about which he allegedly lied on the Form U-4), as well as evidence establishing that NASD staff sent him the information requests described in the complaint. The Hearing Officer should limit the proceedings on remand to the introduction of Enforcement's documentary evidence relating to the allegations in the complaint.

Respondent, however, will not be allowed to introduce evidence on remand. We limit the scope of the proceedings on remand because Respondent defaulted below and he has failed to

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complaint to respondent's last known address); Eric M. Diehm, 51 S.E.C. 938, 941 n.14 (1994) (rejecting argument that NASD sent notice to the wrong address because notice was sent to respondent's last known CRD address); Department of Enforcement v. Liu, No. C04970050, 1999 NASD Discip. LEXIS 32, at *15 (NAC Nov. 4, 1999) (affirming default decision based on determination that mailing to respondent's last known address constituted valid service under Procedural Rule 9134).

show good cause for his failure to answer the complaint. Respondent was twice served with notice of the complaint, and Enforcement also served Respondent with its Motion for Entry of Default Decision. NASD has interests in finality and efficiency, and those interests would be undermined if Respondent were allowed, in effect, to set aside the default decision and relitigate this matter.

We therefore instruct the Hearing Officer not to conduct a full evidentiary hearing on liability or sanctions. As to sanctions, we note that under the NASD Sanction Guidelines, a bar is "standard" for a complete failure to respond to a request for information,⁶ and Respondent has already admitted to such a violation.

IV. Conclusion

Accordingly, this matter is remanded to the Office of Hearing Officers for proceedings consistent with this decision.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

⁶ See NASD Sanction Guidelines at 39 (2001 ed.).