

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

DEPARTMENT OF ENFORCEMENT,

Complainant

v.

EDWARD D. CRARY, JR.  
(CRD No. 2225349),

Respondent

Disciplinary Proceeding  
No. 2007009702901

Hearing Officer – AWH

**HEARING PANEL DECISION**

November 13, 2008

**Formerly registered representative barred from associating with any  
FINRA member firm in any capacity for failure to appear and testify  
at a FINRA disciplinary hearing and failure to appear and testify at  
on-the-record interviews, in violation of NASD Rules 8210 and 2110.**

Appearances:

David F. Newman, Esq., for the Department of Enforcement.

Michael L. Parrish, Esq., for Edward D. Crary, Jr.

**DECISION**

**I. Background**

On February 21, 2008, the Department of Enforcement filed a Complaint against Respondent Edward D. Crary, Jr., alleging that he failed to appear and testify at a FINRA disciplinary hearing and failed to appear for on-the-record interviews, in violation of NASD Rules 8210 and 2110.<sup>1</sup> Crary filed an Answer to the Complaint on March 20, 2008, admitting that he did not appear at a FINRA disciplinary hearing scheduled from May 8 to May 10, 2007, and that he did not appear and testify at an on-the-record

---

<sup>1</sup> The Complaint also charged another respondent with failing to appear and testify at the same FINRA disciplinary hearing. That respondent settled the complaint against him.

interview on either August 9 or August 23, 2007. He denied certain other facts, denied that he violated NASD Rules 8210 and 2110, and requested a hearing. Upon agreement of the parties, a hearing by telephone was held on September 9, 2008, before a Hearing Panel composed of the Hearing Officer and two current members of the District 9 Committee.

## **II. The Respondent**

In May 1993, Crary first became registered with FINRA as a General Securities Representative through a member firm. From August 2005 to March 19, 2007, he was registered as both a General Securities Representative and a General Securities Principal through Harvest Capital Investments, LLC (“HCI”). During his career in the securities industry, he has also served as a branch manager and a compliance officer. Crary is not currently associated with a member firm.<sup>2</sup>

## **III. The Violations<sup>3</sup>**

### **A. Failure to Appear and Testify at a Hearing**

On or about October 16, 2006, the Department of Enforcement filed a complaint against HCI and Dennis Cotto, a person alleged to manage and control HCI. Senior Regional Counsel Thomas M. Huber was the lead attorney representing the Department of Enforcement in the disciplinary proceeding. One of the issues in the case was whether Cotto had engaged in various activities that required registration as a principal, without being registered in any capacity with FINRA.<sup>4</sup>

---

<sup>2</sup> Complaint, ¶ 2; Answer ¶ 2; Tr. 65.

<sup>3</sup> References to the Department of Enforcement’s exhibits are designated CX-; the Respondent’s exhibits, as RX-; and the transcript of the hearing, as Tr.\_.

<sup>4</sup> Tr. 6-8.

Because Crary was registered as a principal with HCI at a time relevant to the complaint he was prosecuting, Huber decided to call Crary as a witness at the hearing to refute Cotto's defense that he did not engage in activities at HCI requiring registration. Cotto claimed that he had principals in place who operated and managed the firm. To pursue his litigation strategy, Huber sent Crary a letter on February 5, 2007, requiring him, pursuant to NASD Rule 8210, to appear and testify at the hearing that was tentatively scheduled for May 8-10, 2007. The letter was sent to Crary by first class and certified mail to his residential address as listed in NASD's CRD system. The certified letter was returned, marked "Unclaimed." The first class letter was not returned.<sup>5</sup> Crary testified that he had not seen the letter until the day of the hearing in this matter. He speculated that his mother, who also lives at the same address, returned or threw out the letter. He testified that she is no longer married to his father, whose name is Edward D. Crary, and disposes of mail addressed to his father. However, the Hearing Panel does not credit that testimony because the letter was addressed specifically to Edward D. Crary, Jr.<sup>6</sup>

On March 2, 2007, Crary sent an email to Huber, stating that an NASD staff member directed him to Huber "in reference to any pending enforcement actions" relating to HCI and Cotto. Crary provided his telephone number and asked Huber to contact him. Huber called that phone number a few days later and spoke with Crary. Huber told Crary that he would require him to appear and testify at the hearing, which was scheduled to be held in Philadelphia, Pennsylvania. Crary commented that "he had

---

<sup>5</sup> CX-2, CX-3; Tr. 11-16.

<sup>6</sup> CX-3; Tr. 76-77.

no problem coming to Philadelphia; he had grown up in or near the city; and he would be glad to have a visit to the city.”<sup>7</sup>

Referring to that phone conversation, Huber sent a letter to Crary on March 15, 2007, again stating that, pursuant to Rule 8210, Crary was required to appear and testify at the hearing in Philadelphia on May 8 through May 10, 2007. The letter asked Crary to notify Huber of any change in his contact information and to update Web CRD with any change. The letter was sent by first class and certified mail to Crary’s CRD address. The certified mailing was returned, marked “Unclaimed.” The first class mailing was not returned.<sup>8</sup>

Over the next few weeks, Huber made several unsuccessful attempts to contact Crary by phone. He left messages for Crary, but Crary never returned the calls. On April 20, 2007, Huber sent Crary a letter, pursuant to Rule 8210, requiring him to appear and testify at the hearing. He again asked Crary to contact him. The letter was sent to Crary by first class and certified mail to Crary’s CRD address. The certified mail was returned, marked “Unclaimed.” The first class mailing was not returned.<sup>9</sup>

Between April 24 and May 2, 2007, Huber called Crary three more times concerning the hearing and his obligation to appear. Each time, Huber left a message on

---

<sup>7</sup> CX-13; Tr. 17-20. Crary testified that Huber, in their phone conversation, stated that he would require Crary to testify at the hearing in Philadelphia. However, he also testified that Huber gave him no specifics for his anticipated testimony or any indication of a firm and definitive date for the hearing. Tr. 76-79. However, the Hearing Panel does not credit that testimony. Rather, it credits the March 15, 2007, letter that Huber sent Crary which recounts their telephone conversation in which Huber referred to the Order in the disciplinary proceeding that scheduled the hearing for May 8-10, 2007 in Philadelphia and describes Crary’s anticipated testimony. The letter was sent, and the phone conversation took place, during the same week. CX-4.

<sup>8</sup> CX-4; Tr. 21-23.

<sup>9</sup> CX-5; Tr. 23-26. Crary testified that he received the voice mail messages from Huber but did not return the calls. Tr. 79-80.

Crary's voice mail, requesting that Crary return his call. However, Crary did not return any of the calls. Crary failed to appear at the hearing as requested.<sup>10</sup>

#### B. Failure to Appear and Testify at On-The-Record Interviews

Several weeks after the disciplinary hearing, FINRA staff began an investigation into Crary's failure to appear and testify. On July 12, 2007, pursuant to Rule 8210, Compliance Specialist Eric Bickhardt sent a letter to Crary requiring him to appear and testify at an OTR scheduled for August 9, 2007 in the Philadelphia District Office. The letter was sent by first class and certified mail to Crary's CRD address. The certified mailing was returned, marked "Unclaimed." The first class mailing was not returned.<sup>11</sup>

On August 7, 2007, Bickhardt left a telephone message for Crary and sent him an email confirming that he was required to appear at the OTR on August 9, 2007. The email was sent to the email address for Crary that he had provided to Huber and from which he had previously sent FINRA staff other emails. However, Crary did not respond to the email, return the phone call, or appear at the OTR as scheduled.<sup>12</sup>

On August 10, 2007, pursuant to Rule 8210, Bickhardt sent a letter to Crary requiring him to appear and testify at an OTR scheduled for August 23, 2007 in Philadelphia. Bickhardt informed Crary that, if he did not appear at the OTR, he would be subject to disciplinary action and possible sanctions, including a bar. The letter was sent by first class and certified mail to Crary's CRD address. The certified mailing was returned, marked "Unclaimed." The first class mailing was not returned. Crary failed to appear at the OTR on August 23, 2007.<sup>13</sup>

---

<sup>10</sup> CX-6; Tr. 27-29.

<sup>11</sup> CX-7; Tr. 40-44.

<sup>12</sup> CX-8, CX-9; Tr. 44-48.

<sup>13</sup> CX-11; Tr. 49-51.

### C. Legal Analysis

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 its regulatory functions without subpoena power.<sup>14</sup> When an individual fails to provide requested documents and information, FINRA's ability to perform its regulatory responsibilities is subverted.<sup>15</sup>

Here, Crary argues that Enforcement was successful in the disciplinary proceeding against HCI and Cotto, in the absence of his testimony. However, a respondent may not second guess an information request or set conditions on compliance with it; and a belief that FINRA does not need the requested information provides no excuse for failure to supply it.<sup>16</sup> FINRA is not required to bring a disciplinary action in order to obtain compliance with its rules governing investigations.<sup>17</sup>

Crary also argues that he should not be charged with a violation of Rule 8210 because he was "a witness, not a target of the investigation" that led to the disciplinary proceeding against HCI and Cotto. However, Rule 8210 is not so limited. Clearly, its application extends to witnesses. The Rule provides that an associated person may be required to appear and testify "with respect to any matter involved in the investigation,

---

<sup>14</sup> See, e.g., *Dep't of Enforcement v. Valentino*, No. FPI010004, 2003 NASD Discip. LEXIS 15, at \*12 (N.A.C. May 21, 2003), aff'd, 2004 SEC LEXIS 330 (Feb. 13, 2004) ("It is well established that because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD's ability to carry out its regulatory mandate.") (citation omitted); *Joseph G. Chiulli*, Exchange Act Release No. 42,359, 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).

<sup>15</sup> *Joseph P. Hannan*, Exchange Act Release No. 40,438, 1998 SEC LEXIS 1955, at \*9 (Sept. 14, 1998).

<sup>16</sup> *Morton Bruce Erenstein*, Exchange Act Release No. 56,768, 2007 SEC LEXIS 2596 (November 8, 2007) (citations omitted); *Hannan*, 1998 SEC LEXIS 1955 at \*11 ("an NASD member may not second guess or impose conditions on the NASD's request for information").

<sup>17</sup> *Valentino*, 2004 SEC LEXIS 330, at \*\*15-16.

complaint, examination, or proceeding.” Moreover, Rule 8210(f) provides that “a witness” may inspect the official transcript of the witness’ own testimony or procure a copy of “the person’s documentary evidence” or “testimony.” Finally, Notice to Members 97-31, cited by Crary in his Wells submission,<sup>18</sup> does not limit the use of Rule 8210 to investigate only the particular individual to whom the Rule 8210 request is sent. Although the Notice to Members arose in the context of individuals who were the subject of investigations, the Notice concerns the continuing obligation of all registered persons to notify FINRA of any change in the person’s current mailing address, an obligation that Crary failed to fulfill. The Notice was issued to address precisely the claim that Crary makes in this proceeding with respect to several of the 8210 requests: that he failed to receive them because he no longer resided at the address listed in the CRD.

Crary failed to respond to three letters, issued pursuant to Rule 8210, requiring him to appear and testify at a disciplinary hearing, and two letters, issued pursuant to Rule 8210, requiring him to appear and testify at OTRs. The requests were properly served on Crary at his CRD address, giving him constructive notice of the disciplinary hearing and the OTRs. Moreover, FINRA staff left several telephone messages for him at a number that he provided, and sent him an email at an address he provided. In addition, Crary had a telephone conversation with Huber in which he was given actual notice of the disciplinary proceeding to be held in Philadelphia. By failing to respond to the requests for his appearance and testimony at the disciplinary proceeding and at the OTRs, Crary violated NASD Rules 8210 and 2110.

---

<sup>18</sup> CX-15.

#### **IV. Sanctions**

For failure to respond in any manner to requests made pursuant to Procedural Rule 8210, the FINRA Sanction Guideline states that a bar should be standard.<sup>19</sup> Enforcement argues that Crary's conduct was egregious, in that he failed completely to respond to a total of five requests for his appearance and testimony. As the Hearing Panel has noted above, Crary's arguments that he was not the subject of the investigation, and that Enforcement prevailed in the disciplinary proceeding in the absence of his testimony, do not mitigate the violations. His history in the securities industry as a principal, a branch manager, and a compliance officer make it clear that he was fully aware of his responsibilities under Rule 8210. Accordingly, the Hearing Panel will bar Crary from associating with any FINRA member firm in any capacity for the violations.

#### **V. Conclusion**

Edward D. Crary, Jr. is barred from associating with any FINRA member in any capacity for failing to respond to requests for information, in violation of NASD Rules 8210 and 2110. The bar shall become effective immediately if this Decision becomes the final disciplinary action of FINRA.

**SO ORDERED.**

---

Alan W. Heifetz  
Hearing Officer  
For the Hearing Panel

---

<sup>19</sup> FINRA SANCTION GUIDELINES, at 35.



Copies to:

Edward D. Crary, Jr. (*via overnight courier and first class mail*)

Michael L. Parrish, Esq. (*via facsimile and first class mail*)

David F. Newman, Esq. (*via electronic and first class mail*)

Mark P. Dauer, Esq. (*via electronic and first class mail*)

David R. Sonnenberg, Esq. (*via electronic and first class mail*)