

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

VINCENT P. CONIGLIONE
(CRD #1756741),

Staten Island, NY,

Respondent.

Disciplinary Proceeding
No. C10000116

Hearing Officer—Andrew H. Perkins

Hearing Panel Decision

May 2, 2001

Formerly registered representative charged with violating NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by failing to testify at an on-the-record interview. The Hearing Panel rejected the Respondent's claim that the Fifth Amendment to the United States Constitution applied to NASD Regulation disciplinary proceedings and barred the Respondent from association with any NASD member firm in any capacity.

Appearances

For the Complainant: Philip A. Rothman (David E. Shellenberger and Rory C. Flynn, Of Counsel).

For the Respondent: Paul A. Lemole, LEMOLE MCCARTHY & ASSOCIATES.

DECISION

I. INTRODUCTION

The Department of Enforcement (“Enforcement”) filed this disciplinary proceeding against the Respondent Vincent P. Coniglione (“Coniglione”) alleging that he violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by refusing to answer questions asked of him by NASD Regulation, Inc. staff at an on-the-record interview on April 28, 2000, which had been convened pursuant to NASD Procedural Rule 8210. Coniglione admitted that he appeared with his counsel at the scheduled interview and refused to answer the questions posed by the staff. Coniglione contended, however, that he was entitled to refuse to answer the questions because to do so would violate his Fifth Amendment privilege against self-incrimination.

II. PROCEDURAL HISTORY

Enforcement filed the Complaint against Coniglione on June 30, 2000, and Coniglione, by counsel, filed his Answer and Affirmative Defense on July 31, 2000. Although in his Answer he denied the allegations in the Complaint, in the Affirmative Defense Coniglione admitted the core underlying facts alleged in the Complaint. Coniglione affirmatively alleged, however, that Enforcement had scheduled his on-the-record interview, among other reasons, “because of an agreement between [Enforcement] and the District Attorney’s Office of New York County and the United States Attorney’s Office, in an attempt to defeat the respondent of his Constitutional Rights¹ and in an attempt to build a criminal case against the respondent.” (Answer ¶ 6.)

¹ Coniglione also asserted that the New York State Constitution guaranteed him the right not to incriminate himself.

Coniglione further asserted that he could not, as a matter of law, violate NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by exercising a Constitutional right.

On September 1, 2000, Enforcement filed, pursuant to Code of Procedure Rule 9264, a Motion For Summary Disposition. The motion was accompanied by a Statement of Undisputed Facts, Memorandum of Law, and the affidavits of two staff members of NASD Regulation. In response to the Motion For Summary Disposition, on December 6, 2000, Coniglione filed a document entitled Affirmation In Response To Motion For Summary Judgment, which was an affidavit of Coniglione's counsel. In his response Coniglione agreed that there were no issues of fact in dispute. But, Coniglione asserted that the determination of the "penalty to be imposed upon the respondent" remained an open issue that should be decided after a hearing. (Affirmation at 1.)

Because Coniglione's response was ambiguous in part, the Hearing Officer convened a pre-hearing conference on December 21, 2000, to clarify Coniglione's position. At the pre-hearing conference, Coniglione's counsel confirmed that he was not contesting liability, but he wanted to be able to present evidence at the hearing relevant to the determination of the sanction to be imposed by the Hearing Panel. Accordingly, with the agreement of the Parties, the case was set for hearing on February 28, 2001.

The Hearing Panel, composed of NASD Hearing Officer Perkins and two current members of the District Committee for District 10, held the hearing on February 28, 2001, in New York City.² Enforcement offered the testimony of two witnesses (a staff supervisor and a compliance examiner with NASD Regulation) and ten exhibits, of which six (CX-1, and CX-5

through CX-9) were admitted into evidence without objection. The Hearing Officer denied admission of the remaining exhibits. Coniglione offered no evidence.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Respondent's Background in the Securities Industry

Coniglione first entered the securities industry in 1989 and became registered through South Richmond Securities, Inc. on March 29, 1989, as a General Securities Representative. (CX-1, at 12.) He registered as a General Securities Principal on March 20, 1995, through Meyers, Pollock & Robbins, Inc. (Id. at 11.) Coniglione's registrations with the National Association of Securities Dealers, Inc. ("NASD") terminated on September 18, 1998. (Id. at 10.) At the time of the hearing, Coniglione was not employed in the securities industry or associated with an NASD member firm.

B. Jurisdiction

The NASD has jurisdiction over this proceeding under Article V, Section 4 of the NASD's By-Laws, which creates a two-year period of retained jurisdiction over formerly registered persons, covering conduct that began before their registrations terminated. The By-Laws also impose a continuing duty on formerly registered representatives to respond to requests for information issued by the NASD during this two-year period of retained jurisdiction. Coniglione's registration as a General Securities Representative and as a General Securities Principal terminated effective September 18, 1998. Enforcement filed the Complaint on June 30, 2000, within two years of that date, and the Complaint alleged a failure to answer

² The transcript of the hearing is cited as "Tr. ____."

questions at an on-the-record interview that was convened on April 28, 2000, during the period of retained jurisdiction.

C. The On-The-Record Interview

The underlying facts are undisputed. In connection with NASD Regulation's investigation of William Scott & Co., an NASD member firm, the staff sought to depose Coniglione at an on-the-record interview. (Tr. 11.) The staff was investigating William Scott because it had received more than 150 customer complaints over a two-year period. Coniglione's testimony was sought because he was a principal at William Scott during the period under investigation. The staff had hoped that Coniglione could supply information about the activities at William Scott. (Id.) Coniglione himself was not the focus of NASD Regulation's investigation. (Tr. 49.)

Pursuant to NASD Procedural Rule 8210, the staff requested Coniglione to appear and testify about his employment at William Scott. (CX-5.) By letter dated April 6, 2000, Coniglione's attorney advised the staff that Coniglione had no objection to attending an on-the-record interview, but, because Coniglione may be the target of a criminal investigation being conducted by the District Attorney's Office for New York County, he would invoke his rights against self-incrimination and refuse to answer any questions. (CX-7.)

Coniglione's on-the-record interview was held on April 28, 2000, at which Coniglione appeared with his counsel. Once the interview commenced, the staff advised Coniglione that the interview was being conducted pursuant to NASD Procedural Rule 8210 and that his failure to answer questions completely and truthfully would constitute a violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. (CX-9.) Thereafter, Coniglione declined to answer

any questions. Coniglione asserted that he had a right to refuse to answer under both the Fifth Amendment to the United States Constitution and Article 1 of the New York State Constitution. (E.g. CX-9, at 8.) Faced with Coniglione's refusal to answer any questions, the staff concluded the interview. (CX-9, at 13-14.)

D. The Respondent's Contentions

Coniglione concedes that he otherwise was obligated to answer the staff's questions, but he argued that because there was an ongoing criminal investigation of the activities at William Scott, he had a constitutional right not to incriminate himself and could not, therefore, be coerced into testifying by NASD Regulation. Coniglione further argued that the Fifth Amendment should apply to this questioning because NASD Regulation had received an access request letter from the Office of the United States Attorney for the Southern District of New York, which meant that the transcript of Coniglione's on-the-record interview would be turned over to the United States Attorney's Office following the interview. (Tr. 42.) Indeed, Coniglione elicited testimony on cross-examination of the NASD Regulation's witnesses that NASD Regulation eventually granted the Department of Justice access to NASD Regulation's investigative file on William Scott. (Tr. 34.) In summary, Coniglione contends that, either by tacit or express agreement, NASD Regulation became the tool or agent of the government, and thus he should be guaranteed the same rights he would have had if the government were conducting the examination. Coniglione did not, however, present any evidence that the on-the-record interview was scheduled at the government's behest.³

³ Enforcement denied that there was an express agreement to gather evidence for any criminal authorities, but it did concede that NASD Regulation normally honors requests by governmental agencies, including criminal authorities, for access to its files.

E. Discussion

The Hearing Panel rejects Coniglione's contentions. NASD Regulation is a private not-for-profit corporation organized under the laws of Delaware and is a self-regulatory organization registered with the Commission as a national securities association pursuant to the 1938 Maloney Act Amendment to the Securities Exchange Act of 1934, 15 U.S.C. § 78o et seq.

The Fifth Amendment to the United States Constitution protects individuals only against violations of constitutional rights by the government, not by private actors. See, e.g., Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982). The Supreme Court has repeatedly held that private entities, even those intimately involved in governmental regulatory schemes, are not thereby made government actors. See National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 193 (1988); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 544 (1987). Moreover, the courts have specifically held that NASD Regulation, in performing its statutory mandate and central role, is not a government actor. See, e.g., Jones v. S.E.C., 115 F.3d 1173, 1182-83 (4th Cir. 1997) (rejecting claim based on the Fifth Amendment's Double Jeopardy Clause because NASD is not a government agency), cert. denied, 118 S. Ct. 1512 (1998); Datek Secs. v. NASD, 875 F. Supp. 230, 234 (S.D.N.Y. 1995) (dismissing Fifth and Fourteenth Amendment claims regarding a disciplinary proceeding because the NASD is not a state actor).⁴ Accordingly, Coniglione's claim that he was entitled to decline to answer questions posed to him by NASD Regulation staff on the ground that he may be a target of a parallel criminal investigation must fail.

⁴ See also First Jersey Secs., Inc. v. Bergen, 605 F.2d 690, 698 & 699 n.5 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980) (holding that NASD is not a state actor); Graman v. NASD, No. Civ. A. 97-1556, 1998 WL 294022 (D.D.C. Apr. 27, 1998) (same); United States v. Bloom, 450 F. Supp. 323, 330 (E.D. Pa. 1978) (same).

Substantially similar arguments were rejected recently by the United States District Court for the Southern District of New York in D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc., No. 01 Civ. 0728, 2001 U.S. Dist. LEXIS 1912 (S.D.N.Y. Feb. 26, 2001). In D.L. Cromwell, the Plaintiffs, targets or subjects of a federal grand jury investigation, sought an injunction barring NASD Regulation from compelling them to testify in an investigation and commencing any proceeding to punish them for asserting their privileges against self-incrimination. The Plaintiffs contended that the “Rule 8210 demands [had] been issued by [NASD Regulation] as an agent for the government in order to coerce them into surrendering their privileges against self-incrimination by threatening them with permanent banishment from the securities industry if they decline to testify in the NASD investigation.” (Id. at *12.) The court found, however, that the Fifth Amendment prohibits only governmental action, and the NASD and NASD Regulation are private entities. “Hence, even if the individual plaintiffs are being compelled to give evidence against themselves by the threat of NASD sanctions, [NASD Regulation’s] actions raise no Fifth Amendment issue unless it fairly can be said that its actions are fairly attributable to the government.” (Id. at *13.) In this case, Coniglione has presented no such evidence. Coniglione’s conclusory assertions provide no grounds for finding the NASD Regulation acted improperly or in bad faith when it requested Coniglione’s testimony.

Similarly, in Department of Enforcement v. Levitov, No. CAF980025, 1999 NASD Discip. LEXIS 30 (Nov. 1, 1999) the National Adjudicatory Council (NAC) rejected the identical argument now made by Coniglione. In Levitov, the respondents, who were then under indictment in a related matter, argued that if they testified for NASD Regulation before their criminal cases were resolved, Enforcement would turn over the transcripts of their on-the-

record interviews to the criminal authorities and that they would thereby be deprived of their Fifth Amendment rights. The Levitov respondents also questioned Enforcement's motives, suggesting that the real purpose of the requests for information was to feed information to the criminal authorities.⁵ In rejecting these defenses, the NAC held that "respondents in failure-to-respond cases cannot raise the purpose of the information requests as part of a substantive defense." (Id. at *13-14.) The fact that state and criminal authorities also had commenced similar investigations, or that Enforcement may share information with those authorities, does not relieve associated persons of their obligation to cooperate fully and testify when requested by NASD Regulation, nor is NASD Regulation obligated to postpone its investigation or its interviews because of pending criminal charges or investigations. (Id. at *15.)

The Hearing Panel concludes, based on the controlling precedent, that Coniglione has failed to raise any legally valid defense for his failure to testify at his on-the-record interview in connection with a *bona fide* NASD Regulation investigation. Accordingly, the Hearing Panel has determined that Coniglione violated NASD Procedural Rule 8210 and that his failure to cooperate did not comport with high standards of commercial honor and just and equitable principles of trade, and he thus violated NASD Conduct Rule 2110.⁶

⁵ The Hearing Panel notes that, as in Levitov, there is no evidence supporting Respondent's contention that the real purpose for Coniglione's on-the-record interview was to gather evidence for the criminal authorities investigating William Scott.

⁶ The SEC has consistently recognized that a violation of another NASD Rule constitutes a violation of the requirement to adhere to "just and equitable principles of trade" set forth in Rule 2110. William H. Gerhauser, Exchange Act Release No. 40639, 68 S.E.C. Docket 1238, 1243, 1998 SEC LEXIS 2402, at *20-21 (Nov. 4, 1998).

IV. SANCTIONS

The applicable NASD Sanction Guideline recommends that where an individual respondent did not respond in any manner, a bar should be “standard.”⁷ The Guideline thus recognizes that a refusal to provide information is a serious violation given NASD Regulation’s inability to subpoena required information.⁸ In this case, Enforcement requested that Respondent be barred for his failure to provide testimony.

Although not well articulated, Coniglione generally argued that there are mitigating factors present that weigh in favor of imposing a less severe sanction than a bar, specifically that: (1) he did not ignore NASD Regulation’s request and timely advised NASD Regulation that he would invoke the Fifth Amendment if he was required to appear for an on-the-record interview; (2) because of his potential criminal exposure, he had a legitimate reason for refusing to testify; and (3) he asserted his Fifth Amendment rights in good faith and on reliance of the advice of counsel.

The Hearing Panel does not find that these factors—either alone or in combination—mitigate the gravity of Coniglione’s failure to testify. The Panel does not consider mitigative the fact that Coniglione responded to NASD Regulation’s requests or that he appeared at the on-the-record interview. Coniglione made a conscious and knowing decision not to comply despite the fact that NASD Regulation staff clearly advised him that a failure to comply could result in disciplinary action against him and the imposition of sanctions. Moreover, the assertion of the

⁷ NASD Sanction Guidelines 39 (2001 ed.).

⁸ Richard J. Rouse, 51 S.E.C. 581, 1993 SEC LEXIS 1831, at *11 (1993). See also, e.g., Barry C. Wilson, 1996 SEC LEXIS 3012, at *14 (“[a]bsent subpoena power, members and associated persons must cooperate fully

privilege against self-incrimination “is not mitigative of a refusal to respond to NASD investigative requests” District Bus. Conduct Comm. No. 7 v. Joiner, No. C07940022, 1994 NASD Discip. LEXIS 200, at *12 (N.B.C.C. Dec. 8, 1994). The Hearing Panel believes that if NASD Regulation, as a matter of course, were to treat the assertion of the Fifth Amendment as mitigative for purposes of sanctions, this would be tantamount to recognizing the existence of a privilege that clearly does not apply in NASD Regulation’s investigations or disciplinary proceedings: only the state, not private entities, is prohibited from offering an individual the “Hobson’s choice between self-incrimination or loss of employment.” Vincent Musso, 47 S.E.C. 606, 1981 SEC LEXIS 994, at *8-9 (1981).

Moreover, notwithstanding Coniglione’s claim that he invoked his Fifth Amendment rights in good faith, he introduced no evidence to establish the extent to which, if at all, the subject matter of the criminal proceeding and NASD Regulation’s investigation overlapped. Obviously, the risk of self-incrimination and any prejudice that might result from giving testimony in a civil proceeding during the pendency of a criminal proceeding is substantially more likely if there is significant overlap between the issues in the two proceedings. Trustees of the Plumbers and Pipefitters Nat’l Pension Fund v. Transworld Mechanical, Inc., 886 F. Supp 1134, 1139 (S.D.N.Y. 1995).⁹ For that matter, it is not clear from the record that Coniglione was ever the target of any criminal investigation. (Tr. 77.)

in providing information requested by the NASD in order for the NASD to carry out its regulatory functions. . . . Failing to cooperate with the NASD is a serious violation.”).

⁹ This is not to say that the assertion of the Fifth Amendment privilege in cases where there is substantial overlap between an NASD Regulation investigation and a criminal proceeding, or that a selective assertion of the privilege, necessarily would mitigate a respondent’s failure to comply with a Rule 8210 request. However, it does undercut his claim that his response was reasonable under the circumstances.

For the foregoing reasons, the Hearing Panel concludes that Coniglione should be barred from association with any NASD member firm in any capacity.¹⁰

V. ORDER

Vincent P. Coniglione is barred from association with any NASD member firm in any capacity for failing to testify at an on-the-record interview, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. The bar will become effective immediately upon this Decision becoming the final disciplinary action of the Association.¹¹

Andrew H. Perkins
Hearing Officer
For the Hearing Panel

Copies to:

Vincent P. Coniglione (by FedEx, next day delivery, and first-class mail)
Paul A. Lemole, Esq. (by facsimile and first-class mail)
Philip A. Rothman, Esq. (by first-class and electronic mail)
David E. Shellenberger, Esq. (by first-class and electronic mail)
Rory C. Flynn, Esq. (by first-class and electronic mail)

¹⁰ The Hearing Panel has not imposed a fine because the Respondent is barred. See Guidelines at 13.

¹¹ 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.