

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

HOWARD BRETT BERGER
(CRD No. 2284367)

Roslyn Heights, NY,

Great Neck, NY,

Respondent.

Disciplinary Proceeding
No. C9B040069

Hearing Officer – AWH

HEARING PANEL DECISION

March 23, 2005

Respondent barred for failing to respond to requests for information, in violation of Rules 8210 and 2110, and assessed costs.

Appearances:

Jonathan M. Prytherch, Esq., and David B. Klafter, Esq., for Department of Enforcement.

Ira Lee Sorkin, Esq., and Sandra Bourgasser-Ketterling, Esq., for Howard Brett Berger.

DECISION

Background

On July 14, 2004, the Department of Enforcement (“Enforcement”) issued the Complaint in this matter against Howard Brett Berger (“Berger” or “Respondent”), alleging that he failed to appear at two on-the-record interviews (“OTRs”), in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. Respondent filed an Answer to the Complaint on August 17, 2004, in which he admitted that he did not appear for the two OTRs, but challenged NASD’s jurisdiction over him, and requested a hearing. A hearing was held on December 1, 2004, in Woodbridge, New Jersey, before a hearing

panel composed of the Hearing Officer and two current members of the District 9 Committee. Both parties filed post-hearing submissions on January 21, 2005, and reply briefs on January 28, 2005.

Findings of Fact¹

The Respondent's Background with NASD

Berger first entered the securities industry in 1992 when he became registered as a General Securities Representative through NASD member firm GKN Securities Corp. ("GKN"). CX-1 at 5. In 1995, shortly after registering through GKN as a General Securities Principal, he left GKN for another firm. CX-1 at 4. At his second firm, among his other duties, Berger filed Forms U-4 as a compliance officer. Tr. 235. By 1997, Berger was registered not only as a representative and principal at a third firm, but also as a Financial and Operations Principal and a Municipal Securities Representative. CX-1 at 3. Berger became employed by a fourth member firm, IPOMarket.com, in late 1999. CX-1 at 2. He remained registered there as a representative, principal, and FINOP until May 2, 2001, when that firm voluntarily withdrew its NASD membership and filed a U-5 on Berger's behalf. CX-1 at 2, 13.

Berger was unregistered and unassociated with any member firm for nearly two years thereafter. CX-1 at 2. During that time, he was employed as a hedge fund manager and the chief financial officer of a software company, positions that required no NASD registration. Tr. 218, 224, 225-26. On April 15, 2001, Millennium Brokerage LLC ("Millennium") submitted a Form U-4, Uniform Application for Securities Industry Registration on his behalf. CX-1 at 13. Subsequently, his application was amended

¹ References to Enforcement's exhibits are designated as CX-_, and the transcript of the hearing, as Tr._. Respondent offered no exhibits into evidence.

twice, on April 23, 2003 and May 12, 2003. CX-1 at 13. That application is the subject of the present proceeding.

Respondent's Association with Millennium Brokerage LLC

Berger first became familiar with Millennium in 2002. Tr. 224. He had negotiated a licensing agreement with the firm on behalf of Financial Services Group ("FSG"), the software company for which he served as chief financial officer. Tr. 224-25. He was also a customer of Millennium through his hedge fund, Professional Traders Fund ("PTF"). Tr. 226-27.

In April 2003, Berger contemplated becoming registered with NASD through Millennium. Tr. 228-31. His objective was to capture some of the commissions PTF was paying to Millennium, and, since his securities licenses were about to lapse, he also sought to avoid having to retake his licensing examinations. Tr. 228-231, 239. Berger discussed these ideas with Lisa Esposito, a Millennium registered representative. Tr. 229-30. Berger explained to her that he might soon be engaging in some business that would require his registration and that he was considering putting that business through Millennium. Tr. 229-31. Esposito offered to speak with "the powers that be" on his behalf. Tr. 231.

As a result, Millennium's President, Christopher Horihan, discussed with Berger the prospect of his bringing business to the firm. CX-15 at 20; Tr. 94-95. Millennium's Compliance Officer, Christopher Ranni, was aware that Berger would possibly be introducing customers to Millennium, and that he would need to be registered to share commissions. Tr. 215. Stephen Fox, Millennium's CEO at that time, also was aware of Berger's attempt to register. CX-17 at 31.

Berger relayed to Esposito the time-sensitivity of his proposal and expressed an interest in taking some action to prevent his securities licenses from lapsing. Tr. 231. She subsequently sent him an e-mail to provide the firm with some preliminary personal information to start a Form U-4. Tr. 232. That e-mail contained a template that Berger edited to disclose his name, social security number, residential history, employment history, and information about his affiliations with PTF and FSG. Tr. 172, 232-33. He then sent the completed template back to Esposito by e-mail. Tr. 233, 237. At some point, Berger also supplied information for an initial Disclosure Reporting Page (“DRP”) about a \$30,000 judgment obtained against him in November 2001. CX-7 at 25; Tr. 57-58. All of that information was used to complete Berger’s U-4, which was filed electronically with NASD on April 15, 2003. CX-1 at 13.

Ranni was the person at Millennium who was responsible for submitting filings to NASD. Tr. 177. Though he could not specifically recall finalizing and submitting Berger’s application, Ranni testified credibly that it was likely he followed his “usual business practice” of e-mailing to Berger a link to NASD’s website which prompted Berger to review his U-4 and release the form to the firm when it was complete. Tr. 178-79, 206, 213-16. Ranni explained that only after a candidate released the form to the firm would he be able to submit it to the Central Registration Depository (“CRD”). Tr. 179, 194-95, 215. Ranni also confirmed that Berger released his U-4 to the firm on or about April 15, 2003, and that he had to remind Berger to submit fingerprints to the firm to supplement the application. CX-13 at 3; Tr. 199. Finally, Ranni represented on that Form U-4 that he had provided Berger an opportunity to review the form, and that Berger had approved and signed it. CX-7 at 15. Indeed, Berger’s typewritten name appears

under “signature of applicant” on the U-4, signifying his electronic signature, and Millennium confirmed that “all signatures required on the Form U-4 were made electronically.”² CX-7 at 14-15, CX-12.

The amendments to Berger’s U-4 were executed in the same manner. CX-8, CX-9. The first amendment, filed April 23, 2003, shows a number of changes to Berger’s DRPs, including an update of one arbitration matter to explain, in the first person, that the matter was disposed of on October 4, 2001, and an initial disclosure of another matter. CX-8 at 22-27; Tr. 61-67. There are also changes to show that Berger had been notified that he was the subject of a regulatory complaint or proceeding, and that he had also been the subject of an investment-related, consumer-initiated complaint. CX-8 at 10-11. Berger’s May 12, 2003, amendment shows that a request for a Financial and Operations Principal examination was made on his behalf. CX-9 at 3.

Finally, on August 8, 2003, Millennium filed a Form U-5 to show the voluntary termination of Berger’s association with the firm. CX-10 at 2. Ranni explained that there was no other way to “get him off the books.” Tr. 190. There is no indication in that filing that Berger’s U-4 was submitted in error, or that the application was submitted without his consent.

Failure to Respond to Requests for Information

In connection with a routine examination of Millennium, on January 14, 2004, the Staff sent to Berger a request to appear for an OTR on January 27, 2004. CX-2; Tr. 47-49. The request was issued pursuant to Procedural Rule 8210 and was sent by first class and certified mail to Berger’s CRD residential addresses, and to a possible business

² The Hearing Panel notes, however, that Millennium failed to retain copies of Berger’s originally executed Form U-4 and the amendments to it, as the firm was required to do. CX-12; Tr. 128.

address discovered by the Staff during the course of its investigation. CX-2. Berger did not appear for the January 27, 2004, OTR. CX-3; Complaint ¶ 11; Answer ¶ 11.

That same day, Berger's first attorney telephoned the Staff to reschedule the OTR, noting that Berger's failure to appear was unintentional. Berger's first attorney also sent a letter to the Staff, reiterating Berger's inadvertent absence and interest in rescheduling. CX-4. Two days later, the Staff contacted Berger's first attorney to set a new date for the OTR, and, instead, learned that Berger had new representation. Complaint ¶¶ 14-15; Answer ¶ 15.

On January 30, 2004, the Staff spoke with Berger's new attorney about rescheduling the OTR. His attorney agreed to reschedule the OTR for February 12, 2004, though he challenged NASD's jurisdiction over Berger. Complaint ¶ 15; Answer ¶ 15. That same day, Berger's attorney sent the Staff a letter, confirming the details of his telephone conversation with the Staff. CX-4 at 2.

Accordingly, on February 2, 2004, the Staff sent to Berger a request to appear for an OTR on February 12, 2004. CX-5. The request was issued pursuant to Procedural Rule 8210 and was sent in the same manner as the January 14, 2004, letter was sent; except that, the Staff also sent copies to Berger's initial and second attorneys. CX-5.

On February 11, 2004, the Staff contacted Berger's attorney to confirm Berger's appearance at the OTR for the following day. Complaint ¶ 19; Answer ¶ 19. Berger's attorney advised that Berger would not appear because he contested NASD's jurisdiction. Complaint ¶ 19; Answer ¶ 19. The Staff also received a letter from Berger's attorney, confirming the details of that conversation. CX-6. Berger failed to appear for the February 12, 2004, OTR. Complaint ¶ 21; Answer ¶ 21.

Discussion

Berger's Status as an Associated Person

Article 1, Section (dd)(1) of the NASD By-Laws defines an “associated person” as “a natural person who . . . has applied for registration under the Rules of the Association.” Jurisdiction thus attaches to a person when he signs and submits a Form U-4. *See* Notice to Members 99-95, 1999 NASD LEXIS 117 (Nov. 1999) (explaining that a person who applies for registration on Form U-4 is an associated person); *Dep't of Enforcement v. Gray*, No. C02030015, 2003 NASD Discip. LEXIS 52, at *3 (OHO Nov. 14, 2003) (“Gray voluntarily submitted to NASD’s jurisdiction by applying for registration under NASD’s rules.”). Contrary to Berger’s contention, jurisdiction neither hinges on NASD’s approval of an application for registration, nor on an applicant’s employment or compensation status at a member firm. *Dep't of Enforcement v. Respondent*, No. C10010146, 2003 NASD Discip. LEXIS 1 (NAC Jan. 3, 2003) (finding that, although the respondent never became registered, he was subject to NASD jurisdiction because he executed and submitted a Form U-4 to NASD); *Dep't of Enforcement v. Respondent 1*, No. CAF000029, 2002 NASD Discip. LEXIS 9, at * 12 (NAC Mar. 21, 2002) (“An individual need not be an employee of a broker-dealer in order to be considered an ‘associated person.’”); *Dist. Bus. Conduct Comm. v. Maliagos*, No. C10920110, 1994 NASD Discip. LEXIS 47 (NBCC Jan. 10, 1994) (finding that the execution and filing of a Form U-4 was sufficient to confer jurisdiction over the respondent, though he never worked for the member firm).

Though Berger admitted providing the information to process his Form U-4, he denied signing or submitting the form and further denied authorizing the application to be

filed with NASD on his behalf. Tr. 172, 174. His claim, however, is unpersuasive. First, Berger's electronic signature appears on the Form U-4 and both amendments. As Berger is no doubt aware from his own experience filing Forms U-4 as a compliance officer, electronic signatures are valid for NASD filing purposes. Furthermore, his signature is confirmed not only by a boilerplate representation contained in the form itself, but by letter and testimony from Ranni, a credible witness, that Berger "completed the electronic registration" that Ranni prepared, and that Berger "released" it to the firm for filing. CX-13 at 3; Tr. 178-79. Millennium had no incentive to submit an unauthorized application and two amendments, and upon terminating Berger's association, the firm did not indicate any error in submitting the filing. Moreover, Berger never made any attempt to correct his CRD records, or took any action against Millennium for making an improper filing. Tr. 173.

On the contrary, there is evidence of Berger's cooperation in the process, particularly because new information was disclosed in his updated DRPs that had not been disclosed in prior DRPs, and because that new information was likely known only by Berger. Clearly, it was not the type of information that Ranni would enter on a Form U-4 because he never updated a candidate's DRP.³ Tr. 208-09. Additionally, Berger admitted supplying his personal information for the filing, and he demonstrated a time-sensitive interest in becoming registered.

³ Prior to his association with Millennium, Berger's last U-4 and U-5 were filed by IPOMarket.com on October 13, 2000, and May 2, 2001, respectively. The U-4 filed by Berger with Millennium was dated April 15, 2003, and, as noted previously, contains an *initial* DRP that discloses a judgment that was entered after the U-5 that was filed in May 2001. CX-7 at 25. Ranni credibly testified that he did not update DRPs, and the Hearing Panel finds it more likely than not that Berger entered the information on the DRP. Similarly, the U-4 update of April 23, 2003, states, with regard to a 1999 arbitration that "I [Berger] was withdrawn as a respondent." CX-8 at 22. That update information, written in the first person, could not have been copied from a previous filing, and Ranni would not have entered that information himself.

Based on his demeanor, the consistency of his testimony, and the lack of any motive to testify less than fully and truthfully, the Hearing Panel credits Ranni's description of his customary procedure for submitting a Form U-4. With regard to Berger's U-4, Ranni had no reason to stray from his usual practice of letting the candidate complete his own DRP information and release the form to the firm for submission to NASD. Moreover, Ranni, himself, represented on Berger's initial Form U-4 that Berger had reviewed and approved the information contained in the filing and signed it.

Because Berger's Form U-4 and two amendments to it were submitted with his cooperation and authorization, Berger became an associated person by applying for registration with NASD. Accordingly, Berger voluntarily submitted to NASD's jurisdiction by that application for registration.

NASD Jurisdiction Over Formerly Associated Persons

Article V, Section 4 of the NASD By-Laws provides for a two-year period of retained jurisdiction over a formerly associated person after the effective date of the individual's termination of association. During this period of retained jurisdiction, NASD may file a complaint based upon conduct that occurred while the individual was associated with a member firm, or based upon such person's failure to provide information requested pursuant to Procedural Rule 8210, if the request was made, and the complaint is filed, during the foregoing period of retained jurisdiction.

Enforcement filed its Complaint on July 14, 2004, within two years of the termination of Berger's association with Millennium. Additionally, the Complaint is based upon failures to appear for two OTRs during the period of retained jurisdiction. Therefore, NASD has jurisdiction over this proceeding.

Failure to Respond to NASD Requests for Information

Procedural Rule 8210 authorizes NASD to require any person subject to its jurisdiction to provide information and testimony related to any matter under investigation. The Rule serves as a key element in NASD's oversight function and allows NASD to carry out its regulatory functions without subpoena power. *See, e.g., Dep't of Enforcement v. Valentino*, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *12 (N.A.C. May 21, 2003), *aff'd*, 2004 SEC LEXIS 330 (Feb. 13, 2004) ("It is well established that because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD's ability to carry out its regulatory mandate.") (citation omitted); *Joseph G. Chiulli*, Exchange Act Release No. 42,359, 2000 SEC LEXIS 112, at *16 (Jan. 28, 2000) (noting that Rule 8210 provides a means for the NASD effectively to conduct its investigations, and emphasizing that NASD members and associated persons must fully cooperate with requests for information). When an individual fails to respond to information requests, including requests for an OTR, NASD's ability to perform its regulatory responsibilities is subverted. *Joseph P. Hannan*, Exch. Act Rel. No. 40,438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998). Further, a violation of Procedural Rule 8210 is also a violation of Conduct Rule 2110, contravening "high standards of commercial honor." *Dep't of Enforcement v. Baxter*, No. C07990016, 2000 NASD Discip. LEXIS 3, at *25 (NAC, Apr. 19, 2000).

Under Procedural Rule 8210, notice of a request for an OTR is considered received if the request is mailed or otherwise transmitted to the person's last known CRD address. Because Enforcement mailed the requests to Berger's last known CRD

addresses, he received valid constructive notice of the requests. Further, through counsel, Berger acknowledged actual receipt of those requests. Berger's failure to appear for the OTRs, therefore, violated Procedural Rule 8210 and Conduct Rule 2110.

Sanctions

For failing to respond in any way to requests for information made pursuant to Rule 8210, NASD Sanction Guidelines provide that a bar is the standard sanction. NASD SANCTION GUIDELINES, p. 37 (2004 ed.). Berger plainly refused to appear for either scheduled OTR. His challenge to jurisdiction is not a valid defense for failing to appear. The facts demonstrate that he supplied information necessary to complete the Form U-4 and the two amendments to it, and he released the information to the firm, enabling it to file the Form and the amendments. Case law is clear that the execution – here the release of information to the firm – and filing of a Form U-4 are sufficient to confer jurisdiction over Berger. At the hearing, Berger asserted that he was following the advice of counsel not to appear at the OTR. However, a respondent may not rely on the advice of counsel that is premised on a strategy to avoid full compliance with applicable regulatory requirements for any reason, nor should NASD have to bring a disciplinary proceeding to secure a respondent's compliance with those requirements. *See Dep't. of Enforcement v. Quattrone*, 2004 NASD Discip. LEXIS 17 at **52-53, 55-56 (NAC Nov. 22, 2004), *appeal docketed*, No. 3-11806 (SEC Dec. 28, 2004). Accordingly, because there are no mitigating circumstances that would warrant a sanction less than a bar, Berger will be barred in all capacities for failing to respond to two requests for OTRs made pursuant to Rule 8210. In addition, Berger will be assessed costs in the total

amount of \$2,247.40, consisting of an administrative fee of \$750 and a transcript fee of \$1,497.40.

Conclusion

Howard Brett Berger is barred from association with any member firm in any capacity for failing to appear for on-the-record interviews, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. He is also assessed costs in the total amount of \$2,247.40. The bar shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED

Alan W. Heifetz
Hearing Officer
For the Hearing Panel

Copies to:

Via Facsimile & First Class Mail

Ira Lee Sorkin, Esq.

Sandra Bourgasser-Ketterling, Esq.

Via Overnight Courier & First Class Mail

Howard Brett Berger

Via Electronic & First Class Mail

Jonathan M. Prytherch, Esq

David B. Klafter, Esq.

Rory C. Flynn, Esq.