

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

TRISHA J. SMITH
(CRD No. 2796673),

Respondent.

Disciplinary Proceeding
No. C07050007

Hearing Officer – SNB

**AMENDED
DEFAULT DECISION¹**

July 21, 2005

Respondent is barred from associating with any NASD member in any capacity for misusing customer funds, in violation of NASD Conduct Rule 2110, and for failing to respond to requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. In light of the bars, no other sanctions are imposed.

Appearances

William Brice La Hue, Regional Counsel, Atlanta, Georgia (Rory C. Flynn, Esq., Washington, DC, Of Counsel), for Complainant.

No appearance by or for Respondent.

DECISION

I. Background

On January 31, 2005, the Department of Enforcement ("Enforcement") filed a two-cause Complaint in this proceeding, attached to this Decision as Exhibit A. The Complaint alleges that Respondent Trisha J. Smith ("Respondent") misused customer funds that were intended as

¹ The Decision of July 18, 2005, was erroneously released without an attached copy of Exhibit A, the Complaint.

insurance premiums, in violation of Rule 2110, and failed to respond to requests for information, in violation of Rules 8210 and 2110. Respondent did not file an Answer to the Complaint. On May 25, 2005, Enforcement filed a Motion for Entry of Default Decision, supported by the declaration of William Brice La Hue and five exhibits. Respondent did not reply to the Motion. For the reasons set forth below, the Motion is granted.²

II. Respondent's Default

Enforcement sent the Complaint and Notice of Complaint to Respondent on January 26, 2005, by certified and first class mail to her most current residential address in the Central Registration Depository (the "CRD address"). On March 1, 2005, in the same manner, Enforcement sent the Complaint and Second Notice of Complaint to Respondent. On April 20, 2005, Enforcement also sent these documents to Respondent to an alternate address as well as the CRD address. Respondent did not file an Answer to the Complaint.

Enforcement complied with Rule 9134(b)(1) by mailing the Complaint and Notices of Complaint to Respondent's CRD address, thereby giving Respondent constructive notice of this proceeding. By failing to file an Answer, Respondent defaulted. Pursuant to Rules 9215(f) and 9269(a)(2), the allegations in the Complaint are deemed admitted.

III. Jurisdiction

Respondent was registered with NASD member Horace Mann Investors Inc. ("Horace Mann") from May 1, 1997, until her termination on June 30, 2004. She has not been registered with any NASD member since that date, but remains subject to NASD jurisdiction for this proceeding, pursuant to Art. V, § 4 of NASD's By-Laws, because (1) the Complaint was filed

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.

within two years after her registration terminated, and (2) the Complaint charges her with misconduct while she was registered and failing to respond to requests for information during the two-year period following the termination of her registration.

IV. Violations

A. Misuse of Customer Funds

The first cause of the Complaint alleges that Respondent misused the funds of three insurance customers. Specifically, in April and October 2003, Respondent accepted two \$210.50 cash payments from customer SM for insurance policy premiums, but Respondent failed to ensure that SM was issued an insurance policy as represented. Further, on January 16, 2004, Respondent accepted \$65.00 in cash and a \$55.34 check from customer CH for two insurance policy premiums, but Respondent kept the cash and cashed the check. These funds were not deposited with Horace Mann until approximately April 2004. Finally, on September 8, 2004, Respondent accepted \$136.00 in cash from customer PC for an insurance policy premium, but Respondent failed to ensure that PC was issued an insurance policy as represented.

An associated person "improperly uses" customer funds when he or she fails to apply the customer's funds as directed.³ Such conduct violates Rule 2110.⁴ Accordingly, the allegations of the Complaint, which are deemed admitted, are sufficient to establish for this default decision that Respondent misused customer funds. Accordingly, Respondent violated NASD Conduct Rule 2110, as alleged in the first cause of the Complaint.

³ See, e.g., *DOE v. Alberto E. Argomaniz*, NASD Discip. Pro. No. C07990013 (NASD October 18, 1999); *In re Bernard D. Gorniak*, Exch. Act Rel. No. 35,996, 1995 SEC LEXIS 1820 (1995).

⁴ Id.

B. Failure to Respond

The second cause of the Complaint alleges that on October 11 and 27, 2004, NASD staff sent Respondent requests for information, pursuant to NASD Procedural Rule 8210, concerning her conduct as described in the first cause of the Complaint. The staff sent these requests to Respondent at her CRD address by certified and first class mail. The staff served the requests in accordance with Rule 8210(d), and therefore Respondent is deemed to have received them. Respondent did not respond to the requests. These allegations, which are deemed admitted, are sufficient to establish for this default decision that Respondent failed to respond to requests for information, in violation of Rules 8210 and 2110.

V. Sanctions

For improper use of customer funds, NASD Sanction Guidelines ("Guidelines") recommend a fine of \$2,500 to \$50,000 and a bar, absent mitigating factors, such as evidence of a misunderstanding regarding the customer's intentions.⁵ Here, there is no evidence of a misunderstanding or other mitigating factors that would warrant a lesser sanction. Indeed, the circumstances support the conclusion that Respondent, who cashed at least one customer's check, knowingly acted contrary to her customer's wishes. Enforcement seeks a bar, and the Hearing Officer finds there are no mitigating factors that justify a sanction less than a bar. Accordingly, Respondent is barred from associating with any NASD member in any capacity. Under the Guidelines, a bar is standard for failing to respond to requests for information made pursuant to Rule 8210.⁶ There is no evidence of any mitigating circumstances that would justify a lesser sanction. Accordingly, Respondent is also barred from associating with any NASD

⁵ NASD Sanction Guidelines at 38 (2005 ed.).

⁶ *Id.* at 35.

member in any capacity for this violation. In light of the bars for these violations, no further sanction is imposed.

VI. Conclusion

Respondent is barred from associating with any NASD member in any capacity for misuse of customer funds, in violation of Rule 2110, and for failing to respond to requests for information, in violation of Rules 8210 and 2110. The bars will become effective immediately if this decision becomes NASD's final disciplinary action. In light of the bars, no further sanction is imposed.

SO ORDERED.


Sara Nelson Bloom
Hearing Officer

Copies to: Trisha J. Smith (*via overnight and first class mail*)
William Brice La Hue, Esq. (*via electronic and first class mail*)
Rory C. Flynn, Esq. (*via electronic and first class mail*)

EXHIBIT A

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

TRISHA J. SMITH
(CRD No. 2796673)

Respondents.

Disciplinary Proceeding
No. C07050007

Hearing Officer -

COMPLAINT

Upon information and belief, Complainant alleges as follows:

RESPONDENT

1. Respondent Trisha J. Smith ("Smith") was first registered as an investment company and variable contracts products representative in April 1997, while associated with Horace Mann Investors, Inc. ("Horace Mann"). She was employed by Horace Mann until June 2004. Smith is not currently employed by a NASD member, however she remains subject to the jurisdiction of the NASD pursuant to Article V, Section 4 of the NASD Bylaws.

FOR A FIRST CAUSE OF COMPLAINT

NASD Conduct Rule 2110

(Misuse of Customer Funds)

2. The allegations set forth in paragraph 1 above, are hereby realleged and incorporated herein by reference.
3. On or about September 8, 2004, Respondent Smith accepted \$136.10 in cash from P.C. as a premium payment for an automobile insurance policy. However, Respondent Smith

failed to ensure that these funds were remitted to Horace Mann and failed to ensure that P.C. was issued an insurance policy as represented.

4. On or about January 16, 2004, Respondent Smith accepted \$65.00 in cash and a post dated check, payable to Respondent Smith, in the amount of \$55.34 from C.H. These payments by C.H. represented two months of premium payments on an insurance policy maintained by C.H. Respondent Smith took the cash and cashed C.H.'s check in February 2004 but did not remit the funds to Horace Mann until in or about April 2004.
5. In or about April 2003 and again in or about October 2003, S.M. gave Respondent Smith cash payments in the like amount of \$210.50 for premium payments on an insurance policy. S.M. further gave Respondent Smith a cash payment in the amount of \$310.50 on or about April 9, 2004. Respondent Smith failed to ensure that these funds were remitted to Horace Mann and failed to ensure that S.M. was issued an insurance policy as represented.
6. Respondent Smith misused the funds of P.C., C.H. and S.M. in that she failed to follow the directions of these individuals and remit them to Horace Mann or held these funds for up to three months prior to remitting them as directed.
7. Each such failure to apply client funds as directed constitutes a violation of NASD Conduct Rule 2110 by Respondent Smith.

FOR A SECOND CAUSE OF COMPLAINT

NASD Conduct Rule 2110 and Procedural Rule 8210

(Failure To Respond to NASD Request for Information)

8. The allegations contained in paragraphs 1 through 7, above, are hereby realleged and incorporated herein by reference.
9. In August 2004, the NASD Atlanta District office received a Uniform Notice of Termination for Securities Industry Registration ("Form U-5") filed by Horace Mann on behalf of Respondent Smith. The Form U-5 alleged that Smith had accepted cash from customers for payment of premiums and failed to fund the customers' insurance policies. The NASD Atlanta District office initiated an investigation into the allegations on the Form U-5.
10. By letter dated October 11, 2004, sent via first class and certified mail to Smith at her CRD address of [REDACTED] Smith was requested, pursuant to Procedural Rule 8210, to provide a written statement to the NASD and certain specifically enumerated documents no later than October 25, 2005.
11. The October 11 letter sent by first class mail was not returned but the letter sent by certified mail was returned marked "Unclaimed." Smith failed to provide the requested written statement by October 25, 2005.
12. Consequently, Smith was again requested by letter dated October 27, 2004, sent to her CRD address via both certified and first class mail, pursuant to Procedural Rule 8210, to provide the information requested in the October 11 letter. Smith' response was due no later than November 9, 2004.

13. The October 27 letter sent by first class mail was not returned. However, a receipt was returned to the NASD Atlanta district office indicating it was delivered and appearing to bear the signature of Respondent Smith.
14. Smith failed to respond by November 9, 2004, and, as of the date hereon, has not responded.
15. Such failure to respond to the October 11 and October 27, 2004, request letters constitutes separate and distinct violations of Procedural Rule 8210 and Conduct Rule 2110.

PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

- A. Findings of fact and conclusions of law that Respondent Smith committed the violations charged and alleged herein;
- B. An order imposing sanctions upon Respondent Smith in accordance with NASD Rule 8310;
- C. An order requiring Respondent Smith to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest.
- D. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330; and
- E. An order imposing any other fitting sanction.

Date: 1/26/05



Daniel J. Stefek, Director
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