NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C3A020020
v.	:	Hearing Officer – JN
STEPHANIE ANN DIXON (CRD #4217627),	:	**HEARING PANEL DECISION**
Tempe, AZ ,	:	November 6, 2002
Respondent.	:	

Respondent provided a false response on a Form U-4, in violation of Rule 2110 and IM-1000-1 and failed to respond in a timely manner to requests for information issued pursuant to Rule 8210, in violation of Rules 2110 and 8210. For the false answer, Respondent fined $2,500 and ordered to complete an accelerated continuing education requirement, if she re-enters the securities industry. For the untimely responses, Respondent fined $2,500 and suspended for six months.

Appearances

For the Complainant: David A. Watson, Esq. and Rory C. Flynn, Esq.

For the Respondent: Stephanie Ann Dixon, pro se.

Decision

I. Introduction

On July 18, 2002, the Department of Enforcement filed an Amended Complaint against Respondent Stephanie Ann Dixon. The First Cause alleged that she made willful misrepresentations on a Uniform Application for Securities Industry Registration or Transfer ("Form U-4"), in violation of Rule 2110 and IM-1000-1. The Second Cause alleged that she failed to provide, in a timely manner, information requested by NASD

staff, pursuant to Rule 8210, a violation of Rules 8210 and 2110. The Hearing Officer treated Dixon's May 17, 2002 letter as an Answer.

A Hearing Panel, composed of an NASD Hearing Officer and two members of NASD District Committee No. 3, conducted a hearing on August 19, 2002, in Phoenix, Arizona. Dixon appeared pro se and testified on her own behalf. The parties admitted thirteen joint exhibits (JX-1 through JX-13). Respondent introduced one exhibit (RX-1). The Hearing Officer kept the record open for an additional thirty days (until September 19, 2002) to give Ms. Dixon the opportunity to make a supplemental submission, which she chose not to file.

II. Background

On May 17, 2000, Dixon, who had no prior experience in the securities industry and had not yet qualified by examination, filled out a Form U-4 in applying for registration as an associated person, to be employed by PFS Investments Inc. ("PFS") (JX-3, Ex. B; Tr., p. 38). The form required, inter alia, that she answer certain questions pertaining to any possible criminal history. Question 23A(1)(b) asked "[h]ave you ever . . . been charged with any felony?" (JX-3, Ex. B). Dixon answered that question "No" (Id.) and testified that she did so on the advice of her mentor at the firm, to whom she reported (Tr. 46-47, 51, 82, 84).

It is undisputed that in November of 1999, Respondent was charged with four felonies, arising out of her having set her car on fire: arson, making a fraudulent insurance claim, making a false or misleading insurance claim, and theft (Tr., p. 17; JX-3, Ex. A). On April 28, 2000, the fraudulent claim and theft charges were dismissed, while

the arson and false claim charges were reduced to misdemeanors to which Ms. Dixon pleaded guilty (JX-3). Respondent was sentenced to two years of probation (Id.).

Some time after submitting the U-4, PFS sent Respondent a Criminal Disclosure Reporting Page (referred to in the record as a "DRP"), on which she disclosed the felony charges and their subsequent history (JX-3, Ex. D).[1] On October 23, 2000, the firm filed a Uniform Termination Notice for Securities Industry Registration ("Form U-5"), which reflected the termination of her association with PFS, citing the DRP and her prior nondisclosure of the felony charges (JX-1).

After receiving the Form U-5, NASD began an investigation into the matter (JX-2; JX-4). As part of that investigation, on March 5, 2001, April 6, 2001, and March 5, 2002, NASD staff sent Respondent letters, issued pursuant to NASD Rule 8210, requesting information about her failure to disclose the felony charges on the U-4 (JX-6; JX-7; JX-9). Respondent testified that although her son (ten or eleven years old) signed for the March 5, 2001 letter, she never received it (Tr., p. 29). She admitted to receiving but not responding to the April 6, 2001 request (Tr., pp. 29-30). She also admitted to receiving the March 5, 2002 letter, which imposed a deadline of March 15, 2002 for Respondent to provide the requested information (JX-9; Tr., p. 31). On March 19, 2002, Respondent called NASD and informed the staff that she would respond in one week (Tr., pp. 70-72).

On April 15, 2002, Enforcement, having received no response, filed the instant Complaint. On May 17, 2002, Respondent filed an Answer to the Complaint (RX-1). The parties agreed to treat that Answer as a belated response to the Rule 8210 requests

[1] The record does not explain what caused the firm to send the DRP to Respondent.

(Pre-Hearing Conference on June 7, 2002, pp. 14-15). Thereafter, on July 18, 2002, Enforcement filed an Amended Complaint, alleging that Respondent failed to respond timely to the staff requests.

III. Discussion

A. Filing a False or Inaccurate Form U-4

Failing to disclose prior criminal charges on a Form U-4 constitutes a violation of NASD Conduct Rule 2110. As stated in IM-1000-1, "[t]he filing with [NASD] of information with respect to . . . registration . . . which . . . could in any way tend to mislead . . . may be deemed to be conduct inconsistent with just and equitable principles of trade and when discovered may be sufficient cause for appropriate disciplinary action." See Dep't of Enforcement v. Vu, 2001 NASD Discip. LEXIS 40 at *6 (OHO November 15, 2001) (failing to amend U-4 to reflect subsequent felony charges).

Here, Respondent had been charged with four felonies, but answered "No" to a question that asked if she had ever been charged with any felony. Her false answer could have misled the firm into believing that she had a clean record; moreover, the falsity was especially significant for employment in the securities industry because the underlying charges involved fraud and theft.

Respondent's belief that she had not been charged with felonies, partially based on her mentor's advice to answer "no" to the question about felony charges, does not excuse the false answer. The Form U-4 "serves as a vital screening device for hiring firms and the NASD against individuals with 'suspect history.'"[2] Truthful answers are

[2] Dist. Bus. Conduct Comm. v. Bernadette Jones, 1998 NASD Discip. LEXIS 60, at *9 (NAC August 7, 1998).

essential to a meaningful system of self-regulation, and non-disclosure of felony charges can only frustrate that process.

Under any view of the facts, Respondent was careless and inattentive to details in executing the Form U-4. If she was unclear about the meaning of the relevant question, after reading it carefully, she could have consulted her former counsel or someone in the firm's compliance department. The mentor, a salesperson who did not examine any of the criminal court documents (Tr., pp. 84, 97), was not the authoritative source. In any event, as the SEC has held, "a respondent cannot shift his or her responsibility for compliance with an applicable requirement to a supervisor . . . ." Thomas C. Kocherhans, Exchange Act Rel. No. 36556, 1995 SEC LEXIS 3308 at *10 (December 6, 1995) (citations omitted). Respondent's failure to disclose her prior felony charges on the Form U-4 constitutes a violation of Rule 2110 and IM-1000-1.

B. Willfulness

The Complaint alleged that Respondent's failure to disclose the felony charges was "willful" (Amended Compl., ¶ 3), a finding which, though not an element of the offense under Rule 2110, has serious collateral consequences. Under Section 15(b)(4)(A) of the Securities Exchange Act of 1934, a person who files an application seeking association with a member of a self-regulatory organization and who "willfully" fails to disclose "any material fact which is required to be stated" in that application is disqualified from functioning as an associated person in the securities industry. See also Article III, Section 4(f) of the NASD By-Laws (tracking this statutory language).[3]

[3] To find "willfulness," Enforcement must show that "the respondent knew or should have known under the particular facts and circumstances that [her] conduct was improper." In re Christopher LaPorte, Exchange Act Rel. No. 39171, 1997 SEC LEXIS 2058 at *8 (September 30, 1997). The term "willfully" requires "proof that [Respondent] acted intentionally in the sense that [s]he was aware of what [s]he was

At the conclusion of the hearing, Enforcement conceded that it had not proved that Ms. Dixon willfully made a false answer (Tr., p. 109). The record supports that concession. After disclosing the charges to her mentor (a firm vice president whom she saw as an experienced securities professional), Respondent asked him "how to answer it appropriately," and he advised that she answer "no" to the question involving felony charges (Tr., pp. 46-47, 82). Her voluntary disclosure of the criminal charges to the mentor, and similar disclosure to the firm on the DRP are inconsistent with intentional hiding of the felony charges. The Panel agrees with the prosecution that this record does not spell out willfulness.

C. Failing to Respond Timely to Requests for Information

The record shows that Respondent failed timely to respond to NASD information requests. Wholly apart from the March 5, 2001 letter (which she said she never saw, after her young son signed for it), she admitted that she received the April 6, 2001 and March 5, 2002 letters and did not reply to them within the allotted time period (Tr., pp. 29-30, 69, 70-72, 120, 130, 133).

Her belief that she did not need to respond because she had already informed the firm about the charges and assumed that it would inform NASD is no defense (Tr., pp. 32-33, 50-51). A respondent cannot second-guess NASD's need for the requested information. Brian Prendergast, Exchange Act Rel. No 44632, 2001 SEC LEXIS 1533 at *36 (August 1, 2001). Nor is there merit to the contention that she was not called by NASD and told how to respond (Tr., pp. 121-123). "Participants in the

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doing . . . . '[W]illfully' in this context means intentionally committing the act. There is no requirement that the actor also be aware that he is violating one of the Rules or Acts." Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976).

securities industry must take responsibility for compliance with regulatory requirements and cannot be excused for lack of knowledge, understanding, or appreciation of these requirements." Thomas C. Kocherhans, Exchange Act Rel. No. 36556, 1995 SEC LEXIS 3308, at *9-10 (Dec. 6, 1995) (citations omitted). Furthermore, the SEC has "repeatedly held that a respondent cannot shift his or her responsibility for compliance with an applicable requirement to . . . NASD" (Id.) (citations omitted).

Failing to respond timely to requests for information, issued pursuant to NASD Procedural Rule 8210, is a violation of Rules 8210 and 2110. Department of Enforcement v. Bello, 2002 NASD Discip. LEXIS 10, *10 (NAC June 3, 2002). Respondent violated those Rules by failing to respond timely to NASD's April 6, 2001 and March 5, 2002 information requests.

IV. Sanctions

A. Filing a False or Inaccurate Form U-4

For filing a false or inaccurate Form U-4, the NASD Sanction Guidelines recommend a fine of $2,500 to $50,000 and a possible suspension for five to thirty business days. See NASD Sanction Guidelines, p. 77 (2001 ed.). Enforcement requested a $5,000 fine.

Three principal considerations bear on sanctions for submitting a false U-4: (1) the "[n]ature and significance of information at issue;" (2) whether the omission resulted in a statutorily disqualified person becoming associated with a firm; and (3) whether the misconduct harmed a registered person, a firm, or anyone else (Guidelines, p. 77). Here, those factors cut in Respondent's favor.

Though the felony charges should have been disclosed, their ultimate adjudication was less significant than the allegations themselves. The fraud and theft charges were dismissed, and the other two were reduced to misdemeanors (JX-3, Ex. A). Respondent was put on probation. The omission did not result in a statutorily disqualified person becoming associated with a member firm. In fact, the omission resulted in Respondent being terminated by a member firm even before she became registered (JX-1). Third, there is no showing of "harm" on this record. Dixon's firm itself discovered the falsity, requested information from Respondent, and terminated her prior to her becoming registered. There is no suggestion that she inflicted any particular injury on the firm, its representatives, or its customers. Finally, Ms. Dixon was a novice, who had no experience or training when she filled out the Form, and she apparently did so in reliance on the advice of a mentor.

In the circumstances of this case, the Hearing Panel finds that the minimum $2,500 fine is sufficiently remedial.

As an additional sanction, to emphasize the importance of compliance with the details of regulatory oversight, the Hearing Panel also directs acceleration in the continuing education requirement required by Rule 1120. If Ms. Dixon re-enters the securities industry, she shall complete the Regulatory Element prescribed by that Rule within one year following her registration.

B. Failing to Respond Timely to Requests for Information

For failing to respond timely to requests made pursuant to NASD Procedural Rule 8210, the NASD Sanction Guidelines recommend a fine of $2,500 to $25,000 and a suspension of up to thirty days. See NASD Sanction Guidelines, p. 39 (2001 ed.). In

egregious circumstances, however, adjudicators may impose sanctions above the recommended range (Id. at 5). That is what Enforcement proposes here, urging a one-year suspension on the ground that Ms. Dixon's tardiness frustrated an investigation and created what might have been an unnecessary hearing (Tr., pp. 108, 114). The Panel agrees that a suspension greater than thirty days is appropriate in the circumstances of this case.

Prompt responses would have enabled Enforcement further to investigate Ms. Dixon's false U-4. Such action might have resolved any question of willfulness and left the case in a posture where settlement was feasible. Respondent instead waited until after the Complaint was filed, indeed until the hearing itself began, to explain the circumstances of her false answer.

Enforcement had to send Respondent at least two letters and file a Complaint against her before receiving a response. 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). It is well settled that "[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). These principles are especially applicable here, where the delay caused the commitment of NASD resources for a hearing, which might well have been unnecessary.

Considering all of the circumstances, the Panel concludes that a six-month suspension is an appropriate sanction for this aspect of Respondent's misconduct.

As to a fine, Enforcement seeks $5,000. The Panel considered that Respondent has a young son, is currently employed in two jobs, will be obligated to pay a $2,500 fine for her false answer, and will be required to pay $1,733.08 as the costs of this proceeding. In addition, the Panel believes that she was confused about the need to respond, in light of her understanding that disclosure of the charges to the firm was tantamount to disclosure to NASD. The Panel finds that a $2,500 fine is sufficient for the tardy responses.

V. Conclusion

For providing a false answer on her Form U-4, Respondent is fined $2,500. Respondent shall also complete the continuing education Regulatory Element prescribed by Rule 1120 within one year following any securities industry registration by her.

For failing to respond timely to information requests, in violation of Rules 8210 and 2110, Respondent is fined $2,500 and suspended in any and all capacities for six months.

Respondent is also assessed a total of $1,733.08 in costs, reflecting hearing transcript costs of $983.08 and a standard $750 administrative fee.

The fines and costs become due if and when Respondent becomes registered in the securities industry. If this Decision becomes NASD's final disciplinary action, the suspension shall become effective with the opening of business on Monday, January 6, 2003, and end on Saturday, July 5, 2003.

HEARING PANEL

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Jerome Nelson
Hearing Officer

Dated: Washington, DC
November 6, 2002

Copies to: Stephanie Ann Dixon (via overnight delivery and first class mail)
David A. Watson, Esq. (via electronic and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)