

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION



In the Matter of the Application of,

PATRICK DOWD,

File No.: 3-18283

For Review of the Action Taken by,

FINRA Proceeding No.: 20160508617-01

FINRA.

**DOWD'S RESPONSE IN OPPOSITION TO
FINRA'S MOTION TO DISMISS AND STAY BRIEFING SCHEDULE**

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I. INTRODUCTION

Patrick Hugh Dowd filed the instant Application for Review on November 7, 2017 (“Application”) after FINRA barred him from associating with any FINRA member. On November 28, 2017, FINRA filed its motion to dismiss the Application and requested that the Commission stay the briefing schedule. In support of its motion, FINRA relies on two separate arguments: (i) that Dowd failed to take any action to contest FINRA’s impending bar, and therefore, failed to avail himself of the remedies available to him; and (ii) that Dowd’s Application is untimely and no “extraordinary circumstances” exist to excuse his untimeliness.

II. FACTUAL BACKGROUND

Dowd was terminated from his position of employment with Pruco Securities, LLC (“Pruco”) on July 26, 2016. Pruco based his termination on unfounded grounds, which Dowd was unable to dispute due to the fact that Pruco denied him access to its records after his termination. After he was terminated, Pruco appears to have informed FINRA of the unfounded allegations through FINRA’s Central Registration Depository (“CRD”). FINRA sent correspondence to Dowd requesting applications, correspondence, memoranda, and other written documentation regarding the allegations made against him. Due to the fact that Dowd did not have access to Pruco’s files after his July 26, 2017 termination, he was unable to respond to FINRA’s request in any manner.

Although Dowd made numerous attempts to obtain from Pruco the information and documentation he needed to respond to FINRA’s requests, Pruco did not provide Dowd with the requested access, preventing Dowd from responding to FINRA’s requests in any meaningful manner. FINRA eventually mailed to Dowd a letter notifying him of his being barred from

associating with any FINRA member in any capacity (“Bar Notice”) on March 27, 2017. As FINRA has admitted in its Motion to Dismiss, the certified letter was returned to FINRA. The record does not evidence that Dowd received the notification prior to the expiration of the deadline to file an application for review with the Commission. Due to FINRA’s failure to ensure delivery of the Bar Notice, it failed to ensure that Dowd received sufficient notice of the thirty-day appeal deadline to the Commission.

III. ARGUMENT

The Commission should deny FINRA’s motion to dismiss because FINRA failed to ensure that Dowd received timely notice of his right to appeal the final action to the Commission. Although FINRA mailed the Bar Notice to Dowd via certified U.S. mail, that letter was returned to FINRA. Due to the fact that FINRA utilized its expedited proceeding procedure, it cannot rely on the mailing of the letter to Dowd’s address registered with CRD when it has reason to know that he may not have received it. Due to the fact that the Bar Notice was returned to FINRA, it had an obligation to take additional steps to ensure that Dowd was aware of the bar and ability to timely file an application for review with the Commission.

The Commission should also deny FINRA’s motion to dismiss because the facts and circumstances show that responding would have constituted a futile act on Dowd’s part, and would have assuredly resulted in the same outcome. Due to the fact that Dowd was unable to provide the requested information and documentation necessary to prevent FINRA from taking final action against him, it would have been a futile act for him to have exhausted those administrative remedies.

1 FINRA took no action to ensure that Dowd was on notice of his right to file an application for review with the Commission.

In its Motion to Dismiss, FINRA states that it satisfied its obligation to provide Dowd with notice of the information and documents it requested from him as well as the proceedings against him by simply mailing correspondence to the address on file with the CRD. Although FINRA Rule 9134(b)(1) allows FINRA to serve papers on applicants at the residential address reflected in the CRD, the Commission has not held, in the context of expedited proceedings, that mailing documents to an individual's CRD address is always sufficient to support a dismissal. *Destina Mantar*, Exchange Release No. 79851, 2017 SEC LEXIS 194, *9 (January 19, 2017).¹ In cases, such as Dowd's where FINRA pursues a bar through an expedited proceeding, the Commission regularly remands cases back to FINRA when there is reason to believe that the applicant did not receive the mailed notification. *Id.* at *11.²

As Dowd acknowledges in his Application, FINRA sent the Bar Notice to him on or about March 27, 2017. FINRA admits that the March 27, 2017 Bar Notice was returned as unclaimed. When the certified copy of the Bar Notice was returned to FINRA, FINRA had reason to believe that Dowd did not receive the letter and a duty to make efforts to properly serve the notice on Dowd. *See Kevin M. Murphy*, Exchange Act Release No. 79016, 2016 SEC LEXIS

¹ An expedited proceeding pursuant to FINRA Rule 9552 is different than disciplinary proceedings, which are initiated by a complaint authorized by FINRA's Office of Disciplinary Affairs, are assigned to a Hearing Officer and Hearing Panel as soon as practicable, and, among other things, authorize a respondent found to be in default to move the Hearing Officer to set aside the default for good cause. *Id.* at *10, *citing* FINRA Rules 9211, 9213, and 9269(c).

² *See also, Kevin M. Murphy*, Exchange Act Release No. 79016, 2016 SEC LEXIS 3772 (Sept. 30, 2016); *Robert J. Langley*, Exchange Act Release No. 50917, 2004 SEC LEXIS 3048 (Dec. 22, 2004); *Ryan R. Henry*, Exchange Act Release No. 53957, 2006 SEC LEXIS 1333 (June 8, 2006); *James L. Bari*, Exchange Act Release No. 48292, 2003 SEC LEXIS 3164 (Aug. 6, 2003); *Christopher A. Parris*, 2016 SEC LEXIS 3075 (Aug 24, 2016).

3772. Based on the fact that there is a lack of record evidence to show that Dowd received the Bar Notice in a timely fashion, or that FINRA took steps to ensure its service on Dowd, the evidence is insufficient to show that Dowd was aware of the bar, his ability to appeal the bar to the Commission and the relatively short deadline for doing so. Therefore, FINRA's motion to dismiss for failure to appeal within the thirty-day deadline should be denied based on FINRA's failure to provide proper notice to Dowd.

2 Dowd's failure to exhaust FINRA's administrative remedies is excused because it would have constituted a futile act.

Although the Commission has dismissed applications for review based on an applicant's failure to respond to FINRA's requests for documents and information, dismissal should be denied in the instant case as it would have been futile for Dowd to have responded to FINRA's requests for information. A commonly recognized exception to the requirement that a litigant exhaust his or her remedies before filing an appeal exists when the litigant demonstrates that pursuit of administrative remedies would be a vain or futile act. *See Honig v. Doe*, 484 U.S. 305, 327, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988).³ Although it does not appear that the Commission has addressed the availability of futility as a defense to the failure to exhaust FINRA's administrative remedies, many courts and quasi-judicial administrative bodies have adopted the defense in certain cases.

Had Dowd responded to FINRA's letter without providing the requested information and documents to which he did not have access, he would have undoubtedly received the same disciplinary action. Exhaustion of administrative remedies is futile only if the ultimate denial of

³ See also *McCarthy v. Madigan*, 503 U.S. 140, 146, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992); *Randolph-Sheppard Vendors of Am. v. Weinberger*, 254 U.S. App. D.C. 45, 795 F.2d 90 (D.C. Cir. 1986); *Ross v. United States*, 460 F. Supp. 2d 139, 147 (D.D.C. 2006).

relief is certain. *Marine Mammal Conservancy, Inc. v. Dep't of Agric.*, 328 U.S. App. D.C. 253, 134 F.3d 409, 413 (D.C. Cir. 1998) citing *U.D.C. Chairs Chapter, Am. Ass'n of Univ. Professors v. Bd. of Trs. of Univ. of D.C.*, 312 U.S. App. D.C. 399, 56 F.3d 1469 (D.C. Cir. 1995). In a letter dated August 11, 2016, Dowd was asked to provide specific documents and information to FINRA. The letter stated that Dowd was obligated to respond to the request “fully, promptly, and without qualification.” Furthermore, the August 11, 2016 letter states that [a]ny failure on your part to satisfy these obligations could expose you to sanction, including a permanent bar from the securities industry.” Due to the fact that Dowd did not possess the information requested by FINRA, he would have been unable to respond to FINRA’s requests in a manner that would have prevented FINRA from taking the very same actions that it did. Failure to engage in such a futile act should not bar Dowd from receiving appropriate review of the disciplinary action taken by FINRA.

IV. CONCLUSION

When FINRA notified Dowd of its request for information and documentation, Dowd did not have access to the information and documentation necessary to respond to FINRA’s requests. Dowd made several efforts to contact Pruco and obtain the information he needed to adequately respond to FINRA. Due to the fact that Pruco denied these repeated requests, Dowd was unable to satisfy FINRA’s requests. Due to these facts, it would have been futile for Dowd to have responded to FINRA, and ultimately, FINRA would have taken the same action against him for failing to provide the requested information. For this reason, Dowd’s Application should not be dismissed for allegedly failing to exhaust his administrative remedies.

Ultimately, FINRA engaged in an expedited proceeding against Dowd and barred him. As Dowd acknowledged in his Application, FINRA sent the Bar Notice to Dowd via certified U.S. Mail. That letter, however, was returned to FINRA. The returned certified letter alerted FINRA to the possibility that Dowd had not received the bar notice, and imposed a burden on FINRA to ensure its delivery to Dowd. FINRA has the burden of proving that Dowd was on notice of the bar and deadline to file an application for review with the Commission, and has failed to establish that Dowd failed to timely respond to the notice.

Respectfully submitted this 5th day of December, 2017,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of December, 2017, a true and correct copy of the foregoing has been furnished to the following:

VIA FACSIMILE (COPY):

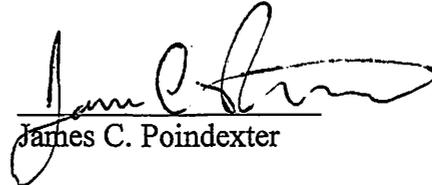
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