BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of Department of Enforcement, Complainant, vs. Mark F. Mizenko Rootstown, OH 44272, Respondent.	DECISION Complaint No. C8B030012 Dated: December 21, 2004

The National Adjudicatory Council increased sanctions for forgery violation. Held, Hearing Panel's findings affirmed and sanctions modified.

Appearances

For the Complainant Department of Enforcement: Pamela Shu, Esq.

For the Respondent: David G. Umbaugh, Esq.

Opinion

We called this matter for review to consider the sanctions imposed in a Hearing Panel's December 29, 2003 decision against Mark F. Mizenko ("Mizenko"). The Hearing Panel found that Mizenko forged the signature of an American Express Financial Advisors, Inc. ("AEFA" or "the Firm") executive vice president on a corporate resolution, in violation of NASD Conduct Rule 2110. The Hearing Panel imposed on Mizenko a $5,000 fine and an 18-month suspension and ordered Mizenko to requalify in all capacities. After a thorough review of the record in this matter, we affirm the Hearing Panel's finding of violation, but increase the sanctions to a bar in all capacities based on our finding that Mizenko's misconduct was egregious. We eliminate the suspension, the fine, and the order to requalify, given our decision to bar Mizenko. We uphold the Hearing Panel's imposition of costs for the hearing below.

I. Background

Mizenko first became registered as a general securities representative and investment company/variable contracts representative with AEFA in 1988. On September 27, 2001, AEFA filed a Uniform Termination Notice for Securities Industry Registration Form U5 ("Form U5"), terminating Mizenko's employment as a result of its finding that Mizenko had forged the name of one of the Firm's corporate officers on a corporate resolution. Mizenko is not presently employed in the securities industry.

II. Factual and Procedural Background

A. The Athlete Program

In the fall of 2000, Mizenko and Darrell DeMarco ("DeMarco"),[1] another registered representative at AEFA, began a program to attract as financial advisory clients college athletes who were about to begin their careers as professional athletes. The idea for marketing AEFA's services to these soon-to-be professional athletes originated with Damon Tyson ("Tyson"), a former professional athlete and self-described "rainmaker," who called AEFA after finding its listing in the Yellow Pages. DeMarco's assistant took the call from Tyson and directed the call to DeMarco. After speaking with Tyson, DeMarco asked Mizenko to sit in on a meeting with Tyson.[2] Tyson told Mizenko and Demarco that, given his contacts, he could help them attract professional athletes as clients. Tyson was not a licensed securities professional, nor did he have any previous professional or personal association with Mizenko or DeMarco.[3]

Tyson proposed to DeMarco and Mizenko that they assist soon-to-be professional athletes in their efforts to obtain automobile loans or leases by having AEFA guarantee the athletes' payments to the automobile dealer as a way "to show [their] support" for the athletes. Mizenko testified that the plan called for the loans to be refinanced in the athletes' names after four or five months, when they were expected to sign their professional player contracts. Mizenko testified that it was DeMarco's responsibility to obtain AEFA's approval for the athlete program.

Mizenko testified that Tyson introduced DeMarco to an automobile salesperson named RW, who provided DeMarco with a corporate resolution form that needed to be completed and

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[1] DeMarco entered into a settlement with NASD on March 18, 2003

[2] Mizenko testified that during the 10 years that he and DeMarco worked at AEFA, DeMarco routinely brought Mizenko in on his accounts that involved high net worth individuals because DeMarco did not consider himself to be knowledgeable or sophisticated enough to work with such clients without another registered representative assisting him.

[3] Mizenko eventually helped Tyson get into AEFA's pre-licensing program.

signed that committed AEFA to make payments to an automobile dealership for prospective automobile loans and leases. According to Mizenko, DeMarco showed him the uncompleted form and told him that if AEFA approved the resolution, they could "do the [athlete] program." About one week later, DeMarco told Mizenko that he had obtained the necessary signature on the corporate resolution. The document bore the purported signature of a "Thomas Shick," who was identified on the document as an AEFA "Executive Vice-President." Mizenko testified that he did not ask DeMarco how he had obtained approval of the resolution from a corporate officer who worked in the Firm's New York office. Mizenko and DeMarco worked in AEFA's Ohio office. DeMarco told Mizenko that they both needed to sign the corporate resolution as local contacts. Mizenko testified that he affixed his own signature and then returned the document to DeMarco. The document includes Mizenko's signature and the purported signature of Thomas Schick ("Schick"), but does not include DeMarco's signature.

Schick testified at the hearing to the following facts: (1) that he was an executive vice president for corporate affairs at AEFA; (2) that the signature affixed to the corporate resolution form was not his signature, and that he did not give anyone authority to sign his name; and (3) that his last name was misspelled (Shick) on the corporate resolution form.

B. Mizenko Traces Schick's Signature

Mizenko testified that in the spring of 2001 he began taking more of a lead in the development of the athlete program after DeMarco relocated from the Hudson, Ohio office to the Tallmadge, Ohio office because Tyson continued to visit the Hudson office to discuss the plan. In an effort to develop the athlete program, Mizenko sought help from Theodore Jenkin ("Jenkin"), an AEFA group vice president with responsibility for the region that included Mizenko's office. Jenkin testified that he provided marketing assistance to Mizenko in an effort to help him attract new clients to the athlete program, which he understood consisted of providing small lines of credit to football players. Mizenko and Jenkin both testified that Mizenko did not notify Jenkin that he had obtained AEFA corporate approval to guarantee would-be professional athletes' automobile loans and leases. Jenkin also testified that Mizenko did not inform him that DeMarco was working with Mizenko on the athlete program. Jenkin testified that he helped Mizenko with the athlete program by obtaining from an AEFA bank affiliate an unsecured credit line of $5,000 for one athlete.

At about the same time that DeMarco left the Hudson, Ohio office, RW advised Mizenko that he was working for a different automobile dealer and that the corporate resolution from the prior automobile dealer was not valid at the new dealership. RW told Mizenko that in order for RW to continue to work with Mizenko on the athlete program, RW needed a new AEFA corporate resolution guaranteeing payments to the automobile dealership with which he had become affiliated. Mizenko testified that he advised RW that he had to check with DeMarco to determine how long it would take to complete the new corporate resolution form because he had not been involved in obtaining the requisite signature on the first corporate resolution.

Mizenko contacted DeMarco about RW's request for a second corporate resolution. According to Mizenko, DeMarco offered to find out what they needed to do to complete the form. After about four or five business days, DeMarco advised Mizenko that they had permission to transfer the signature from the first corporate resolution form to the new one. Mizenko testified that although DeMarco did not advise him who at AEFA had approved the second corporate resolution, he assumed that Schick had approved it because he had signed the first corporate resolution. Mizenko testified that he decided to trace the signature from the first form onto the second form himself as a time saving measure, instead of sending the document to DeMarco to handle. Mizenko further testified that in order to have the handwriting look the same on the two forms, he placed them up to a window and traced Schick's signature. He then sent the form to RW.

Mizenko testified that after RW received the corporate resolution form, RW called to advise him that the new corporate resolution needed a corporate seal in order to be effective. According to Mizenko, he told RW that he did not "even know what a corporate seal [was]" and that RW assured him that any seal would be acceptable. Mizenko admitted that when he received the corporate resolution form back from RW, he crimped it with his old notary seal at a couple of different angles and rubbed it in an effort to conceal the fact that it was a notary, rather than a corporate seal. Mizenko then sent the corporate resolution form to RW via facsimile and mail.

Mizenko testified that he never sent any athletes to either automobile dealership to purchase or lease automobiles, and that he received no financial benefit from any lease or purchase of an automobile under the athlete program.[4] There is no evidence in the record to dispute these claims.

C. AEFA's Investigation

On the evening of August 27, 2001, Mizenko received a phone call from AEFA compliance officer Sandy Smith ("Smith"), asking Mizenko to meet her the next day at AEFA's office in Independence, Ohio. Smith did not advise Mizenko about what would be discussed at the meeting. Mizenko testified that he had "no idea" what Smith wanted to discuss with him, given that he had received no customer complaints.

When Mizenko met with Smith and John Kohagen ("Kohagen"), AEFA director of investigations, on August 28, 2001, he admitted that he had traced the signature of corporate officer Schick from the first to the second corporate resolution form. Mizenko claimed that DeMarco told him that they had corporate authority to "transfer" the signature to the second corporate resolution form. He also admitted using his notary seal to affix a purported corporate

[4] Mizenko testified that although he did not refer any college athletes to either automobile dealership, he is aware of at least one college athlete who obtained an automobile loan through the described program.

seal onto the second corporate resolution form. Mizenko prepared a written statement in which he admitted that he did not have Schick's permission to copy his signature onto the second document.[5]

On September 27, 2001, AEFA filed a Form U5, terminating Mizenko's employment with the Firm. NASD subsequently commenced an investigation as a result of the forgery allegation on the Form U5.

D. The Hearing Panel's Credibility Determination

Kohagen testified that Mizenko told him during the investigative interview that he knew at the time that he traced Schick's signature onto the second corporate resolution form that the signature on the first corporate resolution was not authentic. To the contrary, Mizenko denied telling Kohagen that he knew when he affixed Schick's signature onto the second form that the signature on the first form was not legitimate. Mizenko and Kohagen both testified that Mizenko told Kohagen that Schick's signature was already on the first corporate resolution form when DeMarco gave it to him to sign as a local contact. Mizenko also told Kohagen that he did not know whether DeMarco had signed the first corporate resolution and that he had not witnessed the signing of the form. Mizenko testified that he told Kohagen that he did not deduce until the investigative interview that Schick's signature on the first corporate resolution form was not genuine. The Hearing Panel credited Mizenko's claim that he did not know until the time of the interview that Schick's signature on the first corporate resolution form was not authentic.[6] The Hearing Panel also found Kohagen's testimony not persuasive enough to prove, by a preponderance of the evidence, that Mizenko knew, at the time he affixed Schick's signature to the second corporate form, that the previous signature was not genuine.

III. Discussion

It is well settled that NASD's disciplinary authority under NASD Conduct Rule 2110 is "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."[7] Vail v. SEC, 101 F.3d 37,

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[5] At the hearing, Schick testified that the signature on the second corporate resolution was not his and that he had not given anyone authority to sign his name on either resolution.

[6] The Hearing Panel concluded that, because the existence of the first corporate resolution was not even known by Kohagen until Mizenko informed him about its existence during the investigative interview, it was likely that there was some confusion between Kohagen and Mizenko about which signature was the subject of Kohagen's questions.

[7] NASD Conduct 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." Under NASD Rule 115, associated persons have the same duties and obligations as NASD members under NASD's rules.

39 (5th Cir. 1996) (citations omitted); see, e.g., Daniel D. Manoff, Exchange Act Rel. No. 46708, 2002 SEC LEXIS 2684, at *12 (Oct. 23, 2002) (upholding NASD's finding that Manoff's unauthorized use of a co-worker's credit card numbers constituted unethical business conduct in violation of NASD Conduct Rule 2110); Thomas E. Jackson, 45 S.E.C. 771, 772 (1975) ("Although [respondent's] wrongdoing in this instance [forging signatures on insurance applications to obtain commissions] did not involve securities, . . . NASD could justifiably conclude that on another occasion it might.").

We find that Mizenko's conduct was business-related and therefore subject to NASD's disciplinary authority under NASD Conduct Rule 2110. Mizenko admitted that, without the permission of Schick, who was an AEFA corporate officer, he affixed Schick's purported signature onto a corporate resolution that was used to guarantee payments to an automobile dealership in association with a program to attract would-be professional athletes as clients.

Accordingly, we conclude that Mizenko's forgery constituted unethical business-related conduct, in violation of NASD Conduct Rule 2110.

IV. Sanctions

The NASD Sanction Guidelines ("Guidelines") for Forgery And/Or Falsification of Records[8] recommends a fine of $5,000 to $100,000 and, in cases in which mitigating factors exist, a suspension in any or all capacities for up to two years. In egregious cases, the Guideline recommends consideration of a bar. We have identified numerous, significant aggravating factors that lead us to conclude that Mizenko's conduct was egregious and that a bar is therefore appropriate.[9] Mizenko's actions cast doubt on his commitment to the fiduciary standards demanded of registered persons in the securities industry, as detailed below. See Leonard John Ialeggio, 52 S.E.C. 1085, 1089 (1996), aff'd, 185 F.3d 867 (9th Cir. 1999) (table format).

The principal considerations in determining the proper level of sanctions to impose under the Guideline for forgery are: (1) the nature of the documents forged; and (2) whether the respondent had a good-faith, but mistaken, belief of express or implied authority. For the reasons set forth below, we conclude that these considerations do not weigh in Mizenko's favor.

With respect to the first consideration -- the nature of the forged document -- we consider aggravating the fact that the document at issue was a corporate resolution that committed Mizenko's member firm to guarantee payments to an automobile dealership for prospective automobile loans and leases to college athletes. It is a further aggravating factor that the corporate resolution failed to include a maximum amount that AEFA was purportedly

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[8] See Guidelines (2001 ed.) at 43 (Forgery And/Or Falsification of Records).

[9] In light of aggravating factors, this sanction is consistent with the applicable Guideline. See Guidelines (2001 ed.) at 43 (Forgery And/Or Falsification of Records).

authorizing, leaving the Firm exposed to potentially limitless liability. Indeed, AEFA ultimately paid $10,000 to an automobile dealer to settle litigation that resulted from its liability under the falsified corporate resolution. We conclude that these facts are aggravating.[10]

Turning to the second factor -- whether the respondent had a good-faith, but mistaken, belief that he had express or implied authority -- we find that Mizenko's argument that he had a good-faith belief that he had Schick's authority to trace his signature from the first to the second corporate resolution form fails. The Hearing Panel rejected Mizenko's good-faith argument and found that although Mizenko did not know at the time that he forged Schick's signature that the signature on the first corporate resolution form was not authentic,[11] he was "grossly negligent in believing that he had authority to trace Schick's signature . . . solely on the basis of bald representations by DeMar[c]o that he had such authority."

We affirm the Hearing Panel's decision to reject Mizenko's good-faith argument, but we do so on different grounds from those of the Hearing Panel. We conclude that Mizenko's actions

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[10] Guidelines (2001 ed.) at 10 (Principal Consideration No. 11).

[11] The Hearing Panel credited Mizenko's testimony that, until the time of the investigative interview, he did not know that Schick's signature on the first corporate resolution form was not genuine. We defer to the credibility determinations of the Hearing Panel. It is well settled that credibility determinations of an initial fact-finder, which are based on hearing the witnesses' testimony and observing their demeanor, are entitled to considerable weight and deference, and can be overturned only where the record contains substantial evidence for doing so. See John Montelbano, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at *21 (Jan. 22, 2003).

Although Enforcement cites a few factors to support its argument that Mizenko knew at the time that he forged Schick's signature that the signature was not authentic, they do not rise to the level of "substantial evidence" for purposes of overturning the Hearing Panel's credibility determinations. Cf., Valicenti Advisory Servs., Inc., 53 S.E.C. 1033 (1998), aff'd, 198 F.3d 62 (2d Cir. 1999), cert. denied, 530 U.S. 1276 (2000) (finding that substantial evidence existed to overcome the fact-finder's credibility determination); see, e.g., Dep't of Enforcement v. Puma, Complaint No. C10000122, 2003 NASD Discip. LEXIS 22, at *21 (NAC Aug. 11, 2003) (rejecting claim that record included substantial evidence to overturn the Hearing Panel's credibility determination). We disagree with Enforcement's conclusion that Mizenko's inability to adequately explain his having spelled Schick's name correctly on the second corporate resolution form when it had been misspelled on the first corporate resolution form shows that he knew that the first signature was not authentic. Moreover, Enforcement's claim that Mizenko "admitted" to Kohagen that he knew when he falsified the second resolution form that the signature on the first was a forgery is not undisputed in the record. In fact, the record includes conflicting testimony by Mizenko and Kohagen on that issue, which the Hearing Panel resolved in favor of Mizenko. See, e.g., John Montelbano, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at *21 (Jan. 22, 2003).

were reckless, rather than "grossly negligent" as the Hearing Panel found. We agree with the Hearing Panel's observation that DeMarco's "bald representations" to Mizenko regarding their authority to transfer the signature from the first corporate resolution form to the second form were "highly suspicious." These representations should have been particularly suspicious to Mizenko, whose responsibility as a former notary public was to witness signatures and certify the validity of documents. Further undercutting Mizenko's good faith-claim is the fact that, when confronted by the news that the corporate resolution needed a corporate seal, he proceeded to affix a fake corporate seal to the document. We consider this attempt by Mizenko to conceal his activities from the Firm as an additional aggravating factor.[12] These actions constitute an extreme departure from the requirement under NASD Conduct Rule 2110 to adhere to high standards of commercial honor and just and equitable principles of trade and are thus aggravating for purposes of determining the appropriate level of sanctions.

We reject the Hearing Panel's finding that there were a number of mitigating factors in support of its decision to impose sanctions of less than a bar.[13] The Hearing Panel found Mizenko's admission that he forged Schick's signature to be mitigating. The applicable principal consideration in the Guidelines recommends, however, that adjudicators consider whether the respondent accepted responsibility for and acknowledged the misconduct to his employer or a regulator "prior to detection and intervention by the firm . . . or regulator."[14] Mizenko's admission is not mitigating because he admitted his misconduct only *after* AEFA detected the forgery and confronted him with the evidence during its investigative interview.

In addition, the Hearing Panel found that Mizenko's "actions were aberrant and not part of a pattern of conduct intended to deceive his employer" and that these factors constituted evidence of mitigation. We reject this conclusion. Even if we found that Mizenko's actions were aberrant and not part of a pattern of misconduct, a finding that we do not make, we would not consider that fact to be a mitigating circumstance. See Dist. Bus. Conduct Comm. v. Greene, Complaint No. C07970051, 1998 NASD Discip. LEXIS 49, at *7 (NAC July 1, 1998) (rejecting

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[12] See Guidelines (2001 ed.) at 9 (Principal Considerations No. 10).

[13] The Hearing Panel imposed a $5,000 fine and an 18-month suspension in all capacities, and ordered that Mizenko requalify in all capacities. Mizenko cites our decisions in other forgery cases as support for his argument that the Hearing Panel's imposition of an 18-month suspension was unduly harsh. As the Commission has held, however, "the appropriate remedies in a disciplinary action depend on the circumstances of each particular case." John F. Noonan, 52 S.E.C. 262, 265 n.9 (1995). "It is not appropriate to compare the sanctions imposed in one disciplinary matter to the sanctions imposed in another where . . . the issues under review differ significantly." Dep't of Enforcement v. Flannigan, Complaint No. C8A980097, 2001 NASD Discip. LEXIS 36, at *22-23 (NAC June 4, 2001), aff'd, Michael F. Flannigan, Exchange Act Rel. No. 47142, 2003 SEC LEXIS 40 (Jan. 8, 2003).

[14] See Guidelines (2001 ed.) at 9 (Principal Considerations No. 2).

as a mitigating factor that the forgery occurred on one day and involved only one transaction). The Guidelines do not require us to find that a respondent is a repeat forger before we can impose the sanction of a bar. As to the Hearing Panel's finding that Mizenko's actions were not intended to deceive his employer, we find that, in fact, the record supports a finding to the contrary. We consider Mizenko's use of his notary embosser to imprint a fake corporate seal onto the second corporate resolution form to be a blatant attempt by Mizenko to conceal his misconduct from AEFA.

The Hearing Panel also found to be mitigating the following factors: (1) that no customer was harmed; and (2) that Mizenko gained no personal benefit from his misconduct. As to the first factor, while the Guidelines and prior cases indicate that injury to customers constitutes an aggravating circumstance, there is no authority for the proposition that the absence of harm to customers is mitigating. With respect to the Hearing Panel's finding that Mizenko gained no personal benefit from forging Schick's signature, we note that the Guidelines direct adjudicators to consider "[w]hether the respondent's misconduct resulted in the *potential* for respondent's monetary or other gain."[15] (emphasis added.) It therefore is immaterial that Mizenko did not actually realize the gain that he expected to receive by falsifying the corporate resolution.[16]

Finally, the Hearing Panel found the following facts to be mitigating: (1) that Mizenko cooperated with the Firm's investigation into the forgery; and (2) that he expressed his embarrassment and contrition. Although Mizenko cooperated with the Firm's internal investigation and stated in his letter to the Firm that he was embarrassed and sorry for his actions, these factors do not outweigh the substantial aggravating factors described above.

Mizenko also argues on appeal that his lack of disciplinary history is mitigating. We disagree. The facts of this case do not present any unique circumstances to cause us to deviate from our view that a lack of disciplinary history is not a mitigating factor. See Dep't of Enforcement v. Roethlisberger, Complaint No. C8A020014, 2003 NASD Discip. LEXIS 48, at *18 (NAC Dec. 15, 2003) (rejecting contention that respondent's lack of a disciplinary history should mitigate the severity of the sanctions imposed).

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15 See Guidelines (2001 ed.) at 10 (Principal Considerations No. 17).

16 The Hearing Panel also noted that since Mizenko's termination from AEFA, he has "worked only a few months, earned a small amount of money at approximately one-third of his former salary, and is behind in his mortgage payments." We do not weigh such facts in assessing sanctions. In addition, Mizenko argues on appeal that because he has been unable to find a job in the securities industry since AEFA terminated his employment, he has been suspended "de facto" for more than two and one half years. The NAC has expressly rejected such arguments in assessing sanctions. See, e.g., Dep't of Enforcement v. Davenport, Complaint No. C05010017, 2003 NASD Discip. LEXIS 4, at *13-14 (NAC May 7, 2003) ("As a general matter, NASD, in determining the appropriate sanction, does not give weight to the fact that a firm terminated a respondent.").

Given the aggravating circumstances we have identified and the fact that there are no significant mitigating factors, we order that Mizenko be barred from associating with any member firm in all capacities.[17]

V. Conclusion

Mizenko is barred from associating with any member firm in all capacities. In addition, Mizenko is assessed hearing costs of $1,004.50. The bar is effective upon issuance of this decision.[18]

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney
Senior Vice President and Corporate Secretary

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[17] In light of our policy determination that, in certain cases involving the imposition of a bar or expulsion, no further remedial purpose is served by the additional imposition of a monetary sanction, we do not impose a fine for Mizenko's violation. See Guidelines (2001 ed.) at 13 (Technical Matters).

[18] We also have considered and reject without discussion all other arguments advanced by the parties.