NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. CAROLYN S. EVERHARD (CRD No. 2344119), Respondent.	Disciplinary Proceeding No. 20050025930 Hearing Officer – DMF **HEARING PANEL DECISION** June 19, 2007

Summary

Respondent is barred from associating with any NASD member in any capacity for conversion of customer funds, in violation of Rule 2110. In light of the bar, no additional sanctions are imposed on Respondent for her failure to respond fully and in a timely manner to NASD staff requests for information, in violation of Rules 8210 and 2110.

Appearances

Dale A. Glanzman, Esq., (Rory C. Flynn, Esq., and Mark P. Dauer, Esq., Of Counsel) for Complainant.

Carolyn S. Everhard, pro se, for Respondent.

DECISION

I. Procedural History

The Department of Enforcement filed its Complaint against Respondent Carolyn S. Everhard on July 17, 2006, alleging that she converted to her own use and benefit a total of $6,400 belonging to a customer, JC, in violation of Rules 2110 and 2330(a), and that she failed to respond fully and in a timely manner to NASD staff requests for information, in violation of Rules 8210 and 2110. Everhard filed an Answer contesting

the charges and requested a hearing, which was held in Cincinnati, Ohio on May 1, 2007, before a Hearing Panel.

II. Facts

A. Respondent

Everhard became employed by Bank One in 1973. In 1993, she became registered as an Investment Company and Variable Contract Products Limited Representative through Bank One's affiliated NASD member, Banc One Securities Corporation. In 2005, after Bank One was acquired by JPMorgan Chase & Co., her registration was transferred to Chase Investment Services Corp. Chase terminated her employment and registration in September 2005. She worked in the same bank branch for her entire career with Bank One/Chase. She was registered through another NASD member from March 2006 until September 2006, but has not been registered or associated with any NASD member since then. She has no prior disciplinary record. (CX 1; Tr. 21-23.)[1]

B. Conversion

The conversion charge arises out of events that occurred on August 10 and 11, 2005. On August 10, JC, who had been a banking and securities customer of Everhard for several years, came into the bank branch where Everhard worked for a scheduled meeting at which Everhard was to help her balance her checkbook and set up a program for the automatic payment of certain of JC's monthly bills from her checking account. JC's sister accompanied her. (Tr. 23-24, 26-27, 89, 91.)

[1] In this decision, "CX" refers to Complainant's exhibits; "RX" to Respondent's exhibits; and "Tr." to the transcript of the hearing. CX 1-25 and RX 1-6 were offered and admitted at the hearing. (Tr. 247, 266.)

During the meeting, Everhard pointed out to JC that she had more than $16,000 in her checking account, where it was earning a low rate of interest, and urged her (as she had in the past) to move some of those funds to JC's existing annuity. When JC agreed to this plan, Everhard completed a check from JC's checkbook, which JC signed, withdrawing $6,400 from JC's account. Everhard took the check to a teller and requested a cashier's check in the amount of $6,000, payable to the annuity company, and $400 in cash. She then returned to her desk with the cashier's check and the cash, where JC was waiting. (Tr. 28-35, 93; CX 16, 18.)

At this point, there is a dispute as to the facts. Everhard testified that she gave the envelope containing the $400 to JC, and that she did not believe that JC's sister was present at the time. She testified that during her meeting with JC the sister left Everhard's cubicle twice to smoke a cigarette, and she believed the sister was on one of those breaks when she handed JC the envelope containing $400. JC passed away in April 2007, prior to the hearing. The sister, however, testified that she never left Everhard's cubicle and does not smoke, and that Everhard did not give JC any cash. A recording from a bank security camera confirms that neither JC nor her sister left Everhard's cubicle during the entire period that JC was meeting with Everhard.[2] (Tr. 36, 38-39, 89, 92-94, 97, 185, 217-19, 221-22; CX 25.)

Everhard did not transmit the $6,000 cashier's check to the annuity company on August 10, or complete any of the paperwork that would have accompanied the check; Everhard testified that was because her meeting with JC ended too late in the day for her

[2] A bank investigator, who had reviewed the security camera tape and copied it onto a DVD (CX 25), testified about what was depicted. (Tr. 165-66, 185, 221-22.) The DVD itself was not played at the hearing, but the Hearing Officer reviewed it after the hearing and confirmed that the investigator's descriptions were accurate.

to meet a 3:00 p.m. deadline to submit investments for credit on the day of submission. The bank's security camera recording, however, showed that JC and her sister left Everhard's desk at approximately 1:40 p.m. Moreover, as a bank investigator testified, even if it had been too late to obtain credit that day, the check and paperwork should have been faxed to the annuity company that day to ensure that it would be credited to JC's annuity the following day. (Tr. 40-41, 172-75, 181, 201-02.)

On the morning of August 11, although it was her day off, Everhard appeared at the branch around the time it opened. She told the other branch employees that JC had called her at home the prior evening, telling her that she (JC) had decided that she did not want to invest the additional funds in her annuity. Instead, according to Everhard, JC wanted her to cancel the cashier's check and bring the $6,000 in cash to JC's home. Everhard retrieved the cashier's check from the vault and endorsed it "not used for purpose intended. Bank One." One of the tellers gave her $6,000, in $100 bills, to take to JC. (Tr. 42-44, 115, 118; CX 18.)

According to Everhard, she delivered the $6,000 to JC at her home at approximately 9:30 a.m. on August 11. JC lived in a first-floor condominium apartment. To reach JC's apartment, Everhard would have had to be admitted into the building through an exterior security door. Everhard testified, however, that, even though she did not call in advance, JC was waiting at the security door when she approached the building from her car. Everhard testified that as she neared the security door JC opened it, and she

handed JC the bank envelope containing the $6,000 and left without entering the building. (Tr. 45-50, 103-05.) [3]

Other witnesses, including JC's sister, the bank branch manager and the bank investigator, testified that when they came to JC's home she did not meet them at the security door, even when she expected them, but rather buzzed them through the security door from her apartment after they rang her bell and identified themselves. They also testified that JC was legally blind, could not read print without the aid of a powerful magnifier, and could not recognize faces from even a short distance. (Tr. 90-91, 103-05, 124-25, 168, 170.)

During the process of counting out the $6,000 for Everhard to take to JC, the teller noted that $1,000 was missing from a money strap that had come from the vault. Later, unable to account for the missing funds, the teller speculated that perhaps the money had been mistakenly included in the funds that Everhard delivered to JC, and suggested calling JC. Everhard, however, objected, stating that JC was elderly and might become upset if contacted about the missing funds. Nevertheless, the following week, unable to find any other explanation for the missing funds, the manager of the branch called JC, who said she believed the entire $6,400 had been invested in her annuity, and she had not received any cash from Everhard. (Tr. 50-52, 116-20; CX 22.)

The branch manager then contacted the bank's security department, which assigned an investigator. The investigator and the branch manager visited JC in her

[3] Everhard did not obtain a receipt from JC for the $6,000. At the hearing, the branch manager testified that she told Everhard to obtain a receipt, but Everhard denied that, while the bank's investigator testified that when he spoke to the branch manager and Everhard in 2005, shortly after the events, both told him that the branch manager had said to Everhard, before she left to deliver the money to JC, "If I were you I would get a receipt." (Tr. 45, 49, 116, 178, 208.) The Hearing Panel finds that even if the branch manager did not specifically direct Everhard to obtain a receipt, it should have been obvious to her that, simply as a matter of sound business practice, if she delivered $6,000 in cash to a customer at the customer's residence, she should obtain a receipt signed by the customer.

home. Again she told them that she believed the entire $6,400 had been invested in her annuity, and that she had not requested or received any cash from Everhard. JC also told her sister and an NASD investigator who met with her that she thought the entire $6,400 had been invested in her annuity and that Everhard never gave her any cash. (Tr. 95, 102-03, 123-24, 167-68; 244; CX 19.)

After meeting with JC, the investigator and a Human Resources Department representative met with Everhard. Everhard told them that JC called her at home on the evening of August 10, indicating that she had changed her mind about investing the $6,000 in her annuity and wanted the money in cash, and that she delivered the money to JC at her home. According to the investigator, however, when he asked Everhard to describe JC's residence, "she couldn't tell me if there was a garage or a carport or any kind of a description of the building …." After the interview, Everhard was terminated. Subsequently the bank offered to reimburse JC for the $6,400, and at JC's request the entire amount was invested in her annuity. (Tr. 53-54, 154, 178-79, 182; CX 20-21, 23.)

C. Delayed and Incomplete Responses

After Everhard was terminated, Chase filed a Form U5 Uniform Termination Notice for Securities Industry Registration with NASD. The Form U5 stated that Everhard had been discharged and that "rep allegedly converted customers [sic] funds for personal use." Upon receiving the Form U5, NASD staff began an investigation and on February 6, 2006, sent Everhard a letter, pursuant to Rule 8210, requesting a statement regarding her interactions with JC and documents, including copies of Everhard's own bank account statements. (Tr. 225-28; CX 1, 4.)

Everhard received the request, but did not respond by the February 22, 2006 deadline set forth in the letter. On February 27, 2006, NASD staff sent her a follow-up letter, pursuant to Rule 8210, reiterating the requests in the February 6 letter, and setting a deadline of March 13, 2006, for her to respond. (Tr. 226; CX 5.)

On the same day (February 27), however, NASD staff received from Everhard a copy of a letter dated January 31, 2006, from a Chase "Licensing Specialist" to Everhard, as well as two pages from an amendment to Everhard's Form U-5 that Chase had filed with NASD on January 12, 2006. The original Form U5 filed by Chase had mistakenly included a "yes" response to a question on the Form U5 asking whether Everhard was the subject of any written customer complaint, citing JC's oral statements. The amendment corrected this error, stating, "This was an oral complaint that was inadvertently reported on the reps U4 [sic]. As it is a non-reportable event, please archive this filing." On the copy of the letter that she sent to NASD staff, Everhard wrote, "You will receive full amendment papers from Chase. Just received the above letter 1 day after your letter. Notice section highlighted. Any further questions can go to Chase. Very upset about Chase's handling of my U-4." (Tr. 227; CX 3, 6-7.)

The next day, February 28, NASD staff sent Everhard a letter acknowledging receipt of her letter and the excerpt from her amended Form U5, but explaining, "Regardless of whether the complaint is oral or written or whether it is disclosable on the Form U-4, the staff is investigating the matter and requires that you respond to the staff's request for information." The February 28 letter gave Everhard a "final due date" of March 13, 2006 to respond. (Tr. 233-34; CX 8.)

On March 23, 2006, NASD staff received a three-page handwritten letter from Everhard in which she indicated that she "thought because Chase amended my U-4 due to error all was settled." She also provided a narrative response to the staff's request for information regarding her interactions with JC, but not the documents the staff had requested. The staff then called her to tell her that her response was inadequate because of her failure to provide the requested documents. The staff terminated the call, however, when Everhard informed them that she had retained an attorney. (Tr. 234-37; CX 9.)

Next the staff received a letter dated April 12, 2006, from an attorney who indicated that she had been retained by Everhard, that she had advised Everhard to obtain the bank statements requested by the staff, and that she would forward the statements to the staff "as soon as those bank statements are available." On May 25, 2006, having still not received the documents, the staff sent Everhard another letter, pursuant to Rule 8210. In the letter, the staff stated that they had been notified by the attorney that she no longer represented Everhard, pointed out that Everhard had still not provided the requested account statements, and set a deadline of June 8, 2006, for Everhard to provide the documents. (Tr. 237-39; CX 10-11.)

Later in June 2006—there was no record of the exact date—Everhard left a voicemail message for the NASD investigator who had signed the information request letters stating that she was out of town on a family emergency, that her daughter had told her she had received the letter setting a June 8 deadline for providing the documents, that she wanted someone "higher up" in NASD to consider the need for the requested documents, and that she would contact the investigator after she returned home. The staff

did not, however, receive any documents in response to the Rule 8210 requests prior to the filing of the Complaint in July 2006. (Tr. 239-40; CX 12.)

Everhard filed her Answer to the Complaint on August 31, 2006, and attached a variety of documents to her Answer, including the first page of her bank account statements for the months of August 2005 through January 2006; she did not provide copies of the remaining pages of the account statements. Among the other documents she provided were several W2G tax forms reflecting gambling winnings at slot machines, one of which indicates that she won $1,545 at a slot machine in a casino in Lawrence, Indiana, on August 11, 2005, at 12:15 p.m., less than three hours after she claimed she delivered $6,000 in cash to JC. (Tr. 55-66, 240-41; CX 3.)[4]

III. Discussion

A. Conversion

To prevail on the first charge Enforcement had to prove by a preponderance of the evidence that Everhart converted JC's funds. Conversion is "an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it." NASD Sanction Guidelines at 38 n.2 (2006). Conversion of customer funds violates Rule 2330(a), which prohibits improper use of a customer's funds, and also violates Rule 2110, which requires NASD members and associated persons to "observe high standards of commercial honor and just and equitable principles of trade." See, e.g., Department of Enforcement v. Kendzierski, No. C9A980021, 1999 NASD Discip. LEXIS 40 at ** 6-9 (N.A.C. Nov. 12, 1999). The

[4] After the Complaint and Answer were filed, Everhard appeared for an on-the-record interview (OTR) conducted by NASD staff and provided additional financial records, including the first page of other account statements and certain tax forms. Because the OTR and the additional documents relate to Rule 8210 requests issued after the Complaint was filed, whether Everhard's responses to those requests were complete or timely is not at issue in this proceeding. (CX 13-15, 24.)

issue, therefore, is simply whether Everhard gave the $6,400 to JC as she claims, or kept the funds herself, as Enforcement alleges.

The evidence against Everhard consists principally of JC's statements to various witnesses denying that she received the funds. JC's statements were hearsay, but in NASD proceedings "hearsay statements may be admitted in evidence and, in an appropriate case, may form the basis for findings of fact." Charles D. Tom, 50 S.E.C. 1142, 1992 SEC LEXIS 2000 at *7 (Aug. 24, 1992).[5] In determining how much weight to give hearsay evidence, "[t]he factors to consider include the possible bias of the declarant, the type of hearsay at issue, whether the statements are signed and sworn to rather than anonymous, oral or unsworn, whether the statements are contradicted by direct testimony, whether the declarant was available to testify, and whether the hearsay is corroborated." Id.

Many factors support giving substantial weight to JC's statements. Her initial statement was spontaneous, elicited by the bank's branch manager, who called JC. In order to avoid alarming JC, the branch manager asked, first, whether JC had decided to cancel her annuity. Only after JC indicated that she did not want to cancel the annuity and indeed thought the funds had been invested in the annuity did the branch manager ask about the amount of cash JC had received from Everhard, at which point JC responded that Everhard had not given her any cash. (Tr. 120.)

JC's subsequent statements that she had not received any cash from Everhard were consistent, and made to several witnesses independently. The witnesses to whom

[5] Even if the Federal Rules of Evidence applied, JC's statements would be admissible under FRE 804(b)(5), because JC was unavailable to testify and (A) her statements relate to material facts, (B) her statements were more probative on the point than any other evidence that Enforcement could obtain, and (C) the general purposes of the Rules of Evidence and the interests of justice were best served by admitting her statements into evidence.

she made the statements included two experienced investigators—one from the bank and the other from NASD—who found JC highly credible. In addition, her statement that Everhard did not give her any cash on August 10 was corroborated by her sister. The sister, herself, was a very credible witness, who responded to questions from both parties and the Panel in a calm, thoughtful and dignified manner. Finally, the Panel found it particularly noteworthy that when the bank offered to reimburse JC, she elected to have the entire $6,400 invested in her annuity, which lends support to her statements that she intended to invest the original funds in that manner, rather than take the funds in cash.

In contrast, Everhard's testimony was simply not credible. She claimed that JC's sister left her cubicle at least twice during the meeting on August 10, but the security camera video confirmed the sister's testimony that she stayed in Everhard's cubicle with JC for the entire meeting. Her testimony that she did not complete any paperwork or fax the check to the annuity company because it was after 3:00 p.m. is belied by the bank's security camera tape, which shows that JC and her sister left the bank at about 1:40 p.m., leaving ample time for Everhard to prepare and fax the documentation and check to the annuity company before 3:00 p.m. Moreover, even if she had been unable to meet the 3:00 p.m. deadline for obtaining credit for the investment that day, there was no legitimate reason for her to delay sending the documentation until the following day.

Everhard's claim that JC was waiting for her at the security door is inconsistent with the testimony of the other witnesses regarding JC's habit of having visitors buzz for admission even when she was expecting them. Moreover, JC's vision was so poor, according to the other witnesses, that she would not have been able to recognize Everhard approaching even if she had been looking for her. Everhard's story did conveniently

allow her to avoid questions asking her to describe the interior of JC's apartment, yet, when initially questioned by the bank's investigator, Everhard was unable to describe even the exterior of JC's building. Finally, the notion that JC, who typically withdrew relatively small amounts of cash at wide intervals, would have asked Everhard to deliver $6,000 in cash, in $100 bills, is not credible. If JC had changed her mind about investing the funds in her annuity, she would simply have instructed Everhard to put the funds back in her checking account.

Finally, the Panel notes that Everhard was a habitual gambler at the time, by her own admission going to casinos "once or twice a week." (Tr. 69.) Indeed, the evidence shows that on August 11, after supposedly delivering the $6,000 to JC, Everhard was gambling in a casino within a few hours. She was also in serious financial difficulty at the time, filing for bankruptcy in October 2005. (Tr. 54.) Thus, Everhard had a clear motive to convert JC's funds.

Accordingly, the Hearing Panel finds that Enforcement proved by a preponderance of the evidence that Everhard converted $6,400 belonging to customer JC, in violation of Rule 2110.

B. Failure to Respond Fully and in a Timely Manner

Rule 8210 authorizes NASD staff to require member firms or associated persons to provide information with respect to any matter involved in an NASD examination. Because NASD has no subpoena power, timely and full compliance with information requests is essential to NASD's self-regulatory function. See Joseph G. Chiulli, Exch. Act Rel. No. 42359, 2000 SEC LEXIS 112 at **16, 19 (Jan. 28, 2000); Michael David Borth, Exch. Act Rel. No. 31602, 1992 SEC LEXIS 3248, at *7 (Dec. 16, 1992). "A

failure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate." Department of Enforcement v. Valentino, No. FPI010004, 2003 NASD Discip. LEXIS 15 at *12 (N.A.C. May 21, 2003).

Everhard admits that she received all of the requests that NASD staff sent her. (Tr. 72-73.) Yet she did not respond to any of them in a timely manner or completely. In particular, while she provided a narrative response to the staff's questions in March 2006, following the staff's third request for such information and after the deadline set forth in that request, she continued to refuse to provide the bank account statements requested by the staff until after Enforcement filed its Complaint. Even then she failed to provide complete account statements, as requested.

Everhard argues that, initially, she believed that Chase's filing of an amended Form U5 had eliminated the staff's need for the information it requested. But the amendment merely noted that JC's customer complaint, referred to in the initial Form U5, had been oral, not written, and the staff promptly advised Everhard that the amendment to the Form U5 did not end the staff's inquiry or excuse her from providing the requested information. Furthermore, considering that the staff was investigating whether Everhard had taken JC's money, it must have been clear to her that her bank account statements were relevant and material to the investigation. This is confirmed by the fact that, when she finally submitted portions of her bank statements after the Complaint was filed, she also included documents, such as the W2G forms showing her gambling winnings, in an effort to demonstrate that the deposits to her account had come from sources other than JC's funds. (Tr. 60-61, 66-67.)

The Hearing Panel, therefore, concludes that Everhard violated Rule 8210 by failing to respond fully and in a timely manner to each of the staff's requests for information. A violation of Rule 8210 is also a violation of Rule 2110. Department of Enforcement v. Hoeper, No. C02000037, 2001 NASD Discip. LEXIS 37 at *5 (N.A.C. Nov. 2, 2001).

IV. Sanctions

For conversion, the Sanction Guidelines are unequivocal: "Bar respondent regardless of amount converted." NASD Sanction Guidelines at 38 (2006). There is no evidence of any mitigating circumstances that might justify a lesser sanction in this case. On the contrary, several of the applicable considerations are aggravating. See Sanction Guidelines at 6-7. Everhard has never acknowledged her misconduct, and never attempted to make restitution to JC. In addition, her actions were intentional, the amount of money involved was substantial, and she took advantage of an elderly, trusting customer. And while this case involves only a single customer, Everhard converted the funds through two distinct and deliberate actions, taking $400 on August 10 and the additional $6,000 on August 11. Accordingly, Everhard will be barred for this violation.

For failure to respond to requests for information fully and in a timely manner, the Sanction Guidelines recommend a fine of up to $25,000 and a suspension of up to two years. Id. at 35. In determining specific sanctions, the Guidelines direct consideration of (1) the nature of the information requested, and (2) whether the information was eventually provided and, if so, the number of requests made, the time the respondent took to respond and the degree of regulatory pressure required to obtain a response. Here the staff sought information regarding a very serious conversion accusation and documents that might show whether Everhard deposited the converted funds in her accounts; it took

repeated requests to obtain information and documents; she provided no documents until after the Complaint was filed; and even then she did not provide complete account records. An appropriate sanction, therefore, would be at the upper end of the ranges recommended by the Guidelines. In light of the bar imposed for the conversion violation, however, a fine and a suspension would serve no regulatory purpose. Accordingly, the Panel will not impose any sanctions for this violation.

V. Conclusion

Respondent Carolyn S. Everhard is barred from associating with any NASD member in any capacity for conversion of customer funds, in violation of Rule 2110. In light of the bar, no additional sanctions are imposed on Respondent for her failure to respond fully and in a timely manner to NASD staff requests for information, in violation of Rules 8210 and 2110. If this decision becomes NASD's final disciplinary action, the bar shall become effective immediately.[6]

HEARING PANEL

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By: David M. FitzGerald
Hearing Officer

Copies to: Carolyn S. Everhard *(via overnight and first class mail*)
Dale A. Glanzman, Esq. *(electronically and via first class mail*)
Mark P. Dauer, Esq. *(electronically and via first class mail*)
Rory C. Flynn, Esq. *(electronically and via first class mail*)

[6] The Hearing Panel has considered and rejects without discussion all other arguments of the parties.