

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C07000013
v.	:	
	:	Hearing Panel Decision
JOHN F. BROWN	:	
(CRD #2692039),	:	Hearing Officer - GAC
	:	
Lake Mary, Florida	:	
	:	
	:	
Respondent.	:	March 2, 2001

Digest

The Department of Enforcement (“Enforcement”) filed a single cause Complaint alleging that Respondent John F. Brown (“Respondent”) violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by failing to respond to two requests for information regarding possible unsuitable recommendations. Respondent admitted in his Answer that he failed to respond to the requests for information and waived a Hearing. The Parties were provided the opportunity to submit documentary evidence in support of their positions. Based on the record, including Respondent’s admission of liability, the Hearing Panel found that Respondent violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 as alleged in the Complaint. The Hearing Panel barred Respondent Brown from association with any member firm in any capacity.

Appearances

Gary M. Lisker, Esq., Atlanta, Georgia (Rory C. Flynn, Washington, DC, Of Counsel), on behalf of the Department of Enforcement.

John F. Brown appeared *pro se*.

DECISION

I. PROCEDURAL BACKGROUND

A. Complaint

Enforcement filed a single cause Complaint on February 28, 2000, charging Respondent with violating NASD Conduct Rule 2110 and NASD Procedural Rule 8210. The Complaint alleged that on July 21, 1999, the NASD Regulation, Inc. (“NASDR”) staff sent Respondent a letter pursuant to Procedural Rule 8210, requesting that he provide a written statement concerning possible unsuitable recommendations for a customer account, while he was registered at International Asset Advisory Corp. (“IAAC”). The letter, sent by certified mail, requested that Respondent provide the written response by no later than August 6, 1999. According to the Complaint, the certified mailing was returned to the NASDR staff by the U.S. Postal Service marked “Unclaimed” and Respondent did not respond to the request letter.

The Complaint further alleged that on August 24, 1999, the NASDR staff sent a second letter to Respondent requesting pursuant to Procedural Rule 8210, that he provide a written statement concerning his involvement with the same specified customer account referenced in the first letter. The second letter, sent by certified mail, requested that Respondent provide the written response by no later than September 3, 1999. The Complaint stated that the return

receipt card for the certified mailing was returned by the U.S. Postal Service showing that delivery was made. According to the Complaint, Respondent did not respond by September 3, 1999 or thereafter.

B. Answer

Respondent filed an Answer on April 7, 2000, in which he admitted the allegations in the Complaint and waived a Hearing.¹ In admitting the allegations, Respondent stated, “I ADMIT to the allegation. I have no reason to doubt the attempts to contact me are factual. I also affirm the general information of my history as contained in article one.” [Emphasis in original.] Respondent added to the Answer his explanation as to why he believed customers alleged that he had engaged in unsuitable transactions. Finally, Respondent noted that “I would request a waiving of a hearing and I would hope an ending to your investigation.”

C. Submission of Evidence

Based on Respondent’s waiver of the Hearing, the Hearing Officer issued an order setting a schedule for the submission of evidence (“Order”). The Order called for the service and filing of exhibits, with Enforcement filing its exhibits first, followed two weeks later by Respondent’s submission of exhibits. The Order noted that once the exhibits were received and reviewed, the matter would either be set for Hearing or the Hearing Panel would consider the

¹ On February 29, 2000, well before the Respondent filed his Answer, the Office of Hearing Officers (“OHO”) served the Parties with a Notice of Assignment of Hearing Officer. That same day, consistent with OHO procedure, a Legal Assistant from OHO mailed to Respondent Brown at his CRD address, a set of materials relating to the NASD hearing procedures. These materials included a copy of the NASD Code of Procedure, a guide that describes the disciplinary hearing process, and a brochure with answers to frequently asked questions regarding the hearing process.

matter based on the submissions.² Thereafter, Enforcement filed four exhibits (CX 1-4) in support of its case. Respondent did not file any exhibits. After reviewing the evidence submitted, neither the Hearing Officer nor Hearing Panel ordered that a Hearing be held. Consequently, the Hearing Panel considered the matter on the existing written record.

II. DISCUSSION

A. Background of Respondent

Respondent John F. Brown entered the securities industry in October 1995, and was first registered as a General Securities Representative in January 1996.³ Respondent was employed with member firm IAAC as a General Securities Representative from April 10, 1997 until November 18, 1998, when he was discharged.⁴ Thereafter, IAAC filed a Uniform Termination Notice for Securities Industry Registration (“Form U-5”) for Respondent Brown on November 25, 1998, thereby terminating his registration with the firm.⁵ Respondent has not been associated with another member firm since his termination from IAAC.⁶

² NASD Code of Procedure Rule 9221(a) states that a “Respondent who fails to request a hearing with the filing of his or her answer waives the right to a hearing unless a Hearing Officer, Hearing Panel, or, if applicable, an Extended Hearing Panel, grants, for good cause shown, a later filed motion by such Respondent requesting a hearing.” NASD Code of Procedure Rule 9221(c) states that “[i]f all Respondents waive a hearing, and the Hearing Officer does not order a hearing on his or her own motion, the Hearing Panel or, if applicable, the Extended Hearing Panel, may order a hearing or may consider the matter on the record, as defined in Rule 9267.”

³ Complaint, ¶ 1; admitted by Respondent in Answer, p. 1; CX 1, p. 2.

⁴ CX 1, p. 3.

⁵ CX 1, p. 3; CX 2, p. 1.

⁶ CX 1, p. 2.

B. Jurisdiction

Article V, Section 4 of the NASD By-Laws creates a two-year period of retained jurisdiction over former registered persons, covering conduct that occurred prior to termination of an individual's registration and failures to provide information requested, pursuant to Rule 8210, during the period of retained jurisdiction. As noted *supra*, Respondent Brown's registration was terminated on November 25, 1998. Enforcement filed the Complaint on February 28, 2000, within two years of the termination of Respondent's registration with IAAC. The Complaint alleged failure to respond to requests for information that were issued during the period of retained jurisdiction.

Therefore, the Hearing Panel finds that the NASD has jurisdiction over Respondent for purposes of this proceeding, pursuant to Article V, Section 4 of the NASD By-Laws.

C. Respondent's Failure to Respond to Requests for Information

The Form U-5 filed by IAAC disclosed that Respondent had been discharged for his "failure to follow industry standards and [the] firm's compliance [sic] policies."⁷ As a result of that disclosure, the NASDR staff initiated an investigation.⁸ During the course of that investigation, IAAC disclosed that two customers of a joint account had alleged that Respondent made unsuitable recommendations to them and were claiming damages of \$145,000.⁹

⁷ CX 2, p. 1.

⁸ Complaint, ¶ 3.

⁹ Complaint, ¶ 4. Respondent admitted that "customers ... had alleged that I had made unsuitable recommendations to them to IAAC." Respondent denied that the recommendations were unsuitable, but he was not charged with any such violations. Answer, p. 1.

Pursuant to the investigation, on July 21, 1999, the NASDR staff sent Respondent a letter by certified mail to his CRD address.¹⁰ The letter, sent pursuant to NASD Procedural Rule 8210, indicated that the NASDR staff was reviewing an amended Form U-5 filed by IAAC.¹¹ It further noted that the NASDR staff was “formally requesting that [Respondent] provide a written statement responding to the allegations of failing to follow industry standards and the firm’s policies.”¹² The letter then requested that Respondent’s written statement address specific questions regarding his handling of a particular customer account¹³ and indicated that the response should be received by the NASDR staff by no later than August 6, 1999. The letter also provided the telephone number of the NASDR staff member writing the letter and invited Respondent to call if he had “any questions regarding this request.”¹⁴

The certified mailing was returned by the U.S. Postal Service marked, “Returned to Sender - Unclaimed.”¹⁵ According to the Complaint, an NASDR staff member left a telephone message for Respondent at his residence on or about August 9, 1999, but Respondent did not return that NASDR staff member’s call.¹⁶ Respondent admitted that he did not respond to the

¹⁰ CX 1, p. 4; CX 3, p. 1.

¹¹ Although the July 21, 1999 letter referenced the review of an “amended” Form U-5, the balance of the record does not support a finding that IAAC filed an amended Form U-5 after filing the full Form U-5 on November 25, 1998. See CX 2, p. 2.

¹² CX 3, p. 1.

¹³ Id.

¹⁴ Id.

¹⁵ CX 3, p. 2.

¹⁶ Complaint, ¶ 7.

July 21, 1999 letter and also stated in his Answer that he has “no reason to doubt the attempts to contact me [as alleged in the Complaint] are factual.”¹⁷

On August 24, 1999, the NASDR staff sent Respondent a second request for information pursuant to NASD Procedural Rule 8210. The letter was sent by certified mail to Respondent’s address as reflected in CRD and requested the same information as contained in the first request letter of July 21, 1999.¹⁸ It noted that the NASDR staff had not received a response to the initial request, that the requested information must be provided by September 3, 1999, and that a “[f]ailure to respond may result in disciplinary actions taken by [NASDR].”¹⁹ The August 24, 1999 letter also instructed Respondent to call the NASDR staff at a given telephone number if he had any questions regarding the request for information.²⁰

The return receipt card for the August 24, 1999 letter was returned to the NASDR staff signed with an illegible signature, and bearing the date of delivery as August 26, 1999.²¹ The return receipt card confirms the delivery of the August 24, 1999 request to Respondent’s CRD address. The Complaint alleges, and Respondent admits that he did not respond to the August 24, 1999 letter by the prescribed date, or at all.²²

¹⁷ Complaint, ¶ 7; Answer, p. 1.

¹⁸ CX 4.

¹⁹ Id.

²⁰ Id.

²¹ CX 4, p. 2.

²² Complaint, ¶ 10; Answer, p. 1. There is no evidence in the record that Respondent ever attempted to contact the NASDR staff to seek either clarification of the requests or additional time to respond to them.

III. LEGAL DISCUSSION

NASD Conduct Rule 2110 requires that a member “in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.” The ethical standards imposed on members in Rule 2110 apply equally to persons associated with members. NASD Rule 0115. Rule 8210(a)(1) authorizes the NASD to require a “person subject to the Association’s jurisdiction to provide information orally, in writing, or electronically...with respect to any matter involved in [an] investigation....” This Rule provides a means for the NASD to carry out its regulatory functions in the absence of subpoena power. A violation of Rule 8210 is also a violation of Rule 2110.

The Securities and Exchange Commission (“SEC”) stated that “[w]e have repeatedly stressed the importance of cooperation in NASD investigations. We have also emphasized that the failure to provide information undermines the NASD’s ability to carry out its self-regulatory functions.... Failures to comply are serious violations because they subvert the NASD’s ability to carry out its regulatory responsibilities.” In re Joseph Patrick Hannan, Exchange Act Rel. No. 40438 (September 14, 1998) (*omitting citations noted therein*). The SEC further stated that “[d]elay and neglect on the part of members and their associated persons [in responding to NASD requests for information] undermine the ability of the NASD to conduct investigations and thereby protect the public interest.” In re Barry C. Wilson, Exchange Act Rel. No. 37867 (October 25, 1996).

The Hearing Panel finds that Respondent was properly served with the NASDR staff’s requests for information. The NASDR staff sent the requests during a period in which it retained jurisdiction over Respondent. Under Rule 8210(d), the Respondent is deemed to have

received the requests for information since they were sent to his CRD address. Respondent admitted that he was aware of at least one request for information but chose to ignore the request instead of responding to it.

The Respondent's Answer included, to a small degree, a discussion of the issue of unsuitable recommendations raised in the requests for information. The Hearing Panel finds, however, that it was filed in response to the Complaint, and not in an attempt to comply with the NASDR staff requests for information. The limited information contained with the Answer was not an adequate response to the requests, and therefore did not convert Respondent's violation from failing to respond to requests to failing to respond to requests in a timely manner.

By reason of the foregoing, the Hearing Panel finds that Respondent Brown violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by failing to respond to the requests for information.

IV. SANCTIONS

Enforcement requests that the Hearing Panel bar Respondent from associating with any member in any capacity. The NASD Sanction Guidelines ("Guidelines"), as amended, provide that in the case of a failure to respond, "a bar should be standard."²³ The record does not establish any mitigating factors that require a sanction different from what is recommended in the Guidelines. In this case, the NASDR staff provided Respondent with two opportunities to respond to its request for information. Respondent chose not to claim the first mailing sent to his CRD address, while the second mailing was actually received at his CRD address. Respondent

²³ NASD Sanction Guidelines, p. 31 (1998 ed.).

was aware of the request for information, but his “lack of reply was motivated in part by an earnest desire by everyone involved that the whole issue would go away.”²⁴

The Hearing Panel does not find Respondent’s limited discussion of the possible unsuitable recommendations contained in his Answer to be mitigating. Respondent was twice given the opportunity provide the requested information or to contact the NASDR staff and discuss arrangements to provide the information. Yet he failed to take any steps to fulfill his obligation to provide the information. In In re Charles R. Stedman, 1994 SEC LEXIS 4235; 51 S.E.C. 1228 at *11 (August 10, 1994), the SEC upheld a sanction in which the respondent was barred from associating with any member firm, noting that the respondent’s “dilatatory tactics in response to the NASD’s legitimate inquiries ...[to be,] if not a purposeful attempt to avoid answering, a troubling indifference to his obligations....”

Given the lack of mitigating circumstances and Respondent’s intentional failure to respond, the Hearing Panel finds that a bar from associating with any member in any capacity, as requested by Enforcement, is appropriate under the facts and circumstances of this case.

V. CONCLUSION

The Hearing Panel found that Respondent Brown violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 as alleged in the Complaint.²⁵ The Hearing Panel barred Respondent Brown from association with any member firm in any capacity. The bar shall

²⁴ Answer, pp. 1-2.

²⁵ 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.

become effective immediately upon this Decision becoming the final disciplinary action of the NASD.

Hearing Panel

by: _____
Gary A. Carleton
Hearing Officer

Copies to:

Via Overnight Courier and First Class Mail
John F. Brown

Via First Class Mail and Electronic Transmission
Gary M. Lisker, Esq.
Rory C. Flynn, Esq.