

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 57839 / May 20, 2008

Admin. Proc. File No. 3-12874

In the Matter of the Application of

ROBERT M. RYERSON
c/o Saul Roffe, Esq.
Stark & Stark, P.C.
993 Lenox Drive
Lawrenceville, NJ 08648

For Review of Action Taken by
NASD

ORDER GRANTING
MOTION TO DISMISS
PETITION FOR REVIEW

Robert M. Ryerson, a former associated person of an NASD member firm, has applied for review of disciplinary action taken against him by NASD. ^{1/} NASD has moved to dismiss Ryerson's petition for review. For the reasons discussed below, we grant NASD's motion.

I.

On April 22, 2004, NASD filed a complaint against Ryerson alleging that he engaged in private securities transactions in violation of NASD Rules 3040 and 2110, improperly paid commissions to a non-NASD member in violation of NASD Rule 2110, and failed to provide timely on-the-record testimony to NASD staff in violation of NASD Rules 8210 and 2110. Ryerson answered the complaint, generally denied the allegations of misconduct, and requested a hearing. An NASD Hearing Panel conducted a two-day hearing in October 2004 at which

^{1/} On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Because the disciplinary action here was taken before that date, we will use the designation NASD when applicable.

Ryerson confronted and cross-examined adverse witnesses and presented his own case and witnesses.

On January 24, 2005, the Hearing Panel issued its decision in which it found that Ryerson had committed the violations alleged. The Hearing Panel imposed (1) a two-year suspension in all capacities, a \$230,000 fine, and an order that Ryerson requalify in all capacities for his improper private securities transactions and (2) a fifteen business-day suspension and a \$5,000 fine for his improper payment of commissions to a non-NASD member. ^{2/} The Hearing Panel also ordered that Ryerson pay costs. The Hearing Panel decision ordered that “Respondent’s fines and costs shall become due and payable upon his re-entry into the securities industry.”

Ryerson filed a timely appeal of the Hearing Panel decision with the National Adjudicatory Council (“NAC”). The NAC issued its decision on August 3, 2006. The NAC decision generally affirmed the Hearing Panel’s findings of violations, sanctions, and imposition of costs. ^{3/} Unlike the Hearing Panel decision, the NAC decision did not condition Ryerson’s payment of monetary sanctions on his re-entry into the securities industry. Instead, the NAC opinion stated that, pursuant to NASD Procedural Rule 8320, “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.”

The August 3, 2006 cover letter transmitting the NAC decision to Ryerson stated, among other things, that Ryerson had thirty days from receipt of the NAC decision to file any application for review with the Commission. The cover letter further stated that the “NAC’s orders in the enclosed decision to pay fines and costs will be stayed pending appeal. If you do not appeal the NAC’s decision to the SEC, you may pay these amounts after the 30-day period for appeal to the SEC has passed.”

Ryerson did not seek Commission review of the NASD action within thirty days of receiving the decision. He also did not pay NASD the fines and costs ordered in the NAC decision after expiration of the appeal period. NASD sent Ryerson a letter dated November 13, 2006 seeking payment of fines and costs totaling \$239,178.26. Ryerson’s counsel sent NASD a letter dated November 27, 2006 stating that the NAC decision “did not amend” the part of the Hearing Panel decision that conditioned Ryerson’s payment of monetary sanctions upon

^{2/} The Hearing Panel also imposed a one-year suspension and a \$10,000 fine for Ryerson’s failure to provide timely on-the-record testimony. The National Adjudicatory Council set this sanction aside.

^{3/} See supra note 2.

Ryerson's re-entry into the securities industry and that therefore he was not required to pay the fines and costs.

NASD sent Ryerson two more letters dated January 19, 2007 and July 11, 2007 reiterating its request for payment of fines and costs. Ryerson did not respond to the January 19, 2007 letter but sent a letter to NASD dated July 18, 2007 again stating that he was not required to pay the fines and costs unless and until he re-entered the securities industry. NASD sent Ryerson a letter dated September 20, 2007 stating that the NAC decision superseded the Hearing Panel decision and ordered payment of fines and costs upon request. The September 20, 2007 letter also noted that NASD had earlier notified Ryerson that he had thirty days to appeal the NAC decision with the Commission but that Ryerson had not done so.

On October 19, 2007, more than a year after the NAC issued its decision, Ryerson filed a petition with the Commission requesting that we "reverse" the NAC decision and "stay the collection efforts" of NASD. Specifically, Ryerson requests that we 1) enter an order finding that the NAC decision is void for vagueness, 2) reverse the NAC decision, 3) enter an order affirming the condition precedent to payment of fines and costs as set forth in the Hearing Panel decision, and 4) stay NASD's collection efforts pending resolution of his appeal. On November 20, 2007, NASD filed a motion to dismiss Ryerson's petition pursuant to Rule 154 of the Commission's Rules of Practice. 4/

II.

A. Request to Review Final Disciplinary Sanction

Pursuant to Section 19(d)(2) of the Securities Exchange Act of 1934 5/ and Commission Rule of Practice 420(b), 6/ an applicant must file with the Commission a petition for review of a determination of a self-regulatory organization with respect to a final disciplinary sanction within thirty days after the notice of the determination is filed with the Commission and received by the applicant. It is undisputed that Ryerson failed to file his petition for review within the requisite period.

4/ 17 C.F.R. § 201.154.

5/ 15 U.S.C. § 78s(d)(2).

6/ 17 C.F.R. § 201.420(b).

Ryerson notes that Exchange Act Section 19(d)(2) allows us to accept petitions for review “within such longer period as [the Commission] may determine.” ^{7/} We have stated that “parties to administrative proceedings have an interest in knowing when decisions are final and on which decisions their reliance can be placed.” ^{8/} Accordingly, Rule of Practice 420(b) provides that we will not extend the thirty-day period absent a showing of extraordinary circumstances. ^{9/} Here, we do not find extraordinary circumstances that would persuade us to consider Ryerson’s untimely petition for review.

Ryerson filed a petition for review over fourteen months after the NAC issued its decision. He states that he did not understand until recently that there is a difference of opinion between him and NASD as to when the monetary sanctions are due. He asserts that this misunderstanding is caused by a “latent ambiguity’ in the relationship” between the statements made regarding the timing of payment in the Hearing Panel decision and the NAC decision. Ryerson argues that the two decisions “speak with one voice” and “conform with one another” such that a reasonable person would interpret the NAC decision as preserving the condition precedent to payment of the fines and costs contained in the Hearing Panel decision. Ryerson also asserts that the NAC order with respect to payment of fines and costs is vague.

Ryerson’s argument that the NAC decision must somehow be interpreted in light of the condition precedent to his payment of fines and costs contained in the Hearing Panel decision is

^{7/} 15 U.S.C. § 78s(d)(2).

^{8/} Lance E. Van Alstyne, 53 S.E.C. 1093, 1098 n.10 (1998) (quoting Nequoia Ass’n, Inc. v. U.S. Dep’t. of Interior, 626 F. Supp. 827, 836 (D. Utah 1985)); accord Warren B. Minton, 55 S.E.C. 1170, 1179 n.20 (2002) (citing Van Alstyne, 53 S.E.C. at 1098 n.10).

^{9/} See Adoption of Amendments, Exchange Act Rel. No. 49412 (Mar. 12, 2004), 82 SEC Docket 1744, 1749 & n.30 (“The Commission is adopting its proposed change to Rule 420(b) to make clear that an appeal from self-regulatory organization action must be filed within 30 days, absent a showing of extraordinary circumstances. This standard is consistent with prior Commission precedent.”) (citing Van Alstyne, 53 S.E.C. at 1099); 17 C.F.R. § 201.420(b) (“The Commission will not extend this 30-day period, absent a showing of extraordinary circumstances.”); Larry A. Saylor, Exchange Act Rel. No. 51949 (June 30, 2005), 85 SEC Docket 3118, 3124-25 (finding that applicant had not made the “necessary showing of ‘extraordinary circumstances’” regarding the filing of an untimely petition for review); Minton, 55 S.E.C. at 1179 (“We find that Minton has failed to demonstrate any extraordinary circumstances that would justify accepting his application for review. . . .”); Van Alstyne, 53 S.E.C. at 1099 (“In the interests of finality, only under extraordinary circumstances will we authorize the filing of a late appeal from an SRO action that is subject to the Section 19(d)(1) filing requirement.”).

without merit. NASD Procedural Rule 9348 gives the NAC the power to “affirm, modify, reverse, increase or reduce any sanction.” We have emphasized repeatedly that “it is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of NASD which is subject to Commission review.”^{10/} The NAC decision did not condition Ryerson’s payment of the monetary sanctions upon his re-entry into the securities industry. The NAC observed that the sanctions were payable pursuant to NASD Rule 8320 and that the registration of an associated person could be summarily revoked for non-payment. We recognize that Ryerson was not associated at the time. However, the cover letter attached to the copy of the NAC decision that was mailed to Ryerson was further notice to Ryerson that the NAC expected payment absent an appeal; it stated that payment of the monetary sanctions would be stayed only if he filed a petition for review within thirty days.

If Ryerson had any doubt about whether NASD interpreted the NAC decision differently, NASD’s letter dated November 13, 2006 was evidence that it believed that Ryerson was obligated to pay the monetary sanctions within ten business days and put Ryerson on notice that NASD interpreted the NAC decision differently than he did. While Ryerson’s counsel expressed disagreement with NASD’s position, NASD sent Ryerson another letter in January demanding payment. Ryerson did not respond.

Despite this demand for payment of the monetary sanctions, Ryerson allowed more time to elapse, during which NASD sent him letters in July and September 2007 seeking payment of the monetary sanctions, before filing his petition for review in October 2007. Ryerson explains that he did not file a petition for review immediately following his receipt of NASD’s November 13, 2006 letter because he (1) expected that his responses to the NASD letters in November 2006 and July 2007, in which he asserted that he was not obligated to pay the monetary sanctions upon demand, would resolve the matter or prompt discussion and (2) “did not wish to undergo the time and expense” of the current petition until now. His tactical decision to proceed by sending the two letters to NASD, rather than “undergo the time and expense” of a timely-filed petition for review, does not constitute extraordinary circumstances that justify hearing his late-filed petition.

^{10/} E.g., Morton Bruce Erenstein, Exchange Act Rel. No. 56768 (Nov. 8, 2007), 91 SEC Docket 3114, 3126 & n.26 (quoting Philippe N. Keyes, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 800 n.17), appeal filed, No. 07-15736 (11th Cir. Dec. 13, 2007); see also Chris Dinh Hartley, 57 S.E.C. 767, 776 (2004) (“[I]t is the NAC’s conclusions that are before us for review, not those of the Hearing Panel.”); NASD Code of Procedure Rule 9349(c) (providing that the NAC decision constitutes the final disciplinary action that is subject to review by the Commission).

Ryerson argues that his due process rights are being violated and that NASD's collection attempts are an unconstitutional taking of property. As Ryerson concedes, however, it is well settled that NASD generally is not a state actor and, therefore, the constitutional protections he asserts are inapplicable to this proceeding. ^{11/} Ryerson's claim that NASD's procedures were unfair to him also is without merit. As Ryerson observes, NASD is required to provide fair procedures for the disciplining of members pursuant to Exchange Act Sections 15(A)(b)(8) and 15(A)(h)(1) and the NASD Code of Procedure. ^{12/} The fairness of an NASD disciplinary proceeding depends on whether it was conducted in accordance with NASD's rules and whether NASD implemented its procedures fairly. ^{13/} Ryerson received adequate notice of the complaint, which contained sufficient detail to apprise him of the charges he faced. NASD conducted a hearing on the record at which Ryerson was given the opportunity to, and did, confront and cross-examine adverse witnesses and present his own case and witnesses. Ryerson received the decisions of the Hearing Panel and the NAC and was informed of his right to appeal each decision.

Ryerson argues that NASD is not applying its rules fairly because it ignored his attempts to resolve this matter and, "in delaying as much as seven months between letters, allowed Petitioner to believe that [NASD], after looking at the decision, accepted his interpretation." We question the reasonableness of Ryerson's belief when, after his counsel wrote NASD in November, NASD sent another letter to Ryerson in January again demanding payment. Ryerson failed to respond to this letter.

^{11/} See, e.g., Charles C. Fawcett, IV, Exchange Act Rel. No. 56770 (Nov. 8, 2007), 91 SEC Docket 3147, 3153-55 (noting the well-settled case law holding that NASD is generally not a state actor and finding that applicant failed to demonstrate otherwise in his particular case); Frank P. Quattrone, Exchange Act Rel. No. 53547 (Mar. 24, 2006), 87 SEC Docket 2155, 2162-63 n.20 ("We note that our cases as well as federal court opinions hold consistently that NASD disciplinary proceedings are not state action.") (citing D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155 (2d Cir. 2002); E. Magnus Oppenheim & Co., Exchange Act Rel. No. 51479 (Apr. 6, 2005), 85 SEC Docket 475, 480 n.15.).

^{12/} See 15 U.S.C. §§ 78o-3(b)(8) and (h)(1); NASD Manual at 7301 (2006).

^{13/} See Robert J. Prager, Exchange Act Rel. No. 51974 (July 6, 2005), 85 SEC Docket 3413, 3433 (concluding that respondent received a fair hearing and noting NASD's determinations that the Hearing Panel proceeding was conducted in accordance with NASD's procedures and that those procedures were implemented fairly).

Ryerson cites to our decision in David L. Turnipseed, 14/ to support his argument that we could accept a late-filed appeal. Turnipseed preceded the amendments to Rule 420(b) making clear that we would accept an untimely appeal only in extraordinary circumstances. In any event, in Turnipseed, we found that applicant filed his petition only twenty days late and that NASD did not apply its rules in a fair manner where it attempted to bind applicant to an offer of settlement for more than one year without resolution after NASD staff had assured him that a settlement would result in prompt resolution of the matter. 15/ Here, NASD's repeated demands for payment of the fines and costs did not cause the fourteen-month delay between the issuance of the NAC decision and the filing of the petition before us. Rather, the record demonstrates, and Ryerson admits, that his delay in filing his petition for review resulted from his deliberate choice not to appeal the NAC decision even after he learned that NASD interpreted the decision differently than he did.

Ryerson further claims that NASD "cannot apply the fine" until he becomes associated with a member firm because NASD Rule 8310 only permits the imposition of a sanction upon a person associated with a member firm. However, NASD had jurisdiction over Ryerson for two years following the termination of his registration on June 5, 2002, filed the complaint within that period, and was therefore permitted to impose sanctions. 16/ We find that Ryerson's claim that NASD treated him unfairly in this disciplinary proceeding is without merit and does not justify his late-filed appeal.

Ryerson also requests relief under Federal Rule of Civil Procedure 60(b), which provides that a court may relieve a party from a final judgment, order, or proceeding if it is no longer equitable that the judgment should have prospective application or for any other reason justifying relief from the operation of the judgment. However, we have held that the Federal Rules of Civil

14/ 48 S.E.C. 689 (1987).

15/ Turnipseed, 48 S.E.C. at 691-92.

16/ See Eliezer Gurfel, 54 S.E.C. 56, 60-61 (1999) (finding that NASD had jurisdiction over applicant where NASD filed complaint within two years of applicant's termination of registration and sustaining NASD's imposition of sanctions); Art. V, Sec. 4 of NASD's By-Laws (2006) (providing, among other things, that a person whose association with a member has been terminated and is no longer associated with any member of NASD shall continue to be subject to the filing of a complaint under the NASD Rules based upon conduct that commenced prior to the termination, and that any such complaint shall be filed within two years after the effective date of termination of registration); NASD Rules 8310(a) and 8330 (providing that after compliance with applicable rules, sanctions may be imposed and costs may be assessed).

Procedure do not apply to administrative proceedings. ^{17/} Under certain circumstances, the Federal Rules of Civil Procedure provide helpful guidance, such as when issues are not directly addressed by our Rules of Practice. ^{18/} As discussed above, however, Rule of Practice 420 is the “exclusive remedy” for seeking an extension of the thirty-day appeal period and provides that we will allow the filing of a late petition for review of a determination of a self-regulatory organization with respect to a final disciplinary sanction only under extraordinary circumstances.

We find that Ryerson has failed to demonstrate any extraordinary circumstances that would justify accepting his petition for review.

B. Stay Request

Ryerson requests that we stay NASD’s collection efforts pending his appeal. Given that we have determined to dismiss Ryerson’s late-filed petition for review, his request that we stay NASD’s collection efforts pending his appeal is moot. Moreover, to the extent that Ryerson seeks to have us stay NASD’s collection efforts generally, he has failed to establish that we have jurisdiction to undertake such action. Under Exchange Act Section 19(d)(1), ^{19/} we have the authority to review any action in which NASD (1) imposes a final disciplinary sanction on any person; (2) denies membership or participation to any applicant; (3) prohibits or limits access to services offered by any of its members; or (4) bars any person from becoming associated with a member. Ryerson’s complaint about the collection efforts is a collateral attack on the underlying

^{17/} See Jay Alan Ochanpaugh, Exchange Act Rel. No. 54363 (Aug. 25, 2006), 88 SEC Docket 2653, 2662 n.24 (“The Federal Rules of Civil Procedure do not apply in administrative proceedings.”) (citing Matos v. Hove, 940 F. Supp. 67, 72 (S.D.N.Y. 1996) (citation omitted)); John A. Carley, Exchange Act Rel. No. 50954 (Jan. 3, 2005), 84 SEC Docket 2317, 2318 n.6 (“[W]e have held repeatedly that our proceedings are not governed by the Federal Rules of Civil Procedure.”) (citing Putnam Inv. Mgmt., Admin. Proc. File No. 3-11317 (Apr. 7, 2004), 2004 WL 885245, at *2); cf. Russell Ponce, 54 S.E.C. 804, 824 n.54 (2000), aff’d, 345 F.3d 722 (9th Cir. 2003).

^{18/} See Putnam Inv. Mgmt., 2004 WL 885245, at *2 (“The Federal Rules of Civil Procedure do not govern administrative proceedings before the Commission, but they often provide helpful guidance in resolving issues not directly addressed by the Commission’s Rules of Practice.”) (citation omitted); cf. Ochanpaugh, 88 SEC Docket at 2662 n.24 (noting that the Commission can be guided by the principles of the Federal Rules in certain circumstances and that those circumstances were not applicable to the proceeding) (citing Carl L. Shipley, 45 S.E.C. 589, 595 n.16 (1974)).

^{19/} 15 U.S.C. § 78s(d)(1).

disciplinary action. 20/ NASD's efforts to collect payment of the monetary sanctions do not fall within any of these enumerated categories and, therefore, we lack the authority to stay its collection efforts.

Accordingly, IT IS ORDERED that the motion of NASD to dismiss this review proceeding be, and it hereby is, granted.

By the Commission.

Nancy M. Morris
Secretary

20/ Saylor, 85 SEC Docket at 3121-23 (rejecting applicant's collateral attack on underlying disciplinary action); Minton, 55 S.E.C. at 1176 (same).