BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of Department of Enforcement, Complainant, vs. Robert J. Kendzierski Erie, PA, Respondent.	DECISION Complaint No. C9A980021 Dated: November 12, 1999

Registered representative converted $6,000 in customer funds. Held, findings and sanctions substantially affirmed.

Respondent Robert J. Kendzierski ("Kendzierski") appealed a December 15, 1998 decision of a Hearing Panel pursuant to Procedural Rule 9310. After a review of the entire record in this matter, we affirm the Hearing Panel's conclusion that Kendzierski converted $6,000 of a customer's funds.[1] We order that he be fined $80,000 and barred from association with any member firm in any capacity.

Background

Kendzierski has been a registered representative since 1984. He is currently registered as an investment company/variable contracts representative. Kendzierski was associated with Pruco Securities Corporation ("Pruco") from February 1984 through March 1997. He is currently associated with Indianapolis Life Insurance Company.

Facts

Kendzierski worked in Pruco's Erie, Pennsylvania office, where he sold an equal mix of insurance products and securities, primarily variable life insurance and variable annuities. JS, an 80-year-old widower, was a client of Kendzierski's for almost 12 years.

[1] Kendzierski did not request a hearing. This matter was therefore considered on the basis of the written record.

JS purchased life insurance, mutual funds and annuities, and his was one of Kendzierski's most productive accounts. JS and Kendzierski became friends, and Kendzierski even ate dinner at JS's house on occasion.

On April 23, 1996, JS gave Kendzierski a $5,000 check (the "April 1996 Check") to deposit in an interest-bearing insurance policy that JS maintained at Pruco. The April 1996 Check was made payable to "Prudential," but Kendzierski crossed out "Prudential" and wrote his own name on the payee line. Kendzierski then endorsed and deposited the check into his personal bank account. Two days later, on April 25, 1996, Kendzierski deposited a cashier's check for $4,000 in JS's Pruco account. Kendzierski kept the remaining $1,000 from the April 1996 Check and used it to pay rent that was two months overdue.

On February 14, 1997, JS gave Kendzierski another check for $5,000 (the "February 1997 Check") to deposit in the Pruco account. This check was also made payable to "Prudential," and once again, Kendzierski crossed out "Prudential" and wrote his own name on the payee line. Kendzierski endorsed the February 1997 Check and deposited it into his personal bank account. He used the money to pay his personal expenses.

Shortly thereafter, JS, while reviewing his canceled checks, noticed that the payee line of the February 1997 Check had been altered. JS registered a complaint, and in March 1997, Prudential Insurance ("Prudential"), Pruco's parent company, initiated an investigation of Kendzierski's conduct. Kendzierski resigned from Pruco on March 28, 1997. In June 1998, the NASD Regulation, Inc. Department of Enforcement ("Department of Enforcement") filed a complaint charging Kendzierski with converting $6,000 of customer funds in violation of Conduct Rules 2110 and 2330(a).

The parties entered into a Joint Stipulation of Facts ("Joint Stipulation") prior to the September 24, 1998 hearing before the Hearing Panel. In the Joint Stipulation, Kendzierski stipulated that JS had never authorized him to alter the payee line of the April 1996 Check and had never authorized him to deposit the funds into his personal account. The Joint Stipulation also stated that Kendzierski had told NASD and Prudential investigators that JS had agreed to lend him $1,000. The record contains no evidence, however, other than Kendzierski's own testimony, that JS authorized such a loan.[2]

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[2] The Joint Stipulation shows that Kendzierski lied to investigators during the investigation. For instance, the Joint Stipulation states that Kendzierski told the Prudential investigator that JS had authorized him to change the payee line of the April 1996 Check. Kendzierski, however, later admitted that JS had never given him permission to do so.

At the hearing, Kendzierski admitted that he had deposited the February 1997 Check into his personal account and that JS had not agreed to lend him the money from that check.[3] He stated that he had felt badly about losses that JS had sustained in one of his accounts. Kendzierski said that he therefore deposited the February 1997 Check into his personal account, and he claimed that he sent a check for $5,050 to Pruco for deposit into JS's account a few days later. Kendzierski claimed that the extra $50 was intended to compensate JS for the loss that JS had allegedly sustained in his account. When Kendzierski was asked at the hearing why he first deposited the February 1997 Check into his personal account, he responded, "Stupidity. I don't know."

Kendzierski's check for $5,050, which was payable to Prudential and was dated February 19, 1997, did not arrive at Prudential until April 2, 1997. On April 9, 1997, Kendzierski sent a note to the Prudential investigator stating that he had been unable to locate a receipt for the $1,000, which he had allegedly repaid to JS He stated that he was therefore sending to Pruco another check for $1,000 made payable to Prudential for repayment to JS. Kendzierski enclosed a copy of this other check. Prudential asked Kendzierski to resubmit a cashier's check, which he did on April 25, 1997.

Discussion

On appeal, Kendzierski does not contest the Hearing Panel's finding of violation. He merely asks that the sanctions be reduced. We have reviewed the entire record, and we affirm the Hearing Panel's finding that Kendzierski converted $6,000 in customer funds in violation of Conduct Rules 2110 and 2330(a).[4] We also affirm most of the sanctions that the Hearing Panel imposed.

Conduct Rule 2330(a) prohibits the "improper use" of a customer's funds. "Improper use" rises to the level of conversion where a registered representative deposits a customer's check into his own account instead of into his customer's account, without authorization, and fails to repay the customer. See In re Joel Eugene Shaw, 51 S.E.C. 1224 (1994) (registered representative deposited customer's checks into his own account

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[3] Kendzierski attempted several times during the hearing to deviate from the facts in the Joint Stipulation. When challenged, however, Kendzierski admitted that the Joint Stipulation contained the true facts. Kendzierski stated:

> [W]e have a Stipulation of fact here, all right. I signed it, I agree to everything that's in here the way it is. You needn't go any further.

[4] Rule 2110 states that "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." Rule 2330(a) states that "[n]o member or person associated with a member shall make improper use of a customer's securities or funds."

and did not return funds until conversion had been discovered); In re Stanley D. Gardenswartz, 50 S.E.C. 90 (1989) (registered representative forged customers' signatures on check and converted funds to his own use); In re Wheaton D. Blanchard, 46 S.E.C. 365 (1976) (respondent deposited customer funds into his own account and used them to pay personal expenses). That is precisely what Kendzierski did in this case.

The evidence is undisputed. Kendzierski did not deposit JS's checks into JS's Pruco account as JS had requested. Instead, Kendzierski altered the payee line of the checks and deposited them into his own account and used the money for his personal expenses. Kendzierski did not produce any evidence that JS had agreed to lend him $1,000. Nor could Kendzierski proffer any evidence to support his contention that he had immediately repaid JS the $1,000 that he allegedly "borrowed." Kendzierski testified that he could not find the receipt for the $1,000 check that he had allegedly mailed to Pruco for reimbursement of the April 1996 Check. The evidence before the Hearing Panel showed that Kendzierski returned the converted funds to JS only after Prudential discovered the problem and commenced its investigation in March 1997. He also testified that he mailed the other reimbursement check for $5,050 immediately after writing it on February 19, 1997. The evidence showed, however, that this check did not arrive at Prudential until April 1997. Kendzierski could not explain why this check did not arrive until after Prudential had started its investigation

The Hearing Panel found that Kendzierski's testimony regarding his alleged repayment of the funds was not credible. We may only reject credibility determinations by the initial fact finder when the record contains "substantial evidence" for doing so. See In re Joseph H. O'Brien II, 51 S.E.C. 1112 (1994). We find no such evidence in this case, and we therefore affirm the Hearing Panel's determination that Kendzierski's testimony was not credible. We therefore find that there is sufficient evidence to hold that Kendzierski converted $6,000 of his customer's funds in violation of Conduct Rules 2110 and 2330(a).

Sanctions

The Hearing Panel imposed a censure, a fine of $80,000, and a bar from association with any member firm in any capacity. The fine represented an underlying fine of $50,000 plus $30,000, which represented five times the amount converted. The Hearing Panel also assessed the cost of the proceedings, which amounted to $504.60. The Hearing Panel noted that Kendzierski did not have any prior disciplinary history, but it nonetheless determined that Kendzierski's misconduct was sufficiently egregious to warrant the censure, fine, and a bar. We concur with the Hearing Panel's reasoning, and we uphold all of the sanctions imposed in this case, with the exception of the censure.[5]

[5] The NASD recently instituted a new censure policy, under which the NASD will not impose a censure when a bar is imposed. See NASD Notice to Members 99-59 (July 1999). Because we affirm the imposition of a bar in this case, we therefore must eliminate the censure.

We note that the 1998 Sanction Guideline ("Guideline") for Conversion recommends a fine of $10,000 to $100,000 plus five times the amount converted.[6] The Guideline also recommends that the respondent be barred regardless of the amount converted. In this case, the underlying fine of $50,000 is in the middle of the range recommended by the Sanction Guideline, and the bar is standard for an associated person who has converted funds.

Kendzierski requests that we reduce the fine and eliminate the bar because his registration is his main source of income. He also insists that he is committed to this industry. Kendzierski has in fact shown a serious lack of commitment to the industry. Kendzierski abused the trust of his customer, an 80-year-old widower whose friendship he cultivated over their 12-year relationship. The evidence shows that Kendzierski did not return the funds until after Prudential initiated its investigation. Thus, the fact that Kendzierski finally repaid the customer is not a mitigating factor. See In re Joel Eugene Shaw, 51 S.E.C. at 1227 ("Nor does the fact that Shaw ultimately repaid . . . the money [to the customer] warrant permitting him to remain in the securities business. It appears that Shaw would have retained [the customer's] money if she had not discovered his conversion.").[7] Furthermore, Kendzierski lied to investigators during the investigation.

Because we find that Kendzierski's continued participation in the securities industry presents a risk to the investing public, we hold that barring him from association with any member firm is necessary. We also note that the fine falls in the middle of the range recommended by the Sanction Guideline and is therefore fair and reasonable.

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6 See Guideline (1998 ed.) at 34 (Conversion).

7 See also In re Ernest A. Cipriani, 51 S.E.C. 1004, 1007-08 (1994) (holding that the fact that respondent ultimately paid back the money afforded no justification for the misconduct which, presumably, would have continued had it not been discovered); In re Raymond M. Ramos, 49 S.E.C. 868, 972 (1988) ("[T]he fact that Ramos ultimately paid the money back does not warrant permitting his return to the securities business where he poses a threat to other investors.").

Accordingly, we impose an $80,000 fine, costs of the proceeding in the amount of $504.60, and a bar from associating with any NASD member firm in any capacity. The bar is effective immediately upon the issuance of this decision. [8]

On Behalf of the National Adjudicatory Council,

Joan C. Conley
Senior Vice President and Corporate Secretary

[8] We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.