

NEW YORK STOCK EXCHANGE, INC.

EXCHANGE HEARING PANEL DECISION 03-178

September 30, 2003

DAVID ALEXANDER HERTL
REGISTERED REPRESENTATIVE

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Violated Exchange Rule 342(a) by failing to reasonably discharge his duties and obligations as a branch office manager in connection with the supervision and control of a registered representative; and violated Exchange Rule 405(2) by failing to supervise diligently the activity in one or more customer accounts – Consent to censure and one year supervisory suspension.

Appearances:

For the Division of Enforcement
Steven M. Tanner, Esq.

For the Respondent
Andrew J. Federico, Esq.

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An Exchange Hearing Panel met to consider a Stipulation of Facts and Consent to Penalty entered into between the Exchange's Division of Enforcement and David Alexander Hertl, a registered representative, formerly with Quick & Reilly, Inc. (the "Firm"). Without admitting or denying guilt, Mr. Hertl consented to a finding by the Hearing Panel that he:

- I. Violated Exchange Rule 342(a) by failing to reasonably discharge his duties and obligations as a branch office manager in connection with the supervision and control of the activities of a registered representative of his member firm employer subject to his control.
- II. Violated Exchange Rule 405(2) by failing to supervise diligently the activity in one or more customer accounts handled by an RR of his member firm employer subject to his supervision.

For the sole purpose of settling this disciplinary proceeding, the Division of Enforcement and Mr. Hertl stipulate to certain facts, the substance of which follows:

Background and Jurisdiction

1. David Alexander Hertl ("Hertl") was born in [REDACTED]. He entered the securities industry in or around June 1991 as a registered representative ("RR") with Firm A (a non-member firm). In June 1992, Hertl joined the Firm and, in July 1992, he was approved by the Exchange both as an RR and as a branch office manager ("BOM").

Hertl became the BOM of the Firm's Cincinnati, Ohio branch office (the "Branch") in approximately August 1998, and left the Firm in August 2000. Thereafter, from November 2000 to June 2001, Hertl worked as an RR for Firm B (a non-member firm) and, since June 2001, Hertl has been employed as an RR at Firm C (a non-member firm).

2. By letter to Hertl dated September 21, 2000, the Exchange notified him that it was investigating certain matters in connection with his activities as the BOM of the Branch.
3. Thereafter, Hertl, represented by counsel, provided information and appeared and testified in connection with the Exchange's investigation.

Overview

4. From approximately December 1999 through July 2000 (the "Relevant Period"), Hertl failed to reasonably supervise certain activities of an RR who worked under his supervision, and to supervise diligently certain customer accounts handled by an RR who worked in the Branch under his supervision.

Failure to Supervise

5. Exchange Rule 342(a) requires, in part, that:

The person in charge of a group of employees shall reasonably discharge his duties and obligations in connection with the supervision and control of the activities of the employees related to the business of their employer and compliance with securities laws and regulations.

6. Exchange Rule 405(2) requires that:

Every member organization is required through...persons designated under the provisions of Rule 342(b)(1) to...[s]upervise diligently all accounts handled by registered representatives of the organization.

7. During the Relevant Period, Hertl was responsible for the supervision of Todd Allen Simmons ("Simmons"), an RR employed at the Branch, and for the supervision of customer accounts handled by Simmons. (See Hearing Panel Decision 01-191 October 25, 2001).

Failure to Review and Approve Trade Corrections

8. During the Relevant Period, Hertl failed to conduct adequate supervisory reviews and failed to supervise diligently the activity in customer accounts handled by Simmons.

9. Firm procedures that were in effect during the Relevant Period required that, to effect a trade correction involving information such as the security, price, or account number, the BOM must review and initial a trade correction form.
10. During the Relevant Period, Simmons effected hundreds of unauthorized trades in approximately 14 customer accounts, and then caused the trades to be transferred into the accounts of other customers, through the use of "trade corrections," without the approval of Hertl or the customers into whose accounts the trades were transferred. In many instances, Simmons caused a trade to be moved from one customer account to another multiple times.
11. Simmons usually effected the transfer of trades between customer accounts without preparing the trade correction form required by Firm procedures, and without obtaining Hertl's supervisory approval.
12. In connection with this and other violative activity, Simmons was found, on a stipulation, to have violated Exchange Rules.
13. On approximately five occasions, Hertl became aware that Simmons had effected improper trade corrections and failed to follow Firm procedures. On those occasions, Hertl inquired of Simmons who gave explanations such as that he had placed the trade in the wrong account. Hertl accepted Simmons' explanations without any further investigation.
14. Hertl bore the responsibility, as BOM, to conduct the required reviews and exercise reasonable supervision with respect to this customer account activity. Hertl failed to conduct an adequate supervisory review of the documentation provided by the Firm that would have revealed to him Simmons' unauthorized trades and trade corrections, and failed to supervise diligently the activity in the customer accounts at issue.

Failure to Review Trade Confirmations

15. During the Relevant Period, Hertl failed to adequately review customer trade confirmations.
16. During the Relevant Period, trade confirmations for trades generated by Branch RRs were printed overnight in the Branch.
17. In or around December of 1999, Hertl discovered various trade confirmations on Simmons' desk, all for the account of Simmons' customer AB. When Hertl questioned Simmons about the matter, Simmons stated that he had obtained the confirmations from the Branch personnel who prepared the confirmations to be mailed to customers, and that he had done so because he was preparing AB's tax returns.

18. Hertl did not inquire of other employees to ascertain whether Simmons had requested the AB trade confirmations. In fact, Simmons had removed the confirmations from the daily Branch printouts in an attempt to conceal that he had effected numerous unauthorized transactions in AB's accounts at the Firm.
19. Hertl failed to compare the daily trade confirmations to the daily blotter, as required by Firm procedures, and thus did not become aware, in a timely fashion, that numerous confirmations were missing for both the AB Account and for another customer account.
20. When Hertl learned that Simmons had obtained AB's trade confirmations, Hertl failed to exercise reasonable supervision because he did not investigate Simmons' explanation for having removed the trade confirmations, did not take any action to prevent Simmons from continuing to do so, and did not ascertain whether Simmons ultimately mailed the confirmations to the customer.

Failure to Review New Accounts

21. Hertl failed to review the opening of certain new accounts handled by Simmons.
22. Firm procedures in effect during the Relevant Period required that all new accounts be approved by the BOM prior to any transactions being effected.
23. In June 2000, Simmons opened an account in the name of CD. After the Firm terminated Simmons' employment in July 2000, an NAF for the CD Account was found in Simmons' desk. Hertl had not reviewed or approved that NAF or any other NAF for the CD Account.
24. The NAF for the CD Account contained the name of a co-applicant, EF. Simmons also opened a separate account in EF's name, and Hertl had not reviewed or approved an NAF for that account.
25. Although Hertl had not reviewed or approved an NAF for the CD Account, numerous transactions occurred in that account. For example, the account statement for July 2000, which was available to Hertl, disclosed approximately 250 transactions, all of which were either trade cancellations or were "as of" trades, indicating that the trades were originally executed in another account and later transferred to the CD Account through trade corrections.
26. Hertl, as BOM, failed to provide reasonable supervision of activity in the CD and EF Accounts.

Transfers of Customer Funds

27. Hertl failed to adequately supervise the transfer of customer funds out of a customer account.

28. Firm procedures in effect during the Relevant Period required the BOM to review all letters of authorization (“LOAs”) and activity blotters, and to initial them as proof of his review. Among the blotters to be reviewed was the funds paid blotter.
29. On approximately five occasions between March and July 2000, several handwritten LOAs, signed by Simmons’ customer GH were submitted to the Firm requesting that funds be wired from GHs’ account at the Firm to a bank account in Simmons’ name. Each of the LOAs specifically stated that the recipient of the funds was Simmons. The Firm wired the funds, as requested, to Simmons’ bank account.
30. The Firm’s blotters that reported these wire transfers show that the funds were sent to a bank account in Simmons’ name.
31. Hertl failed to exercise reasonable supervision with respect to these wire transfers from a customer account and thereby failed to supervise diligently the activity in that account. Hertl failed to conduct an adequate supervisory review of the pertinent blotters, which would have disclosed to him that funds were wired from the account of a customer to Simmons, and that he had not reviewed and initialed LOAs for the transfers or approved them.
32. If Hertl had adequately reviewed the blotters, he would have been alerted that a customer apparently was attempting to wire funds to an outside account of an RR, and reasonable supervision would have required Hertl to make further inquiry to assure that the customer requested such transfer of funds.

DECISION

The Hearing Panel, in accepting the Stipulation of Facts and Consent to Penalty, found Mr. Hertl guilty as set forth above by unanimous vote.

PENALTY

In view of the above findings, the Hearing Panel, by unanimous vote, imposed the penalty consented to by Mr. Hertl of a one year suspension from employment or association in any supervisory capacity with any member or member organization.

For the Hearing Panel

Vincent F. Murphy
Hearing Officer