

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ELLIOT M. HERSHBERG
(CRD No. 244269),

Harrison, New York

Respondent.

Expedited Proceeding
No. FPI040007

Hearing Officer – SNB

HEARING PANEL DECISION

February 18, 2005

Respondent is barred in all capacities for failing to respond to a request for testimony, in violation of Rules 8210 and 2110.

Appearances

Richard E. Johnston, Esq., Senior Attorney, and Kevin Carroll, Assistant Director, Washington, DC (Rory C. Flynn, Washington, DC, Of Counsel) for Department of Enforcement.

Michael E. Grenert, Esq., and Jeffrey L. Liddle, Esq., New York, NY, for Respondent.

DECISION

I. Procedural History

Pursuant to NASD Rule 8210, the Staff of the Division of Enforcement (the “Staff”) originally scheduled the testimony of Respondent Elliott M. Hershberg (“Hershberg”) for July 23, 2003, and later agreed to postpone it until July 24, 2003. Later, when Hershberg indicated that he would not testify, the Staff served a Wells Notice on his counsel indicating its preliminary determination to bring a disciplinary action for his failure to testify, and providing Hershberg with an opportunity to respond. Hershberg did not respond. On March 25, 2004, the Staff initiated a non-summary proceeding against Hershberg under Rule 9541, and served him

with a pre-suspension notice that provided him 20 days to cure his failure by testifying. On April 16, 2004, based on Hershberg's continued failure to testify, the Staff served him with a Notice of Suspension under Rule 9541. Accordingly, as of this date, he was suspended from associating with any NASD member in any capacity for failing to provide information requested by NASD Staff under Rule 8210. On September 24, 2004 Hershberg filed a Motion for Reinstatement, pursuant to Rule 9544, offering to cooperate for the first time. On November 22, 2004, a telephonic hearing was held on his motion, before a Hearing Panel that included a Hearing Officer and two members of the District 10 Committee. The parties also filed post-hearing submissions.¹

II. Facts

The facts are generally uncontested. Hershberg became registered as a General Securities Representative with NASD member Bear Stearns & Co., Inc. in November 1981. Hershberg has not been registered or associated with any NASD member since July 2003. Hershberg has worked in the securities industry for approximately 38 years, and has no prior disciplinary history. (CX-5; Tr. at p. 26)

On July 24, 2003, Bear Stearns filed a Form U-5 Uniform Termination Notice for Securities Industry Registration with NASD terminating Hershberg's registration with the firm. The U-5 indicated that Hershberg was terminated from association with the firm on June 25, 2003 for violating compliance policies regarding outside business activities. (RX-C; CX-5) On the basis of this U-5 disclosure, the Staff began an investigation. (Tr. at p. 62)

In the course of the investigation, on July 11, 2003 the Staff sent Hershberg a request, pursuant to Rule 8210, for testimony under oath on July 23, 2003. (CX-1; Tr. at p. 64-66) The

¹ The hearing transcript is cited "Tr." Enforcement's exhibits are cited "CX", and Respondent's Exhibits are cited

Staff mailed the request to Hershberg at his most recent residential address listed in the Central Registration Depository (his “CRD address”). (CX-1; CX-5; Tr. at p. 25-26) Hershberg received the request and retained an attorney, Ira Sorkin (“Sorkin”), to represent him with respect to the request. (Tr. at p. 30-33)

On July 21, 2003 Sorkin called NASD Investigator Clyde Anderson (“Anderson”) to request a one-day postponement of the testimony due to a scheduling conflict. Sorkin told Anderson that Hershberg was sixty-two and he was not going to work in the industry, and he was not sure that Hershberg would testify. (Tr. at p. 69-70) The Staff granted Sorkin’s request for a one-day postponement, and sent a letter confirming this. (Tr. at p. 69) The letter stated that “[f]ailure to appear and testify completely and truthfully in this matter could result in disciplinary action including a censure, fine and bar from the securities industry.” (CX-2)

On July 22, 2003, Sorkin sent a response to the Staff’s request for testimony on Hershberg’s behalf, stating, “[o]n advice of counsel, Mr. Hershberg respectfully declines to appear for testimony pursuant to NASD Rule 8210.” (CX-3) In declining to testify, Hershberg understood that he would be subject to discipline by the NASD. (Tr. at p. 31-32)

On July 23, 2003, the Staff sent a letter to Sorkin reiterating that Hershberg was required to appear for testimony in accordance with Rule 8210, and that his failure to do so would subject him to formal NASD disciplinary action and sanctions, including a censure, fine, and a suspension or bar from the securities industry. The Staff stated that it had made a preliminary determination to recommend that formal disciplinary action be brought against Hershberg for the failure to comply with Rule 8210, and provided Hershberg with a deadline to file a Wells submission. (CX-4; Tr. at p. 77-78)

as “RX”.

Hershberg did not make a Wells submission, and he did not offer to appear for testimony. Because Hershberg would not cooperate, the Staff was unable to complete the investigation. There was no further communication between the Staff and Hershberg or his counsel until March 24, 2004 when the Staff sent Hershberg written notice, pursuant to Rule 9541(b), that, in light of his failure to provide requested testimony, he would be suspended unless he took corrective action within 20 days. The Staff sent the notice to Hershberg at his CRD address and Hershberg received it. Hershberg did not respond to the notice, so on April 16, 2004, the Staff notified Hershberg that his suspension had become effective. Once again, the Staff sent this notice to Hershberg at his CRD address. On September 23, 2004 Hershberg filed a motion for reinstatement, pursuant to Rule 9544. (CX 6; CX-7; Tr. at p. 48-49)

III. Violations

Hershberg does not contest that he violated Rule 8210 by refusing to provide requested testimony. (Tr. at p. 8) The Hearing Panel has also independently considered the charge and finds that it is established by the undisputed facts. A violation of Rule 8210 is also a violation of the requirement under Rule 2110 that members observe just and equitable principles of trade. Department of Enforcement v. Hoeper, No. C02000037, 2001 NASD Discip. LEXIS 37 at *5 (NAC Nov. 2, 2001). Thus, the only issue for the Panel is to determine an appropriate sanction.

IV. Sanctions

Rule 9544 provides that “the Hearing Panel may impose any fitting sanction.” The Staff argues that a bar is the appropriate sanction in this case. Hershberg urges the Panel to impose no sanction beyond the suspension he has already served.

The NASD Sanction Guidelines recommend a fine of \$25,000 to \$50,000 for failure to respond. In addition, “[i]f the individual did not respond in any manner, a bar should be

standard. Where mitigation exists, or the person did not respond in a timely manner, consider suspending the individual in any or all capacities for up to two years.” NASD Sanction Guidelines, at 37 (2004 ed.).

Hershberg first argued that he did not fail to respond “in any manner,” as he was now willing to provide testimony. (Tr. at p. 17, 51) The effect of Hershberg’s action, however, is the same, since the Staff was unable to conclude its investigation. Because the NASD does not have subpoena power, it relies upon compliance with Rule 8210 in order to carry out its investigations and fulfill its regulatory responsibilities. Accordingly, as the SEC has recognized, the NASD should not have to bring disciplinary proceedings in order to obtain compliance with its rules. Toni Valentino, Exchange Act Release No. 49255, 2004 SEC LEXIS 330 (Feb. 13, 2004). For this reason, the National Adjudicatory Council has treated a refusal to provide information as equivalent to a failure to respond in any manner for purposes of imposing sanctions, and a Respondent “is not entitled to a lesser sanction because he was willing to appear for NASD testimony only when the timing was right for him...” Department of Enforcement v. Quattrone, No. CAF030008, 2004 NASD Discip. LEXIS 17 at *49 (NAC Nov. 22, 2004), appeal docketed, No. 3-11786 (SEC Dec. 28, 2004). For these reasons, the panel found that Hershberg’s belated offer of testimony was not mitigating.

Hershberg also argued against a sanction because he was following his counsel’s advice. Although it is not a defense to a failure to respond charge, “reasonable reliance on competent legal advice” is listed in the Sanction Guidelines as a possible mitigating factor in imposing sanctions. NASD Sanction Guidelines, at 8 (2004 ed.).

In this case, while Hershberg testified that he refused to testify based upon advice of counsel, when questioned about his communications with counsel at the hearing, he asserted

attorney-client privilege and refused to answer. Thus, the Panel was unable to evaluate whether his reliance upon advice of counsel was reasonable, and whether the advice was competent. It is axiomatic that a Respondent cannot be heard to assert reasonable reliance on competent legal advice if he or she refuses to testify as to the substance of communications with counsel. The privilege cannot be used as both a “shield and a sword.” See, United States v. Doe, 219 F.3d 175 (2d Cir. 2000), citing United States v. Bilzerian, 926 F.2d 1285 at 1292 (2d Cir. 1991) By asserting attorney client privilege with respect to his communications with counsel, Hershberg foreclosed his ability to rely upon advice of counsel as a mitigating factor.

Moreover, Hershberg knew that a refusal to testify was a violation of NASD rules. Regardless of the advice received, it is not reasonable for a Respondent to rely upon advice to take action that he or she knows is a violation of NASD Rules. Department of Enforcement v. Steinhart, No. FPI020002, 2003 NASD Discip. LEXIS 23 (NAC August 11, 2003).

In view of Hershberg’s refusal to testify until this proceeding was instituted, and the lack of mitigating facts,² the Panel determined that the standard sanction of a bar is appropriate in this circumstance. In light of the bar, a monetary fine would serve no additional remedial purpose. Department of Enforcement v. Geraci, No. CMS020143, 2004 NASD Discip. LEXIS 19 (NAC December 9, 2004)

² In retrospect, Hershberg expresses regret and takes responsibility for his actions. (Tr. at p. 42, 56) While the panel appreciates this, it is insufficient to mitigate the violation.

V. Conclusion

For violating Rules 8210 and 2110, Hershberg is barred from associating with any member firm in any capacity. Hershberg is also ordered to pay hearing costs of \$1,658.32, which includes an administrative fee of \$750 and \$908.32 for the hearing transcript. The bar shall become effective on the date this Decision issued.³

HEARING PANEL

Sara Nelson Bloom
Hearing Officer

Dated: February 18, 2005

Copies to:

Jeffrey L. Liddle, Esq. (via facsimile and first class mail)
Michael E. Grenert, Esq. (via facsimile and first class mail)
Elliot M. Hershberg (via overnight and first class mail)
Richard Johnston, Esq. (via electronic and first class mail)
David A. Greene, Esq. (via electronic and first class mail)

³ The Hearing Panel has considered all of the arguments of the Parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.