

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of	<u>DECISION</u>
Department of Enforcement,	Complaint No. C8A980054
Complainant,	Dated: November 5, 1999
vs.	
Sylvester Cannon, Jr. Detroit, MI,	
Respondent.	

**Respondent was found to have failed to provide information requested by
NASD Regulation, Inc. Held, findings affirmed and sanctions modified.**

Sylvester Cannon, Jr. ("Cannon") has appealed an April 6, 1999 Hearing Officer default decision pursuant to NASD Procedural Rule 9310. After a review of the entire record in this matter, we find that Cannon violated Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to requests for information made by the Department of Enforcement ("Enforcement") for NASD Regulation, Inc. ("NASD Regulation"). We order that Cannon be fined \$25,000 and barred from associating with any member firm in any capacity.

Background

Cannon was registered as an investment company products and variable contracts representative and as a uniform securities agent with member firm Pruco Securities Corporation ("Pruco") from June 1996 through December 1997. Cannon has not been associated with any member firm since that time.

Procedural and Factual History

Enforcement filed the complaint in this matter on July 30, 1998, alleging that Cannon failed to provide requested information in violation of Procedural Rule 8210 and Conduct Rule 2110.¹ On that same date, Enforcement sent a copy of the complaint and notice of complaint to

¹ Enforcement's requests sought information from Cannon in connection with his alleged forgeries.

Cannon at his address listed in the Central Registration Depository ("CRD") by certified mail, return receipt requested, and by first class mail. The Postal Service returned to Enforcement the certified mailing containing the complaint and notice of complaint marked "return to sender." The Postal Service did not return the first class mailing to Enforcement.

After the time for Cannon to file an answer had passed, Enforcement sent another copy of the complaint and a second notice of complaint to Cannon at his CRD address via certified mail, return receipt requested, and by first class mail on September 3, 1998. The Postal Service did not return either the certified or the first class mailing to Enforcement. Cannon did not file an answer.

On October 9, 1998, Enforcement filed a motion for entry of a default decision and a declaration supporting the motion for entry of default decision. At the same time, Enforcement filed six exhibits with the Hearing Officer in support of the motion. These exhibits included the following documents: (1) a copy of a CRD printout evidencing Cannon's last known address; (2) a copy of the complaint and notice of complaint, along with a certificate of service, dated July 30, 1998; (3) a copy of the July 30, 1998 certified mailing (of the complaint and notice of complaint to Cannon's CRD address) that was returned to Enforcement marked "return to sender"; (4) a copy of the second notice of complaint and certificate of service, dated September 2, 1998; (5) a signed statement by an NASD Regulation Field Supervisor detailing Enforcement's requests for information, dated May 22, 1998, and attaching the actual requests for information as exhibits; and (6) a copy of the April 1, 1998 certified mailing (of Enforcement's second request for information) that was returned to Enforcement marked "unclaimed" and "return to sender."

On January 14, 1999, Cannon sent the Hearing Officer a one-page document addressed to Enforcement that referenced documents that Cannon purportedly had previously sent to Enforcement, as well as certain telephone conversations with some unknown person(s). In an order dated February 24, 1999, the Hearing Officer rejected Cannon's submission as an answer because it did not conform to the Code of Procedure and because the purpose of the submission was unclear. The Hearing Officer's order stated further that Cannon had failed to provide any basis for not finding him to be in default. The order did allow Cannon until March 9, 1999, to file a submission addressing sanctions. Cannon, however, did not file any submission discussing sanctions.

On April 6, 1999, the Hearing Officer issued a default decision, finding Cannon in violation of Procedural Rule 8210 and Conduct Rule 2110, as alleged in the complaint. The decision ordered that Cannon be censured, fined \$25,000, and barred from association with any member firm in any capacity. On April 17, 1999, Cannon appealed the default decision.

Discussion

As discussed above, the Hearing Officer issued a default decision in this matter, finding that Cannon had engaged in violative conduct. We will first address the issue of whether the Hearing Officer properly determined that Cannon was in default. We will then review the findings of violation.

Default Decision. Enforcement sent Cannon a copy of the complaint and notice of complaint to his CRD address on two separate occasions. On the first occasion, the certified mailing to Cannon's CRD address was returned to Enforcement. The first class mailing was not returned. On the second occasion, neither the certified nor the first class mailing was returned to Enforcement.

It is well settled that Procedural Rule 9134(b)(3) provides for constructive notice by mailing a complaint to the respondent's most recent CRD address. See Lubeck v. SEC, No. 97-70537, 1998 U.S. App. LEXIS 18849, at *19-20 (9th Cir. Aug. 12, 1998) (finding that the NASD complied with notice requirements by mailing complaint to respondent's last known address); In re Eric M. Diehm, 51 S.E.C. 938, 941 n.14 (1994) (rejecting argument that NASD sent notice to the wrong address because notice was sent to respondent's last known CRD address). Proof of actual receipt of the complaint is not required. In this case, Enforcement properly served Cannon with the complaint on two occasions by mailing it to his most recent CRD address. Moreover, on appeal, Cannon acknowledges that he received the complaint. Cannon, however, failed to file an answer or otherwise respond in a timely manner to the complaint.

On October 9, 1998, Enforcement filed a motion for entry of a default decision. Procedural Rule 9215(f) provides that, if a respondent does not file an answer or otherwise respond within the time required after a second notice of complaint has been sent, the Hearing Officer may "(1) treat as admitted by the respondent the allegations in the complaint; and (2) enter a default decision against the respondent pursuant to Rule 9269."

As discussed above, Cannon's only submission to the Hearing Officer in this case was a one-page document, dated January 14, 1999, addressed to Enforcement. Cannon's submission referenced two conversations that Cannon purportedly had with some unknown person(s) and certain documents that Cannon stated he had previously forwarded to Enforcement and to "Washington D.C.," including a "copy of the complaint" and several unidentified letters. (Cannon's January 14 submission did not attach copies of any of the documents referenced therein.) This submission did not purport to be an answer to the complaint.

On February 24, 1999, the Hearing Officer issued an order notifying the parties that Cannon's January 14 submission would not be treated as an answer. The Hearing Officer's order also provided Cannon an additional opportunity to respond to Enforcement's default motion for sanctions purposes only. Cannon did not file any other papers with the Hearing Officer.

Procedural Rule 9215(a) states that each respondent named in a complaint shall file and serve an answer within 25 days after service of the complaint on such respondent. Procedural Rule 9215(b) provides further that an answer "shall specifically admit, deny, or state that the respondent does not have and is unable to obtain sufficient information to admit or deny, each allegation in the complaint." In the instant case, the Hearing Officer correctly decided that Cannon's January 14 submission should not be treated as an answer. First, Cannon's one-page submission did not respond to the allegations in the complaint. Second, even assuming, arguendo, that Cannon's submission had responded to the allegations, it was untimely because it was filed more than five months after service of the complaint and more than four months after service of the second notice of complaint.

On appeal, Cannon states that he "completed both copies of the complaints that were sent to [his] home address . . . [and that he sent them] to the correct addresses." Cannon also claims that he faxed an unidentified letter to Enforcement and to a legal assistant with the Office of Hearing Officers. Aside from the January 14 submission, however, there is no evidence that Cannon filed anything with the Hearing Officer or delivered any documents to Enforcement.

We find that Cannon failed to file an answer to the complaint and that, therefore, the Hearing Officer properly found that Cannon was in default. We also find that, on appeal, Cannon failed to show good cause for not having participated in the proceedings below.

Failure to Respond to Requests for Information. Procedural Rule 8210 authorizes NASD Regulation, in the course of its investigations, to require persons associated with an NASD member to "provide information orally [or] in writing . . . with respect to any matter involved in the investigation. . . ." That rule also provides that NASD Regulation shall have the right to "inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation." Furthermore, NASD Regulation has "the right to require the submission of the requested materials. . . ." In re Saul H. Cutter, 45 S.E.C. 127, 128 (1972). As the Securities and Exchange Commission ("SEC") has emphasized, because NASD Regulation lacks subpoena power over its members, a failure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate. See In re Brian L. Gibbons, 52 S.E.C. 791, 794 (1996), aff'd, 112 F.3d 516 (9th Cir. 1997) (table format).

Under Procedural Rules 9215(f) and 9269(a), when a respondent fails to file an answer to a complaint, as occurred in this case, or to appear at a hearing, the allegations of the complaint may be deemed to be admitted. In the instant case, moreover, there is ample evidence in the record, independent of the allegations in the complaint, to support the Hearing Officer's finding that Cannon failed to respond to Enforcement's requests for information.

The record indicates that Enforcement sent Cannon a request for information, pursuant to Procedural Rule 8210, by letter dated March 17, 1998. Enforcement sent the letter by first class and certified mail to Cannon at his CRD address. Enforcement received a return receipt card signed by Cannon, which is clear evidence that the request for information was delivered to Cannon. (Of course, the signed return receipt card also demonstrates that Cannon was living at the CRD address to which all of the mailings had been sent.) Enforcement's March 17 letter notified Cannon that he was required to provide the requested information on or before March 31, 1998, and specifically stated that failure to respond could result in disciplinary action. Cannon did not provide the requested information or otherwise respond to Enforcement's March 17 letter.

On April 1, 1998, Enforcement sent a second request for information to Cannon at his CRD address. This letter, again issued pursuant to Procedural Rule 8210, enclosed a copy of the March 17 letter and required Cannon to provide the requested information by April 14, 1998. This second request also reiterated that failure to respond could result in disciplinary action. Enforcement sent the letter via first class and certified mail. The Postal Service returned to Enforcement the certified mailing with the notice: "unclaimed" and "return to sender." The

Postal Service did not return the first class mailing. The evidence indicates that Cannon did not respond to Enforcement's second request for information.

We find, based on both the allegations in the complaint and the record evidence, that Cannon received sufficient notice of Enforcement's requests for information and that he failed to respond to such requests, in violation of Procedural Rule 8210 and Conduct Rule 2110.

Sanctions

The relevant NASD Sanction Guideline for failure to respond to a request for information recommends imposing a fine of \$25,000 to \$50,000.² In addition, the Sanction Guideline provides that, "[i]f the individual did not respond in any manner, a bar should be standard." In the current case, Cannon completely failed to respond to Enforcement's requests for information. Such a total lack of response is the equivalent of a willful refusal to comply, and is a very serious matter due to NASD Regulation's inability to issue subpoenas. There are, moreover, no mitigating factors that warrant a reduction in the sanctions recommended in the Sanction Guideline.

Accordingly, we order that Cannon be fined \$25,000 and barred³ from association with any member in any capacity. The bar is effective immediately upon the issuance of this decision.⁴

On Behalf of the National Adjudicatory Council,

Alden S. Adkins
Senior Vice President and General Counsel

² See NASD Sanction Guideline (1998 ed.) at 31.

³ In light of the bar, we have determined not to impose a censure. See NASD Notice to Members 99-59 (July 1999).

⁴ We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Joan C. Conley
 Senior Vice President and Corporate Secretary
 (202) 728-8381-Direct
 (202) 728-8894-Fax

[insert date]

FIRST-CLASS AND CERTIFIED
MAIL: RETURN RECEIPT REQUESTED

Sylvester Cannon Jr.
 Detroit, MI

Sylvester Cannon Jr.
 Southfield, MI

RE: Complaint No. C8A980054: Sylvester Cannon, Jr.

Dear Mr. Cannon:

Enclosed herewith is the Decision of the National Adjudicatory Council in connection with the above-referenced matter. Any fine and costs assessed should be made payable and remitted to the National Association of Securities Dealers, Inc., Department #0651, Washington, D.C. 20073-0651.

You may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the Commission within thirty days of your receipt of this decision. A copy of this application must be sent to the NASD Regulation, Inc. ("NASD Regulation") Office of General Counsel as must copies of all documents filed with the SEC. Any documents provided to the SEC via fax or overnight mail should also be provided to NASD Regulation by similar means.

Your application must identify the NASD Regulation case number, and set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor. You must include an address where you may be served and phone number where you may be reached during business hours. If your address or phone number changes, you must advise the SEC and NASD Regulation. If you are represented by an attorney, he or she must file a notice of appearance.

The address of the SEC is:
 Office of the Secretary
 U.S. Securities and Exchange
 Commission
 450 Fifth Street, N.W., Stop 6-9
 Washington, D.C. 20549

The address of NASD Regulation is:
 Office of General Counsel
 NASD Regulation, Inc.
 1735 K Street, N.W.
 Washington, D.C. 20006

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is 202-942-7070.

Very truly yours,

Joan C. Conley
Senior Vice President and Corporate Secretary

Enclosure

cc: Dale Glanzman, Esq. (Via Certified Mail: Return Receipt Requested/First-Class Mail)
Joseph M. Furey, Esq. (Via Certified Mail: Return Receipt Requested/First-Class Mail)