

**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.**

In the Matter of the Application of

Kent Vincent Pearce

File No. 3-19228

**FINRA'S BRIEF IN RESPONSE TO THE COMMISSION'S REQUEST FOR
ADDITIONAL BRIEFING CONCERNING JURISDICTION**

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I. INTRODUCTION

Kent Vincent Pearce appeals a determination by the Director of FINRA’s Office of Dispute Resolution (now known as Dispute Resolution Services (“DRS”)) that his request to expunge information about a customer arbitration from FINRA’s Central Registration Depository (“CRD[®]”) is not eligible for arbitration. The Commission should dismiss Pearce’s application for review because it lacks jurisdiction to review Pearce’s appeal. Section 19(d) of the Securities Exchange Act of 1934 (the “Exchange Act”) provides, in relevant part, that the Commission may review a decision by a self-regulatory organization (“SRO”) that “prohibits or limits any person in respect to access to services offered by” the SRO. 15 USC § 78s(s)(d)(1). Pearce, however, has not been denied access to FINRA’s arbitration forum as he alleges. To the contrary, the record unequivocally establishes that Pearce requested expungement in the underlying customer arbitration and that the arbitration panel denied his request.

Pearce’s unsupported claim that the arbitration panel in the underlying customer arbitration did not properly consider his expungement request does not create jurisdiction for the Commission’s review here. If Pearce believed the underlying arbitration award lacked a proper

evidentiary basis, his exclusive remedy was to petition an appropriate court to vacate, modify, or correct the award. He did not do so. DRS's rejection of his attempt to collaterally attack that award 15 years after it was issued, is not a denial or limitation of access to a service.

Accordingly, the Commission lacks jurisdiction to review Pearce's petition and should dismiss it.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Customer Arbitration

Pearce has been registered with FINRA as a general securities representative since 1995. (R. at 92.)¹ In December 2002, Pearce's customers filed a claim with NASD Dispute Resolution, DRS's predecessor, against Pearce and his firm (the "Underlying Customer Arbitration"). (R. at 75, 104.) The customers asserted causes of action for breach of fiduciary duty, breach of contract, fraud, violations of federal and state securities laws, and failure to supervise, and requested compensatory damages of approximately \$260,000. (R. at 75-76.)

Pearce and his firm filed an answer, denying the customers' allegations and requesting dismissal of the statement of claim. (R. at 75-76.) Notably, at that time, Pearce requested that all references to the arbitration be expunged from his record in CRD. (R. at 22-23, 76.)

A three-day arbitration hearing was held in February 2004. (R. at 77.) On February 24, 2004, a majority of the arbitration panel issued an award finding in favor of the customers (the "Customer Award").² (R. at 75-81.) The arbitration panel awarded the customers \$50,000 in compensatory damages, for which Pearce and his firm were liable jointly and severally. (R. at 76.) The arbitration panel also stated that "[a]ny and all relief not specifically addressed herein .

¹ "R. at ___" refers to the page in the Certified Record filed by FINRA on July 10, 2019.

² One of the three arbitrators dissented. (R. at 75-81.)

. . . is denied in its entirety.” (*Id.*) Thus, the arbitration panel denied Pearce’s expungement request.

B. Pearce Files a Statement of Claim Seeking Expungement of Information About the Underlying Customer Arbitration, and Appeals DRS’s Decision that the Claim Is Ineligible for Arbitration

On June 26, 2019, more than 15 years after the Customer Award was issued, Pearce filed a statement of claim with DRS once again seeking expungement of information about the Underlying Customer Arbitration and Customer Award from CRD. (R. at 1-9.) On June 27, 2019, DRS informed Pearce that the Director of DRS had determined that his request for expungement was not eligible for arbitration. (R. at 83.) DRS declined to accept Pearce’s claim, closed the case, and refunded his filing fees. (*Id.*)

On June 28, 2019, Pearce filed with the Commission an application for review of DRS’s decision. (R. at 85-88.) On July 11, 2019, FINRA moved to consolidate Pearce’s appeal with several pending applications for review, the Consolidated Arbitration Applications. The Commission granted FINRA’s motion. *See In the Matter of the Consolidated Arb. Applications*, Exchange Act Release No. 87615, 2019 SEC LEXIS 4816 (Nov. 25, 2019).

The Commission subsequently severed Pearce’s appeal from the Consolidated Arbitration Applications on the grounds that the Customer Award “indicate[s] that, unlike the other applicants in the Consolidated Arbitration Applications, [Pearce] requested and [was] denied expungement of the information regarding the underlying arbitration[] from [his] records during the underlying customer arbitration proceeding[.]” *In the Matter of the Consolidated Arb. Applications*, Exchange Act Release No. 92923, 2021 SEC LEXIS 2619, at *2 (Sept. 9, 2021). The Commission further explained that it was severing Pearce’s appeal “[b]ecause it appears as a result that . . . Pearce may not have been denied access to the arbitration forum for [his] request[]

to expunge the prior adverse arbitration award[.]” *Id.* The Commission ordered the parties to submit additional briefing on the issue of jurisdiction.

III. ARGUMENT

The Commission lacks jurisdiction to review Pearce’s application for review and should, accordingly, dismiss it. Exchange Act Section 19(d) defines the Commission’s jurisdiction to review FINRA’s action and provides, in relevant part, that the Commission may review a FINRA action that prohibits or limits any person in respect to services offered by FINRA. 15 U.S.C. § 78s(d)(1); *see Joseph Dillon & Co.*, 54 S.E.C. 960, 962 (2000). The Commission lacks jurisdiction here because Pearce was not denied access to a service provided by FINRA. To the contrary, Pearce requested expungement in the Underlying Customer Arbitration and the arbitration panel denied his request.

A. FINRA’s Summary Responses to Issues Raised by the Commission

To aid in its review of Pearce’s application for review, the Commission requested further analysis of three issues. We briefly address these issues.

Q: During the underlying customer arbitration proceeding, did Pearce seek expungement of the information about the underlying arbitration from his Central Registration Depository record, and did the arbitration panel deny that request?

A: Yes, the Customer Award states that Pearce requested expungement of information about the Underlying Customer Arbitration from CRD and that the arbitration panel denied this request. *See infra* Part III.B.

Q: How does the underlying customer arbitration panel’s apparent denial of Pearce’s request for expungement bear on whether Pearce accessed FINRA’s arbitration service, or was prohibited or limited in his access to that service? What is the relevance, if any, of Dustin Tylor Aiguier and John Boone Kincaid III?

A: Pearce was allowed full access to FINRA’s arbitration forum for his expungement request in the Underlying Customer Arbitration. The Customer Award reflects that the arbitration panel accepted Pearce’s request for expungement and a hearing was held. The Commission’s holdings in *Dustin Tylor Aiguier* and *John Boone Kincaid III* are both applicable here. Like the applicants in those cases, Pearce accessed FINRA’s arbitration

forum for his expungement request and, when his request was denied, asked for a second hearing on his expungement claim. The Commission held that when, like here, an expungement request was previously submitted to arbitration and denied, it does not have jurisdiction to hear an appeal of FINRA's denial of a request to reopen or relitigate the expungement request. *See infra* Part III.B.1

Q: For the purposes of Exchange Act Section 19(d)(1), is arbitrating an expungement claim during a customer arbitration a “service” and, if so, is it different than the “service” of arbitrating an expungement claim during an intra-industry arbitration? Or is the relevant “service” the same, regardless of whether an expungement claim is made in a customer arbitration or an intra-industry arbitration? In answering these questions, the parties should address the similarities and differences between seeking expungement in customer arbitration and intra-industry arbitration and should consider citing particular FINRA arbitration rules and practices.

*A: The Commission has previously found that arbitrating an expungement claim is a “service” offered by FINRA. The service is the same whether the expungement claim is made in a customer arbitration or in an intra-industry arbitration. In both customer and industry arbitrations, parties are entitled to discovery, a hearing, and to be represented by counsel. Moreover, under the current rules, the standards for recommending expungement set forth in FINRA Rule 2080 apply in both customer and industry arbitrations, and in both cases the arbitrator(s) are required to explain the basis for recommending expungement. *See infra* Part III.B.2*

B. The Commission Lacks Jurisdiction over Pearce’s Appeal Because He Accessed FINRA’s Arbitration Forum for His Expungement Claim

An action by an SRO such as FINRA is not reviewable merely because it adversely affects an applicant. *See Joseph Dillon & Co.*, 54 S.E.C. at 964. Rather, there must be a statutory basis for the Commission’s review. *See WD Clearing, LLC*, Exchange Act Release No. 75868, 2015 SEC LEXIS 3699, at *10 (Sept. 9, 2015). Exchange Act Section 19(d) defines the Commission’s jurisdiction to review FINRA’s action. *See* 15 U.S.C. § 78s(d). Under Section 19(d)(2), the Commission may review a FINRA action that (1) imposes any final disciplinary sanction on any member or person associated with a member, (2) denies membership or participation to any applicant, (3) prohibits or limits any person in respect to services offered by the SRO, or (4) bars any person from being associated with a member. 15 U.S.C. § 78s(d)(1);

see Joseph Dillon & Co., 54 S.E.C. at 962 (finding the Commission lacked jurisdiction over the appeal of an NASD action where the action did not fall within any of the four jurisdictional bases of Section 19(d)).

Peace argues that the Commission has jurisdiction because he was denied access to FINRA's arbitration service for his expungement claim.³ The record flatly contradicts this claim. The Customer Award states that Pearce requested expungement in the Underlying Customer Arbitration and that, other than an award of compensatory damages to the customer, all other relief requested was denied. (R. at 75-81.) Accordingly, Pearce's request for expungement was considered by an arbitration panel, and he was not denied access to arbitration for that claim.

The Commission's decisions in *Dustin Tylor Aiguier* and *John Boone Kincaid III* are instructive here. In *Aiguier*, the applicant filed a statement of claim with DRS requesting expungement of two customer complaints. Exchange Act Release No. 88953, 2020 SEC LEXIS 1430, at *2-3 (May 26, 2020). An arbitration hearing was held, and the arbitrator denied Aiguier's request for expungement. *Id.* at *3. Approximately one year later, Aiguier asked DRS to reopen the expungement arbitration, claiming that he had discovered new evidence that he considered exculpatory. *Id.* at *3-4. DRS denied Aiguier's request, explaining that his request did not comply with the Code of Arbitration rule that allows for submissions after an arbitration case is closed in only very limited circumstances. *Id.* at *4. Aiguier filed an appeal of DRS's decision with the Commission. *Id.* The Commission found that it did not have jurisdiction over Aiguier's application for review because "denying such an attempt to obtain a new hearing after

³ It is undisputed that the other bases for the Commission's jurisdiction are inapplicable here.

an arbitration award does not constitute a limitation of access to FINRA’s arbitration service under Section 19(d)(2).” *Id.* at *5. The Commission noted that FINRA accepted Aiguier’s statement of claim requesting expungement, allowed him access to the arbitration forum, and Aiguier participated in the arbitration. *Id.* at *5-6.

Likewise in *Kincaid*, the Commission again found that it lacked jurisdiction to hear an appeal when the applicant previously had access to FINRA’s arbitration forum for his expungement claim. Kincaid filed a statement of claim with FINRA’s arbitration forum requesting expungement of two customer complaints. Exchange Act Release No. 87384, 2019 SEC LEXIS 4189, at *3 (Oct. 22, 2019). The arbitrator issued a written award denying Kincaid’s request for expungement. *Id.* at *4. Kincaid then filed an application for review with the Commission, claiming that FINRA had limited his access to its arbitration forum by giving effect to an award he claimed violated FINRA rules. *Id.* at *7. The Commission held that it did not have jurisdiction to review Kincaid’s petition because “Kincaid [had] not identified any way in which FINRA limited his access to its arbitration service, nor . . . provide[d] any other basis for [its] jurisdiction to review FINRA’s actions.” *Id.* The Commission further explained that “[a]lthough the arbitrator’s ruling was adverse to Kincaid, FINRA did not limit Kincaid’s access to its arbitration forum but rather provided Kincaid with access to that service.” *Id.* at *9.

The Commission’s holdings in *Aiguier* and *Kincaid* are squarely on point here.⁴ Like the applicants in those cases, Pearce requested expungement of all information related to the

⁴ Pearce’s efforts to distinguish *Aiguier* and *Kincaid* are unpersuasive. Pearce argues that *Aiguier* and *Kincaid* are distinguishable because in those cases, expungement was specifically addressed in the prior awards. But the same is true in this case. The Customer Award states that Pearce requested expungement and that all relief other than an award of compensatory damages to the customer was denied.

Underlying Customer Arbitration. (R. at 76.) A three-day arbitration hearing was held, in which Pearce participated. (R. at 77.) There is no evidence, and Pearce does not claim, that his participation in the hearing was in any way limited. To the contrary, Pearce acknowledges in an affidavit attached to his brief that he was present at the arbitration hearing and that he testified. (Pearce Br. at Ex. 1.)⁵ The Customer Award reflects that Pearce denied the customers' allegations and requested expungement of the matter from CRD. (R. at 76.) A majority of the arbitration panel, however, denied Pearce's expungement request and found him liable for compensatory damages to his customers. (R. at 75-81.) In short, FINRA did not deny Pearce access to the arbitration forum and, accordingly, there is no basis for the Commission's jurisdiction to hear this appeal.

1. Pearce's Arguments That His Access to FINRA's Arbitration Service for His Expungement Request Was Limited in the Underlying Customer Arbitration Have No Merit

Pearce's primary argument is that his expungement request was "never meaningfully addressed" in the Underlying Customer Arbitration. (Pearce Br. at 4.) In support of this claim, Pearce cites his more than 15-year-old recollection that his expungement claim was not addressed during the arbitration hearing. (Pearce Br. at 4, Ex. 1.) Pearce also claims that he was represented at the arbitration hearing by his firm's counsel and not counsel of his "choosing" and that his counsel did not adequately "press" his expungement claim. (Pearce Br. at 4-5, Ex. 1.) Even if these facts were true, however, Pearce has not identified any way *FINRA* denied or limited his access to the arbitration forum in the Underlying Customer Arbitration. Pearce's answer denying the allegations of the statement of claim and requesting expungement was

⁵ "Pearce Br. at ___" refers to Pearce's Opening Brief in Support of the Commission's Jurisdiction Over His Application for Review" filed on November 2, 2021.

accepted and an arbitration hearing was held. Pearce was present and participated in the hearing. He testified and was represented by counsel throughout the proceeding.⁶ There is no evidence, or claim by Pearce, that FINRA limited his presentation at the arbitration hearing.

Pearce also claims, without evidence, and in the face of the plain language of the Customer Award, that the arbitration panel did not consider his request for expungement. (Pearce Br. at 6.) In support of this contention, Pearce points to the lack of specific findings with respect to expungement in the Customer Award, as required by FINRA Rules 2080 and Rule 12805 of the Code of Arbitration Procedure for Customer Disputes (the “Customer Code”).⁷ Pearce’s argument misses the obvious point, however, that neither FINRA Rule 2080 nor Customer Code Rule 12805 had been adopted at the time of the Underlying Customer Arbitration.⁸ Under the applicable rules in effect at the time of the Underlying Customer

⁶ Pearce’s suggestion that his attorney did not adequately represent him because he also represented Pearce’s firm is a baseless attack on the professionalism of that attorney. Regardless, Pearce’s decision to be represented by the same attorney as his firm in the Underlying Customer Arbitration has no relevance to the issue of whether FINRA denied or limited his access to the forum for his expungement claim, and any dissatisfaction he may now have with the attorney does not result in the Commission having jurisdiction to hear this appeal.

⁷ FINRA Rule 2080 provides that a request for expungement relief must be based on findings that (1) the claim, allegation or information in the matter sought to be expunged is factually impossible or clearly erroneous; (2) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; or (3) the claim, allegation or information in the matter sought to be expunged is false. Rule 12805 provides that in order to recommend expungement, an arbitration panel must hold a hearing and “[i]ndicate in the arbitration award which of the Rule 2080 grounds for expungement serve(s) as the basis for its expungement order and provide a brief written explanation of the reason(s) for its finding that one or more Rule 2080 grounds for expungement applies to the facts of the case.”

⁸ The statement of claim in the Underlying Customer Arbitration was filed in December 2002, the hearing was held in February 2004, and the Customer Award was issued on February 24, 2004. (R. at 75-81.) FINRA Rule 2080’s predecessor, NASD Rule 2130, was effective as of April 12, 2004, after the Customer Award was issued. *See* NASD Notice to Members 04-16,

[Footnote continued on next page]

Arbitration, the arbitration panel was not required to make specific findings concerning expungement. *See* Code of Arbitration Procedure Rule 10330(e) (setting forth the requirements for arbitration awards).

In any event, if Pearce believed there was insufficient evidentiary basis for the arbitration panel's denial of his request for expungement in the Underlying Customer Arbitration, his exclusive remedy was to file a petition in an appropriate court to vacate, modify, or correct the Customer Award. As the Commission had previously explained, "Congress has not authorized [the Commission] to reopen an arbitration proceeding that has resulted in an award and grant a new trial;" rather, the "exclusive remedy for challenging . . . an arbitration award rendered by a FINRA arbitrator is to move to vacate, modify, or correct the award in court." *Aiguier*, 2020 SEC LEXIS 1430, at *7; *see also Kincaid*, 2019 SEC LEXIS 4189, at *8-9 (explaining that "as courts have long explained, Kincaid's recourse for challenging an allegedly erroneous arbitration award would be by seeking to vacate, modify, or correct the award in court through the Federal Arbitration Act"). Moreover, as the Commission explained in *Aiguier*, an "objection to the evidentiary basis for the award and the process by which the arbitrator reached a decision does not change the fact that [an applicant] accessed FINRA's arbitration service. 2020 SEC LEXIS 1430, at *5-6.

[cont'd]

2004 NASD LEXIS 18 (Mar. 4, 2004). Moreover, Customer Code Rule 12805, which sets forth requirements when a panel recommends expungement in a customer arbitration, was not yet adopted, and applies to claims that were filed on or after April 16, 2007, long after issuance of the Customer Award. *See* Customer Code Rule 12000, Part 1.

2. The Request for an Expungement Is the Same Whether It Is Made in a Customer Arbitration or Intra-Industry Arbitration

The Commission has found that “FINRA’s service of providing arbitration of expungement claims is ‘fundamentally important’ and central to its function as an SRO.” *Consolidated Arb. Applications*, Exchange Act Release No. 89495, 2020 SEC LEXIS 3312, at *4 (Aug. 6, 2020). That service is the same whether the expungement request is made in a customer arbitration or in an intra-industry arbitration.

The current FINRA rules contain the Customer Code and a separate Code of Arbitration Procedure for Industry Disputes (the “Industry Code”). The Customer Code applies to “any dispute between a customer and a [FINRA] member or associated person of a member that is submitted for arbitration.” Customer Code Rule 12101(a). The Industry Code applies to matters submitted for arbitration between members, members and associated persons, and associated persons. *See* Industry Code Rule 13101(a). A request for expungement may be brought as a counterclaim in a customer case or in an intra-industry arbitration. *See* Customer Code Rules 12303, 12805; Industry Code Rule 13805.

Both the Customer Code and Industry Code contain comparable procedural rules. In both, the parties are entitled to legal representation and a hearing. *See* Customer Code Rules 12208, 12805; Industry Code Rules 13208, 13805. In both, the parties may request discovery. *See* Customer Code Rules 12506, 12507; Industry Code Rule 13506. Moreover, under both the Customer Code and Industry Code, the standards for expungement set forth in FINRA Rule 2080 apply, and when an award includes an order recommending expungement, the award must

indicate which of the grounds for expungement set out in Rule 2080 serves as the basis of the order.⁹ *See* Customer Code Rule 12805; Industry Code Rule 13805.

As discussed above, Pearce’s expungement claim in the Underlying Customer Arbitration was heard prior to the effectiveness of Rule 2080, and prior to the adoption of the Customer Code and Industry Code. Under the prior Code of Arbitration Procedure (“Code”), the rules provided similar protections, including the right to be represented by counsel, discovery, and the right to a hearing. *See* Code Rules 10213, 10303, 10316, 10317, and 10321. The Code did not, however, require that an award explain the basis for the arbitration panel’s decision, including with respect to recommending expungement.¹⁰ *See* Code Rule 10330.

In short, the service accessed when an expungement request is made is the same in all material respects whether it is made in a customer or intra-industry arbitration.

IV. Conclusion

Pearce had not established any of the statutory bases for the Commission’s jurisdiction. The record shows that Pearce’s access to FINRA’s arbitration forum for his expungement claim was not denied or limited. To the contrary, his claim was submitted to the arbitration panel in

⁹ In his brief, Pearce erroneously states that Rule 2080 does not apply to industry disputes and he misquotes the FINRA Dispute Resolution Service Arbitrator’s Guide (the “Arbitrator’s Guide”). *See* Pearce Br. at 9. Contrary to Pearce’s claim, the Arbitrator’s Guide states, that “Rules 2080, 2081 and 12805 do not apply to intra-industry disputes, *unless the information to be expunged involves [a] customer dispute.*” Arbitrator’s Guide at p. 78, <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf>. (Emphasis added.)

¹⁰ Neither the current rules, nor the rules under the Code require the arbitration panel to explain their reasons in the case of a *denial* of expungement.

the Underlying Customer Arbitration and the panel denied it. Accordingly, The Commission lacks jurisdiction to review Pearce's application for review and should dismiss it.

Respectfully submitted,

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November 17, 2021

CERTIFICATE OF COMPLIANCE

I, Celia Passaro, certify that this motion complies with the Commission's Rules of Practice by filing a motion that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

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CERTIFICATE OF SERVICE

I, Celia Passaro, certify that on this 17th day of November 2021, I caused a copy of the foregoing FINRA's Brief in Response to the Commission's Request for Additional Briefing Concerning Jurisdiction, In the Matter of the Application of Kent Vincent Pearce, Administrative Proceeding File No. 3-19228, to be filed through the SEC's eFAP system on:

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