

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

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DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C9A980021
v.	:	
	:	<b>Hearing Panel Decision</b>
ROBERT J. KENDZIERSKI,	:	
Erie, PA	:	
	:	
(CRD #1290761),	:	Hearing Officer - GAC
	:	
Respondent.	:	Date: December 15, 1998
	:	
	:	

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**DIGEST**

The Department of Enforcement (“Enforcement”) filed a Complaint alleging that Respondent Robert J. Kendzierski (“Respondent” or “Kendzierski”) violated NASD Conduct Rules 2110 and 2330(a) by converting for his own use \$6,000 in funds given to him by a customer for deposit into that customer’s interest-bearing insurance policy maintained at Prudential. The Complaint specifically alleged that in April, 1996 and February, 1997, Respondent Kendzierski, while registered with the Association at Pruco Securities Corporation, engaged in two such conversions in a single customer account.

The Hearing Panel found that Kendzierski converted the customer’s funds for his own use, in violation of NASD Conduct Rules 2110 and 2330(a). The Hearing Panel censured the Respondent, fined him \$80,000, and barred him from association with any member firm in any capacity.

Appearances

Michael J. Newman, Esq., Regional Counsel, Philadelphia, Pennsylvania, (Rory C. Flynn, Esq., Washington, DC, Of Counsel), on behalf of the Department of Enforcement.

Robert J. Kendzierski, *pro se*.

**DECISION**

**I. PROCEDURAL BACKGROUND**

A. Complaint

Enforcement filed a single cause Complaint on June 11, 1998. The Complaint alleges that on April 23, 1996, customer J.S. gave Kendzierski a check for \$5,000 to deposit in an interest-bearing insurance policy maintained at Prudential. J.S. made the check payable to “Prudential,” but Kendzierski altered the check by crossing out “Prudential” and writing his own name on the payee line of the check. Kendzierski then endorsed J.S.’s check and deposited the funds into his personal bank account. According to the Complaint, two days later, Kendzierski used a cashier’s check to deposit \$4,000 into J.S.’s account at Prudential.

The Complaint also alleges that on February 14, 1997, J.S. gave Kendzierski another check for \$5,000 to deposit into J.S.’s account at Prudential. Instead of depositing this check, Kendzierski again crossed off the name “Prudential” and wrote his own name as the payee on the check. Kendzierski then deposited the funds from that check into his personal bank account.

According to the Complaint, such actions constitute a violation of NASD Conduct Rules 2110 and 2330(a) by Respondent Kendzierski.

B. Answer

Respondent filed an Answer on July 6, 1998. Respondent's Answer admitted the underlying violative acts, wherein he stated: "In response to [the] Complaint I am not denying that I did wrong. I did cross out Prudential and put in my name and made deposits into my account." Kendzierski claimed that in 1996, he deposited \$4,000 in customer J.S.'s account on the same day that he deposited J.S.'s \$5,000 check into his personal account.

C. The Hearing

The Hearing was held in Pittsburgh, Pennsylvania, on September 10, 1998, before a Hearing Panel composed of the Hearing Officer, a current member of the District 9 Committee, and a former member of the District 9 Committee. The Respondent was the only witness to testify at the Hearing.

The Hearing Officer admitted into evidence 5 exhibits offered by Enforcement without objections from the Respondent. (CX 1 - 5).<sup>1</sup> The Respondent offered no exhibits. The Parties jointly submitted a Joint Stipulation of Facts ("Stipulated Facts"), dated August 3, 1998, which was marked by Complainant as CX 1. It is referenced in detail in the Findings of Fact portion of this Decision.

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<sup>1</sup> References to Enforcement's exhibits admitted at the Hearing are designated "CX."

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent Kendzierski was employed by Pruco Securities Corporation (“Pruco”) in Erie, Pennsylvania, from February 1984 through March 1997. He was registered by Pruco with the NASD as an Investment Company Products/Variable Contracts Representative.<sup>2</sup> At Pruco, Kendzierski sold an equal mix of insurance products and securities, primarily variable life and variable annuities.<sup>3</sup> Presently, Kendzierski is associated with Investors Capital Corporation, a member firm.<sup>4</sup> Kendzierski has no disciplinary history.<sup>5</sup>

Customer J.S. is an 80 year old widower residing in Erie, Pennsylvania. In 1996, J.S. had been Kendzierski’s client for approximately 12 years, and was one of his most productive accounts.<sup>6</sup> Over that period of time, Kendzierski had sold J.S. life insurance, annuities and mutual funds.<sup>7</sup> Kendzierski became friends with J.S. and occasionally ate meals at J.S.’s house.<sup>8</sup>

On April 23, 1996, J.S. gave Kendzierski a check for \$5,000 to deposit in an interest-bearing insurance policy that J.S. maintained at Prudential. The check was made

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<sup>2</sup> Stipulated Facts, ¶¶ 1, 2. Kendzierski holds Series 6 and Series 63 licenses.

<sup>3</sup> Stipulated Facts, ¶ 2.

<sup>4</sup> Stipulated Facts, ¶ 1.

<sup>5</sup> Stipulated Facts, ¶ 1.

<sup>6</sup> Stipulated Facts, ¶ 3.

<sup>7</sup> Stipulated Facts, ¶ 3.

<sup>8</sup> Stipulated Facts, ¶ 3.

payable to “Prudential.” Kendzierski altered the check by drawing a line through the word “Prudential” on the payee line and writing his own name on the payee line of the check.<sup>9</sup> Kendzierski then endorsed J.S.’s check and deposited it into his personal bank account.<sup>10</sup> On April 25, 1996, Kendzierski obtained a cashier’s check for \$4,000, which he deposited into J.S.’s Prudential account. During that time period, Kendzierski was experiencing financial problems due to poor sales productivity.<sup>11</sup> Respondent used the remaining \$1,000 from J.S.’s check to pay his rent which was two months in arrears.<sup>12</sup>

Kendzierski stipulated prior to Hearing that J.S. never authorized him to change the payee line of the check or to receive any of these funds.<sup>13</sup> At Hearing, however, Kendzierski offered conflicting testimony on this issue. Kendzierski stated that he asked J.S. if he could borrow \$1,000 and that J.S. agreed to lend him the money.<sup>14</sup> Kendzierski then testified that “I did take it upon myself to change the payee line of the check for personal use of \$1,000.”<sup>15</sup> Regarding arrangements he had made with J.S. to obtain the \$1,000 loan, Kendzierski testified that J.S. “just said take it out of the \$5,000, that’s all he

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<sup>9</sup> Stipulated Facts, ¶ 4.

<sup>10</sup> Stipulated Facts, ¶ 5.

<sup>11</sup> Stipulated Facts, ¶ 5.

<sup>12</sup> Stipulated Facts, ¶ 5.

<sup>13</sup> Stipulated Facts, ¶ 6.

<sup>14</sup> Hearing Tr. p. 26.

<sup>15</sup> Hearing Tr. p. 26.

said.... Or take it out -- he didn't exactly put it that way. He said take it out of what I just gave you.”<sup>16</sup> Kendzierski, however, offered no documents evidencing a loan.

Kendzierski was questioned several times about the inconsistency of his testimony at Hearing and the Stipulated Facts. Each time he was questioned, Kendzierski agreed to the facts set forth in the Stipulated Facts.<sup>17</sup> In reviewing the evidence, the Hearing Panel found that there was no such agreement between Kendzierski and J.S. that permitted Kendzierski to borrow \$1,000 from J.S. in this manner. Thus, the Hearing Panel found that Kendzierski converted \$1,000 without the permission or authority of J.S.<sup>18</sup>

On February 14, 1997, Kendzierski received another check for \$5,000 from J.S. The check was made payable to “Prudential” and was intended for deposit into J.S.’s account at Prudential.<sup>19</sup> Again, without receiving J.S.’s permission, Kendzierski drew a line through the word “Prudential,” wrote his own name on the payee line, endorsed the check and deposited the \$5,000 into his personal bank account.<sup>20</sup> Kendzierski used this money to pay personal expenses.<sup>21</sup>

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<sup>16</sup> Hearing Tr. pp. 26-27. Kendzierski had also informed NASD and Prudential investigators, prior to the filing of the Complaint, that J.S. had agreed to lend him \$1,000. Hearing Tr. pp. 29-30.

<sup>17</sup> Kendzierski stated, “I have agreed to it, and I don’t want to change anything, so that’s fine.” Hearing Tr. p. 28. When questioned about it again, Kendzierski stated, “[W]e have a Stipulation of fact here, all right. I signed it, I agree to everything that’s in here the way it is. You needn’t go any further.” Hearing Tr. p. 30.

<sup>18</sup> In March 1997, Kendzierski informed Prudential investigators that the \$1,000 he had taken from J.S. was a loan that had been paid back, by way of a deposit to the J.S. account. CX 2. Kendzierski later admitted that he had not reimbursed Kendzierski for the \$1,000 he had kept. Hearing Tr. p. 44. Kendzierski finally reimbursed the J.S. account for the \$1,000 in April 1997.

<sup>19</sup> Stipulated Facts, ¶ 7.

<sup>20</sup> Stipulated Facts, ¶ 8.

<sup>21</sup> Stipulated Facts, ¶ 8.

At the Hearing, Kendzierski admitted that he deposited the check from J.S. into his personal account, and that the money was not a loan.<sup>22</sup> In attempting to justify his actions, Kendzierski offered inconsistent explanations. He stated that he felt bad about losses incurred in J.S.'s account. Therefore, he put the money into his own account because he "wanted to give [J.S.] more money and deposit it into [J.S.'s] account."<sup>23</sup> When asked again why he put J.S.'s money into his own personal account, Kendzierski answered, "Stupidity. I don't know."<sup>24</sup>

Kendzierski argued that after depositing the \$5,000 into his account, he wrote out the check for \$5,050 just a few days later.<sup>25</sup> The Hearing Panel, however, finds that Kendzierski did not attempt to repay the \$5,000 in February 1997 as he claims.<sup>26</sup> Instead, Kendzierski converted the \$5,000 for his own use and then waited until after he learned that he was under investigation by his firm before back-dating the check for \$5,050.

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<sup>22</sup> Hearing Tr. p. 63.

<sup>23</sup> Hearing Tr. p. 38.

<sup>24</sup> Hearing Tr. p. 39.

<sup>25</sup> Hearing Tr. pp. 21-22.

<sup>26</sup> The Hearing Panel found that Kendzierski lacks credibility on this issue. In March 1997, J.S. reviewed his canceled check dated February 14, 1997, and noticed that the payee line had been altered, as described above. J.S. contacted Pruco, which initiated an internal investigation. On March 26, 1997, an investigator from Prudential questioned Kendzierski regarding two checks from J.S. that had been altered. On April 2, 1997, Prudential received a check from Kendzierski in the amount of \$5,050. The check, dated February 19, 1997, was made payable to Prudential and was intended to repay J.S. Hearing Tr. pp. 19-24.

Based on the foregoing, the Hearing Panel concluded that Kendzierski converted \$6,000 given to him by a customer, J.S., as specified in the Complaint, in violation of NASD Conduct Rules 2110 and 2330(a).<sup>27</sup>

### III. SANCTIONS

The Hearing Panel reviewed the principal considerations outlined in the NASD Sanction Guidelines in determining appropriate sanctions. Although the Respondent has no prior disciplinary history, his violative actions are extremely serious. Not only did Kendzierski convert funds on two occasions, but he kept these funds, in one case, for nearly a year before eventually returning the funds. In the interim, he lied to investigators about how he took the money, and about having already repaid it. In a similar case, where money had been converted and was not returned until the conversion was discovered, the Securities and Exchange Commission noted,

As we have previously stated, “[s]uch misconduct is extremely serious and patently antithetical to the ‘high standards of commercial honor and just and equitable principles of trade’ that the NASD seeks to promote.”<sup>28</sup>

The sanction for conversion under the Guidelines calls for fines ranging from \$10,000 to \$100,000 plus five times the amount converted. It also calls for a bar, regardless of the amount converted. Having considered the factors in determining an appropriate sanction, including mitigating factors, the Hearing Panel determined that a sanction reflecting the serious nature of the violation must be imposed. The Hearing Panel

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<sup>27</sup> Respondent also testified to other acts unrelated to customer J.S. Kendzierski testified that “I’ve done things that I should not have done.... I paid premiums for people, and that I shouldn’t have done.” Hearing Tr. p. 40. The Hearing Panel did not consider these other admissions in reaching a determination as to liability or sanctions, since they were not charged in the Complaint.

therefore imposes sanctions of a censure, a fine of \$80,000, and a bar from association with any member firm in any capacity. The fine consists of an underlying fine of \$50,000 plus five times the amount converted, which equals \$30,000, for a total fine of \$80,000. Kendzierski is also assessed \$504.60 consisting of a \$300 administrative fee and \$204.60 for the cost of the Hearing transcript.

#### IV. CONCLUSION

The Hearing Panel found that Respondent Kendzierski converted \$6,000 in funds given to him by a customer, J.S., as specified in the Complaint, in violation of NASD Conduct Rules 2110 and 2330(a). The Hearing Panel censured Kendzierski, fined him \$80,000, and barred him from association with any member firm in any capacity. The Hearing Panel also assessed costs against Respondent Kendzierski in the amount of \$504.60.<sup>29</sup> The sanctions shall become effective on a date specified by the NASD in the future, but not earlier than 45 days from the date of this decision.

Hearing Panel

by: \_\_\_\_\_  
Gary A. Carleton  
Hearing Officer

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<sup>28</sup> Joel Eugene Shaw, Exchange Act Rel. No. 34509 (August 10, 1994), *citing* Wheaton D. Blanchard, 46 S.E.C. 365, 366 (1976). In Shaw, the Respondent was censured, fined and barred from association with any member firm.

<sup>29</sup> 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.

Copies to:

Via First Class Mail

Michael J. Newman, Esq.

Rory Flynn, Esq.

Via First Class and Certified Mail

Robert J. Kendzierski