

BEFORE THE NATIONAL BUSINESS CONDUCT COMMITTEE

NASD REGULATION, INC.

In the Matter of	<u>DECISION</u>
Market Regulation Committee	Complaint No. CMS950042
Complainant,	Market Regulation Committee
v.	Dated: December 1, 1997
Respondent 1	
Respondent.	

This matter was appealed by Respondent 1 pursuant to NASD Procedural Rule 9310. For the reasons discussed below, we hold that Respondent 1 violated Conduct Rule 2110 and Procedural Rule 8210 (formerly Article III, Section 1 ("Section 1") and Article IV, Section 5 ("Section 5") of the Rules of Fair Practice) by not responding to the Association's requests for documents as alleged in the complaint. We affirm the dismissal of cause three of the complaint against Respondent 1. We order that Respondent 1 be censured and fined \$5,000.

Background

Respondent 1 has been registered with the Association as a general securities representative since November 1988. Respondent 1 became associated with Firm A in March 1993 and became registered with Firm A on May 14, 1993. Respondent 1's registration with Firm A was terminated on November 13, 1993. Respondent 1 currently is registered as a general securities representative and associated with a member firm ("Firm B").

Facts

The complaint contained a total of 10 causes of action and named seven respondents. Only causes three and eight concern Respondent 1. Cause three alleged that during the period from March through July 1993, Respondent 1, while employed at Firm A, purchased and/or sold Company A stock for the accounts of four customers without the

prior knowledge or consent of these customers in violation of Section 1. The Market Surveillance Committee (now known as the Market Regulation Committee ("MRC")) found that these transactions were unauthorized but dismissed the allegations in cause three against Respondent 1 on the basis that there was insufficient evidence in the record to show that Respondent 1 executed these transactions. The only evidence that linked Respondent 1 to the unauthorized transactions was that the transactions took place under his registered representative number. Respondent 1, however, testified that he was not in Firm A's office very much during the period of unauthorized trading because he was ill and that the handwriting on the order tickets was not his.

Cause eight alleged that from February 3 through April 21, 1995, Respondent 1 failed to provide timely and complete responses to staff's requests for information in violation of Section 1 and Section 5.

On January 11, 1995, a staff examiner for the Association ("Staff Examiner") spoke to Respondent 1 over the telephone to schedule his appearance for in-person testimony on January 31, 1995. By letter dated January 11, 1995, the Staff Examiner confirmed the January 31, 1995 date for Respondent 1's testimony. On January 30, 1995, Respondent 1 called the Staff Examiner and stated that he could not travel on January 31 due to his health. Respondent 1's testimony was rescheduled for February 3, 1995, and the Staff Examiner requested in writing that Respondent 1 provide a doctor's letter on or before February 3, 1995 indicating his travel restrictions.

Respondent 1 appeared and testified on February 3 as scheduled. He did not bring a letter from his doctor explaining why he could not appear to give testimony on January 31.

Respondent 1, however, explained that he needed to reschedule the January 31 date because he had had a CAT scan on that day.

On February 3, staff again asked Respondent 1 to produce a doctor's letter reflecting why he was unable to attend the January 31 interview. Staff also asked Respondent 1 to produce the following items by February 17, 1995: (i) a copy of his cross-reference binder prepared while he was at Firm A; (ii) the last name of a friend [redacted] with whom he was associated during his employment at Firm C ; (iii) all documents that evidenced any doctor's appointments or stays in the hospital for the period January 1 through September 31, 1993. Respondent 1 failed to provide such documents by February 17, 1995. Through a letter dated March 3, 1995, the Staff Examiner followed up on this oral request with a written request for these same documents.

On April 21, 1995, the Staff Examiner received a letter from Respondent 1 in which he explained that he could not locate his cross-reference binder, and he could not recall [his friend's] name. Respondent 1 also included in this letter a description of his illness and symptoms beginning in October 1992. Respondent 1 explained that beginning in January

1993, his illness became constant and he often missed work. He saw a doctor in April 1993 and two other doctors in July and August 1993. Finally, from August 1993 to the end of November 1993, he was hospitalized. Respondent 1 also included a doctor's letter dated March 7, 1995, stating that Respondent 1 should be excused from travel for the next three months.

On May 5, 1995, the MRC filed the complaint against Respondent 1. Shortly before the MRC hearing, Respondent 1 produced medical records from August 1993, when he was hospitalized, through 1995. Respondent 1 did not produce any medical records concerning his medical condition from March 1993 through July 1993, the period when the unauthorized trading took place.

The MRC found that Respondent 1 never produced his medical records for the period of the unauthorized trading (March through July 1993). The MRC further found that Respondent 1 showed a cavalier attitude toward his responsibilities to respond to requests for information. As an example of this attitude, the MRC found that Respondent 1 never made any attempt to produce his cross-reference binder. The MRC found that Respondent 1 violated Section 5 and Section 1 as alleged in the complaint.

On appeal, Respondent 1 argued that although late, he did reply to staff's requests through his letter received by staff on April 21, 1995. He argued that his severe illness was the cause for his delay in responding and therefore the sanctions imposed by the MRC were unfair and excessive. Respondent 1 argued that the complaint did not allege that he never produced his medical records from March through July 1993, but only that he failed to produce specific information prior to April 21, 1995. Respondent 1 also argued that the MRC went beyond the allegations of the complaint when it found that Respondent 1 never made an attempt to produce his cross-reference binder. Respondent 1 also argued that the MRC had no competent basis to conclude that he never made any attempt to produce his cross-reference binder. Respondent 1 further argued that it was "infantile" for staff to demand a doctor's note relative to Respondent 1's inability to travel on January 31, 1995 for his first scheduled date to appear for testimony. According to Respondent 1, a six-day adjournment would normally be extended as a courtesy, and a doctor's note should not be required.

Respondent 1 also argued that the information sought by the staff was of little material significance to the investigation. Respondent 1 had already explained in his April 21, 1995 letter to staff that during the time period during which the suspected unauthorized trades were made, Respondent 1 had three doctors' visits and no hospital stays. Thus, he argued, the question of his participation in or knowledge of the alleged unauthorized trades would not be resolved by the medical records requested by staff. He further argued that his February 3, 1995 interview was conducted unfairly and tainted the entire proceeding.

In response to Respondent 1's appeal submissions, staff argued that Respondent 1's April 21, 1995 response was untimely and incomplete as charged in the complaint. Staff argued that it was incomplete because Respondent 1 failed to produce a doctor's note indicating why Respondent 1 could not travel for the scheduled January 31 testimony and failed to produce any of the medical records requested by staff. Staff argued that even after the complaint was filed, Respondent 1 failed to produce the outstanding documents. Staff argued that Respondent 1's medical condition prior to the date of staff's requests (late January 1995) was irrelevant.<sup>1</sup>

### Discussion

Unauthorized Trading - Cause Three. We affirm the MRC's dismissal of the allegations in cause three of the complaint. There is insufficient evidence in the record to conclude that Respondent 1 was responsible for the unauthorized trades as alleged in the complaint.

Failure to Respond - Cause Eight. Section 5 authorizes the Association, in the course of its investigations, to require Association members to "report, either informally or on-the-record, orally or in writing with regard to any matter involved in any such investigation." Because the NASD 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." In re Brian L. Gibbons, Exchange Act Rel. No. 37170 (May 8, 1996); In re Michael David Borth, 51 S.E.C. 178, 180 (1992). Accordingly, members may not place conditions upon their responses to NASD inquiries. Gibbons at 5; Borth at 180; In re Boren & Co., 40 S.E.C. 217 (1960). Nor may they take it upon themselves to determine whether information requested is material to the NASD's investigation. General Bond & Share Co. v. S.E.C., 39 F. 3d 1451 (10th Cir. 1994); In re Mark Allen Elliott, 51 S.E.C. 1148 (1994) (respondents cannot "second guess" requests for information). When

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<sup>1</sup> Included in Respondent 1's written appeal submissions is a request to introduce new evidence. That new evidence consists of a one-page letter from Respondent 1's doctor addressing Respondent 1's health preceding his August 1993 hospitalization. Staff did not object to the admission of this new evidence. Pursuant to Procedural Rule 9312, the NBCC denies Respondent 1's request to adduce this new evidence because it is not material to the issues on appeal and Respondent 1 has failed to demonstrate good cause for his failure to adduce the evidence before the MRC. Respondent 1 already provided testimony to the MRC regarding his health condition prior to August 1993. Respondent 1's health prior to August 1993 is only relevant to the unauthorized trading accusations made against Respondent 1 in cause three, and the NBCC concurs with the MRC that there is insufficient evidence in the record to find that he executed these unauthorized trades as alleged in cause three.

Respondent 1 became associated with an NASD member, he agreed to abide by the NASD's rules.

Respondent 1 admitted that prior to the issuance of the complaint, he was late in responding to staff's request for information. Staff asked Respondent 1 for specific information on February 3, 1995. On March 3, 1995, staff made a second request in writing for this same information. There is no ambiguity in staff's requests. Although late, on April 21, 1995, Respondent 1 did partially respond to staff's requests. Respondent 1 failed, however, to produce documents that evidenced any doctors' appointments or stays in the hospital from January 1 through September 31, 1993, and failed to produce a doctor's letter reflecting why he was unable to attend an interview with staff scheduled for January 31, 1995. It appears from the information that Respondent 1 did provide that he saw three doctors from April 1993 through August 1993 and was then hospitalized in August 1993. Just prior to the MRC hearing, Respondent 1 did provide hospital records beginning in August 1993. To date, Respondent 1 has failed to produce medical records for the period of alleged unauthorized trading (March through July 1993). It appears that those records would consist of documentation evidencing the three doctor visits that Respondent 1 described in his April 21 response. To date, Respondent 1 has also failed to produce a doctor's letter reflecting why he could not attend the January 31 interview.

As alleged in the complaint, during the period from February 3 through April 21, 1995, Respondent 1 failed to provide timely and complete responses to staff's requests for information. We disagree with Respondent 1's argument that the complaint alleged only Respondent 1's failure timely to respond. It is clear from the complaint that Respondent 1's April 21 response was not only late, but also incomplete. We therefore find that Respondent 1 did violate Section 5 and Section 1 as alleged in the complaint.

We disagree, however, with the MRC's finding that if Respondent 1 had provided documentation of his illness during the period of alleged unauthorized trading, further investigation might have revealed who did execute the unauthorized transactions. Documentation substantiating the three doctor visits that Respondent 1 described in his April 21 response would have had little relevance to staff's investigation of the unauthorized trading. The fact that Respondent 1 visited a doctor on a particular day does not necessarily mean that he was out of the office all day or that he could not have executed the unauthorized trades. Staff's request for a doctor's note because Respondent 1 requested an extension of a few days for his interview does not appear to have had any regulatory significance to staff's investigation.

We also disagree with the MRC's finding that Respondent 1 never made any attempt to produce his cross-reference binder. According to the record, Respondent 1 was unable to locate the binder. He informed staff of his inability to locate the binder, and staff did not in any way notify Respondent 1 that this response was unacceptable. There is no evidence in

the record that the binder was in Respondent 1's possession or control at the time of the request or any time thereafter.

We reject Respondent 1's argument on appeal that Respondent 1's February 3, 1995 interview was conducted unfairly and that staff's conduct tainted the entire proceeding.

Staff may have repeated some questions and asked Respondent 1 for information that appeared to him to be insignificant, however, staff's conduct during the interview did not rise to the level of tainting the entire MRC proceeding against Respondent 1. Prior to the interview, Respondent 1 was notified in writing that he could be represented by counsel at the interview. Moreover, Respondent 1's interview experience is no excuse for his failure to respond to staff's subsequent requests for information and documents.

We have some sympathy in that Respondent 1 was ill and undergoing medical treatment at the time the requests for information were made. Nonetheless, Respondent 1 must be held responsible for not making reasonable efforts to comply with staff's requests. It would not have been difficult for Respondent 1 to request his medical records or a letter from his doctor. At the time of the DBCC hearing, Respondent 1 was able to produce extensive medical records. At the time the requests were made, Respondent 1 was able to appear in person for an interview and thus it would appear he also was physically capable of requesting his medical records. Respondent 1, therefore, could have been more diligent in providing the requested documents. Nonetheless, we do find mitigation in the fact that Respondent 1 did respond to many of staff's requests. He also cooperated with staff by appearing for an interview, providing an oral explanation as to why he needed a postponement of the January 31 interview, and providing a written explanation of his illness from October 1992 through November 1993. We further note that Respondent 1 has no prior disciplinary history.

### Sanctions

The MRC imposed a \$15,000 fine, a six-month suspension, a requirement that Respondent 1 requalify by examination in all capacities prior to reassociating with a member firm, and costs of \$3,836.40 joint and several with two other respondents named in the decision. Due to the mitigation that exists in this case, we find that the sanctions imposed by the MRC should be modified to a censure and a \$5,000 fine.<sup>2</sup>

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<sup>2</sup> The fine is consistent with the applicable NASD Sanction Guidelines ("Guidelines"). See Guidelines (1993 ed.) at 20 (Failure to Respond or Respond in a Timely Manner to the NASD).

Accordingly, Respondent 1 is censured and fined \$5,000.<sup>3</sup>

On Behalf of the National Business Conduct  
Committee,

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Joan C. Conley, Corporate Secretary

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<sup>3</sup> 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.