

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision ARB990014.

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

|                            |   |                        |
|----------------------------|---|------------------------|
| _____                      | : |                        |
| DEPARTMENT OF ENFORCEMENT, | : |                        |
|                            | : |                        |
| Complainant,               | : | Non-Summary Suspension |
|                            | : | Proceeding             |
|                            | : |                        |
| v.                         | : | No. ARB990014          |
|                            | : |                        |
|                            | : | <b>DECISION</b>        |
|                            | : |                        |
|                            | : | Hearing Officer - JN   |
|                            | : |                        |
| Respondent.                | : | August 3, 1999         |
| _____                      | : |                        |

**Digest**

NASD Regulation, Inc. notified Respondent \_\_\_\_\_ that his registration would be suspended, in accordance with Article VI, Section 3 of the NASD By-Laws and Rule 9510 et seq., for failing to pay an arbitration award. \_\_\_\_\_ requested a hearing, where he acknowledged the non-payment, contending that he is financially unable to pay the award. The Hearing Officer, sitting as a panel under Rule 9514(b), held that \_\_\_\_\_ failed to demonstrate a bona fide inability to pay and that his registration should, therefore, be suspended. Such suspension shall continue until he provides documentary evidence to NASD Regulation showing that: (1) he has made full payment of the award; (2) the Claimant has agreed to a settlement of the award; or (3) he has filed a bankruptcy petition in a

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United States Bankruptcy Court or the award has been discharged by a United States Bankruptcy Court.

### **Appearances**

William Brice LaHue, Atlanta, Georgia, for the Department of Enforcement.

Rory C. Flynn, Chief Litigation Counsel, Washington, DC, for the Department of Enforcement.

\_\_\_\_\_, *pro se*.

### **Decision**

#### **Introduction**

By letter dated April 15, 1999, the Office of Dispute Resolution (ODR) of NASD Regulation notified Respondent that his NASD registration would be suspended, in accordance with Article VI, Section 3 of the NASD By-Laws and Rule 9150 et seq., as a result of his failure to pay the arbitration award rendered in NASD Arbitration No. 97-00916 (CX-5).<sup>1</sup> By letter, of April 23, 1999, \_\_\_\_\_ requested a hearing (CX-6).

The Hearing Officer (acting as a Hearing Panel under Rule 9514(b)) conducted a telephonic hearing on May 27, 1999.<sup>2</sup> The Department of Enforcement offered eight exhibits (CX 1-8) and called one witness, \_\_\_\_\_, counsel for the arbitration claimants. Respondent offered one exhibit (RX-1) and testified on his own behalf.

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<sup>1</sup>“CX” refers to the Department of Enforcement’s exhibits. “RX” refers to the Respondent’s exhibit.

<sup>2</sup>“Tr.” refers to the transcript of the May 27, 1999 Hearing.

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After reviewing the evidence and arguments presented, the Hearing Officer finds that \_\_\_\_\_ failed to demonstrate the existence of any valid defense for his failure to pay the award. Accordingly, \_\_\_\_\_'s registration is hereby suspended until he provides documentary evidence to NASD Regulation showing the existence of one or more events, as specified in this Decision, that would allow for reinstatement.

### **Facts**

\_\_\_\_\_ has been employed in the securities industry since September of 1980 (Jt. Stip. 1).<sup>3</sup> From October 1994 to September 1996, Respondent was employed in the Compliance Department of member firm \_\_\_\_\_, Inc., and was registered as a general securities principal (Jt. Stip. 1). \_\_\_\_\_ is currently associated with member \_\_\_\_\_, where he has been employed since May 1998 (Jt. Stip. 1).

On March 5, 1999, an NASD arbitration panel issued an award requiring \_\_\_\_\_ to pay the claimant, jointly and severally with two others, the sum of \$12,237 plus \$728 in interest, and to reimburse claimant for the \$120 filing fee (CX-2). Because the other two parties each paid pro rata shares of the award, \_\_\_\_\_ is now responsible for a total \$4,361.67, which remains unpaid (Tr. 19). After the claimant's attorney informed the NASD that Respondent had not paid the award, ODR, on April 15, 1999, wrote to \_\_\_\_\_, advising that his registration was subject to suspension for that non-payment (CX-4, CX-5).

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<sup>3</sup>"Jt. Stip." refers to the Stipulations of Fact and Authenticity of Documents.

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As noted, Respondent's letter of April 23, 1999 requested a hearing to present evidence showing financial hardship and an inability to pay the arbitration award (CX-6). During the proceedings, \_\_\_\_\_ acknowledged that he has not paid the award, has not entered into any settlement agreement with the claimant, has not filed any motion to modify or vacate the award, and has not filed a petition in bankruptcy (Pre-Hearing Tr. 10; Tr. 57-58). Claiming a financial inability to pay the award, Respondent offered a Financial Disclosure Statement (CX-8), an affidavit stating that he could not obtain a loan from his family member (RX-1), and his own testimony. Respondent also stated that the claimant is unwilling to settle for a timed payment plan in order to resolve the outstanding award.

### **Discussion**

Arbitration proceedings are designed to settle disputes efficiently and to avoid expensive litigation. See e.g., In re Peter Thompson Higgins, 51 S.E.C. 865 (1993); Eric M. Diehm, 51 S.E.C. 938 (1994). To that end, NASD Rule 10330(h) requires that "[a]ll monetary awards shall be paid within thirty (30) days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction."<sup>4</sup> Under Article VI, Section 3 of the Association's By-laws and Rule 9510 et seq., the NASD may, after notice and opportunity to be heard, suspend or cancel the registration of a person who fails to comply with an arbitration award or a settlement agreement related to an arbitration.

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<sup>4</sup>For this reason, Respondent's complaint about the creditor's refusal to accept part payment has no legal significance. \_\_\_\_\_ owes all of the money, not just part of it. See e.g., Department of Member Regulation v. Bronzino, Non-Summary Suspension Proceeding (NASD Regulation Bd. June 29, 1998) (citing In re Herbert Garrett Frey, Exchange Act Release No. 390007, 1997 SEC LEXIS 1796 (Sept. 3, 1997); In re Richard J. Lanigan, Exchange Act Release No. 36028, 1995 SEC LEXIS 1899 (July 27, 1995)).

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Any such hearing is necessarily limited. As the NASD told \_\_\_\_\_, an associated person's registration will be suspended, absent a showing that: (1) the award has been paid in full; (2) the parties have agreed to settle; (3) the award has been modified or vacated by a court; (4) an action to vacate or modify the award is pending in court; (5) there is a pending bankruptcy petition or the award has been discharged by a United States Bankruptcy Court; or (6) a bona fide inability to pay exists (CX-5; see also, 63 Fed. Reg. 30,789, 30,790 (1998), reflecting the SEC's explanation and approval of the NASD process).

Respondent has argued that he should not be suspended for failure to pay the Award due to a bona fide inability to pay - a factor to be considered in determining whether the respondent's registration should be suspended or canceled for failure to pay an arbitration award. Department of Member Regulation v. Bronzino, Non-Summary Suspension Proceeding (NASD Regulation Bd. June 29, 1998).<sup>5</sup> However, a respondent claiming such a bona fide inability to pay bears the burden of proof. E.g. In re Herbert Garrett Frey, Exchange Act Release No. 39007, 1997 SEC LEXIS 1796 (Sept. 3, 1997); In re Toney L. Reed, Exchange Act Release No. 37572, n. 12, 62 S.E.C. Docket 1543, 1996 SEC LEXIS 2208, at \*7 (Aug. 14, 1996). Further, an inability to pay defense may be rejected if it appears that the respondent has the ability to divert funds from other expenditures to pay

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<sup>5</sup>Cf. In re Bruce M. Zipper, 51 S.E.C. 928 (1993).

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the award, or could borrow the funds, or could make some meaningful payment toward the award from available assets or income, even if he could not pay the full award.<sup>6</sup>

Measured by these standards, \_\_\_\_\_ has failed to satisfy his burden of proof. His failure to pay is a result of his own asset-allocation decisions, and not a genuine inability to pay the award.<sup>7</sup> His 1998 tax return shows combined taxable income of \$92,641. Although his expenses exceed that figure, they reflect \$59,948 in auto loans and \$47,940 in credit card debt (CX-8). His assets include \$2,500 in furniture and jewelry, and \$38,200 in automobiles. He owes only \$4,361.67 on the award. The record fairly supports the inference that \_\_\_\_\_ chooses to continue to pay credit card bills and make car payments (Tr. 57-58, 62-64)<sup>8</sup>, while paying nothing to the claimant. The Hearing Officer agrees with Enforcement's argument that the NASD does not "reward or condone poor financial decisions. Instead, it has an obligation to promote and enforce the payment of awards rendered in the [A]ssociation's forum." (Tr. 68).

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<sup>6</sup>Herbert Garrett Frey, Exchange Act Release No. 39007; In re Michael H. Novick, Exchange Act Release No. 37503, 62 S.E.C. Docket 1129, 1996 SEC LEXIS 1994, at \*4-6 (July 31, 1996); District Bus. Conduct Comm. for Dist. Number 8 v. Miguel Angel Cruz, Complaint No. C8A930048, 1997 NASD Discip. LEXIS 62, at \*108-12 (NBCC Oct. 31, 1997); District Bus. Conduct Comm. for Dist. Number 7 v. Bruce M. Zipper, Complaint No. C07910138, 1994 NASD Discip. LEXIS 194 (NBCC Oct. 31, 1994), aff'd, Exchange Act Release No. 35606, 58 S.E.C. Docket 235 (April 17, 1995).

<sup>7</sup>See Department of Member Regulation v. Barnes, Non-Summary Suspension Proceeding (NASD Regulation Bd. June 26, 1998) ("Barnes has not shown that he is incapable of cutting expenses or raising additional capital. In essence, Barnes' financial position hinges more on his own asset-allocation choices than a genuine inability to pay."); Department of Member Regulation v. Bronzino, Non-Summary Suspension Proceeding (NASD Regulation Bd. June 29, 1998) (respondent failed to cut expenses or raise capital to pay an arbitration award).

<sup>8</sup>Two of the four cars are operated by \_\_\_\_\_' children, one of whom is a senior in college (Tr. 58-65). That family members and two banks refuse to lend him money (RX-1; Tr. 48-51) is not decisive. That circumstance does not explain his failure to attempt to sell his furniture and jewelry, or at least one of his four automobiles (Tr. 51-52).

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Respondent's alleged "inability to pay" is a result of his own financial choices, rather than a genuine inability to produce the funds necessary to pay the remaining \$4,361.67 from the arbitration award.

**Conclusion**

Accordingly, it is hereby ordered, pursuant to Article VI, Section 3 of the NASD By-Laws and Rule 9514(g), that \_\_\_\_\_'s registration shall be suspended effective as of the date of the issuance of this decision, and that such suspension shall continue until he provides documentary evidence to NASD Regulation showing: (1) he has made full payment of the Award; (2) Claimant has agreed to settle the award; or (3) he has filed a bankruptcy petition in a United States Bankruptcy Court or that the Award has been discharged by a United States Bankruptcy Court.

**SO ORDERED**

\_\_\_\_\_  
Jerome Nelson  
Hearing Officer

Dated: Washington, DC  
August 3, 1999