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NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF MARKET REGULATION, Complainant, v. Respondent.	Disciplinary Proceeding No. CMS000157 Hearing Officer—Andrew H. Perkins **Hearing Panel Decision** April 2, 2002

The Department of Market Regulation failed to prove by a preponderance of the evidence that a formerly registered representative violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by knowingly providing false testimony in an on-the-record interview. The Hearing Panel dismissed the proceeding.

Appearances

David H. Katz, Assistant Chief Counsel, James J. Nixon, Counsel, Rockville, MD, and Rory C. Flynn, Chief Litigation Counsel, Washington, DC, for the Department of Market Regulation.

_____ and _____, _____, _____, __, for _____.

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DECISION

I. BACKGROUND

The narrow issue presented in this case is whether _____ ("_____" or the "Respondent"), a former General Securities Representative and General Securities Principal, untruthfully answered a question at an on-the-record interview on November 21, 1997 ("Interview"). At the time, the Department of Market Regulation ("Department") was investigating _____ for possible manipulation of the market for Saf-T-Lock, Inc. stock.[1] Upon commencement of the Interview, which _____ attended without an attorney, he was asked whether he had ever "appeared for testimony or been called to testify in any investigation by the SEC." (C-4, at 5.)[2] _____ answered that he had, and the Department then asked that he explain his answer.

In the course of his explanation, _____ stated that he had worked with the U.S. Attorney's Office, the U.S. Department of Justice, the Securities and Exchange Commission ("SEC"), the Federal Bureau of Investigation, and the Internal Revenue Service on a stock bribery case, which resulted in 11 convictions over a three-year period. (C-4, at 7.) The Department then asked _____ if he had ever appeared before either the SEC or the National Association of Securities Dealers, Inc. ("NASD") for any "testimony for which [he was] the potential respondent." _____ answered no as to the SEC and yes as to the NASD. He was then asked to explain his affirmative response. (Id. at 8.)

At that point, _____ launched into a rambling, non-responsive answer, describing his actions in closing down _____, a broker-dealer, as a result of

[1] The Department filed a separate case against _____ for this alleged violation.

the Government's fraud investigation: the same investigation in which he had assisted. (C-4, at 8.) The Department then asked _____ whether he had "ever entered into an immunity agreement with any prosecution office." (Id. at 10.) _____ interrupted the question and answered, "Never." Then, at the conclusion of the question, _____ stated: "Never. Never. No. Everything I've ever done was voluntary. I have no immunity from anybody for any reason." (Id.)

None of the foregoing questions related to the Department's investigation of the trading in Saf-T-Lock stock. And the Department did not inquire into the details of _____'s cooperation with the Government's criminal fraud investigation or his involvement in the alleged crimes that were the subject of the investigation.[3]

The Department charges that _____'s answer regarding whether he had ever entered into an "immunity agreement" ("Everything I've ever done was voluntary. I have no immunity from anybody for any reason.") was false, and it therefore requests that the Hearing Panel bar him from the securities industry for violating NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

To establish that _____'s answer was untruthful, the Department produced a copy of a letter agreement dated May 17, 1995, between _____ and the United States Attorney for the Southern District of California entitled "Cooperation Agreement" ("Cooperation Agreement"). (C-5.) Pointing to the following provision in the Cooperation

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[2] The Department introduced six exhibits into evidence at the hearing. The exhibits are referenced as: "C- ___." The hearing transcript is referenced as "Tr. at ___."

[3] The fact that the Department asked no questions about the nature of the government fraud investigation of _____ undercuts the Department's argument that if _____ disclosed the immunity agreement the staff likely would have learned about his involvement in that case. (See Complainant's Pre-Hearing Br. at 4.) At no time did the Department follow up with _____ to get more information about the unrelated fraud investigation.

Agreement, the Department contends it is an "immunity agreement," making _____'s answer false:

> The United States Attorney for the Southern District of California, by this letter, has agreed that any testimony and statements provided by your client [_____] pursuant to this agreement from this date forward will not be used against him, directly or indirectly, in any criminal case except a prosecution for perjury, false statements or obstruction of justice as discussed below. This informal extension of testimonial immunity is intended to be coextensive with and equivalent to the protection afforded by Title 18, United States Code, Section 6002, as if [_____] were compelled to testify by order of the court. (Id. at 2.)

Thus, the issue is whether the Cooperation Agreement granted _____ "immunity" as that term was used and understood by _____ during his questioning, thereby rendering _____'s answer false.

II. PROCEDURAL HISTORY

The Department filed the Complaint on July 10, 2000; _____ filed his Answer on August 4, 2000, and requested a hearing. In his Answer, _____ admitted that he had entered into the Cooperation Agreement with the United States Attorney for the Southern District of California, but he denied that it was an "immunity agreement." Accordingly, he asserted that his interview testimony was truthful and that the Hearing Panel should dismiss the Complaint.

A Hearing Panel comprised of two current members of the NASD's District 2 Committee[4] and the Hearing Officer conducted the hearing on December 5, 2001, in Los Angeles.[5] The Department's case-in-chief consisted of six exhibits, which were admitted

[4] Although the Department of Market Regulation brought this case, the Complaint does not allege a violation that permitted the appointment of a member of the Market Regulation Committee. See NASD Code of Procedure Rules 9232(b) and 9120(s).

[5] References to the hearing transcript are cited as "Tr. at ___."

without objection. _____ testified in his own defense and presented the testimony of his former attorney, _____. She represented _____ as court-appointed counsel in the Government's fraud investigation. In 1995, she was with the federal public defender's office in San Diego.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Respondent

_____ was registered as a General Securities Representative and a General Securities Principal with _____, Inc., a former member of the NASD, between 1995 and July 23, 1998, when his registrations terminated. _____ has not been registered with the NASD since 1998. (Compl. ¶ 1; C-2, at 1.) Indeed, _____ is disqualified from associating with a member firm for ten years following his conviction for insurance fraud in May 2000.[6]

B. Jurisdiction

NASD Regulation, Inc. has jurisdiction over this proceeding under Article V, Section 4 of the NASD By-Laws. _____ was registered with the NASD at the time of his alleged violation, and the Department filed the Complaint on July 10, 2000, within two years of when he was last registered with the NASD.

C. The Cooperation Agreement

_____ and _____ each testified that _____ volunteered to help with the Government's fraud investigation. (Tr. at 13, 17, 77.) At a May 11, 1995, debriefing session with Yesmin E. Saide, Assistant United States Attorney, and representatives of the

[6] In various responses to the Department's efforts to introduce evidence concerning _____'s conviction, his counsel stipulated that he pled guilty to insurance fraud, a felony, in the United States District Court

other federal agencies participating in the fraud investigation, Saide presented _____ and _____ with the Cooperation Agreement. _____ testified that she reviewed the agreement briefly and slid it over to _____, who looked at it and asked _____ if he should sign it. She told him he should. (Tr. at 14, 56.) There was no further discussion between them about the contents of the Cooperation Agreement at that meeting or since. (Tr. at 14-15, 57.)

Once the Cooperation Agreement was signed, Saide took it and continued with the debriefing session. She did not give _____ or his attorney a copy of the agreement because she did not have a copier available. (Tr. at 57.) _____ did not receive a copy of the Cooperation Agreement until five years later, after the Department commenced this proceeding.

With respect to the immunity provision in the Cooperation Agreement, _____ and _____ each testified unequivocally that Saide stressed repeatedly during her investigation that _____ did not have a "deal" of any kind regarding the crimes being investigated; _____ could be charged at any time regardless of his cooperation. (Tr. at 15, 58, 77, 84, 86.) In other words, the government had not granted _____ immunity from prosecution. _____ further testified that it was not until three years after she signed the Cooperation Agreement that Saide informed her that the United States Attorney's Office would not pursue _____.

_____ testimony highlights the underlying infirmity in the Department's case: the term immunity is imprecise, and the Department did not make clear in which sense it

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for the Northern District of Texas. Under Article III, Section 4(g)(1), a person is disqualified for ten years following a felony conviction.

used the term. The law recognizes two distinct forms of immunity relating to a witness's liability for criminal acts—"transaction immunity" and "use or testimonial immunity"[7]—and both arise in the context of an individual's constitutional right against self-incrimination. "Transactional immunity" grants an individual immunity from prosecution for offenses to which his compelled testimony relates. *Kastigar v. United States*, 406 U.S. 441, 443 (1972). "Use immunity," on the other hand, merely grants an individual immunity from the government's use of the individual's compelled testimony. (Id.) It does not provide immunity from prosecution.

The Cooperation Agreement did not grant _____ transactional immunity. The Government had not compelled his cooperation or promised that it would not prosecute him. The Cooperation Agreement "informally"[8] extended only "testimonial immunity," meaning the Government could not use his statements against him if it chose to prosecute him for the criminal activity it was investigating, but it could still prosecute him using other evidence.[9]

Since, in its questioning of _____, the Department did not define what it meant by "immunity agreement," and did not ask any further questions to clarify _____'s response, the Hearing Panel must look to the context of the question to determine if _____ testified falsely when he denied that he had "ever entered into an immunity agreement." (C-4, at 10.) From doing so, the Hearing Panel concludes that _____ reasonably could have interpreted the Department's question as asking whether he had

[7] The terms "use immunity" and "testimonial immunity" are interchangeable.

[8] An "informal" grant of use immunity is contractual in nature. Thus, such agreements are governed by ordinary standards of contract law. *U.S. v. Luloff*, 15 F.3d 763, 766 (8th Cir. 1994).

been granted immunity from prosecution in return for his assistance with the Government's fraud investigation of _____. Thus, _____'s answer was literally true. He had not entered into an agreement that granted him immunity from prosecution.

Furthermore, under the circumstances of this case, it would be inequitable to conclude that _____ knowingly answered falsely. Not only is immunity a technical legal concept that is beyond the common understanding of laymen such as _____, but also the Department should not be permitted to take advantage of either the ambiguity of its own questions or the respondent's confusion to punish the respondent. At a minimum, to support a finding that an individual testified falsely, the evidence must show that the Department asked clear questions and followed up on vague responses.[10] Here, neither the question nor the answer was clear, and the Department neither clarified the question nor followed up on the answer because the government investigation in which _____ cooperated had no bearing on the Department's investigation.

Moreover, the papers filed by the Department graphically demonstrate the confusion created by the question. For instance, the Department argues in its pre-hearing brief that _____ "received immunity concerning his participation in exchange for his cooperation with the government." (Pre-Hearing Br. at 4 (emphasis added).) But, as

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[9] Indeed, the Cooperation Agreement specifically uses the term "testimonial immunity" and refers to 18 U.S.C. § 6002, which is the federal testimonial immunity statute. *See U.S. v. Hubbell*, 530 U.S. 27 (2000).

[10] *Cf. Bronston v. United* States, 409 U.S. 352, 360 (1973) (holding that for perjury it is the burden of the questioner to pin the witness down to the specific object of the questioner's inquiry); *cf. also, United States v. Dezarn*, 157 F.3d 1042, 1049 (6th Cir. 1998) (holding that an ambiguous question can never form a basis for a perjury conviction).

demonstrated above, the Cooperation Agreement did not grant _____ immunity for his participation in the fraudulent schemes the Government was investigating. The Hearing Panel further notes that David Katz, the Department's Assistant Chief Counsel, who posed the question to _____ at the on-the-record interview, also signed the Department's pre-hearing brief. Similarly, Katz's co-counsel argued during his closing statement at the hearing that the Government could not prosecute _____ "for what he told them pursuant to [the] cooperation agreement." (Tr. at 94.) This statement does not accurately draw the distinction between the subject of the prosecution and the evidence the Government may use to prosecute _____. The Government could prosecute _____ for any criminal conduct even though he told the Government about such conduct pursuant to the Cooperation Agreement. The Government just could not use _____'s testimony against him. As the Supreme Court has stated clearly, an individual may be prosecuted for the very crime that is the subject of his compelled testimony provided the prosecution proves "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U.S. 460.

In conclusion, the Hearing Panel notes that the charge of providing false testimony during a Rule 8210 interview is extremely grave. Not only can it lead to the respondent's expulsion from the securities industry, but also it can lead to criminal liability. *See New York v. Cohen*, 718 N.Y.S. 2d 147, 2000 N.Y. Misc. LEXIS 472, *20 (2000) (holding that New York State perjury statute prohibits perjury committed during an NASD on-the-record interview, conducted within the State of New York). Consequently, substantial

ambiguity caused directly by the Department's imprecise questioning must be resolved in the respondent's favor.

Here, the questioner did not explain how he was using the term "immunity" or follow up with further questioning to pin down _____'s non-responsive answer that led to his statement: "Everything I've ever done was voluntary. I have no immunity from anybody for any reason." From the context of the questioning and his answer, _____ reasonably could have understood the question as asking him if he had been given transactional immunity, as the Department itself has construed the term in its arguments. On these facts, the Hearing Panel finds that the Department has failed to show by a preponderance of the evidence that _____ knowingly provided false testimony at his on-the-record interview, as alleged in the Complaint. Accordingly, the Hearing Panel will dismiss this proceeding.

IV. ORDER

This proceeding is dismissed.[11]

_____
Andrew H. Perkins
Hearing Officer
For the Hearing Panel

[11] 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.