

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JOHN EDWARD HERBERT
(CRD No. 2727923),

Respondent.

Disciplinary Proceeding
No. 20080135750-01

Hearing Officer – Sara Nelson Bloom

DEFAULT DECISION

May 26, 2010

Respondent is barred from associating with any FINRA member in any capacity for failing to provide requested information, in violation of Rules 8210 and 2010.

Appearances

David Utevsky, Esq., Seattle, WA, for the Department of Enforcement.

No appearance by or for Respondent.

DECISION

I. Background

On February 4, 2010, the Department of Enforcement ("Enforcement") filed a Complaint in this proceeding, attached to this Decision as Exhibit A. The Complaint alleges that Respondent violated Rules 8210 and 2010 by failing to respond to a request for information pursuant to Rule 8210. Respondent did not file an Answer to the Complaint. On April 16, 2010, Enforcement filed a Motion for Entry of Default Decision and Imposition of Sanctions, supported by the declaration of David Utevsky, Esq. ("Utevsky Decl."), and six exhibits.¹

¹ Complainant's Exhibits are referred to as "CX-__."

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Respondent did not respond to the Motion. For the reasons set forth below, the Motion is granted.²

II. Respondent's Default

On February 4, 2010, Enforcement served the Complaint and Notice of Complaint on Respondent, by certified and first-class mail, at Respondent's last known residential address as listed in the Central Registration Depository ("CRD address") and to a corrected version of that address (the "Corrected address").³ All four mailings were returned, marked, "Return to Sender." CX-4; Utevsky Decl. ¶ 19. Respondent did not file an Answer to the Complaint. Utevsky Decl. ¶ 20.

In the same manner, on March 8, 2010, Enforcement served the Complaint and Second Notice of Complaint on Respondent at the CRD and Corrected addresses. CX-5; Utevsky Decl. ¶ 21. Once more, all four mailings were returned, marked, "Return to Sender." CX-6; Utevsky Decl. ¶ 21. Respondent did not file an Answer to the Complaint. Utevsky Decl. ¶ 22.

Enforcement complied with Rule 9134(b)(1) by mailing the Complaint and Notices of Complaint to Respondent's CRD and Corrected addresses, thereby giving Respondent constructive notice of this proceeding. By failing to file an Answer, Respondent defaulted. Pursuant to Rule 9215(f), the Hearing Officer deems the allegations in the Complaint admitted.

III. Jurisdiction

From October 2006 through May 2008, Respondent was registered as a General Securities Principal and General Securities Representative with LPL Financial Corporation (the "Firm"). CX-1; Utevsky Decl. ¶ 5. On May 22, 2008, the Firm filed a Uniform Termination Notice for Securities Industry Registration ("Form U5"), which reported that Respondent's

² The factual determinations in this Decision are based on the allegations of the attached Complaint, which are deemed admitted, and the declaration and exhibits filed by Enforcement with its Motion.

³ The CRD record misspelled Respondent's city of residence as Lyndon rather than Lynden. Utevsky Decl. ¶ 10.

employment had been terminated for “failing to disclose an outside business activity, [and] concerns identified regarding investment strategies.” CX-2 p. 2; Utevsky Decl. ¶ 6. Respondent has not been associated or registered with a FINRA member since that time. CX-1.

Although Respondent is not currently associated with a member firm, FINRA has jurisdiction to bring this proceeding, pursuant to Art. V, § 4 of FINRA’s By-Laws, because (1) the Complaint charges Respondent with failing to comply with requests for information made during the two-year period following termination of his last registration, and (2) the Complaint was filed within that two-year period.

IV. Origin of Investigation

The investigation that led to this proceeding followed the Firm’s filing of a Form U5 terminating Respondent for failing to disclose outside business activities and concerns regarding his investment strategies. Utevsky Decl. ¶ 8.

V. Violation – Failure to Respond

The Complaint alleges that on July 30, 2009, FINRA Staff (“Staff”) sent Respondent a Rule 8210 request for information concerning the circumstances of his termination as disclosed in the Form U5 filed by the Firm. Complaint ¶ 8. Staff sent the request by first-class and certified mail to Respondent’s CRD and Corrected addresses. Utevsky Decl. ¶ 11. All four mailings were returned, marked, “moved left no address, unable to forward, return to sender.” Utevsky Decl. ¶¶ 12, 14; Complaint ¶¶ 9-10. Accordingly, Staff sent a second request for the same information, in the same manner, to Respondent’s CRD and Corrected addresses, on August 5, 2009. Utevsky Decl. ¶ 14; Complaint ¶ 12. Again, all four mailings were returned, marked, “moved left no address, unable to forward, return to sender.” Utevsky Decl. ¶ 15; Complaint ¶¶ 13-14. Respondent again did not respond. Utevsky Decl. ¶ 16.

The Staff served the requests in accordance with Rule 8210(d) by mailing them to Respondent at his CRD and Corrected addresses. Therefore, Respondent is deemed to have received them.

Rule 8210 authorizes FINRA to require any person subject to its jurisdiction to provide information related to any matter under investigation. The Rule serves as a key element in FINRA's oversight function and allows FINRA to carry out its regulatory functions without subpoena power.⁴ Here, although Respondent received valid constructive notice of the Staff's requests,⁵ he failed to respond.

Therefore, the allegations of the Complaint are sufficient to establish, for purposes of this default decision, that Respondent violated Rules 8210 and 2010.

VI. Sanctions

A bar is standard for failure to provide requested information. FINRA Sanction Guidelines ("Guidelines") at p. 35 (2007 ed.). There is no evidence of any mitigating circumstances that would justify a lesser sanction. Therefore, Respondent is barred from associating with any FINRA member in any capacity.

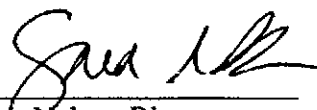
⁴ See, e.g., Dep't of Enforcement v. Valentino, No. FPI010004, 2003 NASD Discp. LEXIS 15, at *12 (NAC May 21, 2003), aff'd, 2004 SEC LEXIS 330 (Feb. 13, 2004) ("It is well established that because [FINRA] lacks subpoena power over its members, a failure to provide information fully and promptly undermines [FINRA's] ability to carry out its regulatory mandate.") (citation omitted); Joseph G. Chiulli, Exch. Act Rel. No. 42359, 2000 SEC LEXIS 112, at *16 (Jan. 28, 2000) (noting that Rule 8210 provides a means for NASD to effectively conduct its investigations, and emphasizing that [FINRA] members and associated persons must fully cooperate with requests for information).

⁵ See David I. Cassuto, Exch. Act Rel. No. 48087, 2003 SEC LEXIS 1496, at *9 (June 25, 2003).

⁶ Respondent received constructive notice of the Staff's requests. Therefore, Respondent is deemed to have received them.

VII. Conclusion

For failing to provide requested information, in violation of Rules 8210 and 2010, Respondent is barred from associating with any FINRA member in any capacity. This bar shall become effective immediately if this Decision becomes the final disciplinary action of FINRA.


Sara Nelson Bloom
Hearing Officer

Copies to: John Edward Herbert (*via overnight courier and first-class mail*)
David Utevsky, Esq. (*via electronic and first-class mail*)
Mark P. Dauer, Esq. (*via electronic mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)

With any FINRA member

Sara Nelson Bloom

Handwritten signature
Sara Nelson Bloom

FINANCIAL INDUSTRY REGULATORY AUTHORITY

OFFICE OF HEARING OFFICERS

Department of Enforcement,

Complainant,

V.

John E. Herbert
CRD No. 2727923,

Respondent.

DISCIPLINARY PROCEEDING
No. 2008013575001

COMPLAINT

The Department of Enforcement alleges: **TRADING REPORT**

SUMMARY

1. On July 30 and August 5, 2009, the FINRA staff sent written requests for information to Respondent John E. Herbert pursuant to FINRA Rule 8210. Respondent Herbert failed to provide any of the requested information.

RESPONDENT AND JURISDICTION

2. John E. Herbert entered the securities industry in March 1996 as an associated person of a FINRA member firm. From on or about October 12, 2006, until on or about May 22, 2008, he was registered through LPL Financial Corporation ("the Firm") as a General Securities Principal and General Securities Representative.

3. On or about May 22, 2008, a Uniform Termination Notice for Securities Industry Registration ("Form U5") was filed by the Firm on behalf of Respondent Herbert. The Form U5 disclosed that Respondent Herbert had been discharged on May 9, 2008.
4. Respondent Herbert is not currently registered or associated with any member firm; however, pursuant to Article V, Section 4 of the FINRA By-Laws, FINRA retains jurisdiction over him for purposes of this Complaint until May 8, 2010.

**FIRST CAUSE OF ACTION
(FAILURE TO RESPOND (RULE 8210))**

5. The Department realleges and incorporates by reference paragraphs 1-4 above.
6. In or about May 2008, FINRA initiated an investigation concerning alleged violations by Respondent Herbert. The investigation focused on whether Respondent Herbert had failed to disclose an outside business activity to his employer firm and whether he had made unsuitable recommendations to a customer. In connection with that investigation, FINRA staff requested information from Respondent Herbert.
7. Respondent Herbert's residential address, as reflected in FINRA's Central Registration Depository ("CRD"), is [REDACTED] ("the CRD Address"). The CRD Address contains a spelling error. The correct version of Respondent Herbert's address is [REDACTED] ("the Corrected Address"). The FINRA staff has been unable to find a more current address for Respondent Herbert.

First Request for Information

8. On July 30, 2009, FINRA staff sent a request for information pursuant to FINRA Rule 8210 relating to the subject matter of the FINRA investigation, via U.S. Postal

Service first class mail and certified mail, return receipt requested, to Respondent Herbert at the CRD Address and the Corrected Address. The first request letter requested a response no later than August 13, 2009.

9. The envelope sent to the CRD Address via first class mail on July 30, 2009, was returned by the U.S. Postal Service, marked "moved left no address, unable to forward, return to sender." The FINRA staff received the returned envelope on August 5, 2009. The envelope sent to the CRD Address via certified mail on July 30, 2009, was returned by the U.S. Postal Service, marked "moved left no address, unable to forward, return to sender." The FINRA staff received the returned envelope on August 4, 2009.
10. The envelope sent to the Corrected Address via first class mail on July 30, 2009, was returned by the U.S. Postal Service, marked "moved left no address, unable to forward, return to sender." The FINRA staff received the returned envelope on August 3, 2009. The envelope sent to the Corrected Address via certified mail on July 30, 2009, was returned by the U.S. Postal Service, marked "moved left no address, unable to forward, return to sender." The FINRA staff received the returned envelope on August 4, 2009.
11. Respondent Herbert did not respond in any fashion to the staff's first request for information.

Second Request for Information

12. As of August 5, 2009, all four envelopes sent to Respondent Herbert on July 30, 2009, had been returned by the U.S. Postal Service, so it was clear that Respondent

Herbert would not respond to the staff's first request information. On August 5, 2009, FINRA staff sent a second request for information pursuant to FINRA Rule 8210 relating to the subject matter of the FINRA investigation, via U.S. Postal Service first class mail and certified mail, return receipt requested, to Respondent Herbert at the CRD Address and the Corrected Address. The second request letter requested a response no later than August 19, 2009.

13. The envelope sent to the CRD Address via first class mail on August 5, 2009, was returned by the U.S. Postal Service, marked "moved left no address, unable to forward, return to sender." The envelope sent to the CRD Address via certified mail on July 30, 2009, was returned by the U.S. Postal Service, marked "moved left no address, unable to forward, return to sender."
14. The envelope sent to the Corrected Address via first class mail on August 5, 2009, was returned by the U.S. Postal Service, marked "moved left no address, unable to forward, return to sender." The envelope sent to the Corrected Address via certified mail on July 30, 2009, was returned by the U.S. Postal Service, marked "moved left no address, unable to forward, return to sender."
15. Respondent Herbert did not respond in any fashion to the staff's second request for information.
16. To date, FINRA has not received any response from Respondent Herbert to the foregoing requests for information.
17. Such acts, practices and conduct constitute separate and distinct violations of FINRA Rule 8210 by Respondent Herbert. Such conduct is inconsistent with high standards

of commercial honor and just and equitable principles of trade and a violation of
FINRA Conduct Rule 2010.

RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. order that one or more of the sanctions provided under FINRA Rule 8310(a),
including monetary sanctions, be imposed.
- B. order that the Respondent bear such costs of proceeding as are deemed fair and
appropriate under the circumstances in accordance with NASD Rule 8330.

FINRA DEPARTMENT OF ENFORCEMENT

Date: February 4, 2010

David Utevsky

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