BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of Department of Enforcement, Complainant, vs. Todd Grafenauer Mukwonago, WI, Respondent.	DECISION Complaint No. C8A030068 Dated: May 17, 2005

Respondent forged documents used to obtain member firm's approval of intern hiring. Held, Hearing Panel's findings and sanctions are affirmed.

Appearances

For the Complainant: Pamela Shu, Esq., Leo F. Orenstein, Esq., Department of Enforcement, NASD

For the Respondent: James F. Blask, Esq.

Opinion

Todd Grafenauer ("Grafenauer") appeals a May 27, 2004 Hearing Panel decision pursuant to Procedural Rule 9311. After a thorough review of the record in this case, we find that Grafenauer forged documents in violation of Conduct Rule 2110 and bar him from associating with any NASD member in any capacity.

I. Background

A. Grafenauer's Employment History

Grafenauer entered the securities industry and became associated with UBS PaineWebber, Inc. ("UBS" or "the Firm")[1] in June 2001. Grafenauer registered as a general securities representative of the Firm in August 2001. On October 17, 2002, the Firm terminated Grafenauer. Grafenauer is not currently associated with any NASD member.

B. Procedural History

In a complaint dated August 29, 2003, the Department of Enforcement ("Enforcement") charged Grafenauer and James R. Miller ("Miller"), a registered representative of the Firm, with violations of Conduct Rule 2110.[2] Enforcement alleged that Grafenauer and Miller forged numerous documents the Firm required of its representatives whenever they desired to utilize unpaid college interns. Grafenauer filed an answer in which he claimed to possess insufficient information to either admit or deny the allegations set forth in the complaint.[3] The Hearing Panel held a two-day hearing, during which it heard testimony from seven witnesses during the presentation of Enforcement's case. Grafenauer was the sole witness to testify in his defense.

The Hearing Panel issued a written decision on May 27, 2004, finding that Grafenauer violated Conduct Rule 2110 by forging documentation for student interns he and Miller utilized in their securities business, and barring him from associating with any NASD member. This timely appeal followed. Grafenauer did not request oral argument before the subcommittee of the National Adjudicatory Council empanelled to consider this appeal. The case was thus considered on the basis of the written record.

---

[1] The firm is now called UBS Financial Services, Inc.

[2] Pursuant to NASD Rule 115(a), this rule applies to all members and persons associated with a member.

[3] Miller did not file an answer. Proceedings as to Miller were stayed pending settlement discussions with Enforcement. On October 7, 2003, an order was entered accepting Miller's offer of settlement. Miller consented to the entry of findings of fact and violations consistent with the allegations of the complaint, and to the imposition of a bar prohibiting his future association with any NASD member in any capacity.

II. Facts

Grafenauer became associated with the Firm's Milwaukee, Wisconsin, branch office shortly after his graduation from college in 2001. After completing the Firm's training program and becoming registered, Grafenauer agreed to partner with Miller, sharing production for customer accounts with a joint representative account number.

Representatives of UBS's Milwaukee branch were permitted to recruit and hire college students as interns. Interns worked either for academic credit from their college or university, or for compensation. UBS required, however, that representatives recruiting "for-credit" interns obtain a letter from the intern's school stating that the intern was eligible to receive academic credit for his or her work with UBS, as well as a "hold harmless agreement" whereby the school agreed to indemnify UBS against any claims that might arise from the student's internship.[4]

Grafenauer personally visited college and university campuses in the Milwaukee area in an effort to recruit interns. Grafenauer and Miller hired a large number of for-credit interns during 2001 and 2002. By the Fall 2002 academic term, Grafenauer and Miller were using approximately 50 interns that were ostensibly participating in the internship program for academic credit. Interns were used to contact potential clients and to invite them to investment seminars that the two registered representatives conducted. Grafenauer and Miller submitted to UBS the required documentation for each intern hired.

The recruiting practices of Grafenauer and Miller did not go unnoticed. Other UBS registered representatives, who were eager to replicate the pair's apparent success in tapping into a free labor pool, found that officials at academic institutions were unwilling to execute the hold harmless agreement required by UBS. In late September 2002, one such registered representative became suspicious of the ease with which Grafenauer and Miller recruited interns, and he informed the branch manager that he was concerned that the two were falsifying the documentation submitted to UBS for their intern hiring.

UBS promptly commenced an investigation of Grafenauer and Miller. During separate interviews with UBS personnel, both at first denied having knowledge of any falsified intern documents. During subsequent questioning, however, Grafenauer and Miller both admitted to UBS personnel that they had forged the signatures of school officials and submitted falsified intern documentation to UBS. As a result of its investigation, UBS terminated Grafenauer and Miller.

---

[4] Registered representatives, not the Firm, generally were required to compensate any intern that was not participating in the intern program for credit.

After reviewing Grafenauer's Uniform Termination Notice for Securities Industry Registration ("Form U5") submitted by UBS indicating that Grafenauer falsified paperwork concerning the intern program, NASD staff began an investigation. In response to NASD staff inquiries, Grafenauer admitted that he had forged the majority of documents submitted to UBS for interns that he and Miller hired.

III. Discussion

There is no dispute as to the salient facts surrounding Grafenauer's violation of Conduct Rule 2110. During the disciplinary hearing in this case, Grafenauer admitted forging the signatures of school officials on at least 29 hold harmless agreements and credit eligibility letters. Grafenauer's conduct clearly involved actions inconsistent with just and equitable principles of trade, and violated the high standards of commercial honor to which NASD holds registered representatives. Dist. Bus. Conduct Comm. v. Peters, Complaint No. C02960024, 1998 NASD Discip. LEXIS 42, at *4-5 (NAC Nov. 13, 1998); see also Eliezer Gurfel, 54 S.E.C. 56, 63 (1999) (sustaining NASD finding that respondent violated Conduct Rule 2110 by engaging in forgery). Although no customer documents were forged and no customer funds were jeopardized or misappropriated as a result of his forgeries, Grafenauer's actions cast serious doubt upon his commitment to the standards demanded of registered persons in the securities industry. See Leonard John Ialeggio, 52 S.E.C. 1085, 1089 (1996) (holding that misconduct not related directly to the securities industry may nonetheless violate Conduct Rule 2110). Accordingly, we conclude that Grafenauer violated Conduct Rule 2110.

IV. Sanctions

The Hearing Panel barred Grafenauer from associating with any NASD member in any capacity. Grafenauer argues that this sanction is unreasonable and excessive, and he requests that we reduce the sanction to a three-year suspension commencing retroactively upon the date he admitted his misconduct to UBS officials. We decline to modify the sanction imposed.

Forgery is an extremely serious offense that, absent mitigating circumstances, may warrant a bar.[5] Dist. Bus. Conduct Comm. v. Kirschbaum, Complaint No. C07960069, 1998 NASD Discip. LEXIS 36, at *10 (NAC Aug. 25, 1998). In deciding upon an appropriate sanction, we have considered both the Guidelines' principal considerations and the considerations that are specific to acts of forgery. In this case, such considerations reason that

---

[5] The NASD Sanction Guidelines ("Guidelines") for misconduct involving forgery recommend that, in egregious cases, a bar be imposed. See Guidelines (2001 ed.) at 43 (Forgery and/or Falsification of Documents). For cases in which mitigating factors exist, the Guidelines provide for a suspension in any and all capacities for up to two years, and a fine of $5,000 to $100,000. Id.

Grafenauer's conduct is egregious and that a bar is warranted. We find that Grafenauer's conduct was intentional.[6] Grafenauer testified that he understood that school officials would not sign the hold harmless agreement provided by the Firm and thus that certain schools would not indemnify UBS. With clear knowledge that he did not possess the authority to sign on their behalf, Grafenauer nonetheless forged the signatures of school officials on numerous hold harmless agreements and falsified credit eligibility letters using school letterhead that he obtained on the Internet.

We have also considered the number of acts of misconduct and the period of time over which these forgeries were perpetrated.[7] Given that Grafenauer forged at least 29 documents over a period of several months, we find that Grafenauer systematically failed to uphold high standards of commercial honor. Grafenauer's conduct was not the result of a momentary lapse of judgment that might establish mitigation.[8]

We have further considered the fact that Grafenauer engaged in this misconduct for his own financial gain.[9] Grafenauer acknowledged that, without the completed intern documentation, he either would not have been able to hire interns or would have been responsible for their compensation. Neither of these scenarios was acceptable to Grafenauer. Grafenauer admitted to NASD staff that he falsified intern documentation so that he would be able to utilize uncompensated interns to promote his securities business and that of his partner.

On appeal, Grafenauer sets forth several arguments that he claims warrant mitigation of the bar imposed by the Hearing Panel. At the outset, we note that these arguments rely upon self-serving, uncorroborated testimony that Grafenauer presented in his defense at the disciplinary hearing. The Hearing Panel did not find Grafenauer to be a credible witness, and we decline to overturn its finding. See, e.g., Dane S. Faber, Exchange Act Rel. No. 49216, 2004

---

[6] See Guidelines (2001 ed.) at 10 (Principal Considerations in Determining Sanctions, No. 13).

[7] See Guidelines (2001 ed.) at 9 (Principal Considerations in Determining Sanctions, Nos. 8, 9).

[8] We also do not accept as a mitigating factor Grafenauer's lack of disciplinary history. See Dep't of Enforcement v. Balbirer, Complaint No. C07980011, 1999 NASD Discip. LEXIS 29, at *10 (NAC Oct. 18, 1999) ("We are not compelled to reward a respondent because he has acted in the manner in which he agreed (and was required) to act when entering this industry as a registered person. We therefore do not find that the absence of a disciplinary history should mitigate the seriousness of the misconduct or the severity of the sanctions imposed.").

[9] See Guidelines (2001 ed.) at 10 (Principal Considerations in Determining Sanctions, No. 17).

SEC LEXIS 277, at *17-18 (Feb. 10, 2004) (emphasizing that the credibility determinations of the initial fact-finder are entitled to considerable weight and deference). In particular, we find troubling Grafenauer's shifting and inconsistent statements related to his termination. For instance, Grafenauer applied for unemployment benefits from the State of Wisconsin, claiming that he had not been given a reason for his termination from UBS. The record, however, shows that Grafenauer knew, or should have known, that he was terminated for cause as a result of the forgeries that are at issue in this case.[10] Furthermore, in an effort to explain to the Hearing Panel the reasons for inconsistencies that appeared in his testimony over time, Grafenauer claimed that he lied while under oath during the administrative hearing held concerning his unemployment claim.[11] Understandably, this did little to bolster Grafenauer's standing in the eyes of the Hearing Panel, and we also find Grafenauer's explanations to be lacking in credibility.

As to the merits of Grafenauer's claims for mitigation, we reject them. Grafenauer asserts that Miller informed him that the intern documents he forged were "meaningless."[12] As we note above, Grafenauer understood that, without the completed intern documentation, he would not have been able to hire interns without compensating them. Grafenauer also knew, or should have known, the importance of the UBS hold harmless agreement given the reluctance of school officials to execute such agreements on behalf of their students. By falsifying such documents, Grafenauer misled UBS into believing that it had insulated itself from certain risks, risks for which schools in fact were unwilling to provide indemnification. With respect to the credit eligibility letters, Grafenauer's misconduct misled UBS into believing that the interns that he hired would be receiving academic credit for their work. In fact, many interns were not eligible to receive credit from their college or university, resulting in UBS having to compensate those interns for their time and resulting in the Firm expending considerable resources to restore its image within the academic community. For these reasons, we do not credit Grafenauer's claim dismissing the significance of the intern documents he forged. Rather, we find aggravating that

---

[10] After an administrative hearing concerning Grafenauer's claim for unemployment benefits, Grafenauer was ordered to repay benefits totaling $5,538. To date, he has repaid only approximately $1,500 of this sum.

[11] Grafenauer argues that the unemployment compensation hearing was "improper and unfair." We are in no position to question the integrity of that process and, more importantly, find Grafenauer’s arguments irrelevant to the issue of sanctions in the current proceeding.

[12] Grafenauer asserts that the hold harmless agreement required by UBS was illegal. We take no position on the enforceability of this document and also do not find it relevant for purposes of determining sanctions.

the documents were of an important nature, and the falsification of such documents was not without considerable consequence to all involved.[13]

Grafenauer also attempts to portray himself as a hapless victim whose participation in a branch-wide forgery "scheme" was coerced and directed by Miller. In this vein, Grafenauer asserts that he fell prey to Miller as a result of inadequate training and supervision by UBS. The record does not support these claims and, thus, we do not credit them.[14] Moreover, even if true, these claims would not serve to mitigate the bar imposed in this case. First, if Grafenauer felt pressured to forge documents, it was not an appropriate reaction to succumb to such pressure. See Dist. Bus. Conduct Comm. v. Bozzi, Complaint No. C10970003, 1999 NASD Discip. LEXIS 5, at *16 (NAC Jan. 13, 1999) (finding the alleged fact that a registered representative succumbed to institutional pressure to submit falsified life insurance applications is not a factor that warrants mitigation of sanctions). Second, we do not accept the proposition, given the facts of this case, that if conduct is pervasive, or even approved by a firm, it should mitigate the sanction imposed. See Charles E. Kautz, 52 S.E.C. 730, 733, 736 (1996) (holding that assertions that the falsification of documents was accepted or approved by the firm did not call for mitigation of sanctions). Finally, neither a respondent's claimed ignorance of the securities laws, nor a respondent's attempt to shift responsibility for a failure to comply with the securities laws to incompetent supervision, will serve to lessen the sanction imposed. See Thomas C. Kocherhans, 52 S.E.C. 528, 531-532, 534 (1995) (concluding that ignorance of NASD rules and absence of supervisory structure do not compel a reduction of sanction); see also Market Reg. Comm. v Shaughnessy, Complaint No. CMS950087, 1997 NASD Discip. LEXIS 46, at *30-31 (NBCC June 5, 1997) (rejecting premise that lack of instruction as to the improper nature of conduct is mitigating factor for purposes of sanctions).

Finally, Grafenauer asserts that he was naively set up as a "fall guy" by his superiors, and claims on appeal that the disciplinary proceedings below were unfair and denied him the opportunity to establish this alleged truth. We find that Grafenauer was provided a fair hearing and was given every opportunity to present his relevant defenses. The fact that the record provides scant evidence to bolster Grafenauer's claims does not call into question the integrity of the disciplinary proceedings below.

---

[13] See Guidelines (2001 ed.) at 43 (Forgery and/or Falsification of Records); Guidelines (2001 ed.) at 10 (Principal Considerations in Determining Sanctions, No. 11).

[14] Grafenauer concedes that, prior to the disciplinary hearing held in this case, he did not inform anyone that others had directed his actions or that Miller had coerced his misconduct by threats or force. Grafenauer's testimony alleging coercion is particularly incredible given his decision to start a consulting business with Miller after both were terminated by UBS.

Rather, we find disquieting Grafenauer's failure to account for his actions.[15] Grafenauer's failure to accept responsibility for his own actions and his continued blame of others for the circumstances that have occurred are aggravating factors that we have considered in reaching our conclusion that a bar is an appropriate sanction in this case. See Shaughnessy, 1997 NASD Discip. LEXIS 46, at *32-33 ("[T]he Commission has found it necessary to bar respondents who . . . fail to accept responsibility for their actions and continue to place blame on others.").

The securities industry "presents a great many opportunities for abuse and overreaching, and depends heavily on the integrity of its participants." Bernard D. Gorniak, 52 S.E.C. 371, 373 (1995). In light of our duty to protect the investing public and ensure the integrity of the market, we find we must act decisively in cases, like this one, in which the evidence proves the dishonesty and lack of veracity of a person associated with a member firm. Dep't of Enforcement v. Brinton, Complaint No. C04990005, 1999 NASD Discip. LEXIS 36, at *9 (NAC Dec. 14, 1999). Because we find that Grafenauer's continued participation in the securities industry presents a risk to the public, we bar him from associating with any NASD member.

V. Conclusion

We find that Grafenauer forged documents in violation of Conduct Rule 2110. Accordingly, we bar Grafenauer from associating with any NASD member in any capacity. The bar is effective upon issuance of this decision.[16]

On Behalf of the National Adjudicatory Council,

_____

Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

---

[15] We do not find Grafenauer's admission of forgery in this case mitigating because he did not admit his misconduct until after UBS detected his misconduct and confronted him with evidence of such. See Guidelines (2001 ed.) at 9 (Principal Consideration No. 10). We also do not find the record supportive of Grafenauer's assertion that he is a "whistleblower" as that term is contemplated under the Sarbanes-Oxley Act of 2002. 18 U.S.C. § 1514A.

[16] We also have considered and reject without discussion all other arguments of the parties.