

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

TIMOTHY M. WHEELER,
(CRD No. 5786068),

Respondent.

Disciplinary Proceeding
No. 2010024320101

Hearing Officer – LOM

**HEARING PANEL
DECISION**

February 26, 2013

Respondent Timothy M. Wheeler violated FINRA Rule 2010 by falsifying test score reports to make it appear that he had passed the Series 66 examination when he did not. For this violation, Wheeler is barred from association with any FINRA member firm in any capacity.

Appearances

Dale A. Glanzman, Kevin G. Kulling, and Mark A. Koerner, Chicago, Illinois, for FINRA Department of Enforcement.

Timothy A. Wheeler for Respondent.

DECISION

I. Introduction

This is a disciplinary proceeding filed by the Department of Enforcement (“Enforcement”) of the Financial Industry Regulatory Authority (“FINRA”)¹ against Respondent, Timothy Martin Wheeler, alleging that Wheeler submitted to his firm falsified test

¹ FINRA, which is responsible for regulatory oversight of securities firms that do business with the public and their associated persons, was formed in July 2007 by the consolidation of NASD and the regulatory arm of the New York Stock Exchange (“NYSE”). FINRA is developing a new “Consolidated Rulebook” of FINRA Rules that includes NASD Rules. The first phase of the new consolidated rules became effective on December 15, 2008. See FINRA Regulatory Notice 08-57 (Oct. 2008). References here to FINRA include the NASD.

results making it appear that he had passed the Series 66 examination when in fact he did not. Wheeler denied the charge but waived a hearing. Based on evidence submitted by Enforcement,² the Hearing Panel³ finds that Wheeler did, as alleged, falsify his test score and concludes that this conduct violated the high standards of commercial honor and integrity embodied in FINRA Rule 2010. For violating FINRA Rule 2010, Wheeler is barred from association with any FINRA member in any capacity.

II. Jurisdiction

Between June 2010 and December 2010, Wheeler was registered as a General Securities Representative with FINRA member firm Morgan Stanley Smith Barney ("Morgan Stanley" or the "Firm"). Wheeler was registered in the same capacity with another FINRA member firm between January 2011 and August 2011.⁴ Wheeler remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because (i) the Complaint was filed on November 30, 2011, within two years after the date upon which he ceased to be registered with a FINRA member firm and (ii) the Complaint charges him with misconduct committed while he was associated with a FINRA member firm.

² Enforcement's motion to admit its exhibits, CX-1 through CX-13 (which is made in ¶ 1 of "Enforcement's Submission Of Declarations And Brief") is granted. Respondent did not submit any proposed exhibits.

³ The three-person Hearing Panel is composed of the Hearing Officer, a current member of the District 8 Committee, and a former member of the District 8 Committee.

⁴ CX-1 (Wheeler's CRD as of July 5, 2012) at 2-3; CX-12 (Glanzman Declaration ¶ 3) at 1.

III. Procedural History And Waiver Of Hearing

After being served with the Complaint, Wheeler filed a short letter on February 21, 2012, denying the charges and seeking a hearing and an opportunity to present his case. The Hearing Officer treated the letter as Wheeler's Answer. A hearing was first scheduled for August 23, 2012, but then was rescheduled for October 23, 2012. The week before the October hearing date, Respondent requested a continuance. The Hearing Officer granted the continuance, and the hearing was rescheduled for Monday, November 12, 2012.

On Friday, November 9, 2012, the Office of Hearing Officers received e-mail correspondence between Wheeler and Enforcement in which Wheeler declared his intent not to appear at the hearing. The Hearing Officer held a pre-hearing conference by telephone with the parties that afternoon. At that pre-hearing conference, the Hearing Officer explained that if the hearing went forward and Respondent did not appear, Respondent would be held in default and the allegations against him would be deemed admitted. Respondent stated that he understood but he still would not appear at the scheduled hearing. In light of Respondent's informed and unequivocal declaration that he would not appear at the hearing, regardless of the consequences, the Hearing Officer took the hearing off the calendar.⁵

The Hearing Officer determined to treat Respondent as having waived any hearing and issued an Order permitting Enforcement and Respondent to file and serve additional documentary evidence and briefs.⁶ By treating Wheeler as having waived a hearing, rather than having defaulted, the Hearing Officer gave Wheeler an opportunity to present evidence in support of his defense. Enforcement submitted evidence, but Wheeler did not.

⁵ Order Granting Waiver Of Hearing And Setting Schedule For Submission Of Papers, dated November 13, 2012 ("November 13, 2012 Order").

⁶ *Id.*

Where a hearing has been waived, FINRA Rules 9221(c) authorizes a hearing panel to determine a disciplinary proceeding on the record. This is the decision of the Hearing Panel in this matter on the record.

IV. Findings Of Fact And Conclusions Of Law

A. Wheeler Falsified His Series 66 Examination Score

Wheeler, who joined Morgan Stanley on May 7, 2010, was required to pass the Series 7, 63, and 66 examinations as a condition of his employment. He passed the Series 63 examination on May 8, 2010, and the Series 7 examination on June 29, 2010. However, he failed the Series 66 examination the first time that he took it on July 15, 2010. Morgan Stanley's policy at that time was to terminate employees who failed the Series 66 examination twice. Wheeler was aware that some people had been terminated after twice failing the Series 66 examination.⁷ So the stakes were high when Wheeler took the Series 66 examination for the second time on August 23, 2010.⁸

Wheeler failed the Series 66 examination the second time that he took it. That failure was recorded by FINRA's PROCTOR system, proprietary software owned by FINRA that is distributed to testing centers and installed on each computer used to take the examination. The PROCTOR software captures every key stroke made by a test taker, and, after an examination, the software generates a score for each portion of the examination and a total final score.⁹

⁷ CX-12 (Declaration – Lynn Egan, Morgan Stanley, ¶ 2) at 3-4; CX-12 (Declaration – James McCoy, Morgan Stanley, ¶ 2) at 6; CX-11 (Wheeler testimony, Jan. 26, 2011, p. 15 of transcript) at 2.

⁸ CX-12 (Declaration – Lynn Egan, Morgan Stanley, ¶ 3) at 4; CX-12 (Declaration – James McCoy, Morgan Stanley, ¶3) at 7.

⁹ CX-12 (Declaration – Jeanne E. Hartman, FINRA Senior Director, ¶¶ 3-7) at 10-11; CX-3 (Timothy Wheeler Series 66 08/23/2010 Sessions Details) at 1.

FINRA staff obtained from the PROCTOR system the details of the screens and keystrokes for the “Timothy Wheeler Series 66 08/23/2010 Session Details.” PROCTOR showed that Wheeler’s score was computed and presented to him at 10:28:50 a.m. on August 23, 2010. That score was 60%, which was not a passing score. PROCTOR then provided Wheeler with a screen of instructions for reapplying for the Series 66 exam, which Wheeler acknowledged by hitting a key on his keyboard. PROCTOR does not present this screen to a person who has passed the examination. It only provides that screen to a person who has failed the examination.¹⁰

Before Wheeler left the examination location on August 23, 2010, a score report was provided to him. Score reports for all FINRA examinations, including the Series 66 exam, are embossed. The standard procedure is for the proctor to write his or her initials on the score report and crimp that portion of the page with an embosser. The embosser is handheld, so the crimped portion will not be in the same exact location for each test, but it will generally be found in the right hand corner of the score report. The embosser raises a seal on the test report. It is not glued to the paper and it cannot peel.¹¹

FINRA staff obtained a true and accurate copy of Wheeler’s score report for the August 23, 2010, Series examination. It showed that he had failed the exam with a total score of 60%.¹²

Wheeler concealed his failure from his Firm and falsely represented that he had passed the examination. Five or ten minutes after returning to his office, which was across the street from the location of the examination, Wheeler gave copies of his score report to his superiors

¹⁰ CX-12 (Declaration – Jeanne E. Hartman, FINRA Senior Director, ¶¶ 5-7) at 10-11; CX-1 (Wheeler’s CRD as of July 12, 2012) at 6.

¹¹ CX-12 (Declaration – Jeanne E. Hartman, FINRA Senior Director, ¶ 8) at 11.

¹² CX-9 (FINRA Letter to Wheeler) at 3; CX-12 (Declaration – Jeanne E. Hartman, FINRA Senior Director, ¶ 10) at 12.

that purported to show that he had passed with a score of 79%. Although Wheeler claims in an unsworn statement that he left the original with his supervisor, his supervisor states under oath that Wheeler did not give him the original score report for the August 23, 2010 examination. Wheeler also told people in his work area that he had passed the exam.¹³

A week after taking the Series 66 examination, Wheeler attempted to participate in a training program sponsored by Morgan Stanley. However, he was denied entrance to the training program because FINRA's Gateway records reflected that Wheeler had failed the Series 66 examination.¹⁴

The discrepancy between Wheeler's claim that he had passed the examination and FINRA's Gateway records showing that he had failed caused his supervisor, James McCoy, to ask Wheeler to provide Morgan Stanley with the original score report that he received from the proctor the day he took the Series 66 examination. On September 1, 2010, Wheeler provided McCoy with what he claimed was the original score report. Lynn Egan, another Morgan Stanley employee, was standing with McCoy at the time. Egan and McCoy both state under oath that they could tell immediately that the score report had been falsified. The seal in the lower right hand corner that should have been embossed had been glued onto the page and was peeling off. In addition, the typing on the document was not straight.¹⁵

On September 1, 2010, Wheeler telephoned FINRA staff to say that he had a document indicating that he had passed the Series 66 examination. He sent a copy of the document by

¹³ CX-12 (Declaration – James McCoy, Morgan Stanley, ¶¶ 3-4) at 7; CX-11 (Wheeler testimony, Jan. 26, 2011, p. 37 of transcript) at 6.

¹⁴ CX-12 (Declaration – Lynn Egan, Morgan Stanley, ¶¶ 3-4) at 4; CX-12 (Declaration – James McCoy, Morgan Stanley, ¶ 5) at 7.

¹⁵ CX-12 ((Declaration – Lynn Egan, Morgan Stanley, ¶¶ 5-8) at 4-5; CX-12 (Declaration – James McCoy, Morgan Stanley, ¶¶ 6-9) at 7-8.

facsimile. That document bore signs of falsification in addition to the glued and peeling seal. Certain lines on the score report Wheeler submitted are misaligned. Wheeler's document has 90 asterisks separating two sections of the report when there are always 75 asterisks on a true score report. Most important, Wheeler submitted a report reflecting a 77% for correctly answering 23 out of 30 questions in one section of the exam when that is impossible. The PROCTOR system never rounds up, and would always calculate 23 out of 30 questions as 76%.¹⁶

B. Wheeler's Misconduct Violated FINRA Rule 2010

NASD Conduct Rule 2110 requires that “[a] member, in the conduct of [his] business, shall observe high standards of commercial honor and just and equitable principles of trade.” This Rule applies to all business-related conduct.¹⁷ It is a broad prohibition of unlawful, unfair or unethical conduct.¹⁸ It encompasses not only misconduct that disadvantages investors or violates specific Rules but also misconduct that operates as an injustice or deception as to other market participants or that is generally unethical.¹⁹

Wheeler's falsification of his exam results in order to avoid termination for failure to pass in two tries was unjust to his Firm and constituted an attempt to evade its policies and

¹⁶ CX-12 (Declaration – Jeanne E. Hartman, FINRA Senior Director, ¶¶ 2, 9-10) at 9, 11-12.

¹⁷ *Dep't of Enforcement v. Trende*, No. 2007008935010, 2011 FINRA Discip. LEXIS 54, *11 and nn.12 & 13 (OHO Oct. 4, 2011). See also *Dep't of Enforcement v. Gallagher*, No. 2008011701203, 2011 FINRA Discip. LEXIS 40, at *17-18 and n. 46 (OHO June 13, 2011) (“Rule 2110 is an ethical rule...FINRA’s authority to pursue disciplinary action for violations of Rule 2110 is sufficiently broad to encompass any unethical business-related misconduct, regardless of whether it involves a security.”); *Dep't of Enforcement v. Mullins*, Nos. 20070094345, 20070111775, 2011 FINRA LEXIS 61, at *22 (NAC Feb. 24, 2011) (“FINRA’s disciplinary authority under NASD Rule 2110 is also broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security.”) (internal citation and quotations omitted); *Dep't of Enforcement v. DiFrancesco*, No. 2007009848801, 2010 FINRA Discip. LEXIS 37, at *16 n.11 (NAC Dec. 17, 2010) (citing cases) (“There is a long line of cases stating that a member can be disciplined for “business-related conduct” that violates NASD Rule 2110, even when that activity does not involve a security.”), *aff'd*, Exchange Act Rel. No. 66113, 2012 SEC LEXIS 54 (Jan. 6, 2012).

¹⁸ *Id.*

¹⁹ *Dep't of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *12 (NAC June 2, 2000) (citing *In re Daniel Joseph Alderman*, 52 S.E.C. 366, 369 (1995), *aff'd*, 104 F.3d 285 (9th Cir. 1997)).

procedures. Wheeler's misconduct also casts doubt on his ability to be truthful and honest in the future with his Firm and with any investors with whom he might do business. It is well recognized that "[k]nowingly providing a member firm with a fictitious score report that falsely represents that an associated person has passed a registration examination is conduct that falls within the broad ethical principle of [NASD] Conduct Rule 2110 [the identical precursor to FINRA Rule 2010, charged here]."²⁰ There is no question that his misconduct violated FINRA Rule 2010.

V. Sanctions

Wheeler's misconduct was egregious and intentional. He purposely falsified his examination score and twice presented a document to his Firm showing that he had passed the exam when he knew that he had not. In addition, he also presented a document to FINRA staff falsely showing that he had passed the exam.

The FINRA Sanction Guidelines for falsification of records recommend a suspension for up to two years where mitigating factors may exist and a fine from \$5,000 to \$100,000.²¹ But where a violation is egregious, as it is here, the Guidelines recommend considering a bar from associating with any FINRA member in any capacity. This is because the falsification of documents is an inherently serious violation that "adversely reflects on a person's ability to comply with the regulatory requirements."²²

The NAC's comments in *Salaverria* are instructive:

²⁰ *Dep't of Enforcement v. Salaverria*, No. C07040077, 2005 NASD Discip. LEXIS 10, at *16 (NAC Dec. 12, 2005).

²¹ FINRA Sanction Guidelines (2011), available at www.finra.org/oho (then follow "Enforcement" hyperlink to "Sanction Guidelines"), Falsification of Records at 37.

²² *Dep't of Enforcement v. Taylor*, No. C8A050027, 2007 NASD Discip. LEXIS 11, at *22-23 (NAC Feb. 27, 2007).

[Falsification of exam results] poses a threat to the investing public because [respondent] sought to act as a registered general securities representative without being qualified and cheated before [respondent] ever entered the securities industry. [Respondent] attempted to deliberately deceive [the firm] into believing that [respondent] passed the Series 7 examination. Such conduct threatens the integrity of NASD's registration process and cannot be tolerated.²³

The *Salaverria* decision makes plain that a bar is entirely appropriate here.

VI. ORDER

For violation of FINRA Rule 2010, Respondent Timothy M. Wheeler is barred from association with any FINRA member firm in any capacity. If this decision becomes FINRA's final disciplinary decision, the bar shall become effective immediately.

Lucinda O. McConathy
Hearing Officer
For the Hearing Panel

²³ *Salaverria*, 2005 NASD Discip. Lexis 10, at*19.