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NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	Disciplinary Proceeding
	:	No. E8A2004065102
	:	
Complainant,	:	HEARING PANEL DECISION
	:	
v.	:	
	:	Hearing Officer - SW
	:	
	:	
	:	Dated: August 16, 2006
Respondent.	:	

Respondent violated NASD Conduct Rule 2110 by creating an ATM card that, through his negligence, was used to withdraw funds from a customer’s bank account without the knowledge or approval of the bank customer. The Hearing Panel imposed a Letter of Caution on Respondent for the violation.

Appearances

Kevin G. Kulling, Esq., Regional Counsel, Chicago, IL, for the Department of Enforcement.

Andrew S. May, Esq., Evanston, IL, for Respondent.

DECISION

I. Introduction

On August 19, 2005, the Department of Enforcement (“Enforcement”) filed a one-count Complaint against Respondent. The one-count Complaint alleges that Respondent, a dual employee of Banc One Securities Corporation and Bank One, NA (“Bank One”), violated NASD Conduct Rule 2110 on April 9, 2004, by accessing the bank account of customer SW from a computer terminal that another bank employee had logged onto and creating an instant-issue ATM card without the knowledge, authorization, or consent of customer SW. Subsequently,

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between April 11, 2004 and April 29, 2004, the ATM card created by Respondent was used to withdraw approximately \$5,761 from customer SW's account, without her knowledge or authority. There is no allegation that Respondent used the ATM card or converted SW's funds.

Respondent testified that on the day that the instant-issue ATM card was created, shortly before Bank One's 6:00 p.m. closing time, he was ready to leave when he received a request via telephone, from someone he believed to be a customer, to create an instant-issue ATM card. Respondent activated the card, advised several bank employees of the pin number that he had assigned to the card and that the customer would arrive shortly to pick up the card. Respondent then left to pick up his four-month old daughter from day care. The next day, Bank One assigned Respondent to a different location, and Respondent did not confirm that the customer collected the ATM card. Respondent does not know what happened to the ATM card after he created it and left; but, there is no dispute that Respondent was at work the majority of the times when the ATM card was used to withdraw funds from customer SW's account.

The Hearing Panel, consisting of two current members of the District 8 Committee and a Hearing Officer, conducted a Hearing in Chicago, IL, on April 18 and 19, 2006.¹

II. NASD Conduct Rule 2110 Violation Proven

A. Background

Respondent joined Bank One as a customer service representative on January 5, 2004, and received his Series 6 license.² (CX-1, p. 2; Tr. p. 167). Shortly thereafter, Respondent was promoted to the position of Relationship Banker.³ (Tr. p. 167).

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In April 2004, Respondent was temporarily stationed at the _____ branch of Bank One, in _____, pending the opening of a new branch. (Tr. p. 175). Respondent was “floating” among several branches, including the _____ branch, the _____ branch, and the downtown office. (Tr. pp. 253-254).

Bank One has a data base system called Customer Assist, which indicates whenever a customer account is accessed and indicates which bank employee accessed the account based on the agent log-in ID. (Tr. p. 40; CX-8, pp. 9-10). The Customer Assist data base indicated that on April 7, 2004, Respondent accessed customer SW’s account for approximately 24 minutes⁴ and upgraded customer SW’s checking account to a premier checking account.⁵ (Tr. p. 84, 254; CX-8, p. 10). Customer SW remembers speaking with Respondent on April 7, 2004, but she does not remember what she discussed with Respondent. (Tr. pp. 19, 25, 34-35).

Two days later, on April 9, 2004, Respondent accessed customer SW’s account and created an ATM card tied to SW’s savings account, without the customer being present, in

¹ Hereinafter, “Tr.” refers to the transcript of the Hearing held on April 18 and 19, 2006; “CX” refers to Enforcement’s exhibits; and “RX Exhibits” refers to Respondent’s exhibits.

² Respondent was registered as an investment company and variable contracts products representative with Banc One Securities Corporation from January 26, 2004 to June 4, 2004. (CX-1, p. 3). Respondent was last employed in the industry at Citicorp Investment Services from June 30, 2004 to September 23, 2005. (CX-1, p. 2). Enforcement filed the Complaint in this proceeding on August 19, 2005, prior to the termination date of Respondent’s registration, and the Complaint alleges misconduct occurring before Respondent’s registration terminated. Accordingly, NASD has jurisdiction over Respondent.

³ A Relationship Banker has the authority to open deposit accounts, complete loan applications, sell securities, investments, annuities and generally provide customer service. (Tr. pp. 37-38). Prior to joining Bank One, Respondent worked as a financial analyst at Barclay Savings Bank in England. (Tr. p. 166).

⁴ Bank One’s Customer Assist data base program provided a hyperlink known as “Request Details,” which provided more information about transactions. (CX-8, p. 10). However, the information in the hyperlink is unavailable after approximately six months. (Tr. p. 93). Bank One did not manually retain the information in the hyperlink. (Id.).

⁵ “The Premier THE ONE Card is only available for Premier One checking account customers.” (CX-8, p. 5).

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violation of Bank One's policy. (CX-6; CX-8, pp. 5-6, 10). Respondent accessed customer SW's account by using a computer at the customer service desk that another employee had logged onto with her ID, in violation of Bank One's policy. (Id.). Respondent testified that he received a telephone call on April 9, 2004 from someone identifying herself as a customer and requesting an instant-issue ATM card. (Tr. pp. 176-177). Anticipating that the customer would arrive shortly, Respondent used the computer at the customer service desk because he had already logged out of the computer at his desk to leave to pick up his daughter. (Tr. p. 179). The Hearing Panel notes that Respondent was required to go to the customer service area to activate the ATM card in any event because that is where the ATM card dispenser is located.⁶ (Tr. pp. 53, 243, 250-251).

The digital video tape of the customer service desk and the print out from the Customer Assist data base showed that on April 9, 2006, at a little after 6:00 p.m., Central Time, Respondent activated an instant-issue ATM card, which was tied to SW's savings account. (CX-6; CX-8, p. 10; Tr. pp. 48-49, 109). Respondent created the instant-issue ATM card using the computer at the service desk, on which Ms. _____, a customer service representative, had previously logged on, using her log-in ID. Respondent did this in full view of Ms. _____, Respondent's investment team leader, and at least two other bank employees.⁷ (CX-6; Tr. pp. 90, 229).

⁶To activate an ATM card, an employee would have to get a blank ATM card from the drawer in a credenza at the customer service area. (Tr. p. 53). During April 2004, the drawer was locked only at the end of each day. (Tr. p. 80).

⁷ In 2004, Bank One's computer system did not automatically log off an individual after a period of disuse. (Tr. p. 65). Respondent used Ms. _____'s log-in ID because he used the computer terminal that Ms. _____ had already logged onto. (CX-6).

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The digital video tape also showed that Respondent did not retrieve the ATM card from the card dispenser, which was only accessible to bank employees because it was located behind the customer service desk. (CX-6; Tr. p. 53). Respondent activated the card and assigned it a PIN number in customer SW's absence, in the expectation that when SW arrived Respondent would have her verify her identity, personalize the PIN number, and acknowledge receipt of the card. (Tr. pp. 177-178, 183). Bank One's policies and procedures required that the customer choose the PIN number for an ATM card. (CX-8, p. 6).

Subsequent to activating the ATM card, Respondent, again in full view of other bank employees including his team leader and Ms. _____, used Ms. _____'s computer to access another customer account to assist a customer who came to the customer service desk from the teller area after 6:00 p.m. (Tr. pp. 62, 69; CX-6).

Customer SW did not arrive as expected, and Respondent left to pick up his four month old daughter from day care, after advising the employees remaining at the desk of the existence of the card, the PIN number, and the need to check the customer's identification before releasing the card and to have the customer change the PIN number. (Tr. pp. 163, 181, 183, 187, 224).

Respondent was not at the _____ branch office the next day and did not know whether or not the customer picked up the ATM card. (Tr. p. 187). Respondent does not know what happened to the instant-issue ATM card after he activated it. (Tr. p. 247).

Customer SW states that she does not believe that she requested an additional ATM card. (Tr. p. 19). In any event, Customer SW did not collect the ATM card. Someone else who knew the PIN number assigned by Respondent used the ATM card on 22 separate occasions at various

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ATM machines on the South side of _____ between April 11, 2004 and April 29, 2004.⁸ (Tr. p. 105; CX-4). A total of \$5,761.35 was deducted from customer SW's account including ATM fees. (Id.).

Customer SW reported the unauthorized withdrawals to Bank One at the end of April 2004; Bank One discovered that Respondent had activated the ATM card, reimbursed SW, and terminated Respondent for violating bank policy when he issued an ATM card in the absence of the customer. (CX-1, p. 3; Tr. pp. 22-23, 132, 135).

B. NASD Conduct Rule 2110

NASD Conduct Rule 2110 provides that “[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.”

The SEC has construed Conduct Rule 2110 broadly to apply to all business related misconduct, regardless of whether the misconduct involved securities.⁹ The principal consideration is whether the misconduct reflects on an associated person's ability to comply with regulatory requirements necessary to the proper functioning of the securities industry and protection of the public.¹⁰

⁸ Bank One was unable or unwilling to obtain video tapes of any of the 22 separate instances in which the ATM card was used. (Tr. p. 124).

⁹ DWS Securities Corp., 51 S.E.C. 814, 822 (1993) (“[w]e have repeatedly held that a self-regulatory organization's disciplinary authority is broad enough to encompass business related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security”); Thomas E. Jackson, 45 S.E.C. 771, 772 (1975) (“[a]lthough Jackson's wrongdoing in this instance did not involve securities, the NASD could justifiably conclude that on another occasion it might”).

¹⁰ James A. Goetz, 53 S.E.C. 472, 477 (1998) (finding that respondent's false representation that he would not personally benefit from his firm's matching gifts program violated Conduct Rule 2110 because it reflected “directly on [his] ability to comply with regulatory requirements fundamental to the securities business and to fulfill his fiduciary responsibilities in handling other people's money”).

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The facts in this case are fairly simple. By using a computer that another bank employee had already logged onto to access a customer's account, Respondent violated Bank One's policies and procedures.¹¹ (Tr. p. 41). Respondent then activated an ATM card for a customer without the customer being present, also in violation of Bank One's policies and procedures. (Tr. p. 39). Finally, Respondent assigned a PIN number to a customer's ATM card in violation of Bank One's policies and procedures. (Tr. p. 39; CX-8, p. 6).

Enforcement argued that Respondent intentionally created the instant-issue ATM card in violation of Bank One's policies and procedures without the authorization of customer SW. Enforcement argued that Respondent's conduct reflected directly on his ability to comply with regulatory requirements fundamental to the securities business.

Respondent admits that he created the instant-issue ATM card in violation of Bank One's policies, but he argues that he believed he was complying with the customer's wishes and that he left the card in the safekeeping of other Bank One employees for the customer to collect. A Bank One investigator told Respondent that Bank One would initiate an investigation and that law enforcement would be involved. (Tr. p. 190). Respondent expected that the police investigation would completely exonerate him because it would reveal the person who used the card and ultimately lead back to the person who took the card from the card dispenser. (Tr. pp. 189, 198). However, Bank One reimbursed customer SW, terminated Respondent, and permitted the matter to drop without further investigation. (Tr. pp. 23, 132, 133).

¹¹ The _____ branch manager admitted that she was aware of other instances in which bank employees used someone else's computer log-in ID. (Tr. pp. 64-65). The _____ branch manager also indicated that Ms. _____ was not disciplined for allowing Respondent to use her log-in ID. (Tr. p. 99).

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Respondent appeared honest and sincere in his recitation of the events. Respondent was direct, and did not attempt to minimize his responsibility. Respondent's explanation of what occurred was consistent with the known facts.¹² The Hearing Panel finds Respondent to be a credible witness.

An associated person's violation of his employer's policies violates NASD Conduct Rule 2110 if it reflects on an associated person's ability to comply with regulatory requirements necessary to the proper functioning of the securities industry and protection of the public.¹³ The Hearing Panel finds that Respondent believed that he was assisting a customer by getting the instant-issue ATM card ready at the end of the banking day. Nevertheless, the Hearing Panel also finds that Respondent's disregard of Bank One's prohibitions against (i) activating an ATM card in the absence of the customer, and (ii) assigning a PIN number to the customer's card negatively reflects on his ability to comply with regulatory requirements fundamental to the securities business for the protection of the public. Accordingly, the Hearing Panel finds that Respondent violated NASD Conduct Rule 2110.

III. Sanction

Enforcement argued that Respondent knowingly created an ATM card that was not authorized by the customer. Enforcement also argued that Respondent's actions effectively permitted the misuse of customer SW's funds, and accordingly, his conduct warranted a bar.

¹² The _____ branch manager testified that Ms. _____ had no recollection of the events surrounding the creation of the ATM card. (Tr. p. 92).

¹³ Dep't. of Enforcement v. Davenport, Complaint No. C05010017, 2003 NASD Discip LEXIS 4 (May 7, 2003).

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The Hearing Panel finds that Enforcement failed to prove by a preponderance of the evidence that Respondent knowingly created an ATM card that was not authorized by the customer. To the contrary, the Hearing Panel finds that Respondent sincerely believed that he was assisting a customer. The Hearing Panel also notes that: (1) Respondent accepted responsibility for his actions; (2) the violation was a single instance; (3) Respondent made no effort to conceal his actions; (4) his actions were negligent, not reckless or intentional; and (5) the losses in customer SW's account resulted principally from the criminal acts of the person or persons who took and used the ATM card.

Taking into account Respondent's expectation that a customer would retrieve the ATM card and his reasonable expectation that the other bank employees would complete the necessary customer verification process before relinquishing the card, the Hearing Panel finds that a Letter of Caution is the appropriate sanction for Respondent's violation of NASD Conduct Rule 2110.

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IV. Conclusion

The Hearing Panel finds that Respondent violated NASD Conduct Rule 2110 and deems this Decision a Letter of Caution.¹⁴

HEARING PANEL

By: Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
August 16, 2006

¹⁴ The Hearing Panel has considered all of the arguments of the Parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.