

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

DAPHNE EASLEY
(CRD No. 4509549),

Respondent.

Disciplinary Proceeding
No. 2008013474501

Hearing Officer – LBB

HEARING PANEL DECISION

September 14, 2009

Respondent is barred from associating with any FINRA member firm in any capacity for conversion of funds, in violation of NASD Conduct Rule 2110.

Appearances

Jonathan I. Golomb, Senior Special Counsel, Washington, D.C., for the Department of Enforcement.

Daphne Easley, *pro se*.

DECISION

I. Introduction and Procedural History

The Department of Enforcement (“Enforcement”) filed the Complaint in this matter on February 3, 2009, charging Daphne Easley (“Respondent”) with misappropriation and conversion of funds,¹ in violation of NASD Conduct Rule 2110.² Respondent’s answer to the

¹ Enforcement does not distinguish between “misappropriation” and “conversion,” but alleges both in the Complaint and its motion for summary disposition. Respondent’s conduct fits within the definition of “conversion” set forth in FINRA’s Sanction Guidelines and the caselaw cited below. As noted below, the appropriate sanctions would be the same regardless of the classification of the violation.

² As of July 30, 2007, NASD consolidated with the member regulation and enforcement functions of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD. Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008, including certain conduct rules and procedural rules. *See* Regulatory Notice 08-57 (Oct. 2008). This decision refers to and relies on the NASD Conduct Rules that were in effect at the time of Respondent’s alleged misconduct.

Complaint admitted the allegations in the Complaint, but requested a sanction less than the bar sought by Enforcement.

Enforcement filed a motion for summary disposition on May 6, 2009. Respondent again did not contest the factual allegations or deny liability, but requested a sanction less than a bar.³ The parties agreed that the matter should be decided on their written submissions, without a hearing, and the Hearing Officer issued a notice to the parties that the matter would be decided on that record by the Hearing Panel.

The Hearing Panel, composed of a Hearing Officer and two current members of the District 2 Committee, has reviewed the submissions of the parties, and issues this decision based on those submissions.

II. Respondent

Respondent was employed in unregistered capacities by Merrill Lynch, Pierce, Fenner & Smith, Inc. (“Merrill Lynch”) in Los Angeles from February 1998 until April 2008. Answer; CX-1; CX-2 at 9 – 10.⁴ At Merrill Lynch, Respondent initially served as a manager’s assistant. In 2003, she became a client associate. As a client associate, she was responsible for assisting three brokers, contacting clients, transferring funds, wiring funds, and completing the paperwork for private equity investments. Answer; CX-2 at 10, 12, and 13. Respondent applied for registration with FINRA by submitting a Form U4 on September 24, 2007. Answer; CX-1. Respondent took the Series 7 examination in March 2008 and on one earlier occasion. CX-2 at 13.

³ Respondent’s only response to Enforcement’s motion for summary disposition was an e-mail to the attorney who represents the Department of Enforcement in this proceeding. Enforcement forwarded the e-mail to the Office of Hearing Officers. Because Respondent appeared *pro se*, the Hearing Panel considered this e-mail in reaching its decision.

⁴ Citations to the exhibits attached to the Complainant’s Memorandum of Points and Authorities are referenced as “CX-___.” Respondent did not submit any exhibits.

Merrill Lynch terminated Respondent's employment on April 14, 2008. According to the firm, her employment was terminated "after the firm concluded that she opened an account in the firm's name with a third party for the purpose of ordering gift checks for her personal use." Respondent is not currently employed in the securities industry. CX-1.

Although Respondent is not currently associated with any FINRA member, she remains subject to FINRA jurisdiction for purposes of this proceeding, pursuant to Art. V, § 4 of FINRA's By-Laws, because the Complaint was filed within two years after the termination of her last association with a member firm, and it charges her with misconduct while she was associated with a member firm.⁵

III. Respondent Converted Funds

Merrill Lynch sometimes used gift checks as incentives for employees in the branch office at which Respondent worked. Respondent was familiar with the procedures for ordering gift checks because her duties as a manager's assistant at Merrill Lynch had included ordering gift checks from American Express. The gift checks were supposed to be distributed only at the direction of the office's management team. Answer; CX-2 at 16 – 17; CX-4.

In December 2006, while Respondent was a client associate, she was experiencing financial difficulties and was unable to pay her mortgage, which was approximately \$8,000 in arrears. Her monthly payment was \$2,200. CX-2 at 13 – 15. In December 2006, Respondent ordered 65 gift checks, in \$100 denominations, totaling \$6,500, and used the checks to make a mortgage payment. CX-2 at 13 – 15, 18 – 19; CX-3; CX-4.

⁵ Respondent's responsibilities for contacting clients and transferring funds were sufficient for her to be an associated person and therefore subject to FINRA's jurisdiction. *See Stephen M. Carter*, 1988 SEC LEXIS 1955, at *3 (Sept. 14, 1998) (holding that functions of "customer cashier" who received securities and checks, recorded them in the firm's computer system, prepared firm checks for signature in payment of customer balances, prepared deposit slips, and furnished account balances and other information to customers, were "clearly part of the securities business," and that the respondent was an associated person).

When gift checks were ordered, American Express typically would send invoices to the Merrill Lynch offices that ordered them, and the individual offices paid the invoices. CX-2 at 16 – 18. When American Express called Respondent seeking payment for the gift checks, she told American Express that there had been delays in payment due to administrative errors, and that the amount owed would be paid. CX-2 at 19 – 20; CX-4.

In late March 2008, American Express threatened Respondent and Merrill Lynch with legal action if the amount owed for the checks was not paid. CX-4. Respondent then repaid \$6,175 of the amount owed to American Express by issuing a check from her personal Cash Management Account at Merrill Lynch. CX-2 at 19; CX-5; CX-4. Respondent's payment was \$500 less than the amount owed to American Express at the time of her payment. CX-4.

On Thursday, April 10, 2008, a Merrill Lynch fraud investigator confronted Respondent about the order for the gift checks. CX-2 at 20; CX-4. Respondent immediately admitted what she had done, and expressed her remorse. CX-4; CX-2 at 21. The fraud investigator told Respondent to write a letter to management explaining what she had done. She immediately wrote a letter to the branch managers in which she admitted that she had ordered the gift checks for her personal use, and said she was "really sorry." CX-2 at 20 – 23; CX-6. Respondent did not tell anyone what she had done prior to being confronted by the Merrill Lynch fraud investigator. CX-2 at 23. The fraud investigator told Respondent to go home for the day, and that she would be notified about the status of her employment. CX-2 at 21. Her employment was terminated on April 14, the following Monday. CX-1.

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." *FINRA Sanction Guidelines* at 38 n.2 (2007). FINRA has regularly found that associated persons have

violated Rule 2110 by converting the funds of non-customers. *Dist. Bus. Conduct Comm. v. Vail*, No. C06920051, 1994 NASD Discip. LEXIS 192, at *13 (N.B.C.C. Sept. 22, 1994), *aff'd*, *Henry E. Vail*, 52 S.E.C. 339, 342 (1995), *aff'd*, 101 F.3d 37 (5th Cir. 1996) (barred for misappropriation of funds of private political club); *Daniel D. Manoff*, Exchange Act Rel. No. 46708, 2002 SEC LEXIS 2684 (Oct. 23, 2002) (barred for unauthorized use of co-worker's credit card numbers); *Dist. Bus. Conduct Comm. v. Kwikkel-Elliott*, No. C04960004, 1998 NASD Discip. LEXIS 4 (N.B.C.C. Jan. 16, 1998) (barred for converting funds from employer by submission of false expense reimbursement requests); *Dep't of Enforcement v. Farley*, No. C9A000038, 2001 NASD Discip. LEXIS 51 (O.H.O. Oct. 2, 2001) (respondent barred for keeping and spending firm funds deposited into his account by girlfriend). An alleged intention to repay the money converted is not a defense to a charge of conversion. *Dist. Bus. Conduct Comm. v. Davis*, No. C8A970040, 1998 NASD Discip. LEXIS 45, at *6 (N.A.C. Oct. 22, 1998); *see also Farley*, 2001 NASD Discip. LEXIS 51, at *9.

Respondent has not contested the charge in the Complaint that she converted funds by ordering the American Express gift checks without authorization, and using them for personal purposes. The Hearing Panel finds that the evidence establishes that she converted the funds, as charged in the Complaint.

IV. Sanctions

The Sanction Guidelines recommend a bar for conversion, regardless of the amount converted. *FINRA Sanction Guidelines* at 38 (2007). No specific factors are identified in the Sanction Guidelines as potentially mitigating.⁶

⁶ Whether the violation is classified as misappropriation, conversion, or improper use, the appropriate sanction is a bar under the circumstances of this case. *See Farley*, 2001 NASD Discip. LEXIS 51, at * 8 – *11.

The Hearing Panel has considered Respondent's request for lesser sanctions, and finds that a bar is the appropriate sanction. Respondent's acknowledgment of her actions and remorse when confronted by Merrill Lynch's fraud investigator, in her written statement to her superiors at Merrill Lynch, and in her statements to FINRA, are not sufficient to overcome the presumption that a bar is the appropriate sanction, especially since these statements came only after her actions had been discovered.⁷

Repayment also is not a mitigating factor in this case. Respondent repaid American Express 15 months after she ordered the gift checks, and only after American Express threatened Respondent and Merrill Lynch with a lawsuit. Respondent should have "voluntarily and reasonably attempted, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct." *Dep't of Enforcement v. Farley*, 2001 NASD Discip. LEXIS 51, at *11; *see also Daniel D. Manoff*, Exchange Act Rel. No. 46708, 2002 SEC LEXIS 2684, at *17 – *18 ("Neither [respondent's] repayment of the funds nor his lack of a disciplinary record justifies [his acts of conversion]").⁸ Additionally, Respondent's repayment was \$500 less than the amount owed. Upon consideration of all the evidence, the Hearing Panel finds that the appropriate sanction is a bar in all capacities.

V. Conclusion

Respondent Daphne Easley is barred from associating with any FINRA member firm in any capacity for conversion of funds in violation of NASD Conduct Rule 2110.⁹ The bar shall

⁷ See Principal Considerations in Determining Sanctions, #2, in *FINRA Sanction Guidelines* at 6.

⁸ See Principal Considerations in Determining Sanctions, #4: "Whether the respondent voluntarily and reasonably attempted, *prior to detection and intervention*, to pay restitution or otherwise remedy the misconduct." (Emphasis added).

⁹ The Hearing Panel has considered and rejects without discussion all other arguments of the parties.

be effective immediately if this decision becomes FINRA's final disciplinary action in this proceeding.

HEARING PANEL

By: Lawrence B. Bernard
Hearing Officer

Copies to: Daphne Easley (*via e-mail and first-class mail*)
Jonathan I. Golomb, Esq. (*via e-mail and first-class mail*)
David R. Sonnenberg, Esq. (*via e-mail*)