

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

THOMAS C. HELBIG
(CRD No. 1039534),

Respondent.

Disciplinary Proceeding
No. 2006005528601

Hearing Officer—Andrew H. Perkins

DEFAULT DECISION

May 29, 2008

Respondent is barred for misuse of customer funds, in violation of NASD Conduct Rules 2330(a) and 2110, and IM-2310-2; and for failure to appear for his on-the-record interview, in violation of Procedural Rule 8210 and Conduct Rule 2110.

Appearances

Thomas M. Huber, Regional Counsel, Philadelphia, PA (Mark P. Dauer, New Orleans, LA, Of Counsel) for the Department of Enforcement.

Thomas C. Helbig, *pro se*.

DECISION

I. Introduction

The Department of Enforcement (“Enforcement”)¹ charged Thomas C. Helbig (“Helbig” or the “Respondent”) with misusing customer funds, in violation of NASD

¹ As of July 30, 2007, NASD consolidated with the member firm regulation functions of the NYSE and began operating under a new corporate name, the Financial Industry Regulatory Authority (“FINRA”). References in this decision to FINRA shall include, by reference and where appropriate, references to NASD. FINRA’s rules, which include NASD Conduct and Procedural Rules, are available at www.finra.org/rules.

Conduct Rules 2330(a) and 2110, and with failing to comply fully with requests for information, in violation of Procedural Rule 8210 and Conduct Rule 2110.

The First Cause of Action alleges that, on or about May 26, 2006, Helbig withdrew \$10,000 from customer KM's variable annuity and deposited the funds into a checking account owned by Helbig. The First Cause of Action further alleges that Helbig transferred the funds without KM's knowledge or authorization.

The Second Cause of Actions alleges that FINRA received a complaint from customer MG in March 2007, alleging that Helbig had improperly withdrawn funds from an annuity owned by MG. In connection with the investigation of this allegation, FINRA requested Helbig to provide certain documents and requested that he appear and testify at an on-the-record interview in Philadelphia on July 20, 2007. The Second Cause of Action further alleges that Helbig failed to appear for his scheduled on-the-record interview and that he failed to provide all of the documents FINRA requested.

Helbig answered the Complaint, denied the charges, and waived his right to a hearing. In lieu of a hearing, the Hearing Officer ordered the parties to submit briefs and evidentiary material in support of their respective cases. Helbig did not file a submission with the Office of Hearing Officers.

For the reasons discussed below, the Hearing Officer found that Helbig defaulted and that Enforcement had proven the violations alleged in the Complaint. The Hearing Officer further determined that a bar was the appropriate sanction for each violation.

II. Procedural History

The Complaint in this matter arose from two separate investigations. FINRA commenced the first investigation based upon the Form U5 that PlanMember Securities Corporation ("PMSC") filed of behalf of Helbig on June 8, 2006, which indicated that PMSC discharged Helbig because he failed to respond to requests for information

regarding the manner in which he handled client accounts and funds. FINRA's first investigation concerned in part Helbig's unauthorized transfer of \$10,000 from KM's variable annuity to a bank account Helbig owned. FINRA initiated the second investigation in March 2007 because of a written complaint received from MG by FINRA on March 6, 2007. The primary focus of the second investigation was to determine if various transfers Helbig made from MG's annuity were unauthorized or otherwise improper.

On October 2, 2007, Enforcement filed the Complaint in this proceeding with the Office of Hearing Officers. Helbig filed his Answer on November 16, 2007.

Following receipt of his Answer, the Office of Hearing Officers issued an order setting the Initial Pre-Hearing Conference for December 11, 2007. Helbig did not appear and participate in the Initial Pre-Hearing Conference, nor did he contact the Office of Hearing Officers to request that the Initial Pre-Hearing Conference be continued to another date. After hearing argument from counsel for Enforcement, the Hearing Officer concluded that the issues in this proceeding could be resolved without a hearing. Accordingly, the Hearing Officer established deadlines for the parties to submit briefs and evidence in support of their respective cases. The Order Setting Briefing Schedule in Lieu of Hearing ("Scheduling Order") required Helbig to file a narrative of the facts in his defense and a discussion of the legal theories that support his denial of the charges in the Complaint. In addition, Helbig was granted leave to file documents, declarations, and affidavits in support of his defense.

The Scheduling Order required Helbig to file the foregoing on or before February 18, 2008. However, Helbig did not file a submission as ordered.

On March 28, 2008, the Hearing Officer entered an Order Finding the Respondent in Default. The Hearing Officer concluded that Helbig had abandoned his defense of the

charges against him by failing to participate in the Initial Pre-Hearing Conference on December 11, 2007,² and by failing to comply with the Scheduling Order.

III. Findings of Fact and Conclusions of Law

A. Jurisdiction

Helbig first registered as a General Securities Representative in 1982. Helbig joined PMSC in February 2006. On June 8, 2006, PMSC discharged Helbig because he refused to respond to the firm's requests for an explanation regarding the manner in which he handled client accounts and funds.³ From February 13, 2006, until June 8, 2006, Helbig was registered with FINRA as a General Securities Representative.⁴ After leaving PMSC, Helbig was associated and registered with another FINRA member firm. His last registration with FINRA terminated effective May 18, 2007.⁵

The Hearing Officer finds that FINRA has jurisdiction because the misconduct alleged in the Complaint occurred while Helbig was registered as a General Securities Representative, and Enforcement filed the Complaint within two years following the termination of his latest FINRA registration.⁶ In addition, FINRA issued the requests for information that are the subject of the Second Cause of Action within two years after his last registration terminated.

B. Misuse of Customer Funds

The First Cause of Action alleges that Helbig improperly withdrew \$10,000 from customer KM's annuity. KM, who had been Helbig's customer since 1998, owned a variable annuity that he had purchased from American Skandia Life Assurance

² Under Procedural Rule 9269(a)(1), a Hearing Officer may issue a default decision against a respondent who fails to appear at a pre-hearing conference held pursuant to Rule 9241. The Office of Hearing Officers sent Helbig notice of the Initial Pre-Hearing Conference on November 26, 2007.

³ Bickhardt Decl., Ex. 1, at 2.

⁴ *Id.*

⁵ Bickhardt Decl., Ex. 1, at 1.

⁶ See Article V, Section 4 of the FINRA By-Laws.

Corporation ("ASL"). On May 26, 2006, Helbig submitted an Annuity Withdrawal Request Form to ASL, which directed ASL to process a partial surrender of \$10,000 in KM's annuity and transmit the funds to the account of "Thomas Helbig & Company" at Dollar Bank ("Helbig Account").⁷ The withdrawal form bears KM's signature. However, when Helbig testified before FINRA on November 30, 2006, he admitted he had not obtained KM's authorization to make the withdrawal or to deposit the funds in the Helbig Account, which Helbig owned.⁸ In addition, Enforcement submitted a sworn declaration signed by KM that states that he had not authorized the withdrawal. KM first learned of the withdrawal in June 2006 when he received a written notice from ASL.⁹

Pursuant to Helbig's instruction, ASL transferred \$10,000 from KM's annuity to the Helbig Account on May 31, 2006.¹⁰ Those funds remained on deposit in Helbig's checking account through June 8, 2006, during which period KM's funds were commingled with Helbig's.¹¹

Helbig claimed at his on-the-record interview in November 2006 and in his Answer that he relied on, and acted under the authority of, a "Third Party Investment Advisor Declaration Form"¹² ("Advisor Form") dated July 1998 when he directed ASL to transfer the funds from KM's annuity.¹³ Helbig maintained that the Advisor Form allowed him to withdraw funds from KM's annuity without his express authorization.¹⁴

⁷ Bickhardt Decl., Ex. 3.

⁸ Bickhardt Decl., Ex. 2, at 19, 27. Helbig claimed that he had KM sign blank withdrawal forms, but he could not recall when that occurred. See Bickhardt Decl., Ex. 2, at 17-20, 34.

⁹ KM Decl. ¶ 2.

¹⁰ Bickhardt Decl., Ex. 5 (showing an "Incoming Wire" of \$10,000 on May 31) and Ex. 2, at 27. In addition, Helbig acknowledged in his Answer that KM's funds were deposited into Helbig's personal account. Ans. ¶ 3.

¹¹ Helbig returned the \$10,000 to ASL on June 9, 2006. Bickhardt Decl., Ex. 6 (account statement showing an "Outgoing Wire" of \$10,000 on June 9, 2006).

¹² Bickhardt Decl., Ex. 4.

¹³ Ans. ¶¶ 3, 5. Bickhardt Decl., Ex. 2, at 24.

¹⁴ Bickhardt Decl., Ex. 2, at 20-21, 35-36.

However, the wording of the Advisor Form does not support Helbig's claim. The form authorized ASL to comply with instructions received from Helbig; it did not authorize Helbig to take any action concerning the annuity without KM's express authorization.

When asked why he transferred the funds to his personal account, Helbig denied that he intended to use the funds for his own benefit. Helbig claimed that he intended to reinvest the funds on KM's behalf in a managed account program at PMSC.¹⁵ Helbig explained that he was unfamiliar with PMSC's procedures and that he mistakenly thought that the procedure he followed was permissible.¹⁶ Helbig pointed out that he had only been with the firm for about four months, and he was unfamiliar with its "culture."¹⁷ When KM questioned the withdrawal, Helbig wired the funds back to ASL.¹⁸

The Hearing Officer concludes that the evidence shows that Helbig directed ASL to transfer \$10,000 from KM's annuity to Helbig's bank account without KM's knowledge or authorization, in violation of Conduct Rule 2110. Helbig was obligated to obtain express authorization before effecting a transaction on KM's behalf. This obligation, encompassed within the principle of "fair dealing," is inherent to the broker-client relationship.¹⁹ As the National Adjudicatory Council has stated, "A registered representative's obligation to follow his customer's instructions serves as the essential foundation for the customer/registered representative relationship."²⁰ Unauthorized trading constitutes a violation of NASD Rule 2110.²¹

¹⁵ Ans. ¶¶ 3, 5; Bickhardt Decl., Ex. 2, at 21-23, 25-26, 30.

¹⁶ Bickhardt Decl., Ex. 2, at 66-68.

¹⁷ *Id.*

¹⁸ Bickhardt Decl., Ex. 2, at 29-30.

¹⁹ See IM-2310-2(b)(4)(iii). *See also*, Keith L. DeSanto, Exchange Act Release No. 35,860, 1995 SEC LEXIS 1500, at *16 (June 19, 1995), *aff'd*, 101 F.3d 108 (2d Cir. 1996) [table] ("Unauthorized trading is a fundamental betrayal of the duty owed by a salesman to his customers.").

²⁰ *District Bus. Conduct Comm. v. Wells*, No. C07970045, 1998 NASD Discip. LEXIS 32, at *6 (N.A.C. July 24, 1998).

²¹ *Department of Enforcement v. Gerald C. McNeil*, No. C3B960026, 1999 NASD Discip. LEXIS 3, at *13 (N.A.C. Jan. 21, 1999).

The Hearing Officer further finds that Helbig violated Conduct Rule 2310 and IM-2310-2 by depositing KM's funds in his personal account and thereby exposing them to risk of loss.²² Improper use of funds occurs when a customer's funds are used for a purpose not directed by the customer even absent any intent to retain the funds permanently.²³

C. Failure to Comply with Rule 8210 Request for Testimony and Documents

FINRA opened a second investigation of Helbig in March 2007 after it received a written complaint from MG.²⁴ She expressed concern that Helbig may have made unauthorized transfers of funds from her annuity account. The ensuing investigation disclosed that from about July 2003 to about March 2006, Helbig had transferred \$47,000 from her variable annuity to the Helbig Account. FINRA then asked Helbig to submit information about the transfers so that it could determine if MG had authorized them.²⁵

On about March 26, 2007, FINRA sent Helbig a letter requesting information about seven transfers of funds from MG's variable annuity to his bank account.²⁶ The letter instructed Helbig to provide copies of his federal tax returns for the relevant years if he claimed any of the funds constituted fees for services provided to MG. Helbig responded in writing on April 9, 2007. He claimed that the funds transferred from MG's variable annuity account constituted, "payment of fees for services provided to and

²² *District Bus. Conduct Comm. v. Roach*, No. C02960031, 1998 NASD Discip. LEXIS 11, at *15-16 (N.A.C. Jan. 20, 1998). See also, *District Bus. Conduct Comm. v. Barnes*, No. C01950015, 1996 NASD Discip. LEXIS 40, at *13-14 (holding that the respondent's deposit of firm funds into his personal accounts constituted an egregious misuse of funds).

²³ *Roach*, 1998 NASD Discip. LEXIS 11, *21 ("Subjecting customer funds to a risk of loss in situations other than conversion or misappropriation, however, clearly constitutes business conduct that contravenes Rule 2110."); *Department of Enforcement v. Thomas*, No. C10030082, 2004 NASD Discip. LEXIS 49, at *6 (N.A.C. June 30, 2004).

²⁴ Bickhardt Decl., Ex. 7.

²⁵ Bickhardt Decl. ¶ 8.

²⁶ Bickhardt Decl., Ex. 8.

approved by [MG] prior to processing.”²⁷ Helbig did not provide any of the requested tax returns.

On April 18, 2007, FINRA sent Helbig a second request for information pursuant to Procedural Rule 8210. FINRA requested: copies of his federal tax returns for 2003 to 2006; a detailed accounting of the purported fees MG paid him; a description of the consulting services he purportedly provided her; and, statements for the Helbig Account for a specified period.²⁸ Helbig did not respond to this request for information.²⁹ Accordingly, on April 30, 2007, FINRA sent Helbig another request for the information and documents.³⁰

FINRA received a written response from Helbig on May 14, 2007, along with various documents, but not the requested tax returns or bank statements.³¹ Helbig also failed to provide an accounting of the funds transferred from MG’s variable annuity or a detailed explanation of the specific services he claims he provided MG.³²

On July 6, 2007, Enforcement counsel assigned to this matter sent Helbig a letter requiring him, pursuant to Procedural Rule 8210, to appear for an on-the-record interview in Philadelphia on July 20.³³ The letter also required Helbig to bring specified documents to the on-the-record interview, including the federal tax returns and bank statements he had failed to provide in response to the previous request for information. The letter was sent by first class and certified mail to Helbig’s most current residential address shown in the Central Registration Depository. Helbig did not respond to this request in any

²⁷ Bickhardt Decl., Ex. 9.

²⁸ Bickhardt Decl., Ex. 10.

²⁹ Bickhardt Decl. ¶ 11.

³⁰ Bickhardt Decl., Ex. 11.

³¹ Bickhardt Decl., Ex. 12.

³² Helbig’s response did contain a generic description of the services he was to provide MG under the terms of the Investment Advisory Services Agreement dated June 20, 2003. Bickhardt Decl., Ex. 12.

³³ Huber Decl., Ex. 1.

manner: he did not appear to testify on July 20, and to date he has not produced any of the requested documents.³⁴

The Hearing Officer finds that Helbig violated Procedural Rule 8210 and Conduct Rule 2110 by failing to appear for his on-the-record interview and by failing to provide all of the documents Enforcement requested in connection with its investigation of the transfers from MG's annuity to Helbig's personal bank account.

Procedural Rule 8210(a) grants FINRA the authority to "require a member, person associated with a member, or person subject to [FINRA's] jurisdiction to provide information ... if requested" and to "inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in [a FINRA] investigation, complaint, examination, or proceeding." The term "books, records, and accounts" includes records such as tax returns.³⁵ Here, Helbig's tax returns were relevant to FINRA's investigation because he claimed that he transferred the funds from MG's annuity in payment of fees she owed him for services provided under the Investment Advisory Services Agreement dated June 20, 2003. If Helbig had omitted the \$47,000 from his income declaration on his tax returns, the omission would have supported the inference that the money had been obtained improperly.³⁶ Helbig made his income an issue by claiming that he earned the \$47,000 he transferred from MG's annuity.

In summary, the Hearing Officer finds that Helbig violated Procedural Rule 8210 and Conduct Rule 2110 by failing to produce all the books and records requested and by failing to appear for his on-the-record interview.

³⁴ Huber Decl. ¶¶ 4, 8.

³⁵ *Morton Bruce Erenstein*, Exchange Act Release No. 56,768, 2007 SEC LEXIS 2596, at *12 (Nov. 8, 2007).

³⁶ *Id.* at *15.

IV. Sanctions

A. Improper Use of Customer Funds

Under the FINRA Sanction Guidelines ("Sanction Guidelines"), if an associated person improperly uses customer funds, the maximum sanction is a bar and a fine of \$50,000.³⁷ Where the improper use resulted from the respondent's misunderstanding of his customer's intended use of the funds or other mitigating factors exist, the applicable Sanction Guidelines recommend consideration of a suspension of six months to two years and thereafter until restitution is paid. Here, there is no evidence of any mitigating factors. Helbig admitted that he did not speak to KM before he withdrew the money from KM's annuity. Helbig transferred the funds to his personal account without KM's knowledge. In addition, the Hearing Officer does not find Helbig's explanation of the transfer to be credible. Helbig was a registered representative with more 24 years of experience at the time he transferred the money from KM's account. As such, Helbig most certainly was aware that it would be a violation of his duty of fair dealing to deposit customer funds in his personal account. Accordingly, the Hearing Officer finds that a bar is the appropriate sanction for this violation.³⁸

B. Failure to Comply with Requests for Information

If an associated person fails to "respond in any manner" to a request pursuant to Rule 8210, the maximum recommended sanction is a bar and a \$ 50,000 fine.³⁹ If there are mitigating factors, or the registered representative did not respond in a timely manner, the maximum recommended sanction is a two-year suspension and a \$ 25,000 fine. In determining the appropriate sanction, Sanction Guidelines direct that consideration be given to "[w]hether the requested information has been provided and, if so, ... the

³⁷ FINRA Sanction Guidelines 38 (2008).

³⁸ Cf., e.g., *Bernard D. Gorniak*, Exchange Act Release No. 35,996, 1995 SEC LEXIS 1820, at *6-7 (July 20, 1995) (holding that a bar is appropriate where the respondent held, for a substantial period, customer funds that were intended for the purchase of mutual funds).

³⁹ Sanction Guidelines 35.

number of requests made, the time respondent took to respond, and the degree of regulatory pressure required to obtain a response.”⁴⁰

Here, Helbig did not respond in any manner to the request for information dated July 6, 2007. Moreover, Helbig’s lack of cooperation frustrated FINRA’s investigation into his possible misuse or conversion of MG’s funds. Accordingly, the Hearing Officer finds that a bar is the appropriate sanction for this violation as well.

V. Order

Thomas C. Helbig is barred from association with any member firm in any capacity for: (1) misuse of customer funds, in violation of NASD Conduct Rules 2330(a) and 2110; and (2) failure to supply documents and appear for an on-the-record interview, in violation of Procedural Rule 8210 and Conduct Rule 2110. The bars will become effective immediately if this Default Decision becomes FINRA’s final disciplinary action in this proceeding.



Andrew H. Perkins
Hearing Officer

Copies to:

Thomas C. Helbig (by FedEx, next-day delivery, and first-class mail)
Thomas M. Huber, Esq. (by e-mail and first-class mail)
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⁴⁰ *Id.*