

BEFORE THE NATIONAL BUSINESS CONDUCT COMMITTEE

NASD REGULATION, INC.

In the Matter of

District Business Conduct Committee
For District No. 4,

Complainant,

vs.

Tammy S. Kwikkel-Elliott
Jackson, Missouri,

Respondent.

DECISION

Complaint No. C04960004

District No. 4

Dated: January 16, 1998

Introduction

This matter was called for review by the National Business Conduct Committee ("NBCC") pursuant to NASD Procedural Rule 9310. We affirm the finding of the District Business Conduct Committee for District No. 4 ("DBCC") that Tammy S. Kwikkel-Elliott ("Kwikkel-Elliott") violated NASD Conduct Rule 2110 (formerly Article III, Section 1 of the Rules of Fair Practice) by obtaining funds from her employer under false pretenses. We order that Kwikkel-Elliott be censured, fined \$5,000 and barred from associating with any member of the NASD in any capacity. We also uphold the imposition of costs for the DBCC hearing.¹

¹ The NBCC called this case for review to determine whether the sanctions imposed by the DBCC were appropriate in light of the conduct in question. The parties were provided notice that a hearing of this matter was scheduled for October 7, 1997. Despite receiving this notice, Kwikkel-Elliott did not attend the hearing, either in person or by telephone. The NASD regional attorney who presented this matter to the DBCC was available by telephone, but determined that no further argument was required because Kwikkel-Elliott failed to attend. Accordingly, the matter was decided on the basis of the record below and any timely filed briefs.

Background

During all relevant times Kwikkel-Elliott was associated with member firm AAL Capital Management Corporation ("AAL") as a sales representative and was registered with the NASD as an investment company and variable contract products representative. She is not currently associated with any member firm.

Facts

In November 1993, Kwikkel-Elliott became associated with AAL as a district representative and member of its field staff. She was employed in an AAL office located in Jackson, Missouri ("Jackson Office"). Throughout most of the relevant period, the field staff at the Jackson Office was composed of Kwikkel-Elliott, another district representative, and a district manager. The Jackson Office field staff shared in paying the rent, telephone expenses, and the secretary's salary. There was also evidence that they, along with the field staff of other AAL district offices, jointly advertised and conducted seminars, and shared in these expenses.

As a district representative and member of the field staff, Kwikkel-Elliott was obligated to pay for certain sales and promotional materials from AAL, known as "cost items," for use in sales presentations. Kwikkel-Elliott received a memorandum from AAL addressed to "All Field Staff," dated May 2, 1994, entitled "Urgent Update 92." Urgent Update 92 advised the field staff immediately to cease using listed obsolete cost items. The field staff was instructed to retain all obsolete cost items until a process for obtaining credit was established.

Kwikkel-Elliott received another memorandum from AAL, dated May 31, 1994, entitled "Procedure Update 273." Attached to this mailing was a copy of AAL's "Promotional Materials Reimbursement Request Form" ("Reimbursement Request"), which provided the means for AAL field staff to seek reimbursement for obsolete cost items. Directly above the signature line, the Reimbursement Request included the following attestation: "I have completed the form to the best of my knowledge and have destroyed the materials noted on the Inventory Worksheet." AAL required those seeking reimbursement to return the Reimbursement Request by June 30, 1994.

Kwikkel-Elliott completed, signed and submitted the Reimbursement Request to AAL on June 18, 1994. Kwikkel-Elliott requested reimbursement of \$913.60, but she ultimately received \$879.60 on or about July 1, 1994, due to an adjustment calculated by an AAL home office employee.²

² Kwikkel-Elliott received \$840 in her payroll check from AAL on July 1, 1994. This amount represents the adjusted Reimbursement Request amount of \$879.60, minus \$39.60 for other supplies that she had ordered.

Thereafter, the other district representative in the Jackson Office happened across a copy of Kwikkel-Elliott's reimbursement request of \$913.60. Believing that Kwikkel-Elliott's request was excessive for a person who had been with AAL for less than a year, this district representative made a photocopy of Kwikkel-Elliott's Reimbursement Request and forwarded it to a supervisor outside the Jackson Office. AAL's Special Investigation Department ("Investigation Department") investigated the matter and discovered that, of the 697 Reimbursement Requests received from AAL field staff, Kwikkel-Elliott's Reimbursement Request was one of only 10 that exceeded \$200. The Investigation Department determined that Kwikkel-Elliott actually had ordered and paid for only \$7.60 worth of cost items deemed obsolete by Urgent Update 92 and eligible for reimbursement. The Investigation Department also confirmed that Kwikkel-Elliott received her funds pursuant to the Reimbursement Request.³

When an AAL supervisor confronted Kwikkel-Elliott with this information on August 3, 1994, she did not claim that she had ordered or paid for all of the cost items listed in her Reimbursement Request. Kwikkel-Elliott asserted, however, that she and the other field staff at the Jackson Office jointly may have ordered some cost items and, therefore, AAL records would not accurately reflect all of the cost items that she had ordered. She offered no proof that she had ordered or paid for \$913.60 worth of cost items. She also stated that she simply had estimated the quantity of cost items included in her Reimbursement Request. AAL terminated Kwikkel-Elliott's employment at this meeting.⁴

Discussion

The complaint in this matter alleged, and the DBCC found, that Kwikkel-Elliott violated NASD Conduct Rule 2110 by obtaining funds from AAL under false pretenses. Rule 2110 provides that "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."⁵ It is well established that conduct that is not directly related to the securities industry may violate Rule 2110. See, e.g., Vail v. SEC, 101 F.3d 37, 38 (5th Cir. 1996) ("The SEC has consistently held that the NASD's 'disciplinary authority is broad enough to encompass business related conduct that is inconsistent

³ The Investigation Department also verified that AAL did not review or alter Kwikkel-Elliott's Reimbursement Request, other than to adjust it to \$879.60 because of a miscalculation of the quantity in a unit of one of the cost items.

⁴ Kwikkel-Elliott was the only AAL employee terminated for submission of an inaccurate Reimbursement Request.

⁵ Rule 2110 is applicable to associated persons pursuant to Rule 115(a), formerly Article I, Section 5(a), which states that "[t]hese Rules shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under these Rules."

with just and equitable principles of trade, even if that activity does not involve a security'.")(citations omitted); In re Leonard John Ialeggio, Exchange Act Rel. 37910, at 7 (Oct. 31, 1996) (upholding NASD's finding that respondent violated Article III, Section 1 of the Rules of Fair Practice -- now Conduct Rule 2110 -- by inducing his employer to pay for country club fees and emphasizing that misconduct not directly related to the securities industry nonetheless may violate the NASD rules); In re George R. Beall, 50 S.E.C. 230, 231-32 (1990) (finding that respondent's passing of bad checks to his firm in connection with options trading in his personal account was a violation of Article III, Section 1 of the Rules of Fair Practice, now Conduct Rule 2110).⁶

In the current case, it is undisputed that the Reimbursement Request submitted by Kwikkel-Elliott was inaccurate. She admitted that she personally did not order and pay for all of the items included in her Reimbursement Request. Nevertheless, Kwikkel-Elliott claimed that she did not act in bad faith in preparing and submitting an inaccurate Reimbursement Request. She argued that the Reimbursement Request was confusing and that she believed that it was supposed to have been submitted on behalf of the other field staff at the Jackson Office, as well as on her own behalf. Kwikkel-Elliott explained that, as a result of this misunderstanding, all of the cost items ordered by the Jackson Office field staff were included in her Reimbursement Request. She also stated that in preparing the Reimbursement Request, she did not intentionally exaggerate the number of cost items. Rather, she estimated the promotional materials in the office storage cabinets. She further asserted that once she received the reimbursement funds, she intended to divide them among all the members of the field staff at the Jackson Office. We do not find Kwikkel-Elliott's explanation of the events to be credible.

Kwikkel-Elliott's assertion that the Reimbursement Request was confusing and that she was led to believe that it should be submitted on behalf of the Jackson Office is belied by the facts. Procedure Update 273 and the attached Reimbursement Request were addressed to "All Field Staff." They were not addressed and sent to the Jackson Office or even to the district manager. In addition, Procedure Update 273 provided that the "home office will reimburse you for those materials that have a cost associated with them." (emphasis added). The Reimbursement Request instructed the field staff to "compile all materials you have that are listed on the Inventory Worksheet . . ." and "calculate the amount to be reimbursed to you. . ." (emphasis added). Neither the manner of distribution of the correspondence, the instructions contained therein nor the method of reimbursement suggested that the Reimbursement Requests should be submitted on behalf of anyone other than an individual person.⁷

⁶ See also In re Howard B. Labow, 48 S.E.C. 134, 135 (1985) (affirming NASD finding that insurance agent violated just and equitable principles of trade by falsifying insurance application and retaining commission for policy after policy was canceled); In re Thomas E. Jackson, 45 S.E.C. 771, 772 (1975) (finding that insurance agent's falsification of insurance applications to earn commissions violated Article III, Section 1).

⁷ The Reimbursement Request also had a section where the party seeking

Moreover, notwithstanding her assertion that she found the Reimbursement Request confusing, Kwikkel-Elliott never sought clarification of the proper procedure to follow. She did not ask anyone from AAL, including co-workers at the Jackson Office, for assistance in filling out the Reimbursement Request, despite the fact that she executed the Reimbursement Request and submitted it to AAL on June 18, 1994, 12 days before the June 30, 1994 due date.⁸ She also did not consult her co-workers for help in calculating the quantity of cost items to be included.

Even if the evidence supported Kwikkel-Elliott's claim that she thought that the Reimbursement Request was to be made on behalf of the entire office, which it does not, her "estimate" included both cost items and non-cost items. Kwikkel-Elliott testified that she merely performed a visual inspection of certain cabinets where promotional materials were kept when she made her estimate. These cabinets, however, contained both cost items and non-cost items and Kwikkel-Elliott admitted that she did not distinguish between the two, notwithstanding that only the former items were reimbursable. Thus, her "estimate" would not have been accurate in any event.⁹

Kwikkel-Elliott's claim that she planned to divide the reimbursement funds among all the members of the Jackson Office field staff is also untenable. She made no attempt to determine what portion of the cost items included in her Reimbursement Request belonged to which members of the Jackson Office. Thus, she had no means to determine how to allocate the reimbursement funds. She also never told anyone that she had submitted the Reimbursement Request on behalf of the Jackson Office.

In addition, Kwikkel-Elliott never offered any reimbursement funds to any members of the Jackson Office field staff after the funds were deposited in her account on July 1, 1994. In fact, within five days of receipt of the reimbursement funds, Kwikkel-Elliott did not have sufficient funds to share with other members of the Jackson Office field staff. She claims not to have known that the funds had been directly deposited into her credit union account. However, Urgent

reimbursement was supposed to check the box that represented his or her position with AAL. Kwikkel-Elliott checked the box marked "DR" for district representative. There was no box that could be checked to submit the form for the office as a whole. In addition, Kwikkel-Elliott placed her registered representative number and Social Security number on the form. She did not place the numbers of any other member of the Jackson Office field staff on the form.

⁸ Both "Procedure Update 273" and the Reimbursement Request provided express instructions regarding the proper department to contact with questions about the Reimbursement Request.

⁹ Kwikkel-Elliott also failed to destroy the obsolete cost items, even though she attested on the Reimbursement Request that she had destroyed such materials.

Update 273 advised that the reimbursement funds would be included in the payroll checks of those making requests. She was also sent a payroll document from AAL confirming that the reimbursement funds had been deposited into her account. Furthermore, if she had intended to share the funds with the other members of the field staff, it is likely that she would have been watching for the reimbursement funds.¹⁰

Under these circumstances, we do not find Kwikkel-Elliott's version of events to be plausible. The evidence indicates that Kwikkel-Elliott did not make an inadvertent mistake, but rather that she acted in bad faith. She made no attempt to separate cost items from non-cost items, grossly exaggerated the number of cost items, submitted a Reimbursement Request under false pretenses, and received reimbursement funds of \$879.60. Her conduct was inconsistent with high standards of commercial honor and just and equitable principles of trade. Accordingly, we find that Kwikkel-Elliott violated NASD Conduct Rule 2110.

Sanctions

The DBCC determined that Kwikkel-Elliott should be censured, suspended for 30 days from association with any member firm in any capacity, required to requalify by examination prior to reassociating with a member firm, and assessed costs of \$1,291.90. In mitigation, the DBCC considered that Kwikkel-Elliott was under a great deal of personal and work-related stress at the time she prepared the Reimbursement Request. The DBCC also found that AAL did nothing to determine the accuracy of other Reimbursement Requests and did not terminate any other employees for submitting inaccurate Reimbursement Requests. In addition, the DBCC considered that the Reimbursement Request was a one-time program and that no one at AAL, including Kwikkel-Elliott, had any prior experience with it. Finally, the DBCC noted that Kwikkel-Elliott had no prior disciplinary history and that she offered to return the reimbursement funds at the meeting that resulted in her termination.

We find that the mitigating factors considered by the DBCC do not warrant the lenient sanctions imposed on Kwikkel-Elliott in light of the severity of her misconduct. First, Kwikkel-Elliott's conduct cannot be excused by the fact that she may have been under personal and work-related stress. See In re Leonard John Ialeggio, Exchange Act Rel. No. 37910, at 3-4 (Oct. 31, 1996) (rejecting contention that misconduct was caused, in part, by respondent's extremely busy travel schedule); In re Joel Eugene Shaw, 51 S.E.C. 1224, 1226 (1994) (holding that respondent's conduct cannot be justified by his personal and financial circumstances). Nothing in the record

¹⁰ We note, as well, that the Securities and Exchange Commission ("SEC") has held that a respondent's claim that the act in question resulted merely from his or her disorganization or forgetfulness provides no justification for misconduct of the type alleged in this case. See In re Ernest A. Cipriani, 51 S.E.C. 1004, 1006 n.7 (1994) ("We have held that disorganization and absentmindedness are no excuse for misappropriation.") (citing In re Stanley D. Gardenswartz, 50 S.E.C. 95 (1989)).

convinces us that the conduct in question resulted from or was exacerbated by Kwikkel-Elliott's personal or work-related circumstances. The evidence clearly supports the finding that Kwikkel-Elliott intended to obtain funds under false pretenses and there is no indication in the record before us that she would have acted differently under other circumstances.

Second, whether AAL attempted to verify the accuracy of other Reimbursement Requests and whether it terminated other employees for similar conduct has no bearing on a determination of the appropriate sanctions here. As the SEC has emphasized, "it is no defense that others in the industry may have been operating in a similarly illegal or improper manner." In re Patricia H. Smith, Exchange Act Rel. No. 35989, at 4 n.8 (June 27, 1995). See also In re Bison Securities, Inc., 51 S.E.C. 327, 330 n.10 (1993) ("[O]ne dealer's improper pricing practices cannot legitimize another's."); In re Donald T. Sheldon, 51 S.E.C. 59, 66 n.32 (1992) ("[E]ven if Sheldon had established that other firms also misused customer fully-paid securities, that would not have exonerated him."), aff'd, 45 F.3d 1515 (11th Cir. 1995). AAL discovered, inadvertently, that Kwikkel-Elliott had engaged in misconduct by filing an inaccurate Reimbursement Request. AAL then terminated Kwikkel-Elliott and notified the NASD of her conduct through a Uniform Termination Notice for Securities Industry Registration ("Form U-5"). AAL's vigilance with regard to the accuracy of other Reimbursement Requests is of little consequence.

Third, the fact that the Reimbursement Request was a one-time program with which no one had any prior experience does not provide Kwikkel-Elliott with a basis for mitigation. The forms involved in this matter were not overly complex or confusing. Moreover, Kwikkel-Elliott never sought assistance in interpreting the procedures or in filling out the forms. Under these circumstances, Kwikkel-Elliott cannot shift responsibility for her misconduct to AAL. Cf. In re Thomas C. Kocherhans, Exchange Act Rel. No. 36556, at 6 (Dec. 6, 1995) ("[W]e have repeatedly held that a respondent cannot shift his or her responsibility for compliance with an applicable requirement to a supervisor. . . ."); In re Ernest A. Cipriani, 51 S.E.C. 1004, 1007 (1994) (rejecting contention that the lack of adequate supervision justified conduct in question).

Fourth, Kwikkel-Elliott's lack of any disciplinary history offers little solace given the short time in which she had been registered with the NASD and considering the seriousness of her misconduct. At the time of the infraction, Kwikkel-Elliott had been registered with the NASD for less than a year.¹¹ Receiving funds under false pretenses within a year of becoming registered with the NASD does not evince an exemplary track record. Cf. In re Henry E. Vail, Exchange Act. Rel. No. 35872, at 5 (June 20, 1995) (rejecting contention that bar for misappropriation of funds was unwarranted because of no past disciplinary history), aff'd, 101 F.3d 37 (5th Cir. 1996).

¹¹ Kwikkel-Elliott became associated with member firm AAL in August 1993. She took the Series 6 exam on September 23, 1993, and became registered with the NASD as an investment company and variable contract products representative on September 28, 1993. The violative conduct occurred on June 18, 1994.

Finally, the DBCC viewed Kwikkel-Elliott's offer to pay back the reimbursement funds as a mitigating factor. We note, however, that Kwikkel-Elliott's offer occurred only after she was approached by AAL about her wrongdoing. There is no evidence suggesting that she would have made the offer absent such a confrontation. Under these facts, we do not find Kwikkel-Elliott's repayment offer to be a mitigating factor. See Henry E. Vail, *supra*, at 6 (rejecting contention that repayment of money was a mitigating factor when only done because criminal charges had been filed); Joel Eugene Shaw, *supra*, at 1227 ("Nor does the fact that Shaw ultimately repaid . . . the money [to the customer] warrant permitting him to remain in the securities business. It appears that Shaw would have retained [the customer's] money if she had not discovered his conversion.").¹²

Considering the evidence as a whole, we find that there are no mitigating facts which would warrant the lenient sanctions imposed by the DBCC below. To the contrary, the facts support the finding that Kwikkel-Elliott engaged in serious misconduct. As discussed above, Kwikkel-Elliott acted in bad faith by submitting a materially false Reimbursement Request to her employer, culminating in her obtaining funds under false pretenses. Although Kwikkel-Elliott's wrongdoing in this instance did not involve securities or customer funds, the willingness to acquire a sum of money through questionable means indicates a troubling disregard for basic principles of ethics and honesty which, on another occasion, might manifest itself in a securities- or customer-related transaction. See Thomas E. Jackson, 45 S.E.C. 771, 772 (1975) ("Although Jackson's wrongdoing in this instance did not involve securities, the NASD could justifiably conclude that on another occasion it might."). As the SEC has noted, the securities industry "presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants." In re Bernard D. Gorniak, Exchange Act Rel. No. 35996, at 5 (July 20, 1995) (citations omitted). See also In re Mayer A. Amsel, Exchange Act Rel. No. 37092, at 11 (April 10, 1996) (noting that the securities industry is "rife with opportunities for abuse.").

In light of our duties to protect the investing public and to ensure the integrity of the market, we would be remiss in not acting decisively in cases, like the present matter, where the evidence calls into question the honesty and the veracity of a person associated with a member firm. Because we find that Kwikkel-Elliott's continued participation in the securities industry presents a risk to the public, we hold that she is barred in all capacities from associating with any member firm. See Mayer A. Amsel, *supra*, at 11 ("Amsel has exhibited a disturbing disregard for the standards that govern the securities industry. . . . In light of his deliberate and serious misconduct, we consider his exclusion from that business a desirable safeguard for both broker-dealers and members of the investing public."); Henry E. Vail, *supra*, at 6 ("Through his

¹² See also Ernest A. Cipriani, *supra*, at 1007-08 (holding that the fact that respondent ultimately paid back the money afforded no justification for the misconduct which, presumably, would have continued had it not been discovered); In re Raymond M. Ramos, 49 S.E.C. 868, 872 (1988) ("[T]he fact that Ramos ultimately paid the money back does not warrant permitting his return to the securities business where he poses a threat to other investors.").

mishandling of these funds, Vail demonstrated a serious misunderstanding of the fiduciary obligations he subjected himself to by becoming the Club's treasurer. His actions make us doubt his commitment to the high fiduciary standards demanded by the securities industry."').¹³

Accordingly, we impose a censure, a \$5,000 fine, and a bar from associating with any NASD member firm in any capacity. We also affirm the imposition of costs of \$1,291.90 for the DBCC hearing.¹⁴ In light of the bar, we eliminate the requirement that Kwikkel-Elliott requalify by examination prior to reassociating with a member firm. The bar is effective immediately upon the issuance of this decision.¹⁵

On Behalf of the National Business Conduct Committee,

Joan C. Conley, Corporate Secretary

¹³ See also In re Stanley D. Gardenswartz, 50 S.E.C. 95, 97-98 (1989) (upholding NASD's decision to increase to a bar the one-year suspension imposed on respondent by the DBCC for misappropriating funds belonging to his employer).

¹⁴ In addition, we agree with the DBCC that restitution is inappropriate. AAL took no action on Kwikkel-Elliott's offer to return the reimbursement funds. AAL also has withheld all trailing and renewal commissions due to Kwikkel-Elliott.

¹⁵ We have considered all of the arguments of the parties. Such arguments are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days notice in writing, will summarily be revoked for non-payment.

Distribution of the Kwikkel-Elliott decision for final review and comment before being sent to the parties:

Deborah McIlroy _____

Norman Sue, Jr. _____

(Return to Jim Wrona)

Direct: (202) 728-8381
Fax: (202) 728-8894

Joan C. Conley
Corporate Secretary

January 16, 1998

VIA FIRST CLASS/CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Tammy S. Kwikkel-Elliott
Jackson, Missouri

RE: Complaint No. C04960004: Tammy S. Kwikkel-Elliott

Dear Ms. Kwikkel-Elliott:

Enclosed herewith is the Decision of the National Business Conduct Committee 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
Corporate Secretary

Enclosure

cc: Regional Attorney