

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C02980051
v.	:	
	:	
J. ALEXANDER SECURITIES, INC.	:	Hearing Panel Decision
(BD #7809),	:	
	:	Hearing Officer - GAC
JAMES ALEXANDER	:	
(CRD #2762),	:	
	:	
GORDON KERR	:	
Walnut, CA	:	
(CRD #268444),	:	July 6, 1999
	:	
Respondents.	:	
	:	

Digest

The Department of Enforcement (“Enforcement”) filed a one cause Complaint alleging that Respondents J. Alexander Securities, Inc., James Alexander and Gordon Kerr (“Respondent” or “Kerr”) violated Article III, Section 3(b) of the NASD’s By-Laws, Membership and Registration Rule 1021, and Conduct Rule 2110 by permitting Kerr to function as a securities principal while Kerr was ineligible to act in that capacity.¹

¹ The Hearing Officer previously issued an Order Accepting the Offers of Settlement tendered by J. Alexander Securities, Inc. and James Alexander. Thus, the findings and conclusions set forth in this decision are applicable only to Kerr and are not binding on any of the other named Respondents.

Based on the hearing record, the Hearing Panel found that Kerr committed the violations as alleged in the Complaint. The Hearing Panel fined Kerr \$10,000, suspended him in all capacities for 45 days, and barred him as a principal.

Appearances

Joy H. Hansler, Regional Attorney, Los Angeles, CA, (Rory C. Flynn, Washington, DC, Of Counsel), on behalf of the Department of Enforcement.

Gordon Kerr, *pro se*.

DECISION

I. PROCEDURAL BACKGROUND

A. Complaint

Enforcement filed a single cause Complaint on September 8, 1998. The Complaint alleges that that on or about May 23, 1983, the Securities and Exchange Commission (“SEC” or “Commission”) issued an order in which it barred Kerr from acting as a securities principal for 14 months, and required Kerr to apply for reinstatement of his principal’s license before associating with any NASD member firm in that capacity. According to the Complaint, Kerr never applied for reinstatement of his principal’s license. Nonetheless, the Complaint alleges that Kerr became and remained associated with J. Alexander Securities, Inc. (“JAS”) in a principal capacity from on or about August 16, 1995 through July 1997 (the “review period”).² The Complaint also alleges that during the review period, Kerr, among other things, was allowed to review and approve securities transactions, accept new accounts on behalf of JAS, and supervise registered representatives.

Based on these allegations, Enforcement charges Kerr with violations of Article III, Section 3(b) of the NASD's By-Laws, Membership and Registration Rule 1021, and Conduct Rule 2110.

B. Answer

The Respondent filed an Answer on October 2, 1998. Kerr admitted in his Answer that he has been associated with JAS since on or about August 16, 1995, and that he became registered with JAS as a General Securities Representative on or about October 2, 1996.³ Respondent further admitted that he became statutorily disqualified pursuant to a March 4, 1983 order issued by the SEC. Kerr denied Complainant's allegation that he never applied for reinstatement of his principal's license. To the contrary, Kerr claimed that Enforcement "consistently and unyieldingly resisted the Respondent's pleas for reinstatement by citing rules and regulations implemented years after the Respondent had [settled with the SEC]."⁴

The Respondent denied that he performed principal functions or postured as a principal. Kerr stated that he initialed trade tickets and reviewed new account forms for completeness. He said, however, that for both of these functions the documents were

² Complaint, ¶ 5.

³ Respondent's Answer, ¶ 2.

⁴ Respondent's Answer, ¶3. The issue as to whether Kerr ever attempted to be reinstated need not be resolved by the Hearing Panel. Kerr admits that the SEC bar was in effect during the review period. Hearing Tr., p. 70.

subsequently approved by a principal.⁵ Kerr denies supervising any registered representatives, or any other JAS employees.⁶

Kerr included six affirmative defenses in his Answer. First, Kerr claimed that his compensation was not commensurate with what someone with a principal's license would earn.⁷ Second, Kerr claimed he received no fringe benefits at JAS.⁸ Third, Kerr also asserted that he received a bonus prorated with those of JAS hourly employees, and that, traditionally, officers receive a higher bonus than hourly employees.⁹ Kerr's fourth affirmative defense claimed he was compensated for his technical knowledge and operational ability, a ministerial role.¹⁰ Kerr also claimed that the disciplinary action is prejudicial, given the NASDR staff's prior interaction and advice to JAS and Kerr.¹¹ Finally, Kerr claimed that the NASD's Denver office conducted a hearing in June 1984, based on the identical documentation that the SEC examined in 1983. The NASD censured Kerr in that proceeding.¹²

⁵ Respondent's Answer, ¶¶ 5 - 6.

⁶ Respondent's Answer, ¶ 7.

⁷ Respondent's Answer, ¶ 10.

⁸ Respondent's Answer, ¶ 11.

⁹ Respondent's Answer, ¶ 12.

¹⁰ Respondent's Answer, ¶ 13.

¹¹ Respondent's Answer, ¶ 14.

¹² Respondent's Answer, ¶ 15. The Respondent also included in his Answer a Counterclaim, charging Enforcement with "willfully, intentionally, and unyieldingly [depriving Kerr] of the opportunity to earn a living." The Hearing Officer ruled, prior to the Hearing, that the Hearing Panel lacked jurisdiction with regard to Kerr's counterclaim. Transcript of Pre-Hearing Conference, pp. 29-32, January 6, 1999.

C. The Hearing

The Hearing was held in Los Angeles, California on January 14, 1999, before a Hearing Panel composed of the Hearing Officer, and two current members of the District 2 Committee. Enforcement presented two witnesses, James Alexander (“Alexander”), and Kerr, who also testified on his own behalf. Alexander was the Chief Executive Officer of JAS during the relevant period, and maintained that position as of the date of the Hearing

The Hearing Officer admitted into evidence 11 exhibits Enforcement offered without objection from the Respondent. (CX 1 - 12).¹³ The Hearing Officer also admitted 29 exhibits Respondent offered. (RX 1 - 29).¹⁴

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Kerr’s Registration Limitation Imposed by the SEC

In 1983, the SEC issued findings and an order imposing remedial sanctions in a case in which Kerr was a respondent. (“SEC Order”).¹⁵ In the SEC Order, the Commission found that Kerr willfully aided and abetted violations of Sections 15(c)2-4 and 17(a) of the Exchange Act and Rules 15c2-4, 15c3-3, 17a-3, 17a-4, 17a-5 and 17a-11 promulgated thereunder.¹⁶ The findings were made pursuant to an offer of settlement

¹³ References to Enforcement’s Exhibits admitted at the Hearing are designated “CX.” CX-6 was marked but not offered at the Hearing.

¹⁴ References to Respondent’s Exhibits admitted at Hearing are designated “RX.”

¹⁵ In re Harold Junior Morris; Craig Staton Norton, Lloyd John Harty; Richard Bruce Graibus; and Gordon Kerr, Exchange Act Rel. No. 34-19805 (May 23, 1983). CX 4.

¹⁶ Id.

submitted by Kerr that the SEC determined to accept. In connection with those findings, the SEC determined that Kerr should:

(a) Be barred from acting as a principal, financial principal, officer, director, owner, or employee of a broker or dealer other than as a supervised employee, provided, however, that at the end of fourteen (14) months Kerr may apply to the Commission for permission to work in the capacity of principal (other than financial principal, or as an associated person without supervision (other than as a financial principal)); and at the end of eighteen (18) months, Kerr may apply to the Commission for permission to work in the capacity of financial principal, officer, director, or owner of a broker-dealer.

(b) Comply with the following undertaking:

In the event that Kerr should become employed by or associated with a broker or dealer during the period of the bar, [he] will have such broker or dealer submit an affidavit to the Denver Regional Office of the Commission to the effect that he is properly supervised, is not a principal, financial principal, officer, or director of such firm and that such status will not change without prior consent of the Commission.¹⁷

The Hearing Panel finds, based on the evidence and the Respondent's own admission, that the 1983 SEC bar prohibiting Kerr from acting as a principal, financial principal, officer, director, or owner of a broker or dealer, remained in effect from 1995 through 1997, the time periods alleged in the Complaint.¹⁸

Given the limitations on Kerr's business activities imposed by the SEC in 1983, the Hearing Panel needed to determine whether Kerr overstepped those limitations and acted in a principal capacity while employed at JAS, as alleged in the Complaint. After a careful review of all the evidence, the Hearing Panel finds that Kerr acted in a principal

¹⁷ CX 4, pp. 2-3.

¹⁸ CX 4; Hearing Transcript ("Hearing Tr."), p. 70.

capacity while at JAS, in direct contravention of the SEC Order limiting his activities with member firms.

B. Kerr's Business Activities at JAS

JAS became a member of the NASD in January 1979.¹⁹ In August 1995, Alexander hired Kerr as Compliance Director for JAS.²⁰ Alexander claims that he was not concerned with whether Kerr was licensed as a principal when he hired Kerr.²¹ Alexander stated that although he probably assumed Kerr was a licensed principal when he hired Kerr, he did not find out that Kerr was not licensed as a principal until approximately August 1997.²²

The Hearing Panel found several distinct bases for determining that Kerr acted in a principal capacity without being properly licensed. Those bases are discussed below.

New Account Documentation

NASD Conduct Rule 3110(c)(1) requires, among other things, that member firms include in new customer account documents the signature of the firm's principal who accepts the account on behalf of the firm.²³ The Hearing Panel found that Kerr improperly acted in a principal capacity when he routinely signed new account forms in the space provided for the firm's principal. The uncontested evidence showed that Kerr signed the new account forms, throughout the two year review period, in the space

¹⁹ CX 1.

²⁰ Hearing Tr., p. 20.

²¹ Hearing Tr., pp. 20-21.

²² Hearing Tr., p. 21. However, as noted *infra*, Kerr never attempted to register as a principal at JAS - a fact that Alexander should have known.

²³ NASD Conduct Rule 3110(c)(1)(C); NASD Membership and Registration Rule 1021(b).

provided for the principal's signature. The new account forms showed no signatures of a licensed principal of the firm. Kerr's approval of new account forms is consistent with the JAS procedures manual. The section of the JAS procedures manual addressing the Compliance Director's responsibilities states: "In the exercise of his compliance responsibilities, the Compliance Director, or his designee, shall: ... [r]eview and approve the opening of all new accounts."²⁴ Kerr acknowledged that, during this period, there was no one else at JAS in the Compliance Department.²⁵

Representations to NASD Regulation Staff

The Hearing Panel found that Kerr affirmatively stated that he was a supervisor of at least one registered representative and that he approved certain trades in a series of written communications with the NASD staff.²⁶ In a letter dated May 30, 1997, the NASD requested that Kerr identify the "[t]he name of the person(s) responsible for approving transactions executed by [registered representative BR]" and "[t]he name of the individual(s) who approved the specific transactions executed in [a customer's] account"²⁷ In a letter dated June 11, 1997, Kerr responded that "Gordon Kerr is responsible for supervising [registered representative BR]" and that "Gordon Kerr approved these trades as he does all trades."²⁸

²⁴ CX 9, p. 7.

²⁵ Hearing Tr., p. 62.

²⁶ CX 11, p. 2.

²⁷ Id.

²⁸ CX 11, p. 3

At the Hearing, Kerr acknowledged writing and sending the answers noted above, but claimed that the response he gave the NASD in that letter “wasn’t a true statement” as it related to supervision of the registered representative and approval of his trades.²⁹ Kerr claimed that he incorrectly stated such claims in the letter to the NASD for “expediency reasons.”³⁰

In a letter addressed to Alexander, dated February 28, 1997, the NASD requested that JAS provide the “[n]ame and CRD number for the supervisor of [registered representative BR].”³¹ The letter also requested “[a] signed statement from [registered representative BR’s] supervisor regarding the customer’s allegations.”³² The firm’s response, dated March 20, 1997, was signed by Kerr.³³ It noted that “Gordon Kerr, Compliance Director, 268444,” was the supervisor for the specified registered representative.³⁴ Regarding the “signed statement from [the] supervisor,” the response letter included “Gordon Kerr’s Statement.” In his statement, Kerr described at length the steps he took in speaking to and corresponding with the registered representative and customer in question. There is no reference in the letter to any actions having been taken by any JAS principal.³⁵ The Hearing Panel finds that the series of letters from Kerr to the NASD, indicating Kerr’s responsibility as a supervisor and claiming responsibility for

²⁹ Hearing Tr., p. 107.

³⁰ Hearing Tr., p. 106.

³¹ CX 10, p. 1.

³² Id.

³³ CX 10, pp. 5-8.

³⁴ Id. at p. 5

approving trades, is compelling evidence that Kerr functioned as a principal at JAS during the relevant period.

Review of Order Tickets

Kerr's testimony, as well as copies of actual order tickets, established that, throughout the two year review period, Kerr routinely initialed the firm's order tickets.³⁶ This activity was consistent with Kerr's responsibilities listed in the procedures manual, which included "[r]eview all account transactions, including a daily review of all purchases and sales."³⁷ Here, Kerr admitted that he reviewed order tickets during this period but stated that his review was limited to making sure that there were proper disclosures on the order tickets, and that for "a big trade, [he] wanted to make sure the money was in."³⁸ According to Kerr, Alexander fulfilled the firm's obligation of having a supervisor review the trades by reviewing the daily commission log the day after the trades.³⁹ Although principals often initial order tickets as evidence of their review, it is not uncommon for individuals other than principals to also initial order tickets.⁴⁰ However, Kerr's initials on order tickets are the only evidence of the firm's review of trading activity, and Kerr acknowledged responsibility for approving "all trades" in

³⁵ Id. at pp. 5-8.

³⁶ Hearing Tr., p. 100; CX 7.

³⁷ CX 9, p. 7.

³⁸ Hearing Tr., p. 102.

³⁹ Hearing Tr., pp. 101-102. Commission logs for JAS were not introduced as evidence. There is no evidence in the record reflecting whether the commission log contained the information necessary for a supervisor to make a complete and proper review of the trading activity required under NASD rules.

⁴⁰ Initialing order tickets is one of several acceptable methods that may be used by principals to document review of order tickets. Others include initialing blotters, or filling out review logs. See Notice to Members 98-96.

correspondence with the NASD. The Hearing Panel therefore finds the initials on the order tickets to be corroborative evidence that Kerr was performing as a principal in reviewing and approving order tickets during the two year review period.

Correspondence

The JAS procedures manual in effect during the review period stated that one of the “Prohibited [registered representative] Business Practices” was to “[s]end out any correspondence, except pre-approved ‘form’ letters, without the prior approval of the Compliance Director.”⁴¹ The procedures manual also stated that a “[a] copy of all correspondence must be kept in separate files for each account executive, and initialed by a Registered Principal daily.”⁴² Kerr acknowledges that he was responsible for reviewing the outgoing correspondence.⁴³ The Hearing Panel therefore finds that Kerr was performing a principal function by reviewing and approving outgoing correspondence during the review period.

Other References in the Procedures Manual

In addition to the responsibility for outgoing correspondence, the procedures manual ascribes several other responsibilities to Kerr, as Compliance Director, and refers to him as a supervisor. Many of these responsibilities are normally performed by a principal. The procedures manual lists Kerr, as Compliance Director, under a heading “Supervisory Positions.” The only other people listed under that heading are James

⁴¹ CX 9, pp. 16-17.

⁴² CX 9, p. 54.

⁴³ Hearing Tr., p. 62.

Alexander, Registered Municipal Bond Principal, and Frank McCormack, Registered Options Principal.

The procedures manual also provides that Kerr is responsible for conducting an annual review of JAS's business activities. According to the procedures manual "each registered representative will participate in an annual review, or meeting, conducted by the Compliance Director, or his designee, and other [JAS] supervisory personnel, to discuss compliance matters."⁴⁴

The procedures manual also states that the "Compliance Director or other designated principal shall be certain that a documentary record exists to show that required supervisory reviews were made."⁴⁵ The Hearing Panel finds that JAS intended that the Compliance Director's position be that of a principal of the firm.

The Hearing Panel found that other activities Kerr performed did not constitute violative behavior as alleged in the Complaint. Enforcement argued that Kerr was deceptive in not informing JAS that he was barred as a principal. The Hearing Panel found that Kerr never registered as a principal. Further, Kerr properly disclosed his prior disciplinary history on the Form U-4 for JAS.⁴⁶ The Hearing Panel also found that Kerr's training of registered representatives at the firm did not constitute violative activity, as it is not unusual to have such training conducted by persons who are not principals, including outside consultants.

⁴⁴ CX 9, p. 2.

⁴⁵ CX 9, p. 8.

⁴⁶ CX 5, 6.

Based on the discussion above, having considered all of the arguments and evidence presented by both Parties, the Hearing Panel finds that Kerr acted as a principal at JAS while not being registered as a principal, and thus violated Article III, Section 3(b) of the NASD's By-Laws, Membership and Registration Rule 1021, and Conduct Rule 2110.

III. SANCTIONS

The Hearing Panel reviewed the principal considerations outlined in the NASD Sanction Guidelines ("Guidelines") in determining the appropriate sanctions. Regarding Kerr's disciplinary history, the NASD decision issued in connection with the joint SEC-NASD examination that led to his initial bar as a principal, held that Kerr was responsible for the underlying violation since he was the supervisor for the individuals who committed the violative acts.⁴⁷ However, it went further to state that, "[the NASD does] not believe that Mr. Kerr was fully aware of the devious acts and practices that were found to exist at [the member firm]."⁴⁸

The Hearing Panel also considered the evidence in the record regarding Kerr's compensation as a Compliance Director, and his limited financial means. However, Kerr has many years of experience in the securities industry and clearly should have known that he was performing functions that were required to be done by a principal. Further, he knowingly performed those functions over a two year period. As Compliance Director, responsible for drafting and maintaining the procedures manual, Kerr should have taken the appropriate measures to ensure compliance with the registration requirements.

⁴⁷ RX 24, p. 21.

⁴⁸ Id.

For registration violations, the Guidelines recommend that a fine ranging from \$2,500 to \$50,000 be imposed. In egregious cases, the Guidelines also recommend that a Hearing Panel consider suspending the individual in any or all capacities for 30 business days to two years or barring the individual. Enforcement recommended that Kerr be censured, fined \$20,000, that he be required to disgorge in whole or in significant part the financial benefit to himself as a result of his misconduct, and that he be barred as a principal.

The Hearing Panel did not find that Kerr benefited financially as a result of his misconduct. The misconduct, however, is nonetheless egregious given the significance of the position Kerr held at the firm and duration of the violative conduct. Therefore, while the Hearing Panel did not believe that a fine as high as recommended by Enforcement was warranted, the Hearing Panel did find, consistent with the Guidelines, that a suspension in all capacities and a bar in a principal capacity was appropriate.

By reason of the foregoing, the Hearing Panel hereby fines the Respondent \$10,000, suspends him in all capacities for 45 days and bars him from acting in a principal capacity.

IV. CONCLUSION

The Hearing Panel found that Respondent Gordon Kerr violated Article III, Section 3(b) of the NASD's By-Laws, Membership and Registration Rule 1021, and Conduct Rule 2110. The Hearing Panel fined the Respondent \$10,000, suspended him for 45 days from associating with any member firm in any capacity, and barred him from acting in a principal capacity.

The Hearing Panel also assessed costs against the Respondent in the amount of \$1,582.00, consisting of a \$750.00 administrative fee and \$832.00 for the cost of the Hearing transcript.⁴⁹ The sanctions shall become effective on a date set by the Association, but not earlier than 30 days after the date this decision becomes the final disciplinary decision of the Association; provided, however, that a bar or expulsion shall become effective on the date this decision becomes a final disciplinary action.

Hearing Panel

by: _____
Gary A. Carleton
Hearing Officer

Copies to:

Joy H. Hansler, Esq. (via first class mail and electronically)
Rory Flynn, Esq. (via first class mail and electronically)
Gordon Kerr (via first class and certified mail)

⁴⁹ 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.