

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Wanda P. Sears
Roanoke, VA,

Respondent.

DECISION

Complaint No. C07050042

Dated: July 23, 2009

**On remand from the Securities and Exchange Commission for the
redetermination of sanctions. Held, sanctions modified.**

Appearances

For the Complainant: Leo F. Orenstein, Esq., and Gregory R. Firehock, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Anthony Paduano, Esq., and Willard R. Knox, Esq.

Decision

This matter is before us on remand from the Commission to redetermine the sanctions that should be imposed on Wanda P. Sears for an unauthorized trading violation. On September 24, 2007, we issued a decision in which we found that Sears executed 20 unauthorized trades, in violation of NASD Rule 2110, and engaged in undisclosed outside business activities, in violation of NASD Rules 3030 and 2110.¹ Our previous decision suspended Sears for two years for the unauthorized trading violation, and imposed a concurrent, six-month suspension for the undisclosed outside business activities. Sears appealed to the Commission. The Commission

¹ Following the consolidation of NASD and the member regulation, enforcement and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See FINRA Regulatory Notice 08-57* (Oct. 2008). Because the complaint in this case was filed before December 15, 2008, the procedural rules that apply are the NASD Rule 9000 Series, as it existed on December 14, 2008. The conduct rules that apply are those that existed at the time of the conduct at issue.

sustained the findings and sanctions for the undisclosed outside business activities, but upheld only two trades as unauthorized. The Commission remanded the matter to us for a redetermination of the sanctions in light of the reduced number of transactions.

After a thorough review of the record, including all evidence of aggravation and mitigation, we reduce the suspension for Sears's unauthorized trading from two years to six months, which is to be served concurrently with the six-month suspension for the undisclosed outside business activities.

I. Factual and Procedural Background

A. Sears

Sears entered the securities industry in February 1992 with American Express Financial Advisors, Inc. ("American Express"), where she registered as a general securities representative. Sears remained associated with American Express through April 2002, when she was terminated for violating several company policies, including exercising discretion in customers' accounts and failing to report outside business activities. Upon her termination from American Express, Sears registered with another FINRA member as a general securities representative; however, Sears resigned from that firm in November 2006. Sears has not been associated with any FINRA member since November 2006.

B. The Two Unauthorized Trades

We summarize the factual findings from our prior decision. Sears effected two unauthorized trades – one in the account of WG, and one in the account of DM. WG opened an account with Sears in 1998, and never gave Sears permission to purchase or sell investments for his account without authorization. In January 2002, MG, WG's wife, noticed that Sears purchased 3,675 shares of XO Communications, Inc. for \$549.08. Neither WG nor MG authorized Sears's purchase of that stock. Moreover, Sears did not discuss purchasing the shares with WG or MG prior to the transaction.

DM became Sears's customer in 1999 after an American Express tax advisor referred Sears to her. DM purchased funds and annuities as part of her retirement planning, but never purchased individual stocks. She therefore was "surprised" in February 2002 when she discovered that Sears purchased 450 shares of AOL/Time Warner stock for \$13,225.50 in January 2002. DM never discussed, or authorized, the AOL stock purchase with Sears or anyone else at American Express. DM lost over \$4,500 on the purchase, but American Express later reimbursed DM for the losses incurred.

C. Sears's Undisclosed Outside Business Activities

Between 1998 and 2002, Sears prepared income tax returns, and received compensation for tax preparation services, without disclosing these outside business activities to American Express in writing. Sears admitted that she prepared tax returns for approximately 40 customers, that she received \$3,515 in direct payments from customers for the tax preparation, and that she never disclosed to American Express, in writing, that she prepared tax returns for customers for compensation.

D. Procedural History

In 2007, we issued a decision in which we affirmed that Sears effected unauthorized transactions, but reduced the number of unauthorized transactions from 23 trades as found by the Hearing Panel to 20 trades.² We affirmed the Hearing Panel's findings that Sears engaged in undisclosed outside business activities. We imposed a two-year suspension for the unauthorized trading, and a concurrent, six-month suspension for the undisclosed outside business activities. Sears appealed to the Commission.

The Commission issued its decision on July 1, 2008. The Commission upheld the findings and sanctions for the undisclosed outside business activities and affirmed that Sears executed unauthorized transactions. The Commission, however, reduced the number of unauthorized transactions from 20 trades to two trades. The Commission found that Sears lacked adequate notice that Enforcement's claims concerning the other 18 trades were intended to provide a basis for additional findings of violation. The Commission remanded the matter to us for a redetermination of the sanctions for the unauthorized trading violation.

II. Sanctions

FINRA's Sanction Guidelines ("Guidelines") for unauthorized transactions recommend a fine of \$5,000 to \$75,000 and a suspension from 10 business days to one year.³ In egregious cases, the Guidelines recommend a longer suspension of up to two years, or a bar.⁴ There are two specific considerations to determine sanctions in unauthorized trading cases – whether the respondent misunderstood his or her authority or the terms of the customer's orders, and whether the unauthorized trading was egregious.⁵

The Guidelines identify three specific categories of egregious unauthorized trading: (1) quantitatively egregious unauthorized trading, *i.e.*, unauthorized trading that is egregious because of the sheer number of unauthorized trades executed; (2) unauthorized trading accompanied by aggravating factors, such as, efforts to conceal the unauthorized trading, attempts to evade regulatory investigative efforts, customer loss, or a history of similar misconduct; and (3) qualitatively egregious unauthorized trading, which is measured by the strength of the evidence, and the respondent's motives in effecting the trades, *i.e.*, whether the respondent acted in bad faith, as opposed to based on a reasonable misunderstanding. *See Dist. Bus. Conduct Comm. v.*

² We set forth the procedural history of this case in our prior decision. Our decision explained that the 20 unauthorized transactions consisted of the following trades – WG (one trade), DM (one trade), PD (one trade), CH (four trades), DR (one trade), and LR (12 trades).

³ *See FINRA Sanction Guidelines* 103 (2007), <http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf> [hereinafter *Guidelines*].

⁴ *See id.*

⁵ *See id.* These specific considerations are in addition to the Principal Considerations in Determining Sanctions that must be considered in every disciplinary case. *See id.* at 6-7.

Hellen, Complaint No. C3A970031, 1999 NASD Discip. LEXIS 22, at *15-24 (NASD NAC June 15, 1999); *see also Guidelines*, at 103 n.2.

Our consideration of this case is limited to the appropriate sanctions for only two unauthorized trades. In limiting our review to two transactions, we reject Enforcement's recommendation that we rely upon an additional 26 trades to assess sanctions. Enforcement suggests that we consider the trades of PD (one trade), CH (four trades), DR (one trade), LR (12 trades), and JT (eight trades) as aggravating factors for purposes of assessing sanctions for the two unauthorized trades established for liability.⁶ We decline to follow Enforcement's argument.

Enforcement relies upon a statement in the Commission's decision to justify using PD's, CH's, DR's, and LR's 18 trades as evidence of aggravation. The Commission stated that, "[evidence of the 18 trades contained in the declarations of PD, CH, DR, and LR] may be considered in gauging aggravating factors when assessing appropriate sanctions for the two unauthorized trading violations that we have sustained." *Wanda P. Sears*, Exchange Act Rel. No. 58075, 2008 SEC LEXIS 1521, at *22 n.33 (July 1, 2008). Enforcement relies upon the Commission's statement to urge us to use PD's, CH's, DR's, and LR's trades as aggravating factors in the assessment of sanctions.

The Commission set aside those 18 trades because it found that Sears lacked notice that the trades would be the basis for any findings of violation, not because the trades failed to meet the standard of proof for liability. The Commission therefore gave us the opportunity to consider the trades that it set aside as evidence of aggravation for the assessment of sanctions. The Commission's statement was permissive, however, not mandatory. We have decided that it would be inappropriate under the circumstances presented in this case to factor the additional trades into the redetermination of sanctions. These 18 trades were neither alleged as unauthorized trades in the complaint nor as aggravating factors in the proceedings below. Using these trades as evidence of aggravation at this point in the case confronts the same lack of notice problem that the Commission highlighted in setting aside our initial finding that the 18 trades were unauthorized. We therefore refuse to rely upon the 18 trades of PD, CH, DR, and LR to aggravate Sears's misconduct.

We similarly reject JT's eight trades in this sanctions analysis. Although JT's eight trades were identified in the complaint, neither we nor the Hearing Panel found that such trades were unauthorized transactions. We conclude that it would be inappropriate for us to revive these allegations, find that Enforcement proved them, and use them as a basis for aggravating Sears's misconduct. We also note that the Commission's statement about using the additional trades as evidence of aggravation did not include JT's eight trades. The Commission limited the additional trades to the evidence of unauthorized transactions based upon the declarations of PD, CH, DR, and LR. *See Sears*, 2008 SEC LEXIS 1521, at *22 n.33.

⁶ Our prior decision included the 18 trades of PD, CH, DR, and LR as unauthorized transactions. The Commission set aside the findings with regard to those 18 trades. JT's eight trades were noticed in the complaint, but neither we nor the Hearing Panel assessed Sears with those transactions.

We limit the review of Sears's misconduct to two unauthorized transactions, and conclude that two unauthorized trades are not quantitatively egregious. *See Dep't of Enforcement v. Griffith*, Complaint No. C01040025, 2006 NASD Discip. LEXIS 30, at *25-26 (NASD NAC Dec. 29, 2006) (finding that two unauthorized trades are not quantitatively egregious). We also find that Sears's unauthorized trading was not qualitatively egregious because there was no evidence that she acted in bad faith. Specifically, there was no evidence in the record that Sears gained any commissions on the two unauthorized trades, or was otherwise motivated by selfish interests. *Cf. Dep't of Enforcement v. Wells*, Complaint No. C07970045, 1998 NASD Discip. LEXIS 32, at *6-7 (NASD NAC July 24, 1998) (finding egregious unauthorized trading where the respondent effected the trade to "make some money" for himself).⁷ There similarly was no evidence that Sears attempted to conceal the trades from either her firm or her customers, evaded regulatory investigative efforts, or had a prior history of similar misconduct.⁸ We therefore conclude that Sears's unauthorized trading, when viewed in its entirety, was not egregious, and that the Guidelines' recommendation of a suspension between 10 business days and one year for non-egregious trading should apply.

Sears, however, had a significant intervening disciplinary event, which causes us to impose a more serious sanction.⁹ In June 2008, Sears admitted to, and consented to entry of judgment on, a Rule to Show Cause issued by the Virginia State Corporation Commission. The State Corporation Commission alleged, and Sears admitted, that between April 2002 and November 2006, she held herself out as an investment advisor while she was unregistered, misrepresented her investment advisor qualifications to her customers, and engaged in dishonest and unethical practices, which included exercising discretion in customers' accounts without written authority. Sears paid nearly \$45,000 in penalties, restitution, and costs, and agreed to several heightened supervisory, regulatory, and registration requirements to settle the matter.

⁷ One of the factors to determine whether unauthorized trading is qualitatively egregious is the strength of the evidence. *See Guidelines*, at 103 n.2. We previously held that Sears's misconduct was not qualitatively egregious because a large number of trades were supported by declaration, as opposed to live testimony. *See Dep't of Enforcement v. Sears*, Complaint No. C07050042, 2007 FINRA Discip. LEXIS 1, at *20 (FINRA NAC Sept. 24, 2007). The two trades that are the subject of this remand, however, were established by live testimony, declarations, and documentary evidence. We conclude that the evidence establishing these two trades is strong. We nevertheless find that Sears's unauthorized trading, when viewed in its entirety, is not qualitatively egregious.

⁸ Sears's unauthorized trading resulted in customer losses. *See Guidelines*, at 103 n.2 (considering whether the unauthorized trading resulted in losses). DM stated that her American Express account lost \$4,500 as a result of the unauthorized transaction. WG and MG also testified that WG's American Express account suffered losses as a result of the unauthorized transaction, but the record does not reflect the amount of those losses. Although there were customer losses associated with Sears's unauthorized trading, we do not arrive at a finding of qualitative egregiousness.

⁹ *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 1) (considering a respondent's relevant disciplinary history).

Sears argues that the evidence of the State Corporation Commission's action should be disregarded because the action commenced in February 2007, but Enforcement failed to raise the proceeding until now. As an initial matter, we clarify that *we* ordered the parties to brief the issue of the effect of the State Corporation Commission's action; Enforcement did not raise the case in the first instance. *See FINRA's Remand Briefing Order*, dated July 14, 2008. We gave each party the opportunity to discuss fully the effect of the State Corporation Commission's action. We also stress that the State Corporation Commission's action was not final until June 2008, after Sears admitted the allegations and consented to the entry of judgment against her. Until June 2008, the Rule to Show Cause contained mere allegations that could not be considered in this remand proceeding. *See Cambridge Capital Group, Inc. v. Pill*, 20 F. App'x 121, 125 (4th Cir. 2001) (unsworn factual allegations are not evidence).

We determine that it is appropriate for us to consider the State Corporation Commission's action in this instance. We consider the case because we are mindful that an important objective of FINRA's disciplinary process is to deter and prevent future misconduct by imposing progressively escalating sanctions on recidivists. Thus, evidence of admitted misconduct is a serious, aggravating factor that we should consider. *See generally Dep't of Enforcement v. Cuzzo*, Complaint No. C9B050011, 2007 NASD Discip. LEXIS 12, at *38 (NASD NAC Feb. 27, 2007) (stating that the "existence of a disciplinary history is an aggravating factor when determining appropriate sanctions").

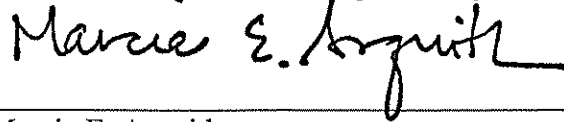
Our previous decisions have followed the rule that disciplinary actions which have become final after an initial decision, but while the case is on appeal to us, are considered when we impose sanctions. *See Dep't of Mkt. Regulation v. Kresge*, Complaint No. CMS030182, 2008 FINRA Discip. LEXIS 46, at *32 (FINRA NAC Oct. 9, 2008) (considering a Hearing Panel decision that was final while a case was before us on remand from the Commission); *Dep't of Mkt. Regulation v. Castle Sec. Corp.*, Complaint No. CMS030006, 2005 NASD Discip LEXIS 2, at *21 n.17 (NASD NAC Feb. 14, 2005) (relying upon a final disciplinary decision that the Commission issued after the Hearing Panel issued its decision, but while the case was still pending before us), *aff'd*, Exchange Act Rel. No. 52580, 2005 SEC LEXIS 2628 (Oct. 11, 2005). We therefore conclude that it is appropriate for us to consider the State Corporation Commission's action in this case.

After balancing the non-egregious nature of Sears's unauthorized trading against the aggravating factor of her disciplinary history, we suspend Sears for six months for the unauthorized trading violation. We note that, in our first decision, we imposed concurrent suspensions for the two violations. We reiterate that Sears's unauthorized trading contained no evidence of fraudulent or deceptive intent, and conclude that concurrent six-month suspensions for the unauthorized trading and undisclosed outside business activities are sufficient.

III. Conclusion

We suspend Sears for six months for unauthorized trading, and suspend her for six months for engaging in undisclosed outside business activities. The suspensions will be served concurrently.¹⁰ We have considered and reject without discussion all other arguments of the parties.

On behalf of the National Adjudicatory Council,



Marcia E. Asquith,
Senior Vice President and Corporate Secretary

¹⁰ We assess no fines or costs against Sears because she filed for bankruptcy, and obtained an order from the bankruptcy court stating that FINRA may only censure, suspend, or bar her.