

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 53145 / January 19, 2006

Admin. Proc. File No. 3-11864

In the Matter of the Application of

ELLIOT M. HERSHBERG
c/o Michael E. Grenert, Esq.
Liddle & Robinson, L.L.P.
800 Third Avenue
New York, New York 10022

For Review of Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF NASD ACTION

Failure to Respond

Former associated person of member firm of registered securities association failed to appear for an on-the-record interview. Held, the application for review is dismissed.

APPEARANCES:

Michael E. Grenert, of Liddle & Robinson, L.L.P., for Elliot M. Hershberg.

Marc Menchel, Alan Lawhead, James S. Wrona, and Carla Carloni, for NASD.

Appeal filed: March 21, 2005

Last brief received: June 21, 2005

I.

Elliot M. Hershberg, a former associated person with Bear, Stearns & Co. Inc. ("Bear Stearns"), an NASD member firm, appeals from NASD action. NASD found that Hershberg violated NASD Procedural Rule 8210 and Conduct Rule 2110 by failing to provide requested testimony 1/ and barred Hershberg from association with any NASD member firm in any capacity. 2/ We base our findings on an independent review of the record.

II.

Hershberg acknowledges that the facts "are generally not in dispute." On July 11, 2003, NASD requested that Hershberg appear for an on-the-record interview in connection with its inquiry into whether certain Bear Stearns initial public offering allocation practices violated federal securities laws or NASD rules. 3/ NASD scheduled Hershberg's appearance for July 23, 2003, and warned Hershberg that his failure to appear "could result in disciplinary action."

On July 21, 2003, Hershberg's counsel, Ira Sorkin, called Neil Alexander, Special Investigator for NASD's Enforcement Department, to request that NASD reschedule Hershberg's testimony for July 24, 2003. Alexander testified that Sorkin also suggested that Hershberg might not testify because he was sixty-two years old and was "not going to work in the industry again." 4/ That same day, NASD wrote Sorkin that NASD rescheduled Hershberg's testimony for July 24, 2003, and asked Sorkin to inform NASD by July 23, 2003 if Hershberg decided not

1/ Procedural Rule 8210 requires persons subject to NASD's jurisdiction to provide information and to testify if requested with respect to an investigation, complaint, examination, or proceeding authorized by NASD. Conduct Rule 2110 provides that members "observe high standards of commercial honor and just and equitable principles of trade." We have held that an associated person's failure to provide information requested by NASD constitutes a failure to observe high standards of commercial honor and just and equitable principles of trade. John A. Malach, 51 S.E.C. 618, 620 (1993).

2/ NASD also assessed hearing and transcript costs.

3/ Three days later, Bear Stearns wrote Hershberg that it had terminated his employment effective July 11, 2003, "for violating the firm's policies regarding the business conduct of registered representatives and outside business relationships." Subsequently, Bear Stearns filed a Form U-5 "Uniform Termination Notice for Securities Industry Registration" with NASD. The Form U-5 indicated that Bear Stearns had suspended Hershberg on June 25, 2003 and, after further internal review, terminated his employment on July 11, 2003, for the reasons given in his termination letter.

4/ Hershberg has not been registered or associated with any NASD member since July 2003.

to testify. NASD stated that Hershberg's failure to testify "could result in disciplinary action including a censure, fine and bar from the securities industry."

On July 22, 2003, Sorkin wrote NASD that Hershberg "respectfully decline[d] to appear for testimony pursuant to NASD Rule 8210." Hershberg understood that by declining to testify he would be subject to discipline by NASD. The next day, NASD notified Sorkin that it had made a preliminary determination to recommend disciplinary action against Hershberg based on his failure to comply with Rule 8210 and invited Hershberg to file a Wells submission by August 8, 2003. NASD again wrote that Hershberg's failure to appear for testimony could result in disciplinary action including a "bar from the securities industry." Hershberg did not respond.

On March 25, 2004, NASD sent Hershberg a Pre-Suspension Notice ("Notice"), which he received on March 26, 2004. The Notice informed Hershberg that, pursuant to NASD Rule 9541, he would be suspended from associating with any member in any capacity twenty days after the service of the notice unless he took "corrective action" within this twenty-day period. The Notice also informed Hershberg that he was entitled, under NASD Rule 9542, to a hearing upon written request if he made such a request within five days of receipt of the Notice. A timely request for a hearing would stay the effective date of the Notice. The Notice stated further that Hershberg could file a Motion for Reinstatement after his suspension became effective but he would be barred automatically from association with any member firm in any capacity if he failed to request a hearing to challenge the suspension within six months of his receipt of the Notice.

Hershberg did not respond to the Notice within the twenty-day period. He did not take "corrective action," and he did not make a written request for a hearing. On April 16, 2004, NASD sent Hershberg a notice that, accordingly, he was suspended from associating with any NASD member firm in any capacity effective immediately. NASD reiterated that Hershberg would be automatically barred if he failed to challenge the suspension within six months of receipt of the Pre-Suspension Notice. This period ended September 26, 2004.

On September 23, 2004, Hershberg, through new counsel, submitted a Motion for Reinstatement and requested a hearing to challenge his suspension. In his motion, Hershberg professed his "willing[ness] to testify before the NASD." Both Hershberg and his new counsel reaffirmed this willingness to testify at the subsequent hearing. Hershberg testified further that he had refused to testify initially on the advice of his former counsel but understood that this decision was his responsibility. He asserted attorney-client privilege and refused to answer when questioned at the hearing about his communications with his former counsel. His hearing counsel stipulated as to liability on the Rule 8210 violation but not as to sanctions. Hershberg urged NASD to impose no sanction beyond the suspension he had already served. NASD sought a bar in all capacities.

The Hearing Panel issued a decision pursuant to Rules 9559(o) and (p) finding violations and imposing sanctions. 5/ It found that Hershberg violated NASD Procedural Rule 8210 and Conduct Rule 2110 by refusing to provide requested testimony. It imposed a bar from associating with any NASD member firm in any capacity due to "Hershberg's refusal to testify until this proceeding was instituted, and the lack of mitigating facts." This appeal followed. 6/

III.

Section 19(f) of the Securities Exchange Act of 1934 provides the standards for our review. 7/ We must dismiss Hershberg's appeal if we find that "the specific grounds" for NASD's action "exist in fact," that NASD's action is in accordance with its rules, that such rules were applied in a manner consistent with the purposes of the Exchange Act, and that NASD's action does not impose an undue burden on competition. 8/

NASD Rule 8210 requires persons subject to NASD's jurisdiction to provide information and testify upon NASD's request. NASD requested that Hershberg appear for on-the-record testimony on July 24, 2003, pursuant to Rule 8210. Hershberg failed to appear. At the hearing under Rule 9559, Hershberg's counsel stipulated as to liability on the Rule 8210 violation, and Hershberg admits in his brief that the only issue is the appropriate sanction for his conduct. We find that the specific grounds for NASD's finding of a violation, Hershberg's failure to testify, exist in fact, and that NASD acted in accordance with its rules in making this determination.

We find further, contrary to Hershberg's contention that a bar was inappropriate, that NASD applied its rules in a manner consistent with the purposes of the Exchange Act in deciding to bar Hershberg for his misconduct. NASD's action fulfills the Exchange Act's purpose of

5/ NASD conducted the hearing pursuant to Rule 9559 because the revised NASD Rule 9550 series took effect on June 28, 2004. See NASD Notice to Members 04-36 (May 5, 2004). The revised rules, aimed at streamlining expedited proceedings, eliminated, among other changes, Rules 9541(a) and (b) and Rule 9544. Therefore, although NASD accepted Hershberg's Motion for Reinstatement pursuant to former Rule 9544, the Hearing Panel conducted its proceeding pursuant to Rule 9559.

6/ The National Adjudicatory Council did not call the Hearing Panel's decision for review as was its option pursuant to Rule 9559(q). Pursuant to Rule 9559(s), the Hearing Panel's decision is final action appealable to the Commission.

7/ 15 U.S.C. § 78s(f).

8/ Robert J. Langley, Securities Exchange Act Rel. No. 50917 (Dec. 22, 2004), 84 SEC Docket 1959, 1963. Hershberg does not claim, and the record does not show, that NASD's action has imposed an undue burden on competition.

protecting investors. ^{9/} "We have repeatedly emphasized the importance of complying with NASD's information requests. When members and associated persons delay their responses to requests for information, they impede the ability of NASD to conduct its investigations fully and expeditiously. The sanctions imposed will serve as a deterrent to others who may be inclined to ignore NASD's information requests." ^{10/} Thus, the bar protects investors by encouraging the timely cooperation that assists in the prompt discovery and correction of wrongdoing.

NASD Sanction Guidelines provide that "[i]f the individual did not respond in any manner, a bar should be standard[.]" but that "[w]here mitigation exists, or the person did not respond in a timely manner, consider suspending the individual in any and all capacities for up to two years." ^{11/} NASD found that Hershberg's "refusal to testify until this proceeding was instituted" constituted a complete failure to respond warranting the standard sanction of a bar, and we agree with this conclusion. ^{12/} We have stressed repeatedly that NASD should not have to bring a disciplinary proceeding in order to obtain compliance with its rules governing investigations. ^{13/} Such compliance is essential to NASD's self-regulatory function because NASD lacks subpoena power. ^{14/} Failure to comply is a serious violation justifying stringent sanctions because it subverts NASD's ability to execute its regulatory functions. ^{15/}

We find no factors that mitigate the imposition of a bar. Hershberg failed to appear for his interview even after NASD rescheduled his testimony at the request of his counsel. He did not agree to testify after NASD informed him that it had made a preliminary determination to institute disciplinary action based on his failure to appear, and he did not file a Wells submission explaining why NASD should not bring formal disciplinary action. Hershberg also did not respond to the Pre-Suspension Notice informing him that he would be suspended in twenty days

^{9/} See, e.g., SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 861 (2d Cir. 1968) (stating that the intent of the Exchange Act "is the protection of investors against fraud").

^{10/} Paz Securities, Inc. and Joseph Mizrachi, Exchange Act Rel. No. 52693 (Oct. 28, 2005), __ SEC Docket __, __ (citing Mark Allen Elliott, 51 S.E.C. 1148, 1151 (1994)).

^{11/} NASD Sanction Guidelines 39 (2001 ed.).

^{12/} NASD rejected Hershberg's claim that his reliance on the advice of counsel mitigated his violation. It found, citing United States v. Doe, 219 F.3d 175 (2d Cir. 2000), that Hershberg's refusal to testify as to the substance of communications with counsel on the basis of attorney-client privilege precluded this defense because the privilege could not be used both as a "shield and a sword." Hershberg does not press this claim on appeal.

^{13/} See, e.g., Charles R. Stedman, 51 S.E.C. 1228, 1232 (1994); Malach, 51 S.E.C. at 621.

^{14/} Malach, 51 S.E.C. at 621.

^{15/} Id.

based on his failure to testify unless he took corrective action within that time period. The Suspension Notice sent to Hershberg by NASD twenty days later still did not produce a response. Hershberg expressed his willingness to testify only after his automatic bar became imminent; his counsel wrote NASD that he was willing to testify just three days before the six-month deadline expired. In these circumstances, Hershberg's conduct amounted to a complete failure to respond, and NASD acted consistently with the purposes of the Exchange Act in imposing the bar. 16/

We reject Hershberg's contention that a bar is not warranted here "under the applicable precedent" because other respondents have not been barred for failing to respond to Rule 8210 requests. We have held consistently that the appropriate sanction depends on the facts and circumstances of each particular case and cannot be determined by comparison with action taken in other proceedings. 17/ Hershberg's refusal to testify for a fourteen-month period and his attempt to avoid a bar by reversing his position at the last minute justified a stringent sanction. 18/

16/ See Toni Valentino, Exchange Act Rel. No. 49255 (Feb. 13, 2004), 82 SEC Docket 711, 719 ("Valentino's attempts to delay and ultimately avoid her appearance are especially troubling given the importance of Rule 8210. Because NASD does not have subpoena power, compliance with its rules requiring cooperation in investigations is essential to enable NASD to carry out its self-regulatory functions. NASD should not have to bring disciplinary proceedings, as it was required to do here, in order to obtain compliance with its rules governing its investigations. The standard sanction of a bar is warranted.") (citations omitted); see also Malach, 51 S.E.C. at 620-21 (sustaining NASD's sanctions including a bar even though respondent ultimately provided the requested information).

17/ See, e.g., Edward C. Farni, II, 51 S.E.C. 1118, 1120 n.11 (1994) (citing Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973)).

18/ Hershberg also contends that, in imposing the bar, NASD relied erroneously on its decision in Dep't of Enforcement v. Quattrone, Complaint No. CAF03008, 2004 NASD Discip. LEXIS 17 (NAC Nov. 22, 2004), appeal docketed, No. 3-11786 (SEC Dec. 28, 2004), in which NASD barred Quattrone. Hershberg claims that a bar was appropriate in that case because, unlike here, Quattrone invoked the Fifth Amendment in refusing to testify and NASD needed to deter other respondents from using the Fifth Amendment to avoid testifying in NASD proceedings. Hershberg also argues that, unlike Quattrone, he is not a criminal defendant and that his case lacks the same public notoriety as Quattrone's case. The facts and circumstances in Quattrone are different from those here. In any event, that case is currently on appeal before the Commission and therefore any precedential value of NASD's decision is undetermined.

We find further that the cases on which Hershberg relies do not support his claim that a bar was inappropriate here. In Edward C. Farni, II, 19/ NASD imposed lesser sanctions where respondent agreed to appear for an on-the-record interview in his answer to NASD's complaint instituting disciplinary proceedings and where he ultimately testified before NASD less than three months after the initial request for information. 20/ In Ashton Noshir Gowadia, 21/ NASD imposed lesser sanctions where respondent eventually supplied the requested information and where respondent believed incorrectly that his member firm had provided the requested information to NASD after respondent had given this information to the firm prior to his departure. 22/ Here, Hershberg simply expressed his willingness to testify almost six months after NASD instituted disciplinary proceedings and fourteen months after the initial request. He testified that he knew he was violating NASD rules by deciding not to appear for his testimony initially. In this situation, NASD found that Hershberg's belated offer to testify did not mitigate his violation, and we find that Hershberg's failure to testify in response to the initial 8210 request, the Wells Notice, and the Pre-Suspension and Suspension Notices supports this conclusion. 23/

19/ 51 S.E.C. 1118 (1994).

20/ Id. at 1119, 1120.

21/ 53 S.E.C. 786 (1998).

22/ Id. at 789, 792.

23/ Valentino, 82 SEC Docket at 719 (sustaining bar imposed by NASD where respondent failed to appear after numerous attempts to schedule the interview over an eleven-month period); see also Stedman, 51 S.E.C. at 1232 (sustaining bar imposed by NASD for failing to respond to requests for information even though respondent provided partial responses). We note further that a sanction is not rendered invalid merely because it is more severe than a sanction imposed in a similar case. Farni, 51 S.E.C. at 1120 n.11 (citing Carter v. SEC, 726 F.2d 472, 474 (9th Cir. 1983) and Peter W. Schellenbach, 50 S.E.C. 798, 803 (1991), aff'd, 989 F.2d 907 (7th Cir. 1993)).

Accordingly, we dismiss Hershberg's application for review because the specific grounds for NASD's action exist in fact, NASD acted in accordance with its rules, and NASD applied those rules in a manner consistent with the purposes of the Exchange Act.

An appropriate order will issue. 24/

By the Commission (Chairman COX and Commissioners GLASSMAN, ATKINS, CAMPOS and NAZARETH).

Nancy M. Morris
Secretary

24/ 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
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ORDER DISMISSING APPLICATION FOR REVIEW OF ACTION OF REGISTERED
SECURITIES ASSOCIATION

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

ORDERED that the appeal of action taken by NASD against Elliot M. Hershberg be, and
it hereby is, dismissed.

By the Commission.

Nancy M. Morris
Secretary