

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No.48731 / October 31, 2003

Admin. Proc. File No. 3-11062

In the Matter of the Application of

CALVIN DAVID FOX
P.O. Box 7900
Jupiter, FL 33468

For Review of Disciplinary Action Taken by the
NEW YORK STOCK EXCHANGE, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY PROCEEDINGS

Alleged Conduct Inconsistent with Just and Equitable Principles of Trade

Alleged Misstatement to Member Firm Employer

Alleged Transmission of Altered Court Order to Member Firm Employer

Former registered representative of member firm of New York Stock Exchange, Inc. is alleged to have engaged in conduct inconsistent with just and equitable principles of trade by making a misstatement to his member firm employer about the status of his license to practice law in the State of Florida and by submitting an altered copy of an order of the Florida Supreme Court to his member firm employer to support the misstatement. Held, proceeding remanded for clarification and explanation of Exchange's findings in support of the allegations.

APPEARANCES:

Calvin David Fox, pro se.

Rex W. Mixon and Steven F. Korostoff, for the New York Stock Exchange, Inc.

Appeal filed: March 7, 2003

Last brief received: August 4, 2003

I.

Calvin David Fox ("Fox"), formerly a registered representative associated with Prudential Securities, Inc. ("Prudential"), a member firm of the New York Stock Exchange, Inc. ("NYSE"), seeks review of NYSE disciplinary action. In May 2002, an NYSE hearing panel found that Fox made a misstatement to Prudential regarding the status of his license to practice law in Florida and, further, that Fox sent an altered copy of a Florida Supreme Court order to Prudential to support the misstatement. The hearing panel found that this conduct was inconsistent with just and equitable principles of trade, in violation of NYSE Rule 476(a)(6), and censured Fox and barred him for a period of four years from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization. On Fox's appeal, the NYSE Board of Directors issued a decision affirming the decision of the hearing panel in all respects. This appeal followed. 1/ We base our findings on an independent review of the record.

II.

From July 1999 until February 2000, Fox was employed as a registered representative at Prudential in its Lauderhill, Florida office. Prior to working at Prudential, Fox practiced as an attorney in Florida. Fox has not worked in the securities industry in a registered capacity since February 2000, when his employment at Prudential was terminated.

1/ On July 31, 2003, Fox filed with the Commission a "Motion to Strike; and/or Extraordinary Motion for Additional Time," in which Fox claimed that the method by which the NYSE served its opposition brief on Fox was improper. Fox requested that the Commission strike the NYSE opposition brief. Fox also requested that he be granted an additional 14 days to file his reply brief. We deny the motion. The NYSE complied with the Commission's Rules of Practice by serving its brief upon Fox by first class mail. The NYSE served Fox by a different means than it served the Commission, but provided an explanation for doing so in its brief, as required by the Commission's Rules of Practice. See 17 C.F.R. §201.150 cmt (a) (2003). We note that Fox ultimately filed his reply brief timely.

Beginning in September 1996, Fox was the subject of a complaint filed with the Florida Bar by the husband of one of Fox's former legal clients. The complaint alleged that Fox had improperly retained funds in a client trust account. In proceedings related to the complaint, Fox was ordered, in September 1997, in a subpoena issued by a grievance committee of the Florida Bar, to produce, among other things, all financial records of his client trust accounts. After a number of intervening proceedings, in which a referee found that Fox had failed to comply with the subpoena without good cause, the Florida Supreme Court issued an order on November 24, 1999. That order directed that Fox be suspended from the practice of law, effective 30 days from the date of the order, on December 24, 1999, until such time as Fox complied with the subpoena. The circumstances surrounding Prudential's subsequent inquiry of Fox regarding the suspension order are the focus of the NYSE's allegations against Fox.

On January 11, 2000, Joseph Rosa ("Rosa"), then an in-house attorney in Prudential's New York office, telephoned Fox in his Prudential office in Florida and asked him questions about the status of his license to practice law in Florida. A Florida newspaper article indicating that Fox was suspended had been brought to Rosa's attention. In response to Rosa's questions during this telephone conversation, Fox stated to Rosa that his license was not then suspended and that his license suspension was stayed pending the Florida Supreme Court's ruling on a motion for rehearing that Fox had filed with the Court earlier that month. Arlene Sankel, chief branch discipline counsel in the Miami office of the Florida Bar, testified before the hearing panel that Fox was suspended at the time of his conversation with Rosa.

At the end of their conversation, Rosa requested that Fox fax to him any materials supporting Fox's claim that his license suspension was stayed. On January 12, 2000, Fox faxed several documents to Rosa, including a copy of his "Supplement to Motion for Rehearing, Etc." before the Florida Supreme Court and certain rules of Florida appellate procedure, but not including a copy of the suspension order. On January 13, 2000, Rosa telephoned Fox again and asked Fox to fax him the order.

Fox then faxed to Rosa a copy of the order, in which the final sentence was deleted (the "altered order"). With the deletion, the final sentence of the altered order read, "Not final until time expires to file motion for rehearing and, if filed, determined." The sentence that had been removed from the order, with underlining in the original document, read, "The filing of a motion for rehearing shall not alter the effective date of this suspension."

III.

Fox acknowledges that he told Rosa that he was not suspended. However, Fox asserts, as he did before the NYSE, that his statements to Rosa expressed his sincerely held, good faith legal opinion that his license suspension was stayed while the Court considered his motion for rehearing. Fox states that this opinion was based on his experience practicing appellate law and his understanding of certain rules of Florida appellate procedure, and was not an intentional misstatement of the status of his license. Although Rosa testified that he did not have a copy of the suspension order at the time he called Fox, Fox testified that he assumed that Rosa had a copy of the order in hand when he first called Fox and, accordingly, was familiar with the language in the order. Fox characterizes his conversation with Rosa as one between two lawyers arguing about the meaning of an order, rather than one involving an affirmative misstatement.

Fox also acknowledges that he faxed the altered order to Rosa. In his defense, Fox claims, as he did before the NYSE, that he accidentally sent Rosa the altered order, which he assertedly had prepared solely with the intention of sending it to his mother and other family members. Over the course of this proceeding, Fox offered two different accounts of his transmission of the altered order: he has represented that he inadvertently detached the altered order from a copy of a letter to his mother and, alternatively, that he accidentally grabbed the altered order from a pile of documents prior to faxing it to Rosa. Notwithstanding this discrepancy, Fox has taken the position throughout this proceeding that his transmission of the altered order does not amount to a violation of NYSE Rule 476(a)(6) because it was accidental and does not involve an act of bad faith or unethical conduct.

IV.

In order to sustain an exchange disciplinary proceeding, we must find, pursuant to Section 19(e) of the Securities Exchange Act of 1934 2/, that the respondent engaged in the acts in which the NYSE found him to have engaged. With respect to a charge that conduct was inconsistent with just and equitable principles of

2/ 15 U.S.C. § 78s(e). We also must find that the acts were in violation of the provisions of the Exchange Act, the rules or regulations thereunder, or the rules of the NYSE as have been specified in the determination of the NYSE and that such provisions are, and were applied in a manner, consistent with the purposes of the Exchange Act.

trade, we have held that a self-regulatory organization need not find that the respondent acted with scienter, but must find that the respondent acted in bad faith or unethically. 3/ In this instance, the NYSE did not make findings with respect to whether Fox acted in bad faith or unethically.

As indicated, Fox has defended his conduct on the ground that his conversation with Rosa was a good faith, back-and-forth argument about the effectiveness of the suspension order. Rosa's testimony did not directly contradict Fox's description of the conversation, and the NYSE hearing panel did not address in its decision whether it found Fox's explanation credible. Instead, the NYSE simply said of the alleged misstatement, "This [statement that his suspension was stayed pending a motion before the court] may have been Fox's opinion but it was not true." Fox also has characterized his transmission of the altered order as an accident and not a bad faith or unethical act. In its findings of fact, the NYSE hearing panel observed that Fox had offered different explanations for the transmission of the altered order, but the panel did not address whether it found that Fox acted in bad faith or unethically in sending the altered order. Instead, the panel declared that Fox was responsible for the transmission of the altered order, simply because it was in his possession and control.

The Commission cannot properly complete its review function in this matter 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. We therefore remand this matter. On remand, in light of Commission precedent requiring a finding of bad faith or unethical conduct in proceedings arising from alleged conduct inconsistent with just and equitable principles of trade, the NYSE

3/ See, e.g., Robert E. Kauffman, 51 S.E.C. 838, 839-40 (1993) (stating that violation of NASD rule prohibiting conduct inconsistent with just and equitable principles of trade against registered representative for misstatement of educational background does not require finding that respondent acted with scienter, but does require finding of bad faith or unethical conduct), aff'd, 40 F.3d 1240 (3d Cir. 1994) (Table); Robert J. Jautz, 48 S.E.C. 702, 704 (1987) (holding that breach of contract by registered representative of member firm violates NASD rule prohibiting conduct inconsistent with just and equitable principles of trade only if committed in bad faith or accompanied by unethical conduct).

should expressly consider whether Fox acted in bad faith or unethically when he made his statement to Rosa that

his suspension was stayed and/or sent the altered order, and, if it finds that Fox did so, provide the specific basis upon which it makes such a determination. We do not intend to suggest any view as to the outcome.

An appropriate order will issue. 4/

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID, ATKINS and CAMPOS).

Jonathan G. Katz
Secretary

4/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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ORDER REMANDING DISCIPLINARY PROCEEDING OF REGISTERED SECURITIES
EXCHANGE

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

ORDERED that this disciplinary proceeding be, and it hereby is,
remanded to the New York Stock Exchange, Inc. for action consistent
with the Commission's opinion.

By the Commission.

Jonathan G. Katz
Secretary