

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C07010017
v.	:	
	:	Hearing Officer – JN
	:	
	:	HEARING PANEL DECISION
	:	
	:	
	:	
	:	November 21, 2001
Respondent.	:	

Department of Enforcement failed to prove that Respondent violated Rule 2110 by violating the Rules of Conduct applicable to a Series 7 examination which Respondent had taken.

Appearances

For the Complainant: Gary M. Lisker and Rory C. Flynn.

For the Respondent: _____, appeared pro se.

DECISION

I. Introduction

On January 26, 2000, Respondent sat unsuccessfully for the Series 7 examination at a testing center in Marietta, Georgia. The Department of Enforcement's Complaint, filed on March 27, 2001, and grounded in NASD Rule 2110, alleges that he violated the Examination's

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Rules of Conduct by possessing unauthorized materials during the examination and by visiting his car during a restroom break. Mr. _____ denied these charges.

The Hearing Panel, composed of the Hearing Officer and two current members of the Association's District 7 Committee, heard this case in Atlanta, Georgia on August 23, 2001. Enforcement presented six exhibits (CX-1 through CX-6) and testimony from a staff witness. Respondent appeared pro se and testified on his own behalf.¹

II. Discussion

A. Alleged Possession of Unauthorized Materials

Before taking the Series 7 examination, Respondent signed the Rules of Conduct pertinent to the examination, attesting, inter alia, that "I must not have *any* notes, formulas, or study materials in my possession during the examination..." (CX-2; Tr. 18, 68). Enforcement contends that a videotape of his conduct during the examination (CX-6) shows Respondent looking at notes. Mr. _____ denies that he had notes, arguing instead that the supposed note was a wrapper containing earplugs supplied by the examination center.

To be sure, the videotape shows Respondent looking at a light colored item in the course of answering an examination question (Tr. 104-106). This could have been a note. But it could also have been the earplug wrapper. The wrapper, which _____ displayed in the hearing room, appeared to be about the same size as the item on the tape (Tr. 47). Respondent said that "lights" were "coming down" on the object, which a panelist described as "shiny" (Tr. 78, 107). The cellophane wrapper which Mr. _____ showed to the Panel reflected the shine of overhead lights when he held it up. The testing center did give out cellophane-packaged

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earplugs to those who requested them – as Respondent testified (Tr. 60, 112). In addition, Mr. _____ said that he was reading something written on the wrapper (Tr. 76), and Enforcement confirmed that the testing center’s ear plug wrapper contained writing (Tr. 112).

The video itself was not clear. As the Department’s counsel candidly acknowledged, “[o]bviously the resolution of the camera is not that great,” and there was no way to “zoom” in on the object (Tr. 110). Despite repeated and careful viewing, the Panel cannot conclude that the item in Mr. _____’s hands constituted “notes, formulas, or study materials.” The Department’s case, at best, was no more persuasive than Mr. _____’s explanation, which, as explained above, bore some measure of corroboration. Where, as here, the record supports equal and conflicting inferences, Enforcement has failed to carry its burden of proving the offense by a preponderance of the evidence. See Department of Enforcement v. Ryan Mark Reynolds, 2001 NASD Discip. LEXIS 17 at *54-55 (June 25, 2001), citing SEC v. Moran, 922 F. Supp. 867, 892 (S.D.N.Y., 1996).

The Complaint alleged that Respondent looked at notes on a further occasion (Compl. ¶ 6). But the videotape showed only the above instance. The tape did not show any further incident. When the Panel requested the Department’s witness to locate other allegedly suspicious activities on the tape, she was unable to do so (Tr. 86). As to the alleged second occasion, the Panel thus concludes that Enforcement also failed to carry its burden.

B. Alleged Improper Departure from the Testing Center

The Complaint further alleged that during an unscheduled break, Respondent “left the premises of the Testing Center and sat in his car, in violation of the Rules of Conduct” (Compl.

¹ The hearing transcript was filed with the Office of Hearing Officers on September 28, 2001.

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¶ 5). The Rules of Conduct provide that “During restroom breaks I must not leave the premises and may go only to the restroom” (CX-2). The Rules contain no restriction on leaving the premises during lunch, which presumably constitutes a scheduled break. Mr. _____ acknowledged going to his car during lunch, but denied that he went to the vehicle during any restroom break (Tr. 71).

Enforcement’s case as to the allegedly improper visit to the car relied on documents purportedly reflecting the observations of two test center employees, who did not testify at the hearing. The first document contains a statement from one of the employees that “I notice he kept going to his car while he was testing” (CX-5, p. 3). The second document contains a statement from another employee that “a co-worker told me she saw him out in his car” during the last few minutes of the examination (Id., at p. 4).

The Panel recognizes that such hearsay is admissible in NASD proceedings, and in an appropriate case may form the sole basis for findings of fact.² But, before relying on such evidence, “it is necessary to evaluate its probative value and reliability, and the fairness of its use.” Tom, at *6. For that purpose, the Hearing Panel must examine five factors: (1) whether the speakers have bias; (2) whether the statements are signed and sworn; (3) whether they are contradicted; (4) whether the speaker was available to provide an affidavit or otherwise testify; and (5) whether the hearsay is corroborated by other reliable testimony. Id. (citations omitted).

As to bias, Respondent testified that he was upset when he learned that he failed the examination and “didn’t show good behavior to those ladies in the exam” (Tr. 31), a factor

² See In re Charles D. Tom, Exchange Act Rel. No. 31081, 1992 SEC LEXIS 200 (1992); District Bus. Conduct Comm. v. Harry Gliksman, 1999 NASD Discip. LEXIS 12 (NAC, March 31, 1999); District Bus. Conduct Comm. v. Kevin Lee Otto, 1999 NASD Discip. LEXIS 21 (NAC, June 28, 1999).

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which might have influenced their accounts of his activities. The first statement was signed by the declarant, but was unsworn. The second statement contained no signature and was also unsworn. The statements were contradicted by Mr. _____, who, as noted, said that he went to his car only once and did so during the lunch break. As to the declarants' availability, one was no longer employed by the testing center; but the other continued as a part-time employee of the center, which was located about fifteen miles from the site of the hearing (Tr. 32, 74). These hearsay statements were not corroborated by any other evidence. Applying the above factors to the instant statements cuts against their reliability.

Moreover, there were other circumstances which also rendered these statements unreliable. They were not entirely consistent: one reported numerous visits to the car, while the other reported one. The first document described Respondent as "_____ _____," whereas his correct name is _____ . It further stated that the employees saw Respondent "pull[] something out of his shirt pocket" during the examination (CX-5, p. 3). The videotape showed no activity whatsoever involving any shirt pocket. Moreover, Respondent was wearing a sweater or sweat shirt (Tr. 38, 49, 131) which did not allow direct access to a shirt pocket. Finally, the second document contained hearsay within hearsay - one worker's statement as to what another told her (CX-5, p. 4).

For all of the above reasons, the Panel concludes that the hearsay statements are not reliable and declines to base a finding of liability upon them.

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C. Conclusion

The Hearing Panel finds that Enforcement did not prove by a preponderance of the credible evidence that Respondent _____ violated the Examination Rules of Conduct and thereby violated NASD Rule 2110. Consequently, the Hearing Panel dismisses the proceeding.³

HEARING PANEL

Jerome Nelson
Hearing Officer

Dated: Washington, DC
November 21, 2001

³ 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.