

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

District Business Conduct Committee
For District No. 2,

Complainant,

vs.

Respondent,

Respondent.

AMENDED DECISION

Complaint No. C02970018

Dated: November 4, 1999

Respondent created and submitted false seminar receipts for the purpose of obtaining additional compensation from his branch office's seminar budget. Held, findings affirmed and sanctions modified.

Pursuant to Procedural Rule 9310, Respondent has appealed a January 29, 1999 decision issued by the District Business Conduct Committee for District No. 2 ("DBCC") in this matter. After a review of the entire record, we find that between April 1992 and May 1993, Respondent created and submitted 11 false receipts for seminar expenses in order to receive \$5,093.46 in additional compensation from his branch office's seminar budget. We find that by engaging in this conduct, Respondent failed to observe high standards of commercial honor and just and equitable principles of trade. We hereby impose a censure and a \$7,500 fine.

Background.

Respondent became registered with the Association as a general securities representative in 1984 and was associated with Firm A (or the "Firm") from September 1984 until his resignation in August 1997. Respondent is presently associated with Firm B., another NASD member firm.

Facts

This matter came to the attention of NASD staff as the result of Firm A's filing of a Uniform Termination Notice for Securities Industry Registration ("Form U-5") regarding the termination of Respondent's branch manager at Firm A ("Branch Manager"), who was also involved in the conduct at issue.¹

The facts are essentially undisputed. In 1990, Respondent became dissatisfied with the compensation formula that Firm A had established for his sales category. Each year, Firm A set sales goals for the various sales categories, and these goals determined the rate at which the Firm paid commissions. A broker whose gross sales were greater than his or her goal was paid at a higher rate than brokers whose gross sales did not meet the goal. Because 1990 was a difficult sales year, in May 1990, Firm A lowered the 1990 sales goals for Level I but not Level II, which was Respondent's sales category. In 1990, Respondent's payout was 30 percent based on a Level II goal of \$150,000. Firm A did lower the goal to \$125,000 in Respondent's sales category in 1991. Although Respondent's sales exceeded \$150,000 in 1991, he did not meet the \$150,000 goal in 1990. Respondent calculated that had his goal been lowered to \$125,000 in 1990, he would have earned an additional \$7,226.99.

In December 1990, Respondent asked the Branch Manager, who was the manager of the Firm A branch where Respondent worked, to ask Firm A retroactively to lower Respondent's 1990 production goal to \$125,000 so that he could be paid the additional \$7,226.99. Respondent wrote:

Would you please make an appeal on my behalf for payment of the withholding of commissions that arose because of my being on Level II payout . . . If you can do anything to prevent me from having my best year turned into my worst year because of paying a \$7,276.00 penalty, it will be a **huge** relief. (Emphasis in original).

In a February 6, 1991 letter, Respondent asked the Branch Manager to check on the status of his appeal.

In a letter dated November 26, 1991, the Branch Manager asked his regional manager to approve the retroactive payment to Respondent. There is no evidence in the record that Firm A ever granted the request.

The Branch Manager nonetheless believed that Respondent should be compensated an additional \$5,000 for his sales efforts in 1990. He told Respondent that he could receive an additional \$5,000 in compensation by submitting false receipts to the Branch Manager, who would reimburse

¹The Branch Manager entered into a settlement with NASD Regulation, Inc. in which he consented to the entry of findings that he engaged in a course of conduct involving the submission of false seminar expense receipts by the Branch Manager or an associated person acting under his direction that resulted in the mishandling and/or misuse of the branch office budget. The Branch Manager was censured and fined \$10,000.

Respondent with funds out of the branch office's budget for seminar expenses until Respondent had been reimbursed approximately \$5,000. The Branch Manager instructed Respondent to submit one false receipt per month for "seminar expenses," with each receipt being for less than \$500. Respondent agreed to do so. Starting in April 1992, Respondent submitted 11 false reimbursement requests -- one per month from April through November 1992 and from March through May 1993 -- for the costs of seminars that never took place, and the Firm Branch reimbursed Respondent out of branch office funds in the amount of \$5,093.46.²

Firm A subsequently terminated the Branch Manager. Firm A did not terminate Respondent, but the Firm did require him to make a \$1,000 contribution to the charity of his choice.

Discussion

After a thorough review of the record, including the parties' submissions on appeal, we affirm the DBCC's findings. Respondent does not appeal the DBCC's finding that his submission of false receipts to the Branch Manager for the purpose of obtaining additional compensation in the guise of reimbursements violated the "high standards of commercial honor and just and equitable principles of trade" that are expected of persons engaged in the securities business. See NASD Conduct Rule 2110.

In reaching our findings, we have considered that the Branch Manager wished to give Respondent additional compensation when Firm A did not agree retroactively to lower Respondent's sales goal for 1990, and that it was the Branch Manager who proposed the false receipts scheme. We have also considered Respondent's contention that he believed that the Branch Manager could use the seminar budget in any manner he wished, so long as the funds were used for business purposes, including compensation that Firm A had not specifically authorized. Respondent described his submission of false receipts as a "bureaucratically expedient methodology" that had been established at his branch office before he ever made his request for additional compensation for 1990. Although Respondent was uncomfortable with this methodology and did not want anyone to conclude that the false receipts were his idea, he went along with the Branch Manager's plan because he believed that he was entitled to the additional compensation. Respondent stated at the appeal hearing:

And so if I had to do something a little bit that I didn't want to do, but if I had to do something to accommodate [the Branch Manager] a little bit because he was accommodating me, okay. I made that concession only after concluding, based on all the evidence I had, that the worst I was doing was exchanging one expense for another.

We find that Respondent acted unethically by obtaining additional compensation from Firm A in the guise of reimbursements for non-existent seminar expenses. Even though he knew that Firm A had not granted his request for additional compensation, Respondent participated in the Branch Manager's

²The Branch Manager allegedly used funds from the branch office seminar budget to pay additional compensation to at least one other employee.

scheme in order to get at least part of the additional income to which he believed he was entitled. Respondent concluded that his deceptive conduct was acceptable because the Branch Manager had instructed him to submit the false reimbursement requests, and because he knew that the Branch Manager had previously used the seminar account for other business purposes. Respondent was, however, acutely aware of the fact that in order to receive funds from the branch office's seminar budget, deception was required. By carrying out the Branch Manager deceptive scheme, Respondent acted unethically in violation of Conduct Rule 2110. In re Timothy L. Burkes, 51 S.E.C. 356 (1993) (registered representative found to have engaged in unethical conduct by causing commissions to which he was not entitled to be improperly credited to his account), aff'd, Burkes v. SEC, No. 93-70527 (9th Cir. July 25, 1994); see also In re James A. Goetz, Exchange Act Rel. No. 39796 (Mar. 25, 1998) (associated person found to have acted unethically by obtaining firm's educational funds through misrepresentation); In re Leonard John Ialleggio, Exchange Act Rel. No. 40028 (May 27, 1998), aff'd, Ialleggio v. SEC, No. 98-70854 (9th Cir. May 7, 1999).

Sanctions

Respondent does not contest the \$2,500 fine imposed by the DBCC or the imposition of \$665.80 in costs. He does, however, appeal the requirement that he pay \$5,093.46 plus interest in restitution to Firm A..

After considering all of the facts in this matter, we affirm the censure, eliminate the DBCC's order that Respondent pay \$5,093.46 plus interest in restitution to Firm A, and raise the fine imposed by the DBCC to \$7,500.³ We have eliminated the restitution order based on Firm A decision not to require restitution from Respondent. We have considered that when Firm A uncovered the conduct at issue, the Firm neither terminated Respondent nor sought restitution. Instead, Firm A deemed it sufficient to require Respondent to make a \$1,000 charitable contribution, which he did. We have determined, however, that Respondent should not keep the funds that he obtained under false pretenses. Accordingly, we are raising the \$2,500 fine to \$7,500, thereby requiring Respondent to disgorge his ill-gotten gains.⁴

³There is no applicable NASD Sanction Guideline.

⁴We have barred individuals for submitting false expense reports to a firm, regardless of the amount requested. See, e.g., In re Tammy S. Kwikkel-Elliott, Complaint No. C04960004 (Jan. 16, 1998). This decision should not be read as a departure from that policy. But for the unique facts and circumstances of this case, we would also have barred Respondent. Specifically, we have considered that the Branch Manager led Respondent to believe that the Branch Manager had the authority to use the branch office's seminar budget in any manner he wished, so long as the funds were used for business purposes, including compensation that Firm A had not specifically authorized. Respondent described his submission of false receipts as a "bureaucratically expedient methodology" that had been established at his branch office before he ever made his request for additional compensation for 1990.

Accordingly, we impose a censure and a \$7,500 fine, and we affirm the DBCC hearing costs of \$665.80.⁵

On Behalf of the National Adjudicatory Council,

Alden S. Adkins
Senior Vice President and General Counsel

⁵We 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.