

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	DECISION
	:	
v.	:	Non-Summary Suspension Proceeding
	:	
	:	No. ARB980019
	:	
	:	Hearing Officer--SW
	:	
	:	
	:	
Respondent.	:	

Digest

In accordance with Article VI, Section 3 of the NASD By-Laws and Procedural Rules 9510 et. seq., _____ (“Respondent”) was advised by a September 24, 1998 letter (“Notice”) that his registration would be suspended for failure to pay \$18,200 plus interest, the balance of the amount specified in an NASD arbitration proceeding (hereinafter the “Award”). By an October 1, 1998 letter, counsel on behalf of Respondent requested a hearing pursuant to Rule 9514(a)(1).

After a review of the entire record in this matter, including exhibits, testimony, and arguments presented at the Hearing held on November 10, 1998, the Hearing Officer concluded that Respondent failed to comply with the Award and that he failed to demonstrate that he met any of the conditions

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision ARB980019.

listed in the Notice, which would excuse his failure to comply.¹ The Hearing Officer also found that Respondent failed to prove that he had a bona fide inability to pay the Award.²

Accordingly, pursuant to Article VI, Section 3 of the NASD By-Laws, and Rule 9514(g), Respondent's registration is suspended, effective as of the date of service of this decision; such suspension shall continue until Respondent, pursuant to Rule 9516, provides documentary evidence to NASD Regulation's Department of Enforcement that reinstatement is appropriate.

Appearances

Rhonda Philopoulos, Counsel, NASD Regulation, Inc., Washington, D.C; James McNamara, Counsel, NASD Regulation, Inc., Washington, D.C.; and, Rory Flynn, Counsel, NASD Regulation, Inc., Washington, D.C., for the Department of Enforcement.

_____, Harrisburg, Pennsylvania, Counsel for _____.

Decision³

Facts

In March of 1995, _____ (“_____”) paid Respondent an up-front forgivable loan of \$243,200 in order to entice him to join _____'s Harrisburg office. (Tr. 9). After

¹ The Notice listed five events that would excuse his previous failure to pay the Award: (1) full payment of the Award; (2) the claimant has agreed to settle the matter; (3) the Award has been modified or vacated by a court; (4) an action to vacate or modify the Award is pending in a court; or (5) a bankruptcy petition is pending in a United States Bankruptcy Court, or the Award has been discharged by a United States Bankruptcy Court.

² A bona fide inability to pay also may be recognized as a valid basis for nonpayment of an arbitration award. The Securities and Exchange Commission recognized in In re Bruce M. Zipper, Exchange Act Rel. No. 33376 (Dec. 23, 1993) that a bona fide inability to pay an arbitration award is an important consideration in determining whether any sanction for failure to pay an arbitration award is excessive or oppressive. Although that case involved the imposition of sanctions stemming from a disciplinary complaint filed for failing to pay the arbitration award, the same standard applies to non-summary suspension proceedings for failure to pay an arbitration award.

³ Hereinafter, references to the transcript of the hearing held on November 10, 1998 will be designated as “Tr.”; references to the Joint Stipulation filed October 20, 1998 will be designated as “Stp.”; references to the exhibits presented by the Enforcement will be designated as “CX-”; and references to the exhibits presented by Respondent will be designated as “RX- .”

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision ARB980019.

Respondent joined _____'s Harrisburg office, disputes arose over whether _____ was fulfilling all of the promises that it had made in recruiting Respondent. (Tr. 10). _____ terminated Respondent's employment in April 1996. (Tr. 10). _____ subsequently filed an arbitration claim seeking repayment in full of the \$243,200 loan. (Tr. 10). On August 19, 1997, an Award ordering Respondent to pay _____ \$243,200 was issued in NASD Arbitration Proceeding No. 96-04224. (Stp. II. A. 1).

Respondent made an initial \$115,000 payment on the Award in late October 1997. (Tr. 11). On December 29, 1997, Respondent signed a promissory note to _____ for the balance of \$128,200. (Stp. II. A. 5). In February of 1998, he paid another installment of \$100,000. (Tr. 11). Respondent subsequently paid another \$10,000 after he received his 1997 federal income tax refund. By early 1998, the remaining balance on the Award was \$18,200.⁴ (Tr. 12).

Counsel for _____ advised NASD Regulation, Inc. ("NASDR") in an August 22, 1998 letter that Respondent had not paid the balance owed pursuant to the Award.⁵ On September 24, 1998, the NASDR Office of Dispute Resolution issued the Notice to Respondent informing him that his registration would be suspended on October 21, 1998, unless he could show that one or more of the events listed in the Notice had occurred.⁶ By an October 1, 1998 letter, Respondent requested a hearing.⁷

⁴ Counsel for Respondent represented that _____ verbally acknowledged that it owes Respondent \$4,431 for 30 shares of _____ stock owned by Respondent that _____ redeemed and the proceeds of which it retained without Respondent's consent. (Tr. 12). Nevertheless, because Respondent stipulated that \$18,200 plus interest was due and payable, the Hearing Officer will not consider any arguments regarding the stipulated amount due. (Stp. I. G.).

⁵ RX-6.

⁶ Exhibit 1 to RX-1.

⁷ RX-1.

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision ARB980019.

The Department of Enforcement and Respondent submitted pre-hearing submissions consisting of exhibits and joint stipulations, including Respondent's stipulation that he failed to pay the \$18,200 plus interest due and payable. The Department of Enforcement also submitted 11 exhibits, including Respondent's statement of financial condition, Respondent's Form 1040s for 1995, 1996, and 1997, and other financial information provided by Respondent, and Respondent submitted 14 exhibits, including information regarding the negotiations with _____. Respondent was the sole witness at the Hearing.

The evidence and the joint stipulations establish that Respondent was obligated to pay \$18,200 and failed to pay the Award.

Discussion

Arbitration proceedings are designed to settle disputes efficiently and avoid expensive litigation. To that end, the NASD has developed an arbitration forum with a comprehensive set of procedural rules for the resolution of disputes. As approved by the Securities and Exchange Commission, the NASD Code of Arbitration Procedure contains rules for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member between or among members or associated persons and public customers, or others.⁸

To ensure compliance with arbitration awards, the NASD adopted rules that allow it to take action against members and/or associated persons for failing to abide by such awards. Rule 9511(a)(2)(B) provides, in pertinent part, that the NASD may, after notice and opportunity to be heard, "suspend or cancel ... the registration of a person for ... failure to comply with an arbitration award or a settlement agreement related to an arbitration or mediation under Article VI, Section 3 of the NASD

⁸ See Rule 10101 of the NASD Code of Arbitration Procedure.

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision ARB980019.

By-Laws.” Article VI, Section 3 of the NASD By-Laws, in turn, provides that the NASD may suspend or cancel the registration of any person “for failure to comply with an award of arbitrators properly rendered pursuant to the Rules of the Association.”⁹

Under Rule 9510 et. seq. and Article VI, Section 3 of the By-Laws, respondents in NASD Regulation non-summary suspension proceedings have the burden of demonstrating why they should not be suspended for failing to comply with an arbitration award.¹⁰ To prevent suspension or cancellation, a respondent must prove that (1) he has made full payment of the award; (2) the parties have agreed to settle the action; (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) a bankruptcy petition is pending in a United States Bankruptcy court or the award has been discharged by a United States Bankruptcy Court; or (6) a bona fide inability to pay exists. A respondent’s defenses to suspension or cancellation are limited to the six above-mentioned events.

The issue in this proceeding is whether Respondent’s registration should be suspended for failure to pay the Award. Respondent stipulated that he has not paid the Award. He also stipulated that he does not have a bankruptcy petition pending in a United States Bankruptcy Court, and that the Award has not been discharged by bankruptcy proceedings. Respondent argues, however, that he attempted in “good faith” to settle the matter, and that he does not have the ability presently to pay the

⁹ In addition, NASD Code of Arbitration Procedure IM-10100(d) provides that the failure to honor an award, or comply with a written and executed settlement, where a timely motion has not been made to vacate or modify the award or where such motion has been denied, may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Conduct Rule 2110.

¹⁰ Department of Enforcement v. Michael A. Bronzino, Non-Summary Suspension Proceeding (NBCC June 29, 1998) (Respondent’s registration was suspended when Respondent failed his burden of proof).

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision ARB980019.

Award. Therefore, Respondent believes his registration should not be suspended. The Hearing Officer disagrees.

First, Respondent's contention that his "good faith," albeit unsuccessful, attempt to settle this matter somehow excuses his failure to pay the Award is without merit.¹¹ Respondent cannot compel, and the Hearing Officer has no authority to order, _____ to accept Respondent's installment payment plan. Indeed, Rule 10330(h) of the Code of Arbitration Procedure 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." As a result, Respondent is responsible for promptly paying the entire award. To hold otherwise would frustrate the goals of speed and efficiency that are the hallmarks of arbitration, and would undermine the integrity of the securities arbitration process.

Second, Respondent has the burden of demonstrating that he is unable to pay the Award because he has insufficient income and little or no assets.¹² Respondent presented information showing his average monthly income to be \$6,000 and his average monthly expenses to be \$9,000. (Tr. 36). Respondent testified that he has not been able to rebuild his business to its mid-1990s level. (Tr. 18). He has been delinquent consistently in his payments on his principal obligations. (Tr. 18). In 1998, he borrowed \$8,800 from his 401(k) to pay current bills, including his mortgage and utility bills, and he has depleted the balance in his IRA accounts. (Tr. 18). He has not bought a new suit in three years. (Tr. 20). Although, the Hearing Officer finds that Respondent does not have the current cash flow to pay the Award, the inquiry does not end there.

¹¹ See Department of Member Regulation v. Milton R. Barnes, Non-Summary Suspension Proceeding (NBCC June 26, 1998).

¹² See In re Toney L. Reed, Exchange Act Rel. No. 37572, at 5 n. 12 (August 14, 1996).

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision ARB980019.

Respondent's Statement of Financial Condition showed assets of \$621,400 and liabilities of \$565,000 resulting in a positive net worth of \$56,400. Because Respondent included \$14,000¹³ owed to _____ in his \$565,000 liabilities calculation, the Hearing Officer has adjusted Respondent's net worth upward to \$70,400. An additional upward adjustment of his net worth is warranted because of the increased value of 20 units of Mendik partnership interest owned by Respondent. Respondent listed the value of the 20 units of Mendik partnership interest as \$1,000. Enforcement's counsel provided information, however, which Respondent did not dispute, that the 20 units of Mendik partnership interest would be receiving a distribution of \$3,200.¹⁴ (Tr. 32). This increases Respondent's net worth an additional \$2,200 from \$70,400 to \$72,600. Although Respondent testified he has no additional borrowing capacity using his home as collateral, Respondent has other assets, including two automobiles, that may be liquidated to pay the Award. (Tr. 21, 24). Accordingly, with a net worth of approximately \$72,600, the Hearing Officer finds that Respondent has assets to pay the \$18,200 Award.

Respondent made extraordinary efforts to pay the \$243,200 arbitration award imposed on him on August 19, 1996. Respondent depleted his assets and borrowed extensively to pay his obligation as quickly as possible. Respondent made a reasonable offer to pay the Award by August 1999.¹⁵ Nevertheless, with some painful asset reallocations, Respondent has the ability to pay the Award presently.

¹³ The \$14,000 approximates the remainder after deducting the value of the 30 shares of _____ stock, which _____ owes to Respondent, from \$18,200, the subject of this proceeding.

¹⁴ Respondent expressed a willingness to pay the entire \$3,200 distribution to _____. (Tr. 32).

¹⁵ Respondent presented evidence that he had offered to pay 90% of his 1998 tax refund and to remit whatever the balance was by the anniversary date of the Award in August 1999. (Exhibit 2 to RX-1). Respondent had previously

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision ARB980019.

Accordingly, the Hearing Officer finds that Respondent failed to comply with the Award. and failed to prove any of the six defenses contemplated by Article VI, Section 3 of the By-Laws and Rules 9510 et. seq. Respondent has therefore failed to demonstrate why suspension should not be imposed.

Conclusion

In light of the foregoing, pursuant to Article VI, Section 3 of the NASD By-Laws and Procedural Rule 9514(g), Respondent's registration is suspended effective upon service of this decision.¹⁶ Under Rule 9516, Respondent may file a written request for reinstatement on the ground that (1) he has complied with the Award; (2) the parties have agreed to modify their Award; (3) the Award has been modified or vacated by a court; or (4) a bankruptcy petition is pending in a United States Bankruptcy Court, or the Award has been discharged by a United States Bankruptcy Court.

Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
February 1, 1999

paid 90% of his 1997 tax refund, approximately \$10,000, to _____, and anticipated that his 1998 tax refund would be approximately the same.

¹⁶ The Hearing Officer considered all of the arguments of the Parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.