

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	Disciplinary Proceeding
Complainant,	:	No. C11040006
	:	
v.	:	Hearing Officer – DMF
	:	
JUSTIN F. FICKEN	:	HEARING PANEL DECISION
(CRD #4059611),	:	
	:	October 15, 2007
Respondent.	:	

Respondent is suspended from associating with any FINRA member in any capacity for two years, fined \$25,000, and ordered to pay costs, for refusing to provide testimony, in violation of Rules 8210 and 2110.

Appearances

Paul M. Tyrrell, Esq., Boston, MA, (Rory C. Flynn, Washington, DC, Of Counsel) for Complainant.

Gary G. Pelletier, Esq., Boston, MA, for Respondent.

DECISION

I. Procedural History

The Department of Enforcement filed a Complaint on February 18, 2004, charging that Respondent Justin F. Ficken refused to provide testimony in violation of NASD Rules 8210 and 2110.¹ On June 14, 2004, the Hearing Panel issued a decision granting Enforcement’s motion for summary disposition, pursuant to NASD Rule 9264, holding that Ficken violated Rules 8210 and 2110, as charged, and barring him from

¹ As of July 30, 2007, NASD consolidated with the member firm regulation functions of NYSE and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD.

association with any member firm.² Ficken appealed the Panel's decision to the National Adjudicatory Council (NAC), which issued a decision affirming the Panel's decision on December 7, 2005.³ Ficken then appealed the NAC's decision to the Securities and Exchange Commission, which, on November 3, 2006, remanded the case to the NAC for further consideration of Ficken's argument that he was entitled to assert his Fifth Amendment rights in FINRA's investigation.⁴ The NAC, in turn, remanded the case to the Hearing Panel for further proceedings in light of the SEC's decision.

Following the remand, Enforcement renewed its motion for summary disposition, and Ficken opposed Enforcement's renewed motion. On April 18, 2007, the Hearing Panel issued an order granting Enforcement's motion in part, finding that the undisputed facts established the violation charged, but denying the motion as to the issue of sanctions.⁵ On July 31, 2007, the Hearing Panel held a hearing on sanctions in Boston, Massachusetts, at which Enforcement offered the testimony of the Special Investigator who had led the investigation and Ficken offered the testimony of one of his former attorneys; Ficken did not testify.⁶

² 2004 NASD Discip. LEXIS 24.

³ 2005 NASD Discip. LEXIS 7.

⁴ Exchange Act Rel. No. 54699, 2006 SEC LEXIS 2547.

⁵ OHO Order No. 07-16 (C11040006), available at <http://www.finra.org/RegulatoryEnforcement/Adjudication/OfficeofHearingOfficersDecisionsandProceedings/OHODisciplinaryOrders/2007Orders/P037032>.

⁶ In addition to the hearing transcript (Tr.), the evidentiary record includes: (1) the declaration of Special Investigator Alan Rubin in support of Enforcement's motion for summary disposition (Rubin Dec.) and attached exhibits; (2) Respondent's exhibits in opposition to Enforcement's motion (Resp. Exh.); (3) the declaration of Special Investigator James E. Coulter in support of Enforcement's renewed motion for summary disposition (Coulter Dec.); (4) the supplemental declaration of Special Investigator Rubin in support of Enforcement's renewed motion (Rubin Supp. Dec.) and attached exhibit; (5) Enforcement's hearing exhibits (CX 1-10); and Respondent's hearing exhibit (RX 2).

II. Facts

The relevant facts are not in dispute. Ficken entered the securities industry in 1999. Until July 2003, he was registered with FINRA through Prudential Securities Incorporated as a General Securities Representative. From July 2003 to October 2003, he was registered in the same capacity through Wachovia Securities, LLC. He has not been registered since October 2003. (CX 1.)

In October 2003, Wachovia filed a Uniform Termination Notice for Securities Industry Registration (Form U5) disclosing that Ficken had been permitted to resign from Wachovia. FINRA staff then opened an investigation “to determine whether Ficken had engaged in, among other things, market timing and late trading activity in mutual fund shares” while he was associated with Prudential. (CX 1; Rubin Decl. at 1.)

At the same time, other regulators were also looking into Ficken’s activities. In early November 2003, the Securities and Exchange Commission filed a civil action against Ficken and several other former Prudential brokers alleging that they had engaged in fraudulent market timing trades in violation of the federal securities laws, and the Massachusetts Securities Division filed an administrative complaint against Ficken and the other individuals alleging fraudulent market timing activities in violation of state law. (Resp. Exhs. A, B; Tr. 87.)

In connection with their investigation, FINRA staff requested, pursuant to Rule 8210, that Ficken appear and provide sworn testimony in an on-the-record interview (OTR). In December 2003, Ficken appeared for an OTR with counsel and answered the staff’s questions for several hours. But when the staff posed questions about certain trades, his counsel announced that he was advising Ficken not to answer any questions

about possible late trading, based upon the Fifth Amendment, because of concerns about a federal criminal investigation. (CX 3 at 140-41.)

The staff continued to question Ficken, and although he refused to answer questions about some trades, based on his counsel's advice, he answered many other questions. At the end of the day, with Ficken's counsel advising the staff that he would not allow Ficken to answer questions on certain topics at that time, the staff concluded the OTR "with the caveat that we are leaving it open for future conversations," to which Ficken's counsel responded, "Agreed." (CX 3 at 187.)

In January 2004, NASD staff requested, pursuant to Rule 8210, that Ficken appear for a second OTR. (CX 4.) After postponements for various reasons, the staff scheduled the OTR for February 9, 2004. (CX 5-6; Tr. 18-19.) On January 13, 2004, Ficken's counsel received a letter from the United States Attorney for the District of Massachusetts advising that Ficken was "the target of a federal grand jury investigation ... regarding alleged violations of federal securities laws," and that Ficken was "someone we are likely to recommend to the grand jury that it indict." (RX 2.) On February 6, 2004, Ficken's counsel sent FINRA staff a letter stating:

in view of the real possibility of criminal action being taken against him, and because an invocation [of] our client's constitutional right not to incriminate himself in any proceedings does not preclude [FINRA] from a Rule 8210 finding, we have advised our client that it is not in his best interest to provide you documentary or testimonial evidence material to [FINRA's] investigation until all related criminal issues have been resolved and/or adjudicated.

Accordingly, the letter advised, Ficken would not appear for his OTR. (CX 7.)

In spite of the letter, the staff convened the OTR on February 9 as scheduled. The staff was prepared to question Ficken about a wide range of topics relevant to their

investigation, but Ficken did not appear. (CX 8; Tr. 20-30.) Ficken has never been charged criminally. (Tr. 102.) Nevertheless, he has never contacted the staff and offered to appear. (Tr. 68-69.)

III. Violation

The Complaint charges that Ficken violated Rule 8210, which provides:

For the purpose of an investigation ... [FINRA] staff shall have the right to ... require ... a person associated with a member ... to testify ... under oath or affirmation ... with respect to any matter involved in the investigation

This authority is critically important to FINRA's effective performance of its self-regulatory function. Pursuant to Section 15A of the Securities Exchange Act of 1934, FINRA is required to have rules that are "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade ... and, in general, to protect investors and the public interest" In addition, the Exchange Act requires that FINRA's rules

provide that ... its members and persons associated with its members shall be appropriately disciplined for any violation of [the Exchange Act], the rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or the rules of [FINRA], by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

To carry out these responsibilities, FINRA must be able to gather information, yet as a private entity it has no subpoena power; instead, it relies on the cooperation of its members and their associated persons. See, e.g., Brian L. Gibbons, 52 S.E.C. 791, 794 (1996), aff'd, 112 F.3d 516 (9th Cir. 1997) (table). Therefore, persons subject to FINRA jurisdiction have "an absolute obligation to appear for testimony," if requested to do so

pursuant to Rule 8210. Department of Enforcement v. Respondent Firm, No. CAF000013, 2003 NASD Discip. LEXIS 40, at *46 (N.A.C. Nov. 14, 2003).

Ficken was registered with FINRA through Prudential and Wachovia until October 2003. Pursuant to Article V, Section 4 of FINRA's By-Laws, he remained subject to FINRA's jurisdiction for two years thereafter with respect to conduct that commenced prior to the termination of his registration, and he was required to provide any information or testimony requested, pursuant to Rule 8210, during that two year period. See Department of Enforcement v. Respondent Firm, 2003 NASD Discip. LEXIS 40, at *27-31.

Ficken appeared for his initial OTR in December 2003 and answered the majority of the staff's questions over a period of several hours. As the lead FINRA Special Investigator testified, the OTR was terminated at the end of a long day "at a logical ending point, knowing that we still had questions to ask." (Tr. 16.) Moreover, during the OTR, Ficken's counsel repeatedly indicated that Ficken wished to cooperate with FINRA's investigation, but was concerned about the pending criminal investigation. At the end of the December OTR, the staff, with the agreement of Ficken's counsel, left the door open for Ficken to provide additional testimony. As explained in the Hearing Panel's summary disposition order, under all these circumstances, the Panel declined to find a violation of Rule 8210 based on Ficken's refusal to answer certain questions during his December OTR.

Instead, the Panel found that Ficken violated Rule 8210 by failing to appear for his February 2004 OTR. Ficken had notice of the February OTR, but refused to appear, citing the pending criminal investigation. But, as Ficken's counsel acknowledged in his

letter conveying Ficken's refusal, as a private entity, FINRA ordinarily is not required to recognize Fifth Amendment claims. See D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc., 279 F.3d 155, 162 (2d Cir. 2002); Marchiano v. NASD, 134 F. Supp. 2d 90, 95 (D.D.C. 2001); United States v. Shvarts, 90 F. Supp. 2d 219, 222 (E.D.N.Y. 2000).

Ficken has argued, however, that he was entitled to claim Fifth Amendment protection in this case, speculating that in conducting its investigation FINRA staff may have been acting at the behest of or in cooperation with prosecutors, the SEC or Massachusetts regulators. And, indeed, a private entity such as FINRA may be treated as a state actor and required to recognize Fifth Amendment rights if its actions are "fairly attributable" to the government, because the government has either "exercised coercive power" over or "provided such significant encouragement" to the private actor that its actions must be deemed to be that of the government. Cromwell, 279 F.3d at 161.

In its original decision, the Panel rejected Ficken's argument because he had not adduced any evidence to support his speculation. While plainly the SEC, the state of Massachusetts and federal prosecutors were also investigating Ficken, the mere existence of parallel investigations does not by itself suggest that FINRA's investigators were coerced or encouraged by the government, or that they were taking part in any sort of joint investigation. Thus, Ficken offered no evidence whatsoever that FINRA's OTR request was fairly attributable to the government.

As noted above, the SEC remanded this proceeding for further consideration of Ficken's Fifth Amendment argument in light of Frank P. Quattrone, Exchange Act Rel. No. 53547, 2006 SEC LEXIS 703 (Mar. 24, 2006), which the SEC decided after the Panel's and the NAC's decisions in this case. On remand, the Hearing Panel carefully

reviewed the SEC's analysis in Quattrone, but found that case clearly distinguishable. In Quattrone the respondent offered evidence

that the Commission, the NYSE, and NASD launched a joint inquiry into spinning and research analyst conflict allegations at twelve investment firms, that they decided that NASD would lead the investigation of Quattrone's firm, and that NASD investigated Quattrone as part of this inquiry. Commission staff also sent Quattrone a letter two days after NASD sent Quattrone the Rule 8210 Request emphasizing the joint nature of NASD's investigation, stating that any settlement of that investigation would have to involve the Commission and NYSE, and declaring that the Commission, NYSE, and NASD would confer to determine how to proceed if no settlement was reached. Quattrone, therefore, did not rely on mere conclusory allegations or speculation but instead offered specific facts to support his contention that NASD engaged in state action as a joint actor with the Commission.

2006 SEC LEXIS 703 at *19-20.

In contrast, on remand Enforcement submitted declarations from two FINRA Special Investigators who were involved in FINRA's investigation of Ficken stating that their investigation of Ficken was independent, not part of a joint investigation, and that neither the SEC nor the Department of Justice instructed or encouraged them to initiate FINRA's investigation or to gather evidence for their use. (Coulter Dec.; Rubin Supp. Dec.) And at the hearing, the Special Investigator who led the investigation of Ficken confirmed that the staff initiated and conducted their investigation of Ficken independently. (Tr. 13, 50-58.) In contrast, Ficken once again offered no evidence that FINRA was involved in a joint investigation, or that FINRA staff was acting under the direction or at the behest of any governmental body.⁷

⁷ Moreover, in granting Enforcement's motion for summary disposition, the Panel noted that even if Ficken had been entitled to assert Fifth Amendment rights, that would not have justified his refusal to appear for an OTR. It is firmly established that in order to assert Fifth Amendment rights in a civil proceeding "a witness must normally take the stand, be sworn to testify, and assert the privilege in response to each allegedly incriminating question as it is asked." Roach v. NTSB, 804 F.2d 1147, 1151 (10th Cir. 1986), cert. denied, 486 U.S. 1006 (1988).

Therefore, the Hearing Panel granted Enforcement's motion for summary disposition in part, holding that by refusing to appear for his OTR in February 2004, Ficken violated Rule 8210. 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

The Sanction Guidelines provide that for a failure to respond to a Rule 8210 request, "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." In addition, the Guideline recommend a fine of \$10,000 to \$25,000 for "failure to respond completely." The Guidelines list as specific relevant considerations in determining appropriate sanctions: (1) the nature of the information requested, and (2) whether the requested information has been provided and, if so, the number of requests made, the time respondent took to provide the information and the degree of regulatory pressure required to obtain a response. FINRA Sanction Guidelines at 35 (2007 ed.).

As explained above, Ficken failed to respond in any manner to the request that he appear for an OTR in February 2004. In several cases, the NAC has imposed a bar when a respondent refused to appear on Fifth Amendment grounds. See, e.g., Department of Enforcement v. Steinhart, No. FPI020002, 2003 NASD Discip. LEXIS 23, at *10-14 (Aug. 11, 2003). In its original decision, the Hearing Panel also imposed a bar.

At the hearing on remand, however, Ficken urged the Panel to impose a two-year suspension in this case rather than a bar. Ficken argued that the SEC implicitly precluded the imposition of a bar and directed the entry of a two-year suspension when it remanded

this proceeding. Specifically, Ficken relied on the following language in a footnote in the SEC's decision:

Ficken also objects to the sanction imposed as unduly harsh under the circumstances. According to the [FINRA] Sanction Guidelines, a bar is the standard sanction for an NASD Procedural Rule 8210 violation where an individual fails to respond in "any" manner; where mitigation exists, the recommended sanction is a two-year suspension. [Citation omitted.] We note that Ficken appeared at the initial OTR and answered questions for over three hours before invoking his Fifth Amendment privilege.

2006 SEC LEXIS 2547 at *26 n. 38.

The Panel does not agree that this general observation amounted to a direction by the SEC regarding the sanctions to be imposed in this case. The Panel does agree, however, that under the circumstances presented in this case, Ficken's extended testimony during his first OTR is a mitigating factor. This is not simply because Ficken answered some of the staff's questions; as a general matter, the mere fact that a respondent answered only those questions that he or she found unobjectionable is not mitigating. In this case, however, the transcript of the initial OTR, taken as a whole, indicates that Ficken generally cooperated with the investigation and answered most of the staff's questions. Moreover, his expressed concerns about compromising his ability to defend himself in the criminal investigation were offered in good faith, in the sense that he was, in fact, a target of an on-going criminal investigation.

There are, however, a number of off-setting aggravating factors. First, as the lead Special Investigator explained, FINRA staff scheduled the February OTR in order to obtain additional testimony from Ficken regarding important aspects of their investigation into Ficken's possible involvement in market timing and late trading activities. For example, the staff had obtained "block letters" that mutual funds sent to

Ficken, as well as other Prudential representatives, expressing concern about possible market timing trades in customer accounts. The staff wanted to “get [Ficken’s] understanding as to what precipitated the letter[s]. Have an understanding if there were prior communications. What steps he took to follow-up. Basically just hear his answers to those questions and perhaps formulate follow-up questions.” (Tr. 21-24.) The staff also intended to consider supervision issues in its investigation, and wanted testimony from Ficken regarding the policies and procedures that were in place at Prudential. (Tr. 25-26.) And the staff was aware that some mutual funds had restrictions on market timing trades and “wanted to see how those restrictions were communicated and what Mr. Ficken’s understanding of them [was].” (Tr. 27.)⁸

The staff was also concerned about possible late trading of mutual funds.⁹ They had records demonstrating that some of Ficken’s trades were effected after 4 p.m., but to determine whether those trades were improper they needed to question Ficken as to when the orders were received. (Tr. 28-29.) And while the staff eventually obtained a

⁸ As the SEC explained in the civil complaint it filed against Ficken and others, “[m]arket timing refers to the practice of short-term buying and selling of mutual fund shares in order to exploit inefficiencies in mutual fund pricing.” (Resp. Exh. A at 2.)

⁹ The SEC’s civil complaint against Ficken and others did not include allegations of late trading of mutual funds. As the SEC has explained:

“Late trading” refers to the practice of placing orders to buy or sell mutual fund shares after the time as of which a mutual fund has calculated its NAV (usually as of the close of trading at 4:00 p.m. ET) but receiving the price based on the prior NAV already determined as of 4:00 p.m. Late trading enables the trader to profit from market events that occur after 4:00 p.m. ET but that are not reflected in that day’s price. In particular, the late trader obtains an advantage - at the expense of the other shareholders of the mutual fund - when he learns of market moving information and is able to purchase (or sell) mutual fund shares at prices set before the market moving information was released. Late trading harms other shareholders when it dilutes the value of their shares.

David Byck, Exchange Act Rel. No. 56440, 2007 SEC LEXIS 2038, at *7 (Sept. 14, 2007).

transcript of testimony that Ficken gave to the SEC, that transcript did not fully address the topics that the staff intended to cover during the February OTR. (Tr. 31.)

During the hearing, Ficken's counsel elicited testimony to the effect that the staff had other potential sources of information available. For example, FINRA staff were investigating other former Prudential representatives at the same time they were investigating Ficken, and those individuals did provide OTR testimony. But the Special Investigator explained that this did not eliminate the staff's need to obtain testimony from Ficken: "Specifically we were interested in Mr. Ficken's activities. We were still trying to flush out his role with the group and isolating Mr. Ficken's responsibilities" (Tr. 40.) The Hearing Panel, therefore, concluded that, notwithstanding Ficken's prior OTR and the possible availability of other sources of information, the information that the staff was seeking to obtain from Ficken in his second OTR was important to the staff's investigation into possible improper market activity by Ficken and others.

Second, the information has not been provided. Ficken never offered to appear for an OTR, even though it appears that at some point he was no longer a target of the criminal investigation. Ficken points out that the staff did not renew its request that he appear, but that is irrelevant. The staff properly requested that Ficken appear, and in response his counsel stated that they had advised Ficken that "it is not in his best interest to provide you documentary or testimonial evidence ... until all related criminal issues have been resolved and/or adjudicated." Ficken, not the staff, was in a position to know when that occurred, and it was up to him to notify the staff that he was willing to provide the requested OTR.

Giving Ficken credit for his initial OTR testimony, but taking into account that he willfully refused to appear for his follow-up OTR, that the topics the staff intended to cover in that OTR were important to their investigation into possible improper market activity, and that Ficken never provided the requested testimony, the Panel finds that the appropriate sanction in this case is a two-year suspension, together with a \$25,000 fine.

V. Conclusion

Respondent Justin F. Ficken is suspended from associating with any FINRA member in any capacity for two years and fined \$25,000 for refusing to appear and provide testimony, in violation of Rules 8210 and 2110. In addition, he is ordered to pay costs in the amount of \$1,473.75, which includes a \$750 administrative fee and the costs of the hearing transcript. If this decision becomes FINRA's final disciplinary action in this matter, the suspension shall become effective on December 3, 2007, and shall end on December 2, 2009. The fine and costs shall be due and payable when and if Ficken seeks to become associated with a FINRA member following his suspension.¹⁰

HEARING PANEL

By: David M. FitzGerald
Hearing Officer

Copies to: Justin F. Ficken (*via overnight and first class mail*)
Brad Bailey, Esq. (*via facsimile and first class mail*)
Gary G. Pelletier, Esq. (*via facsimile and first class mail*)
Paul M. Tyrrell, 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*)

¹⁰ The Hearing Panel has considered and rejects without discussion all arguments of the parties not expressly addressed.