

UNITED STATES OF AMERICA  
Before the  
COMMODITY FUTURES TRADING COMMISSION

---

MICHAEL CLARK

v.

NATIONAL FUTURES ASSOCIATION

---

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

CFTC Docket No. CRAA-01-02

OPINION AND ORDER

Michael Clark (“Clark”) appeals from a final decision of the National Futures Association (“NFA”) denying his application to become registered as a floor trader. NFA held that Clark failed to rebut the presumption of unfitness arising from the Commission’s 1997 decision revoking Clark’s registration as a floor trader. *See In re Clark*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,032 (CFTC Apr. 22, 1997) (“*Clark I*”).

On appeal, Clark claims that he was denied a fair hearing because NFA denied him an opportunity to either discover or introduce evidence relating to alleged irregularities during an exchange disciplinary proceeding. NFA asserts in response that the evidence Clark sought to introduce was irrelevant to the issues material to its proceeding. In addition, it contends that Clark failed to make a clear and convincing showing that his registration as a floor trader would pose no substantial risk to the public. For the following reasons, we affirm the result of the decision below.

**BACKGROUND**

Because Clark’s arguments in this case can best be understood in the context of our *Clark I* decision, we briefly review that proceeding. The Commission issued a complaint in 1993, alleging that Clark’s involvement in nine exchange disciplinary actions constituted “other good

cause” to revoke his registration under Section 8a(3)(M) of the Commodity Exchange Act (“CEA” or “Act”).<sup>1</sup> While some of these actions, which were decided between 1987 and 1992, addressed relatively minor offenses, four alleged serious misconduct and resulted in the imposition of significant sanctions.

One of the four serious exchange actions is the source of Clark’s arguments concerning the procedural validity of this case and *Clark I*. In that action, NYMEX found that Clark (1) allowed his clerk to trade in a manner contrary to exchange rules, (2) made material misstatements to NYMEX investigators, (3) failed to produce requested books and records, and (4) engaged in conduct substantially detrimental to the best interests of the exchange. NYMEX suspended Clark’s membership for three-and-a-half years and ordered him to pay a \$75,000 fine should he ever reapply. *In re Clark*, NYMEX Docket No. 90-02 (1991) (“NYMEX 90-02”).<sup>2</sup> Clark filed an untimely appeal from NYMEX’s decision, which the Commission dismissed. *Clark v. New York Mercantile Exchange*, CFTC Docket No. 92-E-10, 1992 WL 121892 (CFTC May 29, 1992).

Clark’s response to the Commission’s complaint in *Clark I* asserted that the outcome in NYMEX 90-02 was tainted by *ex parte* contacts between the members of NYMEX’s Appeal Panel and NYMEX’s compliance staff. These flaws, he contended, made that case an unreliable basis for a statutory disqualification proceeding. He otherwise admitted the existence of the various exchange disciplinary actions, but argued that the complaint mischaracterized their

---

<sup>1</sup> At that time, Clark had been a member of the Commodity Exchange (“COMEX”) for six years. He had been a member of the New York Mercantile Exchange (“NYMEX”) from 1985 to 1990. NYMEX initiated six of the exchange disciplinary actions at issue in *Clark I* and COMEX initiated three.

<sup>2</sup> The fine was made contingent upon Clark’s reapplication because Clark voluntarily withdrew from NYMEX membership while the proceeding was pending.

nature and severity, and that his agreement to settle some exchange actions was not a sufficient basis for inferring that the alleged misconduct actually took place.

An evidentiary hearing was held before an Administrative Law Judge (“ALJ”), at which the Division submitted records of the exchange actions and presented the testimony of exchange compliance officials who had investigated Clark. Clark testified and denied that he knowingly participated in any misconduct.

The ALJ discredited Clark’s testimony and found that the record established that Clark’s knowing misconduct justified revoking his registration. On appeal, the Commission undertook a *de novo* review of the evidentiary record and concluded that the Division’s proof established Clark’s knowing participation in customer fraud, a pattern of noncompetitive trading, and obstruction of an exchange disciplinary process. It held that Clark’s misconduct amounted to “other good cause” for revoking his registration and that Clark’s showings on rehabilitation and mitigation were insufficient to warrant a different result. *Clark I*, ¶ 27,032 at 44,297.

The Commission also concluded that the Division’s proof established that Clark was involved in a pattern of exchange disciplinary proceedings that charged serious misconduct and resulted in the imposition of significant sanctions. It held that this amounted to an independent basis for concluding that there was “other good cause” for revoking Clark’s registration. *Id.* at 44,928-29.

NYMEX 90-02 was one of the three exchange disciplinary proceedings underlying the Commission’s finding that Clark was involved in a pattern of exchange disciplinary proceedings that charged serious misconduct and resulted in the imposition of serious sanctions. At the hearing, the ALJ refused to permit Clark to present a witness supporting his claim that the result

in NYMEX 90-02 was a product of exchange irregularities. After the hearing, the ALJ denied Clark's request to reopen the record and consider an affidavit addressing the alleged irregularities. Clark challenged both these decisions in his appeal, but the Commission concluded that the ALJ had acted properly. *Id.* at 44,926-27; 44,929.

Clark challenged both the Commission's substantive and procedural rulings in his appeal to the United States Court of Appeals for the Second Circuit, which summarily affirmed the Commission's revocation of Clark's floor broker registration. *Clark v. CFTC*, No. 97-4228 (2d Cir. Nov. 9, 1999). The court did not comment on the Commission's conclusion that proof of a pattern of exchange disciplinary proceedings that charged serious misconduct and resulted in the imposition of serious sanctions was sufficient to establish "other good cause" for revoking a registration.

In January 2000, Clark filed an application with NFA for registration as a floor trader. In response, NFA filed an action to deny, alleging that the Commission's revocation of Clark's floor broker registration in *Clark I* disqualified him from registration under Section 8a(2)(A) of the Act. Clark's answer did not contest the fact of revocation, but challenged the validity of the *Clark I* proceeding. NFA Record, Tab 2 at 1-2.<sup>3</sup>

During the prehearing stage of NFA's proceeding, Clark repeatedly sought subpoenas and the production of documents relating to his claim that NYMEX 90-02 was tainted. NFA's hearing panel ruled that NYMEX's alleged misconduct was not relevant to its proceeding on Clark's application, and that Clark's presentation would be limited to evidence of mitigation and rehabilitation. Tabs 15, 24-34.

---

<sup>3</sup>"Tab \_\_\_" refers to the indicated item in the Certified Record for this proceeding that NFA filed with the CFTC on May 14, 2001. "Tr. \_\_\_" refers to the indicated page number in the Transcript of the November 8, 2000 hearing before a subcommittee of NFA's Membership Committee, which appears at Tab 35 of the Record.

Clark appeared at the hearing *pro se*, and reiterated his requests for information related to NYMEX 90-02. The hearing panel advised Clark that the focus of the proceeding was whether Clark continued to represent a threat to the trading public. Tr. 10, 40. As one member of the hearing panel stated, “We are dealing with you going forward, we are not dealing with you going into the past.” Tr. 70-71.<sup>4</sup>

Following NFA’s presentation of documentary evidence relating to the Commission’s decision in *Clark I*, Clark testified on his own behalf, denying any wrongdoing and arguing that the alleged procedural irregularities of NYMEX 90-02 should be viewed as a mitigating circumstance. As for rehabilitation, Clark remarked “how can I be rehabilitated for something I didn’t do,” Tr. 55, and asserted that he would not present a risk to the public as a floor trader since he would be trading solely for himself.

Clark presented no other witnesses on his behalf. After the close of the hearing, he sought an opportunity to submit affidavits from community members attesting to his good character. Tr. 71. The hearing panel denied the request as untimely. Tr. 75.

On March 13, 2001, NFA issued its decision denying Clark’s application because he had failed to make a clear and convincing showing that his registration as a floor trader would pose no substantial risk to the public. NFA reasoned that proof that the Commission revoked his

---

<sup>4</sup>That panel member explained the limited scope of the hearing:

You know, we can’t go over the past. Obviously you are having trouble getting over what happened in the past. This isn’t a panel addressing the past . . . we are accepting what happened in the past and now we are saying to go forward in the future. You obviously applied for re-registration in this industry. What we want to see is . . . [whether] this guy deserves another chance, that’s what we are looking for.

Tr. 61 (remarks of panel member James A. Calcagnini).

registration in *Clark I* shifted the burden of establishing fitness to Clark and that he had made a negligible showing on mitigation and rehabilitation.<sup>5</sup>

NFA offered two justifications for its refusal to consider evidence relating to alleged irregularities in NYMEX 90-02, the credibility of witnesses who testified before the Commission, or the integrity of the proceedings underlying *Clark I*: (1) the evidence of alleged irregularities in NYMEX 90-02 was irrelevant because the Commission had based its revocation of Clark's registration on proof that he had knowingly participated in customer fraud, a pattern of noncompetitive trading, and obstruction of an exchange disciplinary process; and (2) Clark was collaterally estopped from relitigating issues that he fully litigated before the Commission and the Second Circuit.

Clark filed a timely notice of appeal from NFA's decision, arguing that he was denied a fair hearing because NFA would not permit him to develop the record on exchange misconduct affecting NYMEX 90-02. He maintains that had he been allowed to properly develop the record, he could have shown that the Commission's revocation order was "false." App. Br. at 10. Clark asks the Commission to vacate NFA's order, grant him registration, and order an investigation into the misconduct that he alleges occurred.

---

<sup>5</sup>With respect to rehabilitation, NFA held that Clark had failed to show that he had undergone a change in direction since his disqualification, observing that:

Clark testified that he has continued his education, is gainfully employed, and is active in his church and his community. However commendable these activities may be, they do not, in and of themselves, demonstrate rehabilitation.

Tab 34 at 8. NFA pointed to Clark's failure to accept responsibility for his misconduct and continued belief that he had done nothing wrong as evidence that he had not undergone a change in direction. Tab 34 at 9. It held that the hearing panel properly denied his request to supplement the record with affidavits from community leaders, since Clark had been provided ample opportunity to furnish such information in a timely manner, but failed to do so.

In response, NFA argues that it conducted its proceeding in a manner consistent with fundamental fairness and that Clark failed to show that his registration would pose no substantial risk to the public. With respect to the first point, NFA maintains that evidence relating to NYMEX's alleged misconduct related to issues that the Commission had considered in deciding *Clark I*. It notes that Commission precedent recognizes that Section 8a(2)(A) “does not provide the opportunity to relitigate the earlier revocation proceeding.” NFA Br. at 11, quoting *In re Schillaci*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,735 at 44,040 (CFTC July 11, 1996). As to the second point, NFA argues that Clark's claim of personal rehabilitation was undermined by “weak and unconvincing” evidence and by his failure to accept responsibility for his actions. NFA Br. at 17-19.

## DISCUSSION

Clark's appeal rests on the fundamentally flawed premise that virtually all his current troubles spring from the exchange decision resolving NYMEX 90-02. The Commission's revocation of his floor broker registration in *Clark I*, however, rested on two independent legal theories, only one of which placed any reliance on NYMEX 90-02.<sup>6</sup> Moreover, Clark has not shown that NYMEX's alleged misconduct affected the Commission's finding that his participation in serious misconduct actually was proved before its ALJ. Finally, Clark did not submit credible evidence relating either to mitigation or rehabilitation. Indeed, his appeal brief omits any discussion of these considerations other than to allude to the alleged unfairness of the proceedings below as a “mitigating” factor. App. Br. at 4. Mitigation, however, focuses on the disqualifying *act*, not the disqualifying proceeding. *In re Walter*, [1987-1990 Transfer Binder]

---

<sup>6</sup>NYMEX 90-02 clearly played a role in the Commission's discussion of its pattern of exchange proceedings theory, as one of three exchange disciplinary actions that the Commission relied on in finding a pattern.

Comm. Fut. L. Rep. (CCH) ¶ 24,215 at 35,013 (CFTC Apr. 14, 1988); *accord*, *Schillaci*, ¶ 26,736 at 44,042.

In assessing evidence of rehabilitation, we look to whether the record establishes that respondent has “undergone a changed direction in his activities.” *In re Tipton*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,673 at 22,752 (CFTC Sept. 22, 1978). Clark’s testimony emphasizes the losses that he has suffered due to *Clark I*, efforts to supplement his education and training, and his active involvement in church and community. He also contends that a switch from being a floor broker to a floor trader would permit him to avoid trouble.

Clark asks us to credit his testimony regarding these factors, despite his insistence that he never knowingly violated any trading rules. Neither the ALJ who observed Clark’s testimony during *Clark I*, nor the members of the hearing panel who observed Clark’s testimony in this case, were willing to endorse his innocent explanation for his conduct. Moreover, as the Court of Appeals for the Seventh Circuit has recognized, a respondent’s insistence on innocence in the face of findings of violations supported by evidence “demonstrates by his obduracy the likelihood he will repeat his [wrongdoing.]” *SEC v. Lipson*, 278 F.3d 656, 664 (7<sup>th</sup> Cir. 2002).

In light of this factor, we conclude that Clark’s showing on rehabilitation falls well short of that necessary to meet the “changed direction” standard for rehabilitation. Consequently, the record does not support an inference that Clark’s registration as a floor trader will pose no substantial risk to the public.



## **CONCLUSION**

In light of this analysis, we affirm the result of NFA's decision to deny Clark's application to become registered as a floor trader.

IT IS SO ORDERED.

By the Commission (Chairman NEWSOME and Commissioners HOLUM and ERICKSON).

---

Jean A. Webb  
Secretary of the Commission  
Commodity Futures Trading Commission

Dated: May 9, 2002