

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 80135 / March 1, 2017

Admin. Proc. File No. 3-17294

In the Matter of the Application of

DAVID B. TYSK

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY
PROCEEDING

Conduct Inconsistent with Just and Equitable Principles of Trade

FINRA found that registered representative of FINRA member firm engaged in conduct inconsistent with just and equitable principles of trade by altering notes and failing to disclose those alterations. *Held*, case is remanded to FINRA for clarification of its findings.

APPEARANCES:

Brian L. Rubin and Lee A. Peifer, of Sutherland, Asbill & Brennan LLP, for *David B. Tysk*.

Alan Lawhead, Gary Dernelle, and Lisa Jones Toms for FINRA.

Appeal filed: June 14, 2016
Last brief received: September 21, 2016

David B. Tysk, a registered representative of a FINRA member firm, seeks review of FINRA disciplinary action.¹ After finding that he committed two violations of its rule prohibiting conduct inconsistent with just and equitable principles of trade, FINRA suspended Tysk from associating with any member firm in any capacity for one year, fined him \$50,000, and ordered him to pay hearing and appeal costs. FINRA's decision provides insufficient clarity regarding the violations for us to conduct our statutory review. FINRA's first cause of action alleged that Tysk violated just and equitable principles of trade by violating his firm's document retention policies, but it is unclear from the opinion under review if FINRA concluded that Tysk violated these policies. FINRA's second cause of action alleged that Tysk violated just and equitable principles of trade by violating arbitration discovery rules, but FINRA did not explain in its decision why Tysk's conduct during discovery violated just and equitable principles of trade. For the reasons explained below, we remand this case to FINRA to clarify its findings.

I. Background

This case stems from a former customer's complaint against Tysk and his firm that resulted in arbitration. At the conclusion of the arbitration, the panel awarded sanctions against them based on its conclusion, among other things, that Tysk had altered the record of his contacts with the customer after the customer complained about the suitability of a recommended investment. FINRA subsequently brought a disciplinary proceeding against Tysk that alleged he had engaged in two violations of FINRA rules governing standards of commercial honor and just and equitable principles of trade.

FINRA's first cause of action alleged that Tysk altered his notes before the arbitration filing "to bolster his defense to the customer's claim, . . . in violation of his firm's policies" (emphasis added). FINRA alleged that this conduct violated NASD Rule 2110 and FINRA Rule 2010.² NASD Conduct Rule 2110, superseded by identically worded FINRA Rule 2010 on December 15, 2008, requires members and associated persons to "observe high standards of commercial honor and just and equitable principles of trade" in the conduct of their business.³

FINRA's second cause of action alleged that, having "altered his own ACT! Notes after he received the customer's Demand Letter," "Tysk did not notify the claimant, or [Tysk's firm], of these edits when Tysk responded to discovery requests for his notes and when he responded to subsequent requests for edits to his notes." FINRA alleged that this conduct violated FINRA Code of Arbitration Procedure for Customer Disputes IM-12000 and FINRA Rule 2010. IM-12000(c) advises that "[i]t may be deemed conduct inconsistent with just and equitable principles

¹ *Dep't of Enf. v. Tysk*, Complaint No. 2010022977801 (NAC May 16, 2016), available at http://www.finra.org/sites/default/files/NAC_2010022977801_Tysk_051616_0_0.pdf.

² FINRA did not allege that Tysk violated books and records requirements applicable to broker-dealers under the Securities Exchange Act of 1934.

³ See FINRA Regulatory Notice 08-57, available at http://finra.complinet.com/net_file_store/new_rulebooks/f/i/finra_08-57.pdf; see also NASD Rule 0115(a) ("Persons associated with a member shall have the same duties and obligations as a member under these Rules."); FINRA Rule 0140(a) (same).

of trade and a violation of Rule 2010” for an associated person to fail “to produce any document in his possession or control as directed pursuant to provisions of the Code.”

After an extended hearing panel found Tysk and his firm liable,⁴ Tysk (but not his firm) appealed to FINRA’s National Adjudicatory Council (“NAC”). The NAC found that Tysk violated NASD Rule 2110 and FINRA Rule 2010 when he “altered his ACT! Notes after receiving [his customer’s] complaint letter, and deliberately failed to disclose to his firm or [the customer] that he had done so for several months.” The NAC also found that Tysk violated IM-12000 of the Arbitration Code and FINRA Rule 2010 “when he concealed his altered notes and deliberately submitted discovery that was misleading in an arbitration proceeding.”

Tysk challenges the NAC’s findings that he violated just and equitable principles of trade. He asserts that he supplemented his notes to make them more complete before his customer filed the arbitration demand and observes that FINRA does not contend that the revisions he made were false. Among other things, Tysk argues that his firm’s policies did not prohibit his revisions, that FINRA did not conclude that they did, and that he responded to discovery requests as required by FINRA arbitration rules. FINRA argues, among other things, that Tysk’s revisions were misleading and were “backdated” because he added detailed entries in the present tense to his notes as late as years after the events he documented.

II. Analysis

Section 19(e)(1) of the Securities Exchange Act of 1934 requires us to consider, among other things, whether Tysk engaged in the conduct that FINRA found; whether he violated the provisions FINRA specified in its disciplinary decision; and whether those provisions “were applied in a manner[] consistent with the purposes of” the Exchange Act.⁵

We have recognized that “it is important that a self-regulatory organization,” such as FINRA, “clearly explain the bases for its conclusions.”⁶ If FINRA “fails to do so, we cannot discharge properly our review function.”⁷ For the reasons explained below, we remand this case to FINRA for additional explanation of the basis for its findings of violation.

⁴ *Dep’t of Enf. v. Ameriprise Fin. Servs., Inc.*, Discip. Proc. No. 2010022977801 (OHO Oct. 13, 2014), available at http://www.finra.org/sites/default/files/OHO%20Web%20Decision%20Proceeding%20Number%202010022977801_0.pdf.

⁵ 15 U.S.C. § 78s(e)(i).

⁶ *Jonathan Feins*, Exchange Act Release No. 37091, 1996 WL 169441, at *2 (Apr. 10, 1996); accord *Donald R. Gates*, Exchange Act Release No. 36109, 1995 WL 497444, at *2 (Aug. 16, 1995) (same).

⁷ *Feins*, 1996 WL 169441, at *2; see also *Gates*, 1995 WL 497444, at *2 (If a self-regulatory organization “fails to [explain itself clearly], applicants are impaired in their ability to defend themselves before us, and we cannot discharge our review function.”).

A. FINRA did not adequately explain its findings with respect to the first cause of action.

Exchange Act Section 15A(h)(1) provides that, in a FINRA disciplinary proceeding, FINRA “shall bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record.”⁸ FINRA predicated its first cause of action on a violation of firm policy. Tysk contends that FINRA’s findings with respect to this claim must be set aside because the NAC “did not find that Tysk had actually violated” any of his firm’s policies.

We cannot discern from the NAC’s decision whether it concluded that Tysk violated firm policies by altering his notes. The NAC explained in a footnote that it “support[ed] the Extended Hearing Panel’s finding that Tysk’s actions called into *serious question* whether he complied with Ameriprise’s retention policies” (emphasis added). This determination does not appear to constitute a finding that Tysk in fact violated his firm’s policies. The NAC also stated, however, that it “support[ed] the Extended Hearing Panel’s finding,” which unambiguously concluded that “Tysk Violated Ameriprise’s Policy.” Indeed, Tysk’s briefs evidence confusion over what exactly FINRA found in holding him liable under the first cause of action because, despite arguing that FINRA failed to find he violated firm policy, Tysk also challenges FINRA’s “finding that Tysk unethically violated Ameriprise policy.”

Under these circumstances, we believe it is necessary to remand this case to FINRA to clarify its findings. We remand “for a more complete statement” of FINRA’s findings because we are “unable to discern from the [written] decision why [FINRA] found violations.”⁹ On remand, FINRA should explain whether Tysk violated his firm’s policies by altering his notes and, if so, which policies were violated and how Tysk’s conduct violated Rules 2010 and 2110.¹⁰

B. FINRA did not adequately explain its findings with respect to the second cause of action.

We also remand for additional explanation of FINRA’s determination that Tysk is liable under the second cause of action. IM-12000 provides that “[i]t *may* be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010” for an associated person to fail “to produce any document in his possession or control as directed pursuant to provisions of the Code;” it does not provide that such a failure shall always be considered a Rule 2010 violation.¹¹ Because the NAC did not explain in its analysis of the second cause of action why Tysk’s conduct was inconsistent with just and equitable principles of

⁸ See 15 U.S.C. § 78o-3(h)(1) (emphasis added).

⁹ See *Feins*, 1996 WL 169441, at *2.

¹⁰ See *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 WL 6044123, at *10 (Nov. 15, 2013) (“An associated person may be found liable under this rule for either engaging in unethical conduct or acting in bad faith.”).

¹¹ See IM-12000 (emphasis added).

trade, other than to explain that he violated IM-12000, we are unable to review its conclusions with respect to the second cause of action.

Other aspects of FINRA's conclusion that Tysk violated IM-12000 are also unclear. The NAC cited Rule 12506(b)(2), which requires parties to act in good faith when complying with Rule 12506(b)(1), but it did not specifically discuss Rule 12506(b)(1)'s underlying direction for parties in an arbitration to produce documents, identify and explain why they cannot do so, or specifically object to their production. On remand FINRA should explain the extent to which its conclusions rest on any violation of these obligations.

Although the NAC found that Tysk "stonewalled producing the requested information until he was compelled by an arbitration order to have his computer examined by a forensic expert," it did not clearly address Tysk's argument that he relied on his counsel's advice in doing so. Elsewhere in its decision, the NAC determined that, because Tysk did not consult an attorney before he altered his notes, his claims of reliance on counsel were not mitigating. But that addresses Tysk's alteration of his notes before the arbitration was filed, rather than the second cause of action based on alleged discovery violations during the arbitration proceeding.

For these reasons, we remand this case to FINRA for further proceedings consistent with this opinion.¹² We do not suggest any view as to the outcome.

An appropriate order will issue.

By the Commission (Acting Chairman PIWOWAR and Commissioner STEIN).

Brent J. Fields
Secretary

¹² See *Calvin David Fox*, Exchange Act Release No. 48731, 2003 WL 22467374, at *3 (Oct. 31, 2003) (remanding where we could not "complete [our] review function . . . until the NYSE has provided the Commission with clarification and further explanation of the basis of its finding that Fox's conduct was inconsistent with just and equitable principles of trade").

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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For Review of Disciplinary Action Taken by

FINRA

ORDER REMANDING DISCIPLINARY ACTION TO FINRA

On the basis of the Commission's opinion issued this day, it is

ORDERED that this disciplinary action be, and it hereby is, remanded to FINRA for further proceedings consistent with the Commission's opinion.

By the Commission.

Brent J. Fields
Secretary