

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 06-41 (ARB060022).

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Expedited Proceeding
No. ARB060022

Hearing Officer – DRP

**ORDER DEEMING DEFENSE AS ABANDONED, HEARING AS WAIVED,
AND NASD SUSPENSION NOTICE AS FINAL**

On or about June 2, 2006, an NASD arbitration panel rendered an award of \$32,803.29 (Award) against Respondent. He was duly notified of the Award and of his obligation to pay the Award within 30 days.

By letter dated July 27, 2006 (Notice of Suspension or Notice), NASD's Office of Dispute Resolution notified Respondent that, pursuant to NASD Rule 9554, NASD intended to suspend his registration on August 17, 2006, for failing to comply with the Award. The Notice advised Respondent that he had the right to request a hearing in writing, setting forth with specificity certain limited defenses.¹ On August 4, Respondent filed with the Office of Hearing Officers (OHO) a written request for a hearing, but failed to set forth any of the specified defenses.

¹ The Notice advised Respondent of the applicable defenses, namely, that he: paid the Award in full; entered into a fully-executed written settlement agreement with the arbitration claimant; timely filed an action to vacate or modify the Award, which motion has not been denied; or filed for bankruptcy protection and the Award has not been deemed non-dischargeable by a federal court. In addition, the Notice stated that a bona fide inability to pay the Award may be a factor in determining whether any sanction for failure to pay the Award is excessive or oppressive.

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 06-41 (ARB060022).

In an order issued on August 8, 2006, the Hearing Officer directed Respondent to file a statement of defense by August 16, 2006, noting that “[a] failure to comply with this Order may be deemed a waiver of any opportunity for a hearing, in which case the Notice will be deemed to be final NASD action.” Respondent failed to file timely his statement of defense, but on August 25, OHO received a letter from Respondent in which he asserted an inability to pay the Award.

On August 29, 2006, the Hearing Officer issued an order convening a telephonic pre-hearing conference for September 6. In the order, the Hearing Officer cautioned Respondent “that any failure to ... comply with the hearing or pre-hearing schedule in this proceeding may be deemed an abandonment of Respondent’s defenses to the Notice and a waiver of any opportunity for a hearing, in which case the Notice will be deemed to be final NASD action.”

During the September 6, 2006 pre-hearing conference, Respondent reasserted his inability to pay the Award and confirmed that he had received a request from Enforcement for financial information and documentation in support of his defense. At the conference, the Hearing Officer explained to Respondent that he bears the burden of proving his defense and would be required to file a financial disclosure statement along with documentation to support his asserted inability to pay the Award. She also cautioned that if Respondent failed to comply with certain pre-hearing deadlines, the Notice could become final and his request for hearing would be deemed waived. The parties agreed to set the hearing in this matter for October 4, 2006.

Immediately after the September 6 pre-hearing conference, the Hearing Officer issued an order establishing the pre-hearing and hearing schedule, which, among other things, directed Respondent to complete, file and serve a financial statement, together with all required materials in support of his defense, by September 20, 2006. This order again warned Respondent that

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 06-41 (ARB060022).

“[a]ny failure to ... comply with the pre-hearing schedule may be deemed an abandonment of Respondent's defenses to the Notice of Suspension dated July 27, 2006, and a waiver of any opportunity for a hearing, in which case the Notice will be deemed to be final NASD action.”

Respondent failed to file the financial statement or supporting materials with OHO, and failed to serve the documents on Enforcement, by September 20, as required. Consequently, on September 25, Enforcement filed a motion for an order finding that Respondent has abandoned his defense and waived his opportunity for a hearing. For the reasons stated below, Enforcement's motion is granted.

NASD Procedural Rule 9559(m) provides that “Failure of any respondent ... to comply with any order of the Hearing Officer ... requiring production of information to support any defense to the notice that the respondent has raised, shall be considered an abandonment of the respondent's defense and waiver of any opportunity for a hearing provided by the Rule 9550 Series.”

To date, Respondent has not produced financial information and documents in support of his defense as required by the Hearing Officer's order, nor has he contacted Enforcement or OHO. Respondent has had ample time and opportunity to provide the documentation and was repeatedly advised that his failure to comply with the pre-hearing schedule would be considered an abandonment of his defense, waiver of an opportunity for a hearing, and result in his immediate suspension.²

² The Hearing Officer notes that, pursuant to the September 6 order, pre-hearing exhibits were due to be filed by September 27, 2006. Respondent has also failed to file any pre-hearing exhibits.

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 06-41 (ARB060022).

Accordingly, the Hearing Officer deems Respondent's asserted defense to be abandoned and his hearing request to be waived. Pursuant to Rule 9559(m), the July 27, 2006 Notice of Suspension is deemed to be final NASD action, and the instant proceeding is hereby terminated.

SO ORDERED.

Dana R. Pisanelli
Hearing Officer

Dated: September 28, 2006
Washington, DC