

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 61541 / February 18, 2010

Admin. Proc. File No. 3-13648

In the Matter of the Application of

EDWARD J. JAKUBIK, JR.
c/o De Meo & Feigin, L.L.C.
125 Half Mile Road, Suite 200
Red Bank, NJ 07701

For Review of Disciplinary Action Taken by

FINRA

ORDER GRANTING
MOTION TO DISMISS
APPLICATION FOR
REVIEW

On October 13, 2009, Edward J. Jakubik, Jr., formerly a registered representative associated with Grayson Financial LLC ("Grayson Financial" or the "Firm"), a FINRA member firm, filed an application requesting that the Commission set aside a default decision by an NASD Hearing Panel that became final on December 13, 2004 and cancel the bar that had been imposed on Jakubik by that decision.¹ On November 4, 2009, NASD filed a motion to dismiss Jakubik's application for review.² NASD asserts that Jakubik failed to exhaust his administrative remedies in not appealing the default decision. Alternatively, NASD contends that Jakubik's application should be denied because it was filed long after the deadline for appeals to the Commission of self-regulatory organization disciplinary action. For the reasons discussed below, we have determined to grant NASD's motion and dismiss Jakubik's application.

¹ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc. ("FINRA"), in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Because the disciplinary action here was instituted before that date, we continue to use the designation NASD.

² NASD also requested that we stay the issuance of a briefing schedule while its motion remained pending. In light of our order, we do not address this request.

I.

On May 24, 2004, NASD's Department of Enforcement ("Enforcement") issued a complaint against Jakubik alleging that he had violated NASD Conduct Rule 2110 and IM-2310-2³ by executing unauthorized trades in customer accounts.⁴ In its notice accompanying the complaint, issued the same day as the complaint, Jakubik was advised that he was "required . . . by no later than **June 21, 2004**, to answer this Complaint" [emphasis in original].⁵ Jakubik does not dispute that he received copies of the complaint and notice and, according to Enforcement's Regional Counsel who was assigned to this matter, Jakubik confirmed that he received these documents in a phone call to the Regional Counsel in which Jakubik expressed his interest in reaching a settlement. Although he contacted Enforcement about a possible settlement on June 11, 2004, Jakubik did not answer the complaint by June 21, 2004 or afterwards.⁶

On June 23, 2004, Enforcement sent a second notice of the complaint to Jakubik.⁷ This notice advised Jakubik that, "[Jakubik's] failure to submit an answer to the Complaint . . . on or

³ NASD Conduct Rule 2210 requires that members and associated persons observe high standards of commercial honor and just and equitable principles of trade and IM-2310-2 imposes a requirement of "fair dealing" with customers.

⁴ According to the complaint, Jakubik made unauthorized purchases of Loral Space & Communications shares between November 2001 and April 2002 for the accounts of four customers.

⁵ On May 24, 2004, Enforcement served the complaint and notice by sending copies of both to Jakubik by certified and first class mail. One copy was sent to Jakubik's most current residential address as disclosed in the Central Registration Depository ("CRD"), 315 E. 77th Street, Apt. 3F, New York, NY 10021 (the "CRD Address"). Another copy was sent to 16 Carlisle Terrace, Little Silver, NJ 07739 (the "New Jersey Address"), which Enforcement had reason to believe was actually Jakubik's current residence. The certified mailing to the CRD Address was returned, marked "Returned to Sender, Attempted - Not Known." The first class mailing to the CRD Address was returned, marked "Returned to Sender, Moved, not forwardable." The certified mailing to the New Jersey Address was returned with confirmed delivery of May 28, 2004 and bearing an illegible signature.

⁶ On June 25, 2004, Enforcement sent Jakubik a proposed offer of settlement but did not receive a response back from him.

⁷ Enforcement served this notice by sending it to Jakubik's CRD and New Jersey Addresses, again by first class and certified mail. The first class mailing to the CRD Address was not returned. The certified mailing to the CRD Address was returned marked "Returned to Sender, Unclaimed." Neither the first class nor the certified mailing sent to Jakubik's New Jersey Address was returned.

before July 12, 2004, shall allow the [NASD] Hearing Officer, in the exercise of his or her discretion, to: (1) treat as admitted by [Jakubik] the allegations in the complaint; and (2) enter a default decision against [him]" The notice also told Jakubik that "[t]he case may be decided on that basis and sanctions may be assessed against [him] without further notice." Jakubik did not answer the complaint by July 12, 2004 or afterwards.

Enforcement filed a motion on September 13, 2004 for entry of a default decision and a request for sanctions.⁸ On November 16, 2004, the NASD Hearing Officer, acting pursuant to NASD Procedural Rules 9215(f) and 9269,⁹ entered a default decision against Jakubik and barred him.¹⁰

The Hearing Officer's Notice of Default Decision advised Jakubik that the decision would "become the final decision of NASD 25 days after service of the Decision upon [Jakubik] unless either [he] or . . . Enforcement appeals to the [NASD] National Adjudicatory Council ("NAC"),

⁸ Enforcement served this motion by sending it to Jakubik by first class mail at both his CRD and New Jersey Addresses.

⁹ NASD Procedural Rule 9215(f) provides, as relevant here, that, if a respondent fails to file an answer or response to an Enforcement complaint "within the time required, the Department of Enforcement . . . shall send a second notice to such Respondent requiring an answer within 14 days after service of the second notice." This second notice is required to advise the respondent that further failure to reply within the period specified "shall allow the Hearing Officer, in the exercise of his or her discretion, pursuant to Rule 9269 to: (1) treat as admitted by the Respondent the allegations in the complaint; and (2) issue a default decision against the Respondent." Procedural Rule 9269 authorizes a hearing officer to issue a default decision in accordance with the notice provisions of Rule 9215(f) and directs that, if the "default decision is not appealed . . . within 25 days after the date the Office of Hearing Officers serves it on the Parties, the default decision shall become the final disciplinary action" of NASD.

¹⁰ In reaching his decision to bar Jakubik, the Hearing Officer concluded that the trades were "quantitatively egregious" and warranted a "severe sanction." He found that there was "strong" evidence that the trades were unauthorized, noting that, not only did Jakubik's four customers declare that they had not given their authorization or consent, but the Firm also "immediately cancelled each of them after finding that they were account-opening transactions that were unauthorized." The Hearing Officer further determined that "there is no evidence that Jakubik misunderstood any communication from these customers, or disputed their claims that the trades were unauthorized," nor were there any mitigating circumstances that would warrant a sanction less than a bar.

or the NAC calls the Decision for Review."¹¹ The Hearing Officer served the notice and default decision by sending it to Jakubik by both first class and overnight mail. Jakubik did not appeal to the NAC by December 13, 2004 (25 days after service of the Hearing Officer's decision) or afterwards and the NAC did not call the decision for review. The Hearing Officer's decision, accordingly, became NASD's final disciplinary action on December 13, 2004.

II.

Jakubik does not dispute that he failed to seek review within the specified time period, but claims that we should nevertheless consider his appeal, pursuant to our Rule of Practice 420(b),¹² because, he asserts, there exist "extraordinary circumstances" that warrant our granting his request for an extension of time to file the requisite application. These "extraordinary circumstances," Jakubik alleges, consist of "serious issues of alleged prosecutorial misconduct" by Enforcement during the NASD proceeding and "denial of fair process" by the NASD Hearing Officer. According to Jakubik, Enforcement engaged in prosecutorial misconduct by: (1) offering no evidence at the hearing to show that Jakubik engaged in unauthorized trades, "much less 'egregious' unauthorized trades;" and (2) not submitting certain customer questionnaires and declaration into the record but, instead, having its "prosecuting attorney state in his declaration [to the Hearing Officer] that these [customer] documents 'confirm' that Mr. Jakubik engaged in 'egregious' unauthorized trading in four customer accounts."¹³

¹¹ A case administrator in NASD's Office of Hearing Officers ("OHO") stated in a declaration attached to NASD's brief that it was OHO's business practice to send decisions and notices of decision to the addresses on the service list it maintains for a case, on the same day the documents are dated, and via the means of service identified at the end of the documents. The case administrator noted that both the CRD and New Jersey Addresses were on OHO's service list for the Jakubik proceeding and that two Federal Express shipment detail sheets show that, on November 16, 2004, OHO made two priority overnight shipments to Jakubik. Jakubik does not dispute that he received this notice.

¹² Rule of Practice 420(b), 17 C.F.R. § 201.420(b), requires that an applicant file "an application for review with the Commission within 30 days after the notice of the determination is filed with the Commission and received by the aggrieved person applying for review." Further, the rule provides that the Commission will not extend this 30-day period, "absent a showing of extraordinary circumstances," and that this rule is the "exclusive remedy for seeking an extension of the 30-day period."

¹³ Jakubik requests that we accept into evidence copies of the three customer questionnaires and customer declaration that NASD "withheld below and that are mischaracterized in its prosecuting attorney's declaration below." We note, as an initial matter, that, contrary to Jakubik's claim, these documents appear to support the allegations against Jakubik since the customers stated in these questionnaires and declaration that they had not

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Jakubik further maintains that the Hearing Officer denied him fair process by making findings and a sanction determination "based solely on the inadmissible and misleading hearsay statements of the NASD prosecuting attorney, and *not* on any record evidence [emphasis in original]."¹⁴ As a result, Jakubik argues, "the Hearing Officer failed to give Mr. Jakubik, who was *pro se* and had no prior disciplinary record, the fair process that he was due under 15 U.S.C. § 78o-3(b)(8)."¹⁵ Jakubik asserts that, as a *pro se* party, he did not appreciate the "impropriety of the hearsay statements" made by Enforcement and its failure to provide supporting evidence, nor did he appreciate "the legal ramifications of not appealing the default decision within the 30 day time period set forth in Rule 420(b)."¹⁶

¹³ (...continued)

authorized anyone from Grayson Financial to purchase stock for their accounts. One customer stated in his questionnaire response that he had advised Jakubik that he "would buy the stock," but "only after [the customer] read the paperwork on the same" and that he had assumed that the Firm was "not interested" in his business when his phone messages were not returned.

In any event, Jakubik has failed to satisfy the requirement of Rule 452 of our Rules of Practice, 17 C.F.R. §201.452, that his motion for leave to adduce additional evidence "show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." His motion makes neither required showing. The customer questionnaires and declaration relate only to the merits of the underlying proceeding and have no bearing on whether dismissal is warranted because of Jakubik's purported failure to exhaust his administrative remedies and the untimeliness of this appeal.

¹⁴ Jakubik further contends that the bar imposed by the Hearing Officer "far exceeds the sanction imposed on . . . Jakubik's former partner and the subject of the investigative proceeding that was the origin of the complaint against Jakubik." Jakubik also maintains that the bar exceeds the \$10,000 fine and one-year suspension sought by Enforcement. He notes that the bar imposed by NASD "had already precluded [him] from associating with a member firm for nearly five years now [and that] [u]nless the Commission agrees to review the default decision, it is more than likely [he] will never have the opportunity to associate with a FINRA member firm again." In light of our finding that Jakubik failed to exhaust his administrative remedies and that his appeal is untimely, we do not address these contentions.

¹⁵ Exchange Act § 15A(b)(8), 15 U.S.C. § 78o-3(b)(8), requires that a registered securities association "provide a fair procedure for the disciplining of . . . persons associated with members"

¹⁶ Jakubik explains that "[d]uring the entire time the proceedings below were pending," he was "experiencing financial problems . . . [and] could not afford to retain an attorney to represent him before the Office of Hearing Officers or to advise him regarding the

(continued...)

Jakubik argues that the "Commission's interest in determining whether the alleged prosecutorial misconduct occurred and whether Mr. Jakubik received the fair process he was due strongly outweighs FINRA's interest in having the NAC rule on those issues in the first place." He urges that the Commission "exercise its discretion to accept [his] application for review without requiring [him] to first appeal the default decision to the NAC."¹⁷

NASD maintains that Jakubik's appeal should be denied because he failed to exhaust his administrative remedies in not challenging the Hearing Officer's decision. NASD asserts that, once the Hearing Officer issued his default decision, Jakubik failed to pursue either of the two administrative options available to him under NASD rules to challenge the decision, *i.e.*, (1) filing a motion with NASD's Office of Hearing Officers to set aside the default; or (2) filing a written notice of appeal to the NAC within 25 days after service of the default decision. NASD argues that, consistent with Commission precedent, we should not consider Jakubik's application for review and "should refrain from addressing any of the numerous merit-based arguments that Jakubik advances here."

Alternatively, NASD argues that Jakubik's application for review does not establish his claim of extraordinary circumstances and should, therefore, be dismissed as untimely. According to NASD, "[a] showing of extraordinary circumstances must explain why the appeal was not and could not be filed on time." Noting that Jakubik filed his appeal with the Commission nearly five years after the default decision became NASD's final disciplinary action, NASD contends that Jakubik's arguments purporting to establish the existence of extraordinary circumstances "lack merit," and that "nearly all of the arguments that Jakubik has advanced in his extension request . . . go to the merits of an appeal," which is irrelevant in determining whether extraordinary circumstances exist. To permit Jakubik to have his appeal heard at this late date, NASD argues, "would open the floodgates of late appeals from barred respondents who previously opted not to pursue all their appeal options . . . [and] would also severely frustrate the interests of finality served by the appeal deadline." Accordingly, NASD argues, Jakubik's appeal should be dismissed as untimely.

¹⁶ (...continued)

legal ramifications of not appealing the Default Decision within 30 days of the decision becoming final.

¹⁷ Jakubik asks that, if we dismiss his appeal, we do so without prejudice. In support, he cites to *Standard Inv. Chartered, Inc. v. NASD*, 560 F.3d 118 (2d Cir. 2009), for the proposition that a "dismissal for failure to exhaust available administrative remedies should be without prejudice." *Id.* at 124. He cites, however, to no provision in our Rules of Practice or relevant Commission precedent to support his request, and we are aware of none. In any event, as discussed below, our order dismissing Jakubik's application is based not only on his failure to exhaust his administrative remedies but also on his failure to meet the filing deadline for submitting his appeal to us, and we therefore deny his request.

III.

We agree with NASD and conclude that we should dismiss Jakubik's appeal. Jakubik failed to exhaust his administrative remedies by appealing to the NAC, as required by NASD's rules. We have repeatedly held that "the Commission will not consider an application for review if the applicant failed to follow NASD procedures."¹⁸ These procedures serve an important regulatory purpose. As we recently explained, "NASD's rules are designed to provide for a timely reexamination by the NAC of decisions of various hearing panels before NASD's action can be brought before us for review . . . [and that [t]]o allow the bypassing of the NAC . . . would tend to destroy the effectiveness of these procedures."¹⁹ The United States Court of Appeals for the Second Circuit expanded on this in *MFS Securities Corp. v. SEC*:

Were SRO members, or former SRO members, free to bring their SRO-related grievances before the SEC without first exhausting SRO remedies, the self-regulatory function of SROs could be compromised. Moreover, like other administrative exhaustion requirements, the SEC's promotes the development of a record in a forum particularly suited to create it, upon which the Commission and, subsequently, the courts can more effectively conduct their review. It also provides SROs with the opportunity to correct their own errors prior to review by the Commission. The SEC's exhaustion requirement thus promotes the efficient resolution of disciplinary disputes between SROs and their members and is in harmony with Congress's delegation of authority to SROs to settle, in the first instance, disputes relating to their operations.²⁰

Here, Jakubik did not follow the clear steps provided under NASD's rules to appeal the Hearing Officer's decision and bar. Jakubik was specifically advised in the Hearing Officer's opinion that, pursuant to those rules, the decision would become the final decision of NASD twenty-five days after service of the decision upon Jakubik unless he appealed to the NAC. It is undisputed that Jakubik was properly served once the default decision was entered and that he did not seek to set aside the default or appeal to the NAC by this deadline or, in fact, at any time afterwards. We conclude, therefore, that the regulatory purposes underlying the exhaustion doctrine would not be

¹⁸ *Jeffrey A. King*, Securities Exchange Act Rel. No. 52571 (Oct. 7, 2005), 86 SEC Docket 1439, 1443; *Lee Gura*, 57 S.E.C. 972, 976 (2004) (same); *David I. Cassuto*, 56 S.E.C. 565, 570 (2003) (same). *See also Calvin David Fox*, Exchange Act Rel. No. 54840 (Nov. 30, 2006), 89 SEC Docket 1282, 1284 (holding that applicant's "failure to exhaust his remedies at the NYSE precludes our consideration of his application for review").

¹⁹ *Florence Sarah Pollard*, Exchange Act Rel. No. 55978 (June 28, 2007), 90 SEC Docket 2909, 2910 (internal quotation omitted).

²⁰ 380 F.3d 611, 621-22 (2d Cir. 2004).

served if we were to consider Jakubik's application for review without his having first allowed the NAC to consider the issues raised in this appeal.

We have stated that "parties to administrative proceedings have an interest in knowing when decisions are final and on which decisions their reliance can be placed."²¹ We thus agree with NASD that Jakubik's appeal is untimely. Nowhere does he explain why he waited nearly five years to file his application despite the fact that he received timely notice of the NASD action. Moreover, in our view, Jakubik's arguments that "extraordinary circumstances" exist to justify our hearing this appeal are misplaced. Jakubik offers various challenges to Enforcement's and the Hearing Officer's actions and decision in the prior proceeding, but fails to present the kind of circumstances required to justify an extension of the appeal filing deadline, particularly given the extreme delay in the filing of his appeal.²²

Accordingly, it is hereby ORDERED that NASD's motion to dismiss the application for review filed by Edward J. Jakubik, Jr. be, and it hereby is, GRANTED.

By the Commission.

Elizabeth M. Murphy
Secretary

²¹ *Robert M. Ryerson*, Exchange Act Rel. No. 57839 (May 20, 2008), 93 SEC Docket 6058, 6061 (quoting *Lance E. Van Alstyne*, 53 S.E.C. 1093, 1098 n.10 (1998)).

²² *Cf. Ryerson*, 93 SEC Docket at 6064 (holding that extraordinary circumstances did not exist where, among other things, NASD "did not cause the fourteen-month delay between the issuance of the NAC decision and the filing of the petition before [the Commission]" but rather the delay "resulted from [Ryerson's] deliberate choice not to appeal . . .").