

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C8A010094
	:	
v.	:	Hearing Officer – JN
	:	
JONATHAN B. DAY	:	HEARING PANEL
(CRD #2722456)	:	DECISION
	:	
Chicago, IL,	:	February 10, 2003
	:	
Respondent.	:	

Respondent failed to disclose prior criminal history on a Form U-4, in violation of Rule 2110, and failed to respond timely to staff requests for information, in violation of Rules 8210 and 2110. Respondent is suspended for five days for failing to file an accurate Form U-4, and is suspended for twenty days and fined \$1,000 for failing to respond in a timely fashion. The suspensions shall be served concurrently. Respondent was also assessed \$2,046.02 in hearing costs.

Appearances

For the Complainant: Kevin G. Kulling, Esq.

For the Respondent: Jonathan B. Day, pro se.

Decision

I. Introduction

On December 18, 2001, the Department of Enforcement filed a Complaint against Respondent Jonathan B. Day, alleging that he failed to disclose his prior criminal history on a Uniform Application for Securities Industry Registration or Transfer (“Form U-4”), in violation of Rule 2110. The Complaint did not allege that this failure was willful.

Enforcement's Complaint also alleged that Respondent failed to respond to NASD staff requests for information, in violation of Rules 8210 and 2110 – a charge later reduced to a failure to respond timely.

A Hearing Panel composed of an NASD Hearing Officer and two members of NASD District Committee No. 8 conducted a hearing on November 15, 2002 in Chicago, Illinois. The prosecution called two witnesses (including the Respondent), and introduced ten exhibits (CX-1 through CX-10). Respondent called one witness and introduced seven exhibits (RX-1 through RX-7). The parties jointly introduced two exhibits, including a stipulation of certain facts (JX-1, JX-2).

As matters developed at the hearing, there was no dispute about Respondent's liability or about the basic facts underlying it. The only issue was whether there were sufficient mitigating circumstances to warrant sanctions lighter than those sought by the Department.

II. Liability

A. The U-4

On December 23, 1993, Day was charged in Florida with Possession of Controlled Substances, a felony charge which was later dropped by the prosecution (JX-1, ¶ 3; Tr. 27; CX-3; CX-5). On May 28, 1994, he was charged in Florida for misdemeanor theft and fraud, which charges were also dropped by the prosecution (JX-1, ¶ 4; Tr. 27; CX-4; CX-5; RX-4).

On October 11, 2000, he completed, signed, and caused to be filed with NASD a Form U-4, seeking to become registered with Driehaus Securities Corporation

(JX-1, ¶ 2). Question 23A(1)(b) asked whether Day had ever been “charged with any felony,” and he answered “NO” (CX-2, p. 7). Question 23B(1)(b) asked whether he had ever been “charged with a misdemeanor specified in 23(B)(1)(a).” The specified misdemeanors included those “involving ... any fraud, false statements or omissions ... [or] wrongful taking of property.” Day answered “NO” to Question 23B(1)(b) (Id.). At the hearing, Respondent admitted that his “NO” answers to Questions 23A(1)(b) and 23B(1)(b) were incorrect (Tr. 29-30).

NASD, state regulators, and broker-dealers rely on the Form U-4 to determine and monitor the fitness of securities professionals. See Rosario R. Ruggiero, Exchange Act Release No. 37070, 1996 SEC LEXIS 990, at *8-9 (Apr. 5, 1996). In applying for registration with NASD, applicants have an affirmative obligation to disclose fully all material facts, including an individual’s criminal history, in response to the questions on the Form U-4. An applicant’s failure to do so violates NASD Conduct Rule 2110. See id.; see also Dist. Bus. Conduct Comm. v. Perez, No. C10950077, 1996 NASD Discip. LEXIS 51, at *1, 5 (NBCC Nov. 12, 1996) (finding that the failure to disclose an arrest on a Form U-4 violates NASD Conduct Rule 2110).

The Panel concludes that Day violated Conduct Rule 2110 by failing to disclose his prior criminal history on the Form U-4.

B. Failure to Respond Timely to Requests for Information

After terminating Day’s employment (upon learning of the criminal charges) Driehaus filed a Form U-5, which then triggered an NASD investigation into the non-disclosure. Acting under Rule 8210, the NASD staff issued two requests for information. It sent each request by first class mail and certified mail to Day at his last

known residential address reflected in the CRD (Tr. 15-19). The Postal Service returned the certified mailings as unclaimed and did not return the first class mailings (Id.). Day did not respond to any of these requests within the time set forth in them (Tr. 18, 19).

Respondent testified that he did not receive these requests, citing mail delivery difficulties in his building (Tr. 55-57), a matter discussed in the Sanctions portion of this Decision. It is undisputed that he did not reply to either of the requests within the time specified in them (Tr. 18, 19).

Respondent then moved to a new address, to which certain mail was forwarded. In that way, he received the Complaint which initiated this disciplinary proceeding (Tr. 32, 55-56, 63). After Enforcement sent Day a copy of its first information request – and within the time specified for answering the Complaint – Day sent a letter to the staff, which belatedly responded to the underlying requests for information (RX-6; Tr. 31, 169-170, 179, 182-183). Enforcement counsel agreed that Respondent’s Rule 8210 misconduct should thus be viewed as involving a “seriously untimely” response, rather than a failure to respond at all (Tr. 182-183).

The Panel finds that Day failed to respond to the staff’s requests in a timely fashion and thereby violated Rules 8210 and 2110. See Dep’t of Enforcement v. Paul John Hoeper, No. C02000037, 2001 NASD Discip. LEXIS 37, at *5-8 (NAC Nov. 2, 2001); Dep’t of Enforcement v. Manuel M. Bello, No. CAF000030, 2002 NASD Discip. LEXIS 10, at *10-11 (NAC June 3, 2002).

III. Sanctions

A. Failure to Disclose Prior Criminal History on Form U-4

For false answers on a Form U-4, the NASD Sanction Guidelines recommend a suspension of five to thirty business days, and a fine of \$2,500 to \$50,000 (NASD Sanction Guidelines, p. 77 (2001 ed.)). Enforcement here seeks a thirty-day suspension and a \$2,500 fine (Tr. 197-199). The Panel concludes that the appropriate sanction for the U-4 violations should be less severe.

As to the felony charge, it is undisputed that on a handwritten U-4 submitted to the firm, Respondent initially answered “YES” to Question 23A(1)(b), thereby disclosing the charge (Tr. 85, 113; JX-2). It is also undisputed that the firm’s compliance officer changed that answer to “NO” as a result of a conversation with Day (Tr. 86, 114). Respondent says that the officer told him he need not disclose the charges because they were not “securities related;” the latter said that Day told him the charges involved a misdemeanor, not a felony (Tr. 86, 114).

Under any view, the record shows that at least until the conversation with the compliance officer, Day was disclosing the existence of the felony charge, not hiding it. Such a disclosure was consistent with Respondent’s prior conduct. He previously answered “YES” to the National Futures Association’s “felony charge” question and furnished details in seeking registration with that self-regulatory organization (RX-2; Tr. 102-103). He also disclosed the entire matter to the Chicago Board of Trade in his membership application (RX-1). In the Panel’s view, there would have been no reason for Respondent to treat the offense as a felony on the draft U-4 and then tell the

compliance officer something different. That is especially so, considering his testimony that he knew that NASD would discover his record through a fingerprint check (Tr. 159).

To be sure, the felony accusation involved narcotics and was, therefore, serious on its face. Even if there was some communication confusion between Day and the compliance officer, Respondent's overall attitude toward disclosure of the felony charge, coupled with the fact that the compliance officer changed the "YES" to "NO," constitute mitigating circumstances.

The undisclosed misdemeanor charge presents a mix of circumstances. Respondent's "NO" answer was the result of careless reading – he saw the phrase "*investment-related*" and assumed that it governed the entire question (Tr. 97-98, 104). Such misreading, however understandable, is nonetheless important in an industry which demands attention to details. Moreover, misdemeanors involving "theft" and "fraud" certainly appear serious for purposes of potential registration in the securities industry. But, the subject of the "theft" was a rubber identification stamp used by a bar (which Day said was stolen by his friend) and the "fraud" involved stamping the hands of two under-21 females to obtain their entry into the bar (Tr. 95-96). The events occurred during Respondent's undergraduate days and these charges were dropped, resulting in no adjudication of any such misconduct. Considering all of the factors, the Panel concludes that Day's acknowledged failure to disclose the misdemeanor charges warrants sanctions at the low end of the recommended scale.

As principal considerations bearing on sanctions for a false U-4, the Guidelines mention the nature and significance of the information and the possibility that false

answers could lead to registration of a statutorily disqualified person (Guidelines, supra, at p. 77). Those factors cut in Day's favor. All charges were dropped. There were no convictions and thus no predicate for statutory disqualification.

On balance, the Panel concludes that for the U-4 violations, Day should be suspended for five days, with such suspension to be served concurrently with the twenty-day suspension imposed infra for his failure to respond on time to Rule 8210 requests.

B. Failure to Respond Timely to Requests for Information

For a failure to respond on time to staff requests under Rule 8210, the Guidelines recommend a fine of \$2,500 to \$25,000 and a suspension of up to two years (NASD Sanction Guidelines, p. 39). Enforcement requests that Respondent be suspended for six months and fined \$5,000 (Tr. 184, 198). Here, again, the Panel finds that the appropriate sanction should be less than that sought by the Department.

According to Respondent, the untimeliness was attributable to mail delivery difficulties in the Chicago neighborhood where he lived when the staff sent the requests (Tr. 57). He lived in an "eclectic neighborhood," where two shootings had occurred during his residence there (Tr. 56-57). His building had an outside mailbox, and the Postal Service frequently left mail scattered on the ground. Fed Ex packages sent to Respondent had been stolen; he missed "a tremendous amount of mail," including telephone and credit card bills (Tr. 55-57, 189-190). The panelists, who knew of the area and of Chicago mail difficulties, expressed an understanding of the difficulties which Day said he faced (Tr. 178-179, 181).

The Panel recognizes that because NASD lacks subpoena power, it is essential that associated persons “cooperate fully with NASD requests for information.” In re Joseph G. Chiulli, Exchange Act Rel. No. 42359, 2000 SEC LEXIS 112 at *16 (Jan. 28, 2000). By allowing his mail to be scattered to the four winds, Day ignored the importance of maintaining communication between himself and NASD. Moreover, NASD should not have to issue a Complaint in order to obtain compliance with requests made under Rule 8210. See, e.g., Sundra Escott-Russell, Exchange Act Rel. No. 433653, 2000 SEC LEXIS 2053 at *9 (September 27, 2000). “[D]elay and neglect [in responding to requests for information] undermine the ability of the NASD to conduct investigations and thereby protect the public interest.” Richard J. Rouse, Exchange Act Rel. No. 32658, 1993 SEC LEXIS 1831 at *588 (July 19, 1993).

But, Day’s response, submitted after he learned of the requests (and filed within the time for answering the Complaint) demonstrates good faith. There is no evidence that he intentionally avoided NASD’s requests, sought to hide the facts, or tried to mislead the organization. Indeed, the record shows that he fully disclosed the matters to other self-regulatory organizations. Finally the “nature of the information requested” (Guidelines, supra), involved charges which were dropped by the prosecution.

Upon consideration of all of the circumstances, the Panel concludes that a \$1,000 fine and a twenty-day suspension is an appropriate sanction for the failure to respond in a timely fashion.

IV. Conclusion

It is hereby ordered, pursuant to Article VI, Section 3 of the NASD By-Laws and Rule 9514(g), that Respondent Day is suspended for five days for failing to disclose his prior criminal history on his Form U-4, in violation of Conduct Rule 2110.

Additionally, Respondent Day is fined \$1,000 and suspended for twenty days for failing to respond in a timely manner to NASD staff requests for information, in violation of Procedural Rule 8210 and Conduct Rule 2110. Respondent is also responsible for \$2,046.02 in costs, reflecting \$1,296.02 for hearing transcripts and the standard \$750 administrative fee.

These sanctions shall become effective on a date set by NASD, but not earlier than thirty days after this Decision becomes the final disciplinary action of NASD, except that if this Decision becomes the final disciplinary action of NASD, the suspensions shall become effective with the opening of business on April 7, 2003 and end at the close of business on May 5, 2003.¹

FOR THE PANEL.

Jerome Nelson
Hearing Officer

Dated: Washington, DC
February 10, 2003

Copies to: Jonathan B. Day (via overnight delivery and first class mail)
Kevin G. Kulling, Esq. (via electronic mail and first class mail)
Rory C. Flynn, Esq. (via electronic mail and first class mail)

¹ The Hearing Panel 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.