

NASD OFFICE OF HEARING OFFICERS

**DEPARTMENT OF
ENFORCEMENT,**

Complainant,

v.

**JOHN M. CARSON
(CRD No. 41916),**

Respondent.

**Disciplinary Proceeding
No. E072004075201**

DEFAULT DECISION

Hearing Officer – SW

Dated: August 29, 2006

Respondent violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 when he failed to appear for an on-the-record interview scheduled by the NASD staff pursuant to Rule 8210. Respondent is barred from associating with any member firm in any capacity for the violation.

Appearances

Gene E. Carasick, Esq., Regional Counsel, Atlanta, GA, and Rory C. Flynn, Esq., Of Counsel, Washington, DC, for the Department of Enforcement.

John M. Carson appeared pro se prior to his default.

DECISION

I. INTRODUCTION

On March 21, 2006, the Department of Enforcement (“Enforcement”) filed the attached one-count Complaint alleging that Respondent John M. Carson

(“Respondent”) failed to appear for an on-the-record interview, in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210.

Respondent filed an Answer to the Complaint on May 9, 2006. In his Answer, Respondent admitted that he did not appear for the on-the-record interview, but he denied that his failure to appear violated NASD Rules 8210 and 2110. Respondent also denied that he was subject to NASD’s jurisdiction and stated that he was not requesting a Hearing.¹

On May 12, 2006, the Hearing Officer issued an order scheduling a pre-hearing conference on May 26, 2006, via telephone. The order further directed the Department of Enforcement (“Enforcement”) to serve on Respondent and file with the Office of Hearing Officers no later than May 24, 2006, a copy of Respondent’s CRD record.²

On May 17, 2006, Enforcement filed a CRD record for Respondent. However, Respondent failed to appear, in person or through counsel, for the May 26, 2006 pre-hearing conference. On May 31, 2006, the Hearing Officer issued an order deeming Respondent in default for his failure to appear at the pre-hearing conference.

¹ This Decision solely addresses the one-count Complaint filed with the Office of Hearing Officers on March 21, 2006, despite the statements made in Respondent’s Answer regarding the allegations that Enforcement raised before the Complaint was filed, including allegations concerning recommendations to purchase shares of Class B mutual funds.

² A CRD record establishes the date of a respondent’s Form U-5 filing, which establishes the effective date of a respondent’s termination of registration.

On June 30, 2006, Enforcement filed a Motion for Entry of Default Decision (“Motion”), supported by the affidavit of Gene E. Carasick, Esq., Regional Counsel in NASD’s Atlanta, GA office, and by 3 exhibits.³ For the reasons set forth below, Enforcement’s Motion is granted.

II. RESPONDENT’S DEFAULT

On March 20, 2006, Enforcement served a Complaint and Notice of Complaint on Respondent at his residential address as reflected in NASD’s Central Registration Depository System (“CRD address”), via first class mail and certified mail.⁴ (CX-1, p. 1; DECL at ¶ 7). On April 17, 2006, Enforcement received correspondence dated April 12, 2006, from Respondent that referenced the March 20, 2006 Complaint.

On April 24, 2006, Enforcement filed a copy of Respondent’s April 12, 2006 correspondence with the Office of Hearing Officers. The April 12, 2006 correspondence did not address the allegations of the Complaint.

On April 25, 2006, the Hearing Officer served an order on Respondent at his CRD address directing Respondent to file an Answer that met the requirements of NASD Procedural Rule 9215.

³ Hereinafter, the statements in the Motion will be designated as “Motion, p.”, the statements in the Carasick Declaration will be designated as “DECL at ¶”, and Enforcement’s exhibits will be designated as “CX-” with the appropriate page numbers.

⁴ Respondent’s CRD address is [REDACTED] (CX-1, p. 1).

On May 9, 2006, Respondent filed an Answer to the Complaint denying the allegations of the Complaint and specifically denying that he was subject to the jurisdiction of NASD. However, Respondent did admit "I gave notification to the NASD that I could not and would not attend their so-called on-the-record interview on March 3, 2005, due to my financial circumstances and lack of proper legal counsel."

On May 12, 2006, after receipt of Respondent's Answer, the Hearing Officer served an order ("May Order") on Respondent at his CRD address, scheduling a pre-hearing conference to be held via telephone on May 26, 2006.⁵ The May Order was sent to Respondent via first class mail and FedEx. FedEx reported that it delivered the mailing to Respondent's CRD address at 8:23 a.m., on May 15, 2006.

The May Order explicitly stated **"a failure to appear at the Conference, in person or through counsel, may be deemed a default,"** and explicitly stated **"if Respondent defaults, the Hearing Officer may treat the allegations in the Complaint as admitted and draft a default decision, sanctioning Respondent for the admitted allegations."**

⁵ In the May Order, the Hearing Officer wrote that she wanted to confirm her understanding of Respondent's wishes. The May Order also indicated that dates for documents to be filed in lieu of a hearing would be discussed.

Respondent failed to appear, in person or through counsel, at the May 26, 2006 pre-hearing conference. At the May 26, 2006 pre-hearing conference, a staff member of Enforcement reported that he had attempted to confer with Respondent about the matters to be discussed at the scheduled pre-hearing conference, but Respondent stated that he did not intend to participate in the May 26, 2006 pre-hearing conference or the disciplinary process.⁶

On May 31, 2006, the Hearing Officer issued an order holding Respondent in default pursuant to Code of Procedure Rules 9241(f) and 9269. Respondent failed to respond to the May 31, 2006 order.

Pursuant to Rule 9269, the Hearing Officer finds that Respondent received notice of the May 26, 2006 pre-hearing conference, and that he defaulted by failing to appear at the pre-hearing conference.⁷

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent became registered as a general securities representative with National Planning Corporation ("National Planning") on April 27, 1999. (CX-1, p. 4; DECL at ¶ 4). On March 26, 2004, National Planning filed a Form U-5

⁶ Respondent's statement to Enforcement was consistent with an earlier statement that appeared in a letter dated April 12, 2006 sent to Enforcement, in which Respondent wrote "I will not appear before the NASD and participate in a monkey trial."

⁷ The following Findings of Fact and Conclusions of Law incorporate the allegations in the attached Complaint, pursuant to Rules 9241(f) and 9269(a), and NASD Notice to Members 99-77.

terminating Respondent's registration.⁸ (CX-1, p. 8; DECL at ¶ 4). Accordingly, pursuant to Article V, Section 3(a) of the NASD By-Laws, Respondent's termination was effective March 26, 2004 upon the filing of the Form U-5.⁹

Article V, Section 4(a) of the NASD's By-Laws creates from the effective date of termination of registration a two-year period of retained jurisdiction over former registered persons, covering misconduct that began before the registration terminated and failure to provide information, requested pursuant to Rule 8210, during the period of retained jurisdiction.

The Complaint in this proceeding was filed within two years of March 26, 2004, and it alleges that Respondent failed to appear for an on-the-record interview requested by the NASD staff pursuant to Rule 8210 while Respondent was subject to NASD's jurisdiction. Thus, contrary to the claim in Respondent's Answer, the Hearing Officer finds that NASD has jurisdiction over Respondent in this proceeding, and accordingly, denies Respondent's Motion to Dismiss the

⁸ National Planning wrote on the Form U-5 that Respondent had been discharged for his failure to promptly notify the firm of events that were required to be disclosed on Respondent's Form U-4, i.e., multiple liens, and an outstanding judgment and bankruptcy. (CX-1, p. 4).

⁹ NASD's jurisdiction is determined not by the termination of an individual's employment or association with a firm, but by the effective date of termination of the individual's registration, which is the date of NASD's receipt of a Form U-5. Donald M. Bickerstaff, 52 S.E.C. 232, 234 (1995).

Complaint for lack of jurisdiction.¹⁰

B. Respondent Violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210

The Complaint alleges that Respondent violated NASD Rules 2110 and 8210 by failing to appear for an on-the-record interview requested pursuant to Rule 8210. (Complaint at ¶¶ 2-5).

Specifically, in August 2004, the NASD staff began an examination of National Planning during which the staff reviewed an arbitration claim filed against Respondent by customers C&JW alleging, among other things, unsuitable transactions in Class B mutual fund securities. (Complaint at ¶ 2). On February 14, 2005, in connection with the examination, the NASD staff mailed to Respondent at his CRD address, via certified and first class mail, a request that he appear for an on-the-record interview to be held on March 3, 2005, pursuant to Rule 8210. (Complaint at ¶ 3).

Respondent advised the NASD staff that he was advised by a lawyer not to appear without legal representation and since he could not afford a lawyer, he would

¹⁰ Article V, Section 4(a) of the NASD By-Laws also provides that the running of the two year period of retained jurisdiction recommences from the date of the filing of an amended Form U-5, if the amended Form U-5 (i) is filed within two years of the original Form U-5 filing, and (ii) discloses that such person may have engaged in conduct actionable under any applicable statute, rule, or regulation.

National Planning filed several amendments to Respondent's Form U-5, including the June 3, 2004 and March 1, 2005 filings, indicating that Respondent may have engaged in conduct actionable under the NASD Rules. Accordingly, the two year period of retained jurisdiction recommenced on March 1, 2005, and extends to March 1, 2007. (CX-2; CX-3).

not appear. (Complaint at ¶ 4). On March 3, 2004, Respondent did not appear for the scheduled on-the-record interview. (Id.).

Under NASD Procedural Rule 8210, NASD may require any person subject to its jurisdiction to provide information regarding any matter under investigation. The obligation to respond is unqualified. Because NASD lacks subpoena power, Rule 8210 is the means by which NASD carries out its regulatory functions. It is a “key element in the NASD’s efforts to police its members.”¹¹ Failure to comply with Rule 8210 requests for information is a serious violation because it subverts NASD’s ability to perform its regulatory responsibilities.¹² “A refusal to comply with an NASD request for information is tantamount to a complete failure to respond.”¹³

Respondent’s communication with the NASD staff demonstrated that he received actual notice of the NASD staff’s Rule 8210 request. In any event, pursuant to Rule 8210(d), Respondent is deemed to have received the Rule 8210 request, which was sent to his CRD address. In his Answer, Respondent admitted that he did not appear for the on-the-record interview, but argued that he was advised by a lawyer not to appear without legal representation, and because he could

¹¹ See Richard J. Rouse, Exchange Act Rel. No. 32,658, 1993 SEC LEXIS 1831, at *7 (1993); Joseph G. Chiulli, Exchange Act Rel. No. 42,359, 2000 SEC LEXIS 112, at *16 (Jan. 28, 2000).

¹² Id.

¹³ Dep’t of Enforcement v. Steinhart, No. FPI020002, 2003 NASD Discip. LEXIS 23 (NAC Aug. 11, 2003).

not afford a lawyer, he did not appear. There is no constitutional or statutory right to representation by counsel in NASD proceedings.¹⁴ In addition, the SEC has “repeatedly held that reliance on counsel does not excuse an associated person’s obligation to supply information or testimony or otherwise cooperate with NASD investigations.”¹⁵

The allegations in the Complaint and the evidence submitted by Enforcement are sufficient to establish that Respondent violated NASD Procedural Rule 8210 and thereby violated NASD Conduct Rule 2110 by failing to appear for the on-the-record interview, as requested by the NASD staff.¹⁶

IV. SANCTIONS

When an individual fails to respond in any manner to requests issued pursuant to Rule 8210, the NASD Sanction Guidelines provide that a bar is the standard sanction.¹⁷ The Guidelines provide that a suspension of up to two years may be appropriate where mitigating factors exist.¹⁸ By refusing to appear at the March 3, 2005 on-the-record interview, Respondent failed to respond “in any manner.” Respondent’s decision not to appear can be distinguished from the respondent’s

¹⁴ See Mark H. Love, Exchange Act Rel. No. 49,248, 2004 SEC LEXIS 318, at *18 (Feb. 13, 2004).

¹⁵ Toni Valentino, Exchange Act Rel. No. 49,255, 2004 SEC LEXIS 330, at *13 (Feb. 13, 2004).

¹⁶ Dep’t of Enforcement v. Baxter, No. C07990016, 2000 NASD Discip. LEXIS 3, at **21, 25 (NAC Apr. 19, 2000).

¹⁷ NASD Sanction Guidelines, p. 35 (2006).

¹⁸ Id.

decision in Dept. of Enforcement v. Ryerson¹⁹ not to appear at a scheduled on-the-record interview. The respondent in Ryerson had undertaken good faith efforts to retain counsel, but found it necessary on the eve of the scheduled interview to seek new counsel, and therefore failed to appear for his on-the-record interview. In this case, Respondent disclosed no efforts to retain counsel, but simply indicated that, because he could not afford counsel, he would not appear.

Accordingly, the Hearing Officer bars Respondent in all capacities for refusing to appear for an on-the-record interview as requested by the NASD staff pursuant to Rule 8210.

V. CONCLUSION

Respondent John M. Carson is barred from associating with any member firm in any capacity for violating NASD Procedural Rule 8210 and NASD Conduct Rule 2110. The bar shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

Sharon Witherspoon
Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
August 29, 2006

¹⁹ Dep't of Enforcement v. Ryerson, Complaint No. C9B040033 (NAC Aug. 3, 2006), available at http://www.nasd.com/web/groups/enforcement/documents/nac_disciplinary_decisions/nasdw_017113.pdf.

Copies to:

John M. Carson (via FedEx and first class mail)

Gene E. Carasick, Esq. (via electronic and first class mail)

Rory C. Flynn, Esq. (via electronic and first class mail)

Mark P. Dauer, Esq. (via electronic and first class mail)

**NASD
OFFICE OF HEARING OFFICERS**

Department of Enforcement,

Complainant,

v.

John M. Carson
CRD No. 41916

Respondent.

Disciplinary Proceeding
No. E072004075201

Hearing Officer:

COMPLAINT

Upon information and belief, Complainant alleges as follows:

1. Respondent John M. Carson was registered as a general securities representative with NASD member IFG Network Securities ("IFG") from January 16, 1997, until March 18, 1999, and with National Planning Corporation ("NPC") from about April 27, 1999, until about March 26, 2004. His employment end date with NPC was March 26, 2004. Carson first became registered with NASD in about August 1970. NASD retains jurisdiction over Carson pursuant to Article V, Section 4 of NASD Bylaws.

CAUSE OF COMPLAINT

Failure to Appear to Give Testimony

NASD Conduct Rule 2110; NASD Procedural Rule 8210

2. In August 2004, the NASD staff conducted an examination during which it reviewed an arbitration claim that had been filed against Respondent Carson by C&JW (husband and wife), alleging, among other things, unsuitable transactions in Class B mutual fund securities and in equity stocks in their securities account at NPC.
3. In connection with the examination, by letter dated February 14, 2005, sent via certified and first class mail to Respondent Carson's CRD residential address at [REDACTED] [REDACTED] the NASD staff requested Carson, pursuant to NASD Procedural Rule 8210, to appear and give sworn testimony to NASD regarding the activity in C&JW's account on March 3, 2005 at

the NASD offices in Atlanta, Georgia. Neither the first class nor the certified mailing was returned by the Postal Service; nor did the staff receive a signed delivery receipt for the certified mailing.

4. Respondent Carson failed to appear to give testimony on March 3, 2005, as requested by the staff. Carson told the staff that he was advised by a lawyer not to appear without legal representation, and that since he could not afford a lawyer, he did not appear. Carson's failure to give testimony as requested by the staff impeded the staff's investigation into the trading activities in C&JW's account.
5. Respondent Carson's failure to appear to give testimony requested by the NASD staff pursuant to NASD Procedural Rule 8210 constitutes separate and distinct violations of NASD Conduct Rule 2110 and Procedural Rule 8210 by Respondent Carson.

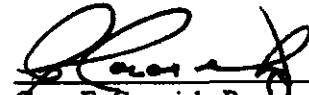
PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

- A. Findings of fact and conclusions of law that Respondent Carson 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.

March 20, 2006

NASD Department of Enforcement


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