

NEW YORK STOCK EXCHANGE, INC.

In the Matter of)	Appeal from
)	Exchange Hearing Panel
Michael P. Riley)	Decision 97-5

In accordance with Exchange Rule 476(f), after a consideration of the record in this matter, written submissions filed by the parties and oral argument, the Board affirms the decision of the Hearing Panel in all respects.

March 5, 1998

By the Board of Directors
New York Stock Exchange, Inc.

NEW YORK STOCK EXCHANGE, INC.

EXCHANGE HEARING PANEL DECISION 97-5

January 30, 1997

MICHAEL P. RILEY

FORMER REGISTERED REPRESENTATIVE

* * *

Misappropriated funds from a customer -- Censure and permanent bar.*

Appearances:

For the Division of Enforcement
Margaret S. Fox, Esq.
Geoffrey W. Cloud, Esq.

For the Respondent
Douglas S. Brenner, Esq.

* * *

An Exchange Hearing Panel conducted a hearing on charges brought by the Exchange's Division of Enforcement against Michael P. Riley, a former registered representative with Everen Securities, Inc. (the "Firm"). Mr. Riley was charged with having:

1. Engaged in conduct inconsistent with just and equitable principles of trade in that he misappropriated funds from a customer of his member organization employer.
2. Violated Exchange Rule 477 in that he failed to comply with a request by the Exchange to testify with respect to activities that occurred while he was employed as a registered representative of a member organization.

Mr. Riley, through his counsel, submitted an Answer to the Charge Memorandum. He admitted some of the facts contained in the Charge Memorandum and denied other facts. He denied the charges. After the hearing at which Mr. Riley and others testified and at which the Hearing Panel received evidence, the Hearing Panel found as follows:

1. Riley was born on [REDACTED] and entered the securities industry in 1990. He was employed by the Firm from June 1994 to August 1995. He has not been employed in the securities industry since August 1996.

2. On September 12, 1995, the Exchange received an amended Uniform Termination Notice for Securities Industry Registration (Form U-5) from the Firm dated September 8, 1995. The amended Form U-5 reported a customer complaint by Dr. AB.
3. By letters dated September 17 and November 20, 1995 and February 15, 1996, which he received, the Exchange notified Riley of its investigation.

* See decision by the Board of Directors dated March 5, 1998.

Misappropriation

4. In or about January 1995, Riley solicited Dr. AB to open an account at the Firm. Dr. AB opened an account on or about February 10, 1995.
5. When he opened the account, Dr. AB was 87 years old. He was a retired oral surgeon, who resided in his own home with his wife. Dr. AB was virtually bedridden and legally blind. Mrs. B suffered from Alzheimer's.
6. Although he had not previously opened an account at the Firm, Dr. AB had previously purchased shares of various mutual funds. He held the certificates in a safe deposit box. After AB opened his account, the certificates were deposited into his account.
7. On or about May 29, 1995 Riley came to Dr. AB's house with a notary to prepare documents to replace a missing certificate for XYZ.
8. As part of the reissuance process and at Riley's instruction, on or about May 29, 1995 Dr. AB issued a check to a bonding company in the amount of \$2830. Dr. AB then gave the check to Riley.
9. The second check for \$2830, dated June 28, 1995, was made payable to Riley. After leaving Dr. AB's home that day, Riley negotiated the check and kept the proceeds.
10. The second check for \$2830, dated June 28, 1995, was made payable to Riley. After leaving Dr. AB's home that day, Riley negotiated the check and kept the proceeds.
11. The June 28, 1995 check was neither needed for the reissuance of the missing stock certificate nor required for any purpose related to Dr. AB's account.
12. Riley never returned the money to Dr. AB, nor did he use it for any purpose related to Dr. AB's account.
13. After an internal investigation, the Firm credited Dr. AB's account in the amount of \$2830.

Alleged Failure to Cooperate

14. On August 14, 1996 in a telephone conversation with Riley's attorney, the Division of Enforcement requested that Riley appear and testify on August 21, 1996.
15. By letter dated August 15, 1996, sent by facsimile to Riley's attorney and by U.S. Mail to Riley, the Division of Enforcement confirmed that it had scheduled Riley's testimony on August 21, 1996 at 10:00 a.m. in California. This letter advised Riley that his failure to appear:

“ ... may result in the institution of formal disciplinary proceedings against him based on his failure to comply with the Exchange's request for testimony.”
16. Riley's attorney stated that he had spoken with Riley and confirmed the scheduled date of August 21, 1996, and that Riley had confirmed his availability.
17. Exchange staff and Riley's attorney appeared for Riley's testimony at 10:00 a.m. on August 21, 1996, but Riley did not appear.
18. By letter dated September 4, 1996, Riley's attorney informed the Exchange that Riley did not appear on August 21st because he had suffered a relapse of an alcohol problem. The letter expressed Riley's continuing willingness to cooperate.
19. On or about September 6, 1996, Exchange staff advised Riley's attorney that Riley's testimony could be scheduled in New York on or before September 13, 1996.
20. By letter dated September 9, 1996, sent by facsimile to Riley's attorney, the Division of Enforcement advised that it:

“ ... is prepared to extend to Mr. Riley the opportunity to give testimony at the offices of the Division of Enforcement ... on or before Friday, September 13, 1996.”
21. On or about September 13th, Riley's attorney contacted Exchange staff and advised that Riley would not testify within the period requested by the Exchange. Riley's attorney said that Riley remained willing to cooperate.
22. By letter dated September 13, 1996, sent via facsimile and U.S. Mail to Riley's attorney and via U.S. Mail to Riley, the Exchange extended to Riley the opportunity to testify at the offices of the Division of Enforcement at any time on September 18th, 19th or 20th. The September 13, 1996 letter stated that:

“ ... Riley’s failure to supply testimony on the scheduled dates may result in the institution of formal disciplinary proceedings against him based upon his failure to comply with the Exchange’s request for testimony.”

23. In the course of discussions with the Division of Enforcement concerning Riley’s testimony in New York, Riley’s attorney asked the Division for sufficient notice to enable Riley to obtain discounted, advance purchase airline tickets.
24. Neither Riley nor the Division of Enforcement attempted to schedule any testimony after September 20, 1996.

DISCUSSION AND DECISION

On June 28, 1995, Michael Riley admittedly obtained a check from the Bs made payable to him and immediately cashed it. Riley contends that, when he arrived at Dr. B’s house on June 28, 1995, the Bs had already drafted a \$2830 check payable to Michael Riley. Riley further contends that the B’s mistakenly thought that the check was needed for the reissuance of the XYZ certificate. When he advised them of this error, Riley maintains the Bs pressed him to accept the check as a gift or reward for his work concerning XYZ. After refusing the check as a gift or reward, Riley asserts he then agreed to accept the check as a loan.

Riley’s version of events is contradicted by the evidence. Dr. B, in testimony which the Panel found more credible than Mr. Riley’s, denied making a loan or gift to Riley. Dr. B stated that Riley asked that the second \$2830 check be made payable to Riley in connection with the XYZ matter.

The circumstantial evidence also supports Dr. B’s version. The amount of the second check indicates it was written in connection with the XYZ matter rather than as a loan or a reward. No note, agreement or schedule of repayment exists which supports Riley’s contention that the check represented a loan. Accordingly, the Hearing Panel, by unanimous vote, found Mr. Riley guilty of Charge I.

Charge II presented the Hearing Panel with a closer question. Hearing Panels have previously noted that “ ... effective self regulation depends upon the Exchange’s ability to conduct thorough and complete investigations ...” (John D. Goldsmith EHPD 96-60) and have imposed severe penalties for failure to comply with Exchange requests to testify (Victor Bruce Mirra EHPD 96-128). The subject of an investigation must, however, be given a reasonable opportunity to comply with the Exchange’s requests.

Here, the Division of Enforcement magnanimously excused Riley’s August non-appearance when it learned Riley was suffering from the illness of alcoholism. In contrast, the Hearing Panel finds the Division was not sufficiently accommodating when scheduling the September dates. Riley’s attorney asked for sufficient notice so as to enable Riley to buy advance purchase, reduced fare airline tickets for his trip from California to New York. The Division refused this request and

scheduled Riley's testimony on what, in the circumstances, was unreasonably short notice. Accordingly, the Hearing Panel, by unanimous vote, found Mr. Riley not guilty of Charge II.

PENALTY

In view of the above findings, the Hearing Panel, by unanimous vote, determined that Mr. Riley be censured and permanently barred from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization.

For the Hearing Panel

Edward W. Morris, Jr.
Chief Hearing Officer