NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C10020060
v.	:	Hearing Officer – JN
ANDREW KNIGHT (CRD #3011465),	:	**AMENDED HEARING PANEL DECISION**[1]
Port Chester, NY	:	June 5, 2003
Respondent.	:	

Respondent willfully failed to disclose on a Form U-4 that he had been charged with two felonies. For this misconduct, Respondent fined $2,500, suspended for thirty business days, and assessed $1,075.50 in costs.

Appearances

For the Complainant: Adam Lipnick, Esq. and Jon Batterman, Esq.

For the Respondent: Bruce Schoenberg, Esq.

Decision

I. Introduction

On June 20, 2002, the Department of Enforcement filed a Complaint against Respondent Andrew Knight, alleging that he willfully failed to disclose certain felony

[1]Enforcement's May 28, 2003 letter requests that the Panel make an "express finding" of materiality as to the Respondent's non-disclosures. Mr. Knight filed no response to this request. A sentence in the original Decision reads: "The undisclosed felony charges (grand larceny and forgery) certainly had serious implications for employment in the securities industry" (at p. 6). In a footnote to that sentence, this Amended Decision makes the requested finding.

charges on an Application for Securities Industry Registration or Transfer ("Form U-4"), in violation of Rule 2110 and IM-1000-1. A Hearing Panel, composed of an NASD Hearing Officer and two members of NASD District Committee No. 10, conducted a hearing on March 12, 2003, in New York City. The parties entered into a Stipulation (JX-1). The Department of Enforcement introduced eight exhibits (CX-1 through CX-8),[2] and the Respondent testified on his own behalf (Tr. 11-74).[3]

II. Background

On February 16, 2001, Knight signed and completed a Form U-4, seeking registration as a general securities representative of First Union Securities Financial Network, Inc., a firm which had hired him as a broker (JX-1, ¶¶ 1, 2). The U-4 required, inter alia, that he answer certain questions pertaining to any possible criminal history. Question 23A(1)(b) asked "[h]ave you ever . . . been charged with any felony?" (CX-2, p. 000011, emphasis in original). Respondent answered that question "No" (Id.). The parties agree that on February 8, 2001, about one week before signing the U-4, Knight had been charged in New York with two felonies: grand larceny and forgery (JX-1, ¶ 4). The firm later terminated Respondent for his failure to have disclosed those felony charges on his Form U-4 (Id., at ¶ 6).

III. Discussion

Failing to disclose prior criminal charges on a Form U-4 constitutes a violation of NASD Conduct Rule 2110. As stated in IM-1000-1, "[t]he filing with [NASD] of

[2] Exhibit CX-3 originally contained three pages. During the hearing, Enforcement withdrew bates-stamped pages 000033 and 000034, and CX-3, as admitted, thus contains only bates-stamped page 000032.

[3] "Tr." refers to the transcript of the hearing.

information with respect to . . . registration . . . which . . . could in any way tend to mislead . . . may be deemed to be conduct inconsistent with just and equitable principles of trade and when discovered may be sufficient cause for appropriate disciplinary action." See Dep't of Enforcement v. Vu, 2001 NASD Discip. LEXIS 40 at *6 (OHO November 15, 2001) (failing to amend U-4 to reflect subsequent felony charges).

Here, Respondent had been charged with two felonies, but answered "No" to a question that asked if he had ever been charged with any felony. The false answer could have misled the firm into believing that he had a clean record; moreover, the falsity was especially significant for employment in the securities industry because the underlying charges involved grand larceny and forgery.

The Form U-4 "serves as a vital screening device for hiring firms and the NASD against individuals with 'suspect history.'"[4] Truthful answers are essential to a meaningful system of self-regulation, and non-disclosure of felony charges can only frustrate that process. Knight clearly violated Rule 2110 and IM-1000-1 by failing to disclose the felony charges.

The Complaint alleges that Knight's omissions on the U-4 were "willful." A finding of willfulness, though not an element of the offense under Rule 2110, may have serious collateral consequences. See Article III, Section 4(f) of the NASD By-Laws, creating a disqualification for a person who "has willfully made or caused to be made in any [Form U-4] statement which was at the time, and in light of the circumstances under

[4] Dist. Bus. Conduct Comm. v. Bernadette Jones, 1998 NASD Discip. LEXIS 60, at *9 (NAC August 7, 1998).

which it was made, false or misleading with respect to any material fact or has omitted to state in any such [form] any material fact which is required to be stated therein."

"Willfulness" is described in In re Christopher LaPorte, Exchange Act Rel. No. 39171, 1997 SEC LEXIS 2058 at *8 (September 30, 1997) and Arthur Lipper Corp. v. S.E.C., 547 F.2d 171, 180 (2d Cir. 1976). This element requires proof that "the respondent knew or should have known under the particular facts and circumstances that his conduct was improper" (LaPorte). The term "willfully" requires "proof that [Respondent] acted intentionally in the sense that he was aware of what he was doing . . . '[W]illfully' in this context means intentionally committing the act. There is no requirement that the actor also be aware that he is violating one of the Rules or Acts" (Lipper). Measured by those principles, the Panel finds that Respondent's conduct was willful.

According to Knight, he did not know whether grand larceny and forgery were felonies; he discussed the charges with a supervisor, who said that a "yes" answer would preclude him from getting the job and advised that he wait for "black and white" documentation and thereafter amend the U-4 appropriately (CX-7; Tr. 24, 42, 49, 67, 69, 72). Respondent thus decided to answer "No" to Question 23A(1)(b).

In so doing, Respondent knew that he had been charged with grand larceny and forgery (JX-1, ¶¶ 2, 4; Tr. 18, 35, 36, 41). He further knew that a felony was "a serious charge, more than a misdemeanor" (Tr. 66). Indeed, the Form U-4 explained that "felony" referred to an offense punishable by imprisonment for at least one year and/or a $1,000 fine (NASD Manual (July, 2001), p. 472). He knew that grand larceny and

forgery were sufficiently serious to have warranted his arrest, his incarceration for twenty-four hours, his arraignment before a judge, and assignment of court-appointed counsel (Tr. 17, 18, 34).[5] He also knew that a "Yes" answer would result in his not getting the job. Knight is a man of reasonable intelligence. He is a high school graduate who passed the Series 7 test and worked in the securities industry for several years. In the Panel's view, he "knew or should have known under the particular facts and circumstances that his conduct was improper" (LaPorte), and his misconduct was willful.

Respondent's defenses lack merit. His purported reliance on the word of a supervisor, who had no compliance responsibility and was also a personal friend (Tr. 27, 32), is of no significance for liability purposes. Respondent could have consulted with the office manager or with the firm's compliance department, but chose not to do so (Tr. 45, 64). Nor did he choose to contact the attorney who had represented him, the police, or court personnel (Tr. 43-45), all of whom could have informed him as to the events in question, which occurred only about a week before Knight executed the U-4. In any event, "a respondent cannot shift his or her responsibility for compliance with an applicable requirement to a supervisor . . .." Thomas C. Kocherhans, Exchange Act Rel. No. 36556, 1995 SEC LEXIS 3308 at *10 (December 6, 1995) (citations omitted). See also Dep't of Enforcement v. Marlowe Robert Walker, No. C10970141, 2000 NASD Discip. LEXIS 2 at *22 (NAC April 20, 2000) (Respondent "cannot evade responsibility for the accuracy of the [Form U-4] by attempts to shift responsibility to his attorney").

[5] Testimony that he did not know whether grand larceny and forgery were felonies, misdemeanors, or lesser "violations" (like disputes with a girl friend) (Tr. 67, 72) was wholly unconvincing.

Nor does Respondent's asserted self-induced ignorance carry the day. As noted, the Form U-4 plays a vital role in the securities industry. Under Knight's approach, applicants for registration could easily avoid the prescribed consequences of willful misstatements or nondisclosures (disqualification) by simply declining to inform themselves. It has long been settled that securities professionals cannot circumvent regulatory provisions by putting their heads in the sand.[6] Common sense militates against such a contention, and the Panel rejects it here.

Respondent's reliance on Dep't of Enforcement v. Stephanie Ann Dixon, No. C3A020020 (OHO November 6, 2002) is misplaced. There the prosecution concededly failed to prove willfulness and dropped that contention (slip op. at 6), a factor which makes Dixon wholly distinguishable. Moreover, that case involved an applicant with "no prior experience in the securities industry and [who] had not yet qualified by examination" and was a "novice, who had no experience or training when she filled out the Form" (Id., at 2, 8). Respondent Knight, on the other hand, had passed the Series 7 test, had three years' experience in the securities industry at the time in question, and had filled out the U-4 "numerous times" in the past (Tr. 13, 14, 21). In the contrasting circumstances of the instant case, the Panel finds it reasonable to infer that Knight "knew or should have known under the particular facts and circumstances that his conduct was improper" (LaPorte), and that his misconduct was, therefore, willful.

[6] See Securities Exchange Corporation, Exchange Act Rel. No. 1395, 1937 SEC LEXIS 602 at *763 (September 21, 1937) ("Pierce's recurrent protestations of ignorance of the meaning of [a statute] do not, in our opinion, avail to prevent the conclusion that his unlawful conduct constitutes a deliberate and willful violation…. To permit an applicant to take refuge in such a claim of ignorance, when the means of information are not only readily at hand, but have in fact been furnished to him, would be to afford an opportunity to applicants to disregard the provisions of the Section…"); William Monroe Layton, Exchange Act Rel. No. 4204, 1949 SEC LEXIS 79 at *38 (February 2, 1949) (ignorance resulting from "deliberate indifference" to Respondent's obligations does not undermine a finding of willfulness).

IV. Sanctions

For filing a false or inaccurate Form U-4, the NASD Sanction Guidelines recommend a fine of $2,500 to $50,000 and a possible suspension for five to thirty business days. See NASD Sanction Guidelines, p. 77 (2001 ed.). Enforcement requested the minimum recommended fine ($2,500) and a thirty-day suspension (Tr. 95).

Three principal considerations bear on sanctions for submitting a false U-4: (1) the "[n]ature and significance of information at issue;" (2) whether the omission resulted in a statutorily disqualified person becoming associated with a firm; and (3) whether the misconduct harmed a registered person, a firm, or anyone else (Guidelines, p. 77). The undisclosed felony charges (grand larceny and forgery) certainly had serious implications for employment in the securities industry.[7] On the other hand, they were dropped by the prosecution (JX-1, ¶ 7; Tr. 19). There were, therefore, no convictions, and Knight's nondisclosure never led to the employment of a statutorily disqualified person. Nor was there any evidence in this record suggesting that Knight had inflicted "harm" on any investor or on his firm.

In the circumstances of this case, the Hearing Panel imposes a $2,500 fine and a suspension for thirty business days.

V. Conclusion

For providing a false answer on his Form U-4, Respondent is fined $2,500 and suspended in any and all capacities for thirty business days.

Respondent is also assessed a total of $1,075.50 in costs, reflecting hearing transcript costs of $325.50 and a standard $750 administrative fee.

[7] The information which Respondent failed to disclose was material.

If this Decision becomes NASD's final disciplinary action, the fines and costs become due if and when Respondent re-enters the securities industry, and the suspension shall become effective with the opening of business on Monday, August 4, 2003, and end at the close of business on September 15, 2003.

HEARING PANEL

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Jerome Nelson
Hearing Officer

Dated: Washington, DC
June 5, 2003

Copies to: Andrew Knight (via overnight delivery and first class mail)
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