

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

District Business Conduct Committee  
for District No. 3,

Complainant,

vs.

Respondent 1,

Respondent.

DECISION

Complaint No. C3A960040

District No. 3 (DEN)

Dated: May 13, 1998

This matter 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 findings of the District Business Conduct Committee for District No. 3 ("DBCC") that Respondent 1 effected an unauthorized transaction in violation of Conduct Rule 2110. We increase the sanctions imposed on Respondent 1 to a censure and a \$2,500 fine.

Background

Respondent 1 entered the securities industry in 1984. From January through October 1994, Respondent 1 was associated with Firm A ("the Firm"). Respondent 1 was registered as a general securities principal during the time period relevant to this matter. Respondent 1 currently is not associated with any member of this Association.

Facts

Customer AS opened a securities account at the Firm in February 1994. Two representatives, Respondent 1 and another representative, were assigned to AS's account. On May 9, 1994, AS purchased

---

<sup>1</sup> The National Business Conduct Committee ("NBCC") of NASD Regulation, Inc. called this case for review to determine whether the sanctions imposed by the District Business Conduct Committee for District No. 3 ("DBCC") were appropriate given the DBCC's finding that Respondent 1 effected an unauthorized transaction. This matter was decided by the National Adjudicatory Council, which, as approved by the Securities and Exchange Commission, became the successor to the NBCC on January 16, 1998.

700 shares of Company A stock. On May 27, 1994, Company A issued a 20 percent stock dividend, increasing AS's total shares to 840. On August 18, 1994, Respondent 1 sold all 840 shares of AS's Company A stock. AS made a profit on the transaction of \$1,700 or approximately 23 percent. The following day, August 19, 1994, Respondent 1 telephoned AS. AS was not home, but Respondent 1 left a message with AS's husband, stating that Respondent 1 had sold the 840 shares of Company A.

In a letter dated January 19, 1995, AS complained to the NASD that Respondent 1 had sold the Company A stock without her permission. AS's complaint letter prompted the investigation that led NASD Regulation District No. 3 to file the complaint in this action.

The parties do not dispute that Respondent 1 sold AS's Company A stock without contacting AS immediately before the sale and receiving specific authorization to sell. The parties agree that AS first learned of the sale when she received Respondent 1's message the following day. Beyond these events, the parties presented conflicting evidence as to whether AS authorized the stock sale.

AS testified that she had not authorized Respondent 1 to sell Company A. She further testified as follows: AS did not authorize the joint representative on the account, to sell Company A. AS gave neither Respondent 1 nor the joint representative discretion to sell Company A at any preset price. She did not give blanket authority to sell stock in her account when she opened the account, and she did not give authority to sell the Company A stock when she purchased it.

Respondent 1 testified that she believed AS had authorized the sale because, as a practice, the Firm's registered representatives discussed with all customers when the representatives opened accounts that the Firm might need to react to movements in the market and sell a customer's stock if it rose or fell approximately 20 percent. Respondent 1 also claimed that she routinely discussed the conditions under which the Firm would sell whenever a customer purchased stock. As to the sale of AS's Company A stock, Respondent 1 testified that when she was unable to contact AS, she asked the joint representative what to do. Respondent 1 testified that the joint representative, whom she described as her boss, instructed her to sell the stock. Respondent 1 admitted, however, that AS had not given Respondent 1 or the joint representative written authorization to exercise discretion in handling her account.

### Discussion

The DBCC's finding that Respondent 1 sold AS's stock without authorization was based on its finding that AS's testimony was credible and that Respondent 1's conflicting testimony was not credible. We give "considerable weight" to the credibility determinations of the DBCC when, as here, it actually heard the testimony of the witnesses. In re Christopher J. Benz, Exchange Act Rel. No. 38440 (Mar. 26, 1997); In re Frank J. Custable, 51 S.E.C. 643, 648 (1993); In re Jonathan Garrett Ornstein, 51 S.E.C. 135, 137 (1992). Based on our review of the hearing transcript, we uphold this credibility determination by the DBCC.

We find that the evidence squarely supports the DBCC's finding that Respondent 1 sold the Company A stock without AS's authorization. AS testified without qualification that she had not given prior authorization to the joint representative or Respondent 1 to sell Company A. While testifying, AS also authenticated a declaration that she signed on July 1, 1996, during NASD Regulation's investigation of this matter. Although AS completed her declaration more than nine months before the DBCC hearing, her written statement was exactly the same as her testimony before the DBCC.

We find Respondent 1's claim that she had blanket authorization to sell any stock in AS's account to lack credibility. AS did not give written authorization to Respondent 1 or the joint representative to use discretion in handling her account. To handle AS account as Respondent 1 described, Respondent 1 needed written authorization. See Conduct Rule 2510. Moreover, Respondent 1 gave no specific details to support her claim that AS verbally gave her discretion in handling the account.

As to Respondent 1's claim that the joint representative instructed her to sell Company A, we credit this testimony. Respondent 1's testimony was corroborated by the testimony of the Firm's office assistant. Respondent 1, however, should not have followed the instructions of a joint representative on the account because she should have known that AS did not authorize the joint representative to sell her stock. First, Respondent 1 knew that the joint representative did not have written authorization from AS regarding her account. Second, selling stock from AS's account without discussing the sale with AS was inconsistent with previous stock sales in AS's account. On the two previous occasions when Respondent 1 recommended selling stock from AS's account, AS authorized the sales before Respondent 1 effected the transactions.

When Respondent 1 sold the stock, she was a registered principal. As such, she was required to comply with the rules of the NASD. See Carter v. SEC, 726 F.2d 472, 474 (9th Cir. 1983) (per curiam) (registered representative presumed as a matter of law to have knowledge of NASD rules). Respondent 1 should have told the joint representative that she needed AS's authorization to sell the stock. Respondent 1 knew that the joint representative had not recently spoken with AS. Respondent 1 had no reasonable basis for believing that AS's had given authorization to the joint representative.<sup>2</sup> By following the joint representative's instructions, Respondent 1 executed an unauthorized trade just as completely as if she had acted totally on her own.

In summary, we agree with the DBCC that AS was a more credible witness than Respondent 1 on the issue of whether AS authorized Respondent 1 to sell her stock.

---

<sup>2</sup> Respondent 1 testified that she overheard one side of a telephone conversation between the joint representative and AS that took place months before the sale at issue here. Because Respondent 1 did not hear AS give discretion to the joint representative, we find that this conversation does not provide Respondent 1 with a defense.

## Sanctions

In imposing sanctions of a censure and a \$2,500 fine, we have considered that although unauthorized trading is serious misconduct, several circumstances make this case unique among unauthorized trading cases. The arrangement between the joint representative and Respondent 1 was that Respondent 1 received no commissions for AS's account. Accordingly, Respondent 1 received no commission for the sale of the Company A stock. Respondent 1's conduct is therefore unlike a typical unauthorized trading case, in which the registered representative profits from an unauthorized trade. Moreover, although we find that Respondent 1's reliance on the joint representative's instruction to sell the stock was unjustified, the joint representative's role in this transaction made Respondent 1's misconduct less severe. We find that these circumstances are mitigating.

We also note that this case involved only one unauthorized trade in one customer's account. In addition, Respondent 1 has no disciplinary history. In light of all of the circumstances, we find that the appropriate sanctions are different from those suggested by the NASD Sanction Guidelines ("Guidelines") for unauthorized transactions.<sup>3</sup> We impose a censure on Respondent 1 and a \$2,500 fine. We conclude that Respondent 1 did not engage in this activity in order to earn a commission but rather that she committed a mistake in judgment.<sup>4</sup>

Accordingly, we order that Respondent 1 be censured and fined \$2,500.

On Behalf of the National Adjudicatory Council,

---

Joan C. Conley, Corporate Secretary

---

<sup>3</sup> The smallest sanction suggested by the applicable Guideline is a \$5,000 fine. See Guidelines (1996 ed.) at 56 (Unauthorized Transactions).

<sup>4</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.

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.