

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JIMMIE LEE GRIFFITH
(CRD No. 2321620),

Respondent.

Disciplinary Proceeding
No. C01040025

Hearing Officer – DRP

PANEL DECISION

September 7, 2005

Respondent is fined \$10,000 and suspended from association with any member firm in any capacity for three months for violating NASD Conduct Rule 2110 by effecting two unauthorized transactions in a customer account.

Appearances

For the Department of Enforcement: David A. Watson, Regional Counsel, San Francisco, CA (Rory C. Flynn, Washington, DC, Of Counsel).

For the Respondent: John S. Preston, Esq., Oakland, CA and Tania Rose, Esq., San Francisco, CA.

DECISION

I. Procedural History

The Department of Enforcement filed a single count Complaint on November 1, 2004, charging that Jimmie Lee Griffith (Griffith or Respondent) violated NASD Conduct Rule 2110 by effecting two transactions on November 9, 2000 in the account of The JS and JS Trust without the knowledge or consent of the customers. Griffith filed an Answer on February 14, 2005, in which he admitted effecting the transactions at issue but asserted that the customers had consented to the trades.

On April 26, 2005, a one-day hearing was held in San Francisco before a hearing panel composed of the Hearing Officer and two former members of the District 1 Committee. At the hearing, Enforcement called two witnesses, customer Widow JS and Nelia Virtusio, a Senior Compliance Examiner for NASD. Enforcement also offered thirteen exhibits, all of which were admitted in evidence. Respondent testified on his own behalf and offered fourteen exhibits, of which twelve were admitted in evidence.¹

II. Findings of Fact and Conclusions of Law

A. Respondent

Griffith was registered as a general securities representative with member firm McLaughlin, Piven, Vogel Securities, Inc. (MPV) from October 27, 1994, until his registration was terminated on June 16, 2003. He has not been associated or registered with any NASD member since that time. Respondent is subject to NASD jurisdiction pursuant to Art. V, Section 4 of NASD's By-Laws, because the Complaint, filed within two years of the termination of Respondent's registration with MPV, charges him with misconduct that occurred while he was registered. (Tr. 78; CX-1.)

B. Customer JS

In 1995, JS and his wife (Widow JS) opened a joint trust account with MPV. At the time, they were 71 and 69 years old, respectively. According to their new account form, their investment objectives were price appreciation, income, and safety. JS, who had worked as a researcher for the University of California-Davis, was an experienced, informed investor. He handled all investment decisions in the trust account and was a frugal, methodical investor, who did not like to pay fees. (Tr. 26-27, 178-180; CX-5 at 2; CX-7.)

¹ Respondent voluntarily withdrew two exhibits. References to the hearing transcript are noted as Tr. Enforcement's exhibits are cited as CX; Respondent's exhibits are cited as RX.

In February 1997, Respondent took over the trust account from another registered representative. Respondent did not meet JS or his wife, but in May 2000, he asked the customers to update their new account form to reflect a change in their investment objectives to speculation, price appreciation, income, and long-term growth. JS was almost 76 years old at this time. Respondent testified that he suggested these revisions after JS told him about financial experts he had seen on television, who said that “we shouldn’t be in bonds now ... we should be in equities.” According to Respondent, he recommended a gradual shift into equities and began by purchasing “a small amount” of mutual funds.² (Tr. 37, 150-151, 166-169; CX-5, CX-7, CX-8; RX-2, RX-13.)

JS suffered from Parkinson’s disease, which was diagnosed in 1981. According to Widow JS, as of January 2000, JS was confined to a wheelchair. His health declined after suffering a minor stroke on June 14, 2000 and a suspected second stroke shortly thereafter. His condition continued to deteriorate, and he was admitted to the hospital for surgery in August. After a month in a nursing facility, he returned home on September 11, 2000. JS required around-the-clock nursing care and was fed through artificial means. According to Widow JS, he lost his concentration and sense of time. He was hospitalized again on November 1 and died on November 3, 2000. Widow JS did not inform Respondent or MPV that JS was afflicted with Parkinson’s disease until after his death. (Tr. 27-30, 62-63, 65, 145-147, 151-152; CX-5, CX-13.)

² A review of the account history, however, shows that JS started purchasing mutual funds in 1997, shortly after Respondent took over the account. (RX-2.)

C. October 16, 2000 telephone call

On October 16, 2000, Respondent phoned the JS residence.³ JS answered the telephone but soon motioned for his wife to hold the phone while he talked. Widow JS could not hear Respondent's side of the conversation, but she heard her husband repeatedly questioning the imposition of a maintenance fee on their grandson's account, which she believes occurred a year or two earlier.⁴ (Tr. 30-31, 135-136, 138, 153; CX-5 at 1.)

Respondent testified that after he and JS discussed the fee issue, he continued the conversation by conducting a year-end portfolio review. Respondent testified that the trust account had realized approximately \$83,000 in short-term capital gains. According to Respondent, he recommended that JS sell securities to generate approximately \$117,000 in realized losses, because the trust stipulates that it should be managed in a tax efficient manner. According to Respondent, JS agreed to several securities transactions.⁵ (Tr. 154-155, 185.)

Respondent further testified that during the October 16 call, he sought and received permission from JS to liquidate his \$100,000 position in Putnam New Century Growth Fund (Putnam) if the value declined by \$25,000. At the time of their conversation, JS had sustained an unrealized loss of \$12,000. Respondent testified that JS instructed him to "keep an eye on" Putnam over the next few months and agreed to sell his B shares before losses exceeded \$25,000,

³ Though no telephone records were presented at the hearing, it appears that a phone call from the JS residence was made to MPV on the morning of October 16, 2000 and that Respondent returned the call. (Tr. 69, 133, 153.)

⁴ According to Respondent, JS said he was reading from an October account statement, which showed that his grandson's account had been charged a \$69.50 safekeeping fee. Because it is highly unlikely that JS had received an October 2000 account statement when this conversation took place on October 16, JS either was confused, or he was reading from an October account statement for a previous year. (Tr. 153-154.)

⁵ A review of the account history shows that on October 16 and 17, 2000, JS sold several municipal bond funds and purchased a technology trust fund. (RX-2.) The propriety of these trades is not at issue in this case.

despite the possibility of incurring a contingent deferred sales charge (CDSC).⁶ According to Respondent, JS also concurred with his recommendation to reinvest the Putnam proceeds in B shares of Federated World Wide Utility Fund (World Wide). Respondent asserted that this plan gave JS the ability to take income from World Wide at a later date. (Tr. 154-158, 193, 195-196.)

Respondent testified that he reviewed all of the proposed transactions with JS and then asked to speak with Widow JS. According to Respondent, he told her to give JS a “big hug and a kiss,” because he had just made them \$83,000 in tax-free income. Respondent further testified that he explained to Widow JS how he planned to sell some securities to generate losses in order to eliminate capital gains and tax liability for 2000. (Tr. 156-157, 184.)

According to Widow JS, she took the phone from her husband to apologize to Respondent, because her husband was incoherent and “having a bad day.” Respondent then told her about the transactions he had proposed. Widow JS, who had never before discussed this account with Respondent, did not understand his recommendations and told him so. She did not authorize any trades. She returned the phone to her husband, who ended the call, which had lasted approximately twenty minutes. Widow JS testified that during the call, her husband complained about the fee for their grandson’s account. She did not hear JS say anything else. (Tr. 31-32, 46-47, 135, 138-139, 141-142, 146-148, 152-153.)

D. November 9, 2000 transactions

Respondent testified that on November 9, 2000, he noticed that JS’s position in Putnam had declined approximately \$18,000. Because he feared the price would continue to drop, he sold 4,165.68 B shares of Putnam and bought 6,261.741 B shares of World Wide for the JS trust

⁶ JS had purchased Class B shares in Putnam on January 31, 2000. When Respondent sold Putnam on November 9, 2000, a \$4,392.71 contingent deferred sales charge was imposed. Respondent testified that he recommended the sale of Putnam in spite of the CDSC, “[b]ecause the fund was losing money like water going through a sieve.” (Tr. 180-181; CX-5 at 3.)

account.⁷ According to Respondent, he called the JS residence when the trade settled on November 14 and learned from JS's daughter that he had died on November 3. Respondent testified that he offered his condolences and briefly reviewed with her the trades he had made on November 9. (Tr. 159-161; CX-9, CX-10.)

According to Respondent, he had received permission from JS during their October 16 conversation to effect the November 9 trades. Respondent admitted, however, that JS had never before given him authority to make a trade without first contacting him; JS wanted Respondent to notify him if a security was not performing well, so JS could decide whether or not to sell. Respondent did not follow that practice in this instance. (Tr. 181-183.)

In December 2000, Widow JS reviewed the monthly account statement and noticed the November 9 transactions. She met with Respondent in February 2001 and discussed the trust account and these trades. Though troubled by the November 9 transactions, it was not until NASD contacted her that she filed a complaint.⁸ (Tr. 39-42, 45, 49; CX-6 at 8.)

E. Discussion

Unauthorized trading is defined as "causing the execution of transactions which are not authorized by customers"⁹ The SEC and NASD have consistently held that "unauthorized trading in a customer's account violates Conduct Rule 2110."¹⁰ Based on the foregoing findings, the Hearing Panel concludes that Respondent engaged in unauthorized trading, in violation of Rule 2110, as alleged in the Complaint.

⁷ For reasons not known to the Hearing Panel, the handwritten order tickets are dated November 8, 2000.

⁸ In addition to filing a complaint with MPV and NASD, Widow JS filed an arbitration claim against MPV and received a substantial award. (CX-3; CX-4; CX-6.)

⁹ NASD IM-2310-2(b)(4)(iii).

¹⁰ *Jeffrey B. Hodde*, No. C10010005, 2002 NASD Discip. LEXIS 4, at *13-14 (NAC Mar. 27, 2002) (citations omitted); *see also Robert L. Gardner*, Exchange Act Release No. 35,899, 1995 SEC LEXIS 1532, at *1 n.1 (June 27, 1995); *Keith L. DeSanto*, Exchange Act Release No. 35,860, 1995 SEC LEXIS 1500 (June 19, 1995), *aff'd*, 101 F.3d 108 (2d Cir. 1996).

The evidence establishes, and Respondent concedes, that he effected two trades in the trust account on November 9, 2000, six days after JS died. Respondent claims that during his October 16 conversation with JS, the customer authorized these transactions. The credible evidence does not support this contention.

The Panel credits Widow JS's testimony that her husband, who was quite ill, seemed confused during the October 16 conversation and did nothing more than repeatedly question Respondent about a fee that had been imposed a year or two earlier.¹¹ Respondent, who concurred that JS phoned to discuss this fee, used the call to pitch several securities transactions to JS, whom he had not spoken to in several months. Whether or not the customer acceded to the trades placed on October 16 and 17 is not before the Panel; however, we do not believe that JS authorized the November 9 transactions.

By Respondent's own admission, JS had never before given him authority to sell a security without first obtaining approval. Granting Respondent "time and price" discretion, as he claims occurred here, would thus have been a complete departure from past practice for JS. For that reason, the Panel believes that Respondent's claim that the customer gave him time and price discretion was an explanation he invented when questioned about the November 9 trades, orders he placed almost a week after the customer's death.¹²

¹¹ Widow JS's testimony was consistent, and her manner was forthright and direct. Furthermore, she was not obligated to testify, nor did she stand to gain from her testimony, as she had previously received an arbitration award from Respondent's firm.

¹² NASD Conduct Rule 2510(b) prohibits a registered representative from exercising discretionary power in a customer's account unless such customer has given prior written authorization, and the representative's firm has accepted the account. Under Rule 2510(d)(1), the rule does not apply to discretion regarding the price or time a customer order regarding a specified security shall be executed. This rule was recently amended to limit time and price discretionary authority to the end of the business day it was granted, absent a specific, written indication signed and dated by the customer. *See* NTM 05-08 (Jan. 2005). In addition, any exercise of time and price discretion must now be noted on the order ticket. *Id.*

The fact that Respondent discussed all of the proposed trades with Widow JS, with whom he had never before spoken, supports the Panel's conclusion. Had Respondent believed JS approved the trades, there would have been no need to review his recommendations with Widow JS. We thus reject Respondent's testimony that JS authorized the November 9 trades.

Accordingly, the Hearing Panel finds that Respondent intentionally executed two trades in the trust account on November 9, 2000 without authorization, in violation of NASD Conduct Rule 2110.

III. Sanctions

For unauthorized transactions, the Sanction Guidelines recommend a fine of \$5,000 to \$75,000, plus the amount of a respondent's financial benefit, and a suspension in any or all capacities for a period of 10 business days to one year.¹³ A longer suspension or a bar is recommended in an egregious case. The principal considerations in determining sanctions for unauthorized transactions are whether a respondent misunderstood his or her authority or the terms of the customer's orders, and whether the unauthorized trading was egregious.¹⁴

Enforcement concedes this is not an egregious case. After reviewing the evidence and the Guidelines, the Panel reaches the same conclusion.¹⁵ There was no "quantitatively egregious" unauthorized trading, which is characterized by a large number of unauthorized transactions. Nor was the unauthorized trading accompanied by "aggravating factors," such as an attempt to conceal the misconduct or evade NASD investigative efforts, or a history of prior

¹³ *NASD Sanction Guidelines* (2005 ed.) at 103.

¹⁴ *Id.*

¹⁵ In addition to the Guideline for unauthorized transactions, the Panel also considered the General Principles Applicable to All Sanction Determinations, as well as the Principal Considerations in Determining Sanctions. *Id.* at 2-7.

unauthorized trading. Finally, the unauthorized trading was not “qualitatively egregious.”¹⁶

There is no evidence that Respondent was motivated to make money at his customer’s expense or that he intimidated and induced the customer to authorize the trades.¹⁷

Respondent’s misconduct was serious. Unauthorized trading is a “fundamental betrayal of the duty owed by a salesman to his customers.”¹⁸ The Hearing Panel believes that Respondent’s wrongdoing warrants a significant sanction, but is mindful that only two transactions were involved. Accordingly, Respondent is suspended for three months from association with any member firm in any capacity and fined \$10,000. The evidence, which shows a gross commission of \$3,300 paid to MPV,¹⁹ does not adequately quantify the financial benefit to Respondent. The Panel thus declines to impose any additional financial sanction.

IV. Conclusion

Respondent Jimmie Lee Griffith violated NASD Conduct Rule 2110 by effecting two unauthorized trades in a customer account.²⁰ For this violation, Respondent is suspended from association with any member firm in any capacity for three months and is fined \$10,000.

Respondent shall also pay costs in the amount of \$2,345.75, which includes an administrative fee of \$750 and transcript costs of \$1,595.75.

¹⁶ See *id.* at 103, n.2. See also *Dist. Bus. Conduct Comm. v. Hellen*, No. C3A970031, 1999 NASD Discip. LEXIS 22 (NAC June 15, 1999).

¹⁷ See *Hellen* at *17-18.

¹⁸ *Dep’t of Enforcement v. Bond*, No. C10000210, 2002 NASD Discip. LEXIS 6, at *12 (NAC Apr. 4, 2002) (citation omitted).

¹⁹ RX-2 at 3.

²⁰ The Hearing Panel has considered all of the arguments of the parties. They are sustained or rejected to the extent they are in accord or inconsistent with the views expressed herein.

These sanctions shall become effective on a date set by NASD, but not earlier than 30 days after this Decision becomes the final disciplinary action of NASD, except that if this Decision becomes the final disciplinary action of NASD, the suspension shall become effective with the opening of business on Monday, November 7, 2005 and with the close of business on February 6, 2006.

SO ORDERED.

Dana R. Pisanelli
Hearing Officer
For the Hearing Panel

Dated: September 7, 2005
Washington, DC

Copies to: Jimmie Lee Griffith (*via overnight and first class mail*)
Tania Rose, Esq. (*via facsimile and first class mail*)
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