

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C9B020037
v.	:	
	:	Hearing Officer - AWH
KENNETH J. GILMORE	:	
(CRD #1047301),	:	Hearing Panel Decision
	:	
Gillette, NJ	:	
	:	
	:	
Respondent.	:	January 8, 2003

Registered representative found liable for falsifying records, in violation of NASD Conduct Rule 2110. Respondent suspended in all capacities for ten business days, fined \$7,500, and assessed costs.

Appearances:

Michael J. Newman, Esq., for the Department of Enforcement

Richard Szuch, Esq., for Kenneth J. Gilmore

DECISION

On April 29, 2002, the Department of Enforcement (“Enforcement”) filed the Complaint in this matter, alleging that Kenneth J. Gilmore (“Gilmore” or “Respondent”) violated NASD Conduct Rule 2110 by falsifying records. On May 22, 2002, Respondent filed an Answer to the Complaint, denying the allegations against him. A hearing was held in Woodbridge, New Jersey, on August 28, 2002, before a Hearing Panel composed of the Hearing Officer and two current members of District Committee No. 9. Both parties filed post-hearing briefs.

Findings of Fact¹

I. BACKGROUND

Kenneth J. Gilmore entered the securities industry in 1982 as a General Securities Representative of an NASD member. CX 3. He has been employed with several broker-dealers since his entry into the industry, and is currently registered through Financial Consultant Group, Inc. (“FCG”). He is also licensed as a general securities principal; municipal securities representative; municipal securities principal; and government securities representative. *Id.* In the early 1990s, Gilmore became the president of FCG, and he continues to serve in that capacity. Tr. 97. FCG is a general securities firm with approximately fifteen registered persons, headquartered in Short Hills, New Jersey. Compl. ¶1. As president of FCG, Gilmore is responsible for ensuring that the firm maintains complete and accurate records. Stip. ¶ 2.

II. NASD DISTRICT 10 EXAMINATION - 1998

In 1998, NASD examiners from District 10 conducted a routine examination of FCG, covering 1997. In December 1998, following the examination, the examiners and Gilmore met at a compliance conference during which the examiners reviewed their findings. One of the violations the staff noted was the firm’s failure to designate as an officer its Senior Registered Options Principal (“SROP”), Ms. Lauren Alexander. Gilmore informed the staff that the firm had replaced Ms. Alexander with Howard Spindell as the firm’s SROP, and that the firm would make the necessary amendments on the Form BD to reflect the change. Stip. ¶ 3.

Spindell was appointed as an officer of the firm and as the firm’s SROP and Compliance Registered Options Principal (“CROP”) in December 1998. Stip. ¶¶ 4, 14. Spindell had begun his employment with the firm as its Financial and Operations Principal on August 3, 1996. Stip.

¹ References to Enforcement’s exhibits are designated as CX __; the Joint Stipulation of Facts located at CX 1, as Stip. ¶ __; and the transcript of the hearing, as Tr. __.

¶ 5. However, shortly after the December 1998 conference, Gilmore inexplicably created a memorandum dated August 3, 1996, (“August 1996 Memo” or “Memo”) stating that Spindell had been appointed as an officer, SROP, and CROP of the firm on August 3, 1996. Stip. ¶ 4. Gilmore maintained the letter in the firm’s records. Stip. ¶¶ 4-6; CX 4.

III. NASD DISTRICT 9 EXAMINATION - 2000

In 2000, NASD examiners from District 9 conducted a routine examination of FCG. Stip. ¶ 7. On August 14, 2000, as part of that examination, the staff faxed a request to Gilmore that he provide, among other information, (1) Spindell’s official title and his ownership interest, if any, in FCG, and (2) the corresponding corporate minutes in which Spindell was appointed to his title. Stip. ¶ 8; CX 5. Later that day, Christopher J. Cook, the firm’s Financial Operations Principal, replied by fax, providing the staff with a copy of the August 1996 Memo. Stip. ¶ 8; CX 6.

On September 21, 2000, the examiners held an exit conference with Gilmore to review their preliminary findings. Stip. ¶ 9; CX 7. The staff noted that the firm had designated Howard Spindell as its SROP and CROP, but had not identified him as an officer or partner of the firm.² *Id.* After concluding the examination, on October 26, 2000, the staff issued a Letter of Caution to FCG, citing several technical, non-formal violations. Stip. ¶ 10; CX 8. The Letter also stated, “The issue of the firm’s SROP/CROP registration is still under review.” CX 8.

After receiving the Letter of Caution, Gilmore contacted the staff supervisor by telephone, seeking clarification of the “still under review” language. Tr. 36. The staff

² The finding that Spindell was not identified as an officer of FCG is seemingly inconsistent with the staff’s receipt of the August 1996 Memo that identifies him as an officer. The staff investigator, who received the August 1996 Memo, is no longer with NASD and did not testify at the hearing. The staff supervisor, who did testify, stated “[a]pparently, I overlooked this document [the August 1996 Memo]” Tr. 48. However, the staff supervisor later testified that the Form BD did not identify Spindell as an officer of FCG. Tr. 74-75. The form BD was not introduced into evidence.

supervisor explained that the legal department was then considering whether to take formal action in the matter. Specifically, the legal department was considering whether the firm had failed to designate its SROP as an officer of the firm as required by NASD rules. According to the staff supervisor, Gilmore responded that the firm had “slipped up” in not designating Spindell as an officer of the firm.³ Tr. 36. Gilmore also stated that he would respond to the Letter of Caution. Tr. 37.

On November 13, 2000, Gilmore wrote a response to the Letter of Caution. Stip. ¶ 11; CX 9. Consistent with the Memo he had written two years earlier, he stated that “Howard Spindell had been appointed as an officer and SROP / CROP on August 3rd[,] 1996.” CX 9. In reply to Gilmore, the staff requested documentation showing that Spindell was an officer of the firm and the firm’s SROP as of August 3, 1996. As a result, on November 20, 2000, Gilmore faxed the August 1996 Memo to the staff. Tr. 40-41; Stip. ¶ 12; CX 4. The staff questioned the accuracy of the date on the August 1996 Memo, and began an investigation to determine when the Memo was created and Spindell was appointed an officer and the SROP/CROP of FCG. Stip. ¶ 13.

On July 5, 2001, as part of the NASD investigation, Gilmore testified under oath that the August 1996 Memo was created on August 3, 1996; that the Memo correctly indicated that Spindell was an officer of FCG on August 3, 1996; but that the Memo was inaccurate to the extent that it indicated Spindell had been appointed a SROP/CROP as of August 3, 1996. Tr. 51-52, 130-33. During his testimony, he did not indicate that the August 1996 Memo had been backdated. Tr. 56.

³ The staff supervisor believed Gilmore’s admission that FCG “slipped up” referred to the current District 9 examination finding that Spindell had not been designated as an officer of FCG. Tr. 36. On the other hand, Gilmore was referring to the finding, made two years earlier by District 10, that Spindell had not been designated an officer. Tr. 116. It was that earlier finding that prompted him to write the August 1996 Memo.

A few weeks after his testimony, on August 3, 2001, Gilmore sent a letter to NASD, through his counsel, correctly noting that Spindell had not been appointed an officer of the firm until December 1998, and acknowledging that the August 1996 Memo was inaccurate regarding the date of that appointment. Stip. ¶ 14.

Discussion

IV. NASD CONDUCT RULE 2110

The focus of NASD rules is the “professionalization of the securities industry.” *Department of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, *11 (NAC June 2, 2000). To that end, NASD Conduct Rule 2110 obliges an associated person⁴ to “observe high standards of commercial honor and just and equitable principles of trade.” *DBCC v. Roach*, No. C02960031, 1998 NASD Discip. LEXIS 11, at *16 (NBCC Jan. 20, 1998) (citations omitted). Falsifying records submitted to NASD is inconsistent with that obligation. *DBCC v. Sickels*, No. C9A950036, 1997 NASD Discip. LEXIS 23, *10 (NBCC Jan. 22, 1997) (citing *Charles E. Kautz*, Exchange Act Rel. No. 37072, 1996 SEC LEXIS 994, *7 (Apr. 5, 1996)).

It is also inconsistent with Conduct Rule 2110 to falsify records maintained in a member firm’s official records. As the Securities and Exchange Commission has stated, “the entry of accurate information on official Firm records is a predicate to the NASD’s regulatory oversight of its members. It is critical that associated persons, as well as firms, comply with this basic requirement.” *Id.* at *10-11 (quoting *Kautz*, 1996 SEC LEXIS 994 at *11-12).

⁴ General Provision 0115 extends the obligations of Conduct Rule 2110 to associated persons, as well as members.

V. GILMORE FALSIFIED FCG'S RECORDS

The August 1996 Memo stated that FCG appointed Howard Spindell as an officer of the firm and the firm's SROP/CROP on August 3, 1996. Gilmore admitted that Spindell was not appointed as an officer or SROP/CROP until around December of 1998, and that the Memo was backdated. The August 1996 Memo therefore contained false information. Nevertheless, Gilmore maintained the document in FCG's official records and submitted a copy of it to NASD staff.

Gilmore argued that he did not violate Conduct Rule 2110 because Enforcement failed to prove he had a motive to backdate the August 1996 Memo, and because he did not act with an intent to deceive. However, Enforcement does not need to establish malicious intent or deceitfulness to prove that Gilmore violated Conduct Rule 2110. It need demonstrate only that he acted unethically. *Department of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, *16 (NAC June 2, 2000). Regardless of his mental state at the time, Gilmore had an obligation, under Conduct Rule 2110, to ensure the accuracy of documents submitted to NASD and maintained in his firm's records. He failed to meet this "basic requirement," demonstrating conduct inconsistent with the obligation to observe high standards of commercial honor and just and equitable principles of trade. *DBCC v. Sickels*, 1997 NASD Discip. LEXIS 23, at *10-11. Accordingly, Gilmore violated Conduct Rule 2110.

Sanctions

For falsification of records, the NASD Sanction Guidelines ("Guidelines") recommend a fine of \$5,000 to \$100,000. NASD SANCTION GUIDELINES, p. 43 (2001 ed.). If mitigating factors exist, the Guidelines recommend a suspension for up to two years; in egregious cases, they recommend considering a bar. *Id.*

Enforcement requests that Gilmore be suspended for thirty days and fined \$7,500. Enforcement's Post-Hearing Brief, p. 6. Raising a number of arguments based on the general and principal considerations highlighted in the Guidelines, Gilmore argues that no sanction or a minimal sanction should be imposed. Respondent's Post-Hearing Brief, pp. 10-11.

The Hearing Panel finds that Gilmore's actions were negligent and unthinking, but not intended to deceive. There was no reason for him to backdate the memorandum or to create a false document. All he had to do to comply with the findings of the District 10 examination was to memorialize the appointment of Spindell as an officer of the firm and as the firm's SROP/CROP as of December 1998, the actual date of his appointment. Gilmore gained nothing by asserting that the appointment was made in 1996. Even Gilmore could not explain why he chose the earlier date when he created the August 1996 Memo, except to say that August 3, 1996, was date Spindell began his employment with the firm. Nor could he explain why he compounded his error when, in responding to the District 9 Letter of Caution, and again, during his on-the-record interview, he failed to ensure that his representations were accurate.

The evidence demonstrates that Gilmore "slipped up" in 1998 by not having appointed Spindell as an officer of the firm; that to rectify the slip up, he created the back-dated memo; that, nevertheless, in 2000, the District 9 staff found that Spindell had not been identified as an officer of the firm; that Gilmore was confused by this finding because the firm had given a copy of the August 1996 Memo to the staff; that he sent the staff another copy of the August 1996 Memo in response to the Letter of Caution; and that, to be consistent with the substance of the Memo that he had created two years earlier, he continued to assert, in his on-the-record interview, that the Memo was created in August 1996 and that, at that time, Spindell was an officer of the firm. But for the irrational blunder of back dating the Memo and the date of

appointment, Gilmore would not be the subject of a disciplinary complaint. Had Gilmore dated the Memo when it was actually created and when Spindell was actually appointed as SROP/CROP and as an officer – in December 1998, – there would be no reason for the District 9 staff to believe that there was a repeat violation by failing to have the SROP/CROP designated as an officer of the firm, as had been found by the District 10 staff, two years earlier.

The Hearing Panel finds that NASD did not rely on the August 1996 Memo to the detriment of its efforts to monitor FCG's compliance with NASD rules. Enforcement argued that the Memo had regulatory importance because the 2000 investigation may have found a repeat violation of Rule 2860(b)(20)(A), the requirement for supervision by an officer of the firm who has been identified to NASD as the firm's SROP. The argument overlooks the fact that there could have been no repeat violation because, as stipulated by the parties, FCG appointed Spindell an officer and SROP/CROP in December 1998. Therefore, the Hearing Panel does not find this case to be as serious as, for example, those involving falsification of documents to allow a representative to avoid firm restrictions and supervision. *See, e.g., John Lawson Greer, III*, No. C05990035, 2001 NASD Discip. LEXIS 34 (NAC Aug. 6, 2001). Moreover, shortly after his on-the-record testimony, Gilmore advised the staff of the true dates of Spindell's appointments. Once those true dates were furnished to the staff, the only discrepancy remaining in the Memo was the date of its creation. Obviously, a memo written in 1996 could not logically state that an appointment had been made two years into the future.

Although his disclosure of the inaccuracy of the August 1996 Memo to the staff is mitigating, it does not excuse his conduct in back-dating the Memo and failing to ensure that his responses to the staff were accurate. The obligation to maintain accurate information in the books and records of a member firm is absolute. That obligation is not dependent on the purpose

of an NASD investigation. Once the staff made an inquiry, Gilmore was bound to ensure that any response he gave to that inquiry was accurate.

The Hearing Panel does not find Gilmore's lack of a disciplinary history to be a mitigating factor. While the existence of a disciplinary history is an aggravating factor, its absence is not mitigating:

Registered individuals are required as part of the terms of their admission to the securities industry to comply with the NASD's Rules and observe high standards of conduct. 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.

DOE v. Mark S. Balbirer, No. C07980011, 1999 NASD Discip. LEXIS 29 (NAC Oct. 18, 1999).

Gilmore correctly notes that, while his behavior was clearly negligent, it did not result in harm to investors or create the potential for his own, or the firm's, monetary gain. Those factors are mitigating.⁵ However, the Hearing Panel concludes that a fine and a short suspension are necessary to impress upon Gilmore that the responsibility to maintain accurate records is not to be taken lightly, and that inquiries from the staff looking into the accuracy of records require careful scrutiny of those records instead of a casual assumption that they are accurate as maintained.⁶ Accordingly, the Hearing Panel will fine Gilmore \$7,500, suspend him for ten business days, and assess costs of \$1,961.65, consisting of a \$750 administrative fee and a \$1,211.65 transcript fee.

⁵ See *Norman E. Mains*, Co. C8A950016, 1997 NASD Discip. LEXIS 3, *21 (NBCC Jan. 3, 1997) (including as a mitigating factor that the respondent did not willfully disregard an SEC rule); *James Michael Brown*, Exchange Act Rel. No. 31223, 1992 SEC LEXIS 2688, *11-12 (Sept. 23, 1992) (upholding a sanction, reduced by NASD because the respondent's violation did not result in harm to investors).

⁶ The Hearing Panel 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.

Conclusion

For falsifying records, in violation of NASD Conduct Rule 2110, Kenneth J. Gilmore is suspended for 10 business days, fined \$7,500, and assessed costs of \$1,961.65. The sanctions shall become effective on a date determined by NASD, but not sooner than 30 days from the date this Decision becomes the final disciplinary action of NASD, except that, if this Decision becomes the final disciplinary action of NASD, the suspension shall become effective with the opening of business on Monday, March 3, 2003 and end at the close of business on Friday, March 14, 2003, and the fine shall become due and payable upon his reentry into the securities business.

SO ORDERED.

Alan W. Heifetz
Hearing Officer
For the Hearing Panel

Copies to:
Via First Class Mail & Facsimile
Richard Szuch, Esq.
Via First Class Mail & Overnight Courier
Kenneth J. Gilmore
Via First Class & Electronic Mail
Michael J. Newman, Esq.
Rory C. Flynn, Esq.