

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of :
ALLEN MANSFIELD :
For Review of Disciplinary Action Taken by the :
National Association of Securities Dealers, Inc. :

ADVISORY REPORT

Washington, D.C.
August 4, 1978

Warren E. Blair
Chief Administrative Law Judge

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APPEARANCES: Allen Mansfield, pro se.

Peter J. Chepucavage, Esq. for the National
Association of Securities Dealers, Inc.

BEFORE: Warren E. Blair, Chief Administrative Law Judge

The disciplinary action now under review was initiated June 1, 1973 by the National Association of Securities Dealers, Inc. ("NASD") against Allen Mansfield ("Mansfield"), formerly a registered representative of Pacific Western Securities, Inc. ("PWS"), a former member of the NASD, and is based upon a complaint by the NASD District Business Conduct Committee of District No. 2, Los Angeles, California. The complaint alleged that Mansfield effected unauthorized securities transactions in various customers' accounts during 1971 and 1972 and thereby violated Article III, Sections 1 and 18, of the Rules of Fair Practice of the NASD. It was further alleged that those acts constituted conduct inconsistent with just and equitable principles of trade. ^{1/}

At a hearing on the complaint on November 21, 1973 before a Subcommittee of the District Conduct Committee of District No. 2, Mansfield appeared with counsel, but did not testify nor offer evidence nor call witnesses. Mansfield refused to answer questions asked of him by members of the Subcommittee, his counsel invoking Mansfield's privilege under the Fifth Amendment of the United States Constitution. Upon the evidence introduced at the hearing, the District Committee found that Mansfield had committed the alleged violations and on March 12, 1974 censured him,

^{1/} Article III, Section 1 of the NASD Rules of Fair Practice requires the observance of high standards of commercial honor and just and equitable principles of trade; Section 18 prohibits deceptive and fraudulent devices in securities transactions.

imposed a fine of \$10,000, and barred him from being associated in any capacity with a member of the NASD.^{2/} Upon appeal by Mansfield, the Board of Governors of the NASD affirmed the District Committee's findings and penalties.^{3/}

Application for review of the NASD disciplinary action by the Commission was then filed by Mansfield pursuant to Section 19(d)(2) of the Securities Exchange Act of 1934 ("Exchange Act"), and on May 25, 1976 the Commission issued an order remanding the proceedings to the Board of Governors.^{4/} The remand was intended to afford the NASD an opportunity to consider additional evidence Mansfield had attached to the Brief he had submitted to the Commission and any other evidence that the NASD or Mansfield might wish to adduce.^{5/}

A second evidentiary hearing was held before a Subcommittee of the Board of Governors of the NASD on October 27, 1976. Additional documentary evidence was introduced and the testimony of Mansfield received under a reservation of his right to testify further if investor witnesses, who had refused to appear voluntarily, later testified under subpoena. On the record as supplemented, the

^{2/} Allen Mansfield, Complaint No. CA-482 (NASD District Committee No. 2, March 12, 1974).

^{3/} Allen Mansfield, Complaint No. CA-482, District No. 2 (Board of Governors, NASD, May 23, 1974).

^{4/} Allen Mansfield, Securities Exchange Act Release No. 12479 (1976), 9 SEC Docket 719, 720.

^{5/} Id. See also Allen Mansfield, Securities Exchange Act Release No. 12666 (1976), 10 SEC Docket 107.

Board of Governors again affirmed the findings and penalties imposed by the District Committee, ^{6/} and Mansfield appealed to the Commission for review of that decision.

Because the record was found to be inadequate, the Commission determined that further hearings in the matter should be held. By an Order dated February 27, 1978 ("Order of Referral") supplementary evidentiary hearings were scheduled to commence before an administrative law judge on March 28, 1978 in Los Angeles, California. The hearing was postponed until May 2, 1978 upon application of counsel for Mansfield on the basis that insufficient time had been allowed within which to contact proposed witnesses and to obtain access to the records of PWS. ^{7/}

On May 2, 1978 the hearing commenced and was concluded on the following day, May 3, after completion of the testimony of Mansfield. No other witness was called by counsel for Mansfield or by the NASD. ^{8/} At the conclusion of the hearing, during which Mansfield was represented by counsel, the parties were afforded the opportunity to submit proposed findings and conclusions

6/ Allen Mansfield, Complaint No. CA-482, District No. 2 (Board of Governors, NASD, June 2, 1977).

7/ Custody of PWS records had been assumed by a Trustee for the Liquidation of PWS who had been appointed by the United States District Court for the Central District of California upon application of the Securities Investor Protection Corporation (SEC v. Pacific Western Securities, Inc., Civil Action 73-646-LTI, March 28, 1973).

8/ Subpoenas issued on April 3, 1978 at the instance of Mansfield were not served by him except for that directed to the Trustee for the Liquidation of PWS. The Trustee was excused from appearing on May 2 upon request of Mansfield's counsel. No subpoenas were sought by the NASD.

and briefs; timely filings thereof were made by each party.^{9/}

Based upon the whole of the record in this cause, it is recommended that the NASD findings and penalties be affirmed.

Unauthorized Transactions

As noted in the Order of Referral, the Commission previously held that the NASD had "already put in enough to establish prima facie that Mansfield violated its Rules of Practice, as alleged."^{10/} The burden of overcoming the prima facie case the NASD introduced against him has not been met by Mansfield. Indeed, the record as now supplemented by Mansfield's completed testimony more convincingly supports the NASD findings than before. Much of Mansfield's testimony is equivocal regarding his relationships and communications with his six complaining customers^{11/} and it was quite evident while he was on the stand that he was being less than candid and forthright in his responses, especially when questioned on

^{9/} At the conclusion of the hearing the parties were directed to make simultaneous filings of their proposed findings, conclusions, and supporting briefs by June 19, 1978. On June 15 Mansfield's counsel telephoned to advise that he was withdrawing his appearance as a result of a dispute over payment of his attorney fees. On June 15 Mansfield also telephoned to request an extension of time for filing, stating that he had not received the transcript of the May 2 and 3 hearings until that day, that his former attorney had not worked on the brief, and that counsel for the NASD did not "actively object" to the requested extension. Upon Mansfield's filing a confirming letter application dated June 15, 1978 for an extension until July 10, 1978, time for the parties' initial filings was extended to July 10, 1978, and the time for filing reply briefs extended until July 24, 1978. Because of delay in United States Postal Service delivery, Mansfield's reply brief was not filed until August 1, 1978. It is accepted as timely.

^{10/} Order of Referral, February 27, 1978, at 4.

^{11/} Roy L. Slater, Ruth V. Righter, Eleanor Methany, Paul I. Plann, Al Sherman, and Warren R. Kisling.

the circumstances surrounding the execution of the transactions that give rise to these proceedings.^{12/}

To the extent that Mansfield denies that he effected unauthorized transactions in the accounts of six complaining customers, his self-serving denials are not persuasive. Those customers, some of whom had been Mansfield's customers for a period of years and some of whom Mansfield acknowledged were both intelligent and knowledgeable in business, made specific and direct statements concerning the transactions at which their complaints were directed and called Mansfield to task at a time close enough to the dates of those transactions that their recollections would be reasonably fresh. Against the specifics afforded by the letters of those six customers Mansfield's testimony offers not rebuttal but assertions of misunderstandings by his customers, and claims that the customers were satisfied with his explanations and that he never executed transactions without previous customer authorization. Moreover, the substance of the purported conversations which Mansfield testified he had with those customers regarding their transactions cannot be satisfactorily reconciled with the record of their transactions. Further, if conversations had

12/ Exemplifying the weakness, unreliability, and shortcomings of Mansfield's testimony are his vague statements concerning the complaint letter written by Ruth V. Righter about his unauthorized margin purchases in her account as well as his professed inability to understand the thrust of her complaint. (Tr. 57-73, May 2, 1978, re: Righter letter dated March 11, 1972, identified at NASD hearing as part of Committee's Exhibit No. 5 consisting of 43 pages and identified in the record as Record Document No. 11).

taken place, as he claims, in which the complaining customers conceded the error of their complaints, ordinary prudence would have dictated a need to memorialize in some form of writing the resolution of the customers' complaints. That Mansfield recognized the wisdom of making a record where a dispute had arisen is shown by his letter of October 2, 1972 to Warren Kisling, which made reference to a telephone conversation between them in which Kisling questioned transactions effected in his account on September 27, 1972. ^{13/} In no other instance does the record include a letter or other writing recording the details of disagreement with a customer's complaint.

Nor are the affidavits that Mansfield introduced in lieu of the appearance and testimony of two of his customers ^{14/} and the other portions of the record relied upon by him found sufficient to overcome the evidence introduced by the NASD except with respect to the complaint of a single customer, Warren Kisling. But disregarding the Kisling complaint, there still remains a record sufficiently probative and reliable under the standard laid down by the Commission ^{15/} to support the NASD's decision.

^{13/} Mansfield's letter dated October 2, 1972 is also included among the 43-page exhibit identified as Record Document No. 11 as is Kisling's letter, also dated October 2, in which Kisling claimed Mansfield acted "in advance of my authorization."

^{14/} Roy L. Slater and Ruth V. Righter.

^{15/} "The NASD is a lay body, composed of businessmen purporting to make a businessman's judgment. As such, it may properly draw inferences from evidence a reasonable layman would deem sufficient in formulating a decision with respect to a matter of moment in his own affairs. [Footnote omitted]" Allen Mansfield, SEA Release No. 12479, at 3.

While the complaints in question vary in detail, each of the customers except Kisling had known and dealt with Mansfield over a period of years prior to complaining about his unauthorized trading, and, according to Mansfield, all of those customers excepting Kisling still call him from time to time for investment advice. It would appear, therefore, again excepting Kisling, that no animus toward nor bias against Mansfield entered into their decisions to protest his actions.

Roy L. Slater

Referring to the complaints against him, Mansfield begins by arguing that Roy Slater's complaint is erroneous because (1) Slater had granted him discretionary authority, (2) notice of Slater's revocation of that authority by letter of August 23, 1972 was not received by him until early 1973, and (3) Slater had specifically authorized the complained of transactions. Mansfield also asserts that the NASD examiner's report was not impartial but "doctored." None of those arguments has merit.

Regardless of whether Mansfield actually received Slater's notice of revocation of authority prior to effecting transactions for his account on October 2, 1972, the authority was effectively revoked upon receipt of Slater's revocation letter of August 23, 1972 in the offices of PWS a few days later. At most, absence of actual notice would be a mitigating

circumstance, but here it cannot be so regarded because Mansfield claims not to have relied upon that authority but upon express authority received from Slater. But the claim to the latter authorization is not supported by the record, which includes a letter dated November 8, 1972 in which Slater demands that PWS reverse the unauthorized transactions effected in his account subsequent to his August letter and a letter dated January 20, 1973 addressed to Mansfield in which Slater complains that his account has still not been straightened out. In his January letter Slater also informed Mansfield of the substance of his conversation with the NASD examiners. Further, the truth of the statements in his November and January letters is attested to in an affidavit dated April 29, 1978 which Mansfield obtained and introduced in the record.^{16/} In view of Slater's letters and affidavit and the testimony of Melville Drown, PWS Vice-President-Compliance, that Mansfield had agreed with the gist of Slater's complaint and had told him "we would have to cancel the trade,"^{17/} Mansfield's testimony that Slater expressly authorized the trades in question cannot be accepted.

Also unacceptable is Mansfield's assertion that the NASD examiner's report was "doctored." The document designated

16/ Mansfield Exhibit 2.

17/ NASD District Committee No. 2 Hearing, November 21, 1972, at 36.

"Exhibit I" ^{18/} attached to Mansfield's Brief indicates only that the report had been reviewed and a supervisor's comments given. There is no evidence that deletions in the examiner's report, if any were made pursuant to Exhibit I, materially affected the substance of the report.

Ruth V. Righter

Mansfield takes the position that Ruth Righter has no complaint against him and that there is no evidence of unauthorized trading in her account. He also claims that at all times a "full discretionary account authorization for Mrs. Righter" was in effect, and charges that the NASD "was deliberately trying to frame the applicant by 'using' Mrs. Righter." ^{19/}

While Righter may not have made a complaint against Mansfield in the sense that she sought action by disciplinary authority, her letters clearly detail and complain about his dealings in her account, particularly his failure to honor her instructions not to effect further margin transactions. Her letter of June 2, 1971 is unequivocal regarding her shock at being billed for nearly \$10,000 to cover a purchase of Gulf Resources securities

^{18/} In accordance with instructions given at the hearing, the NASD searched its files for exculpatory information. By letter dated May 18, 1978 copies of certain documents were submitted which the NASD did not believe exculpatory but which counsel for the NASD believed might "conceivably" be considered exculpatory by Mansfield. While the documents did not appear upon review to be exculpatory within the meaning of the Brady doctrine, Brady v. Maryland, 373 U.S. 83 (1963), Mansfield's counsel was granted time until June 5, 1978 to apply to reopen the record for the purpose of offering the documents submitted by the NASD. No application was filed, but Mansfield has attached certain of those documents to his "Trial Brief and Contentions of Fact and Law," dated June 29, 1978 ("Mansfield Brief") as exhibits thereto. In view of the withdrawal of Mansfield's counsel, all documents attached to Mansfield's Brief not heretofore in the record are hereby admitted as part of the record.

^{19/} Mansfield's Brief, at 79.

after having told Mansfield she did not have "extra money to invest" and had "only authorized purchase in the amount of any balance" she had in her account. Further, in a postscript to her letter she writes, "This also reconfirms my statement that under NO circumstances do I wish any MARGIN account." It is clear from this letter that Righter was complaining about Mansfield's having effected an unauthorized trade in disregard of expressed wishes, and that she was again telling Mansfield that she wanted her account to be on a cash basis. While Mansfield may very well have, as he testified, explained to Righter after he received the letter that payment would be made for the new purchase by sale of other of her holdings a little later, his explanation in no wise erases the fact that his purchase for her account was unauthorized.

Despite Righter's instructions, Mansfield purchased 30,000 shares of Occidental Petroleum stock for her account on margin in late August and early September, 1971 and sold it some six months later on February 25, 1972 at a loss of nearly \$4,300. By letter dated March 11, 1972, Righter complained that the Occidental Petroleum purchases were made on margin, writing:

I don't blame you for the market—but I do blame you for buying anything for me on margin. If you will refer to my letter of June 2, 1971, you will see that I reconfirmed my earlier statement that I didn't want any purchases made for me on Margin. This statement stands today as a firm order — No Margin. 20/

Righter again had occasion to write Mansfield on October 21, 1972 protesting his purchase of 2,900 shares of Source Capital, Inc. stock on October 19, 1972. Not only does she again declare that the purchase was "NOT authorized" but adds, "What happened to your memory & my written instructions regarding purchases & sales without authorization."

Mansfield could offer no credible explanation in his testimony to justify the unauthorized transactions in the Righter account which brought about her June, 1971 and March, 1972 letters of complaint. Additionally his admission that he had effected transactions on margin after receiving her June 2, 1971 prohibiting margin purchases, removes any doubt that as to Righter's account, Mansfield deliberately violated his customer's instructions and executed unauthorized purchases in her account. Mansfield misplaces his reliance in Righter's affidavit, ^{21/} for although there are statements in it at some variance with the reports of the interviews had with Righter by NASD examiners, she does not contradict their report that she told Mansfield to close her margin account, nor does she amend or recant her letters of June 2, 1971 and March 11, 1972. Although Righter's affidavit dissipates the complaint in her letter of October 21, 1972, that letter nonetheless serves to reinforce the finding that Righter had previously directed Mansfield not to effect transactions without authorization.

There is no validity in Mansfield's claim that he had discretionary authority over Righter's account by virtue of the purported trading authorization dated August 8, 1966 signed by Righter. ^{22/} The document is incomplete on its face and in any event would have to be considered modified by Righter's later instructions. Neither is there foundation in the record for Mansfield's repeated assertions that the NASD "doctored" the reports of their examiners or that it was "out 'to get' a member."

Eleanor Methany

Eleanor Methany wrote to Mansfield on February 26, 1972 regarding transactions he had effected in her account in June and July, 1971 without consulting her, and about unauthorized securities purchases he had made for her in February, 1972. In that letter Methany mentions that in June, 1971 her account had a debit balance of \$1,060 and continues:

Early in June I told you that this balance would be paid off by income from Amico and Kaman during the summer months. Additionally, I told you I would be able to put together about \$3000 for additional investment. Further, I stressed the fact that after August, 1971, the date of my retirement from USC, I would not be able to provide any more money for investment purposes. And I also told you that after August, 1971, I would need whatever interest and dividends might accrue to my investments to supplement my modest "pension", my very modest salary as a beginning part-time travel consultant, and the relatively small amounts I might earn from writing and lecturing.

However, during the summer, while I was away, you sold my Kaman for \$15,670 — (despite the fact that it was then going up, and has since gone up to a market value of about \$20,000) — and, despite my repeated refusals to invest in oil-related stocks, you bought 10000 Gulf Resources for \$9359 and 20000 Occidental Petroleum for \$21,068. (Immediately after purchase these oil-related bonds went down, down, down — and they now have a market value of about \$7400 and \$18,000 respectively)

Thus, in August, when I returned from my Eastern trip, and paid you \$3000 as promised -- I found myself in the untenable position of still owing you \$12,455 for some oil-related stocks which were then worth about \$6000 less than the amount I had paid for them.

When we discussed this in September, you assured me that you planned to pay off this \$12,455 by selling some of my holdings at appropriately profitable times -- and you assured me that the interest on my unpaid balance would be more than covered by the income from these oil-related bonds. Further, you assured me that after that I would be able to collect all accrued interest and dividends.

During December, you sold the American Motors for \$6790 -- but this sale did not reduce the unpaid balance -- because you immediately bought 10000 Pettibone for \$6465. So by January, by virtue of some interest/dividend payments, the \$12,455 balance had been reduced to \$10,814.

When we discussed this in January, you again assured me that Gulf Resources and Occidental Petroleum were on their way up, and that the income from these bonds was more than offsetting the interest charges. Further, you advised me to hold on to the 3000 Amico/US Equity, which was then down to \$3, and even suggested the possibility of buying more of it while it was down. Also you suggested the possibility of getting back to SMC. Specifically, I rejected both suggestions -- and again I told you that I had to get out of debt as soon as possible.

Nonetheless, while I was out of the city in February, my unpaid balance soared to \$19,000. (You sold the recently acquired Pettibone for \$6088 -- and then, despite my specific rejection of both Amico/US Equity and SMC, you bought me an odd-lot of 150 US Equity for \$525 and 15000 SMC for \$14,062.) 23/

Mansfield flatly denies the truth of Methany's letter, pointing to discrepancies between the dates of transactions given in her letter and those reflected in his records and to his testimony that he and Methany had conversations in which she approved and authorized him to effect those transactions. The variances in dates Mansfield notes are not significant even if his records rather than Methany's statements were to be credited.

and his testimony that Methany authorized the transactions in question cannot be accepted in the face of her repeatedly stated aversion to oil-related securities and the investment objectives she had in mind. ^{24/} It is too far-fetched for belief that a woman on the brink of retirement from a teaching position, needing "whatever interest and dividends" her investments might bring to supplement the income from her "modest" pension and wages from a part-time job, and having determined that \$3,000 was the limit of the funds she could find by mid-August, 1971 for further investment would, within a few days or weeks, so alter her thinking as to authorize transactions which by September, 1971 would leave her in a position of having to raise \$12,455 over and beyond the \$3000 limit she had set for herself. Similarly, it is improbable that Methany would have acquiesced in or authorized the program that Mansfield embarked on in February, 1972 involving sales of certain of her holdings and purchases of other securities which left her with an unpaid balance that had, in her words, "soared to \$19,000," instead of "in the clear" as Mansfield had told her she would be by January, 1972. ^{25/}

^{24/} An undated note or letter to Mansfield from Methany, in evidence as Mansfield Exhibit No. 6, which states that Methany will be out of town June 10 — July 20 and that she can raise about \$3,000 by mid-August for investment, corroborates Methany's statement in her February 21, 1972 letter regarding the limited funds available to her.

^{25/} That Mansfield understood that Methany was anxious to rid herself of the debit balance in her account is clear. See Tr. May 3, 1978, at 123.

Paul I. Plann

Paul I. Plann purchased \$5,000 face amount in bonds issued by Clairtone Sound Corp., a Canadian company, through Mansfield on October 17, 1969. On September 11, 1972 Mansfield sold those bonds and purchased 160 shares of SMC stock for Plann's account. Plann promptly protested the September transactions in a letter dated September 14, 1972 addressed to Mansfield's attention at PWS. Plann wrote:

I'm returning herewith your unauthorized buy and sell orders for 160 shares of SMC and 5 Clairtone bonds respectively. I have no desire to make either trade at this time at the indicated prices. 26/

Mansfield responded by letter dated September 19, 1972 in which he told Plann of his difficulties in reaching him and advised him that he would be "very happy to cancel the sale on Clairtone Sound Corp. 5 7/8% if you so desire, but as I told you at our last conversation, we only had one remaining chance of getting anything out of the bonds." Mansfield also referred to Clairtone's bankruptcy and the cessation of interest on the bonds after August 31, 1972, and told Plann to advise whether he wanted the sale "since there are 400 bonds in line behind you awaiting a sale." Plann accepted the sale during a subsequent telephone conversation.

Mansfield's testimony that during several conversations between February and September, 1972 he discussed the sale of

26/ Plann's letter and Mansfield's reply of September 19, 1972 are part of Record Document No. 11.

Clairtone and the purchase of SMC with the proceeds and received Plann's authorization for those trades does not ring true in light of the absence of reference to such authorization in his September 19 letter to Plann and his own admission, "Again I was remiss; I didn't call him and say, we sold the bonds. I confess to that, it was an error." ^{27/} If Plann had, in fact, authorized the disputed trades, there would be no occasion for Mansfield to express regret in not calling Plann, and certainly in the response to Plann's complaint, one would expect a reminder of that earlier authorization rather than an attempt to persuade Plann to accept the Claritone sale.

The record not only reflects that the Plann transactions in September, 1972 were not specifically authorized but also that Mansfield was not in possession of general discretionary authority over Plann's account. The incomplete undated Trading Authorization form introduced as Mansfield Exhibit No. 12 is inadequate to confer discretionary authority on anyone, even though signed by Plann and his wife, and does not raise any presumption that a valid authorization received by Mansfield was in existence in PWS files.

27/ Tr., May 3, 1978, at 152.

Al Sherman

On September 21, 1971 Mansfield purchased \$15,000 face value Interstate Bakeries bonds for Al Sherman which PWS confirmed to his Trust Account at United California Bank ("UCB"). Sherman returned that confirmation to Mansfield, placing a handwritten note at its top:

Allen — I have instructed UCB to return to you. I cannot use — no bread! 28/

According to Mansfield, anytime Sherman placed an order Mansfield would send him copies of instructions which Sherman would then forward to UCB. The bank would call Mansfield and either arrange for delivery of securities to PWS if Sherman had sold or for delivery to the bank against payment for Sherman's purchases. Sherman conditioned his orders many times by limiting purchases to the amount of cash in his trust account, and had told Mansfield to call UCB to check the amount of money available.

With respect to Sherman's refusal to forward the Interstate Bakeries confirmation to the bank, Mansfield claimed Sherman had erred in thinking that his trust did not have the cash to pay for the bonds covered by the September 21 confirmation. Mansfield's testimony was to the effect that in the early days of September, 1971 he had discussed selling Sherman's holdings of Kaman Corp. bonds and buying Interstate Bakeries bonds, and that on September 9, 1971 he made an initial purchase of \$22,000

of Interstate Bakeries bonds. Mansfield stated he made that purchase before selling any Kaman bonds, and after checking Sherman's cash situation with UCB. Continuing his testimony and referring to his customer account record on Sherman, ^{29/}

Mansfield stated:

On September 30, 1971 there are sales of Kaman and the records are hard to read, and I can't figure it out, but anyway sometime along in that period, 65,000 of the Kaman were sold which is a fairly considerable sum of money. The balance of the amount that I had available for purchase was (sic) 15,000 more of the Interstate which I didn't verify exactly from the bank until — in other words, by the 21st I knew there was enough money left from the sales and so on to purchase 15 more. ^{30/}

The cited testimony is in direct conflict with the entries reflected in the Sherman customer account record and is without credibility. Mansfield's record on Sherman has six lines referring to transactions in Kaman bonds, and contrary to Mansfield's statement, it is not very difficult to decipher. The first two entries reflect purchases of \$65,000 face of Kaman bonds in February, 1971 and sales of \$5,000 of those bonds on September 30, 1971 at a price of \$3,282.36 and another \$7,000 sold on October 7, 1971 for \$4,608.26. The remaining \$53,000 of Sherman's Kaman holdings are recorded as being sold in early November, 1971, over six weeks after the rejected trade. It is evident that as of September 21 Sherman's trust account had not received proceeds from sales of Kaman bonds and, as noted by Sherman, did not have

29/ Mansfield Exhibit 14.

30/ Tr., May 3, 1978, at 165.

the cash for payment of the rejected purchase. Mansfield's purchase of Interstate Bakeries bonds on that date was therefore, by the terms of the arrangement with Sherman, an unauthorized transaction.

It appears that Sherman had other problems with Mansfield which he attempted to resolve in a letter to Mansfield dated January 13, 1972. In that letter he wrote:

I think it best that we have an understanding regarding the buying and selling of any investments. In the future, do not enter any transaction without prior discussion with me. 31/

In another letter to Mansfield, dated January 25, 1972, Sherman wrote:

I am very angry and unhappy with your methods of doing business. It is not so much that you sold when I had direct correspondence with you directing you to clear something with me beforehand, BUT, I have repeatedly told you not to discuss my personal business with my secretary or anyone else in the office! 32/

Mansfield testified that he was uncertain as to the transactions Sherman was referring to in his January letter. He did recall that Sherman did "bawl" him out about the Interstate Bakeries transaction, and believed that Sherman could be referring in his letters to the sale of Kaman in connection with that purchase.

Standing alone, Sherman's January letters would not suffice to establish that Mansfield had disregarded instructions

31/ Tr., May 3, 1978, at 168.

32/ Included as part of Record Document No. 11.

and executed unauthorized trades. But they do contribute further evidence, together with Mansfield's testimony, that the Kaman and Interstate Bakeries sales and purchases were a continuing source of friction between Mansfield and Sherman and had not been authorized.

Warren R. Kisling

On September 28, 1972 PWS sent confirmations to Warren R. Kisling covering purchases of 1,720 shares of SMC stock and a sale of 200 shares of American General Bond Fund for a joint account that Mansfield had opened in the names of Kisling and his wife. Kisling rejected the trades by letter dated October 2, 1972, writing to PWS:

The Securities listed on the enclosed statements (200 shares of AMER GENL BOND FUND and 1720 shares of SMC INVESTMENT CRP) were traded in advance of my authorization, consequently I am returning the statements to your office. 33/

A few days later PWS reversed the transactions, charging Mansfield with the loss of \$400 resulting from the buy-in.

Mansfield learned of Kisling's intention to refuse the trades in a telephone conversation with him on October 2. Kisling told him that he had spoken to another broker who had not liked SMC as an investment. Mansfield immediately wrote Kisling a letter dated October 2, 1972 in which he summarized their entire course of dealing and with respect to the critical final conversations, wrote:

33/ Included as part of Record Document No. 11.

Since we have been discussing this for three or four months, you were very well informed about the situation at the time you gave me the orders Wednesday afternoon, September 27th. I made it very clear the orders would be executed Thursday since the meeting on SMC was Friday and I wanted to buy the shares before the exchange was approved.

You gave me all the details that were necessary on the phone Wednesday and then called me at 10:00 p.m. Friday night at least four times more concerning the transfer. On Friday I informed you of the execution except that I told you 1800 shares of SMC had been purchased whereas in fact it had only been 1720. To come back on Monday, October 2nd and say that you were not aware of the transactions is rather ridiculous and I am sure you did not expect me to bear the expenses of you changing your mind. 34/

Mansfield's testimony concerning his dealings with Kisling was consistent with the statements in his October 2 letter and covered his initial telephone call introducing himself to Kisling which he stated was made at the suggestion of a friend of Kisling.

Mansfield's testimony, his letter of October 2, and the fact that there appears to be no reason for Mansfield to pursue a potential new customer for four to six months and then chance alienating him by effecting unauthorized trades, suffice to carry Mansfield's argument that Kisling simply had second thoughts about the trades and took advantage of the absence of a written authorization to walk away from his commitments. The record does not support Kisling's position that the trades in dispute were unauthorized.

Other Matters

A number of defenses are raised in Mansfield's Brief in addition to his contention that the NASD has failed to prove its allegations against him. One of his arguments is that the NASD violated his constitutional rights under the Fifth and Sixth Amendments to the United States Constitution. Mansfield asserts that his "arguments have been made repeatedly throughout the five-year course of the conduct of the case. They need not be repeated here. . . ." ^{35/} His now repeated objections to the insufficiency of the charges and of the time in which to prepare his defense have been rejected by the Commission, ^{36/} and the record does not otherwise give support to his claim that he did not have adequate opportunity to defend himself before an impartial District Committee and Board of Governors. His assertions that a "minor regulatory hearing has ballooned into a vendetta" ^{37/} are found only to reflect an unwillingness to accept the proceedings as involving serious charges of improper conduct in the securities business that are

^{35/} Mansfield's Brief, at 9-10.

^{36/} Allen Mansfield, Securities Exchange Act Release No. 12479 (1976), at 4.

^{37/} Mansfield Brief, at 9.

of grave concern to regulatory authorities responsible for protection of the investing public.

Mansfield also contends that hearsay evidence has been improperly admitted and that revocation of a license is penal in nature and requires application of criminal safeguards. As to the admissibility of hearsay, the Commission noted^{38/} in considering Mansfield's same argument that the evidence in the record met the standard required in an NASD proceeding. Mansfield has added nothing to his argument which would require reconsideration of that ruling. With respect to the nature of the proceeding, Mansfield is clearly in error in attempting to equate this proceeding with a criminal action. The NASD is not a political but a lay body composed of businessmen with limited powers to discipline its membership. To impose safeguards afforded to criminals in their trials upon NASD disciplinary actions would contradict the entire concept of self-regulation and seriously impede, if not thwart, the NASD's ability to properly regulate and control its membership.^{39/}

Mansfield complains that the burden of going forward was placed upon him and attempts to make that burden analagous to "asking the defendant at a murder trial to present his defense before the prosecution has presented a case."^{40/} The

^{38/} Allen Mansfield, Securities Exchange Act Release No. 12479, at 3-4.

^{39/} Later in his brief Mansfield complains that admission of hearsay evidence was a denial of his right of confrontation under the Sixth Amendment (Mansfield's Brief, at 19-34) and states, "The accusers must be produced if there is to be a conviction." Inasmuch as the Sixth Amendment, as Mansfield also recognized in his brief, guarantees the right of confrontation only in criminal prosecutions, which these proceedings are not, there is no substance to his argument on that score.

^{40/} Mansfield's Brief, at 14.

flow in that approach is apparent, Mansfield does not acknowledge the Commission's decision that the NASD had presented a prima facie case against him, and that he had the burden of overcoming evidence that he had violated the NASD's Rules of Fair Practice at a hearing before an administrative law judge.

A further argument advanced by Mansfield is that he was compelled to testify against himself in derogation of his rights under the Fifth Amendment to the United States Constitution. He suggests that when the burden of going forward was placed upon him he "was forced to take the stand and in essence give up his Fifth Amendment rights or he would have lost his right to earn a livelihood."^{41/} That approach ignores completely the fact that he was not limited in the method of presenting his defense. He had the opportunity to present any witnesses, including himself, that his defense might dictate. It was his determination not to avail himself of the testimony of other witnesses except for affidavits and not to serve the subpoenas which had been issued at his instance requiring the appearance of the complaining customers. In short he was not, as was in the case of Garrity v. New Jersey^{42/} cited by him, placed in the position of having to incriminate himself in order to preserve his livelihood.^{43/}

^{41/} Id., at 18.

^{42/} 385 U.S. 493 (1967).

^{43/} Cf. U.S. v. Solomon, 509 F.2d 863 (2d Cir. 1975).

Mansfield also insists that "hearsay evidence alone is not enough for a finding of guilt," ^{44/} seeking support in numerous cases involving matters on appeal from decisions of federal and state administrative agencies. But as noted earlier, the "NASD is a lay body, composed of businessmen" ^{45/} and not a formal administrative tribunal. Its proceedings are not governed by the Federal Administrative Procedure Act nor are its decisions to be viewed in the same light as those of formal administrative tribunals. But where it is necessary, as Mansfield claims, that the hearsay evidence considered by the NASD in reaching its decision be supported by other relevant evidence "as a reasonable mind might accept as adequate to support a conclusion," ^{46/} the record includes such corroborative evidence. Mansfield's testimony before the NASD on October 27, 1976 and at the hearings held on May 2 and 3, 1978 pursuant to the Order of Referral and the related exhibits contain admissions and statements that acknowledge the authenticity of the letters of complaint, and corroborate directly or furnish a reasonable basis for inferences corroborating the substance of five of the six complaints against Mansfield upon which the NASD relied

^{44/} Mansfield's Brief, at 35-43.

^{45/} Allen Mansfield, Securities Exchange Act Release No. 12479, at 3.

^{46/} Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

in making its charges.^{47/}

Mansfield again invokes the Sixth Amendment to the United States Constitution in requesting dismissal of the proceedings because of a failure to afford him a speedy trial on the NASD charges. Although the prompt trial guarantee of the Sixth Amendment has no applicability to these proceedings, a person charged with serious misconduct, whether by a self-regulatory body or by a governmental authority, is entitled to a prompt determination of the charges. Here the NASD held its first hearing on November 21, 1973, less than six months after the filing of the complaint, so promptly, in fact, that Mansfield raised the defense earlier in his brief that he did not have sufficient time "to prepare, obtain witnesses, subpoena documents, or take any of the basic steps in preparation for trial."^{48/} That Mansfield was not satisfied with the type of hearing afforded cannot alter the fact that he promptly received the hearing to which he was entitled before the NASD.

Disciplinary Sanctions

Mansfield regards the sanctions imposed upon him as excessive, and attributes the severity to the fact that the NASD had been challenged and "[t]hey were going 'to show the

^{47/} As a corollary to his hearsay arguments, Mansfield claims, "that the NASD did not prove its case beyond a reasonable doubt and by clear and convincing evidence and no showing of intent was made." (Mansfield's Brief, at 46-51). That claim, which grows out of Mansfield's viewing these proceedings as a criminal matter, is devoid of merit.

^{48/} Mansfield Brief, at 8. That claim was rejected by the Commission, supra, n. 36.

defendant,' not to equitably punish him for a purported crime.^{49/}
He further urges that in assessing the sanctions, the NASD
erroneously took into consideration its previous disciplinary
action against him.^{50/}

The imposed sanctions are indeed severe, but there is
no justification for Mansfield's assertions that vindictiveness
or other unacceptable emotional considerations dictated the
extent of the NASD sanctions. The record reflects unauthorized
trading in the accounts of five customers despite their repeated
objections to Mansfield's conduct,^{51/} and the fact that
previously the NASD had occasion to discipline Mansfield for
the same offense. Under the circumstances established by the
record, which has been carefully reviewed with the added factor
in mind that Mansfield's admission to practice law in California
may be at stake, it is concluded that the sanctions found
necessary by the NASD cannot be deemed either "excessive or
oppressive."^{52/} In reaching that conclusion, consideration has

^{49/} Mansfield's Brief, at 61.

^{50/} Pacific Western Securities, Inc., Complaint No. A-343, District No. 2
(Board of Governors, NASD, November 5, 1971).

^{51/} Mansfield's actions in effecting the unauthorized transactions in question
constituted fraud within the meaning of the NASD Rules of Fair Practice.
Cf. L.B. Securities Corporation, 42 S.E.C. 885 (1966).

^{52/} Section 19(e)(2) of the Exchange Act uses those terms of measurement.
Prior to the Securities Amendments Act of 1975 (Public Law No. 94-29
approved June 4, 1975) it appeared in Section 15A(h)(2) of the Exchange
Act.

also been given to the fact that the NASD sanctions "do not operate as a permanent bar if a subsequent showing can be made that a future association in the securities business would be consistent with the public interest."^{53/}

As to Mansfield's position that an overturning of the previous disciplinary action may result from his efforts in that direction,^{54/} and that a rehearing in this matter would then be required, there is little problem. The previous disciplinary action has been taken into consideration only with respect to the appropriateness of the sanctions imposed by the NASD in these proceedings, and then only after the conclusion was reached that the evidence is sufficient to support the NASD findings of violations by Mansfield as charged. If the NASD's previous action is modified or reversed, the sanctions in this matter can be readily taken under review.

^{53/} Charters & Co. of Miami, Inc., 43 S.E.C. 175, 180 (1966).

^{54/} See Appeal of Allen Mansfield for Review of Refusal to Reopen and Amend Published Decision A343 Taken by National Association of Securities Dealers, Inc., dated June 16, 1978; and letter dated July 10, 1978 to the Secretary of Commission by Mansfield on the same subject.

Recommendation

It is recommended that an appropriate order issue ^{55/} directing the dismissal of this review proceeding.

Respectfully submitted,


Warren E. Blair
Chief Administrative Law Judge

Washington, D.C.
August 4, 1978.

55/ All proposed findings and conclusions submitted by Mansfield and the NASD have been considered, as have their contentions. To the extent such proposals and contentions are consistent with this advisory report, they are accepted.