

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C10980041
	:	
v.	:	
	:	
	:	DECISION
HAROLD LEE JENKINS	:	
(CRD #1821631)	:	Hearing Panel
Bronx, New York	:	
	:	
	:	December 14, 1998
	:	
Respondent.	:	

Digest

The Department of Enforcement filed a two-count Complaint alleging that Respondent Harold Lee Jenkins violated NASD Rules 2110 and 2330 by converting the funds of several of his customers, and violated NASD Rules 2110 and 8210 by failing to appear for two on-the-record interviews with the NASD. Respondent submitted an Answer to the Complaint in which he admitted the allegations and waived his right to a hearing. Based on the Complaint, the Answer, and the written submissions of the Department of Enforcement, the Hearing Panel held that, as alleged in the Complaint, Respondent violated (1) NASD Rules 2110 and 2330 by converting the funds of several customers and (2) NASD Rule 2110 and Procedural Rule 8210 by failing to appear for two on-the-record interviews. The Hearing Panel censured Respondent, fined him \$225,000 for the conversion and \$25,000 for the failure to appear, and ordered him to pay restitution in the amount of \$28,751.90. In addition, Respondent was permanently barred from associating with any member firm in any capacity for each of the violations.

Appearances

David M. Jaffe, Regional Counsel, New York, New York, for the Department of Enforcement.

Leonard Amoruso, of counsel, New York, New York, for the Department of Enforcement.

Anita Zigman, of counsel, New York, New York, for the Department of Enforcement.

Rory C. Flynn, of counsel, Washington, DC, for the Department of Enforcement.

Harold Lee Jenkins pro se.

DECISION

I. Procedural Background

The NASD Regulation, Inc. (“NASDR”) Department of Enforcement (“Enforcement”) filed the Complaint in this proceeding against Respondent Harold Lee Jenkins on June 24, 1998. The Complaint was served on Respondent on June 23, 1998 at his last known address as reflected in the records of the NASD Central Registration Depository (the “CRD address”). On July 30, 1998, Respondent filed an Answer in this proceeding, in which he said he was “admitting to the charges filed in the complaint,” and he was waiving “all rights to [a] hearing.”

On August 17, 1998, the Hearing Officer issued an order directing Enforcement to file and serve its case against Respondent by September 23, 1998, including “all evidence ... that Enforcement considers necessary to support the sanctions sought, including mitigating or aggravating factors.”¹ In the same order, the Hearing Officer gave Respondent until October 5, 1998, within which to file and serve “any opposition or other response to Enforcement’s

¹ The order provided that because of Respondent’s admission of liability, additional evidence supporting the conversion and the failure to respond allegations would not be required.

submissions, which should include any argument or evidence that Respondent wishes the Hearing Panel to consider.”

Enforcement served its submissions on Respondent on September 23, 1998, and filed them on September 25, 1998. The submissions included a declaration from David M. Jaffe, Regional Counsel for Enforcement and 11 exhibits.² Respondent filed nothing in response to Enforcement’s submissions. Accordingly, the Hearing Panel, composed of two current members of the District Committee for District 10 and the Hearing Officer, considered this matter on the basis of the Complaint, Respondent’s Answer, and Enforcement’s submissions.

II. Findings of Fact and Conclusions of Law

A. Jurisdiction

Respondent first became registered with the NASD as an Investment Company/Variable Contracts Representative on or about November 11, 1988. (CX-7, 2). Respondent was associated with Liberty Securities Corporation (“Liberty”), an NASD member firm, from April 1992 to May 1995, and with M&T Securities, Inc. (M&T”), an NASD member firm, from May 1995 to January 1996.³ (CX-7, 1). Respondent is not currently employed in the industry. (CX-7, 1).

Liberty filed a termination notice on Form U-5 that reported Respondent’s administrative termination on May 1, 1995. Subsequently, Liberty submitted an amended Form U-5 on June 25, 1996. (CX-7, 2). The amended Form U-5 was updated on June 30, 1996 to report that, after an

² Hereinafter the statements in the declaration will be designated as “DECL at ¶” and Enforcement’s exhibits will be designated as “CX-” with the appropriate page number. On November 30, 1998, Enforcement submitted additional information.

³ M&T filed a termination notice on Form U-5 on January 3, 1996, reporting Respondent’s voluntary termination. M&T filed an amended Form U-5 on February 26, 1996, reporting that Respondent was under investigation for taking \$5,000 from a customer. (CX-7, 3).

internal investigation by Liberty, it appeared that Respondent had taken two customers' checks and invested them in his own personal account. (CX-7, 11).

Article IV, Section 4 of the NASD's By-laws provides:

A person whose association with any member has been terminated and is no longer associated with any member of the Corporation ... shall continue to be subject to the filing of a complaint under the Code of Procedure based upon conduct which commenced prior to the termination ... or upon such person's failure, while subject to the NASD's jurisdiction as provided herein, to provide information requested by the NASD pursuant to the Rules of the Association, but any such complaint shall be filed within ... two years after the effective date of the termination"

Article V, Section 4(a) also provides that the running of the two year period recommences from the date of the filing of an amended Form U-5, if the amendment (i) is filed within two years of the original Form U-5 filing, and (ii) discloses that such person may have engaged in conduct actionable under any applicable statute, rule, or regulation.⁴

The Hearing Panel concludes that the information in the amended Form U-5, filed on June 25, 1996 and updated on June 30, 1996 by Liberty, disclosed that the Respondent may have engaged in conduct actionable under the NASD Rules. Therefore, the Association has jurisdiction over Respondent because the Complaint involved conduct which occurred prior to his termination, as well as his failure to provide information pursuant to Rule 8210 while subject to the NASD's jurisdiction, and was filed within two years of the date of the amended Form U-5.

⁴ See NASD Notice to Members 92-19 (April 1992).

B. Allegations of the Complaint

1. Respondent Converted Customers' Funds to his Personal Use

Respondent admitted the allegations of the Complaint in his Answer. (CX-1, 1). He specifically admitted that from approximately October 1994 to December 1995 he converted the funds of seven M&T customers, HHT, LB, VH, BW, LH, DJL, and CB (“M&T customers”).⁵

Respondent was working for M&T as an investment executive out of several branches of the East Savings Bank in New York (“East Savings”) in 1995. (CX-5, 2). At these locations, he solicited M&T customers to provide funds to him for investment in mutual funds and insurance products. (CX-5, 5). The M&T customers, who were also depositors of East Savings, withdrew funds from their East Savings accounts and obtained teller checks, which were then provided to Respondent. (CX-5, 5; DECL ¶12). According to the Complaint, four M&T customers’ checks were made payable to “Dreyfus” (or “Dreyfus Family of Funds and “Dreyfus Corporation”) and three were made payable to AI Life Insurance Co. of NY (“AI Life”). By admitting to the allegations in the Complaint, Respondent admitted, that instead of investing the customers’ funds on their behalf, he deposited the four checks into his own personal money market account with Dreyfus (the “Dreyfus Personal Account”)⁶ and also converted the three customer checks made payable to AI Life.

As early as January 1996, Respondent admitted to M&T that he had converted customers’ funds. (CX-5, 2). This admission occurred at about the same time as M&T received a customer

⁵ Previously, on or about May 1996, Respondent admitted to M&T in writing that he had converted the funds of the M&T customers, and he admitted the same conduct to an NASD examiner in a letter dated November 1, 1996. (CX-2; CX-3; CX-4). He also expressed remorse for his actions. (CX-1, 1; DECL at ¶10).

⁶ The dates on the East Savings’ teller checks preceded the date of deposit into the Dreyfus Personal Account by approximately one week, in most cases. (CX-5, 5).

complaint regarding Respondent. (CX-5, 2). As a result of the admission and a subsequent civil suit, Respondent executed an Affidavit of Confession of Judgment and a Stipulation of Payment and Stay of Litigation Agreement (“Confession”), on May 28, 1996, in which he admitted converting the following customers’ funds on the following dates (CX-4, 3; DECL at ¶10):

Approximate Date of Conversion	Customer Initials and Date of Birth⁷	Annual Income⁸	Principal Amount Converted
6/20/95	HHT 9/19/04	\$12,000	\$ 5,000.00
7/17/95	LB 3/20/41	\$20,000	\$ 4,501.10
8/03/95	VH 5/2/25	\$25 to \$30,000	\$ 3,856.07
9/06/95	BW 7/30/28	\$25 to \$30,000	\$ 7,000.00
10/23/95	LH N/A	N/A	\$ 2,500.00
12/14/95	DJL 2/18/35	\$25 to \$30,000	\$ 2,314.44
12/19/95	CB N/A	N/A	<u>\$ 5,000.00</u>
		TOTALS	<u>\$30,171.61</u>

Respondent agreed to pay M&T \$32,262.63 to compensate M&T for reimbursing M&T Customers \$30,171.61 with interest.⁹ (CX-4, 2). The vice president of M&T reported that Respondent still owes M&T \$28,751.90, and M&T has undertaken collection efforts against Respondent.¹⁰ (CX-10; DECL at ¶19).

NASD Conduct Rule 2330 provides that no member or person associated with a member shall make improper use of a customer’s securities or funds. An associated person “converts” customer funds in violation of Rule 2330 when the associated person “intends permanently to

⁷ Enforcement obtained the date of birth information and the annual income information from the opening account statements of the M&T customers; no statements were provided for CB and LH. (DECL at ¶17; CX-9).

⁸ The majority of the M&T customers were elderly people with limited financial resources.

⁹ The Confession was limited in scope and effect to the claims of M&T customers listed in it. (CX-4, 5). M&T specifically reserved any potential or future claim or claims that might arise or result from Respondent’s conversion of funds other than those delineated in the Confession. (CX-4, 5).

¹⁰ Respondent made payments totaling \$3,905.73 in accordance with the Confession. (CX-10). Thereafter, he made payments of \$362.92, leaving a current judgment balance of \$28,751.90. (CX-10).

deprive the customer of the use of his or her funds (i.e., the associated person intends to ‘steal’ the funds).”¹¹ The Hearing Panel concludes that, based on the documentary evidence and Respondent’s admission, Respondent converted \$30,171.61 of M&T customers’ funds to his own use in violation of Rule 2330 and thereby also failed to observe high standards of commercial honor and just and equitable principles of trade in violation of Rule 2110.

2. Respondent Failed to Appear for Two-on-the-Record Interviews.

In his Answer, Respondent also admitted the Complaint’s allegations regarding his failure to respond. (CX-1).

NASDR staff requested, pursuant to Rule 8210, that Respondent appear for an on-the-record interview on February 12, 1997. The staff sent this request to Respondent at his CRD address via Federal Express on January 29, 1997. Federal Express informed the staff that the letter was delivered on January 31, 1997 and signed for by “M. Jenkins.” Respondent failed to appear for the interview.

The staff again requested that Respondent appear for an on-the-record interview on February 19, 1997, in a letter issued pursuant to Rule 8210. The staff sent the request to Respondent’s CRD address, via a February 12, 1997 Federal Express letter. Federal Express informed the staff that the letter was delivered on February 12, 1997 and was signed by “E. Jenkins.” Respondent again failed to appear for the interview.

NASD Procedural Rule 8210(a)(1) authorizes the NASD to require persons associated with a member of the NASD to report “orally, [or] in writing . . . with respect to any matter”

¹¹ District Business Conduct Committee No. 5 v. James C. Arnold, (No. C05960034, NBCC February 25, 1997) at n. 8 (emphasis in original cite of Joseph H. O’Brien, II, 51 S.E.C. 112 (1994) and Raymond M. Ramos, 49 S.E.C. 868 (1988)).

under investigation by it. The purpose of this rule is to provide a means for the NASD to carry out its regulatory functions in the absence of subpoena power; it is a “key element in the NASD’s effort to police its members.”¹² Failure to respond subverts the NASD’s ability to carry out its regulatory responsibilities.¹³

In this case, NASDR sent the two requests to Respondent’s CRD Address, as required by NASD Procedural Rule 8210; Respondent admitted in his Answer receipt of both requests. Respondent failed to appear. The Hearing Panel concludes that Respondent violated NASD Procedural Rule 8210. The Hearing Panel also concludes that, by violating Rule 8210, Respondent failed to “observe high standards of commercial honor and just and equitable principles of trade,” in violation of Rule 2110.

III. Sanctions

For conversion, NASD Sanction Guidelines suggest a fine of \$10,000 to \$100,000, an additional fine of five times the amount converted, and a bar.¹⁴ For failure to respond, NASD Sanction Guidelines suggest a fine of \$25,000 to \$50,000 and provide that, if an individual does not respond in any manner, a bar should be standard.

A number of the “Principal Considerations” listed in the NASD Sanction Guidelines¹⁵ are relevant for setting sanctions in this case. Did respondent accept responsibility for and acknowledge the misconduct to his or her employer or regulator prior to detection and intervention by the firm or a regulator? Did respondent voluntarily and reasonably attempt, prior

¹² Richard J. Rouse, 51 S.E.C. 581, 1993 WL 276149, at *2 (1993).

¹³ John L. Malach, 51 S.E.C. 618, 1993 WL 307544, at *2 (1993).

¹⁴ NASD Sanction Guidelines, 34 (1998).

¹⁵ NASD Sanction Guidelines, 8, 9, 31, and 34 (1998).

to detection or intervention, to pay restitution or otherwise remedy the misconduct? Did respondent engage in numerous acts and/or a pattern of misconduct? Did respondent engage in the misconduct over an extended period of time? Did respondent's misconduct result in injury to other parties and what was the extent of the injury? Did respondent provide substantial assistance to NASDR in its examination and/or investigation of the underlying misconduct? Was respondent's misconduct the result of an intentional act? Did respondent's misconduct result in potential for respondent's monetary or other gain. Other considerations include respondent's relevant disciplinary history, the number, size, and character of the transactions at issue, and the level of sophistication of the injured customer.

In this case, Respondent reported his misconduct to his employer prior to detection by the regulator, but about the same time as a customer complaint was made to M&T. Respondent voluntarily agreed on May 28, 1996 to pay restitution to M&T, which had reimbursed the M&T customers. Respondent's actions in converting the funds of at least seven different customers in amounts ranging from \$2,300 to \$7,000 established a clear pattern of misconduct, which extended over a period of approximately six months. Respondent's misconduct resulted directly in injury to customers in the amount of \$30,171.61, which sum M&T reimbursed. Respondent, in response to an investigation by NASDR, immediately acknowledged his wrongdoing in a November 3, 1996 letter, but failed to appear for two-on the record interviews in February 1997. Respondent's misconduct was the result of an intentional act and resulted in direct monetary gain to Respondent.

Most of the M&T customers were elderly people who had limited financial resources. The impact upon them would have been devastating had M&T not reimbursed them for the

amounts Respondent converted. These factors, on balance, outweigh Respondent's lack of prior disciplinary history, his remorse, and his early admissions of guilt.¹⁶

Enforcement suggests a censure, a fine of \$225,000 for the conversion¹⁷ and \$25,000 for his failure to appear, a permanent bar from associating with any member in any capacity, and an order to pay restitution to M&T in the amount \$28,751.90. The Hearing Panel agrees.

IV. Conclusion

Therefore, Respondent is censured, fined \$225,000 for the conversion and \$25,000 for the failure to respond, and ordered to pay restitution to M&T in the amount of \$28,751.90. In addition, Respondent is permanently barred from associating with any member in any capacity, for each of the violations, the conversion and the failure to respond. These sanctions shall become effective on a date set by the Association, but not before the expiration of 45 days after the date of this decision.¹⁸

HEARING PANEL

By: Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
December 14, 1998

¹⁶ Enforcement did not present any evidence that Respondent had a previous disciplinary history. See NASD Sanction Guidelines, 3 (1998).

¹⁷ The \$225,000 fine represents a fine of \$75,000 plus five times \$30,000, the approximate amount converted.

¹⁸ The Hearing Panel has 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.

Copies to:

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