

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

KENNETH JAMES NEMETZ
(CRD No. 1299654),

Respondent.

Disciplinary Proceeding
No. E0620030534-02

Hearing Officer – AWH

November 30, 2005

Formerly registered representative misused customer funds, in violation of NASD Conduct Rules 2330 and 2110. Respondent is barred from associating with any member firm in any capacity for the violation.

Appearances:

Karen E. Whitaker, Esq., for the Department of Enforcement.

No appearance by or for Kenneth James Nemetz.

DECISION

Background

On July 8, 2005, the Department of Enforcement ("Enforcement") issued the one-cause Complaint in this proceeding, alleging that Kenneth James Nemetz ("Nemetz") misused customer funds, in violation of NASD Conduct Rules 2330 and 2110.

Nemetz did not file an Answer to the Complaint; nor did he respond to the Second Notice of Complaint, mailed to him on August 9, 2005. As a result, Enforcement filed a Motion for Entry of Default Decision on October 6, 2005. Nemetz failed to respond to the Motion. Accordingly, pursuant to Procedural Rules 9215(f) and 9269, Enforcement's

Motion will be granted, and the allegations of the Complaint, which is attached to this decision, will be deemed admitted.

Findings of Fact¹

Respondent

Nemetz first became associated with an NASD member firm in 1984. He subsequently obtained Series 6, 26, and 63 securities licenses, and, in August 1993, became registered through Linsco/Private Ledger Corporation ("Linsco"). On November 26, 2003, Linsco terminated his registration after Nemetz admitted depositing a customer's check in a bank account he controlled. Nemetz is not currently associated with any member firm.

Misuse of Customer Funds

In March 2003, upon the advice of Nemetz, customers PM and SM, husband and wife, liquidated two of their mutual fund holdings, intending to use the proceeds to invest in a fixed annuity. Instead of investing the customers' funds in the fixed annuity they chose, Nemetz endorsed the check and deposited it into an account he controlled, without the knowledge or consent of the customers. Nemetz concealed his actions by making a purported quarterly interest payment to the customers from his personal funds. When the customers complained to Linsco about their lack of documentation for their investment, Nemetz repaid the customers from his wife's Charles Schwab account. Linsco settled a claim that the customers brought against it as a result of Nemetz's misconduct.

¹ All findings of fact are based upon the admitted allegations in the Complaint, the Declaration Supporting a Motion for Entry of Default Decision by Karen E. Whitaker, and the three exhibits attached thereto.

Service of the Complaint

On July 8, 2005, Enforcement served Nemetz with the Complaint and Notice of Complaint by both first-class and certified mail, sent to his CRD address and an alternate address obtained by NASD staff. Neither first class mailing was returned. Both certified mailings were returned, marked "Unclaimed" and "Returned to Sender." Nemetz did not file an Answer.

On August 9, 2005, Enforcement served the Complaint and Second Notice of Complaint on Nemetz in an identical fashion. Neither first class mailing was returned. The certified mailing to the CRD address was returned, signed by an "S.P. Veazy." The certified mailing to the alternate address² was returned, signed by Laura Nemetz. Nemetz again failed to file an Answer or respond to the Complaint in any way.

Discussion and Conclusions

Jurisdiction

Article V, Section 4 of the NASD By-Laws provides for a two-year period of retained jurisdiction over a registered person after the effective date of the person's termination of registration. During this period of retained jurisdiction, NASD may file a complaint based upon conduct that occurred while the individual was registered through a member firm.

Enforcement filed the Complaint on July 8, 2005, within two years of the termination of Nemetz's registration. The Complaint alleges misconduct while Nemetz was registered with an NASD member firm. Therefore, NASD has jurisdiction over this proceeding.

Respondent's Default

Enforcement properly served the Complaint on Nemetz by sending it via first-class and certified mail to his CRD address, as well as to an alternate address obtained during the course of the investigation. Pursuant to NASD Procedural Rule 9134, the mailings provide constructive notice of the instant proceeding. Moreover, Nemetz had actual knowledge of the Complaint, since his wife signed a return receipt for the certified mailing sent to the alternate address. Because Nemetz failed to respond to the Complaint, Procedural Rules 9215(f) and 9269 authorize entry of a default decision against him. Accordingly, the allegations in the Complaint are deemed admitted.

Misuse of Customer Funds

NASD Conduct Rule 2330(a) mandates that “[n]o member or other person associated with a member shall make improper use of a customer’s securities or funds.” A person misuses funds by failing to use or apply them as directed by the customer. *See Alderman v. SEC*, 104 F.3d 285 (9th Cir. 1997). Misuse of funds is “patently antithetical to high standards of commercial honor and just and equitable principles of trade,” and thus a violation of NASD Conduct Rule 2110. *In re Wheaton D. Blanchard*, Exchange Act Release No. 12,484, 1976 SEC LEXIS 1571 at *2 (May 27, 1976); *In re Joel Eugene Shaw*, Exchange Act Release No. 34,509, 1994 SEC LEXIS 2493 at *6 (Aug. 10, 1994).

Nemetz misused the funds of customers PM and SM by depositing those funds into an account he controlled, contrary to their instructions and without their knowledge or consent. By so doing, Nemetz violated NASD Conduct Rules 2110 and 2330, as alleged in the Complaint.

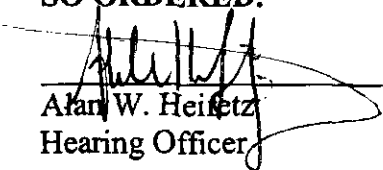
Sanctions

The NASD Sanction Guideline for misuse of funds recommends consideration of a bar.³ Where the misuse occurred as a result of the respondent's misunderstanding of the customer's intended use of the funds, or where other mitigating factors exist, a suspension of six months to two years may be considered. Here there are no mitigating factors. The misuse was intentional and flagrant. Moreover, his misconduct was aggravated when he attempted to conceal it by making a purported interest payment to the customers from his own personal funds. Accordingly, a bar is the appropriate sanction.

Conclusion

Kenneth James Nemetz is barred from association with any NASD member firm in any capacity for misusing customer funds, in violation of NASD Conduct Rules 2330 and 2110. The bar shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.


Alan W. Heifetz
Hearing Officer

³ NASD SANCTION GUIDELINES, at 38.

Copies to:

Via First Class Mail & Overnight Courier

Kenneth James Nemetz

Via First Class & Electronic Mail

Karen E. Whitaker, Esq.

Roger D. Hogoboom, Esq.

Rory C. Flynn, Esq.

**NASD
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Department of Enforcement,

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Kenneth James Nemetz
CRD No. 1299654

Respondent.

Disciplinary Proceeding
No. E0620030534-02

Hearing Officer:

COMPLAINT



Upon information and belief, Complainant alleges as follows:

1. Respondent Kenneth James Nemetz ("Nemetz") entered the securities industry in July 1984, when he became associated with an NASD member firm. He subsequently obtained Series 6, 26 and 63 securities licenses. In August 1993, Nemetz registered with NASD member firm Linsco/Private Ledger Corporation ("Linsco"), where he remained until his termination on November 14, 2003. Since that time, Nemetz has not been registered with any other NASD member firm. NASD has jurisdiction over Nemetz pursuant to Article V, Section 4 of the Association's By-Laws, which provides for a two-year period of retained jurisdiction over formerly associated persons.

CAUSE OF COMPLAINT

Respondent Misused Customer Funds

(Violation of NASD Conduct Rules 2110 and 2330)

2. Paragraph number 1, above, is realleged and incorporated herein by reference.
3. In March 2003, Nemetz advised customers PM and SM, husband and wife, to liquidate two of their mutual fund holdings, and invest the proceeds in a fixed annuity offered by Jackson National Life.
4. Nemetz told the customers that the Jackson National annuity paid an interest rate of 7% annually. He initially told the customers that interest payments would be made monthly. He later told them that the payments would be made quarterly.
5. The customers followed Nemetz' advice, and in late March 2003, wrote a check payable to Nemetz in the amount of \$23,000 for an investment in a Jackson National Life fixed annuity.
6. The amount paid to Nemetz consisted of proceeds received from the liquidation of the customers' mutual funds.
7. Upon receipt, Nemetz endorsed the customers' check, and admitted that he deposited it into a bank account that he controlled.
8. In July 2003, Nemetz made a purported quarterly interest payment to the customers in the amount of \$409.60 from his personal funds.
9. Nemetz never told the customers where he deposited their funds, or the source of the purported interest payment.
10. Nemetz never provided the customers with a receipt or any other type of documentation evidencing his receipt of their funds.

11. Beginning in June 2003, and continuing through at least August 2003, the customers expressed concern to Nemetz over the lack of documentation for their investment.
12. After trying unsuccessfully for several months to get some evidence of their investment from Nemetz, the customers filed a complaint with Linsco.
13. After learning of the customers' complaint, Nemetz returned their \$23,000 plus one additional interest payment in the amount of \$409.60. These payments were made from Nemetz' wife's Charles Schwab account.
14. Nemetz' actions were taken without the customers' knowledge, authorization or consent.
15. The aforementioned acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rules 2110 and 2330 by Kenneth James Nemetz.

PRAYER FOR RELIEF

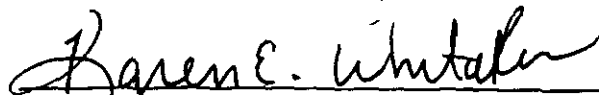
WHEREFORE, Complainant respectfully requests:

- 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.

7-8-05

Date


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