NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C07010084
v.	:	Hearing Officer – JN
FORREST G. HARRIS (CRD No. 4219457),	:	**HEARING PANEL DECISION**
Charlotte, NC,	:	May 31, 2002
Respondent.	:	

An applicant for registration submitted an inaccurate Form U-4, in violation of NASD Conduct Rule 2110. Respondent suspended for two months and fined $7,500, payable upon his re-entry into the industry.

Appearances

Gene E. Carasick, Regional Counsel, Atlanta, GA, for the Department of Enforcement.

Rory C. Flynn, Chief Litigation Counsel, Washington, DC, for the Department of Enforcement.

Forrest G. Harris, pro se.

DECISION

I. Background

A. Procedural history

On November 21, 2001, the Department of Enforcement filed the Complaint in this proceeding, alleging that Respondent Forrest G. Harris, while applying for registration as an associated person, violated NASD Conduct Rule 2110 by willfully submitting a materially inaccurate Uniform Application for Securities Industry Registration or Transfer ("Form U-4"). Harris' Answer, filed on December 10, 2001, acknowledged the inaccuracies, but denied that they were willful.

On March 20, 2002, the Hearing Panel, composed of the Hearing Officer and two current members of the NASD's District 7 Committee, conducted a hearing in Charlotte, North Carolina. Harris appeared pro se and testified on his own behalf. The parties admitted one joint exhibit (cited as JX-1), with four attached exhibits (cited as Ex. A through D). Enforcement filed a Post-Hearing Submission on March 22, 2002, and Harris responded on April 5, 2002.

B. Respondent's Form U-4

On June 12, 2000, NASD member Dean Witter Reynolds, Inc. hired Harris to work as a trainee for the firm (JX-1, ¶1). As part of his application for registration, Harris filled out a Form U-4, which required inter alia that he answer certain questions pertaining to any possible criminal history. Question 23A(1)(b) asked "[h]ave you ever...been charged with any felony?" Question 23B(1)(b) asked "[h]ave you ever...been charged with a misdemeanor…involving...wrongful taking of property...?" (JX-1, Ex. B). Harris answered those questions "No" (Id.).

While in college, Respondent allegedly was involved in stealing a parking meter, throwing beer at a police officer, possessing someone else's driver's license, and stealing some cough medicine, conduct which, in part, arose out of a homecoming party (Tr. 36-39). The incidents involving the meter, the beer, and the license were first charged as felonies, then reduced to misdemeanors, and ultimately not prosecuted (JX-1, Ex. C). The cough medicine incident was charged as a petit larceny misdemeanor and ultimately dropped (Id.).

Respondent's record thus reflected three felony charges and one misdemeanor theft charge (JX-1, ¶3). Harris stipulated to the fact that his answers on the Form U-4 did not refer to these charges (JX-1, ¶3).

Respondent became registered as a general securities representative on August 18, 2000. Thereafter, Dean Witter learned of the inaccuracies, directed that he file an amended Form U-4, and in December of 2000, terminated his employment with the firm (JX-1, Exs. A, D; Tr. 42-43).

II. Liability

As to the "misdemeanor" question, Respondent said that he stopped reading after its italicized reference to "investment-related" and never reached the phrase "wrongful taking of property" (Tr. 18-19, 21). He testified that when answering the question about felony charges, he did not realize that his actions – stealing a parking meter, throwing beer on an officer, or possessing another's driver's license – constituted felonies (Tr. 32-33, 41, 52). He said that he was also unclear whether the word "charged" referred to what the police officer wrote down or had some other more formal meaning (Tr. 33). In any event, he did not think he had been charged with felonies because ultimately "everything was

reduced" or "dropped or adjudication withheld" and "I didn't really get into too much trouble" (Tr. 17, 19, 33). He could not remember what his former attorney may have said at the time as to whether the charges amounted to felonies (Tr. 17, 32, 53).

Harris was unquestionably careless and inattentive to details in executing the Form U-4. He should have read the questions carefully and fully and consulted his former counsel as to their meaning. Presumably, he also could have consulted persons in the Dean Witter compliance department for advice. Respondent's failure to disclose his prior criminal charges on the Form U-4 constitutes a violation of NASD Conduct Rule 2110. As stated in IM-1000-1, "[t]he filing with the Association 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."[1] See also In re Jon R. Butzen, Exchange Act Rel. No. 36512, 1995 SEC LEXIS 3228 (November 27, 1995), (failure to disclose pending NASD Complaint violated Rule 2110's predecessor).

III. 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 five to 30 business days. See NASD Sanction Guidelines, p. 77 (2001 ed.). In egregious cases, the Guidelines suggest a suspension of up to two years or a bar (Id. at 78).

This case involves a mix of aggravating and mitigating circumstances. The Form U-4 "serves as a vital screening device for hiring firms and the NASD against individuals

[1] Non-disclosure of felony and theft charges could mislead the employing firm by encouraging it to proceed without investigation.

with 'suspect history.'"[2] In the instant case, three of the four non-disclosed items involved felony charges and two of the four involved theft – matters which, on their face, reflected "suspect history." Truthful answers are essential to a meaningful system of self-regulation, and non-disclosure of felony and theft charges can only frustrate its critical checking process.

There are also mitigating factors. The Guidelines suggest three principal considerations bearing on sanctions for the submission of 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, supra, p. 77). In the instant case, those factors cut in Respondent's favor.

Although the arrest record was important on its face and should have been disclosed, its actual details were less significant. As noted, the felony charges were reduced to misdemeanors and never prosecuted; the misdemeanor theft charge was dropped (JX-1, Ex. C). Harris' undergraduate misconduct involved stealing a parking meter, shoplifting a bottle of cough medicine, throwing beer on a police officer, and possessing another person's driver's license (Tr. 36-39). Two of the felony charges arose out of a homecoming party in Gainesville, Florida, when "the police tried to break it up and party-goers weren't too happy about it" (Tr. 38). In the Panel's view, these events and charges have little significance for purposes of assessing Respondent's fitness for employment in the securities industry.

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

Nor did the omissions result in employment of a statutorily disqualified person. Section 15(b) of the Securities Exchange Act of 1934 turns on convictions, not charges. As noted, none of the charges in this case led to a conviction or was ever prosecuted. Nor is there any showing of "harm" on this record. Harris' firm itself discovered the falsity, questioned Respondent, and directed that he file an amended U-4 (JX-1, Ex. D; Tr. 42-43). There is no suggestion that he inflicted any particular injury on the firm, its representatives, or its customers. Indeed, there is no evidence that Harris had any contact whatsoever with any other registrant or with any customer.

Respondent acknowledged his wrongdoing, learned his lesson, and demonstrated remorse. He described himself as "careless" and "stupid" in filling out the form (Tr. 69, 73). He stated that "[l]ooking back on it, I'll never do anything like that again," and added "now I know that any…communications I have with the NASD...I'll think them through very carefully, take them very seriously, and make sure I'm doing...everything just within the guidelines" (Tr. 69). Finally, Harris said that "when I fill out an application now...I do disclose fully...[Y]ou have to go a lot further than I did as far as diligence. I apologize" (Tr. 74).

Enforcement recommended that Respondent be fined $7,500 and suspended for one month (Tr. 67).[3] After balancing the above aggravating and mitigating factors, the Panel concludes that the fine should be $7,500, as requested, and that the suspension should be for two months – twice the Department's recommendation.

[3] The Department recommended higher sanctions if the Panel were to find "willfulness," as alleged in the Complaint – a matter discussed next in this Decision.

Respondent earns $29,200 as a customer service associate with CIGNA HealthCare, and has $2,700 in an IRA account. His wife is not employed and remains at home with their young child (Tr. 13, 71). In these circumstances, the Panel believes that anything greater than Enforcement's recommended $7,500 would be inappropriate. The NASD installment payment plan is available where the fine exceeds $5,000 (Tr. 71). The Panel concludes that Harris should have the opportunity to pay off his fine, together with hearing costs, on an installment basis, with such payments beginning when Respondent re-enters the securities industry.

As to suspension, the Panel again notes that the non-disclosed charges appeared significant on their face, even though the details later showed otherwise. Full disclosure is essential in order that the Form U-4 function as a "vital screening device for hiring firms and the NASD" (Jones, supra). For this reason, the Panel concludes that Harris should be suspended for two months, rather than one month, as recommended by Enforcement.

IV. Willfulness

The instant Complaint alleged that Harris "willfully" failed to disclose the felony and misdemeanor charges (Compl., ¶3). A finding of willfulness, 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, which tracks this statutory language.

Respondent agreed that he failed to disclose the charges on his U-4, but urged that the omissions were not willful.[4]

"Willfulness" is described in In re Christopher LaPorte, Exchange Act Rel. No. 39171, 1997 SEC LEXIS 2058 at *8 (September 30, 1997) and Arthur Lipper Corp. v. S.E.C., 547 F.2d 171, 180 (2d Cir. 1976), cited by Enforcement. This element requires proof that "the respondent knew or should have known under the particular facts and circumstances that his conduct was improper" (LaPorte). The term "willfully" requires "proof that [Respondent] acted intentionally in the sense that he was aware of what he was 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" (Lipper).[5] However, "willfulness" differs from inadvertence or negligence.

Applying these principles, the Panel is not persuaded by a preponderance of the evidence that Respondent's omissions were willful, rather than careless.

The questions required that Harris remember details of allegations made nearly six years ago. The parking meter, beer-throwing, and driver's license incidents would not, at first blush, appear so serious as to constitute felonies. Indeed, each ended up as a misdemeanor, and none ever went to trial. He misread the misdemeanor question's reference to "investment-related" misconduct. Finally, the Panel credits Harris'

[4] Harris raises no issue as to the "materiality" of the omissions. As the Department argues, the existence of felony and petit larceny charges would be of obvious significance to a potential employer (Tr. 55). That the charges turned out to involve relatively minor conduct does not excuse the failure to disclose them at the outset for purposes of the screening process.

[5] 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.

testimony that it would have made "no sense" for him to conceal the arrests because he knew that Dean Witter had his fingerprints and assumed that the firm would likely discover his arrest record in any event (Tr. 15-16, 20, 43).

V. Conclusion

For submitting an inaccurate Form U-4, in violation of Rule 2110, Respondent is fined $7,500, to be paid under the NASD installment plan if and when he re-enters the securities industry. For this same misconduct, Respondent is suspended in all capacities for a period of two months. Finally, Respondent is directed to pay a total of $1,190.22 in costs, reflecting $440.22 for the hearing transcript and the standard $750 administrative fee.

These sanctions shall become effective on a date set by the Association, but not earlier than 30 days after this Decision becomes the final disciplinary action of the Association, except that if this Decision becomes the final disciplinary action of the Association, Respondents' suspension shall become effective with the opening of business on August 5, 2002 and end at the close of business on October 4, 2002.[6]

HEARING PANEL

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Jerome Nelson
Hearing Officer

Dated: Washington, DC
May 31, 2002

Copies to: Forrest G. Harris (via overnight delivery and first class mail)
Gene E. Carasick, Esq. (via electronic and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)

[6] 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.