

NEW YORK STOCK EXCHANGE, INC.

EXCHANGE HEARING PANEL DECISION 04-127

August 11, 2004

DAVID A. FINNERTY
FORMER EXCHANGE MEMBER

* * *

Violated Exchange Rule 477 in that Finnerty failed to testify – Censure and bar until he complies to become permanent if he does not comply within 60 days.

Appearances:

For the Division of Enforcement
Susan F. Axelrod, Esq.
Craig P. Hammond, Esq.

For the Respondent
Lee D. Unterman, Esq.
Patricia L. Moore, Esq.

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An Exchange Hearing Panel conducted a hearing on a charge brought by the Exchange's Division of Enforcement against David A. Finnerty, a former Exchange member and specialist with Fleet Specialists, Inc. (the "Firm"). Mr. Finnerty was charged with having violated Exchange Rule 477 in that he failed to cooperate in an Exchange investigation by failing to appear and testify.

Mr. Finnerty submitted an Answer to the Charge Memorandum in which he denied certain of the facts alleged and admitted others. He denied the charge.

Prior to the hearing, the Division of Enforcement moved to deem the essential facts admitted and enter Summary Judgment on the violation charged. Alternatively, they asked to strike the affirmative defenses. After considering the supporting and opposing papers on the Motion, the Charge Memorandum and Answer, I denied the Motion for Summary Judgment. However, pursuant to my authority to determine the facts put into issue by the Charge Memorandum and Answer, I determined that only a small portion of the alleged facts were still in issue. I deemed admitted the balance of the facts.

I determined to strike the affirmative defenses subject to two narrow exceptions. The first affirmative defense contained a statement that I did not strike. The statement was: "Respondent has repeatedly advised Enforcement of his desire to cooperate with the Exchange." In my Order, I offered to make available the first day of the hearing, if both parties agreed, for Mr. Finnerty to testify. He did not testify at that time.

In the third affirmative defense Respondent notes that he has offered to discuss the resolution of any charges or claims that Enforcement has so that there is no need for further testimony. They

assert that Enforcement failed and refused to discuss a resolution of any claims. Thus, Enforcement's insistence on testimony is an abuse of process by the Exchange. Respondent failed to sustain this affirmative defense at the hearing.

After a hearing, an Exchange Hearing Panel found:

Background and Jurisdiction

1. David A. Finnerty ("Finnerty") was born on July 7, 1966. He entered the securities industry in or around 1986 when he became employed with Firm A as a clerk on the Floor of the American Stock Exchange ("AMEX"). Thereafter, sometime in 1986, Finnerty became employed with Firm B, a specialist firm, on the Floor of the AMEX, initially as a clerk, and then, in 1989, as a specialist member. Finnerty remained with Firm B until approximately November 1996, when he became a New York Stock Exchange, Inc. ("Exchange") member and a specialist with Firm C, a predecessor entity of the Firm. Finnerty was employed as a specialist with the Firm and its predecessor entities until his termination on or around December 31, 2003.
2. During Market Surveillance's investigation, Finnerty testified on May 2, 2003, concerning his activities as a specialist while employed at the Firm.
3. By letter dated July 17, 2003 (the "July 17th Letter"), which Finnerty received, the Exchange notified him that Enforcement was formally investigating allegations that while he was employed at the Firm he may have violated Exchange rules in connection with his trading in the stock of XYZ ("XYZ").

Finnerty's Failure to Cooperate

4. The July 17th Letter included a request that Finnerty appear and give testimony on-the-record under oath ("OTR") before the Exchange on July 29, 2003. The July 17th Letter also advised Finnerty that should he fail to appear for the OTR or should he at any time during the course of the investigation fail to fully cooperate, he may become subject to a disciplinary action based on his failure to cooperate pursuant to Exchange Rules 476(a)(11) and 477, copies of which were enclosed with the July 17th Letter.
5. Finnerty appeared and testified before the Exchange as requested on the adjourned date of August 8, 2003.
6. Thereafter, by letter dated January 7, 2004 (the "January 7th Letter"), Enforcement requested that Finnerty appear and give additional on-the-record testimony.
7. The January 7th Letter provided supplemental notice that Enforcement was also formally investigating allegations that during his employment with the Firm, Finnerty may have violated federal securities laws in connection with his trading of XYZ, and that he may have violated federal securities laws and Exchange Rules in connection with his trading in the stock of ABC and DEF (n/k/a GHI).

8. The January 7th Letter also advised that pursuant to Exchange Rules 476(a)(11) and 477, Finnerty's failure to appear and testify before the Exchange within the time period that the Exchange requires may result in the institution of disciplinary charges against him based on his failure to cooperate.
9. Pursuant to negotiations between the parties, it was agreed that Finnerty would appear and provide additional on-the-record testimony before the Exchange on March 2, 2004 ("March 2nd").
10. Prior to March 2nd, based on conversations with counsel for Finnerty, Enforcement determined to adjourn Finnerty's OTR while it investigated certain recent information brought to its attention during an attorneys only proffer meeting on February 26, 2004.
11. By letter dated March 1, 2004 (the "March 1st Letter"), Enforcement adjourned Finnerty's OTR for a period of two weeks until March 16, 2004. Thereafter, by way of letters dated March 15, 2004 (the "March 15th Letter"), April 5, 2004 (the "April 5th Letter"), and April 26, 2004 (the "April 26th Letter"), Enforcement separately adjourned Finnerty's OTR for varying amounts of time to April 6, April 27 and May 11, respectively. The March 1st, March 15th, April 5th, and April 26th Letters each advised that pursuant to Exchange Rule 477, Finnerty was required to cooperate in the investigation in the same manner that he was required to cooperate prior to the termination of his employment with the Firm and that his cooperation included complying with any requests by the Exchange to appear, testify, submit books, records, papers or tangible objects, respond to written requests, and attend hearings. Each of these letters further advised that Finnerty's failure to appear and testify before the Exchange on the date specified might result in the institution of disciplinary action against him based on his failure to cooperate.
12. By way of letter dated May 5, 2004 (the "May 5th Letter"), Enforcement confirmed that it was proceeding to take the on-the-record testimony of Finnerty on May 11th beginning at 10:00 a.m., at Enforcement's offices located at 14 Wall Street, 14th Floor, New York, NY 10005. The May 5th Letter indicated that Enforcement had previously noticed Mr. Finnerty's OTR for May 11th by way of the April 26th Letter. The May 5th Letter also advised that pursuant to Exchange Rule 476, Finnerty was required to cooperate in the investigation in the same manner that he was required to cooperate prior to the termination of his employment with the Firm, and that this cooperation included complying with any requests by the Exchange to appear, testify, submit books, records, papers or tangible objects, respond to written requests, and attend hearings. The May 5th Letter further advised that Finnerty's failure to appear and testify before the Exchange on May 11th, may result in the institution of disciplinary action against him based on his failure to cooperate.
13. By a faxed letter on May 10 Respondent's counsel advised Enforcement "This is to confirm that we will not be appearing with Mr. Finnerty on May 11th." The letter

continues, “Mr. Finnerty remains interested in cooperating with your investigation, however, under the circumstances, we believe a further adjournment is in everyone’s best interest.”

14. On May 11th, Finnerty failed to appear and give testimony as required. Enforcement made a stenographic record of Finnerty’s failure to appear and testify. To date, Finnerty has not complied with the Exchange’s requests that he appear and give additional testimony concerning allegations that he may have violated federal securities laws and Exchange Rules in connection with his trading of XYZ, ABC and DEF, in the Firm’s dealer account.
15. Finnerty was given notice on April 26 and May 5 of his May 11, 2004 on-the-record testimony. On May 10th, his attorneys wrote Enforcement what they characterize as an adjournment request. However, their “Request” contains the language “ ... we will not be appearing with Mr. Finnerty. ...” Clearly, this is not a request but a refusal to appear. Their later mention that “ ... a further adjournment is in everyone’s best interest.” does not change the character of the communication.
16. At the proffer meeting on February 26, 2004, Enforcement learned that Finnerty had important, critical and relevant information about his former member organization and a number of individuals. It was not unreasonable for the Division of Enforcement to adjourn Finnerty’s testimony for a total of about two months while they evaluated the information he had.

DECISION

The Hearing Panel, by unanimous vote, found Mr. Finnerty guilty as charged. Finnerty had adequate notice of his testimony. He had testified twice before and had been advised that Enforcement reserved the right to call him back should it become necessary. In a regulatory investigation it is the regulator and not the Respondent that controls the scope and scheduling of the investigation.

PENALTY

In view of the above findings, the Hearing Panel, by unanimous vote, determined that Mr. Finnerty be censured, barred from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization until he complies with the Exchange’s requests with which he as failed to comply. Further, if he does not comply within 60 days of the decision becoming final, the bar shall become permanent.

In seeking a greater penalty, the Division of Enforcement cited cases involving three former Exchange members who were permanently barred. However, all of the individuals completely failed to cooperate with the Exchange and defaulted without an Answer when charges were issued. Finnerty testified for both Market Surveillance and Enforcement. His attorneys met with Enforcement in a proffer meeting to detail previously undisclosed relevant information that he possessed. When a Charge Memorandum was issued, he did not default, but his attorneys

submitted an Answer and other papers and appeared for him at the hearing. These important differences make the precedent cases cited by the Division of Enforcement less relevant for this case. Thus, the penalty imposed here is appropriate and not excessive or oppressive, in view of all the facts and circumstances before the Hearing Panel.

For the Hearing Panel

Vincent F. Murphy
Hearing Officer