

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

---

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C10980054
	:	
v.	:	<b>HEARING PANEL DECISION</b>
	:	
	:	Hearing Officer - JN
	:	
	:	April 12, 1999
	:	
	:	
	:	
	:	
	:	
	:	
Respondent.	:	

---

*Digest*

The Department of Enforcement filed a Complaint alleging that Respondent \_\_\_\_\_ violated NASD Rules 8210 and 2110 by failing to respond to requests for information. The Hearing Panel found that \_\_\_\_\_ did respond, but failed to do so in a timely manner. As a sanction, the Hearing Panel ordered that its Decision be deemed a letter of caution to \_\_\_\_\_. The Hearing Panel also ordered that Respondent pay costs in the amount of \$998.85.

*Appearances*

Thomas M. Huber, Philadelphia, PA (Rory C. Flynn, Washington, DC, Of Counsel), for the Department of Enforcement.

\_\_\_\_\_, pro se.

## **DECISION**

### **I. Introduction**

The Department of Enforcement filed its Complaint against Respondent \_\_\_\_\_ on August 27, 1998, alleging that he violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by failing to respond to staff requests for information. A Hearing Panel, composed of an NASD Hearing Officer, and a current and former member of the District Business Conduct Committee for District 10, conducted a hearing in New York on March 19, 1999. The parties presented “Joint Stipulations of Fact” (with four attached exhibits) and two additional exhibits. The Respondent testified and introduced one exhibit.<sup>1</sup>

The Panel finds that Respondent failed to respond in a timely manner to NASD staff requests, in violation of Rules 2110 and 8210. In the particular circumstances of this case, the Panel further finds that the appropriate sanction is a Letter of Caution, in the form of this Decision.

### **II. Liability**

The facts relevant to Respondent’s liability are not disputed. The parties stipulated that (1) on August 15, 1997, pursuant to Rule 8210, NASD Examiner \_\_\_\_\_ requested that \_\_\_\_\_ answer questions concerning a customer complaint about an alleged unauthorized transaction; and that (2) Respondent received and understood this request, but did not answer it by August 28, 1997, the deadline specified (Ex. 3, pp. 1-2). The parties further stipulated that on

---

<sup>1</sup> The “Joint Stipulations” are cited as “Ex. A,” and the exhibits attached to it are referred to as “J1” through “J4.” The other two exhibits (CRD extracts) are cited as “Ex. B” and Ex. C.” The designation “Tr.” refers to the transcript of the March 19, 1999 hearing.

September 8, 1997, pursuant to Rule 8210, \_\_\_\_\_ requested that Respondent answer the prior questions by September 19, 1997 (Id., at p. 2).

Although \_\_\_\_\_ later sent two more requests under Rule 8210, the parties stipulated that “[o]n or about November 8, 1997, before \_\_\_\_\_ received \_\_\_\_\_ third letter, he prepared a written response and mailed it or caused it to be mailed to the District Office,” and that “[a] copy of \_\_\_\_\_ response is attached as Exhibit J4” (Ex. A, p. 3). Enforcement’s counsel explained to the Panel that although the Department had no record of receiving the response, “the staff is affording \_\_\_\_\_ the benefit of the doubt and will acknowledge that he prepared a reply and sent it on November 8<sup>th</sup>” (Tr. 11). In that document, Respondent addressed the staff’s questions about the customer complaint, explaining that he was not employed by the relevant firm at the time in question and that if he had been so employed, he would have canceled the particular transaction (Ex. A, Ex. J4).

NASD Procedural Rule 8210(a)(1) authorizes the NASD to require persons associated with a member of the NASD to provide information “orally or in writing with regard to any matter” under investigation. This Rule provides a means for the NASD to carry out its regulatory functions in the absence of subpoena power<sup>2</sup> and requires the “prompt cooperation of persons associated with members when requests for information are made. Failure to provide information fully and promptly undermines the NASD’s ability to carry out its regulatory mandate.”<sup>3</sup>

---

<sup>2</sup> Joseph Patrick Hannan, Exchange Act Release No. 40438, 68 S.E.C. Docket 24, 26 (September 14, 1998). See also Richard J. Rouse, Exchange Act Release No. 32658, 51 S.E.C. 581 (1993), 1993 SEC LEXIS 1831, at \*7 (citing former Article IV, Section 5); John J. Malach, Exchange Act Release No. 32743, 51 S.E.C. 618 (1993), 1993 SEC LEXIS 2026, at \*7 (citing former Article IV, Section 5).

<sup>3</sup> Michael David Borth, 51 S.E.C. 178, 180 (1993) (emphasis added).

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10980054.**

On this record, there is no question about Respondent's liability. Enforcement properly invoked Rule 8210, seeking information in the course of investigating a customer complaint of a possible unauthorized transaction (Ex. A, Exs. J1 - J3). It is undisputed that the first two staff requests required responses by August 28, 1997 and September 19, 1997 respectively, and that \_\_\_\_\_ did not reply until November 8, 1997, when he prepared and mailed his response to the District office (Ex. A, p. 3). When asked whether they agreed with the Hearing Officer that "what we have here is an admitted case of a failure to respond timely," Enforcement's counsel and Respondent agreed, while Respondent added that "there are mitigating circumstances" (Tr. 39).

In these circumstances, the fact that the Complaint charged Respondent with a failure to respond does not prevent the Panel from concluding that he committed the lesser offense of failing to respond in a timely manner. See District Business Conduct Committee v. Weiss, 1997 NASD Discip. LEXIS 10 (January 21, 1997); District Business Conduct Committee v. Quiel, 1996 NASD Discip. LEXIS 35 (October 30, 1996), aff'd, 1997 SEC LEXIS 1878 (September 11, 1997); and District Business Conduct Committee v. LaPlante, 1994 NASD Discip. LEXIS 202 (October 6, 1994), all recognizing that a failure to respond can be reduced to a failure to respond timely, where, as here, the record warrants that adjustment. Cf. Daniel Joseph Avant, Exchange Act Rel. No. 36423, 1995 SEC LEXIS 2816 (October 26, 1995) (complaint alleging failure to pay arbitration award also encompassed allegations of untimely payment).

### **III. Sanctions**

For a person's failure to respond in a timely manner to Rule 8210 requests, the NASD Sanction Guidelines (1998) recommend fines of \$2,500 to \$25,000 and consideration of suspension for up to two years (at p. 31). At the same time, the Guidelines recognize that:

Depending on the facts and circumstances of a case, Adjudicators may determine that no remedial purpose is served by imposing a sanction within the range recommended in the applicable guideline, i.e. that a sanction below the recommended range, or no sanction at all, is appropriate (General Principle 3, at p. 5).

The Panel considered the Guideline recommendation as a starting point, but concluded that, in the circumstances of this case, the appropriate sanction should be below the recommended range.

\_\_\_\_\_ testified that his failure to respond on time was due to time consumed in attempting to contact his former firm, where the alleged unauthorized transaction occurred. He did not want to answer NASD's requests without calling the firm "to find out what was going on with the guy's account" (Tr. 32). He persisted in calling despite the firm's repeated failures to return his calls (Tr. 28-29). He tried to reach the broker and the firm's owner "[a]nd they never returned my calls" (Tr. 32). The firm "didn't want to talk to me for whatever reason" (Tr. 33). Meanwhile, "shortly thereafter they went out of business. They weren't even around any more" (Tr. 32). Finally, "[r]ight before I sent the response in" (Tr. 34), \_\_\_\_\_ succeeded in talking with the broker, who told him that he had done nothing about the customer complaint and had "let it go" (Tr. 29).

In the Panel's view, this explanation, while not a defense to the charge, is reasonable and credible. \_\_\_\_\_ testified (consistent with his belated response to the Rule 8210 request) that he left the firm before the challenged transaction occurred, and that the account was taken over by a new broker (Tr. 25). Because he was no longer employed there, he presumably had no idea about what, if anything, the firm may have done concerning the customer complaint. At the same time, he was confronted with NASD's demand for "a signed, detailed, written statement addressing" these allegations of serious misconduct (Ex. A, Ex. J1). In these circumstances, to assure accuracy in a "detailed, written

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10980054.**

statement” about events that happened after he left, it was understandable that Respondent attempted to contact the firm before answering the staff requests.

That the firm’s broker and owner repeatedly failed to return his calls, with concomitant passage of time, is also consistent with the circumstances. Respondent left the firm “because I had differences with the owner” (Tr. 25). Moreover, his calls were about an error which the firm’s broker had ignored and for which the broker and the firm were responsible. In addition, the firm was about to go out of business (Tr. 28-29). These circumstances are consistent with a series of unreturned telephone calls.

Respondent further testified that, after sending the response, he had no further contact with the NASD because his CRD record showed that the case was “closed” (Tr. 26). At the Panel’s request, Enforcement obtained and introduced the relevant CRD record, which shows that the firm had reported the status of the underlying complaint as “closed” (Tr. 44, 46-47; Ex. C). In the Panel’s view, the corroboration of Respondent’s testimony on this matter strengthened his credibility.

There was no suggestion that \_\_\_\_\_ delay in responding to the Rule 8210 requests actually hampered or prejudiced the Department’s investigation. Indeed, the record suggests that the untimeliness had no regulatory significance. The firm “fixed” the complaining customer’s account and recorded the matter as “closed” (Tr. 26; Ex. C). Counsel for the Department stated that “[f]rom a regulatory standpoint [the customer complaint] was filed without action,” explaining that “the staff made a determination there was nothing in the circumstances that warrant any formal disciplinary proceeding” (Tr. 42).

Nor was there any evidence that Respondent’s conduct involved an attempt to conceal or to provide inaccurate or misleading information to the NASD. For all that appears on this record, his response (albeit belated) was entirely truthful.

**This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C10980054.**

Finally, Respondent, with several years of experience in the securities industry, has no disciplinary history (Exs. B and C).

As a general proposition, a failure to respond timely to Rule 8210 requests is, of course, a very serious matter. However, the Department of Enforcement itself apparently recognized that the instant case was not among the most serious violations. It recommended a “short suspension” limited to Respondent’s functioning in his registered capacity, for not more than 30 days (Tr. 51, 53). As to monetary sanctions, Enforcement first supported a “low level fine” of \$2,500. Later, after reviewing Respondent’s financial submission, counsel stated that “a fine would be a substantial hardship in this case” and recommended censure and a suspension of not more than 30 days (Tr. 53).

The Panel has considered suspension and a fine, but concludes that because of the above mitigating circumstances, and Respondent’s financial situation, such sanctions would be inappropriate. The Panel finds that, in this case, a Letter of Caution will satisfy NASD’s remedial goals. In addition, the Panel assesses a total of \$998.85 in costs, reflecting a standard administrative fee of \$750, plus \$248.85 in transcript costs. Respondent may arrange to pay these costs on an installment basis.<sup>4</sup>

**HEARING PANEL**

---

Jerome Nelson  
Hearing Officer

Dated: Washington, DC  
April 12, 1999

---

<sup>4</sup> 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.