

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Roric E. Griffith
Milwaukee, WI,

Respondent.

DECISION

Complaint No. 2010025350001

Dated: December 22, 2015

Respondent exercised time and price discretion without written authorization and engaged in unauthorized trading. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Thomas K. Anderson, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Ross A. Anderson, Esq.

Decision

Roric E. Griffith appeals a June 13, 2014 Hearing Panel decision pursuant to FINRA Rule 9311. The Hearing Panel found that Griffith exercised time and price discretion in a customer's account without written authorization, in violation of NASD Rule 2510 and FINRA Rule 2010, and engaged in an unauthorized trade, in violation of FINRA Rule 2010.¹ For his exercise of discretion, the Hearing Panel fined Griffith \$5,000 and suspended him from associating with any FINRA member in any capacity for 20 business days. For his unauthorized trade, the Hearing Panel fined Griffith an additional \$5,000 and suspended him for two months, with the suspensions running concurrently. After an independent review of the record, we affirm the Hearing Panel's findings of liability but modify the sanctions it imposed.

¹ The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

I. Factual Background

A. Griffith

Griffith entered the securities industry in 1997. Since 2005, he has been registered as a general securities representative and as an investment company products/variable contracts representative with Princor Financial Services Corporation (“Princor”).

B. The Ks Become Griffith’s Clients and Discuss JK’s Retirement

In 2007, JK was a 53 year-old assistant business manager for a labor union. JK and his wife, WK (together the “Ks”), were existing Princor customers who had become dissatisfied with their account representative. In 2007, in light of this dissatisfaction, DB, a Princor representative affiliated with the union who was also Griffith’s supervisor, introduced JK to Griffith. After meeting with Griffith, the Ks became Griffith’s customers. The Ks and Griffith met about every six months to prepare for JK’s retirement. Although JK initially intended to retire at age 56, JK informed Griffith in late 2008 that he wanted to retire earlier than originally planned, setting his new target retirement date as March 19, 2009, at age 55. JK explained that he and his wife needed to retire with an annual income of \$90,000.

Based on JK’s new target retirement date, and his desired annual income, Griffith recommended an income generation strategy, which he used for about 30 to 40 other customers, designed for retirees or those soon to be retired. Under this strategy, Griffith would compile a pool of investments consisting primarily of closed-end funds and mutual funds that used leverage to generate substantial dividends, thereby reducing the need to draw down principal in retirement. Griffith selected the funds included in the model portfolio and determined the portfolio weight of each fund, periodically recommending changing or rebalancing the investment mix as he deemed appropriate.

Griffith explained that this strategy was one of the only ways for the Ks to meet their desired income goal, short of JK continuing to work for at least another year. To implement this strategy, Griffith recommended using funds in JK’s IRA (derived primarily from the pension distribution that would follow JK’s retirement) to purchase shares in the dividend-generating funds. To avoid the tax penalty that would result from early distributions from the IRA, Griffith recommended that JK complete trustee-to-trustee transfers of the dividends from JK’s IRA to his union 401(k) plan account, from which Griffith believed the funds could be withdrawn without penalty. Although Griffith and the Ks met in early 2009 to discuss the strategy and complete the paperwork required for JK’s pension distribution to be rolled over into his IRA, the income generation strategy could not be implemented until JK actually retired (in March 2009) and the distribution was completed (in June 2009).

C. JK Retires and Sends IRA Rollover to Princor

JK retired on his target date, March 19, 2009, and then had approximately one month of paid vacation days after retirement. When he retired, JK submitted his IRA rollover paperwork, knowing that it may take between six weeks and three months for the funds to

rollover to Griffith for investment. JK received a statement from the IRA at the end of June 2009, which indicated that Griffith had received the funds that month. JK tried to call and email Griffith once he received the statement as he wanted Griffith to implement the income generation strategy as soon as possible, but JK could not reach Griffith. Ultimately, JK reached out to his friend, TD, who also worked at Princor, and to Griffith's supervisor, DB. In early July, Griffith contacted JK to schedule a meeting.²

D. The July Meeting

On July 21, 2009, the Ks, Griffith, and TD met at the Ks' home. During their meeting, Griffith discussed the specifics of his income generation strategy and provided a "Hypo Report" containing a "Portfolio Snapshot" that indicated each fund to be purchased and the percentage of the portfolio that the funds would comprise. Griffith recommended to JK that he implement the income generation strategy in a fee-based brokerage account. JK agreed and signed new account and account opening forms.³

During the meeting, Griffith and JK also agreed on how Griffith's income generation strategy would be implemented. They first agreed that Griffith would purchase only shares in the funds identified in the Hypo Report and that the weighting of shares in each fund would match the percentage allocations set out in the Hypo Report. Although Griffith and JK discussed making the specified purchases immediately, JK agreed to give Griffith some flexibility to purchase shares later – when Griffith considered it appropriate to do so, considering premium and discount figures, share prices, and ex-dividend periods, but requested that Griffith make the purchases as soon as possible. Even though JK granted Griffith time and price discretion, Griffith did not obtain written authorization from JK to exercise discretion, and Princor did not authorize its representatives to have discretionary accounts.

JK grew concerned when he did not hear from Griffith within a few days of their meeting, as he had requested that Griffith immediately inform him when he made purchases. JK thus began calling Griffith on a daily basis, eventually enlisting TD to help him reach Griffith. Ultimately, Griffith called JK at the end of July or the beginning of August and, as a result of their conversation, JK understood that Griffith had, by that time, purchased shares in at least some of the funds listed in the Hypo Report, which he in fact had not. In an August 5,

² In fact, Griffith never received notice that the funds had been rolled over to JK's account. At that time, Princor did not have a notification system to alert representatives that a deposit had been made into a customer account, and JK's check was sent to Princor's home office and not to Griffith. Griffith did not learn that the funds had been deposited until JK contacted him in early July 2009, when JK communicated his frustration that the funds had been distributed but Griffith had not taken any action to invest the funds.

³ For reasons Griffith could not explain, submission of the documents to Princor was delayed. Griffith acknowledged that this holdup contributed to the delay in implementing the strategy.

2009 email, JK sought confirmation that a portion of JK's pension and IRA funds would be used to purchase investments "that would begin to pay dividends starting in July 2009," and asked for a list of the investments "that were purchased." Griffith responded on August 14, 2009, by email, informing JK that JK's email was correct in all relevant regards and listed the ticker symbols of the funds that Griffith had purchased, but did not correct JK's incorrect assumption that he would receive dividends from July.

E. Griffith Purchases Funds Listed in the Hypo Report and Makes One Unauthorized Purchase

1. Griffith Purchases Five of the Nine Funds Included in the Hypo Report

On August 13, 2009, the day before his email to JK, Griffith made the first purchases for JK. As he indicated in his email, Griffith placed purchase orders in five of the nine funds listed in the Hypo Report. During FINRA's investigation and the hearing below, Griffith explained that he had delayed the purchase to avoid paying premiums for shares and to avoid ex-dividend periods. However, some of funds could have been purchased earlier than August 13, 2009, without paying a premium. Additionally, seven of the nine funds could have been purchased before August 13 without being in an ex-dividend period. Griffith stipulated that he was exercising time and price discretion without written authority when he purchased the funds on August 13.

2. Griffith Purchases a Fund Not Included in the Hypo Report

At this same time, Griffith also purchased BlackRock Debt Strategies Fund ("DSU"), which was not included on the Hypo Report or discussed at the July meeting. Griffith never discussed purchasing this fund with the Ks. About one week after his July 21, 2009 meeting with the Ks, Griffith decided to change the investment mix of the income generation strategy model portfolio, to reduce holdings in one BlackRock closed-end fund and add holdings in DSU. While Griffith contacted the customers in whose accounts he already had implemented the strategy to get their approval to change their mix of investments, he mistakenly neglected to call JK, whose account was then in cash.⁴ Griffith stipulated that this trade was unauthorized.

⁴

Griffith testified that:

[I]n my mind, [JK] had asked me to implement the strategy that we were using for clients [already invested in Griffith's strategy]. And a mistake was made in my adding the fund to his mix. And because there was not a transaction of a buy and sell, it never occurred to me to contact him and let him know we're making this change; whereas, the other clients there was a buy and sell that had to be actively made, and we contacted those clients.

3. Griffith's Investment Strategy Collapses

After Griffith made the purchases, Griffith and JK learned that JK's 401(k) did not permit additional deposits from retirees, which meant that Griffith's tax avoidance plan was ineffective. The remaining four funds were never purchased, and Griffith was replaced as the broker for JK's account. The Ks filed a complaint with Princor and reached a settlement agreement. Subsequently, Griffith received a letter of reprimand from Princor's regional vice president in April 2011.⁵ Griffith accepted the allegations in the letter of reprimand, acknowledging and taking responsibility for the mistakes that he made. Princor and Griffith entered into a special supervision agreement. Griffith and his supervisor, DB, met monthly rather than quarterly. Griffith's trades were reviewed and cell phone calls documented. Griffith and DB have continued meeting monthly, despite the special supervision period ending.

II. Procedural History

FINRA commenced an investigation of Griffith after JK complained to FINRA and Princor about Griffith's handling of the account. The Department of Enforcement ("Enforcement") filed a two cause complaint against Griffith on June 26, 2013, alleging under cause one that Griffith violated NASD Rule 2510 and FINRA Rule 2010 when he exercised time and price discretion for the purchase of funds without written authorization, and under cause two that Griffith engaged in unauthorized trading when he purchased BlackRock Debt Fund shares without JK's permission, in violation of FINRA Rule 2010.

Enforcement and counsel for Griffith entered into a stipulation of facts, in which Griffith admitted his liability for both exercise of time and price discretion without written authorization and unauthorized trading. A hearing was held on April 2, 2014. The Hearing Panel issued its decision on June 13, 2014, finding that Griffith engaged in the misconduct charged by Enforcement. The Hearing Panel imposed a 20-business-day suspension and \$5,000 fine for Griffith's improper exercise of discretion and a concurrent suspension of two months and an additional \$5,000 fine for Griffith's unauthorized trading. This appeal followed.

⁵ Princor's reprimand letter highlighted several deficiencies concerning Griffith's handling of JK's account. The letter noted that Griffith's failure to confirm the possible tax consequences of the transfer between JK's accounts was the primary driver of JK's complaint to Princor. The letter also chided Griffith for his failures to follow up with JK and Griffith's recordkeeping. With respect to Griffith's exercise of discretion, the letter states that "[a]s it stands, such a delay might be viewed as exercising investment discretion, which is explicitly prohibited by Princor."

III. Discussion

The parties have stipulated to Griffith's liability and the following violations are not in dispute.

A. Griffith Exercised Time and Price Discretion Without Written Authority

We affirm the Hearing Panel's findings that Griffith exercised time and price discretion without the customer's written authority, in violation of NASD Rule 2510(b) and FINRA Rule 2010.⁶

NASD Rule 2510(b) prohibits registered representatives from exercising discretion over a customer account unless the customer has given written authorization and the firm accepts the customer's account in writing. "[D]iscretionary trading in a customer's account is a practice that is inherently susceptible to abuse." *Murphy*, 2013 SEC LEXIS 1933, at *27. It can lead to ancillary violations such as excessive trading, churning, or unsuitable transactions. In light of the potential for abuse, FINRA's rules require that the authorization for the exercise of discretionary power in a customer's account be in writing to ensure "that the trading is being done with the consent of the customer and to alert the firm that extra oversight of the sales representative's handling of the account may be necessary to protect against improper or unsuitable trading." *William J. Murphy*, 54 S.E.C. 303, 307 (1999); see *Dep't of Enforcement v. Wilson*, Complaint No. 2007009403801, 2011 FINRA Discip. LEXIS 67, at *30-31 (FINRA NAC Dec. 28, 2011) (explaining that compliance with the requirements of NASD Rule 2510(b) is "an additional means of ensuring effective supervision of sales practices at securities firms").

There is no dispute that Griffith exercised time and price discretion and did not receive written authority from JK before exercising this discretion.⁷ Additionally, Princor, which did not permit its representatives to exercise discretion over customer accounts, did not accept JK's account as discretionary. Therefore, Griffith violated NASD Rule 2510(b) and FINRA Rule 2010. See *Michael Pino*, Exchange Act Release No. 74903, 2015 SEC LEXIS 1811, at *17-18 (May 7, 2015) (finding that the respondent violated NASD Rule 2510(b) when he did not have customer written authorization and permission from firm to effect trades); *Murphy*, 2013 SEC LEXIS 1933, at *27-28 (finding a violation of Rule 2510 when customer granted oral authority for discretionary trading but did not grant written authority).

⁶ It is well settled that a violation of another FINRA rule is a violation of FINRA Rule 2010. See *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *26 (July 2, 2013), 751 F.3d 472 (7th Cir. 2014).

⁷ NASD Rule 2510(d)(1) provides an exception to 2510(b), stating that the requirement does not apply to "discretion as to the price at which or the time when an order given by a customer for the purchase or sale of a definite amount of a specified security shall be executed, except that the authority to exercise time and price discretion will be considered to be in effect only until the end of the business day on which the customer granted such discretion, absent a specific, written contrary indication signed and dated by the customer." The parties do not argue, nor do we find, that this exception applied in this instance.

B. Griffith Engaged in Unauthorized Trading

We affirm the Hearing Panel's findings that Griffith violated FINRA Rule 2010 when he purchased DSU shares without authorization from JK.

FINRA Rule 2010 requires that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." An associated person is "responsible for obtaining his [or her] customer's consent prior to purchasing a security for the customer's account." *Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at *6 (July 1, 2008) (internal quotations omitted). The Commission has held that "[u]nauthorized trades are a serious breach of the duty to observe high standards of commercial honor and just and equitable principles of trade. Such misconduct goes to the heart of the trustworthiness of a securities professional, and is a fundamental betrayal of the duty owed by a sales[person] to his [or her] customers." *Id.* (internal quotations omitted).

It is undisputed that Griffith engaged in unauthorized trading. Griffith listed nine specific mutual funds and closed-end funds in the Hypo Report presented to the Ks at the July 21 meeting. DSU was not included in the Hypo Report, and Griffith and the Ks did not discuss purchasing DSU at any time. Griffith acknowledged that he purchased shares in this fund without authorization and should have contacted the Ks before purchasing DSU. Accordingly, Griffith violated FINRA Rule 2010 when he purchased these shares without authorization. *See Murphy*, 2013 SEC LEXIS 1933, at *33-34 (finding respondent violated NASD Rule 2110 when he made trades that were not part of trading strategy approved by his customer); *Sears*, 2008 SEC LEXIS 1521, at *8 (concluding that respondent violated NASD Rule 2110 when she made trades without customers' permission).

IV. Sanctions

A. Sanctions for Exercising Discretion Without Written Authority

The Hearing Panel fined Griffith \$5,000 and suspended him for 20 business days in all capacities for violating NASD Rule 2510(b) and FINRA Rule 2010. As explained in further detail below, we find that the \$5,000 fine is appropriate. We, however, disagree with the Hearing Panel's determination that Griffith's exercise of discretion was egregious, and we find that Griffith's actions do not merit a suspension.

For the exercise of discretion in a customer's account without written authority, the FINRA Sanction Guidelines ("Guidelines") recommend a fine of \$2,500 to \$10,000 and direct adjudicators to consider a suspension in any or all capacities for 10 to 30 business days when the exercise of discretion is egregious.⁸

⁸ *FINRA Sanction Guidelines* 85 (2013) [hereinafter *Guidelines*].

There are two principal considerations we are directed to consider when determining sanctions for the exercise of discretion without written authority from the customer in the Guidelines.⁹ The first is “[w]hether [the] customer’s grant of discretion was express or implied.”¹⁰ The second principal consideration is “[w]hether [the] firm’s policies and/or procedures prohibited discretionary trading and/or whether the firm prohibited the respondent from exercising discretion in customer accounts.”¹¹

Under the first principal consideration, we find that Griffith had express time and price discretion, but did not have discretion to change composition of investments. This is not a case where the client expressly forbade discretion or was unaware that discretionary trades could occur. *See Pino*, 2015 SEC LEXIS 1811, at *36-37 (finding it aggravating that the respondent had neither written nor oral authority to exercise discretion). Though Griffith has now acknowledged that he violated NASD Rule 2510(b) and FINRA Rule 2010, at the time, he believed that he was working in accordance with JK’s grant of discretion.

With respect to the second principal consideration, which directs adjudicators to consider whether firm policy permits discretionary trading,¹² it is undisputed that Princor’s policies did not permit representatives to have discretion over accounts. Griffith stipulated that Princor’s policies did not permit discretionary control over accounts in any capacity. Therefore, we find it aggravating that Griffith acted contrary to Princor’s policies.

Looking to the Guidelines’ Principal Considerations in Determining Sanctions, we find the small number of trades and short duration of time over which the trades occurred mitigate Griffith’s misconduct.¹³ Griffith’s five fund purchases were entered over the course of 10 minutes on one day.

We finally look to whether Griffith’s misconduct resulted in the potential for monetary gain.¹⁴ Griffith asks the NAC to find it mitigating that he could not have derived any profit from exercising discretion.¹⁵ *See Dep’t of Enforcement v. Mizenko*, Complaint No.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Guidelines*, at 85.

¹³ *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, Nos. 8 and 9).

¹⁴ *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 17).

¹⁵ Griffith notes that he was being compensated on a fee basis and did not receive commission payments for any of the trades made; therefore, he argues he had no potential for monetary gain.

C8B030012, 2004 NASD Discip. LEXIS 20, at *20 (NASD NAC Dec. 21, 2004) (overturning panel's finding that respondent's failure to benefit personally from misconduct was a mitigating factor but rather noting that the Guidelines direct adjudicators to consider whether the respondent's misconduct resulted in the potential for monetary or other gain), *aff'd*, 58 S.E.C. 846 (2005). While prior cases have held that both realized and potential gain can be aggravating, there is no authority for the proposition that the absence of potential for monetary gain is mitigating, and we decline to create any such authority here.¹⁶ Even though we do not find Griffith's lack of potential for monetary gain to be mitigating, we do find it relevant to Griffith's intent for purposes of sanctions that Griffith could not have profited in evaluating his motives and state of mind when making the discretionary trades.¹⁷ Griffith was not attempting to circumvent the rules for his own benefit. Rather, through negligence or imprudence, Griffith ignored FINRA and his Firm's rules regarding discretion, and he did not trade with the intent to personally profit.

* * *

In light of our finding that Griffith's misconduct for this violation is not egregious, we do not find a suspension to be the appropriate sanction. We are satisfied that Griffith fully understands his mistakes and that he and his Firm have implemented procedures to prevent similar future misconduct, greatly reducing the chances of recidivism. Accordingly, we find the appropriate sanction for exercising discretion in this case is a \$5,000 fine.

B. Sanctions for Unauthorized Trading

The Hearing Panel found Griffith's unauthorized purchase of DSU shares serious, but not egregious, and imposed a \$5,000 fine and two-month suspension. As explained in further detail below, we affirm the Hearing Panel's fine and agree that Griffith's conduct was not egregious, but we do not find it appropriate to impose the two-month suspension and instead only impose the \$5,000 fine.

For engaging in unauthorized trading, the Guidelines recommend a fine of \$5,000 to \$75,000 and a suspension of 10 business days to one year. In egregious cases, the Guidelines direct us to consider a suspension of up to two years.¹⁸

¹⁶ Enforcement highlights that the NAC has frequently considered realized and potential gain as aggravating factors. Additionally, Enforcement asserts that the NAC frequently holds that the absence of gain frequently is not to be mitigating. They are correct in asserting that the case law is well established regarding these specific nuances. However, Enforcement does acknowledge in its brief on appeal that there are no cases discussing whether it can be mitigating when a respondent did not even have the potential to profit.

¹⁷ *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 17).

¹⁸ *Id.* at 98.

There are two principal considerations to determine sanctions for unauthorized transactions in the Guidelines.¹⁹ The first principal consideration is “[w]hether [the] respondent misunderstood his or her authority or the terms of the customer’s orders.”²⁰ The second principal consideration is “[w]hether the unauthorized trading was egregious.”²¹

First, it is evident that Griffith did not misunderstand his authority over JK’s order. It is undisputed that Griffith did not have authority to purchase DSU shares. Those shares were not listed in the Hypo Report, and Griffith never discussed them with JK. Griffith has consistently acknowledged that, despite not intending to trade without authorization, he violated FINRA Rule 2010 when he failed to check with JK when purchasing DSU shares for JK’s account.

Next, we consider whether Griffith’s unauthorized trade was egregious. The Guidelines explain that a trade can be egregious when the trade is accompanied by aggravating factors or when the trade is qualitatively or quantitatively egregious.²² First, there are no aggravating factors accompanying Griffith’s unauthorized trade, such as efforts to conceal the unauthorized trading, attempts to evade regulatory investigative efforts, customer loss, or a history of similar misconduct.²³ In addition, the trade was not quantitatively egregious because there was only one instance of unauthorized trading. Finally, the unauthorized trade was not qualitatively egregious because it resulted from mistake or oversight rather than bad faith.²⁴ Although Griffith did make a serious error when he failed to contact JK before purchasing the shares, he did not intentionally try to harm him or personally benefit from the purchase. Therefore, under the Guidelines, we find that Griffith’s unauthorized trade was not egregious.

In light of our finding that Griffith’s misconduct for this violation arose out of an oversight on Griffith’s part, we do not find a suspension to be an appropriate sanction. As the Guidelines make clear, the purpose of FINRA’s disciplinary process is to protect the investing public, support and improve the overall business standards in the securities industry, and decrease the likelihood of recurrence of misconduct by the disciplined respondent.²⁵ Adjudicators should impose sanctions that are remedial and not punitive. Moreover, sanctions

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 98, n.2.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 2 (General Principles Applicable to All Sanction Determinations, No. 1).

should protect the public, not penalize brokers and prevent the respondent from causing future harm to the public. We conclude that it is not necessary to impose a suspension on Griffith to sculpt an appropriately remedial sanction. This was an isolated incident. He did not intentionally make the unauthorized trade or intend to harm his client for his own personal benefit. Rather, the trade occurred because Griffith overlooked JK when contacting other customers about purchasing DSU. Griffith has maintained practices from the supervision agreement even after the required 24-month period expired, indicating his commitment to his customers and to following FINRA's rules and Princor's policies.

A suspension, in this case, will not protect the public or ensure that Griffith will not make an unauthorized trade again. We are satisfied that Griffith's acknowledgement of his error and subsequent steps to prevent future mistakes sufficiently encourage Griffith to follow FINRA rules and his firm's policies and procedures. A suspension would provide little remedial effect for Griffith and is unnecessary. We therefore conclude that a fine of \$5,000 is the appropriate remedial sanction.

V. Conclusion

Griffith violated NASD Rule 2510(b) and FINRA Rule 2010 when he made discretionary trades without written authority from his customer and violated FINRA Rule 2010 when he made unauthorized trades for his customer. Accordingly, we fine Griffith \$5,000 for making discretionary trades without written authority and an additional \$5,000 for his unauthorized trading. We affirm the Hearing Panel's order to pay \$2,685.77 in costs.²⁶

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith

²⁶ Pursuant to FINRA 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.