

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

JOYCE ENGLISH
(CRD No. 4504306),

Respondent.

Disciplinary Proceeding
No. C8A040091

Hearing Officer – AWH

HEARING PANEL DECISION

November 9, 2005

Formerly associated person barred from association with any member firm in any capacity for possession of unauthorized written materials and cheating during qualification examination, in violation of NASD Membership and Registration Rule 1080 and NASD Conduct Rule 2110. Respondent assessed costs.

Appearances:

Dale A. Glanzman, Esq., and Marcletta Kerr, Esq.,
For the Department of Enforcement

Rayl L. Stepter, Esq., for Joyce English

DECISION

Introduction

On October 6, 2004, the Department of Enforcement (“Enforcement”) issued a Complaint in this proceeding alleging that Joyce English (“English” or “Respondent”) possessed unauthorized written materials and cheated during a qualification examination, in violation of NASD Membership and Registration Rule 1080 and NASD Conduct Rule 2110. On November 19, 2004, Respondent filed an Answer to the Complaint, admitting that she was in possession of the unauthorized written materials during the examination, but denying that she reviewed the materials for the examination or intentionally violated

the Rules of Conduct. She also requested a hearing. A hearing was held on September 8, 2005, in Cleveland, Ohio, before a hearing panel consisting of the Hearing Officer, a current member of the District 8 Committee, and a former member of that Committee.

Findings of Fact¹

From September 25, 2002, to June 9, 2004, Joyce English was an associated person with member firm Huntington Investment Company. In September 2002, she executed a Uniform Application for Securities Industry Registration or Transfer (Form U-4), pursuant to which she submitted herself to the jurisdiction of NASD. On November 20, 2002, April 1, 2003, and July 7, 2003, she took and failed the Series 6 licensing examination. C-1, C-4.

On April 12, 2004, she took the Series 6 examination for the fourth time, and again failed the examination. Four or five other persons took examinations at the same time. Tr. 29. English signed into the test center at 7:49 a.m., began the examination itself at 8:00 a.m., and finished at 10:44 a.m. At 8:05 a.m., she left the room for a three-minute break. C-2.

Upon entering the test center, each examination candidate was given a form entitled "Rules of Conduct -- Prohibition of Study Materials or Assistance." C-2. By signing that form, English attested that she understood that, among other things, she must not take any notes or study materials into the examination room, must not have any notes or study materials in her possession during the examination, and must give any notes or study materials that she had in her possession to the test center staff. The form also noted in parenthesis "I will check my pockets, wallet, purse, etc. *to avoid inadvertently*

¹ References to Enforcement's Exhibits are designated as C-_; Respondent's, as R-_' and the transcript of the hearing, as Tr._.

retaining such items.” (emphasis added). In addition to the Rules of Conduct, the candidates were given a list of rules for the specific test center that stated: “Keep your identification with you at all times. Otherwise you must have completely empty pockets.” and “Before entering the test center use the locker for storing hats, digital watches, wallets, purses, pagers, cell phones, car keys, tissues, food, beverages, et cetera.” Tr. 9-10.

During the course of the examination, she reached into the outside pocket of the jacket she was wearing, and removed three white sheets of paper that were pages from a Series 6 study book and had her handwriting on them. On a walk-through at approximately 9:10 a.m., test center proctor NB saw the sheets of paper “propped up on the desk folded in half.” Tr. 12. He left the room to have another proctor, TH, verify what he had seen. TH then entered the test room, found the three sheets of paper underneath colored scratch papers that she had been given to use during the examination, and removed the three white sheets from the test room. Tr. 20-21. English was then allowed to complete the examination. NB and TH immediately reported their findings to the Help Desk where a written report was made. C-2.

Discussion and Conclusions

In her Answer to the Complaint, and in her testimony at the hearing, English maintained that (1) she did not review the Rules of Conduct before she signed the form attesting that she had read them; (2) she put the three sheets of study materials into her pocket at home that morning “with the purpose of getting to the test site early enough to study”; (3) she arrived at the test site later than she planned, after dropping her children off at school; (4) she “signed in right away, and then went right into the test site”;

(5) when she entered the test site, she did not recall that she had the study materials on her; and, (6):

Halfway through the exam my nose was running, and I reached in my jacket pocket to get tissue out, and I pulled out the papers.... So I just slid them underneath the two papers that they provided for me, left them there, and continued to take the exam.

Tr. 46-51.

The Hearing Panel does not find her testimony to be credible. Even assuming that she was delayed by traffic and arrived at the test center later than she had planned, there was an eleven minute gap between the time she signed in and the time the test began. She testified that she did not use any of that time to review the study materials that she had put in her pocket that morning with the intent to review the material prior to the exam. Moreover, she claimed that she forgot that she had brought the study materials with her, and was intent only on writing down on the scratch paper everything she had studied the previous evening. That explanation still does not account for the eleven minute gap. In addition, the Hearing Panel does not find it likely that she would have placed the study materials in her jacket pocket just prior to leaving her house that morning and then forgotten that she did so by the time she arrived at the test site before signing in at 7:49 a.m.

The Hearing Panel does not believe that she was unaware of the substance of the Rules of Conduct or the specific instructions that were given by the test center, even if she did not read them on the morning of the test. This was her fourth attempt to pass the examination, and she could not have been unaware that the possession of study materials in the test room was absolutely forbidden.

Finally, the Hearing Panel does not find credible her testimony that she became aware of the study materials only when she reached into her jacket pocket to retrieve a tissue. Common sense and experience dictate that one instantly can feel the difference between a soft tissue and stiffer bond paper. Moreover, even if she had not felt any difference between the two, there was no reason to place the papers either on her desk or under the colored scratch paper. When asked why she did not just put the study materials back into her pocket, she answered, "I didn't want to run the risk of being accused of cheating or pulling information out." Tr. 62. She did not tell the proctors that she had the materials because she "didn't know that I could, and I didn't want to jeopardize me taking the exam." *Id.* However, when asked what she intended to do with the study materials at the end of the examination, she was unable to provide a logical answer that would not implicate her in an accusation of cheating or justify her earlier decisions not to alert the proctors or put the study materials back in her pocket rather than under the scratch papers on top of the desk.

The testimony of the test proctors, on the other hand, was consistent and credible. Neither of them had any reason to fabricate his testimony. NB described the study materials as having been folded. That is consistent with English's own testimony that the pages were folded. TH found the papers to be under the scratch paper. His testimony is consistent with English's account of where they came to rest.

Based on all the evidence, the Hearing Panel concludes that English possessed the study materials during the examination and used them to cheat during the examination. She had the means to cheat, and because of her previous three failures to pass the examination, she had the motive to cheat. Because the study materials were on top of the

desk and within her sight, the logical presumption is that she used those materials.² That presumption is not rebutted by her testimony, which the Hearing Panel does not find credible. Accordingly, the Hearing Panel concludes that English possessed unauthorized written materials and cheated during a qualification examination, in violation of NASD Membership and Registration Rule 1080 and NASD Conduct Rule 2110.

Sanctions

The NASD Sanction Guidelines provide that for cheating during a qualification examination a bar is standard.³ The principal consideration is whether the nature of the unauthorized material indicated that it would not be useful for taking the examination, and therefore would make clear that the respondent did not intend to cheat. Here, it is clear that the material was taken directly out of a Series 6 study guide and would certainly be of use in taking the Series 6 examination. English does not dispute that the material would be helpful, nor does she deny knowing that NASD and the test center prohibited possession of such material in the testing room. Tr. 78-79. Accordingly, the Hearing Panel concludes that there is no mitigating evidence that would warrant a sanction less than a bar.⁴

² See *District Bus. Conduct Comm. 10 v. Stephen Maliagos*, 1994 NASD Discip. LEXIS 47, at *11 (Jan. 10, 1994).

³ NASD SANCTION GUIDELINES, at 43 (2005 ed.).

⁴ Had the Hearing Panel concluded that English did not cheat, but merely possessed unauthorized materials during the examination, it would have imposed a suspension for two years, in addition to a \$20,000 fine. In view of the fact that this was the fourth time she had taken the examination and clearly knew that possession of such material was prohibited by NASD Rule, advice to applicants by NASD Regulation Qualifications Department, examination pamphlets, and proctor instructions before the examination, severe sanctions would be appropriate. *Id.*, n.2.

Conclusion

Joyce English is barred from association with any member firm in any capacity for possession of unauthorized written materials and cheating during a qualification examination, in violation of NASD Membership and Registration Rule 1080 and NASD Conduct Rule 2110. She is also assessed costs in the total amount of \$1,243.75, consisting of an administrative fee of \$750 and a transcript fee of \$493.75.

Alan W. Heifetz
Hearing Officer
For the Hearing Panel

Copies to:
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