

FINANCIAL INDUSTRY REGULATORY AUTHORITY¹
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JOSEPH RICUPERO
(CRD No. 1457028),

Respondent.

Disciplinary Proceeding
No. 20060049953-01

Hearing Officer- Sara Nelson Bloom

Hearing Panel Decision

May 14, 2008

Respondent is barred for failing to respond to written requests for information and documents, in violation of Rules 8210 and 2110. In light of this bar, no further sanctions are imposed for Respondent's failure to make various required filings on behalf of his member firm, in violation of Rule 2110.

Appearances

Hugh C. Patton, Esq., and Jon S. Batterman, Esq., New York, NY, appeared for the Department of Enforcement.

Lawrence R. Gelber, Esq., appeared for Respondent.

DECISION

I. Procedural History

On June 19, 2007, the Department of Enforcement ("Enforcement") filed a five-count Complaint against Joseph Ricupero ("Respondent"). The Complaint alleged that Respondent failed to respond to written requests for information and documents, in violation of Rules 8210 and 2110. The Complaint also alleged that Respondent failed to make various required filings

¹ As of July 30, 2007, NASD consolidated with the member firm regulation functions of the NYSE and began operating under a new corporate name, the Financial Industry Regulatory Authority ("FINRA").

on behalf of America First Associates Corp. (“America First”), namely: FOCUS reports for March, April, and May 2006; an annual audit report for the fiscal year ended December 31, 2005; a Rule 1017 application for approval of transfer of assets; and a notification of a change in auditors. Respondent filed an Answer requesting a hearing and asserting that he had insufficient information to admit or deny the charges.² The hearing was held on December 12, 2007, before a hearing panel composed of a Hearing Officer, a former member of the District 10 Committee, and a current member of the District 9 Committee.³ At the opening of the hearing, Enforcement withdrew its charge that Respondent failed to notify FINRA of a change in auditors. Tr. 7-10.

II. Respondent

Respondent became registered with FINRA as a General Securities Representative in March 1998, and has been associated with various member firms since then. CX-24. During all times relevant to the Complaint, Respondent was registered as a General Securities Representative, General Securities Principal, Financial and Operations Principal, and Equity Trader Limited Representative through America First. Id. In addition, Respondent owned more than 75 % of America First and served as its Chief Executive Officer, Chief Compliance Officer, Financial and Operations Principal and sole director. Respondent is not currently associated with a member firm. Id. Pursuant to Rule 9552(h), America First was suspended and subsequently expelled from FINRA membership for failing to file an annual audit report for the fiscal year ended December 31, 2005.

² References to the testimony of the hearing are designated as “Tr.,” with the appropriate page number. References to the exhibits provided by Enforcement are designated as “CX-.” References to stipulations are designated as “Stip.” CX-1 through 26, RX-2 and RX-3 were admitted into the record. Tr. 235-236.

³ The Hearing Officer denied Respondent’s pre-hearing motion for a postponement of the hearing which asserted that Respondent’s ability to effectively participate in his defense was impaired. During the hearing, the Panel observed that Respondent was actively engaged and able to participate in his defense. Tr. 78, 258.

III. Facts

A. Failure to Respond

In March of 2006, FINRA Staff (“Staff”) noticed that America First’s February 2006 FOCUS Report balance sheet listed exactly the same value for securities owned by the firm as it had listed on the prior month’s report. CX-7, CX-8; Tr. 49-54. Because that seemed improbable, FINRA Staff member Tracey Wood-Selem (“Wood-Selem”) sent Respondent an email asking for an explanation and documentation to support the firm’s valuation of its securities holdings for the past two months. CX-1; Tr. 55-56.

Wood-Selem did not receive a response, so she telephoned Respondent and left a voicemail. Tr. 56. Ten days later, Respondent called back, but, rather than providing the requested information, he asked Wood-Selem to make a formal written document request. Tr. 56-57. Accordingly, on April 10, 2006, Wood-Selem sent Respondent a request, citing Rule 8210, for the firm’s proprietary account statements corresponding to the \$345,520 in securities reflected on line number 424 of the firm’s January 2006 and February 2006 FOCUS reports. She also requested a copy of the firm’s trial balances for the periods ending January 31, 2006, and February 28, 2006. CX-2; Tr. 57. She sent the request to America First’s address as then reported in the Central Registration Depository (the “CRD address”), by first-class mail, and also sent it to the firm’s email address. Tr. 58. Because the request was narrow, and the responsive documents should have been readily available in the firm’s files, Wood-Selem requested a response within two days, i.e., by April 12, 2006. Id.

On April 12, 2006, Wood-Selem sent Respondent an email reminding him that the response was due that day. When she did not hear from Respondent, she sent him another letter

on April 13, 2006, reiterating the April 10 request, pursuant to Rule 8210, this time with a response date of April 18, 2006. Tr. 59.

On April 17, 2006, Staff received a letter from Respondent dated April 12, 2006,⁴ acknowledging receipt of the April 10, 2006, request. The letter stated that America First would not be able to respond until May 1, 2006, because Respondent was observing religious holidays and would be on vacation. CX-3; Tr. 62-63, 89, 91.

On April 27, 2006, Staff visited America First at its CRD address and saw that the firm appeared to be closed. Tr. 68-70, 142-143. On April 28, 2006, Wood-Selem's supervisor sent Respondent a letter reiterating Staff's April 10, 2006 and April 13, 2006, Rule 8210 requests. CX-5; Tr. 72-73. This time, Staff sent the letter to Respondent's residential address, as well as by email, and by first-class mail, and certified mail to America First's CRD address.

On May 24, 2006, Wood-Selem spoke with Respondent about the requested documents, but because Respondent was angry, she cut the conversation short. Tr. 70-71.

On June 13, 2006, Staff wrote Respondent a final letter, pursuant to Rule 8210, reiterating its April 10, 2006, and April 13, 2006, requests, and requiring that Respondent submit a response by June 20, 2006. CX-6. The letter noted that a failure to comply might result in disciplinary action. Staff sent the letter by first-class and certified mail to Respondent at America First's CRD address and his home address, as reflected in CRD, and by email. Id. Wood-Selem also called Respondent that day, and Respondent expressed his annoyance that Staff had sent him 12 copies of the same letter. Tr. 71.

⁴ The letter was dated April 12, 2005, but the reference to 2005 was a typographical error, because the letter was in response to a 2006 letter. Stip. at Tr. 63.

At the hearing, Respondent testified that he did not recall receiving the June 13, 2006, Rule 8210 request. Tr. 200. He attributed this to the fact that his email address was not operable for a period of time, and that the mailing addresses used by the Staff were no longer current. However, the Panel noted that Respondent listed the same email and mailing addresses in his Answer to the Complaint, which was filed at a much later date. In any event, Respondent was required to maintain current addresses in CRD, and is deemed to have received the mailings sent to him at his CRD addresses.

Respondent did not respond to Staff's Rule 8210 requests, and Staff therefore instituted this proceeding. Respondent finally responded to the requests, just weeks before the hearing. CX-20 – CX-23; Tr. 73-75. While this response was substantive and included some documentation, it was incomplete. Tr. 75-78.

At the hearing, Respondent testified that he responded to the request on May 1, 2006.⁵ Tr. 195. In support of this claim, Respondent offered an eight-page document addressed to "NASD Compliance" which was dated May 1, 2006. RX-2.

The Panel did not find Respondent's belated claim of compliance to be credible. If he had already complied, he would have said so when he received the Staff's Wells Notice; when he received the Complaint; when he answered the Complaint; and during the initial pre-hearing conference. Tr. 203-211. Moreover, Wood-Selem credibly testified that a letter addressed to NASD Compliance from America First would have been directed to her, but she did not receive any such correspondence. Tr. 82-83. In addition, no such letter was listed in the Staff's

⁵ This document was not filed as a proposed exhibit as required by the Scheduling Order in this matter. Respondent's counsel provided this document to Enforcement just days before the hearing, and offered it as an exhibit at the hearing. Tr. 237.

correspondence log. CX-25; Tr. 86-87, 90-93. Further, Respondent had addressed all prior correspondence to Wood-Selem or other staff members by name, but the purported response from Respondent dated May 1, 2006, was simply addressed to “NASD Compliance.” Tr. 84-85. The Panel, therefore, found that Respondent did not respond to the requests for information on May 1, 2006, as he claimed.

B. Failure to File FOCUS Reports, Annual Audit Report, and Application for Sale of Customer Accounts

There is no dispute that America First, through Respondent, failed to file: (1) FOCUS reports for March 2006, April 2006, and May 2006; (2) an Annual Audit Report for fiscal year ended December 31, 2005; and (3) a Form 1017 application for approval of America First’s agreement to sell some 1,800 accounts, representing substantially all of the customer accounts of America First, to York Securities, Inc., for approximately \$50,000. CX-10, CX-14 – CX-18; Tr. 95-100, 104-111, 118.

IV. Discussion

A. Failure to Respond

The Complaint alleges that Respondent failed to respond to written requests for information and documents, in violation of Rules 8210 and 2110. There is no dispute that the requests were sent to the appropriate CRD address, and Respondent does not dispute that he received at least some of these requests. There is also no dispute that Respondent belatedly responded to the requests several weeks before the hearing.

Rule 8210 authorizes FINRA to require any person subject to its jurisdiction to provide information and testimony related to any matter under investigation. The Rule serves as a key element in FINRA’s oversight function and allows FINRA to carry out that function without

subpoena power. See, e.g., Dep't of Enforcement v. Valentino, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *12 (NAC May 21, 2003), aff'd, 2004 SEC LEXIS 330 (Feb. 13, 2004) (“It is well established that because [FINRA] lacks subpoena power over its members, a failure to provide information fully and promptly undermines [FINRA’s] ability to carry out its regulatory mandate.”) (citation omitted); Joseph G. Chiulli, Exchange Act Release No. 42359, 2000 SEC LEXIS 112, at *16 (Jan. 28, 2000) (noting that Rule 8210 provides a means for FINRA effectively to conduct its investigations, and emphasizing that FINRA members and associated persons must fully cooperate with requests for information). When an individual fails to provide requested documents and information, FINRA’s ability to perform its regulatory responsibilities is subverted. Joseph P. Hannan, Exchange Act Release No. 40438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998).

Respondent offered several defenses to the Complaint. First, he claimed that he provided a response on May 1, 2006, but the Panel rejected that claim, as discussed above. Second, he claimed that documents were in the possession of, or could have been obtained from, others. It is well settled, however, that respondents cannot dictate the terms and conditions under which information will be furnished, nor can they “second guess” a request or “take it upon themselves to determine whether information requested is material to a [FINRA] investigation of their conduct.” Morton Bruce Erenstein, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *n.10 (November 8, 2007) (citations omitted); Hannan, 1998 SEC LEXIS 1955, at *11 (“a [FINRA] member may not second guess or impose conditions on [FINRA’s] request for information”); General Bond & Share Co. v. SEC, 39 F.3d 1451, 1461 (10th Cir. 1994).

Respondent also claimed that the responsive documents were not readily available, because he was in the process of shutting down his firm. However, “recipients of requests under Rule 8210 must promptly respond to the requests or explain why they cannot.” Charles C. Fawcett, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *n.20 (Nov. 8, 2007). Staff should not have to bring a disciplinary proceeding to obtain responses to its request for information. Dep’t of Enforcement v. Steinhart, No. FPI020002, 2003 NASD Discip. LEXIS 23, at *13 (NAC Aug. 11, 2003).

Based upon the forgoing, the Panel finds that Respondent violated Rules 8210 and 2110.⁶

V. Sanctions

A. Failure to Respond

Under FINRA Sanction Guidelines (“Guidelines”), “[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.”⁷ Enforcement argues that a bar is the appropriate sanction in this case; Respondent urges the Panel to impose no sanction.

As a threshold matter, the Panel finds that Respondent’s conduct amounts to a complete failure to respond, because he did not provide a response until after the Complaint was filed – indeed, just weeks before the hearing. In a similar case, where the Respondent failed to provide documents in response to Rule 8210 requests until “nine months after the original requests were sent, and more than six months after the filing of the complaint,” the National Adjudicatory

⁶ A violation of Rule 8210 is also a violation of Rule 2110, contravening “high standards of commercial honor.” Dep’t of Enforcement v. Baxter, No. C07990016, 2000 NASD Discip. LEXIS 3, at *25 (NAC Apr. 19, 2000).

⁷ Guidelines, at p. 35 (2007 ed.).

Council treated the violation as a failure to respond and imposed a bar. Dep't of Enforcement v. Hoeper, No. C02000037, 2001 NASD Discip. LEXIS 37, at *4, 7-8 (NAC Nov. 2, 2002); see also, Elliot M. Hershberg, Exchange Act Release No. 53145, 2006 SEC LEXIS 99, at *11-15 (Jan. 19, 2006), aff'd, 210 Fed. Appx. 125 (2d Cir. 2006) (upholding bar despite belated offer to comply); John A. Malach, 51 S.E.C. 618, 620-21 (1993).

Respondent's explanations that his firm was in the process of shutting down, that the documents were in storage and hard to get, and that Staff could have obtained the documents from other sources are not mitigating. See, Hoeper, 2001 NASD Discip. LEXIS 37, at *6-7.

Respondent also argued that he did not intend to hurt anybody, and asserted that he dodged the requests, rather than filing a Form BDW to close the firm, in hopes of keeping his firm. Tr. 253-254. However, this is also not mitigating. Indeed, the Panel finds that Respondent's refusal to respond was knowing and unequivocal. Moreover, the Panel finds Respondent's belated and dishonest claim of compliance to be aggravating. There are no mitigating circumstances that would warrant a lesser sanction. Accordingly, Respondent is barred from association with any FINRA member in any capacity for failing to provide information requested pursuant to Rule 8210.

In light of the bar, no further sanctions are imposed for Respondent's failure to make various required filings on behalf of his member firm, in violation of Rule 2110.⁸ However, if it were to impose sanctions for Respondent's failure to make various required filings, Enforcement's recommendation of a 30 day suspension and a \$25,000 fine is reasonable.

⁸ 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.

VI. Conclusion

Respondent is barred from association with any member firm in any capacity for failing to respond to requests for information and documents, in violation of Rules 8210 and 2110. In light of the bar, no further sanctions are imposed for Respondent's failure to make various required filings on behalf of his member firm, in violation of Rule 2110. The bar shall become effective immediately if this Decision becomes the final disciplinary action of FINRA.

HEARING PANEL

By: Sara Nelson Bloom
Hearing Officer

Copies to: Joseph Ricupero (*via electronic mail and first-class mail*)
Lawrence R. Gelber, Esq. (*via facsimile and first-class mail*)
Hugh C. Patton, Esq. (*via electronic and first-class mail*)
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