BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of District Business Conduct Committee For District No. 9, Complainant, vs. Respondent 1 Respondent.	DECISION Complaint No. C9A960029 District No. 9 Dated: October 22, 1998

This matter was called for review by the National Adjudicatory Council ("NAC") pursuant to Procedural Rule 9312 to determine whether the bar imposed by the District Business Conduct Committee for District No. 9 ("DBCC") was appropriate in light of the nature of the violation. After a review of the entire record in this matter, we affirm the DBCC's finding that Respondent 1 failed to remit customer funds and failed to inform her employer of her omission in violation of Conduct Rule 2110, but we reduce the sanction from a bar to a two-year suspension, which is retroactive to the date of Respondent 1's termination from Firm A. We also require Respondent 1 to requalify by examination in any capacity in which she seeks to participate in the securities industry.[1] We affirm the censure and the requirement that Respondent 1 pay costs associated with the DBCC proceeding.[2]

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[1] We note that Respondent 1 was terminated from Firm A in March 1996, and she therefore would have to requalify by examination to re-enter the industry regardless of this sanction.

[2] Respondent 1 has already reimbursed the customer for funds lost plus interest.

Background

Respondent 1 became an employee of Firm B in 1982. From August 1986 until March, Respondent 1 was registered as a variable contracts representative of Firm B and Firm A, where she sold annuities and mutual funds. She has not been registered since her termination in 1996.

Facts

On April 4, 1995, SF, who had been one of Respondent 1's customers for seven or eight years, gave Respondent 1 $2,000 in cash to purchase shares of the Managed Assets Fund. According to Respondent 1, SF typically made cash deposits. After returning to the office with the $2,000 in cash, Respondent 1 learned that the minimum deposit for the Managed Assets Fund had increased from $2,000 to $2,500. Respondent 1 called SF and told her that an additional $500 was needed in order to open the account. SF informed Respondent 1 that she was leaving to go to State. They agreed that Respondent 1 would collect the additional $500 after SF returned from her trip.

According to the usual practice at Firm A, agents who received deposits from customers completed a form and gave the deposit to a member of the clerical staff, who then deposited the funds in the appropriate account. The agents were required to remit funds by Friday of each week.[3] On this particular day, however, did not follow this procedure. She testified that she intended to wait to remit the funds until she had received the entire $2,500. She thought that she placed the envelope containing the $2,000 in the SF client file and forgot about it. At this time and during the ensuing several months, Respondent 1 was spending a lot of time out of the office to care for her father, who was dying of cancer.

Three months later, on June 26, 1995, Respondent 1 went to SF's home and collected an additional $500 for the Managed Assets Fund. It was clear that at that time Respondent 1 remembered the previous $2,000 she had collected from SF. Respondent 1 gave SF a receipt, which stated as follows:

> June 26, 1995
> $500.00 additional deposit
> to managed asset fund
> to be added to 2,000 gross deposit.
> /s/ Respondent 1
> B-65 090-2

[3] Respondent 1 testified that although approximately 80 percent of her business was in mutual funds at this time, she had been given very little training in this area. She also stated that her manager was frequently absent during this period.

Although she testified that it was her customary practice to take a customer file with her when she met with a client, Respondent 1 could not remember whether she had taken SF's file or the $2,000 with her on that particular day. Respondent 1 testified that she did not turn the $2,500 deposit over to the clerical staff when she returned that day. She claimed that she forgot about the money, and that, as she later discovered, she never used it to open a Managed Assets Fund account for SF.

Several weeks later, in July 1995, SF called Respondent 1 and told her that she had not received a quarterly report. Respondent 1 told her that it should arrive soon. Respondent 1 testified that since most fund reports were sent after the close of the quarter in June, she thought that the report simply had not yet arrived. She testified that she could not remember exactly what she had thought at the time, but that she probably assumed she had already submitted the $2,500 for deposit.[4]

Many months later, a former Firm A employee named Employee 1 solicited SF's business. At this time, SF inquired about the $2,500 for which she had never received a report. Employee 1 encouraged her to call the new Firm A manager and discuss the matter with her. The manager spoke with Respondent 1 and together they searched her office and her computer records to see if the deposit had been credited accidentally to another one of SF's accounts. They could not find the $2,500. Respondent 1 testified that she had forgotten about the $2,500 until this time, and she concluded that the file had been lost. She offered to pay SF $2,500 plus $70.35 interest out of her own funds. She paid Firm A, and Firm A reimbursed SF on March 29, 1996.

Although Respondent 1's recollection of the events surrounding her receipt of the two deposits was vague, she testified emphatically that she did not take the money for her own use. She believed that she forgot about the $2,500 and that it was simply lost or taken from her office. She could not recall whether the $2,500 was locked in a desk drawer, but she said that her office door was most likely locked when she was not there. She testified that she always locked her desk and the door to her office. She also stated that the staff had access to keys to her office and her desk. She claimed that she did not report the loss to the police after discovering it in February because she did not suspect theft. She also stated, however, that because she was frequently out of the office to care for her father during this time, it is possible that someone stole the money from her office.

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[4] SF wrote a letter to Firm A on February 14, 1996, in which she requested a refund of her $2,500. She stated, however, that she gave Respondent 1 $2,500 in cash on April 4, 1995 for deposit in a Managed Assets Fund account. She claims that when she "questioned [Respondent 1] about [her confirmation], she kept telling [her that] it was coming . . . ." SF's assertion that she gave Respondent 1 the entire $2,500 in cash on April 4, 1995 is contradicted by the June 26, 1995 receipt for the additional $500.

Respondent 1 was fired from Firm A on March 15, 1996 for her "irresponsible" conduct. She is currently a licensed insurance agent with Firm B.

The DBCC Analysis. The DBCC found it highly unlikely that Respondent 1 simply could have forgotten about $2,500 in cash in her office. The DBCC mentioned three incidents that it believed should have reminded Respondent 1 of the money: (1) the additional $500 that she received from SF in June 1995 and for which she gave SF a receipt acknowledging the earlier $2,000; (2) the phone call that SF made to Respondent 1 in July 1995 to inquire about a quarterly statement she had not received for one of her accounts; and (3) the fact that Respondent 1 never received a commission for the sale.

At the DBCC hearing, Respondent 1 offered vague explanations for why none of these incidents reminded her that she had forgotten to deposit SF's funds. Respondent 1 could not remember what she did with the $500 when she returned to her office on June 26, 1995. She speculated that she might have returned after 4:00 and that the clerical staff would therefore have already left for the day. Respondent 1 thought that she put the entire $2,500 in SF's file and locked it in the credenza or desk in her office; however, Respondent 1 also testified that she may have left the money in the file on her desk.

Respondent 1 testified that SF's phone call to her in July 1995 probably did not remind her of the $2,500 because she probably assumed that she had deposited the $2,500, and it was too soon for SF to have received a statement.

Finally, Respondent 1 also testified that the fact that she did not receive a commission for the Managed Assets Fund did not remind her of the $2,500. She explained that she did not enter the $2,500 sale into the personal record book she kept for mutual funds, as was the custom at Firm A, because she did not make the deposit.[5] Because there was no sale recorded in the record book, she did not notice that she did not receive a commission.

Discussion

This case was called for review to determine whether the imposition of a bar was appropriate given the nature of the violation. We affirm the DBCC's finding that Respondent 1 violated Conduct Rule 2110 by failing to remit the $2,500 she received from SF and by failing to inform her employer promptly of the loss of such funds. Although we find credible her testimony that she does not remember what she did with the money and that she must have simply lost the money, we do not in any way excuse her negligent conduct. We agree with the

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[5] Respondent 1 explained during the NAC hearing on August 4, 1996, that the branch office only tracked life and annuity commissions. Individual representatives kept track of their own mutual fund commissions.

DBCC that there were a number of incidents that should have jogged her memory, and we thus find that her conduct was extremely irresponsible.

The 1996 edition of the NASD Sanction Guidelines ("Guidelines") for "Conversion or Improper Use of Funds" recommends the imposition of a bar for conversion, but not for improper use of funds. For improper use of funds, the Guidelines recommend a suspension in all capacities for six months to two years, followed by requalification by examination and proof of restitution.[6] Although we find that Respondent 1's conduct was inexcusable, we nonetheless conclude for the reasons stated below that a bar is not warranted in this case.

Respondent 1's frequent absences due to her father's illness may help to explain how she forgot about the funds, but she was nonetheless remiss in her execution of her obligations both to her customer and to her employer. Her alleged lack of training at Firm A and the absence of her manager do not excuse or mitigate her conduct. We recognize the seriousness of her violation, but we also note that the DBCC did not allege or find, nor do we find, an intent to misappropriate the funds or any facts that suggest she misappropriated the funds. In fact, her conduct did not rise to the level of conversion. Thus, we find that it would be inappropriate to impose a bar in this case.

Accordingly, we order that Respondent 1 be censured; suspended for two years; and required to requalify by examination in any capacity in which she seeks to participate in the securities industry. Respondent 1's period of suspension is retroactive to the date of her termination from Firm A in March 1996.[7] We emphasize that we do not absolve Respondent 1 of responsibility for her failure to discharge her fundamental duties to her customer and her employer. This type of conduct is not tolerated in the industry. We believe, however, that it is unlikely that Respondent 1 will make this mistake again. Requiring her to requalify should impress upon her the seriousness of her conduct, will remind her of her obligations to her

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[6] The Guidelines also suggest imposing a fine in the range of $2,500 to $20,000. The DBCC did not impose a fine because her conduct "did not involve the deliberate infliction of financial harm upon a customer," and she used her own funds to reimburse the customer. We have also decided not to impose a fine. We base our decision on the fact that she had no other prior misconduct, she did not convert the funds, and she made prompt and voluntary restitution from her own funds once the loss was discovered.

[7] The recommended sanctions are consistent with the applicable Guidelines, except for the lack of a fine. <u>See</u> Guidelines (1996 ed.) at 13 (Conversion and Improper Use of Funds).

customers and employer and will therefore serve to protect the public and the securities industry.[8] We affirm the DBCC's assessment of $1,145 in costs.

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Corporate Secretary

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[8] 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.

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.