

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant

v.

SHAWN D. BURKE
(CRD No. 1463381),

Respondent.

Disciplinary Proceeding
No. 2005000924701

Hearing Officer – RSH

DEFAULT DECISION

April 10, 2006

Respondent violated NASD Conduct Rules 2330(a) and 2110 by misusing or converting customer funds and NASD Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to NASD requests for information. For these violations, Respondent is barred from associating with any NASD member in any capacity.

Appearances

Paul D. Taberner, Esq., Regional Counsel, John M. D'Amico, Esq., Regional Chief Counsel, Boston, MA (Rory C. Flynn, Esq., Of Counsel, Washington, DC) for Complainant.

No appearance by or for Respondent.

DECISION

I. Introduction

The Department of Enforcement filed a Complaint (attached to this Decision as Exhibit A) on November 28, 2005, alleging that Respondent Shawn D. Burke violated NASD Conduct Rules 2330(a) and 2110 by misusing customer funds and NASD Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to NASD requests for information.

Respondent did not file an Answer to the Complaint. On February 16, 2006, Enforcement filed a Motion for Entry of Default Decision, which was supported by the Affidavit

of Paul D. Taberner and nine exhibits. Respondent did not file a response to the motion.

Accordingly, for the reasons set forth below, Enforcement's motion is granted.¹

II. Jurisdiction

The Complaint alleges, and the Respondent's CRD record shows, that Respondent was registered as a Variable Contracts Representative of NASD member firm New England Securities ("NES") from February 1986 to May 2, 2005.² Respondent is not currently registered with an NASD member firm; however, he remains subject to NASD jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of NASD's Bylaws, because (1) the Complaint was filed within two years following the termination of Respondent's employment and registration with NES and (2) the Complaint charges him with misconduct committed while he was associated with NES and with failing to respond to NASD requests for information made during the two-year period following his termination from NES.

III. Respondent's Default

Enforcement sent the Complaint and Notice of Complaint to Respondent on November 22, 2005, by first-class and certified mail to the most recent address listed in the Central Registration Depository ("CRD address") and to an address NASD obtained from a current Equifax report for Respondent ("Equifax address").³ On November 28, 2005, NASD received the certified mailing return receipt for the Complaint sent to the Equifax address, with the signature of "Patricia Burke" reflecting a delivery date of November 25, 2005.⁴

Respondent did not file an Answer by the December 20, 2005 due date. On December 20, 2005, Enforcement sent the Complaint and Second Notice of Complaint by first class and

¹ The factual determinations in this decision are based on the allegations in the attached Complaint, which are deemed admitted, as well as the additional materials filed by Enforcement with its motion.

² Complainant's Default Exhibit ("Exh. C")-1.

³ Taberner Declaration, ¶23.

⁴ Exh. C-7.

certified mail to Respondent's CRD address and to his Equifax address.⁵ On January 12, 2006, both certified letters were returned to NASD marked "return to sender". The first class letters were not returned to NASD.⁶

The Second Notice of Complaint required Burke to submit an answer to the Complaint by January 6, 2006. To date, Respondent has failed to answer or otherwise respond to the Complaint.⁷ On February 15, 2006, Enforcement sent the Motion for Entry of Default Decision by certified mail to Respondent's CRD address and Equifax address.

Enforcement served the Complaint and Notices of Complaint on Respondent in accordance with Rule 9134, thereby giving him constructive notice of this proceeding. By failing to file an Answer or otherwise respond to the Complaint, Respondent defaulted. Pursuant to Procedural Rule 9269(a)(2), the Hearing Officer will deem the allegations in the Complaint admitted.

IV. Findings of Fact and Conclusions of Law

A. Misuse of Customer Funds

The First through Fifth Causes of the Complaint allege that Respondent violated Conduct Rules 2330(a)⁸ and 2110 by accepting checks, made payable to himself or as an agent of Health Professional Solutions ("HPS"), from five customers. Between May 3, 2003 and January 20, 2005, Respondent accepted twelve customer checks totaling approximately \$313,256.84. Rather than using the funds to benefit the customers, Respondent deposited the funds into a bank account that he controlled.

⁵ Taberner Declaration, ¶29; Exh. C-9.

⁶ Taberner Declaration, ¶¶30, 31; Exh. C-9.

⁷ Taberner Declaration, ¶33.

⁸ "No member or person associated with a member shall make improper use of a customer's securities or funds".

Cause One of the Complaint alleges that on May 3, 2004 and May 11, 2004, customer DA wrote two checks to Respondent, as agent for HPS, in the amounts of \$5,000 and \$5,700, respectively. DA intended the funds to be invested in HPS; however, Respondent deposited the checks into a bank account that he controlled.

Cause Two alleges that on May 21, 2004 and June 14, 2004, two checks in the amounts of \$25,000 each were written from customer CB's account and made out to Respondent for the purchase of municipal bonds for CB. Rather than using the funds to purchase the municipal bonds, Respondent deposited the funds in a bank account that he controlled.

Cause Three alleges that on July 19, 2004, August 16, 2004 and September 13, 2004, Burke accepted three checks in the amount of \$30,000 each, made payable to himself, as an agent of HPS, from customer CC. CC gave the checks to Respondent as an investment in HPS; however, HPS was out of business and Respondent deposited the funds in a bank account that he controlled.

Cause Four alleges that on October 22, 2004, November 13, 2004 and December 8, 2004, Respondent accepted three checks made payable to himself as an agent of HPS, from customers HH and JH. The amount of the checks totaled \$79,500. JJ and HJ gave these funds to Respondent as an investment in HPS; however, Respondent deposited the funds in a bank account that he controlled.

Cause Five alleges that on January 14, 2005, and January 20, 2005, Respondent accepted two checks, totaling \$83,056.84, made payable to himself as an agent of HPS, from customer WB. Respondent told WB that he was going to use the money to fund a variable annuity contract issued to WB. Instead, Respondent deposited the checks into a bank account that he controlled.

Enforcement staff has the following documentation supporting its charges: a letter written by Respondent admitting that he received checks from a customer and used the funds for his own personal use, copies of the customers' checks made payable to Respondent as agent for HPS and a copy of NES's investigative report, which includes details from interviews with Respondent's customers.⁹

Enforcement's allegations, which are deemed admitted, are sufficient to establish that Respondent misused customers' funds. NASD Conduct Rule 2330(a) provides that "no member or person associated with a member shall make improper use of a customer's securities or funds." An associated person makes improper use of customer funds where he or she fails to apply the funds as directed by the customer.¹⁰ Indeed, the fact that Respondent deposited the customers' funds into a bank account that he controlled raises his conduct to the level of conversion.¹¹ Conduct Rule 2110 provides that a member "shall observe high standards of commercial honor and just and equitable principles of trade." The misuse or conversion of customer funds is patently antithetical to NASD standards and principles.¹²

Accordingly, the Hearing Officer finds that Respondent violated NASD Conduct Rules 2330(a) and 2110 by misusing or converting customer funds.

B. Failure to Respond to NASD Requests for Information

The Sixth Cause of the Complaint alleges that Respondent failed to respond to numerous NASD requests for information and documents concerning allegations that he had misappropriated customer funds. The Complaint alleges that, pursuant to Procedural Rule 8210,

⁹ Taberner Declaration, ¶16.

¹⁰ *DOE v. Shailesh B. Patel*, Complaint No. CO2990052, 2001 NASD Discip. LEXIS 42, at *25 (NAC, May 23, 2001).

¹¹ See *Dep't. of Enforcement v. Kendzierski*, Complaint No. C9A980021 (NAC Nov. 12, 1999) ("Conduct Rule 2330(a) prohibits the 'improper use' of a customer's funds. 'Improper use' rises to the level of conversion where a registered representative deposits a customer's check into his own account...and fails to repay the customer.").

¹² *Joel Eugene Shaw*, 1994 SEC LEXIS 2493, 51 S.E.C. 1224, 1226-27 (1994).

Enforcement sent Respondent requests for information on May 25, 2005, June 16, 2005, July 12, 2005, July 22, 2005 and August 4, 2005. All of the requests were sent to Respondent's CRD address and to his Equifax address by first class and certified mail.¹³ NASD received return receipts evidencing successful delivery of two letters dated June 16, 2005. The receipts were apparently signed by Respondent. Most of the other letters were not returned or were returned as undeliverable.¹⁴ Thus, Respondent received constructive and actual notice of NASD staff's 8210 requests for information. To date Respondent has not responded in any manner to the requests.

These allegations, which are deemed admitted, are sufficient to establish for purposes of this proceeding that Respondent failed to respond in any manner to Enforcement's requests for information and so violated NASD Procedural Rule 8210. A violation of Procedural Rule 8210 is also a violation of Conduct Rule 2110.¹⁵

V. Sanctions

Enforcement has described Respondent's conduct as an egregious case of misusing customer funds which merits a bar under NASD Sanction Guidelines. That description is accurate; however, the Sanction Guidelines define "conversion" as "an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it." The Sanction Guidelines recommend a bar for conversion, regardless of amount converted.¹⁶ Respondent clearly "converted" customer funds by placing them into a bank account that he controlled.¹⁷ Whether characterized as "conversion" or

¹³ Taberner Declaration, ¶¶17-21.

¹⁴ Taberner Declaration, ¶18; Exh. C-3.

¹⁵ *Dep't of Enforcement v. Baxter*, No. C07990016, 2000 NASD Discip. LEXIS 3, at *25 (N.A.C. Apr. 19, 2000); *Joseph P. Hannan*, Exchange Act Release No. 40,438, 1998 SEC LEXIS 1955, at *9 (September 14, 1998).

¹⁶ NASD Sanction Guidelines at 38 (2005 ed.).

¹⁷ Fn 11, *supra*.

“improper use of funds”, Respondent’s conduct was egregious and there is no evidence that Respondent misunderstood his customers’ intent or that other mitigating circumstances exist to justify a sanction of less than a bar. Consequently, a bar is appropriate and will be imposed.¹⁸

NASD Procedural Rule 8210 authorizes NASD to require any person subject to its jurisdiction to provide information and testimony related to any matter under investigation. The Rule serves as a key element in NASD’s oversight function and allows NASD to carry out its regulatory functions without subpoena power.¹⁹ For failing to respond in any manner to NASD staff requests for information issued pursuant to Procedural Rule 8210, the Sanction Guidelines recommend the imposition of a bar unless mitigating circumstances exist to warrant a lesser sanction.²⁰ Here, there is no evidence of mitigating circumstances that would warrant a lesser sanction. Accordingly, Respondent will be barred for this violation.

VI. Conclusion

Respondent Shawn D. Burke violated Conduct Rules 2330(a) and 2110 by misusing or converting customer funds. He also violated Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to NASD requests for information. For each of these violations, he is barred

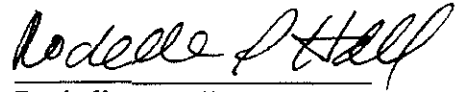
¹⁸ Restitution to the customers in this case would be appropriate; however, Enforcement has not requested restitution and the record does not contain facts sufficient to allow findings of actual losses to customers. There is, for example, no information concerning the use of the customers’ funds after they were placed in the bank account that was controlled by Respondent, nor is there information concerning other restitution that may have been made by NES.

¹⁹ See *Joseph G. Chiulli*, Exchange Act Release No. 42,359, 2000 SEC LEXIS 112, at *16; *Dep’t of Enforcement v. Benz*, No. C01020014, 2003 NASD Discip. LEXIS 11, at *18 (OHO Mar. 4, 2003), *aff’d*, 2004 NASD Discip. LEXIS 7 (NAC May 11, 2004) (“Because NASD has no subpoena power, timely and full compliance with information requests is essential to NASD’s self-regulatory function.”).

²⁰ NASD Sanction Guidelines at 35 (2005 ed.).

from associating with any NASD member in any capacity. The bars will become effective immediately if this decision becomes NASD's final disciplinary action in this proceeding.

SO ORDERED.

A handwritten signature in cursive script, appearing to read "Rochelle S. Hall", written over a horizontal line.

Rochelle S. Hall
Hearing Officer

Copies to: Shawn D. Burke (*overnight and via first class mail*)
 Paul D. Taberner, Esq. (*electronically and via first class mail*)
 Rory C. Flynn, Esq. (*electronically and via first class mail*)
 Roger D. Hogoboom, Esq. (*electronically and via first class mail*)

EXHIBIT A

COPY

**NASD
OFFICE OF HEARING OFFICERS**

Department of Enforcement,

Complainant,

v.

Shawn D. Burke
(CRD No. 1463381)



Respondent.

Disciplinary Proceeding
No. 2005000924701

Hearing Officer -

COMPLAINT

Upon information and belief, Complainant alleges as follows:

1. Respondent Shawn D. Burke ("Burke") first became registered with an NASD member in 1986 as a Variable Contracts Representative. He was registered with New England Securities ("NES") in that capacity from approximately February 1986 to approximately May 2, 2005. He has not been registered with any member since May 2, 2005. NASD retains jurisdiction over Burke for purposes of this Complaint pursuant to Article V, Section 4 of NASD's By-Laws in that: the misconduct alleged in Causes One through Five occurred while Burke was associated with NES; and, this Complaint was filed within, and the violations of Procedural Rule 8210 alleged in Cause Six occurred within, two years of Burke's last registration with a member firm.

CAUSE ONE OF COMPLAINT

Misuse of Customer DA's Funds Violation of NASD Conduct Rules 2330(a) and 2110

2. The allegations in Paragraph 1 above are re-alleged and incorporated herein by reference.
3. On or about May 3, 2004 and on or about May 11, 2004, Burke accepted two checks made payable to himself, as an agent of a Pennsylvania company ("HPS"), from customer DA as an investment in HPS. DA issued the checks against her New England Securities ("NES") account after Burke stated that he and several agents were moving to a new company. The amount of these checks totaled \$10,700 (\$5,000 and \$5,700, respectively).
4. Rather than use these funds to benefit customer DA, Burke deposited the funds in a bank account he controlled.
5. By doing so, Burke violated NASD Conduct Rules 2330(a) and 2110.

CAUSE TWO OF COMPLAINT

Misuse of Customer CB's Funds Violation of NASD Conduct Rules 2330(a) and 2110

6. The allegations in Paragraphs 1 through 5 above are re-alleged and incorporated herein by reference.
7. On or about May 21, 2004 and on or about June 14, 2004, Burke accepted two checks made payable to himself, as an agent of HPS, from customer CB. The checks were issued against CB's account at NES after Burke advised WB, who holds power of attorney for his mother CB, to purchase municipal bonds for customer CB. The amount of these checks totaled \$50,000 (\$25,000 each).

8. Rather than use these funds to purchase municipal bonds for CB, Burke deposited the funds in a bank account he controlled.
9. By doing so, Burke violated NASD Conduct Rules 2330(a) and 2110.

CAUSE THREE OF COMPLAINT

Misuse of Customer CC's Funds Violation of NASD Conduct Rules 2330(a) and 2110

10. The allegations in Paragraphs 1 through 9 above are re-alleged and incorporated herein by reference.
11. On or about July 19, 2004, August 16, 2004, and September 13, 2004, Burke accepted three checks made payable to himself, as an agent of HPS, from customer CC. The amount of these checks totaled \$90,000 (\$30,000 each).
12. CC gave the funds to Burke as an investment in HPS. However, at the time Burke accepted these checks from CC, HPS was no longer in business.
13. Rather than use these funds to benefit CC, Burke deposited the funds in a bank account he controlled and converted them for his own use and benefit.
14. By doing so, Burke violated NASD Conduct Rules 2330(a) and 2110.

CAUSE FOUR OF COMPLAINT

Misuse of Customers HH and JH's Funds Violation of NASD Conduct Rules 2330(a) and 2110

15. The allegations in Paragraphs 1 through 14 above are re-alleged and incorporated herein by reference.
16. On or about October 22, 2004, November 13, 2004, and December 8, 2004, Burke accepted three checks made payable to himself, as an agent of HPS, from customers HH

and JH. The amount of these checks totaled \$79,500 (\$30,000, \$30,000, and \$19,500, respectively).

17. HH and JH gave these funds to Burke as an investment in HPS. However, at the time Burke accepted these checks from HH and JH, HPS was no longer in business.

18. Rather than use these funds to benefit HH and JH, Burke deposited the funds in a bank account he controlled.

19. By doing so, Burke violated NASD Conduct Rules 2330(a) and 2110.

CAUSE FIVE OF COMPLAINT

Misuse of Customer WB's Funds Violation of NASD Conduct Rules 2330(a) and 2110

20. The allegations in Paragraphs 1 through 19 above are re-alleged and incorporated herein by reference.

21. On or about January 14, 2005 and on or about January 20, 2005, Burke accepted two checks made payable to himself, as an agent of HPS, from customer WB. The amount of these checks totaled \$83,056.84 (\$5,000 and \$78,056.84, respectively).

22. At the time Burke accepted these checks from WB, HPS was no longer in business.

23. Burke told WB that he was going to use these monies to fund a variable annuity contract issued to WB. Rather than use these funds to fund a variable annuity contract for WB's benefit, however, Burke deposited the funds in a bank account he controlled.

24. By doing so, Burke violated NASD Conduct Rules 2330(a) and 2110.

CAUSE SIX OF COMPLAINT

Failure to Respond Violation of NASD Procedural Rule 8210 and Conduct Rule 2110

25. The allegations in Paragraphs 1 through 24 above are re-alleged and incorporated herein by reference.

26. By two letters dated May 25, 2005, NASD requested, pursuant to Procedural Rule 8210, information and documents from Burke regarding allegations that he had misappropriated client funds. Both letters, one by certified mail, and a second by regular mail, were sent to Burke's CRD address at [REDACTED] and requested a response by June 9, 2005. On June 6, 2005, both letters were returned as not deliverable as addressed-unable to forward.

27. By two letters dated June 16, 2005, NASD again requested, pursuant to Procedural Rule 8210, information and documents from Burke regarding allegations that he had misappropriated client funds. One letter, sent by certified mail, was sent to the [REDACTED] Baldwin Street address and a second letter, sent by certified mail, was sent to [REDACTED] [REDACTED]. NASD obtained the Canterbury Drive address from an Equifax report. On June 27, 2005, NASD received returned receipts evidencing successful delivery for both letters, with what appears to be Burke's signature on both receipt cards. The letters warned Burke that failure to produce the documents requested could result in disciplinary action against him by NASD. The letter sent to the Baldwin Street address required a response by June 27, 2005, and the letter sent to the Canterbury Drive address required a response by June 30, 2005. To date, Burke has failed to produce any requested information to NASD.

28. By four letters dated July 12, 2005, NASD requested, pursuant to Procedural Rule 8210, Burke's response to previous request letters dated May 25, 2005 and June 16, 2005.

These letters, which were included with the July 12 letter, requested information and documents from Burke regarding allegations that he had misappropriated client funds.

The letters required a response from Burke by July 21, 2005, and warned that failure to respond could subject Burke to disciplinary action. Two letters, one sent by certified mail, and a second by regular mail, were sent to the [REDACTED] Baldwin Street address. Two additional letters, one sent by certified mail and the second by regular mail, were sent to the [REDACTED] Canterbury Drive address. On July 19, 2005, the [REDACTED] Baldwin Street certified letter was returned to NASD as not deliverable as addressed-unable to forward. On July 25, 2005, the [REDACTED] Baldwin Street letter sent by regular mail was returned to NASD as not deliverable as addressed-unable to forward. On August 2, 2005, the [REDACTED] Canterbury Drive letter sent by certified mail was returned to NASD as unclaimed. The [REDACTED] Canterbury Drive letter sent by regular mail was not returned.

29. By two letters dated July 22, 2005, NASD requested, pursuant to Procedural Rule 8210, that Burke respond to previous request letters dated June 16, 2005 and July 12, 2005.

These letters, which were included with the July 22 letter, requested information and documents from Burke regarding allegations that he had misappropriated client funds.

The letters were sent by certified mail and regular mail to the [REDACTED] Canterbury Drive address, and required a response by August 2, 2005. The letters also warned Burke that a failure to respond could result in disciplinary action being taken against him. On August 15, 2005, the certified letter was returned to NASD as unclaimed. The letter sent by regular mail was not returned.

30. By four letters dated August 4, 2005, NASD made a final request, pursuant to Procedural Rule 8210, to Burke for his response to the May 25, 2005 and June 16, 2005 letters.

These letters, which were included with the August 4 letter, requested information and documents from Burke regarding allegations that he had misappropriated client funds.

Two letters, one sent by certified mail and the other by regular mail, were sent to the

█████ Baldwin Street address. Two additional letters, one sent by certified mail and the

other by regular mail, were sent to the █████ Canterbury Drive address. Each letter

required Burke to respond by August 15, 2005, and each warned that a failure to provide the requested information could result in disciplinary action being taken against him. On

August 11, 2005, the █████ Baldwin Street letter sent by certified mail was returned to

NASD as not deliverable as addressed-unable to forward. On August 25, 2005, the █████

Canterbury Drive letter sent by certified mail was returned to NASD as unclaimed.

Neither of the letters sent by regular mail were returned to NASD.

31. To date, Burke has failed to provide NASD any response to the letters requesting information from him.

32. Based on the foregoing, Burke violated NASD Procedural Rule 8210 and Conduct Rule 2110.

PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

A. Findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;

B. An order imposing sanctions upon the Respondent in accordance with NASD Rule 8310;

- C. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330; and
- D. An order imposing any other fitting sanction.

Date: 11/22/05



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