NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. MICHAEL K. KALMAER (CRD No. 2610334), New York, New York, Respondent.	Disciplinary Proceeding No. C9B020016 Hearing Officer—Andrew H. Perkins **Hearing Panel Decision** September 17, 2002

An applicant for registration failed to disclose on his Form U-4 that he had been charged with a felony, in violation of NASD Conduct Rule 2110. Respondent is suspended for 15 business days and fined $5,000, payable upon his re-entry into the securities industry. Respondent also is ordered to complete the Regulatory Element of Continuing Education annually for four years after he re-enters the securities industry, and to pay the costs of this proceeding in the amount of $1,873.01.

Appearances

For the Department of Enforcement: Michael J. Newman, NASD Regional Counsel, Woodbridge, NJ (Rory C. Flynn, NASD Chief Litigation Counsel, Washington, DC, Of Counsel).

For Michael K. Kalmaer: Eric S. Hutner, New York, NY.

DECISION

NASD charged Michael K. Kalmaer ("Kalmaer" or the "Respondent") with violating NASD Conduct Rule 2110 by failing to amend his Uniform Application for Securities Industry Registration or Transfer ("Form U-4") and by willfully submitting two materially inaccurate Form U-4s while applying to register as an associated person.

The Department of Enforcement ("Enforcement") filed the Complaint on March 4, 2002. The Complaint alleges that in November 1998 the Respondent was arrested and charged with a misdemeanor and a felony.[1] At the time, the Respondent was associated with National Securities Corporation ("National"), an NASD member firm, and registered with NASD as a General Securities Representative.[2] The Complaint alleges that the Respondent failed to update his Form U-4 within 30 days of his arrest to disclose that he had been charged with a felony.[3] The Complaint alleges that in May 2000 Kalmaer submitted a Form U-4 to become associated with Investprivate, Inc. ("Investprivate") without disclosing the felony charge.[4] Finally, the Complaint alleges that in July 2000 Kalmaer submitted a Form U-4 to become associated with Bluestone Capital Partners, L.P. ("Bluestone") without disclosing the felony charge.[5]

On April 16, 2002, Kalmaer filed his Answer denying the charges and requesting a hearing.

On July 30, 2002, the Hearing Panel, composed of the Hearing Officer and two current members of NASD's District 10 Committee, conducted a hearing in New York, New York. Enforcement called Kalmaer to testify and submitted 12 exhibits, including a Joint Stipulation of Facts ("Stip.").[6] Kalmaer also testified on his own behalf.

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[1] Compl. ¶ 6.

[2] *Id* ¶ 1.

[3] *Id.* ¶ 8.

[4] *Id.* ¶ 12.

[5] *Id.* ¶¶ 16-17.

[6] The exhibits are cited as "Ex. C– __." The Joint Stipulation of Facts is Ex. C–1. References to the hearing transcript are cited as "Tr. ___."

I. Findings of Fact and Conclusions of Law

A. Background

In November 1998, a plainclothes police officer arrested Kalmaer after he got into a "shoving" match with a bartender who had called Kalmaer a "Chink."[7] Kalmaer spent the night in jail before the Court released him on his own recognizance. Kalmaer was charged with resisting arrest, a misdemeanor; bribery in the third degree,[8] a felony; and disorderly conduct, a violation[9].

In February 1999, on its own motion, the State dismissed the felony charge,[10] and, in April 1999, as part of a plea agreement, the State dismissed the misdemeanor charge. Kalmaer pled guilty to the violation, and the Court imposed a sentence of one day of community service.[11]

At the time of his arrest, Kalmaer was registered as a General Securities Representative with National.[12]

B. The Respondent's Form U-4s

In February 1997, Kalmaer submitted a Form U-4 to The Boston Group LP (which firm was acquired by National) in which he accurately certified that he had never

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[7] Tr. 32, 63.

[8] Enforcement presented no explanation of this charge. The only reference to the basis for the charge is contained in the affidavit (Ex. C–9) the police officer submitted to the Court. In the affidavit, the police officer states that the Respondent offered him $100 if he would let the Respondent go.

[9] Disorderly conduct is classified as a "violation" under New York State law. (*See* NY CLS Penal § 240.20 (2002)). Section 10.100 of the New York Penal Law distinguishes between a "violation", a "misdemeanor" and a "felony" and defines a "crime" as "a misdemeanor or a felony." Hence disorderly conduct is not a crime. *See DePaula v. City of Albany*, 406 N.E.2d 1064, 1066 (1980).

[10] Tr. at 34; Stip. ¶ 3.

[11] Ex. C–9, at 3; Stip. ¶ 4.

[12] Stip. ¶ 5.

been charged with a felony. Question 22B of the Form U-4 asked in pertinent part: "Have you ... ever been charged with any felony … in a domestic or foreign court?" Kalmaer answered "No," which was accurate.[13] The Form U-4 also required Kalmaer to amend his answers "whenever changes occur to answers previously reported."[14] Nevertheless, Kalmaer did not amend his Form U-4 following his arrest in November 1998.[15]

Kalmaer testified that the Monday following his arrest he told his immediate supervisor (who served as National's regional compliance officer), his branch manager, and several co-workers about his arrest and the charges against him.[16] Kalmaer specifically testified that he told his supervisor about the felony charge.[17] Kalmaer further testified that he asked both his supervisor and his branch manager if he needed to do anything because of the incident. They both said no.[18] The issue of Kalmaer amending his Form U-4 was never discussed.[19]

Kalmaer remained registered with National until July 2000. On May 15, 2000, however, he submitted a new Form U-4 to dual register with Investprivate, Inc.[20] Question 23A(1)(b) of the Form U-4 asked "[h]ave you ever ... been *charged* with any *felony*?"[21] Kalmaer answered "No." He testified that because the felony charge had been

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[13] Ex. C–11, at 3.

[14] Ex. C–11 ¶ 9, at 4.

[15] Tr. 35.

[16] Tr. 36, 41–43, 69.

[17] *Id.* at 40.

[18] *Id.* at 41.

[19] *Id.* at 51.

[20] Tr. 72; Ex. C–2. Kalmaer had the same two supervisors at Investprivate as he did at National.

[21] Ex. C–2, at 6.

dropped he mistakenly thought, "it was as if it never really happened."[22] Kalmaer also testified that his attorney had advised him at the time the criminal charges were resolved that "everything was going to be dropped and it would be as if nothing had happened."[23] Kalmaer did not receive a deficiency notice concerning his Form U-4 while he was associated with Investprivate.[24]

After two months with Investprivate, Kalmaer accepted an employment offer from Bluestone.[25] On July 25, 2000, Kalmaer submitted a Form U-4[26] to Bluestone to register as a General Securities Representative, Question 22B of the Form U-4 asked, in pertinent part, "[h]ave you ... ever been *charged* with any *felony* … in a domestic, foreign, or military court?" Kalmaer answered "No," which was not true.[27]

Following Bluestone's submission of Kalmaer's Form U-4 to NASD, it sent Bluestone a deficiency notice regarding Kalmaer's failure to disclose the felony charge. Bluestone investigated the matter and terminated Kalmaer on September 7, 2000, for failing timely to disclose the felony charge on his Form U-4.[28]

Kalmaer then rejoined Investprivate in November 2000 where he worked as a General Securities Representative until June 2002.[29] When he returned to Investprivate, Kalmaer submitted a Form U-4 on which he correctly disclosed the felony charge.[30]

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[22] Tr. 50, 77.

[23] *Id.* at 92–93.

[24] *Id*. at 77, 78.

[25] Stip. ¶ 1.

[26] Ex. C–3.

[27] Tr. 53.

[28] Stip. ¶ 1.

[29] *Id.*

[30] Tr. 31.

Kalmaer testified that he left Investprivate for a better opportunity, but he has been unable to obtain another position in the securities industry due to this pending case.[31] Kalmaer is no longer registered with NASD or employed in the securities industry.

C. Liability

The Hearing Panel finds that Kalmaer's failure to update his Form U-4 while he was associated with National, and his failures to disclose the felony charge on the Form U-4s he submitted to Investprivate and Bluestone, constitute violations 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."[32]

II. Sanctions

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 5 to 30 business days.[33] The Guidelines suggest three principal considerations bearing on sanctions for the submission of an inaccurate Form 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.[34] Each of these factors weighs in Kalmaer's favor.

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[31] *Id.* at 85-86.

[32] *See also Jon R. Butzen*, Exchange Act Rel. No. 36512, 1995 SEC LEXIS 3228 (Nov. 27, 1995) (holding that failure to disclose pending NASD Complaint violated Rule 2110's predecessor).

[33] NASD Sanction Guidelines 77 (2001 ed.).

[34] *Id.*

Although the charge of bribery was important on its face and should have been disclosed, the actual details of Kalmaer's arrest were not significant. As noted, Kalmaer's arrest arose from a shoving match that ensued after Kalmaer was subjected to a racial epithet. His arrest and charges were not related to matters of finance, fraud, or his employment.[35] Moreover, the New York State District Attorney's Office declined to prosecute the subject felony charge.[36] Ultimately, both criminal charges were dismissed, leaving the Respondent without a criminal conviction. The Hearing Panel further notes that Kalmaer has no other "suspect history."[37] He has no other arrest record or disciplinary record with NASD or any other regulatory body. Kalmaer also has not been the subject of a customer complaint or a defendant in a civil action.[38] In summary, the Hearing Panel views the event and resulting charges as having little significance for the purposes of assessing the Respondent's fitness for employment in the securities industry.

With respect to the second factor under the Guidelines, the omissions did not result in employment of a "statutorily disqualified person." Under Section 3(a)(39)(F) and Section 15(b)(4)(B) of the Securities and Exchange Act of 1934 (the "Exchange Act"), a person is subject to a statutory disqualification if such person has been **convicted** of **any felony** or certain specified misdemeanors. As noted, Kalmaer was not convicted of the felony charge; the charge was not even prosecuted.

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[35] *Cf. Richard Thomas Rutherford*, 1985 NYSE Disc. Action LEXIS 7, at *8 (NYSE, Jan. 30, 1985) (considering as mitigating the fact that the respondent's undisclosed arrests and convictions were not related to fraud, matters of finance or moral turpitude).

[36] Ex. C–9.

[37] *See District Bus. Conduct Comm. v. Bernadette Jones*, 1998 NASD Discip. LEXIS 60 at *9 (NAC, Aug. 7, 1998) (stating that the Form U-4 "serves as a vital screening device for hiring firms and the NASD against individuals with 'suspect history'").

[38] Tr. 86–88.

Finally, there is no showing of “harm” on this record. Kalmaer promptly reported the incident and charges to his superiors at National who told him that he did not need to do anything further. Furthermore, the same supervisors accepted his Form U-4 when he applied to Investprivate. And Kalmaer left Bluestone before he became registered as a General Securities Representative.[39] In summary, there is no suggestion that he inflicted any particular injury on any of the affected firms, their representatives, or their customers.

Notwithstanding these mitigating factors, the Hearing Panel stresses the importance of the Form U-4 and each applicant’s obligation to answer the questions on the Form U-4 truthfully. The Form U-4 is an integral part of the national regulation of broker-dealers and associated persons under the Exchange Act, which aims to insure fair dealings and to protect investors from harmful or unfair trading practices. Truthful answers are essential to a meaningful system of self-regulation, and non-disclosure of a felony charge can only frustrate its critical checking process.

Enforcement recommended that the Respondent be fined $7,500 and suspended for six months. After balancing the above aggravating and mitigating factors, the Panel concludes that the fine should be $5,000 and that the suspension should be for 15 business days. In light of the Respondent’s current unemployment, the Hearing Panel concludes that the Respondent should have the opportunity to pay off his fine, together with hearing costs, on an installment basis, such payments to begin when the Respondent re-enters the securities industry.

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[39] Kalmaer testified that he did not perform any registered representative services for Bluestone and that he never got paid by Bluestone. (Tr. at 29-30, 102.)

The Hearing Panel further concludes that the Respondent should complete the Regulatory Element of Continuing Education each year for four years after the Respondent re-enters the securities industry. While the Hearing Panel finds that the Respondent orally reported his arrest to his supervisors at National, his failures reflect a general lack of understanding regarding the importance of his reporting requirements and his obligations under the NASD Conduct Rules. Accordingly, the Hearing Panel concludes that increased training is appropriately remedial under the facts and circumstances of this case.

III. Willfulness

Enforcement also requested that the Hearing Panel make a finding that the Respondent "willfully" failed to disclose the felony charge. Although "willfulness" is not an element of an offense under NASD Conduct Rule 2110, Enforcement requests this finding because of the collateral consequence such a finding would have. Under Section 15(b)(4)(A) of the Exchange Act, 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.

"Willfulness" is described in *Christopher LaPorte*, Exchange Act Rel. No. 39,171, 1997 SEC LEXIS 2058 at *8 (Sept. 30, 1997) and *Arthur Lipper Corp. v. S.E.C.*, 547 F.2d 171, 180 (2d Cir. 1976). This element requires proof that the respondent knew or should have known under the particular facts and circumstances that his conduct was

improper. The term "willfully" requires proof that the respondent acted intentionally in the sense that he was aware of what he was doing.[40]

Applying these principles, the Hearing Panel is not persuaded by a preponderance of the evidence that Kalmaer's omissions were willful. Accordingly, the Hearing Panel declines to find that Kalmaer willfully omitted disclosing the felony charge. In doing so, the Hearing Panel credits Kalmaer's testimony, presented as part of Enforcement's case-in-chief, that he fully disclosed the details of his arrest to his supervisors—each a seasoned securities professional.[41] Kalmaer's immediate supervisor was approximately 60 years old and had more than 20 years experience. Kalmaer's testimony is corroborated in part by the fact that the same supervisors took Kalmaer back after Bluestone terminated him for failing timely to disclose the felony charge. The Hearing Panel believes that it is more unlikely than not that had Kalmaer concealed his arrest from his supervisors they would not have permitted him to return to work at the firm. Moreover, Enforcement did not call Kalmaer's former branch manager who is still registered with Investprivate to contradict Kalmaer's claim.

IV. Order

Michael K. Kalmaer is fined $5,000, to be paid under NASD's installment plan if and when he re-enters the securities industry. The Respondent also is suspended for 15 business days from associating with any member firm in any capacity and ordered to complete the Regulatory Element of Continuing Education each year for four years after

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[40] However, liability for what a Respondent "should have known" must rest on more than a general duty to answer the U-4's questions carefully and accurately. Statutory disqualification would otherwise flow automatically from any material error. Such a result would penalize every applicant who made a mistake and would render the "willfulness" requirement meaningless.

[41] Tr. 42.

he re-enters the securities industry.[42] Finally, the Respondent is ordered to pay a total of $1,873.01 in costs, reflecting $1,123.01 for the hearing transcript and the standard $750 administrative fee.

These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after this Decision becomes the final disciplinary action of the NASD, except, if this Decision becomes the final disciplinary action of the NASD, the Respondent's suspension shall commence with the opening of business on November 18, 2002, and end at the close of business on December 3, 2002.

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Andrew H. Perkins
Hearing Officer
For the Hearing Panel

Copies to:

Eric S. Hutner (by facsimile and first-class mail)
Michael K. Kalmaer (by FedEx, next day delivery, and first-class mail)
Michael J. Newman, Esq. (by first-class and electronic mail)
Rory C. Flynn, Esq. (by first-class and electronic mail)

[42] The Hearing Panel considered all of the arguments of the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.