

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 55978 / June 28, 2007

Admin. Proc. File No. 3-12482

In the Matter of the Application of

FLORENCE SARAH POLLARD
c/o McColloch & Campitiello, LLP
5900 LaPlace Court, Suite 100
Carlsbad, California 92008

For Review of Disciplinary Action Taken by

NASD

ORDER DISMISSING APPEAL

Florence Sarah Pollard, formerly a registered representative at Equitrade Securities Corporation ("Equitrade"), has appealed from an NASD Hearing Panel decision fining her \$5,000 and suspending her for six months in a principal capacity.

In December 2005, NASD's National Adjudicatory Council ("NAC") issued an opinion reversing an earlier Hearing Panel decision in favor of Pollard. The NAC found that Pollard had violated NASD Conduct Rules 2460 and 2110 ^{1/} by procuring payments for Equitrade from issuers in exchange for making markets in the issuer's stock (the "December 2005 Decision"). The NAC remanded the case to the Hearing Panel to determine the appropriate sanction.

In September 2006, the Hearing Panel issued its decision imposing the sanctions set forth above (the "Remand Decision"). The transmittal letter accompanying service of the Remand Decision on Pollard informed her that she could "appeal to the NAC if [she] disagree[d] with this

^{1/} NASD Conduct Rule 2460 provides, in relevant part, that "[n]o . . . person associated with a member shall accept any payment or other consideration, directly or indirectly, from an issuer of a security . . . for publishing a quotation, acting as market maker in a security, or submitting an application in connection therewith."

NASD Conduct Rule 2110 provides that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."

Remand Decision by filing a Notice of Appeal within 25 calendar days after service of the Remand Decision upon [her] [in accordance with the procedures] set forth in Conduct Rule 9311." ^{2/} NASD further advised Pollard that the Hearing Panel decision would "become the final decision of NASD 45 days after service of the Remand Decision upon [her] unless . . . [she] appeal[ed] to the . . . NAC, or the NAC calls the Remand Decision for review." ^{3/} Instead, Pollard applied for Commission review of the Remand Decision on November 14, 2006.

Pollard's appeal must be dismissed because she failed to exhaust her administrative remedies by not first appealing the Hearing Panel's sanction determination to the NAC. Under NASD Rule 9311(a), Pollard had twenty-five days after service of the Remand Decision to appeal its sanction determination to the NAC. Pollard was informed by NASD of her right to appeal to the NAC. She was further informed that the Remand Decision would "become the final decision of NASD . . . unless . . . [she] appeal[ed] to the . . . NAC." Pollard chose not to appeal the Hearing Panel's sanction determination to the NAC.

The precedent on this issue is well settled: "It is clearly proper to require that a statutory right to review be exercised in an orderly fashion, and to specify procedural steps which must be observed as a condition to securing the review." ^{4/} NASD's rules are designed to provide for a timely reexamination by the NAC of decisions of various hearing panels before NASD's action can be brought before us for review. To allow the bypassing of the NAC in cases such as that presented here, "would tend to destroy the effectiveness of these procedures." ^{5/}

Pollard states that she is not seeking review of the Hearing Panel's sanction determination but, rather, the December 2005 Decision finding liability. Pollard argues, however, that, "[s]ince no party has appealed the sanction award within the applicable appeal period, the decision on

^{2/} NASD Rule 9311(a) provides, in relevant part, that a respondent "may file a written notice of appeal within 25 days after service of a decision issued" by an NASD Hearing Panel." Rule 9311(b) directs that this appeal be made to the NAC.

^{3/} Evidence submitted by NASD, including copies of a fax receipt and a Federal Express airbill, establishes that NASD sent copies of the Remand Decision to Pollard's attorney on September 18, 2006. Pollard does not dispute this.

^{4/} Royal Secs. Corp., 36 S.E.C. 275, 277 (1955). See also Jeffrey A. King, Securities Exchange Act Rel. No. 52,571 (Oct. 7, 2005), 86 SEC Docket 1439, 1443 (emphasizing that we "will not consider an application for review if the applicant failed to follow NASD procedures"); David I. Cassuto, 56 S.E.C. 565 (2003) (same); Gary A. Fox, 55 S.E.C. 1147 (2002) (same); see also Calvin David Fox, Exchange Act Rel No. 54,840 (Nov. 30, 2006), 89 SEC Docket 1282, 1284 (appeal dismissed for failing to exhaust New York Stock Exchange remedies); MFS Secs. Corp., 56 S.E.C. 380 (2003), aff'd, 380 F.3d 611 (2d Cir. 2004) (same).

^{5/} Royal Secs. Corp., 36 S.E.C. at 277.

remand constitutes a final disciplinary sanction in this action . . . [and, therefore,] [t]his matter is subject to review by the Securities and Exchange Commission pursuant to NASD Rule 9370 6/ and SEC Rule 420." 7/

Pollard misconstrues the scope of our jurisdiction. Exchange Act Section 19(d)(1) authorizes us to hear appeals of "final disciplinary sanctions" imposed by self-regulatory organizations, including NASD, on its members or associated persons. 8/ Exchange Act Rule 19d-3 9/ directs that "[a]pplications to the Commission for review of any final disciplinary sanction . . . shall be made pursuant to Rule 420 of the Commission's Rules of Practice." Rule of Practice 420(a)(I) provides that "[a]n application for review by the Commission may be filed by any person who is aggrieved by a determination of a self-regulatory organization with respect to any . . . final disciplinary sanction." The December 2005 Decision did not impose a final disciplinary sanction but merely made findings that Pollard had violated NASD rules. As Pollard concedes, the Remand Decision imposed the final disciplinary sanction against her, not the December 2005 Decision. Before filing her appeal with the Commission, Pollard was required to appeal the Remand Decision to the NAC.

Pollard argues, however, that NASD Rule 9370(a) permits a respondent to apply for review to the Commission if he or she was aggrieved by "final disciplinary action pursuant to the Rule 9200 Series [Hearing Panel actions] or the Rule 9300 Series [NAC review proceedings]" (emphasis added). Pollard notes that the "Rule 9200 Series" refers to hearing panel disciplinary proceedings, and that the "Rule 9300 Series" applies to NAC reviews of hearing panel decisions. Because Rule 9370(a) is written in the disjunctive, Pollard argues, a party may apply to the Commission for review when aggrieved by a final decision issued pursuant to either set of rules. Since the Remand Decision became final once she failed to appeal it, and the NAC failed to call it for review within the requisite time period, Pollard reasons, she had the option under Rule 9370 of appealing directly to the Commission.

Such a reading of Rule 9370 would fly in the face of the long-standing Commission precedent discussed above. It is also an unnecessary reading. The use of the disjunctive in Rule 9370 clarifies that a party may appeal to the Commission whether they were aggrieved by a decision in the Rule 9200 Series (because a hearing panel found against such party and the party's appeal to the NAC was unsuccessful) or by the Rule 9300 Series (because, although the

6/ NASD Procedural Rule 9370(a) states, in relevant part, that "[a] Respondent aggrieved by final disciplinary action pursuant to the Rule 9200 Series [Hearing Panel actions] or the Rule 9300 Series [NAC actions] may apply for review by the Commission pursuant to Section 19(d)(2) of the Act."

7/ Rule of Practice 420, 17 C.F.R. § 201.420, sets out the procedures for appealing a self-regulatory organization decision to the Commission.

8/ 15 U.S.C. § 78s(d)(1).

9/ 17 C.F.R. § 240.19d-3.

party prevailed before the hearing panel and therefore was not aggrieved during the Rule 9200 Series proceeding, Enforcement appealed the decision to the NAC or the NAC called it for review and the party was aggrieved by a subsequent decision pursuant to the Rule 9300 Series).

We decline to construe NASD rules in a way that would disturb the long-settled and well-justified policy of requiring people to exhaust the full administrative process at NASD. Prior to any appeal here, Pollard was required to appeal the Remand Decision to the NAC. If she had then decided to appeal the NAC's ruling to us, she could have, at that time, raised any issue raised in the course of the proceeding, including her challenge to the December 2005 Decision. As NASD correctly pointed out in its motion to dismiss Pollard's appeal, Pollard's failure to follow this established procedure frustrates "an essential goal of an orderly appeal process: allowing the lower body to articulate its rationale or correct mistakes."

Accordingly, IT IS ORDERED that the appeal by Florence Sarah Pollard be, and it hereby is, dismissed.

By the Commission.

Nancy M. Morris
Secretary