

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RICHARD N. MARUYAMA
(CRD No. 2047779),

Respondent.

Disciplinary Proceeding
No. 20100248883-01

Hearing Officer – MAD

HEARING PANEL DECISION

November 30, 2012

Respondent mishandled customer securities and funds, in violation of FINRA Conduct Rule 2010 and NASD Conduct Rule 2110. The Hearing Panel suspended Respondent from associating with any member in any capacity for 18 months and fined him \$7,500.

Appearances

For the Complainant: John S. Han, Senior Regional Counsel, and Jacqueline D. Whelan, Regional Chief Counsel, FINRA, DEPARTMENT OF ENFORCEMENT, San Francisco, CA.

For Respondent: Naomi Sakamoto, Esq., Michael M. Purpura, Esq., and William M. Harstad, Esq., Carlsmith Ball LLP, Honolulu, HI.

DECISION

I. INTRODUCTION

The Department of Enforcement initiated this disciplinary proceeding against Respondent Richard M. Maruyama, a former General Securities Representative with BancWest Investment Services, Inc. (the “Firm”), a FINRA member firm. The Complaint alleges that Maruyama failed to timely deposit a stock certificate and related checks into a customer account. Specifically, the Complaint alleges that Maruyama held the

customer's stock certificate and thirty checks in his office for approximately seven years. The Complaint further alleges that, on occasion during branch office inspections, Maruyama took affirmative steps to conceal the presence of the certificate and checks. The Complaint charges Maruyama with violating FINRA Conduct Rule 2010 and NASD Conduct Rule 2110.¹

II. PROCEDURAL HISTORY

Enforcement filed the Complaint with the Office of Hearing Officers on January 26, 2012. Maruyama filed his Answer on March 6, 2012. In his Answer, Maruyama admitted to certain facts in the Complaint, such as holding the stock certificate and checks in his office; however, he stated that the allegations did not establish a violation of FINRA Conduct Rule 2010 and NASD Conduct Rule 2110.² On July 23, 2012, the parties filed stipulations regarding many of the facts at issue.

The hearing was held in Honolulu, Hawaii, on September 11, 2012, by a hearing panel composed of the Hearing Officer, a current member of the District 2 Committee, and a former member of the District 3 Committee. Enforcement called two witnesses to testify at the hearing: Maruyama and a FINRA Examination Manager. Maruyama testified on his own behalf and did not call any other witnesses. Enforcement offered 22 exhibits, and Maruyama offered 19 exhibits. All exhibits were admitted into evidence without objection.

¹ Following the consolidation of NASD and the member regulation, enforcement, and arbitration functions of NYSE Regulation into 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 (Oct. 2008). Because the Complaint in this case was filed after December 15, 2008, the FINRA procedural rules apply. The conduct rules that apply are those that existed at the time of the conduct at issue. The applicable rules are available at www.finra.org/rules.

² Maruyama also raised affirmative defenses relating to due process and laches. Answer ¶¶ 22, 24.

Based upon a careful review of the entire record, the Hearing Panel makes the following findings of fact and conclusions of law.

III. FINDINGS OF FACT

A. Respondent Richard Maruyama

Maruyama has been in the securities industry for approximately twenty years.³ Since 1997, Maruyama has been employed by First Hawaiian Bank (the “Bank”), a financial institution headquartered in Honolulu, Hawaii.⁴ From March 1999 until November 1, 2010, Maruyama was also employed as a General Securities Representative with the Firm, an affiliate of the Bank.⁵ On November 8, 2010, the Firm filed a Uniform Termination Notice for Securities Industry Registration (Form U5) on Maruyama’s behalf, terminating his registration.⁶ Maruyama remains an employee of the Bank as a product manager in its bank operations.⁷

B. Maruyama’s Mishandling of Customer Securities and Funds

This disciplinary proceeding arose out of Maruyama’s mishandling of his customer’s stock certificate and related checks while he was employed by the Bank and the Firm. In July 2003, Maruyama was working for the Firm at the Makiki branch of the Bank.⁸ At that time, the Bank’s branch manager asked Maruyama to assist KO, a financial advisor, and his customer, KM.⁹ KO wanted assistance with rolling over

³ Maruyama first registered with FINRA as a General Securities Representative through his association with a FINRA member firm in 1990. Stip. ¶ 1; CX-1, at 4. From July 1993 to March 1999, he worked at three other FINRA firms as a General Securities Representative. *Id.*

⁴ Stip. ¶ 1.

⁵ Stip. ¶ 2.

⁶ CX-1, at 10-11.

⁷ Stip. ¶ 11.

⁸ CX-20.

⁹ Stip. ¶ 3.

company PS shares held in the name of the profit sharing plan (“PSP”) of KM’s company, which was being terminated, to an individual retirement account (“IRA”) for KM.¹⁰ Maruyama agreed to assist KO and KM, and opened an IRA account for KM on July 22, 2003.¹¹

1. The Stock Certificate

In late July 2003, Maruyama received KM’s stock certificate: 575 shares of company PS, registered to the PSP of KM’s company.¹² Maruyama attempted to have the shares of PS re-registered in the name of KM.¹³ However, he realized that he was missing a required document from KM in order to complete the re-registration and rollover.¹⁴ Instead of obtaining the document immediately, Maruyama placed the stock certificate in a pending file in his desk.¹⁵ He then forgot about the matter for nearly five months.¹⁶

In December 2003, Maruyama still had KM’s stock certificate in his desk.¹⁷ He contacted the Firm’s clearing firm in a second attempt to have the shares re-registered in KM’s name, but he encountered the same impediment: the lack of a signed document from KM.¹⁸ He realized, however, that contacting KM at this point would uncover his mishandling of the matter.¹⁹ He was also afraid to seek assistance because he did not want

¹⁰ *Id.*

¹¹ CX-3, CX-20; Tr. 25. Maruyama backdated the IRA account form so that the date for his signature would correspond to the date KM signed the IRA account form. Tr. 25-26.

¹² CX-4; Tr. 26.

¹³ Stip. ¶ 4.

¹⁴ Stip. ¶ 4; CX-20.

¹⁵ Stip. ¶ 5; CX-20.

¹⁶ CX-20.

¹⁷ *Id.*; Tr. 28.

¹⁸ CX-7; Tr. 28-29.

¹⁹ Tr. 29-30.

to disappoint the Bank's branch manager.²⁰ Consequently, Maruyama made no further attempts to have the certificate re-registered at that time.²¹

Finally in July 2010, Maruyama ceased holding the stock certificate when he obtained KM's signature on the required document and completed the re-registration of the shares in KM's name.²²

2. Checks Relating to the Stock

Meanwhile, customer KM's shares of company PS continued to pay dividends.²³ Each quarter, KM received a dividend check from company PS, made payable to the PSP of KM's company, which was defunct.²⁴ Financial advisor KO delivered these checks to Maruyama approximately once per quarter or once every two quarters for the purpose of depositing them into KM's IRA account.²⁵ Each time, Maruyama placed the dividend check in the same file as the stock certificate and took no further action.²⁶ Between July 2003 and July 2010, Maruyama accumulated 29 dividend checks, totaling approximately \$9,221.34.²⁷ He never told his Firm that he was holding customer dividend checks.²⁸

In June 2008, customer KM received a notice sent on behalf of company PS stating that, unless KM took action within 30 days, the checks issued by PS would be subject to the State of Hawaii's abandoned property laws because they were uncashed

²⁰ CX-20; Tr. 29-30.

²¹ CX-20; Tr. 30.

²² Stip. ¶ 4; CX-15; Tr. 37-38.

²³ CX-20.

²⁴ CX-5, CX-20.

²⁵ CX-20; Tr. 26-27. In late 2008, Maruyama began picking up the checks directly from KM. Tr. 61-62, 68-69.

²⁶ CX-21, at 4; CX-21a; Tr. 26-27.

²⁷ CX-5.

²⁸ Tr. 31.

and aged.²⁹ Financial advisor KO subsequently brought the letter to Maruyama's attention.³⁰ Maruyama testified that he contacted the State to determine how to get KM's money back, but he learned that he still needed documentation regarding the closure of the PSP.³¹ With that knowledge, Maruyama did not take any steps to obtain the required documentation because he was concerned that his mishandling of KM's stock certificate and checks would get back to his Firm.³²

In addition to the dividend checks, in April 2010, KO brought Maruyama a \$441.00 check, representing the proceeds from KM's sale of 18 shares of PS.³³ As with the dividend checks, Maruyama placed this check in the file containing the certificate.³⁴

3. Respondent's Concealment from and Disclosure to his Firm

a. *Concealment*

Maruyama concealed his mishandling of the stock certificate and checks from his Firm by (1) failing to follow Firm policy and (2) hiding the certificate and checks. The Firm required that customer checks and stock certificates be recorded in logs or documented by completing a receipt.³⁵ Maruyama was aware of the Firm's policy.³⁶ In fact, on more than one occasion, he reiterated the policy when completing Firm audit

²⁹ CX-14.

³⁰ Tr. 33-34. Maruyama testified that he received the letter after the 30-day period had expired. Tr. 35. Upon his receipt of the letter, Maruyama told KO that he wanted to deal with customer KM directly. Tr. 35. Soon thereafter, he met with KM and explained that he was having difficulty with the rollover of the shares into the IRA account. Tr. 35, 53-54, 69-70.

³¹ Tr. 36.

³² Tr. 36-37.

³³ CX-6; Tr. 27.

³⁴ Tr. 27.

³⁵ CX-21, at 5; Tr. 41-43.

³⁶ Tr. 19.

reports.³⁷ Despite his knowledge of the Firm's policy regarding the handling of customer securities and funds, Maruyama never updated any log or completed any receipts for the stock certificate or related checks.³⁸

From July 2003 through July 2010, the Firm conducted approximately six branch inspections of Maruyama's office.³⁹ On at least two of those occasions, Maruyama hid customer KM's file, which contained the certificate and checks, in a location where he believed it would not be found by the Firm.⁴⁰ Maruyama concealed his activity because he was "concerned for [his] job" and "embarrassed about the situation."⁴¹

b. *Disclosure*

In October 2010, financial advisor KO approached a banker at the Makiki branch to inquire about the status of KM's uncashed dividend checks.⁴² Because the banker was unaware of the matter and Maruyama was no longer working at the Makiki branch, the banker asked the registered representative currently working at the Makiki branch.⁴³ That registered representative also had no knowledge of the matter, so he attempted to contact Maruyama via telephone and email.⁴⁴ Maruyama never responded to the call and email from the registered representative;⁴⁵ however, shortly thereafter, he disclosed his

³⁷ CX-10, at 28; CX-11, at 17.

³⁸ CX-21, at 5; CX-21a; Tr. 19-20.

³⁹ CX-8, CX-9, CX-10, CX-11, CX-12, CX-13.

⁴⁰ Stip. ¶ 6; CX-21, at 4; CX-21a; Tr. 39-40, 65.

⁴¹ CX-21, at 5; CX-21a; *see also* Tr. 39-40.

⁴² CX-21, at 2; CX-21a; Tr. 54-55, 66-67. At this point, Maruyama was no longer working at the Makiki branch. *See* Stip. ¶ 5; CX-1, at 6; CX-21, at 2, 4.

⁴³ CX-21, at 2-3; CX-21a; Tr. 54-55, 66-67.

⁴⁴ CX-16; CX-21, at 3; CX-21a; Tr. 54-55, 67.

⁴⁵ CX-21, at 3; CX-21a.

misconduct to the Firm.⁴⁶ The Firm then conducted an inspection of Maruyama's office and recovered KM's checks.⁴⁷ Due in part to the closure of the PSP and in part to the passage of time, the checks recovered from Maruyama could no longer be used.⁴⁸ Consequently, the Firm compensated customer KM for his losses, which totaled \$11,015.07.⁴⁹

The Firm terminated Maruyama effective November 1, 2010.⁵⁰

IV. CONCLUSIONS OF LAW

A. Maruyama Mishandled Customer Securities and Funds

FINRA Conduct Rule 2010, and its identical predecessor NASD Conduct Rule 2110, require a registered person to "observe high standards of commercial honor and just and equitable principles of trade" in the conduct of his business. The Rule "is not limited to rules of legal conduct but rather . . . it states a broad ethical principle."⁵¹ The ethical standards imposed in disciplinary proceedings go beyond legal requirements and depend on general rules of fair dealing and the reasonable expectations of the parties.⁵² "[A] member's failure to live up to obligations owed to a customer or to a fellow member constitutes a breach of 'just and equitable principles of trade.'"⁵³

In *Bernard D. Gorniak*, the Securities and Exchange Commission ("SEC") held that retaining customer funds and securities without processing them in accordance with

⁴⁶ Stip. ¶¶ 6, 7, 8; CX-20; Tr. 43-44.

⁴⁷ Tr. 55.

⁴⁸ CX-17.

⁴⁹ CX-18, CX-19.

⁵⁰ Stip. ¶ 11; CX-1, at 3; Tr. 55.

⁵¹ *Timothy L. Burkes*, 51 S.E.C. 356, 360 n.21 (1993).

⁵² *E.F. Hutton & Co., Inc.*, 49 S.E.C. 829, 832-35 (1988).

⁵³ *NASD, Inc.*, 19 S.E.C. 424, 437 (1945).

the customer's instructions was a violation of these ethical duties.⁵⁴ In *Gorniak*, the respondent received customer funds for the purpose of purchasing securities and failed to execute those transactions.⁵⁵ Instead, he held the funds for approximately eighteen months before returning them to the customer.⁵⁶ The SEC found the respondent's conduct to be a clear violation of his ethical responsibilities as an associated person of a FINRA member firm.⁵⁷

Similarly, Maruyama accepted customer KM's stock certificate and checks with the understanding that he would have them re-titled for deposit into the newly opened IRA account. Instead of following his customer's instructions, he held the securities and checks for years, hiding them from his firm during two branch office inspections.⁵⁸

The Hearing Panel concludes that Maruyama's mishandling of his customer's securities and funds, for such a lengthy period of time, constitutes a violation of FINRA Conduct Rule 2010 and NASD Conduct Rule 2110.

⁵⁴ *Bernard D. Gorniak*, 52 S.E.C. 371, 373 (1995).

⁵⁵ *Id.* at 372.

⁵⁶ *Id.*

⁵⁷ *Id.* at 373.

⁵⁸ Maruyama held the stock certificate for seven years, and the checks from on or about the date each check was issued until October 2010. Tr. 26-27.

B. Maruyama's Arguments

In defense of the allegation, Maruyama argued that (1) his due process rights were violated because the cause of action is vague and ambiguous, failing to set forth the conduct that must be complied with; and (2) the Complaint is barred by laches. Each argument is address separately below.

1. Due Process

Maruyama argued that his due process rights were violated. He asserted that FINRA Conduct Rule 2010 and NASD Conduct Rule 2110 do not provide fair guidance proscribing the type of conduct that is under review in this proceeding.⁵⁹ He argued that due process requires that a respondent know what is prohibited before finding a violation of FINRA Conduct Rule 2010 and NASD Conduct Rule 2110.⁶⁰

The Hearing Panel disagrees and finds that Maruyama's rights were not violated for three reasons. First, as explained above, Maruyama's conduct was inconsistent with both the plain language and the underlying purpose of the rule. Second, the National Adjudicatory Council has explained that a respondent has sufficient notice of the breadth of a rule if a reasonable person would understand that the rule prohibited the conduct at issue.⁶¹ The Hearing Panel finds that a reasonable person would understand that holding a customer's securities and checks for approximately seven years instead of depositing them as instructed is a violation of "just and equitable principles of trade." The fact that

⁵⁹ Respondent's Pre-Hrg Br. at 9.

⁶⁰ *Id.*

⁶¹ See *Mark H. Love*, Exchange Act Rel. No. 49248, 2004 SEC LEXIS 318, at *12 (Feb. 13, 2004) (noting, in context of a vagueness challenge to NASD Rule 3040, that the rule must give fair guidance to firms, their associated persons and NASD decision makers with respect to the type of activities that are subject to its restrictions); *Richard Kwiatkowski*, Exchange Act Rel. No. 48707, 2003 SEC LEXIS 2568, at *18 n.15 (Oct. 28, 2003) ("Due process requires that 'laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'") (quoting *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996))

Maruyama concealed his activity from his Firm during branch inspections further supports the conclusion that Maruyama knew his conduct was improper. Lastly, in 1995, prior to Maruyama's misconduct, the SEC issued the *Gorniak* decision. *Gorniak*, described above, specifically addressed the conduct at issue and provided Maruyama with notice that such conduct constituted a violation of FINRA Conduct Rule 2010 and NASD Conduct Rule 2110. For the above reasons, Maruyama failed to establish that his due process rights were violated.

2. Laches

Maruyama asserted an affirmative defense of laches. "A successful laches defense requires the applicant to show both a lack of diligence by the party against whom the defense is asserted and prejudice to the applicant."⁶² Here, Maruyama failed to establish either element of the defense. Maruyama's activities that form the basis for the charges took place from July 2003 through October 2010, and the Complaint was filed on January 26, 2012. Maruyama neither established that this time period constituted a delay nor asserted any delay was due to a lack of diligence by FINRA.⁶³ More importantly, Maruyama caused the "delay" by concealing his misconduct.⁶⁴ Maruyama also failed to

⁶² *Larry Ira Klein*, 52 S.E.C. 1030, 1038 (1996).

⁶³ FINRA began investigating Maruyama based on the Firm's Form U5 filing. Tr. 72. The investigation was initially handled by FINRA's preliminary review group, and then transferred to its San Francisco office in January 2011. Tr. 72-73. *See Robert Tretiak*, Exchange Act Rel. No. 47534, 56 S.E.C. 209, 230 (Mar. 19, 2003) (rejecting claim of laches, where NASD received the matter in late 1997, took testimony in February of 1998, and filed a Complaint in July of 1999).

⁶⁴ *See City of Reading v. Austin*, 816 F. Supp. 351, 367 (E.D. Pa. 1993) ("A delay may be excused upon a showing that the party asserting the defense substantially contributed to the delay through concealment, misrepresentation, unfilled promises, or any other inequitable conduct."); *Pierce v. International Telephone & Telegraph Corp.*, 147 F. Supp. 934, 938 (D.N.J. 1957); ("Where the party interposing the defense of laches has contributed to or caused the delay, he cannot take advantage of it."); *In re After Six, Inc.*, 167 B.R. 35, 44 (E.D. Pa. 1994) (emphasizing that, in resolving an equitable claim, the court must scrutinize the particular facts and balance "the respective interest and equities of the parties, as well as of the general public," and noting that "a delay may be excused upon a showing that the party asserting the defense substantially contributed to the delay").

establish that he was prejudiced by any delay. The Hearing Panel finds that Maruyama failed to establish a laches defense.

V. SANCTIONS

The FINRA Sanction Guidelines (“Guidelines”) provide guidance to adjudicators for certain violations. The most analogous sanction guideline for Maruyama is the guideline for improper use of funds or securities. Although Maruyama did not *use* KM’s stock certificate and checks, he did not employ them as instructed by the customer: namely, to deposit them into the customer’s IRA account.

For improper use of customer funds, the Guidelines recommend a fine ranging from \$2,500 to \$50,000, and consideration of a bar.⁶⁵ If mitigating circumstances are present, such as when the misuse may be attributable from a respondent’s misunderstanding of the customer’s intended use of the funds, the Guidelines recommend a suspension of six months to two years, or until the respondent pays restitution. The Guidelines do not include specific principal considerations for those violations; rather, they direct the adjudicator’s attention to the general Principal Considerations for Determining Sanctions.⁶⁶

Here, the Hearing Panel finds that Maruyama’s misconduct was very serious. While his misconduct may have originated from his lack of knowledge on how to process such a rollover, it became intentional once he learned the requirements and elected not to take the necessary steps in order to preserve his reputation with the Firm and the Bank.

Maruyama’s misconduct continued for an extremely long period of time. He held customer KM’s stock certificate for seven years, and held the checks from the date of

⁶⁵ FINRA Sanction Guidelines 36 (2011).

⁶⁶ *Id.*

issuance until October 2010. At some point during 2008, Maruyama advised KM that he was having difficulty with the rollover. However, he never informed his Firm about the certificate and checks despite his knowledge that serving as a custodian of customer securities and checks was prohibited by Firm policy. In addition, on at least two occasions, he concealed his misconduct from the Firm by hiding the file containing the certificate and checks during branch inspections.

While it is clear that Maruyama did not engage in this misconduct for any financial gain, he testified that it was very difficult for him to confront this problem because he was concerned about his reputation and embarrassed about the situation. He emphasized that as more time passed, it became harder and harder for him to disclose his misconduct to the Firm. Ultimately, he made a complete disclosure to the Firm; however, his disclosure occurred after he learned that Makiki branch employees were aware of the issue.

At the hearing, Maruyama was forthright with the Hearing Panel and admitted his misconduct. It was clear to the Hearing Panel that he was very remorseful.

Maruyama argued that the Hearing Panel should consider his lack of disciplinary history as a mitigating factor. While the existence of a disciplinary history can be an aggravating factor, the absence of one is not mitigating.⁶⁷ Registered individuals are required to comply with FINRA's rules and observe high standards of conduct.⁶⁸

Maruyama also argued that the Hearing Panel should consider mitigating: (1) the economic hardship he suffered from the loss of his position at the Firm, and (2) the

⁶⁷ *Dep't of Enforcement v. Fergus*, No. C8A990025, 2001 NASD Discip. LEXIS 3, at *58 (N.A.C. May 17, 2001).

⁶⁸ *Id.*

reduction in income he sustained when he accepted the position as product manager with the Bank. However, FINRA and the SEC have rejected the concept that the harm, economic or otherwise, that befell a respondent as a result of his actions or FINRA's proceedings should factor into a sanctions determination.⁶⁹ Accordingly, the Hearing Panel gave no consideration to these factors in determining sanctions.

Upon consideration of the entire record, the Hearing Panel concludes that the appropriate sanctions are a \$7,500 fine and an 18-month suspension in all capacities. These sanctions are remedial because they will deter Maruyama and others from mishandling customer securities and funds, and thereby protect the investing public.

VI. ORDER

Respondent Richard N. Maruyama is fined \$7,500 and suspended for 18 months from associating with any FINRA member in any capacity for mishandling customer securities and funds, in violation of FINRA Conduct Rule 2010 and NASD Conduct Rule 2110.

In addition, he is ordered to pay costs in the amount of \$1,714.00, which includes a \$750 administrative fee and the cost of the hearing transcript. The costs shall be payable on a date set by FINRA, but not less than 30 days after this decision becomes FINRA's final disciplinary action in this matter. If this decision becomes FINRA's final disciplinary action, the suspension shall begin on January 21, 2013, and end at the close

⁶⁹ *Dep't of Enforcement v. Bullock*, 2011 FINRA Discip. LEXIS 14, at *63-64 (N.A.C. May 6, 2011) (citing *Jason A. Craig*, Exchange Act Rel. No. 59137, 2008 SEC LEXIS 2844, at *27 (Dec. 22, 2008) (holding that the Commission does not "consider mitigating the economic disadvantages [the respondent] alleges he suffered because they are a result of his misconduct"); *Dep't of Enforcement v. Jordan*, No. 2005001919501, 2009 FINRA Discip. LEXIS 15, at *53-54 (N.A.C. Aug. 21, 2009) (rejecting argument that respondent's contention that her "personal and business reputation [have been] besmirched and livelihood threatened" should warrant a reduction in sanctions)).

of business on July 21, 2014. The fine shall be due and payable if and when Maruyama reenters the securities industry.⁷⁰

Maureen A. Delaney
Hearing Officer
For the Hearing Panel

Copies to: Richard N. Maruyama (via first-class and overnight mail)
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⁷⁰ The Hearing Panel has considered and rejects without discussion all other arguments of the parties.