

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision DFC990003.

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Rule 9530 Suspension
	:	Proceeding
	:	
v.	:	No. DFC990003
	:	
	:	DECISION
	:	
	:	Hearing Officer - SW
	:	
Respondent.	:	October 6, 1999
	:	

Digest

The NASD Finance Department notified Respondent _____ (“Respondent”) that his registration would be suspended, in accordance with the Rule 9530 Series, for failing to pay a forum fee and a postponement fee assessed on Respondent as part of an arbitration award. Respondent requested a hearing, at which he acknowledged his failure to pay the fees, but explained that he was financially unable to pay the fees.

The Hearing Officer held that Respondent failed to demonstrate a bona fide inability to pay the \$833.34 in fees, and, therefore, the Hearing Officer suspended Respondent’s registration. Such suspension will continue until Respondent provides documentary evidence to the Office of Hearing Officers that: (1) he has paid the fees; (2) the NASD Finance Department has agreed to a payment schedule; or (3) he has filed a bankruptcy petition in a United States Bankruptcy Court or the fees have been discharged by a United States Bankruptcy Court.

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Appearances

William Brice La Hue, Regional Counsel, Atlanta, Georgia, for the Department of Enforcement.

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

_____, pro se.

Decision

Introduction

The NASD Finance Department (“Finance”) notified Respondent in a July 12, 1999 letter that his NASD registration would be suspended, in accordance with the Rule 9530 Series, because he failed to pay the fees imposed in connection with NASD Arbitration No. 97-00916.¹ (CX-5). On December 28, 1998, the Securities and Exchange Commission approved a rule change which deleted the non-summary proceedings for failure to pay fees and other charges from the Rule 9510 Series and provided for a hearing by a Hearing Officer pursuant to a new Rule 9530 Series, which became effective on March 26, 1999.²

¹ “CX” refers to the Department of Enforcement’s exhibits. “RX” refers to the Respondent’s exhibit. The Securities and Exchange Commission initially approved the suspension or cancellation of the registration of an associated person in the event of nonpayment of fees, dues, or assessments in August 1991. Previously, the failure to pay forum fees associated with the arbitration process could result in cancellation of a firm’s membership but no similar remedy was available for associated persons. In adopting the change, the NASD Board stated that the rule would protect the integrity of the arbitration process and the marketplace and provide uniformity in the treatment of associated persons failing to pay fees. Notice to Members 91-61 (May 1991).

² Notice to Members 99-16 (February 1999)

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In response to the July 12 letter, Respondent requested a hearing in a July 17, 1999 letter. (CX-6). The Hearing Officer conducted a telephonic hearing on August 24, 1999.³ The Department of Enforcement (“Enforcement”) offered eight exhibits and called Respondent as a witness. Respondent offered one exhibit and testified on his own behalf.

Facts

Respondent has been employed in the securities industry since September 1980.⁴ (Stip. at 1). Respondent was employed in the Compliance Department of, and registered as a general securities principal with, _____, Inc. from October 1994 to September 1996. (Stip. at 1; CX-1, 4). Most recently, Respondent was registered with _____ from June 12, 1998 to July 15, 1999; he has been unemployed since July 15, 1999. (Stip. at 1).

In connection with his employment at _____, an NASD arbitration panel issued an arbitration award, on March 5, 1999, requiring Respondent to pay the claimant, jointly and severally with two others, the sum of \$12,237 plus \$728 in interest, and to reimburse the claimant’s \$120 filing fee.⁵ (Stip. at 6-8).

In addition Respondent was ordered to pay, jointly and severally with two other individuals and a corporate entity, the sum of \$1,000 representing the forum fee in the arbitration and to a pay a

³ “Tr.” refers to the transcript of the August 24, 1999 Hearing.

⁴ “Stip.” refers to the Stipulations of Fact and Authenticity of Documents filed by the Parties on August 13, 1999.

⁵ In a separate Non-Summary Suspension Proceeding (ARB990014) under the Rule 9510 Series, the NASD, in a decision dated August 3, 1999, suspended Respondent’s registration until: (1) he has made full payment of the arbitration award; (2) he has reached an agreement for payment with the claimant; or (3) he has filed a petition in the a

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postponement fee in the amount of \$500 (collectively the “fees”). (Stip. at 9-10). Because the other parties paid their pro rata share of the fees, Respondent is responsible for fees totaling \$833, which remain unpaid. (Tr. 11-12).

Finance provided Respondent with a final statement of account detailing the outstanding fees assessed against him in an April 13, 1999 letter. (Stip. at 13; CX-4). Finance wrote Respondent on July 12, 1999, advising him that his registration was subject to suspension for non-payment of fees. (Stip. at 16; CX-5).

Respondent’s July 17, 1999 response requested a hearing. (Stip. at 23; CX-6). At a pre-hearing conference held on August 3, 1999, Respondent indicated he would present evidence showing financial hardship and an inability to pay the fees. (Stip. at 27; Tr. 10). Respondent acknowledged that he had not paid the fees, had not entered into any installment payment agreement with Finance, had not filed any motion to modify or vacate the award, had not filed a petition in bankruptcy, and that the arbitration award and the fees had not been discharged in any bankruptcy proceeding. (Stip. at 21-22; Tr. 13-14).

Respondent offered an updated Financial Disclosure Statement as of August 12, 1999 and testimony that he could not obtain a loan from his family members or banks to support his claim of a financial inability to pay the fees. (CX-8; Tr. 15). Respondent also stated that it was his understanding

United States Bankruptcy Court or the arbitration award has been discharged by a United States Bankruptcy Court. (CX-9).

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that Finance was unwilling to enter into an installment plan for amounts less than \$5,000, although he acknowledged that he had never approached Finance to confirm his understanding. (Tr. 10).

Discussion

Arbitration proceedings are designed to settle disputes efficiently and to avoid expensive litigation.⁶ NASD Rule 10330(g) requires that “[f]ees and assessments imposed by the arbitrator ... shall be paid immediately upon the receipt of the award by the parties.” Under the Rule 9530 Series, the NASD may issue a written notice suspending or canceling the registration of a person who has failed to pay a fee, due, assessment or other charge, or submit a required report or information related to such payment. Within five days after the date of service of a notice issued under Rule 9531, the person served with such notice may file with the Office of Hearing Officers a written request for a hearing.

Respondents in NASD Non-Summary Suspension Proceedings have the burden of demonstrating why they should not be suspended.⁷ To prevent suspension or cancellation, a respondent must prove that: (1) the fees have been paid in full; (2) Finance has agreed to an installment plan; (3) an action to vacate or modify the underlying arbitration award or fees is pending in court; (4) there is a pending bankruptcy petition or the underlying arbitration award and fees have been discharged by a United States Bankruptcy Court, or (5) a bona fide inability to pay exists. (CX-5).

⁶ See In re Peter Thompson Higgins, Exchange Act Release No. 33325, (December 10, 1993), 1993 SEC LEXIS 3439 (1993).

⁷ Department of Enforcement v. Michael A. Bronzino, Non-Summary Suspension Proceeding, 1998 NASD Discip. LEXIS 54 (1998) (Respondent’s registration was suspended when Respondent failed his burden of proof).

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Respondent argued that he should not be suspended for failure to pay the fees due to a bona fide inability to pay. A respondent who claims a bona fide inability to pay bears the burden of proof.⁸ 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 amount.⁹

In this proceeding, Respondent provided evidence that his liabilities exceeded his assets. (CX-8, 2). However, the evidence also showed that Respondent had an income of \$94,000 for the last 12 calendar months. (Tr. 18; CX-8, 1). Although Respondent currently is unemployed, Respondent's wife is still gainfully employed and earns approximately \$48,000 annually. (Tr. 18). In addition, Respondent anticipates receiving unemployment benefits in excess of \$200 a week for a limited period of time. (Tr. 16). From May 12, 1999 to August 12, 1999, Respondent made payments of at least \$4,081 on his automobile loans decreasing his liabilities from \$59,948 to \$55,867. (Tr. 20; CX-8, 2).

Measured by these standards, the Hearing Officer found that Respondent failed to satisfy his burden of proof. Based on Respondent's combined family income, he had the means to satisfy the \$833.34 in fees. The updated financial statement, reflecting a decline in certain liabilities, supports the

⁸ District Bus. Conduct Comm. for Dist. No. 7 v. Bruce M. Zipper, Complaint No. C07910138, 1994 NASD Discip. LEXIS 194 (1994), aff'd, Exchange Act Release No. 35606, (April 17, 1995).

⁹ District Bus. Conduct Comm. for Dist. No. 1 v. Glen McKinley Richards, III, Complaint No. C01970017, 1998 NASD Discip. Lexis 48 (1998) (The National Advisory Counsel found that, based on his personal and combined family income of \$19,709.75 for Richards and \$27,940 for his wife for 1996, Richards was not without means to satisfy the \$5,500 arbitration award.)

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inference that Respondent chooses to pay credit card bills and make car payments, while paying nothing to Finance. (Tr. 19). The Hearing Officer found that Respondent's failure to pay the fees was the result of his own asset-allocation decisions, and not a genuine inability to pay the award.¹⁰

The Hearing Officer sympathizes with the difficult financial decisions that Respondent has had to make. However, it is clear that Respondent, after reviewing his other obligations, chose not to pay the fees, rather than having an inability to pay the fees. 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 \$833.34 in fees.

Conclusion

After reviewing the evidence and arguments presented, the Hearing Officer found that Respondent failed to demonstrate any valid defense for his failure to pay the fees. Accordingly, it is hereby ordered that Respondent'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 the Office of Hearing Officers showing: (1) he has made full payment of the fees; (2) Finance has agreed to

¹⁰ Herbert Garrett Frey, Exchange Act Release No. 39007, 1997 SEC LEXIS 1796 (1997); District Bus. Conduct Comm. for Dist. No. 7 v. Bruce M. Zipper, Complaint No. C07910138, 1994 NASD Discip. LEXIS 194 (1994), aff'd, Exchange Act Release No. 35606, (April 17, 1995).

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an installment plan; or (3) he has filed a bankruptcy petition in a United States Bankruptcy Court or that the fees have been discharged by a United States Bankruptcy Court.¹¹

SO ORDERED

Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
October 6, 1999

¹¹ 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.