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NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	
Complainant,	Non-Summary Suspension Proceeding No. ARB980029
v.	Hearing Officer - AHP
	DECISION
	March 29, 1999
Respondent.	

Digest

The Office of Dispute Resolution of NASD Regulation, Inc. (the "ODR"), pursuant to Rule 9513(a), 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 the amount due in settlement of an NASD arbitration. _______ requested a hearing, pursuant to Rule 9514(a), at which he acknowledged that he had not paid the full amount due, but he argued that he should not be suspended because he was financially unable to make the required payments. The Hearing Officer, sitting as the Hearing Panel pursuant to Rule 9514(b), held that _______ adequately demonstrated his bona fide inability to pay the amount due under the terms of the settlement agreement and dismissed the proceeding.

Appearances

Jacqueline D. Whelan, Esq., Regional Counsel, Denver, Colorado, and Rory C. Flynn, Chief Litigation Counsel, Washington, DC, for the Department of Enforcement.

_______________, *pro se*.

DECISION

Introduction

Pursuant to Rule 9513(a), the ODR notified _______, by letter dated November 3, 1998, that his 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 full amount due under the terms of a Stipulation dated March 31, 1998, settling the claims against him and __________ ("________") in NASD Arbitration No. 97-00376 (the "Settlement Agreement"). By letter dated November 23, 1998, _______ requested a hearing pursuant to Rule 9514(a).[1]

A hearing was held, by telephone, on January 8, 1999, at which the Department of Enforcement ("Enforcement") introduced five exhibits (C 1-5), and _______ called ______ _________ to testify on his behalf and introduced two exhibits, including a completed Disclosure of Assets and Financial Information ("Disclosure Form") (L 1). Mr. _______ is a Certified Financial Planner who assisted _______ with the preparation of his Disclosure Form.

[1] The ODR extended _______'s deadline to request a hearing to November 25, 1998, because he alleged that the notice initiating this non-summary suspension proceeding dated November 3, 1998, had not been sent to him by facsimile or overnight commercial courier as required by Rule 9513(a).

After a review of the entire record, the Hearing Officer finds that _______ has satisfactorily shown a bona fide inability to pay the award. Accordingly, this non-summary suspension proceeding will be dismissed.

Facts

On March 31, 1998, _______ and _______ entered into a stipulation of settlement of NASD Arbitration No. 97-00376. (C 3.) Under the terms of the Settlement Agreement, they are required to pay the Claimants $28,000 in 14 equal monthly installments commencing on May 1, 1998. Despite the fact that _______ and _______ were jointly and severally obligated under the terms of the Settlement Agreement, _______ agreed to make all the payments because _______ was not financially able to contribute. (Tr. 34.) In furtherance of their agreement, _______ paid the first three installments in the total amount of $6,000 before he discontinued further payments. No further payments have been made by either _______ or _______.

On November 3, 1998, ODR sent _______ a letter initiating this non-summary suspension proceeding. _______ requested a hearing on the ground that he lacked the financial ability to make the payments required under the terms of the Settlement Agreement.

In support of his claimed inability to pay, _______ introduced his Disclosure Form. (L 1.) Attached to the form were copies of his U.S. Individual Income Tax Returns for 1996 and 1997, a Notice of Federal Tax Lien dated October 23, 1997, and other documents reflecting his debts.

_______'s Disclosure Form shows that currently he has a negative net worth of ($41,213) and that he has earned only $5,000 over the last 12 months from his employment at _____ _______. (L 1, at 1.) His reported income for 1997 was $18,083. Other than some furniture he values at $2,300,

_______ owns no tangible personal property, and he has no other source of funds that he could use to make the payments under the terms of the Settlement Agreement.

According to _______'s CRD record, he is currently associated with _____________, Inc. and registered with the NASD. (C 4, at 1.)

Discussion

A respondent in a non-summary suspension proceeding bears the burden of establishing his bona fide inability to pay an arbitration award or settlement where such inability is raised as a defense to suspension of the respondent's registration for failure to pay the award or settlement.[2] 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 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.[3]

_______ satisfied this burden of proof. Under the terms of the Settlement Agreement, _______ is required to pay the Claimants another $22,000 in monthly installments of $2,000 each. _______'s evidence establishes that his income is insufficient to meet this obligation. _______'s income is only $5,000 per year, which is not enough to make the required payments even though his living expenses

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[2] See In re: Bruce M. Zipper, Exchange Act Release No. 33376, 55 S.E.C. Docket 2002 (Dec. 23, 1993) ("Because the scope of his assets is particularly with Zipper's knowledge, we think Zipper should properly bear the burden of adducing evidence with respect to those assets.").

[3] District Business Conduct Committee for District No. 7 v. Escalator Securities, Inc. Complaint No. C07930034 (NBCC Feb. 19, 1998); District Business Conduct Committee for District No. 8 v. Miguel Angel Cruz, Complaint No. C8A930048 (NBCC Oct. 31, 1997); Herbert Garrett Frey, Exchange Act Release No. 39007 (Sept. 3, 1997); Michael H. Novick, Exchange Act Release No. 37503, 62 S.E.C. Docket 1129 (July 31, 1996); District Business Conduct Committee for District No. 7 v. Bruce M. Zipper, Complaint No. C07910138 (NBCC Oct. 31, 1994), aff'd, Exchange Act Release No. 35606, 58 S.E.C. Docket 235 (April 17, 1995).

are minimal. Moreover, _______ does not have a source of funds that he could use to make a meaningful payment toward the amount due. Accordingly, this proceeding is dismissed.[4]

____
Andrew H. Perkins
Hearing Officer

[4] The Hearing Officer 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.