

NASD OFFICE OF HEARING OFFICERS

| | | |
|---------------------------|---|-------------------------------|
| DEPARTMENT OF ENFORCEMENT | : | |
| | : | |
| | : | Disciplinary Proceeding |
| Complainant, | : | No. C3A030012 |
| | : | |
| v. | : | Hearing Officer – DMF |
| | : | |
| GREGORY A. EASTMAN | : | HEARING PANEL DECISION |
| (CRD #2456282) | : | |
| Tempe, AZ | : | February 18, 2004 |
| | : | |
| | : | |
| Respondent. | : | |

Respondent engaged in unethical conduct, in violation of Rule 2110, by falsely representing his past commissions and assets under management to a member firm in order to obtain employment. He is suspended in all capacities for two years and fined \$20,000.

Appearances

Roger D. Hogoboom, Esq., Denver, CO, (Rory C. Flynn, Esq., Washington, DC, Of Counsel) for Complainant.

Anthony B. Bingham, Esq., Mesa, AZ, for respondent.

DECISION

1. Procedural History

The Department of Enforcement filed a Complaint charging that respondent Gregory A. Eastman engaged in unethical conduct, in violation of Rule 2110, by falsely representing his commissions and assets under management at his then-current employer in order to obtain employment with another NASD member firm. Eastman filed an Answer in which he admitted the violation, but requested a hearing on the issue of sanctions. The hearing was held in Phoenix, Arizona on January 22, 2004, before a

Hearing Panel that included a Hearing Officer and two members of the District 3 Committee.¹

2. Facts

There was no dispute about the relevant facts. Eastman has been in the securities industry since 1994. From 1997 to May 2002, he was registered with U.S. Bancorp Piper Jaffray Inc. as a General Securities Representative. From May to June 2002, he was registered with RBC Dain Rauscher Inc. From June 2002 to the present, he has been registered as a General Securities Representative with Securities America, Inc., and since September 2002, he has also been registered with that firm as a General Securities Principal. He has no prior disciplinary history. (JX 1; Tr. 56-57.)

Beginning in about 2001, Mark Delton, who was then a branch manager for RBC Dain, attempted to recruit Eastman to transfer from Piper Jaffray to RBC Dain. Delton, however, was only interested in recruiting representatives who were generating at least \$300,000 in gross commissions per year and had at least \$30 million in assets under management. In early 2002, Eastman advised Delton that he was interested in moving to RBC Dain and that he met those criteria. Specifically, he provided Delton with a hand-written month-by-month and quarter-by-quarter summary of his commissions for 2001. The summary indicated that Eastman's commissions had increased each quarter, from \$125,000 in the first quarter of 2001 to \$190,000 by the last quarter of 2001. To substantiate his summary, Eastman gave Delton Piper Jaffray "Commission Sheets" purportedly showing his total commissions at the end of each quarter. Eastman also told Delton that during the first quarter of 2002, he had \$41.6 to \$42.5 million in assets under

¹ Enforcement offered the testimony of one witness and Complainant's Exhibit ("CX") 1, which was admitted. Eastman testified in his own behalf and called two other witnesses. The parties also offered 13 Joint Exhibits ("JX"), which were admitted, and 15 Stipulations of Fact ("Stip.").

management, which did not include an additional \$3.5 million invested in annuities. He gave Delton a Piper Jaffray “Individual Performance History” to substantiate the amount of assets he claimed to have under management. (JX 2, 3, 6; Tr. 16-17, 19-28, 58-61.)

In fact, Eastman had only \$114,517 gross commissions at Piper Jaffray during all of 2001, which was less than the amount he told Delton he had generated in the first quarter of 2001 and less than 20% of the \$619,134 he claimed he had generated for the entire year. The quarterly amounts that Eastman told Delton he had earned during 2001 actually reflected his four highest quarters selected from the years 1999 and 2000. Even in 1999 and 2000, his best years, his commissions for the entire year did not approach the \$619,000 he told Delton he generated in 2001. Eastman falsified the Commission Sheets that he gave Delton. He made photocopies that combined the dated top portions of his Commission Sheets for the four quarters of 2001 with the bodies of Commission Sheets from his four best 1999 and 2000 quarters, so it appeared that the commissions he had actually generated in 1999 and 2000 were earned in 2001. In addition, during the first quarter of 2001, Eastman’s assets under management actually ranged from \$14.6 to \$15.3 million, \$27 million less than the amount he had told Delton he had under management. Eastman also falsified the Individual Performance History that he gave Delton to substantiate his assets under management claim by taking a document showing the correct figures to a photocopy shop, which replaced those figures with the false numbers that Eastman had given Delton. (JX 3, 4, 5, 7, 8; Tr. 61-70, 82-83.)

Based upon Eastman’s claims concerning his commissions and assets under management, RBC Dain offered him a position, and as an inducement, offered him a forgivable loan. Based upon his claimed commissions and assets under management,

Eastman negotiated a loan of \$400,000, substantially more than RBC Dain had originally offered him, which would be forgiven month by month over a period of 72 months. On May 31, 2002, Eastman signed an Employment Agreement with RBC Dain. The Agreement stated that “[a]s a major inducement for the employment of [Eastman] with RBC Dain, [Eastman] agree[d] and/or warrant[ed] and represent[ed]” among other things, that his “total commissions ... for the twelve month period immediately preceding [his] employment with RBC Dain was \$620,000” and that his “total assets under management ... in the month immediately preceding [his] employment with RBC Dain was \$46 million.” (JX 9; Tr. 18, 29-34, 70-71.)

RBC Dain deposited the \$400,000 in Eastman’s RBC Dain securities account on June 3, 2002. During the course of a routine conversation, however, Eastman’s former branch manager at Piper Jaffray told Delton that Eastman’s claims regarding his 2001 commissions and his assets under management were not correct, and he subsequently gave Delton Piper Jaffray documents showing Eastman’s true commissions and assets under management. Upon receiving this information, Delton called Eastman and asked for an explanation. According to Delton, Eastman claimed that the numbers he had given Delton were correct, and when asked for additional supporting documentation, said that he had given Delton all the documentation that he had. At the hearing, Eastman denied that he told Delton that the numbers he had claimed were correct, but admitted that he did not acknowledge that he had misrepresented the amounts. Following the conversation, on June 5, 2002, RBC Dain withdrew the \$400,000 from Eastman’s account. A few days later, as RBC Dain planned to terminate Eastman, he submitted his resignation. (JX 10; Tr. 35-44, 73-76, 111-12, 121-22.)

3. Violations

Eastman admitted that he engaged in wrongful conduct, in violation of Rule 2110, as charged in the Complaint. (Tr. 12, 78, 137.) The Hearing Panel, however, has independently considered the charge and finds that it is established by the undisputed facts.

In Department of Enforcement v. Shvarts, the National Adjudicatory Council explained the reach of Rule 2110:

Conduct Rule 2110 “is not limited to rules of legal conduct but rather . . . it states a broad ethical principle.” . . . Disciplinary hearings under Conduct Rule 2110 are ethical proceedings, and one may find a violation of the ethical requirements where no legally cognizable wrong occurred. . . . The NASD has authority to impose sanctions for violations of “moral standards” even if there was no “unlawful” conduct.

No. CAF980029, 2000 NASD Discip. LEXIS 6, at *11 (NAC June 2, 2000) (citations and footnote omitted). As Eastman concedes, his conduct was plainly unethical and therefore it violated Rule 2110.

4. Sanctions

Enforcement requested that the Hearing Panel fine Eastman \$20,000 and suspend him in all capacities for 18 months. Eastman argued that these sanctions were too high, proposing a fine of less than \$20,000 and a suspension of no more than 90 days.

The parties agreed that there are no directly applicable Guidelines, and suggested that it might be appropriate for the Panel to consider the Guidelines for falsification of records, by analogy. Those Guidelines recommend a fine of \$5,000 to \$100,000. In addition, where mitigating factors exist, they recommend a suspension of up to two years, or, in egregious cases, a bar. See NASD Sanction Guidelines (2001 ed.) at 43. The

Hearing Panel agrees that there are no directly applicable Guidelines, but believes that, because Eastman's misrepresentations to Delton were at the heart of his scheme, the Guidelines for intentional misrepresentations may be a more appropriate analogy. Those Guidelines recommend a fine of \$10,000 to \$100,000 and a suspension for 10 days to two years, or, in egregious cases, a bar. Sanction Guidelines at 96. The Panel concludes, however, that, regardless whether it looks to the Guidelines for falsification of records or those for misrepresentations, the sanctions in this case must be determined by applying the Principal Considerations listed in the Guidelines to Eastman's misconduct. Sanction Guidelines at 9-10.

In applying the Principal Considerations, the Hearing Panel found the following circumstances particularly relevant. Eastman did not accept responsibility for and acknowledge his misconduct to his employer, RBC Dain, prior to its detection by RBC Dain. In that regard, the Panel notes that although at the hearing Eastman claimed he "felt bad" after misrepresenting his commissions and assets under management, he admitted that even when Delton questioned him after learning of his misrepresentations, he still did not acknowledge them. In addition, although this was a single episode, Eastman made his misrepresentations over several months, a significant period of time, from initial false statements regarding his commissions and assets under management, through providing falsified documents to substantiate those claims, to signing an Employment Agreement with RBC Dain that was expressly premised upon the accuracy of the figures that he had provided. At each point, Eastman had a clear choice. He could

have told RBC Dain the truth, or he could simply have said that he had changed his mind about leaving Piper Jaffray. Instead, each time he chose to continue the deception.

Finally, Eastman's misconduct was intentional, and it resulted in the potential for very substantial gain. All of these factors are highly aggravating.

Eastman points to several facts that he urges are mitigating. First, he argues that he should be given credit because he did not attempt to move or spend the \$400,000 that RBC Dain deposited to his account before RBC Dain reclaimed the funds. Eastman is entitled to little credit, however, because, given the speed with which RBC Dain reclaimed the funds, he had little opportunity to spend or move them. Moreover, RBC Dain reclaimed the funds, Eastman did not voluntarily return them. At the hearing, Eastman claimed that he was not motivated by any pressing need for funds, but, during his negotiations with RBC Dain, he sought and received a substantially larger forgivable loan than RBC Dain initially offered, and when pressed, he admitted that actions were motivated by his desire for the additional money he would obtain from RBC Dain, compared to what he would earn at Piper Jaffray.

Eastman also argues that he has no prior disciplinary history, but while a prior history may be an aggravating factor, the lack of a prior history is not mitigating. He also urges that no customers were hurt by his actions, but the fact that he employed misrepresentations to obtain funds from a firm, rather than from a customer, is hardly mitigating. He points out that that, in the end, RBC Dain did not suffer a loss, but that was attributable to RBC Dain's prompt action in reclaiming the funds, not to anything that Eastman did. Finally, Eastman says he assisted NASD staff during the investigation

by providing requested documents and testimony, and by admitting his actions during his testimony. Eastman was required to provide requested documents and testimony, however, pursuant to Rule 8210, and he is entitled to little credit for telling the truth, at last, when compelled to testify under oath.

The Hearing Panel, therefore, concludes that the sanctions proposed by the parties are not adequate to accomplish NASD's remedial goals. The Hearing Panel considered Enforcement's repeated statements that "this is not a bar case" (Tr. 12, 136), but concluded that the suspension must be longer than the 18 months suggested by Enforcement to reflect the seriousness of Eastman's misconduct. Therefore, Eastman will be suspended in all capacities for two years. The Panel agrees with Enforcement's recommendation of a \$20,000 fine.

5. Conclusion

Respondent Gregory A. Eastman engaged in unethical conduct, in violation of Rule 2110, by falsely representing his commissions and assets under management at his then-current employer in order to obtain employment with another NASD member firm. He is suspended from associating with any NASD member in any capacity for two years and fined \$20,000, which will be due and payable when and if he seeks to return to the securities industry. In addition, he is ordered to pay costs in the amount of \$1572.27, which includes an administrative fee of \$750 and hearing transcript costs of \$822.27. If this decision becomes NASD's final disciplinary action in this matter, Eastman's

suspension shall begin with the opening of business on Monday, April 19, 2004, and shall end at the close of business on Wednesday, April 19, 2006.²

HEARING PANEL

By: David M. FitzGerald
Hearing Officer

Copies to:

Gregory A. Eastman (via overnight and first class mail)
Anthony B. Bingham, Esq. (via facsimile and first class mail)
Roger D. Hogoboom, Esq. (electronically and via first class mail)
Rory C. Flynn, Esq. (electronically and via first class mail)

² The Hearing Panel has considered all of the arguments of the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.