

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Andrew C. Knight
Fleetwood, NY,

Respondent.

DECISION

Complaint No. C10020060

Dated: April 27, 2004

Respondent willfully failed to disclose on a Form U4 that he had been charged with two felonies. Held, Hearing Panel's findings are affirmed and sanctions are modified.

Appearances

For the Complainant: Adam Lipnick, Esq., NASD Department of Enforcement.

For the Respondent: Andrew C. Knight, Pro se.

Opinion

We called this matter for review pursuant to NASD Procedural Rule 9312 to examine the sanctions imposed by the Hearing Panel. After a de novo review of the record, we affirm the Hearing Panel's findings that Andrew C. Knight ("Knight") violated Conduct Rule 2110 and IM-1000-1 by willfully failing to disclose on the Uniform Application for Securities Industry Registration or Transfer Form ("Form U4") that he had been charged with two felonies. We fine Knight \$5,000, suspend him in all capacities for 30 business days, and order him to pay \$1,075.50 in costs.

I. Background

Knight began working in the securities industry in 1998. From September 1998 until January 2000, Roan Capital Partners ("Roan Capital") employed Knight, first as a broker trainee, and beginning in 1999, as a general securities representative. Quick & Reilly employed Knight from July 2000 until January 2001 when the firm terminated him for job abandonment. Knight

began working for First Union Securities Financial Network, Inc. ("First Union") on February 16, 2001. Knight is not currently employed in the securities industry.

II. Facts

On February 7, 2001, New York state authorities arrested Knight for allegedly taking the credit card and driver's license of a Quick & Reilly coworker, signing the coworker's name on an automobile rental agreement, and renting an automobile in the coworker's name, all without the coworker's permission. After spending one night in jail, Knight appeared before a judge at an arraignment on February 8, 2001. The judge appointed an attorney to represent Knight throughout the proceedings. Knight met briefly with his attorney prior to the judge reading the charges against Knight and asking him for his plea. The district attorney charged Knight with forgery and grand larceny—two felonies. During the hearing before the Hearing Panel, Knight testified that neither the judge nor Knight's attorney informed him that these charges were felonies, and he was unaware of the possible jail time stemming from these charges.¹ Knight did not receive a written copy of the criminal complaint filed against him.

Eight days later, on February 16, 2001, Knight completed and signed a Form U4 in connection with his registration as a general securities representative for First Union. Question number 23A(1)(b) on the Form U4 asked Knight: "[h]ave you ever . . . been charged with any felony?" Knight answered "no" to this question.

In April 2001, Joyce Wagner ("Wagner"), the compliance officer for First Union, received an investigatory report from the U.S. Department of Justice pursuant to processing Knight's fingerprint cards. Wagner learned from this report that state authorities had charged Knight with two felonies, which Knight had failed to disclose on the Form U4 completed for First Union. First Union immediately terminated Knight's employment.

On June 20, 2002, NASD's Department of Enforcement ("Enforcement") filed a complaint against Knight, alleging that he had violated Conduct Rule 2110 and IM-1000-1 by willfully failing to disclose two felony charges on a Form U4. On July 17, 2002, Knight filed an answer to the complaint, admitting that he willfully had failed to answer in the affirmative on a Form U4 that he had been charged with two felonies, but denying that he understood that forgery and grand larceny were felonies.

At the hearing before the Hearing Panel, Knight explained the circumstances surrounding the charges brought against him. Knight admitted that he borrowed his coworker's credit card and driver's license to rent an automobile, but he claimed to have done so with the coworker's permission. Knight testified that he returned the credentials to the coworker's desk drawer at

¹ The "Explanation of Terms" within the general instructions section for the Form U4 describes a felony as "an offense punishable by a sentence of at least one year imprisonment and/or a fine of at least \$1,000."

Quick & Reilly shortly after he executed the rental agreement and prior to leaving town for the weekend. Upon return, Knight became ill and was unable to work at Quick & Reilly for several weeks. During Knight's absence, the coworker filed the forgery and grand larceny charges at issue against Knight. The district attorney dismissed the charges against Knight on August 3, 2001.

During the course of NASD's investigation and in response to requests for information, Knight wrote two letters dated May 28, 2001, to NASD. In those letters, Knight stated that he had discussed the two charges pending against him with a senior coworker at First Union, Edward Pitlake ("Pitlake"), and Pitlake advised him to lie about his arrest record on the Form U4. According to the letters, Pitlake "coached [him] to act as if [he] didn't know any better" when responding to questions by the NASD examiner. Knight admitted before the Hearing Panel, however, that he fabricated the information contained in these letters, and Pitlake never told him to lie. Knight testified he was angry with Pitlake after First Union had fired him, and felt Pitlake "hung him out to dry." While Knight had consulted with Pitlake around the time he completed the Form U4 for First Union and had informed Pitlake about the charges filed against him, Pitlake provided minimal insight and advised Knight to amend the Form U4 if he later learned the nature of the charges.

On June 5, 2003, the Hearing Panel issued an amended decision,² finding that Knight willfully failed to disclose on the Form U4 that he had been charged with two felonies in violation of NASD Rule 2110 and IM-1000-1. The Hearing Panel fined Knight \$2,500, suspended him from associating with any member firm in any capacity for 30 business days, and ordered him to pay \$1,075.50 in costs. The Hearing Panel's finding that Knight willfully failed to disclose material information on a Form U4 subjected Knight to statutory disqualification from the securities industry.

On July 21, 2003, we called this matter for review to examine the sanctions imposed by the Hearing Panel. Knight did not request a hearing or file a brief. The NAC therefore decided the case based upon the written record.

² In the Hearing Panel's original decision issued on May 27, 2003, the Hearing Panel failed to make an express finding of materiality regarding Knight's nondisclosure of two felonies on the Form U4. Enforcement requested on May 28, 2003, that the Hearing Panel include an express finding concerning the materiality of the omitted felony charges. A finding that the information omitted was material and that the omission was willful subjects Knight to a statutory disqualification pursuant to Article III, Section 4 of the NASD By-Laws. The Hearing Panel found in its amended decision that the omitted criminal charges were material, and Knight's conduct was willful.

III. Discussion

A. Finding of Violation

We called this matter for review to examine the sanctions imposed by the Hearing Panel. Because the nature of the violation is relevant to the issue of sanctions, we will first consider the Hearing Panel's finding that Knight violated NASD Rule 2110 and IM-1000-1. NASD Rule 2110 and IM-1000-1 prohibit associated persons from failing to disclose information required in the Form U4 and require the observance of high standards of commercial honor and just and equitable principles of trade. The accuracy of an applicant's Form U4 "is critical to the effectiveness" of a self-regulatory organization's ability to screen and monitor the professionals within the securities industry. Rosario R. Ruggiero, 52 S.E.C. 725, 728 (1996); see also Daniel Richard Howard, Exchange Act Rel. No. 46269, 2002 SEC LEXIS 1909, at *9-10 (July 26, 2002) ("The candor and forthrightness of applicants is critical to the effectiveness of this screening process.").

Based on the evidence in the record, it is undisputed that Knight provided false information on the Form U4. "The violation of providing false information to the NASD requires only that the complainant prove that the information was false." Dist. Bus. Conduct Comm. v. Prewitt, Complaint No. C07970022, 1998 NASD Discip. LEXIS 37, at *7 (NAC Aug. 17, 1998). There is no dispute that on February 8, 2001, New York authorities charged Knight with forgery and grand larceny—two felonies. Therefore, Knight should have answered "yes" to Question 23A(1)(b) when he completed a Form U4 on February 16, 2001. Knight's answer of "no" was false. Moreover, Knight admitted in his answer to Enforcement's complaint that he "omitted information that was material" on a Form U4 by answering "no" to Question 23A(1)(b).

B. Knight Is Subject to a Statutory Disqualification

We next consider the separate question of whether Knight's explanation for his inaccurate response to Question 23A(1)(b) contravenes the Hearing Panel's finding that Knight willfully failed to disclose material information.³ If we find that Knight acted willfully by failing to

³ A finding of willfulness causes a respondent to become statutorily disqualified from association with NASD pursuant to Section 15(b)(4)(A) of the Securities Exchange Act of 1934 and the NASD By-Laws. Article III, Section 4(f) of the NASD By-Laws, provides:

[a] person is subject to a "disqualification" with respect to . . . association with a member, if such person: . . . has willfully made or caused to be made in any application . . . to become associated with a member of a self-regulatory organization . . . any statement which was at the time, and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application . . . any material fact which is required to be stated therein.

disclose the two felony charges, he is statutorily disqualified from association with any NASD member.

1. Willfulness

To support a finding that Knight acted willfully, we need not find that Knight intended to violate NASD rules but only find that Knight intended to commit the act that constitutes the violation—completing the Form U4. See Jacob Wonsover, Exchange Act Rel. No. 41123, 1999 SEC LEXIS 430, at *34 & n.36 (Mar. 1, 1999); see also Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965) (stating that there is "no requirement that the actor . . . be aware that he is violating one of the Rules or Acts" to uphold a finding of willfulness).

The Hearing Panel found not credible Knight's assertion that he was unaware that the two charges against him were felonies. We agree. Knight explained to the Hearing Panel that he considered the forgery and grand larceny charges to be outside the classification of felony or misdemeanor and instead claimed that they fell under a lesser category of criminal act known to him as a "violation." The Hearing Panel found Knight's explanation "wholly unconvincing." The credibility findings of an initial fact finder are entitled to considerable weight. Keith L. DeSanto, 52 S.E.C. 316, 319 (1995). Furthermore, Knight could have inquired with his court-appointed attorney or another employee in the criminal justice system to determine if the charges against him were felonies. He did not. We see no reason to disturb the Hearing Panel's credibility determination here.

We also reject Knight's contention that he relied upon the advice of a supervisor. Knight testified that he discussed the criminal charges pending against him with Pitlake, a senior coworker at First Union, after he completed the Form U4. Knight previously worked with Pitlake at Roan Capital, and the two were acquaintances. According to Knight, when he asked Pitlake whether he should have answered "yes" to Question 23A(1)(b), the question concerning felony charges, Pitlake stated that because Knight had no documents showing the charges were felonies, he should not answer "yes" when the accurate answer may be "no." Knight testified that Pitlake told him if he answered "yes" to Question 23A(1)(b), First Union would not hire him. Instead, if he answered "no," Knight later could amend his Form U4 if necessary.

The Hearing Panel concluded that Knight's reliance upon Pitlake's statements, even if true, was unreasonable. Pitlake had no compliance responsibility at First Union, and while he had some supervisory responsibility over Knight, Pitlake was not the branch manager. Knight acknowledged that he had failed to inquire with anyone in the First Union compliance department concerning the nature of these charges, and he elected not to contact his court-

[cont'd]

Because there is no time limitation on such a disqualification, an individual is subject to a disqualification for life.

appointed attorney, the district attorney, the police, or court personnel. We accept the Hearing Panel's finding regarding Knight's reliance on Pitlake. See Jonathan Garrett Ornstein, 51 S.E.C. 135, 137 (1992) ("The credibility determination of the initial decision maker is entitled to considerable weight and deference, since it is based on hearing the witnesses' testimony and observing their demeanor.").

Furthermore, as a registered representative, Knight "is responsible for his actions and cannot shift that responsibility to the firm or his supervisors." See Rafael Pinchas, Exchange Act Rel. No. 41816, 1999 SEC LEXIS 1754, at *14 (Sept. 1, 1999). Knight had a duty to provide accurate information to his prospective employer and in turn to NASD. See Thomas R. Alton, 52 S.E.C. 380, 382 (1995). Article V, Section 2 of the NASD By-Laws requires all applicants to fully and accurately disclose all requested information on the Form U4. As such, Knight had an obligation to inquire about the nature of the charges against him if he was unsure how to accurately answer any question on the Form U4. Indeed, Knight admitted before the Hearing Panel that when he signed the Form U4 he was attesting to its accuracy.

We also find that the timing of events demonstrates that Knight's conduct was willful. State authorities had charged Knight with the two felonies merely one week before he completed the Form U4. Moreover, Knight's subsequent behavior corroborates a finding of willfulness. Knight demonstrated a serious lack of judgment by submitting two documents containing fabricated remarks to an NASD examiner in an effort to explain away his lack of veracity.

In sum, we find that Knight acted willfully.

2. Materiality

Having found that Knight acted willfully, we must now consider whether the information Knight failed to disclose was material. We find that it was. Because of the importance that the industry places on full and accurate disclosure of information required by the Form U4, we presume that essentially all the information that is reportable on the Form U4 is material. "The NASD, which cannot investigate the veracity of every detail in each document filed with it, must depend on its members to report to it accurately and clearly in a manner that is not misleading." Robert E. Kauffman, 51 S.E.C. 838, 839 (1993). In the context of SEC Rule 10b-5, a fact is material if a reasonable investor would view the disclosure of the omitted information as "significantly altering the total mix of information available." SEC v. Mayhew, 121 F.3d 44, 52 (2d Cir. 1997) (internal quotations omitted). Modifying the materiality standard found in Rule 10b-5 cases to apply to this case, the two felony charges posed a significant impediment to Knight's employment in the securities industry. A reasonable employer would have viewed two felony charges as extremely relevant to any employment decision; therefore, we find the nondisclosure of those felonies as altering the total mix of information available and thereby material.

We affirm the findings of the Hearing Panel and conclude that Knight willfully violated NASD Rule 2110 and IM-1000-1, and as a consequence, Knight is statutorily disqualified from association with any NASD member. The record fully supports a finding that Knight was responsible for submitting a false Form U4, in which he failed to disclose two felony charges as required.

IV. Sanctions

The Hearing Panel fined Knight \$2,500, suspended him in all capacities for 30 business days, and ordered him to pay \$1,075.50 in costs. We find that an increase in the fine from \$2,500 to \$5,000 is appropriately remedial and warranted in light of Knight's willful misconduct and the institutional importance of completing an accurate and truthful Form U4. We affirm the 30-business day suspension and the imposition of costs.

We have considered the NASD Sanction Guidelines in determining the appropriate sanctions, including the General Principles and Principal Considerations applicable to all violations.⁴ The General Principles applicable to all sanction determinations provide that disciplinary sanctions are remedial in nature and should be designed to deter future misconduct and to improve overall business standards in the securities industry. We believe that given the importance of the accuracy of the Form U4 to the securities industry, increased sanctions in this case are mandated in order to be effectively remedial.

The following Principal Consideration is also relevant in assessing the appropriate remedial sanctions for Knight's misconduct: whether Knight provided substantial assistance to NASD in its investigation of the underlying violation, or whether he attempted to conceal information from NASD or to provide inaccurate documentary information to NASD.⁵ We consider it aggravating that Knight submitted two letters to NASD containing fabricated information in an effort to excuse and to place false blame upon a senior coworker for Knight's own failure to be truthful. Providing inaccurate information on a Form U4 and falsifying documents in an effort to minimize one's own responsibility is the antithesis of upholding high standards of commercial honor.

Turning to the specific Sanction Guideline for filing a false or inaccurate Form U4, the Guideline provides for fines ranging from \$2,500 to \$50,000 and a suspension in any or all capacities for 5 to 30 business days or, in egregious cases, a suspension up to two years or a bar.⁶

⁴ See NASD Sanction Guidelines (2001 ed.) at 3-11 (General Principles Applicable to all Sanction Determinations; Principal Considerations in Determining Sanctions).

⁵ Id. at 10.

⁶ NASD Sanction Guidelines (2001 ed.) at 77-78 (Forms U4/U5—Filing of False, Misleading, or Inaccurate Forms).

The Guideline for submission of a false Form U4 delineates three considerations bearing on sanctions: (1) whether the information at issue was significant and the nature of that information; (2) whether the respondent's failure to disclose information resulted in a statutorily disqualified individual associating with a firm; and (3) whether the respondent's misconduct resulted in harm.⁷

The Hearing Panel found that only one of these considerations applied to Knight's conduct, and we agree. First, the undisclosed felony charges may have had a serious consequence upon Knight's employment in the securities industry, and therefore the nondisclosure is significant. Second, because the district attorney, and ultimately the court, dismissed the charges against Knight, the felony charges themselves would not have resulted in Knight's statutory disqualification.⁸ Third, as Enforcement acknowledged, there is no evidence that Knight's nondisclosure resulted in any customer harm.

Accordingly, Knight is fined \$5,000, suspended in all capacities for 30 business days, and ordered to pay costs of \$1,075.50.⁹ Knight is also statutorily disqualified. In order for Knight to seek readmission to NASD, a firm must sponsor him through the process known as the Membership Continuation Application or the MC 400. The sanctions we impose are reasonable in light of the facts of this case and the nature of the violation.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

⁷ Id. at 77.

⁸ Knight is statutorily disqualified because he willfully failed to disclose two felony charges on a Form U4. Absent this failure to disclose, Knight would not have been statutorily disqualified by the charges because ultimately he was not convicted of a felony.

⁹ We also have considered and reject without discussion all other arguments of the parties.

Pursuant to NASD Procedural Rule 8320, any member that 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 nonpayment. 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 nonpayment.