

NASD OFFICE OF HEARING OFFICERS

NASD TREASURER,	Complainant,	Expedited Proceeding No. DFC050011
v.		Hearing Officer - AWH
LEE FISHER (CRD No. 2275667),	Respondent.	DECISION
		April 5, 2006

Registered representative failed to pay fees assessed in connection with an arbitration proceeding. Respondent's registration suspended, pursuant to Rule 9553, until he pays the fees, arranges for payment of them, or files a bankruptcy petition.

Appearances:

John S. Han, Esq., for the NASD Treasurer

Lee Fisher, pro se.

DECISION

On December 7, 2005, NASD sent Lee Fisher ("Fisher" or "Respondent") a notice of intent to suspend his registration based on failure to pay outstanding fees in connection with an arbitration proceeding. On December 19, 2005, Respondent filed a request for a hearing, asserting that he had paid a portion of the fees, that NASD had waived the remainder of the fees due, and that, in any event, he had a bona fide inability to pay the balance of any fees due and owing. A hearing was held by telephone conference call on February 8, 2006.

Findings of Fact¹

On October 4, 2002, while he was registered with NASD through Advantage Investment Strategies, Inc., Lee Fisher was assessed fees of \$1,750.00 as a result of an arbitration proceeding administered by NASD.² On December 31, 2002, the NASD Finance Department accepted Fisher's request for payment installments to avoid suspension of his registration. He was to pay \$100 per month until the balance was satisfied.³

Fisher made monthly payments as agreed upon during January, February, March, April, and June 2003. On July 25, 2003, NASD received an undated, handwritten note from Fisher, alleging "financial problems," and requesting that his monthly payments be reduced to \$30.00. His request was denied. He then requested a hardship waiver, and was sent a list of the required documentation. Fisher remitted a \$100 check in August 2003, but the check was returned for insufficient funds. On September 24, 2003, when the balance due had been reduced to \$1,265, NASD denied his waiver request, but agreed to reduce his monthly payments to \$50.00.⁴

NASD was unable to locate Fisher from after September 2003 until July 2005, when it learned that he had become re-associated with Advantage Investment Strategies, Inc. After a second notice of intent to suspend letter was sent to Fisher, he contacted NASD by telephone on October 17, 2005, and requested a financial hardship waiver. On October 21, 2005, his request for a waiver was again denied, and the December 7, 2005,

¹ References to the NASD Treasurer's Exhibits are designated as CX_, and the transcript of the hearing, as Tr_.. Respondent did not offer any exhibits.

² CX-2. Fisher is presently dually registered through Advantage Investment Strategies, Inc., and Redboat Investments LLC. CX-1.

³ CX-4. Fisher made five \$100 payments, reducing the balance owed to \$1,250. However, after the August 2004 check was returned for insufficient funds, he was assessed a \$15.00 administrative cost, increasing the balance due to \$1,265. CX-9.

⁴ CX-5, CX-6, CX-8, CX-9.

letter initiating this proceeding followed.⁵

In response to Fisher's assertion of an inability to pay the arbitration fees, he was asked to provide NASD counsel with the standard information and documentation it routinely seeks when a respondent asserts an inability to pay. On January 14, 2006, Fisher responded that he was a full time student, had no savings, had debts in excess of assets, and "stocks valued at less than 1,000.00." To support his claims, he stated that he had previously provided evidence of his college enrollment, a recent bank statement, and a 2004 federal tax return.⁶

On January 17, 2006, NASD counsel again wrote Fisher, stating that Fisher failed to respond to the 28 specific requests for information to support his claim of inability to pay, and requesting that Fisher provide that information. On January 20, 2006, Fisher responded, demonstrating that (1) he had earned less than \$1,000 in income from any employer since 2003, (2) he graduated college in 2005 with a Bachelor's degree, and was currently taking prerequisite courses for a health profession position, and (3) he had no real property, loans, or credit lines. However, he stated that in 2003 and 2004, he had an investment account "with an average value over that time of 5-10,000 dollars," and that its current value is "less than 1,000." Finally, he stated that he believes that he was given verbal assurance from an unspecified person at NASD that he qualified for a waiver and that he had been relieved of his obligation to pay the remainder of the forum fee.⁷

⁵ CX-8, CX-9.

⁶ CX-11, CX-12.

⁷ CX-13, CX-14.

Discussion

NASD Rule 9553 provides, among other things, that an associated person who fails to pay any fees required to be paid under NASD By-Laws or Rules may be suspended or barred from association with any member firm. The limited defenses available under Rule 9553 are that the associated person has (1) paid the full balance; (2) timely filed an action to vacate or modify the award that was issued in the arbitration proceeding, and the motion has not been denied; or (3) filed for bankruptcy protection, and the fees owed have not been deemed to be non-dischargeable. A bona fide inability to pay arbitration fees may be a factor in determining whether any sanction for failure to pay fees is excessive or oppressive.

Fisher asserts that he received an oral waiver of the fees from NASD at some time in 2002.⁸ He concedes that he has never received any written waiver of those fees. For the reasons that follow, the Hearing Officer does not find his assertion of a waiver to be credible.

First, the only evidence pertaining to a possible waiver in 2002 is a comment in an NASD telephone log which states, “check (sic) Craftis notes and found there is a noted (sic) dated 11/19/02 which states remaining balance of Forum Fees iao (sic) \$1125 was waived. Notes does (sic) not specify if the waiver was for Fisher or any other party in this case.”⁹ However, there was never a balance due of \$1,125 on Fisher’s account. Fisher originally owed \$1,750, and paid nothing on that balance until January 2003, when he submitted his first \$100 payment. He reduced that balance to \$1,250 after five monthly payments, but after the sixth check, dated August 2003, was returned for

⁸ Tr. 32, 39.

⁹ CX-15, p. 1.

insufficient funds, he was charged \$15, making the balance due \$1,265. Accordingly, if there was any waiver, as noted in the telephone log, it did not pertain to Fisher's account. In any event, Fisher began making monthly payments in January 2003, two months after he claimed he had received a waiver. Those payments are inconsistent with any asserted waiver of payments.

Second, in July 2003, Fisher requested that his monthly payments be reduced to \$30.00. That request was denied, and his request for a waiver was denied in September 2003. Fisher again unsuccessfully requested a waiver in October 2005. Those two waiver requests would not have been necessary had he previously been granted a waiver.

While it is clear that Fisher has little, if any, discretionary income, he had assets sufficient to pay the fees in 2003, and he currently has assets sufficient to pay the balance. At the hearing, he admitted that his stock portfolio was worth from \$5,000 to \$10,000 in 2003 and 2004, and that he could have paid the fees.¹⁰ His current portfolio was worth \$934.52 on December 30, 2005, and was worth \$1,222 on the day of the hearing. It has since increased enough to cover the entire balance due.¹¹ Accordingly, the Hearing Officer concludes that Fisher has not demonstrated a bona fide inability to pay the fees due and owing.

Conclusion

Lee Fisher's registration is suspended until he provides documentary evidence to the Office of Hearing Officers showing that: (1) he has made full payment of the fees; (2) the NASD Finance Department has agreed to installment payments of the fees owed; or (3) he has filed a bankruptcy petition in a United States Bankruptcy Court, or a United

¹⁰ Tr. 32.

¹¹ CX-14, p. 14. The Hearing Officer takes official notice of the daily stock price quotes on February 8, 2006, and March 8, 2006.

States Bankruptcy Court has discharged the fees.¹² The suspension is effective as of the date of the issuance of this decision.

SO ORDERED.

Alan W. Heifetz
Hearing Officer

Copies to:
Via First Class Mail & Overnight Courier
Lee Fisher

Via First Class & Electronic Mail
John S. Han, Esq.
David A. Greene, Esq.

¹² See “Self-Regulatory Organizations; Order Granting Accelerated Approval to Proposed Rule Change by the National Association of Securities Dealers, Inc., Relating to Cancellations and Suspensions for Failure to Comply with Arbitration Award,” Exchange Act Release No. 40,026, 1998 SEC LEXIS 1154, at *7 (May 26, 1998) (listing the issues to be resolved in non-summary proceedings).