

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Justin F. Ficken,  
Boston, MA,

Respondent.

DECISION

Complaint No. C11040006

Dated: December 7, 2005

**Respondent refused to provide testimony in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. Held, findings and sanctions affirmed.**

**Appearances**

For the Complainant: Rory C. Flynn, Esq., Department of Enforcement, NASD

For the Respondent: Gary G. Pelletier, Esq.

**DECISION**

Pursuant to NASD Procedural Rule 9311, Justin F. Ficken (“Ficken”) appeals a June 14, 2004 Hearing Panel decision finding that he failed to provide requested testimony in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. The Hearing Panel barred Ficken for this misconduct. After a thorough review of the record, we conclude that the Hearing Panel’s findings were appropriate, and we affirm the sanctions imposed.

## I. Background

Ficken entered the securities industry in October 1999. From October 1999 to July 2003, he was registered with Prudential Securities, Inc. (“Prudential Securities”) as a general securities representative. From July 2003 to October 2003, he was registered with another NASD member firm as a general securities representative. On October 20, 2003, this firm filed a Uniform Termination Notice for Securities Industry Registration terminating Ficken’s registration. Ficken has not been registered with any NASD member since that date.

## II. Procedural History

NASD’s Department of Enforcement (“Enforcement”) filed a complaint on February 11, 2004, alleging that Ficken failed to provide testimony to Enforcement in violation of NASD Procedural Rule 8210<sup>1</sup> and NASD Conduct Rule 2110.<sup>2</sup> In response, Ficken filed an answer in which he contested the charge and requested a hearing.<sup>3</sup> On March 5, 2004, Enforcement filed a motion for summary disposition pursuant to NASD Procedural Rule 9264,<sup>4</sup>

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<sup>1</sup> NASD Procedural Rule 8210 requires that NASD member firms and associated persons provide information to NASD investigators upon request. *See Robert Fitzpatrick*, Exchange Act Rel. No. 44956, 2001 SEC LEXIS 2185, at \*8 (Oct. 19, 2001).

<sup>2</sup> NASD Conduct Rule 2110 requires that NASD members shall, in conducting their business, “observe high standards of commercial honor and just and equitable principles of trade.” We have previously determined that a violation of NASD Procedural Rule 8210 is also a violation of NASD Conduct Rule 2110. *See Dep’t of Enforcement v. Hoeper*, Complaint No. C02000037, 2001 NASD Discip. LEXIS 37, at \*5 (NAC Nov. 2, 2001). In addition, NASD Rule 115 makes all NASD rules, including NASD Conduct Rule 2110, applicable to both NASD members and all persons associated with NASD members.

<sup>3</sup> On April 13, 2004, the Office of Hearing Officers (“OHO”) notified the parties that a hearing would be held on June 23, 2004 in Boston with Hearing Officer Jerome Nelson presiding. On May 18, 2004, OHO notified the parties that Hearing Officer David Fitzgerald had been designated to preside over this matter in place of Officer Nelson. The record does not indicate why Officer Nelson was replaced, and Ficken did not object to his replacement until he appealed the June 14, 2004 decision to the National Adjudicatory Council (“NAC”).

<sup>4</sup> NASD Procedural Rule 9264 provides that in a disciplinary action, either the complainant or respondent may move for summary disposition of any or all of the causes of action against the respondent. A hearing panel may grant a summary disposition motion if there is no genuine issue with regard to any material fact that the moving party relies on in filing its motion and the opposing party does not come forward with specific facts showing a genuine issue in dispute. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

which Ficken opposed. In a decision dated June 14, 2004, a Hearing Panel granted Enforcement's motion for summary disposition. This appeal followed.

### III. Facts

In connection with an investigation of whether Ficken had engaged in late trading activity in mutual fund shares while he was registered at Prudential Securities, Enforcement requested that Ficken appear for an on-the-record interview pursuant to NASD Procedural Rule 8210. On December 17, 2003, Ficken appeared with counsel at NASD's Boston offices for an interview. During his testimony, however, Ficken refused to answer a number of Enforcement's questions. Pursuant to his counsel's advice, Ficken asserted the Fifth Amendment privilege against self-incrimination as grounds for his refusal to testify. The December 17, 2003 interview was adjourned, and on January 20, 2004, Enforcement sent Ficken a letter requesting that he appear for another interview on January 29, 2004. At the request of Ficken's counsel, his appearance was postponed to February 9, 2004. Three days prior to the scheduled interview, however, Ficken's counsel sent Enforcement a letter stating that Ficken would not appear.<sup>5</sup> Ficken ultimately did not appear for the interview. Since then, he has neither appeared nor offered to provide the requested testimony.

### IV. Discussion

The material facts in this case are undisputed. After reviewing the record in this matter, we affirm the Hearing Panel's findings as to the alleged misconduct and the Hearing Panel's decision to grant Enforcement's motion for summary disposition under NASD Procedural Rule 9264.

#### A. Ficken Failed to Comply with Enforcement's Rule 8210 Request for Testimony.

NASD Procedural Rule 8210 requires persons associated with a member of NASD to provide testimony in connection with any investigation, complaint, examination, or proceeding authorized by NASD. NASD Procedural Rule 8210's purpose is to provide a means for NASD to carry out its regulatory functions in the absence of subpoena power, and it is a "key element in the NASD's effort to police its members." *Richard J. Rouse*, 51 S.E.C. 581, 584 (1993). Here, Ficken refused to answer questions posed by Enforcement staff while attending a December 2003 on-the-record interview. Moreover, Ficken failed to appear for a subsequent on-the-record interview scheduled for February 9, 2004. Consequently, we find that Ficken violated NASD Procedural Rule 8210.

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<sup>5</sup> Ficken indicated that he declined to appear because he had received a target letter from the U.S. Department of Justice that he believed pertained to the same conduct that NASD staff was investigating.

B. Ficken's Failure to Testify Was Not Justified.

The Fifth Amendment to the United States Constitution states that “[n]o person shall . . . be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V. The protections afforded by the Fifth Amendment, however, apply only to governmental conduct. *See D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 161 (2d Cir.) *cert. denied*, 537 U.S. 1028 (2002). The self-incrimination privilege does not apply to questioning in investigations by self-regulatory organizations (“SRO”) like NASD because such entities are not state actors.<sup>6</sup>

Ficken argues that the Commission’s supervision of NASD transforms it into a state actor.<sup>7</sup> Ficken’s argument has no merit. No court has ever found NASD to be a state actor.<sup>8</sup> Moreover, courts have expressly rejected the notion that mere oversight by a government agency converts a private entity into a state actor. *See Jackson v. Metropolitan Edison, Co.*, 419 U.S. 345, 350 (1974) (noting that a business entity that is subject to extensive and detailed state regulation does not convert that entity’s actions into those of the state); *see also Desiderio*, 191 F.3d at 206 (finding that the Commission’s regulation of NASD did not automatically convert it into a state actor).

Nevertheless, under standards developed by the courts, NASD may be treated as a state actor when the government has exercised coercive power over NASD or “has provided such significant encouragement, either overt or covert, that [NASD’s actions] must in law be deemed to be that of the State.” *D.L. Cromwell*, 279 F.3d at 161 (citations omitted). Ficken, however, has not provided any evidence of coercion or encouragement by the government that would lead us to conclude that Enforcement’s actions in this case must be deemed to be the actions of the government.

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<sup>6</sup> *See United States v. Solomon*, 509 F.2d 863, 867 (2d Cir. 1975); *Daniel Turov*, 51 S.E.C. 235, 238 (1992).

<sup>7</sup> Ficken claims that this transformation occurred in 1997, when NASD purportedly accepted the “regulatory burden” of policing the securities industry as part of a settlement of a Commission enforcement action.

<sup>8</sup> *See, e.g., D.L. Cromwell*, 279 F.3d at 162; *Desiderio v. Nat’l Assn. of Sec. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999) (finding NASD not a state actor in its capacity as a securities regulator that adopted a rule that requires industry registrants to arbitrate statutory claims), *cert. denied*, 531 U.S. 1069 (2001); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 698 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); *see also Marchiano v. Nat’l Ass’n of Sec. Dealers, Inc.*, 134 F. Supp. 2d 90, 95 (D.D.C. 2001) (stating that the court could find no instance where NASD was deemed to be a state actor).

Ficken claims that Enforcement's investigation of him should be considered state action because Enforcement allegedly forwarded some of its documents regarding the Ficken investigation to the Commission and the U.S. Department of Justice. Ficken, however, offers no evidence that NASD provided any documents to these authorities and does not even specifically identify these documents.<sup>9</sup> Instead, Ficken makes a general assertion that the Commission or the U.S. Department of Justice, in their investigations of Ficken, possessed documents similar to those used by NASD at Ficken's December 2003 on-the-record interview. We find that Ficken's unsubstantiated, generalized assertion demonstrates no government coercion or significant encouragement and does not support a finding that NASD's investigation of him was state action.

Similarly, Ficken concludes that because NASD's investigation of him may cover some topics that overlap with the investigations of state and federal authorities, NASD must be working on behalf of these authorities. We reject this argument. As we have recently stated, NASD's pursuit of "similar evidentiary trails" as governmental authorities does not convert NASD into a state actor subject to constitutional requirements. *See Dep't of Enforcement v. Quattrone*, Complaint No. CAF030008, 2004 NASD Discip. LEXIS 17, at \*25 (NAC Nov. 22, 2004), *appeal docketed*, Admin. Proceeding File No. 3-11786 (SEC Dec. 28, 2004) (citing *Cromwell*, 279 F.3d at 162-63).

We also reject Ficken's argument that Enforcement's refusal to deny expressly any collusion between NASD and other government authorities proves that NASD is a state actor. The burden of establishing NASD's role as a state actor falls on Ficken, and the mere absence of an express denial of collusion does not prove that NASD's actions should be imputed to the government.<sup>10</sup>

We find that Ficken's claims are not sufficient to raise an inference that Enforcement's investigation should be attributed to the government. Ficken has offered no evidence that the government compelled NASD's investigation of him. At most, Ficken has only suggested that the government may have obtained documents generated from NASD's investigation of him. The government's use of information generated from NASD's independent regulatory and enforcement duties does not establish NASD as a state actor. *Cf. Solomon*, 509 F.2d at 863

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<sup>9</sup> Ficken's counsel generically described these files as "calculations" made by NASD.

<sup>10</sup> Ficken also claims that the Commission issued a press release acknowledging NASD's "assistance" in reaching a settlement with a mutual fund company in a related market-timing case. On appeal, Ficken made a motion to make these press releases part of the record. The NAC Subcommittee hearing this case denied Ficken's motion, and we affirm its decision to deny this motion. We nevertheless note that a general press release citing cooperation between NASD and the Commission does not establish the kind of coercion or collusion that would convert NASD into a state actor. Such releases are expected considering the cooperative regulatory role that exists between the Commission and SROs like NASD. *See Quattrone*, 2004 NASD Discip. LEXIS 17, at \*25.

(finding that the SEC's use of subpoenaed NYSE reports, depositions, and other documents generated from NYSE's investigatory activities did not convert NYSE into a state actor). Consequently, we also find that a hearing on the issue of whether NASD's investigation of Ficken should be deemed state action is unnecessary. Our decision is consistent with our prior rulings on this exact issue. See *Quattrone*, 2004 NASD Discip. LEXIS 17, at \*37-40 (finding that respondent was not entitled to an evidentiary hearing on the issue of state action based on respondent's unsupported assertion that NASD and the SEC engaged in a "joint investigation" of respondent); see also *Dep't of Enforcement v. Skelly*, Complaint No. CAF000013, 2003 NASD Discip. LEXIS 40, at \*34-35 (NAC Nov. 14, 2003) (concluding that respondents should not be granted a hearing to interview an NASD attorney or allowed to go on a "fishing expedition" in an effort to produce evidence that the attorney was working on behalf of governmental authorities).

The record does not show that Enforcement initiated its investigation of Ficken for any other purpose except to determine whether he had violated NASD rules. We therefore affirm the Hearing Panel's finding that Ficken was not excused from his obligation to provide requested testimony and affirm the Hearing Panel's decision to grant summary disposition to Enforcement in this matter.

C. The Procedure Below Was Fair.

The Securities Exchange Act of 1934 ("Exchange Act") requires that SROs "provide a fair procedure" for the disciplining of its membership. 15 U.S.C. §78o-3(b)(8) (2005). At least one federal appellate court has held that the Exchange Act requires an adjudicator in an SRO disciplinary proceeding to be impartial. See *D'Alessio v. SEC*, 380 F.3d 112, 121 (2d Cir. 2004). On appeal, Ficken asserts for the first time that Officer Fitzgerald was biased and that OHO's reassignment of this case to Officer Fitzgerald violated the Exchange Act's fairness provision. Ficken's argument is unpersuasive. A reassignment in an NASD disciplinary proceeding is not an extraordinary event and does not create a presumption of impropriety in the adjudicatory process. Moreover, simply because Officer Fitzgerald may have made rulings that Ficken considers more favorable to Enforcement does not suggest that he was biased against Ficken. Adopting this position would mean that any reassigned hearing officer who did not rule in favor of a respondent could be deemed biased. We decline to adopt a rule that presumes a Hearing Officer is biased when no bias has been demonstrated.

Ficken also claims that Officer Fitzgerald violated NASD protocol and procedures<sup>11</sup> by failing to inform other panel members of Officer Nelson's statements from an April 6, 2004 Pre-Hearing Conference. Ficken further argues that the preliminary statements made by Officer

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<sup>11</sup> Ficken alleges that NASD violated its own Procedural Rule 9160, which states that "[n]o person shall participate as an Adjudicator in a matter governed by the Code as to which he or she has a conflict of interest or bias, or circumstances otherwise exist where his or her fairness might reasonably be questioned."

Nelson should bind Officer Fitzgerald. We disagree. Hearing officers, including those that have been reassigned to cases, have broad discretion to determine what evidence or issues are germane to the decision-making process, and Officer Fitzgerald's conduct was within the boundaries of such discretion. Here, Officer Fitzgerald allegedly did not inform other panel members of some preliminary statements made by Officer Nelson that were favorable to Ficken. There is no indication in the record, however, that the panel members did not consider or have access to the transcript that contains Officer Nelson's statements. We therefore do not find anything improper in Officer Fitzgerald's handling of this matter.

#### V. Sanctions

The NASD Sanction Guidelines ("Guidelines") recommend that, in the absence of mitigating factors, persons who fail to testify pursuant to an NASD Procedural Rule 8210 request should be barred.<sup>12</sup> Ficken asserts that because he is not a "high-level" executive, he poses less of a threat to the investing public. Consequently, Ficken urges that we should consider imposing a sanction less than a bar. We reject this argument. NASD maintains the highest expectations for all of its members and associated persons, regardless of their position, and there is no exception for Ficken simply because he is not a so-called "high-level" executive.

In addition, Ficken argues that we should not impose a bar against him because he claims that NASD has imposed lesser sanctions against "high-level" individuals in other disciplinary proceedings. Ficken further argues that Enforcement rejected improperly his offer to settle, because he claims that Enforcement has settled with other persons who have refused to provide testimony on Fifth Amendment grounds. It is well-established, however, that "appropriate sanctions depend on the facts and circumstances of each particular case, and cannot be precisely determined by comparison with the action taken in other proceedings." *John J. Fiero*, 53 S.E.C. 434, 439 n.13 (1998) (citations omitted). Moreover, we find that Enforcement has particularly broad discretion regarding its decisions to propose or accept settlements in furtherance of its regulatory responsibilities. Under the facts of this case, we find both the Hearing Panel's decision to impose a bar, and Enforcement's decision not to settle with Ficken, to be within the scope of their discretion.

We also reject Ficken's contention that his reliance on his counsel should be a mitigating factor because Ficken's counsel was aware that Ficken's failure to testify was a violation of Procedural Rule 8210. *See Quattrone*, 2004 NASD Discip. LEXIS 17, at \*53 (finding that reliance on counsel was not a mitigating factor where respondent's reliance on counsel was part of a strategy to avoid full compliance with NASD rules). We therefore find no mitigating factors in this case and conclude that a bar is warranted for Ficken's violation.

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<sup>12</sup> *See Guidelines* (2001 ed.) at 39 (Failure To Respond Or Failure To Respond Truthfully, Completely, Or Timely To Requests Made Pursuant To NASD Procedural Rule 8210).

VI. Conclusion

We find that Ficken failed to provide requested testimony in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. We reject Ficken's argument that NASD is a state actor and that he could exercise his Fifth Amendment privilege to avoid providing requested testimony at his on-the-record interviews.<sup>13</sup> We therefore affirm the sanctions imposed upon Ficken by the Hearing Panel for these violations.

Accordingly, Ficken is barred from associating with any NASD member firm in any capacity. We also order Ficken to pay appeal costs of \$1,000 plus transcript costs of \$383. The bar will be effective as of the date of this decision.

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney, Senior Vice President and  
Corporate Secretary

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<sup>13</sup> We have also considered and reject without discussion all other arguments advanced by the parties.