

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MICHAEL J. BINSTOCK
(CRD No. 2728462),

Respondent.

Disciplinary Proceeding
No. 2009018377601

Hearing Officer – SNB

HEARING PANEL DECISION

November 19, 2012

For falsifying customer account documents, in violation of NASD Rule 2110 and FINRA Rule 2010, and causing his firm to have inaccurate records, in violation of NASD Rules 3110 and 2110 and FINRA Rule 2010, Respondent is suspended for four months and fined \$25,000. For settling a customer claim away from his former firm, in violation of NASD Rule 2110 and FINRA Rule 2010, Respondent is fined \$5,000. In addition, Respondent is ordered to pay the costs of this proceeding. The unauthorized transaction charge, alleging a violation of NASD Rule 2110 and FINRA Rule 2010, is dismissed.

Appearances

Kristina Juntunen, Esq. and Gerald Murphy, Esq., for the Department of Enforcement.

Roger N. Walter, Esq., for the Respondent.

DECISION

I. Procedural History

The Department of Enforcement (“Enforcement”) filed a Complaint with the Office of Hearing Officers on January 11, 2012, and Michael J. Binstock (“Respondent”) filed his Answer to the Complaint on February 7, 2012. The four-cause Complaint charges that Respondent falsified account documents in eight customer accounts, in violation of NASD Rule 2110 and FINRA Rule 2010; engaged

in an unauthorized transaction, in violation of NASD Rule 2110 and FINRA Rule 2010; settled a customer claim away from his firm, in violation of NASD Rule 2110 and FINRA Rule 2010; and caused his firm to have inaccurate records, in violation of NASD Rules 3110 and 2110, and FINRA Rule 2010.¹

A four-day hearing was held in Minneapolis, MN, from June 26 through June 29, 2012.

The Hearing Panel was composed of a Hearing Officer, a current member of the District 5 Committee, and a current member of the District 3 Committee. Enforcement called ten witnesses to testify, including two employees from the Firm, seven customers, and Respondent. Respondent called a former colleague as a witness and testified on his own behalf.²

II. Facts

A. Origin of Proceeding

The investigation leading to this proceeding began in September 2008 after Thrivent Investment Management, Inc. (the “Firm”) filed a Form U5 disclosing that Respondent had resigned from the Firm following allegations that he had altered customer account documents. Stip. 6.

B. Respondent

Respondent entered the securities industry in 1995. Stip. 1. He was employed with the Firm as a general securities representative between March 1996 and June 2009. *Id.* Respondent registered with another member firm in July 2009 and was registered there at the time of the hearing. *Id.*

¹ Following the consolidation of NASD and the member regulation, enforcement, and arbitration functions of NYSE Regulation into the Financial Industry Regulatory Authority (“FINRA”), FINRA began developing a new “Consolidated Rulebook” of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. See *FINRA Regulatory Notice* 08-57, 2008 FINRA LEXIS 50 (Oct. 2008). The conduct rules that apply are those that existed at the time of the conduct at issue.

² “Tr.” refers to the transcript of the hearing; “CX” to Enforcement’s exhibits; “RX” to Respondent’s exhibits; “Stip.” to stipulations. Exhibits CX-1-60, CX-63-70, and RX-3 were admitted into evidence. Tr. 702.

C. Facts Relating to the Falsification of Documents and Books and Records Charges

Respondent does not dispute that he falsified account documents in seven customer accounts.³ In each case, Respondent submitted the altered documents to his Firm. Stip. 9, 18, 23, 27, 34, 40, 47. The Firm relied on the authenticity of the documents in processing the transactions requested, and maintained a copy of the documents in its books and records. CX-24; Tr. 98, 113. The relevant facts with respect to the activity in each customer account will be discussed in turn.

1. Customer CR

On January 20, 2009, customer CR opened an account with Respondent and signed an application to purchase an IRA. In response to CR's requests for distributions from this account, Respondent photocopied CR's signature from his IRA application and pasted it on four distribution request forms during the period February 10 through April 1, 2009. CX-2 pp. 7-22; Stip. 8.

CR testified at the hearing that he requested these distributions, he had no complaints with Respondent's service, and "everything was handled very well." Tr. 684, 685, 691-692.

2. Customer RK

On January 11, 2008, in response to customer RK's request for a distribution, Respondent completed a distribution form and obtained RK's signature. Later, RK requested another distribution from her account. To facilitate this request, on March 13, 2008, Respondent copied

³ The Complaint charges that Respondent also altered account documents for an eighth customer, CM. Respondent admits he retained three account forms signed in blank for this customer. Stip. 30. However, he does not recall whether he affixed CM's signature to account documents. Tr. 283. CM did not testify at the hearing. The Hearing Panel concluded that the Department did not meet its burden of proof on the charge that Respondent altered CM's account documents.

the earlier distribution form and altered the date so that it would appear as a newly signed form.⁴
CX-6 pp. 1-3; Stip. 16.

RK testified that the distribution was consistent with her request, and she was mostly satisfied with Respondent's service. Tr. 396-397.

3. Customer DK

At some time prior to April 24, 2008, Respondent obtained customer DK's signature on a number of undated distribution forms. Stip. 21; CX-8. Later, in response to DK's request for a distribution from his account, on April 24, 2008, Respondent completed one of the signed distribution forms he had on file and electronically submitted it to the Firm. Stip. 9; CX-8. DK did not testify at the hearing, but Respondent stipulated that he altered this form. Stip. 21, 22.

4. Customer LM

On September 26, 2007, Respondent obtained customer LM's signature on an asset transfer disclosure form for the purpose of funding her brokerage account. Stip. 25; CX-4; Tr. 574. Respondent later made five photocopies, added necessary account information for each of the six resultant forms, and submitted them to the Firm for processing. Stip. 26; CX-4; Tr. 574.

LM testified that the asset transfers were consistent with her instructions, and she continues to trust Respondent although she did not authorize him to affix her signature to other forms. Tr. 575, 586.

5. Customer WA

On July 1, 2008, Respondent changed the date on a completed distribution form so that it would appear as a newly signed form. Stip. 33; CX-7 pp. 1-2. On October 7 and 10, 2008,

⁴ Respondent also retained in his files three signed but incomplete account transfer forms dated May 9, 2007, and an undated transfer on death form that was also signed in blank. Stip. 23, 24. Neither RK nor Respondent recalls the circumstances surrounding RK's signing of the transfer on death form. Tr. 399-401.

Respondent pasted a photocopy of customer WA's signature on two distribution forms. Stip. 32; CX-7 pp. 5-7.

WA testified by telephone at the hearing that, while he does not recall authorizing Respondent to sign Firm documents, he requested the transactions Respondent documented. Tr. 674-676.

7. Customer KS

Respondent pasted a photocopy of KS's signature on redemption requests dated May 11 and May 14, 2009. Respondent also altered the date on a completed distribution form so that it would appear as a newly signed form dated May 14, 2009. Stip. 39; CX-3.

KS did not testify at the hearing, but Respondent stipulated that he altered at least two redemption requests for her account. Stip. 35-39.

D. Facts Relating to the Unauthorized Transaction Charge

At issue with respect to this charge is whether Respondent made a \$2,100 withdrawal from DE's original universal life insurance policy to fund the second annual premium for DE's variable universal life policy without DE's authorization or consent.

In January 2008, Respondent met with DE, who wanted to obtain a better rate of return than he was receiving from his existing fixed insurance policy. Tr. 358, 362. Respondent also noted that, at current rates, the policy would end when DE turned 72. Tr. 302, 360.

Accordingly, Respondent recommended the gradual transfer of DE's fixed insurance policy to a new variable universal life ("VUL") policy, which would continue his death benefit and provide the option of an increased return on the cash value of his existing policy.

Respondent first raised the possibility of using a 1035 exchange,⁵ but ultimately recommended

⁵ A "1035 exchange" refers to a tax-exempt exchange of one annuity contract for another under Section 1035 of the Internal Revenue Code. See 26 U.S.C. § 1035.

gradually shifting assets over from the original policy to the VUL over a period of years, to dollar cost average the investment and minimize the risk of market ups and downs. Tr. 358-362, 369. DE signed the application for the new policy in January 2008. CX-36; Tr. 363, 366.

The initial annual premium was funded through a withdrawal from DE's existing fixed life insurance policy. During their January 2008 meeting, DE also signed a distribution request form authorizing the initial premium for the new policy to be paid from the original policy. Stip. 45; Tr. 541-543; CX-36.

In 2009, when DE received an invoice for the second annual premium on the VUL policy, he asked Respondent to "take care of it." DE reiterated this request to Respondent's sales assistant, who prepared a contemporaneous email reporting that DE was inquiring whether Respondent "took care of his premium for his variable universal life" policy. CX-39 p. 3.

To pay the premium, Respondent affixed DE's signature to a form authorizing a withdrawal of \$2,100 from DE's initial policy to fund the annual premium for the new variable universal life product. Stip. 45; CX-9, CX-39 p 3; Tr. 298-299.

DE's account of the facts changed over time. He first complained to the Firm that he did not know he owned the VUL policy. Tr. 603. However, DE's investment in the VUL policy was the subject of his meeting with Respondent, during which he signed the application for the VUL policy, and provided a swab from the inside of his mouth, which medical information was required for the VUL policy. Tr. 518, 563-564.

At the hearing, DE changed his story, claiming that the original policy was supposed to be cancelled. Tr. 515. However, the Hearing Panel did not find this credible, because DE continued to get quarterly statements on both policies, and he paid the premiums on both policies the previous year. CX-36; Tr. 516-518, 521; 541-542.

DE also expressed surprise at being assessed a premium on the VUL policy. Tr. 548-549. However, DE paid premiums on his original policy for years, and he was unable to explain why he would think that no premium would be charged for the VUL policy. Tr. 549-550. Finally, DE was unable to reconcile his directive to Respondent in January 2009 to take care of the premium on the VUL policy, with his position at the hearing that he did not authorize Respondent to pay the premium.⁶ Tr. 550.

For these reasons, the Hearing Panel did not find DE credible. Accordingly, the Hearing Panel finds that Enforcement did not prove by a preponderance of the evidence that Respondent made an unauthorized withdrawal from DE's account and dismisses the unauthorized transaction charge.

E. Facts Relating to the Settling Away Allegation

The facts pertaining to this allegation are undisputed. In April 2009, customers ET and GT asked Respondent to deposit \$10,000 from a maturing CD into GT's fixed universal life policy. The \$10,000 deposit resulted in a \$500 premium load to the customers. The customers complained and requested reimbursement of the \$500 fee plus interest.

On September 21, 2009, after Respondent had resigned from the Firm, he deposited \$515.76, his commission plus interest, into the customers' checking account without the Firm's knowledge. Respondent testified that he did so because he did not realize that the \$10,000 deposit into the insurance policy would result in a fee to ET and GT or a commission to him. Tr. 337. Because he did not disclose the charge to his customers, he believed that paying the commission back to the customers was the right thing to do. Tr. 490, 377. Because he was no longer at the Firm, he did not consider that he was settling away. Tr. 377.

⁶ DE's request to take care of the premium was contemporaneously memorialized by Respondent's assistant. CX-39 p. 3.

III. Violations

A. Falsification of Documents

NASD Conduct Rule 2110 (now FINRA Conduct Rule 2010) requires members to observe high standards of commercial honor and just and equitable principles of trade. Falsifying customer account documents is unethical and violates the standards demanded by Rule 2110.⁷

Here, it is undisputed that Respondent affixed customer signatures or otherwise altered multiple documents including distribution forms, redemption forms and account transfer forms, in seven customer accounts. Therefore, the Hearing Panel finds that Respondent violated NASD Rule 2110 and FINRA Rule 2010.

B. Settling Away

It is a violation of NASD Rule 2110 and FINRA Rule 2010 for a registered representative to settle a customer complaint without his firm's knowledge or approval. Here, Respondent refunded a fee to a customer without any notice to, or acquiescence by, his Firm that he was doing so. Although Respondent was no longer with the Firm at the time that he paid the customer, this does not excuse his obligation to inform the Firm of his payment.

Respondent's failure to notify the Firm of the settlement was unethical, and violated NASD Rule 2110 and FINRA Rule 2010 because the information was important to the Firm and investors. The Firm had a continuing obligation to update Respondent's Form U5 to reflect the settlement of a customer complaint, but Respondent's actions thwarted the Firm's ability to comply with its obligation. The information could also be important to the investing public and

⁷ *Dep't of Enforcement v. Mizenko*, No. C8B030012, 2004 NASD Discip. LEXIS 20, at *17-18 (NAC Dec. 21, 2004), *aff'd*, Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655 (Oct. 13, 2005); *Dep't of Enforcement v. Brack*, No. C9B020048, 2003 NASD Discip. LEXIS 8, at *16-17 (OHO Feb. 7, 2003).

to future employers. Accordingly, the Hearing Panel finds that Respondent violated NASD Rule 2110 and FINRA Rule 2010.

C. Inaccurate Books and Records

Rule 3110(a) requires member firms to “make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations and statements of policy promulgated thereunder and with the Rules of [FINRA] and as prescribed by SEC Rule 17a-3.”

Entering inaccurate information in a member firm’s books and records violates the requirement of NASD Conduct Rule 3110 to keep accurate books and records.⁸ NASD Rule 2110 and FINRA Rule 2010 require members to observe high standards of commercial honor and just and equitable principles of trade. Falsification of records, even when acting consistent with customer wishes, violates NASD Rules 3110 and 2110, and FINRA Rule 2010.⁹

Here, there is no dispute that Respondent falsified customer documents such as distribution forms, redemption forms and account transfer forms, for seven customer accounts, and that these misleading documents were maintained in the Firm’s files.

Accordingly, Respondent violated NASD Rules 3110 and 2110 and FINRA Rule 2010.

IV. Sanctions

Enforcement suggests a unitary sanction for all the violations – a two-year suspension and a \$100,000 fine. Respondent suggests a \$5,000 fine and a suspension of one to three months. For the reasons below, the Hearing Panel determined to impose a unitary sanction for

⁸ *Dep’t of Enforcement v. Nouchi*, No. E102004083705, 2009 FINRA Discip. LEXIS 8, at *6 (NAC Aug. 7, 2009); *see also, Fox & Co. Inv., Inc.*, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822, at *30-32 (Oct. 28, 2005); *Geoffrey Ortiz*, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401, at *17 (Aug. 22, 2008).

⁹ *See Dep’t of Enforcement v. Correro*, No. E102004083702, 2008 FINRA Discip. LEXIS 29, at *16 (NAC Aug. 12, 2008).

the falsification of documents and books and records charge, and a separate sanction for the settling away charge.

A. Falsification of Documents and Books and Records Charges

For falsification of documents the FINRA Sanction Guidelines (“Guidelines”) recommend a fine of \$5,000 to \$100,000 and consideration of a suspension of up to two years, where mitigation exists.¹⁰ The National Adjudicatory Council (“NAC”) has held that, in cases where the recordkeeping violation is intentional, the Guidelines for falsification of documents apply.¹¹ For this reason, and because the falsification of documents and record keeping violations stem from a single course of conduct, the Hearing Panel determined to impose a unitary sanction for the falsification of documents and books and record charges.

In determining the appropriate sanction the Hearing Panel considered that Respondent knew that his actions were wrong, and he was aware that the Firm’s procedures specifically prohibited alteration of customer documents. Tr. 314-317.

However, the Hearing Panel also considered that the falsified documents were consistent with his customers’ wishes. He had no intent to harm anyone, and no customers were harmed. While Respondent’s actions occurred over a two and a half year period, they involved a limited number of transactions.

While the Hearing Panel viewed as aggravating Respondent’s initial failure to admit to his alteration of customer documents when questioned by Firm personnel, the Hearing Panel also considered that Respondent stipulated to misconduct even with respect to customers who did not testify at the hearing. CX-25; Tr. 102, 309-310. Respondent also expressed remorse for his misconduct. Tr. 388.

¹⁰ Guidelines at 37.

¹¹ *Dep’t of Enforcement v. Nouchi*, No. E102004083705, 2009 FINRA Discip. LEXIS 8, at *6 (NAC Aug. 7, 2009) (applying the Guidelines for falsification of documents where respondent intentionally entered false disability waiver claims).

After a careful consideration of the circumstances, the Hearing Panel determined that the appropriate sanction is a \$25,000 fine and a four month suspension for these violations.

B. Settling Away

For settling customer complaints away from the firm, the Guidelines recommend a fine of \$2,500 to \$50,000, and consideration of a suspension for up to two years, or a bar for egregious cases. Guidelines at 34.

Here, the Hearing Panel considered that Respondent was no longer with the Firm at the time he made the payment to the customer, and he was motivated by a desire to compensate the customer. Moreover, the Firm was aware of the customer complaint. The Hearing Panel concluded that a \$5,000 fine was appropriate for this violation.¹²

V. Conclusion

For falsifying customer account documents, in violation of NASD Rule 2110 and FINRA Rule 2010, and causing his firm to have inaccurate records, in violation of NASD Rules 3110 and 2110, and FINRA Rule 2010, Respondent is suspended for four months and fined \$25,000. For settling a customer claim away from his former firm, in violation of NASD Rule 2110 and FINRA Rule 2010, Respondent is fined \$5,000. In addition, Respondent is ordered to pay the costs of this proceeding in the amount of \$6,623.90, which includes an administrative fee of \$750 and the cost of the hearing transcript. If this Decision becomes the final disciplinary action of FINRA, the suspension shall become effective with the opening of business on January 7, 2013, and end with the close of business on May 7, 2013. The fine and costs shall become due

¹² The Hearing Panel considered and rejected without discussion all other arguments of the parties.

and payable when Respondent returns to the industry. The charge that Respondent engaged in an unauthorized transaction, in violation of NASD Rule 2110 and FINRA Rule 2010, is dismissed.

HEARING PANEL

Sara Nelson Bloom
Hearing Officer
For the Hearing Panel

cc: Michael J. Binstock (via overnight and first-class mail)
Roger N. Walter, Esq. (via electronic and first-class mail)
Kristina Juntunen, Esq. (via electronic and first-class mail)
Gerard Murphy, Esq. (via electronic mail)
David R. Sonnenberg, Esq. (via electronic mail)