

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ROBERT DURANT TUCKER
(CRD No. 1725356),

Respondent.

Disciplinary Proceeding
No. 2009016764901

Hearing Officer – SNB

HEARING PANEL DECISION

January 11, 2013

Respondent is barred for (1) improperly approving a transfer of customer funds, in violation of FINRA Rule 2010; (2) converting those customer funds, in violation of NASD Rule 2330 and FINRA Rule 2010; and (3) improperly commingling those customer funds with his funds, in violation of FINRA Rules 2330 and 2010.

Appearances

Walter Naeder, Esq., and Elissa Meth Kestin, Esq., representing the Department of Enforcement.

Robert Durant Tucker, representing himself.

DECISION

I. Introduction

Respondent Robert Durant Tucker is a FINRA-registered Corporate Securities Representative, who was associated with Bishop Rosen & Co., Inc. (the “Firm”). While at the Firm, he misappropriated funds from one of his customers by wiring the funds to his personal checking account. When the customer discovered the unauthorized transfer, he complained to Respondent and the Firm. The Firm investigated the customer’s complaint and then notified FINRA that Respondent had misappropriated customer funds. FINRA then began the investigation that led to the Department of Enforcement initiating this disciplinary proceeding.

The Complaint sets out three charges emanating from the same conduct—Respondent’s misappropriation of his customer’s funds. The first cause charges that Respondent improperly approved a wire transfer from a customer account, in violation of FINRA Rule 2010. The second cause charges that Respondent converted customer funds, in violation of FINRA Rule 2010 and NASD Rule 2330. The third cause charges that Respondent improperly commingled customer funds with his personal funds, in violation of FINRA Rule 2010.

Following a two-day hearing, the Hearing Panel concluded that Respondent committed the violations charged and the appropriate sanction was a bar.¹

II. Findings of Fact

This is a serious case of a broker in severe financial difficulty who engaged in a scheme to convert customer funds in order to pay his personal expenses and to conceal this misconduct from his firm.²

The Firm had procedures to protect against conversion of customer funds. The Firm required Respondent to complete a wire request form to facilitate the wiring of funds from customer accounts. The wire request form required Respondent’s signature and a manager’s approval. CX-5; Tr. 226. The form also required a signed letter from the customer with the details of the request. *Id.* As an additional safeguard, the Firm had one fax machine available for outgoing correspondence. The Firm restricted access to the machine by having a member of its staff handle outgoing communications. CX-20; Tr. 134-135. As a further control, the fax machine was set up to automatically send copies of outgoing faxes to a Firm email box. *Id.*

¹ Enforcement filed the Complaint on September 9, 2011. On October 28, 2011, Respondent filed an answer denying the charges and requesting a hearing. The hearing was held on July 17 and 18, 2012, in New York, NY. “Tr.” refers to the transcript of the hearing, “CX” to Enforcement’s exhibits, and “RX” to Respondent’s exhibits.

² FINRA has jurisdiction over this proceeding pursuant to Article V, Section 4 of the FINRA By-Laws. Respondent is currently registered as a Corporate Securities Representative through a member firm, and he was registered in the same capacity with the Firm between June 2008 and January 2009. CX-1; Tr. 50.

Respondent was aware of these safeguards and devised a scheme to circumvent them in order to convert funds from a longtime customer, PN, a retired World War II veteran in his eighties.³ On December 19, 2008, Respondent prepared a wire request form instructing the Firm's clearing firm to wire \$4,500 from PN's account to Respondent's personal checking account. CX-5; Tr. 83-85. Instead of obtaining the required supervisor's approval of the transfer as required by the transfer form, Respondent signed the transfer form in his role as the registered representative and also signed it as a supervisor.⁴ Respondent did not use the Firm's fax machine to send the transfer form to the Firm's clearing firm. Instead, Respondent took the falsified form to a retail shop near the office and used the shop's fax machine to send the transfer instructions to the Firm's clearing firm.

Respondent's checking account had a negative balance of \$65 just prior to the deposit of PN's funds. As soon as the funds were deposited in Respondent's account, Respondent withdrew \$3,900 in cash. CX-8. Then, he used the remaining funds to pay for various personal expenses, including a telephone bill, gym charges, and several point-of-sale purchases. *Id.*; Tr. 85, 88-91. Within two weeks, the account balance was again negative. CX-8, CX-22.

PN was vigilant in his review of account statements. When PN saw the unauthorized transfer, he called a compliance officer at the Firm to complain. CX-19; Tr. 131-132. When Respondent was confronted by the Firm's compliance officer, he did not deny that he removed the funds, but said he would "fix it." Tr. 145. Respondent then arranged for a friend to reimburse the funds to the Firm for the benefit of customer PN. CX-9; Tr. 92, 147.

At the hearing, Respondent attempted to justify his actions with an explanation that the Hearing Panel did not find credible. In particular, Respondent claimed that PN had agreed to

³ CX-4; CX-21; Tr. 107. Respondent certified that he reviewed the Firm's supervisory procedures, which required a manager's approval for the disbursement of customer funds to third parties. CX-16, CX-17; Tr. 141-142.

⁴ Tr. 80. Respondent was not a manager, supervisor or registered principal. CX-1; Tr. 81.

invest the \$4,500 in an alternative trading platform outside the Firm, and it was Respondent's plan to transfer the funds to his checking account and then to a limited liability company. CX-5, CX-11; Tr. 63. However, the funds were never transferred, and in fact, Respondent actually used the funds for his own personal expenses. Moreover, PN complained about the transfer as soon as he saw it in his account statement, and credibly testified that he could not recall any discussions about the use of an alternative trading platform. Tr. 124.

Respondent also claimed at the hearing that the Firm's compliance staff member approved the transfer of funds from PN's account, although he could not recall any details about the conversation. Tr. 70, 73, 76, 81. However, during FINRA's investigation, Respondent offered a completely different response. He admitted that no one from the Firm was involved in the transfer but claimed that he left a voicemail for the compliance staff member about the transfer along with a message that he was resigning from the Firm. CX-11, CX-12. The Hearing Panel rejected Respondent's shifting story in favor of the credible testimony of the compliance staff member who testified that Respondent never asked him to approve any transfers to third parties. Tr. 226-227.

III. Conclusions of Law

A. Improper Approval of Fund Transfer

FINRA Rule 2010 provides that a "member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." It is well settled that falsification of documents and the failure to follow firm procedures, particularly those designed to protect customers, are not consistent with the high standards of commercial honor and just and equitable principles of trade required by FINRA Rule 2010.⁵

⁵ *Dep't of Enforcement v. Skiba*, No. E8A2004072203, 2010 FINRA Discip. LEXIS 6, at *13 (NAC Apr. 23, 2010).

Here, Respondent signed the wire transfer instructions as a supervisor without authority to do so, in order to transfer customer funds to his personal checking account. Respondent was initially able to conceal this misconduct by circumventing Firm procedures and faxing the transfer request from a retail store rather than the Firm's fax machine. The Hearing Panel finds that Respondent's improper approval of the wire transfer instructions is plainly unethical and contrary to FINRA Rule 2010.

B. Conversion

NASD Rule 2330(a) provides that “[n]o member or person associated with a member shall make improper use of a customer’s securities or funds.” “An associated person makes improper use of customer funds where he or she fails to apply the funds (or uses them for some purpose other than) as directed by the customer.”⁶ “Improper use rises to the level of conversion ‘when the associated person intends permanently to deprive’ the customer of the use of his funds or securities.”⁷ Misuse of customer funds in violation of NASD Rule 2330 also violates FINRA Rule 2010.⁸

Here, Respondent falsified transfer documentation and circumvented Firm procedures to remove funds from the account of his elderly customer, PN, and deposit them in his personal checking account. Respondent, who was in financial distress, then spent PN's money on Respondent's personal expenses. The Hearing Panel finds that Respondent converted customer funds, in violation of NASD Rule 2330 and thereby also violated FINRA Rule 2010.

⁶ *Dep't of Enforcement v. Patel*, No. C02990052, 2001 NASD Discip. LEXIS 42, at *24-25 (NAC May 23, 2001).

⁷ *Dep't of Enforcement v. Mullins*, Nos. 20070094345 and 20070111775, 2011 FINRA LEXIS 61, at *21 (NAC Feb. 24, 2011), *aff'd*, 2012 SEC LEXIS 464 (Feb. 10, 2012).

⁸ *Dep't of Enforcement v. Thomas*, No. C10030082, 2004 NASD Discip. LEXIS 49, at *6 n.10 (OHO June 30, 2004); *Patel*, 2001 NASD Discip. LEXIS 42, at *24-25 (affirming the Hearing Panel decision barring a representative for misuse of customer funds by depositing customer funds into his own account rather than investing them as directed by the customers).

C. Commingling of Customer Funds

The commingling of customer funds constitutes business conduct that contravenes FINRA Rule 2010 because customer funds are thereby subjected to risk of loss.⁹ Here, the Hearing Panel finds that Respondent violated FINRA Rule 2010 when he deposited customer funds to his personal account without the customer's consent.

IV. Sanctions

The Hearing Panel determined to impose a unitary sanction given that the charges arose from a common course of action.¹⁰ Under the FINRA Sanction Guidelines ("Guidelines"), a bar is standard for conversion.¹¹ Similarly, the sanction for falsification of documents is a bar when no mitigation exists.¹²

Here, there are no mitigating factors, only aggravating ones. Respondent transferred customer funds into his personal checking account and immediately used the funds for his personal benefit. Respondent concealed his misconduct by improperly approving transfer instructions and circumventing Firm procedures. He took no responsibility for his misconduct, and his testimony at the hearing was not credible. Moreover, Respondent has a prior disciplinary history evidencing his disregard for regulatory requirements.¹³ The Hearing Panel concluded that a bar is the appropriate sanction.¹⁴

⁹ *District Bus. Conduct Comm. v. Roach*, No. C02960031, 1998 NASD Discip. LEXIS 11, at *21 (NBCC Jan. 20, 1998).

¹⁰ *FINRA Sanction Guidelines* at 4 (2011), available at www.finra.org/sanctionguidelines.

¹¹ *Id.* at 36. The Hearing Panel also applied the conversion guideline to the third cause, commingling of customer funds, because Respondent's conduct amounted to conversion.

¹² *Id.* at 37.

¹³ *Robert D. Tucker*, Exch. Act Rel. No. 68210, 2012 SEC LEXIS 3496 (Nov. 9, 2012) (holding that during the course of seven years, Respondent willfully failed to disclose, on the Forms U4 he completed for eleven employers, three judgments, two bankruptcies, a federal tax lien, and a state tax lien).

¹⁴ The Hearing Panel considered and rejected without discussion all other arguments of the parties.

V. Conclusion

Respondent is barred for (1) improperly approving a transfer of customer funds, in violation of FINRA Rule 2010; (2) converting those customer funds, in violation of NASD Rule 2330 and FINRA Rule 2010; and (3) improperly commingling those customer funds with his funds, in violation of FINRA Rules 2330 and 2010. Respondent is also ordered to pay the costs of the hearing in the amount of \$3087.15, which includes a \$750 administrative fee and the cost of the hearing transcript. The bars shall become effective immediately if this decision becomes FINRA's final action.

HEARING PANEL

Sara Nelson Bloom
Hearing Officer