

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C3A970074
v.	:	
	:	
	:	Hearing Officer - JMF
	:	
Respondent.	:	

ORDER SETTING SECOND PRE-HEARING CONFERENCE

1. On October 29, 1997, the Department of Enforcement of NASD Regulation, Inc., filed a two-count Complaint against Respondent _____. Cause One alleges forgery of a customer's signature on a refund check and deposit of that check into Respondent's own account in violation of NASD Conduct Rule 2110. Cause Two alleges that Respondent failed to respond to three staff information requests in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210.
2. On November 17, 1997, Respondent filed an Answer to the Complaint denying the allegations set forth in the Complaint.
3. Pursuant to a November 26, 1997 Order, an initial Pre-Hearing Conference was held in this disciplinary proceeding on December 8, 1997 at 2:00 p.m., Eastern Time.
_____, represented the Department of Enforcement. Respondent _____ failed to appear at the Pre-Hearing Conference.

BACKGROUND

4. On December 2, 1997, Respondent _____ prepared and sent correspondence to the Office of Hearing Officers, copying counsel for the Department of Enforcement, indicating that he had attempted to contact his counsel concerning the December 8, 1997 Pre-Hearing Conference.¹ Among other things, the Respondent stated that his attorney (who was not identified by name) would not be able to participate in the Pre-Hearing Conference and that he would be unable to provide future dates when he would be available to participate in a Pre-Hearing Conference.
5. Because the purpose of Respondent's correspondence was unclear, the Hearing Officer instructed _____, a legal assistant in the Office of Hearing Officers assigned to this proceeding, to contact the Respondent and notify him that the December 8, 1997 Pre-Hearing Conference would proceed as scheduled.
_____ contacted Respondent on Friday, December 5, 1997, leaving a message on Respondent's answering machine.
6. On Monday, December 8, 1997, Respondent faxed to the Hearing Officer a document indicating that he had received _____ message that the Pre-Hearing Conference would proceed as scheduled at 2:00 p.m., Eastern Time. However, Respondent indicated that he did not feel "it was wise to participate, based upon advise, without someone who is more knowledgeable in these matters"² The

¹ A copy of the December 2, 1997 correspondence was attached to the December 11, 1997 Initial Pre-Hearing Conference Order and Order to Show Cause Why Respondent Should Not Be Held in Default for Failing to Appear at a Pre-Hearing Conference (the "December 11, 1997 Show Cause Order").

² A copy of Respondent's December 8, 1997 fax was attached to the December 11, 1997 Show Cause Order.

Respondent further stated that he did not want to risk his current job position by participating in the Pre-Hearing Conference but expressed a concern about being held in default for failing to participate in the Pre-Hearing Conference.³

7. Respondent did not copy counsel for the Department of Enforcement on this fax transmission.
8. The Respondent's facsimile also addressed issues that relate to the merits of this disciplinary proceeding. In particular, Respondent stated that no ill gotten gains were received, no money was taken from customers,⁴ and he conveyed to the Hearing Officer his views regarding the allegations against him.⁵

PRE-HEARING CONFERENCE

9. The December 8, 1997 Pre-Hearing Conference was held as scheduled. The Respondent was not present.
10. Pursuant to an oral motion,⁶ _____ requested that the Respondent be found in default for failing to appear at the December 8, 1997 Pre-Hearing Conference.

(Transcript of December 8, 1997 Pre-Hearing Conference at 7). The Hearing Officer

³ The Respondent attached a page from the Standing Order issued in this case and specifically highlighted the section indicating that failing to appear at a Pre-Hearing Conference could be grounds for the entry of a default decision.

⁴ Respondent was not charged with misappropriation of customer funds. Respondent was charged with forgery, *i.e.*, signing a customer's name on a refund check and depositing the check into his own account, and failing to respond to staff requests for information.

⁵ Rule 9143 prohibits Parties from communicating with adjudicators relating to the merits of a proceeding unless all Parties are provided notice and an opportunity to participate. Because Respondent's December 8, 1997 letter was not copied to counsel for the Department of Enforcement, that document was an *ex parte* communication. As a result, the Hearing Officer, in accordance with the requirements of Rule 9143(b), has placed that correspondence into the record.

⁶ NASD Procedural Rule 9241(f) provides: "A Party who fails to appear, in person or through counsel or a representative, at a pre-hearing conference of which he or she has been duly notified, may be deemed in default pursuant to Rule 9269."

denied this Motion and instead indicated his intention to issue an Order to Show Cause as to why Respondent should not be held in default. (Id. at 7-8).

11. Respondent _____ sent the Hearing Officer a letter dated December 17, 1997, apparently in response to the December 11, 1997 Show Cause Order. This letter, which was not copied to counsel for the Department of Enforcement, explained Respondent's reasons for not participating in the December 8, 1997 Initial Pre-Hearing Conference and discussed the merits of this proceeding.⁷

12. Respondent _____ indicated in this letter that his "lack of knowledge" as to the NASD disciplinary process constitutes the reason he "... [has] been advised ... not to participate." (Respondent's December 17, 1997 Letter, ¶1).⁸ Moreover, Respondent indicated that he is "... completely unclear as to what the purpose of the proceedings are and what the intent is ... [and] [he] did not take, receive or realize any gains from any funds that belonged to a client ... [and] did not forge anyone's name." Id. at ¶2.

13. Respondent stated in the letter that he provided a "legitimate explanation" as to why he failed to appear at the initial Pre-Hearing Conference and that he has been "totally cooperative" throughout the proceedings. Id. at ¶3. Respondent further indicated that his job would have been placed in "jeopardy" by "taking time off" to participate in this proceeding via a conference call. Id.

⁷ Respondent's December 17, 1997 letter was another ex parte communication because the Respondent did not serve a copy of the letter on counsel for the Department of Enforcement and Respondent discussed issues relating to the merits of this proceeding. As a result, the Hearing Officer, in accordance with the requirements of Rule 9143(b), has placed the letter into the record. A copy of the December 17, 1997 correspondence is attached to this Order as Exhibit 1.

⁸ Hereinafter referred to and cited as the "Letter."

RESPONDENT SHALL FILE A NOTICE IDENTIFYING THREE DATES AND TIMES WHEN HE IS AVAILABLE TO PARTICIPATE IN ANOTHER PRE-HEARING CONFERENCE

Notwithstanding Respondent's failure to appear at the December 8, 1997 Initial Pre-Hearing Conference, the Hearing Officer has determined not to hold Respondent in default at this time, and to schedule another Pre-Hearing Conference. The Hearing Officer chooses not to pursue a default against Respondent at this time for several reasons. First, Respondent is acting pro se. Second, Respondent has denied the allegations contained in the Complaint and has indicated that he does not fully understand the disciplinary process. Despite Respondent's improper ex parte communications, and failure to comply with the Hearing Officer's Orders in this proceeding, the Hearing Officer nevertheless believes that the most appropriate action to take, in the context of these particular circumstances, is to make every reasonable accommodation to give Respondent an additional opportunity to appear at a Pre-Hearing Conference and further contest the charges filed against him in this disciplinary proceeding.

Respondent is ordered to appear at a Pre-Hearing Conference to be scheduled in the near future at a date and time convenient for Respondent. More specifically, Respondent is hereby ordered to file a Notice with the Office of Hearing Officers containing three different dates and times during the period January 16-23 that he is available to participate in a Pre-Hearing Conference. This Notice shall be filed with the Office of Hearing Officers and served on counsel for the Department of Enforcement by no later than January 15, 1998. If the Respondent chooses to retain counsel for this

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-4 (C3A970074).

disciplinary proceeding, he should advise such attorney of the requirements of Rule 9141 of the NASD Code of Procedure concerning notices of appearance.

After receipt of Respondent's Notice, the Hearing Officer will issue an Order specifying the date and time of the Pre-Hearing Conference. Respondent's failure to comply with this Order's requirement that he submit a Notice containing dates and times he is available for a Pre-Hearing Conference will be a basis for the imposition of sanctions pursuant to Code of Procedure Rule 9280.⁹ Finally, all procedures, requirements, and other details set out in the Order Setting Initial Pre-Hearing Conference shall also apply to this upcoming Pre-Hearing Conference.

Respondent also is specifically instructed to cease submitting ex parte communications to the Hearing Officer in violation of Code of Procedure Rule 9143. Any and all documents filed or sent to the Office of Hearing Officers must be served contemporaneously on the Department of Enforcement.

SO ORDERED

Joseph M. Furey
Deputy Chief Hearing Officer

Dated: January 12, 1998
Washington, D.C.

⁹ Respondent will be held in default should he fail to participate in the upcoming Pre-Hearing Conference.