

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 60361 / July 22, 2009

Admin. Proc. File No. 3-13344

In the Matter of the Application of

GREGORY W. GRAY, Jr.

c/o Marni Weiss
Weiss Imbesi PLLC
462 Seventh Avenue, 12th Floor
New York, NY 10018

For Review of Disciplinary Action Taken by

NYSE Regulation, Inc.

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDING

Conduct Inconsistent with Just and Equitable Principles of Trade

Conduct Detrimental to the Interest or Welfare of the Exchange

Registered representative entered unauthorized trades in customer accounts and harassed and/or threatened customers and/or their family members after they made complaints against representative. *Held*, association's findings of violation and sanctions imposed are *sustained*.

APPEARANCES:

Marni Weiss and Vincent Imbesi, of Weiss Imbesi PLLC, for Gregory W. Gray, Jr.

Susan Light, Penny Rosenberg, Andrew D. Kampel, and Jennifer Mennella, for FINRA, on behalf of NYSE Regulation, Inc.

Appeal filed: January 16, 2009

Last brief received: April 29, 2009

I.

Gregory W. Gray, Jr., a former registered representative with Quick & Reilly, Inc. and H&R Block Financial Advisors, both members of the New York Stock Exchange LLC ("Exchange"), appeals from disciplinary action taken by NYSE Regulation, Inc. ("NYSE").¹ On December 17, 2008, NYSE found that Gray engaged in conduct inconsistent with just and equitable principles of trade in violation of Exchange Rule 476(a)(6) by effecting unauthorized trades in two of his customers' accounts. NYSE also found that Gray engaged in acts detrimental to the interest or welfare of the Exchange in violation of Exchange Rule 476(a)(7) by threatening and/or harassing complaining customers and/or their family members. NYSE censured Gray and barred him from acting in any capacity with a member firm for three years.² We base our findings on an independent review of the record.

¹ On July 26, 2007, the Commission approved proposed rule changes in connection with the consolidation of certain member firm regulatory functions of NASD and NYSE Regulation, Inc. (the NYSE subsidiary responsible for enforcing NYSE regulatory compliance). *See Securities Exchange Act Rel. No. 56146* (July 26, 2007), 91 SEC Docket 517. Pursuant to this consolidation, certain of the member firm regulatory and enforcement functions and employees of NYSE Regulation were transferred to NASD, and the expanded NASD changed its name to the Financial Industry Regulatory Authority, or "FINRA." *See Exchange Act Rel. No. 56148* (July 26, 2007), 91 SEC Docket 522. This proceeding was initiated by NYSE Regulation before July 26, 2007 and was therefore also adjudicated by NYSE Regulation in accordance with its rules and procedures. Although FINRA has now briefed this appeal to us on behalf of NYSE Regulation, we use the designation NYSE to refer to both entities in this opinion.

² Gray sought a stay of that sanction, which was denied. *See Gregory W. Gray, Jr., Order Denying Stay*, Admin. Proc. File No. 3-13344 (Feb. 19, 2009).

II.

A. Unauthorized trade in Konieczko's account

Upon joining Quick & Reilly in March 2002,³ Gray inherited responsibility for a number of accounts of existing Quick & Reilly customers, including Michele Konieczko. Konieczko was the custodian of two accounts opened by her father for the benefit of her sons. The accounts, which were valued then at approximately \$100,000 and \$150,000, were invested mostly in money market funds and were used primarily for paying for Konieczko's sons' education. Konieczko testified that her father "took care of" the accounts until he became ill in 1997. Thereafter, Konieczko simply checked her monthly account statement "to make sure that it balance[d]" but "didn't buy or sell anything." Until Gray became her broker, she contacted Quick & Reilly only about once a year to request a withdrawal of funds to pay her sons' tuition bills.

Some time in the summer of 2003, Gray called Konieczko and suggested that she "should be doing something with" and "investing" the significant cash positions that they held. Gray solicited her interest in buying shares of Evergreen Income Opportunity Fund ("Evergreen"), a new-issue, closed-end mutual fund.⁴ Konieczko did not agree to make any purchase and testified that she knew at the time she "wasn't going to invest in it." She told Gray to send her written information because she thought he was a "young, ambitious man" and she "[didn't] want to hang up on him." When Gray called to follow up two weeks later, Konieczko said she was not interested in buying the shares and explained that, in any event, she would not make any such purchase without first discussing it with her parents. When Gray offered to call her parents to discuss the purchase, Konieczko became "a little annoyed with [Gray] being so aggressive about this." Anticipating that her parents would reject his solicitation, she gave Gray her parents' phone number and told them to expect his call. When Gray called her parents, Konieczko testified, they told him they were not interested in the offer and "hung up."

Konieczko heard nothing from Gray until the end of June or early July 2003, when she received a message on her telephone answering machine informing her that "there was a trade made in error on my son's account" and that she would receive a confirmation of the trade and subsequent cancellation in the mail. Within a week, Konieczko received the trade confirmation and noticed that the "error" was a purchase of \$100,000 (*i.e.*, two-thirds of the value of her son's account) of Evergreen shares. Konieczko testified that she was "very upset" and "shook up" that

³ Gray entered the securities industry in May 1997. He was employed by four different securities firms before becoming associated with Quick & Reilly.

⁴ Gray testified during the investigation by NYSE's Division of Enforcement ("NYSE Enforcement") that, at Quick & Reilly, financial advisors like himself were paid different levels of commission on different kinds of securities transactions: they earned nothing for equity trades, about 2.5% of the transaction value for bond trades, and 3% for closed-end mutual fund trades.

"there could be an error with that kind of money." Konieczko immediately called Quick & Reilly. She was unable to reach Gray but spoke to a representative who assured her the trade would be cancelled. Konieczko received written confirmation of the cancellation in July 2003.

At about this time, Quick & Reilly's automated account monitoring system flagged Konieczko's account because of the unusual activity and generated a report that was forwarded to Gray's supervisor, Peter Lynch.⁵ Lynch was unsuccessful at reaching Konieczko by phone to discuss the activity in her account,⁶ so he wrote to her on November 18, 2003 explaining that, until she contacted him, her account would be restricted from any further trading. Konieczko immediately called Lynch and explained to him the "error" that had been made and that she "was very shocked that an error like that could occur with that kind of money." Lynch assured Konieczko that someone else would be handling her account and confirmed in writing that the Evergreen trade "has been cancelled and removed from your account."⁷ Konieczko ultimately suffered no economic loss from the transaction.

On November 24, 2003, Lynch sent Gray an e-mail asking about the transaction, but Gray did not respond. Gray left the firm three days later. Gray testified that he would have earned close to \$1,000 in commission for the purchase but, because the trade was cancelled, received nothing.

In contrast to Konieczko's testimony, before NYSE Gray claimed that Konieczko authorized the trade but then reversed her decision after her father expressed disapproval. He also denied leaving a message on her answering machine characterizing the trade as an error.

⁵ Lynch passed away during the course of NYSE's investigation. He did not testify regarding the allegations against Gray.

⁶ The record suggests that the reason for Lynch's difficulty is that the phone number that Gray provided him was incorrect.

⁷ According to Gray's investigative testimony, it was his own choice to stop servicing Konieczko's account. When asked if he contacted Konieczko with any other investment ideas after the Evergreen solicitation, he responded:

[If] someone is not going to buy into my philosophy for investing, do[es]n't see the benefit of what I can bring to the table, then it is a waste of my time to continue that relationship. . . . It was not in my best interest to continue a relationship with her going forward.

Gray testified during the investigation that he did not inform Lynch that he had decided to stop servicing Konieczko's account because Gray "just didn't think she was fit for a full service broker."

B. Unauthorized trade in Ricotta's account

In September 2003, Gray wanted to acquire \$150,000 of shares in an initial public offering of Eaton Vance Tax Advantaged Fund ("EVT"), a closed-end mutual fund, for Dorothy Abhau. Gray testified that Abhau was a "referral from my top client, and I wanted to do everything I could for her to get that trade for her." However, Abhau's account was restricted because it had recently been transferred from another firm, and Gray had to secure Lynch's permission before purchasing the shares. In a brief conversation, Gray asked Lynch to approve the purchase but, according to Gray, Lynch was in a hurry to leave and said, "I don't have time to approve it now, no." Because the offering closed that same day, Gray decided to secure the shares in Lynch's absence by purchasing them instead with funds from another client, Deirdre Ricotta, who was chosen at random because she had at least \$150,000 in cash in her Quick & Reilly account. Gray admitted that his intent was to secure Lynch's approval to purchase EVT shares for Abhau's restricted account and then transfer the shares he had "parked" in Ricotta's account to Abhau's.⁸ However, when Lynch returned to the office, he again refused to approve the trade, citing suitability concerns.⁹

Gray did not inform Lynch that he had already purchased EVT shares for Ricotta hoping that Lynch would approve their purchase for Abhau's account. Instead, Gray contacted Ricotta and told her that an "error" had been made in her account by his assistant and gave her the option of correcting the error by selling the shares for a small profit, as the value of her shares had increased by about \$400 since the purchase date. Ricotta declined and, in an e-mail to Gray dated October 11, 2003, requested that the "unauthorized transaction" be cancelled.

Lynch discovered this correspondence via the firm's e-mail monitoring system and contacted Ricotta, who filed a complaint with Lynch. Quick & Reilly cancelled the trade and sent her written confirmation. When Lynch asked Gray to explain the circumstances surrounding the trade, Gray wrote in an e-mail that "[i]f I could change my decision I would, but I was irate that I couldn't place this trade and I did what I thought was right at the time to get my client the shares."

On November 10, 2003, Lynch issued a written letter of warning to Gray, noting, among other things, that Gray had "violat[ed] firm and industry policy regarding unauthorized trading," engaged in "clear insubordination," and was subject to disciplinary action (including termination) if Gray committed further violations or received more customer complaints. About two weeks later, Lynch learned of the activity in Konieczko's account, described above, and requested an explanation from Gray (which, as noted above, Gray did not provide before departing Quick &

⁸ Gray testified that Lynch had approved other trades for Abhau's account in previous months and that he therefore assumed Lynch would approve this one.

⁹ Gray could not recall Lynch's reasons for refusing to approve the trade, but stated in investigative testimony that he believed Lynch "made it personal for other reasons."

Reilly).¹⁰ Gray testified during NYSE Enforcement's investigation that the EVT trade intended for Abhau's account was "\$4500 to me," but he ultimately received no commission because the transaction was cancelled.

C. Gray's harassment of complaining customers

After leaving Quick & Reilly, Gray spent two months at BancOne Securities, Inc., and then joined H&R Block in February 2004. In August 2004, NYSE Enforcement notified Gray that it was investigating unauthorized trades in several customers' accounts while he had been employed at Quick & Reilly. In December 2005, H&R Block suspended Gray and then, in January 2006, terminated him. According to the Form U5 filed by H&R Block, the firm terminated Gray because he "[d]id not submit accurate information regarding clients' ages on insurance applications."¹¹

In February 2006, NYSE Enforcement notified Gray that it had opened another investigation, concurrent with its investigation into Gray's alleged unauthorized trading at Quick & Reilly, into the reasons for his termination from H&R Block. In a letter dated July 5, 2006, NYSE Enforcement notified Gray that the investigation would include complaints filed with H&R Block by six of his former customers, including Harold Sharp and Lucille Wierzbicki.

1. Harassment of Harold Sharp

According to Gray's investigative testimony, Sharp had complained to H&R Block in October 2005 that Gray never returned his calls. Gray testified that he was unaware that he had been assigned by H&R Block to service Sharp's account, which contained holdings worth about \$12,000. Gray testified during the investigation that he had never received Sharp's messages and learned about his calls only when H&R Block's investor center received Sharp's complaint and informed Gray about it. Gray then "called this clown back and asked him, I never spoke to him, I don't know who you are, how are you complaining about me?" Gray explained to NYSE investigators that "[t]he only client I strictly paid attention to was the [\$]20 million in assets that I brought over [to H&R Block] from . . . Quick & Reilly." Gray also testified during the investigation that he "told Mr. Sharp that if this [complaint] causes me any trouble he would hear back from me."

¹⁰ Quick & Reilly disclosed on Form U5 (Uniform Termination Notice) that it filed upon Gray's termination that the firm was conducting a review of Gray's activities because, "through routine active account calls[,] it was discovered that Gray entered unauthorized trades in two customers' accounts." The Form U5 nevertheless describes Gray's termination as a voluntary resignation.

¹¹ Gray asserts he resigned from H&R Block.

Within a day or two of receiving notice from NYSE Enforcement that Sharp's complaint was a basis for its new investigation in 2006, Gray again called Sharp. According to Gray,¹² he wanted to give Sharp "the opportunity to go ahead and have his complaint dismissed" by offering Sharp a letter to sign that retracted his complaint.

Sharp then called H&R Block, which forwarded the call to Gray's former supervisor, Michael Townsend. Townsend testified that Sharp was "upset that Mr. Gray was phoning him at his home and that he was phoning him repeatedly. He felt threatened. He's an older gentleman. He just wanted his money out of our firm and he didn't want Mr. Gray to bother him anymore." Townsend also testified that Sharp told him that Gray blamed him for having been "fired" by H&R Block, that Gray was "going to come from New York to [Sharp's] home [in Illinois] and have that letter signed." Townsend recalled that Sharp "felt physically threatened. He was very, very nervous that Mr. Gray was going to come to his house and physically harm him." Townsend advised Sharp that, "if he felt physically threatened, that was . . . something he needed to address with local law enforcement."

Sharp filed a report with his local police department that same day, July 7, 2006, a copy of which is in the record and corroborates Townsend's testimony.¹³ The report reflects that Sharp told the police that Gray said he was "going to f—ing kill" Sharp, and that he "does not want to upset Mr. Gray more than he already is, but does not want Mr. Gray to call him." The officer contacted Gray and advised him to stop calling Sharp and not to visit Sharp's home. The report reflects that, a week later, the officer followed up with Sharp and was advised that, following the intervention by police, Sharp had had "no additional problems with Mr. Gray."

Gray denies threatening Sharp but admitted having called him "two to three times." Gray admitted during the hearing that he was "upset" and "extremely pissed off" at Sharp. In his petition for review, Gray admits that he "lost his temper" and "cursed at" Sharp when Sharp refused to sign the retraction letter.

2. Harassment of Lucille and Michael Wierzbicki

Gray was assigned the account of Lucille Wierzbicki ("Mrs. Wierzbicki"), an elderly woman in ill health, when he joined H&R Block in 2004. In January 2005, Mrs. Wierzbicki filed a complaint with H&R Block regarding an unauthorized trade in her account. H&R Block investigated the matter at the time and took no action against Gray. However, when H&R Block

¹² Sharp did not testify.

¹³ Gray asserts in his application for review that Townsend "lied under oath."

suspended Gray at the end of 2005 (and ultimately terminated him in January 2006), Gray believed Mrs. Wierzbicki's complaint was the reason.¹⁴

Mrs. Wierzbicki's son, Michael ("Mr. Wierzbicki"), is a school superintendent. He testified that his mother was "very agitated and upset" because Gray had called her in late 2005 and threatened to sue her for \$100,000 because she caused him to lose a commission and his job.¹⁵ Mr. Wierzbicki called Gray on his mother's behalf. During the phone call, Gray claimed that H&R Block was using Mrs. Wierzbicki's complaint "to deny him a commission and also for grounds for termination." Mr. Wierzbicki told Gray to have no further contact with his mother, and that, if Gray was going to sue his mother, their respective attorneys would handle the matter.

In July 2006, after learning of NYSE Enforcement's investigation, Gray called Mr. Wierzbicki and asked if Mrs. Wierzbicki would sign a letter Gray drafted retracting her complaint. Mr. Wierzbicki told Gray he "would consider it."

In October 2006, Mrs. Wierzbicki filed a police report after receiving a series of phone calls she did not answer but attributed to Gray. The calls originated from outside Mrs. Wierzbicki's local area and she was "adamant" that they were from Gray. Mr. Wierzbicki testified that he told his mother, "Enough already, we're going to file a police report. I'm tired of this nonsense." Mr. Wierzbicki testified that he was present when the report was filed and told police that he "can't attest that it's this person who made the last group of calls," but explained to them the contact he and his mother had had with Gray.¹⁶

Gray called Mr. Wierzbicki in January 2007 to see if Mrs. Wierzbicki would sign the letter retracting her complaint. According to Mr. Wierzbicki, the conversation became heated:

When I said to [Gray] that I had decided not to have my mother sign this and we're not going to do anything with this, he became extremely agitated and began to yell at me and told me, "You realize I have all of your information including your social security number." . . . I said, "Excuse me, if you're threatening me, you're making a big mistake." . . . We went up and back about it, and then . . . he said, "Well, you know, how would you like it if somebody called your school board and told a lie about something you did?"

¹⁴ Gray appears to have been mistaken. Townsend, Gray's former supervisor at H&R Block, testified that customer complaints were not the basis for taking disciplinary action against him.

¹⁵ Mrs. Wierzbicki did not testify.

¹⁶ The only copy of the police report in the record contains little information. It describes Mrs. Wierzbicki as the victim of telephone harassment by Gray but does not indicate who filed the report.

Mr. Wierzbicki testified that he "felt threatened" by Gray's remarks and believed that Gray "was going to create more problems" if his mother did not sign the letter. Mr. Wierzbicki hung up on Gray. Gray called one more time after this, and Mr. Wierzbicki told him, "I don't want to deal with you anymore. Don't call me." Mr. Wierzbicki testified that, as of the time of the hearing, he had not spoken to Gray in several months.¹⁷

Gray testified that he was "angry" at H&R Block and "frustrated" with Mrs. Wierzbicki when he called her in 2005, but that he did not threaten to sue her in "those exact words." He nevertheless admitted that he told Mrs. Wierzbicki it was her fault that he had been suspended by H&R Block. Gray also admitted having a "heated" conversation in which he yelled at Mr. Wierzbicki when he refused to recommend that his mother sign Gray's letter. Gray admitted that he was "angry" when he called Mr. Wierzbicki and that he "did say to Michael Wierzbicki, how would you like it if someone called your school and told a lie about you? That's exactly what his mom did to me." Gray testified that Mr. Wierzbicki hung up on him before he could explain that his "poor analogy" was intended to convey that Mrs. Wierzbicki "made a false accusation against me and my family and it's affecting my livelihood."

3. Harassment of Michele Konieczko

In November 2005, Gray gave on-the-record testimony during NYSE Enforcement's investigation into his alleged unauthorized trading at Quick & Reilly and was asked specifically about the Konieczko trade. Gray began calling Konieczko in 2006, leaving one message on her answering machine and a few messages with Konieczko's parents. This was Gray's first contact with Konieczko since the summer of 2003. Gray testified that he wanted to "let her know exactly what was transpiring, not only the New York Stock Exchange[']s side of the story] but my side of the story to see if we could make this issue go away." Konieczko did not return these calls. Konieczko testified that, during the month of January 2007,¹⁸ a person calling from a number designated as "private" on her caller identification unit phoned her repeatedly. She believed the

¹⁷ Ten months after the hearing, on October 20, 2008, Gray's attorney sent a letter to Mr. Wierzbicki threatening to sue him and his mother "for all damages that have resulted" from Mr. Wierzbicki's supposed perjury regarding who filed the police report against Gray. Gray's attorney noted that "the first thing we will do upon commencing litigation is take the deposition of your mother so we can quickly get to the truth of what happened." In a January 12, 2009 e-mail to the NYSE Enforcement attorney handling his case and the Chief Hearing Officer who presided at his hearing, Gray stated that he "would drop my pending lawsuit against Lucille and Michael Wierzbicki" if NYSE agreed to commence the start date for his associational bar ten months earlier than ordered. NYSE denied Gray's request. It is not clear whether Gray has actually instituted a suit against the Wierzbickis.

¹⁸ NYSE Enforcement represents that, in January 2007, they informed Gray that they would be instituting charges against him related to the trade in Konieczko's account, among other things. After a period of settlement discussions in January and February 2007, charges were formally instituted on April 3, 2007.

caller to be Gray because he left his name and phone number in a message on her answering machine once, and also left a message with her mother.¹⁹

On one "very excessive" day, she received forty-seven calls from a private number. Konieczko testified that she was "frightened and nerve-racked" because "[e]very five seconds the phone [was] ringing." Konieczko finally answered the phone and recorded the conversation. The caller was Gray. According to the transcript of the recorded call, Konieczko told Gray, "I do not care to discuss this with you. I do not want you calling my home or my mother's home or any member of my family. . . . Have I made myself clear?" Gray called back a few minutes later and left a message on her answering machine saying, according to Konieczko, that her "children would be ashamed" of the way she'd been "presenting" herself and that he intended to "fight [the allegations against him] with every fiber of his being."²⁰ Gray denied leaving this message. He also denied calling Konieczko more than forty times but admitted he called her "ten to fifteen" times.

III.

Gray admits that he engaged in an unauthorized trade in Ricotta's account but denies that he did so in Konieczko's account, and also denies threatening or harassing anyone. Based on our independent review of the record, we find that a preponderance of the evidence supports the NYSE's findings of violation against Gray.²¹

A. Unauthorized trades

Exchange Rule 476(a)(6) subjects to disciplinary sanctions those persons under its jurisdiction, pursuant to proceedings under the rule, for engaging in conduct inconsistent with just and equitable principles of trade. It is well established that unauthorized trading in customer accounts is inconsistent with just and equitable principles of trade.²²

¹⁹ Konieczko testified that she knew of only one other person with a private number who would call her, and that person would always leave a message.

²⁰ Konieczko testified that the message was accidentally deleted; the contents of the message are not in evidence other than through Konieczko's testimony.

²¹ See *David M. Levine*, 57 S.E.C. 50, 73 n.42 (2003) (applying preponderance of the evidence standard in Commission review of disciplinary proceedings conducted by self-regulatory organizations), *petition denied*, 407 F.2d 178 (3d Cir. 2005).

²² See, e.g., *William J. Murphy*, 54 S.E.C. 303, 308 (1999).

Gray has admitted throughout these proceedings and before the NYSE's Hearing Panel and Board of Directors that he entered an unauthorized trade in Ricotta's account. NYSE found that Gray violated Rule 476(a)(6), and we sustain that finding.

NYSE also found that Gray entered an unauthorized trade in the account of Konieczko. Konieczko testified that Gray solicited her interest in buying Evergreen shares, that she never authorized the trade, and that, two months later, Gray left a message saying an "error" had been made in her account that ultimately turned out to be a \$100,000 purchase of Evergreen. Gray's version of events differs from Konieczko's, and he asserts that she authorized the trade.²³ The NYSE Hearing Panel found Konieczko to be "a credible witness." It found that, given Konieczko's "history of trading inactivity, lack of sophistication regarding securities issues and conservative investment objectives, the Panel did not credit [Gray's] testimony that [Konieczko] had agreed to such a large purchase of shares in a closed end fund that she did not understand." The Hearing Panel also noted that it was "highly unlikely" that Konieczko would make a large purchase in one son's account without doing the same for the other son's account, "given her stated commitment to treat both accounts alike." As we have noted consistently in previous decisions, "[c]redibility determinations of an initial fact finder are entitled to considerable weight because they are based on hearing the witnesses' testimony and observing their demeanor."²⁴ Such determinations generally "can be overcome only where the record contains substantial evidence for doing so,"²⁵ and we do not find the record contains such evidence here. We sustain NYSE's finding that Gray placed an unauthorized trade in Konieczko's account, in violation of Exchange Rule 476(a)(6).²⁶

²³ Gray further asserted that Konieczko's testimony that approximately two months elapsed between the time he first solicited her and when he supposedly informed her of the error in her account is wrong, and that Konieczko was thereby shown to be a non-credible witness.

²⁴ *Joseph Abbondante*, Exchange Act Rel. No. 53066 (Jan. 6, 2006), 87 SEC Docket 203, 209 n.21, *petition denied*, 209 Fed. Appx. 6 (2d Cir. 2006) (unpublished).

²⁵ *Laurie Jones Canady*, 54 S.E.C. 65, 78 (1999) (citing *Anthony Tricarico*, 51 S.E.C. at 460), *petition denied*, 230 F.3d 362 (D.C. Cir. 2000).

²⁶ Although Gray asserts that contemporaneous computer notes in his firm's database would have exonerated him, Gray represents that those notes have been lost. We cannot give any probative value to evidence that is not in the record. To the extent Gray complains that the Hearing Panel erred by not providing him access to the incomplete computer files that lack the notes he seeks to exonerate him, Gray has suffered no prejudice because, as Gray admits, the files do not contain the notes he wants. We therefore reject Gray's claim that NYSE "obstructed [his] legal rights to receive any and all documentation that related to [his] defense."

B. Customer harassment

Exchange Rule 476(a)(7) subjects to disciplinary sanctions those persons under its jurisdiction, pursuant to proceedings under the rule, who have engaged in acts detrimental to the interest or welfare of the Exchange. NYSE charged, and found, that Gray "engaged in acts detrimental to the interest or welfare of the Exchange, in that he threatened and/or harassed one or more complaining customers and/or their family members."

1. Harassment of Sharp

Although Sharp did not testify, Townsend's testimony, corroborated by the police report that Sharp filed, showed that Gray's calls to Sharp made Sharp feel "nervous" and "physically threatened." Gray's own testimony establishes that he called Sharp with the intent of getting Sharp to retract his complaint against Gray, and that during his conversations with Sharp, Gray "lost his temper," was "extremely pissed off," and that he yelled and cursed at Sharp.

Gray asserts without elaboration that Townsend "lied under oath" and that NYSE Enforcement "concedes" this, apparently by not disputing Gray's claim in its filings.²⁷ We do not interpret NYSE Enforcement's silence on the issue as a concession. Moreover, even if we were to ignore Townsend's testimony, Gray's own admissions, together with the police report, are sufficient evidence upon which to base a finding that he harassed and/or threatened Sharp.²⁸ We therefore sustain NYSE's finding.

²⁷ Gray suggests in his application for review that Townsend, as well as another former co-worker who testified at the hearing, were not credible because Gray has "a pending arbitration claim" against them.

²⁸ Although Gray complains that Sharp did not testify at the hearing to support the allegations in the police report, it is well established that hearsay evidence "is admissible in administrative proceedings and can provide the basis for findings of violation, regardless of whether the declarants testify." *Scott Epstein*, Exchange Act Rel. No. 59328 (Jan. 30, 2009), 95 SEC Docket 13833, 13853 & n.32 (citing *David C. Ho*, Exchange Act Rel. No. 54481 (Sept. 22, 2006), 88 SEC Docket 3194, 3206, *aff'd*, 2007 U.S. App. LEXIS 9882 (Apr. 18, 2007)). We determine whether to rely on hearsay evidence after evaluating its "probative value and reliability, and the fairness of its use." Where, as here, the evidence is a signed narrative written by a police officer describing the contemporaneous statements of a customer and is corroborated by other testimony, we find it appropriate to include the evidence as one basis, among others, for our findings. *See Charles D. Tom*, 50 S.E.C. 1142, 1145 (1992) (setting forth test for admission of hearsay evidence).

2. Harassment of Lucille and Michael Wierzbicki

Mr. Wierzbicki testified that his mother was "very agitated and upset" by Gray's calls, resulting in the filing of a police report for telephone harassment.²⁹ Mr. Wierzbicki also testified that he himself "felt threatened" by Gray's remark that Gray had access to Mr. Wierzbicki's social security number and Gray's "poor analogy" about false accusations, which Mr. Wierzbicki interpreted as indicating Gray's willingness to make a false accusation about him to Wierzbicki's employer. Gray admitted calling Mrs. Wierzbicki and telling her that his suspension was her fault. Gray also admitted having a "heated" conversation in which he "yelled" at Mr. Wierzbicki when he refused to have his mother sign Gray's letter.

Gray argues that Mr. Wierzbicki lied at the hearing about the circumstances surrounding the filing of the police report and that, had he known more about those circumstances, he might have called Mrs. Wierzbicki as a witness. The record contains only an incomplete copy of the police report which does not include a narrative explanation of the incident. After the NYSE Hearing Panel issued its decision, Gray obtained a complete copy of the report which has not been introduced into the record.³⁰ Gray claims that the complete report shows that Mrs. Wierzbicki, and not her son, filed the report, and that therefore Mr. Wierzbicki lied when he testified that he filed it.

There is some confusion in the record as to whether Mr. Wierzbicki, Mrs. Wierzbicki, or both of them filed the police report.³¹ However, the Hearing Panel found Mr. Wierzbicki to be a credible witness, accepted his testimony that he felt threatened by Gray, and found that Wierzbicki "filed a complaint on behalf of his mother charging [Gray] with telephone harassment." We find that, even if Mrs. Wierzbicki, not Mr. Wierzbicki, filed the police report

²⁹ As discussed *supra* at note 28, we may rely on hearsay evidence in making findings of violation. Here, however, we rely on the Wierzbicki police report simply as evidence of the fact that the Wierzbickis felt sufficiently harassed by Gray's phone calls that they reported him to the police, and we need not consider the document (which contains little other useful information, in any event) for the truth of any matters asserted therein.

³⁰ Gray appears to have had a copy of the report with him during oral argument before the NYSE Board of Directors and references the document in his application for review to the Commission. However, neither he nor NYSE has sought to introduce a copy of the full report into the record pursuant to Commission Rule of Practice 452, 17 C.F.R. § 201.452, by which the Commission may permit the admission of additional evidence under certain circumstances.

³¹ Mr. Wierzbicki testified during direct examination that "I filed a complaint that my mother was getting harassing phone calls" and that he was "present when [the report] was filed." On cross-examination, Mr. Wierzbicki testified that "[m]y mother caused a police report to be filed."

(which, as noted, is not in the record), that fact does not provide a sufficient basis for overturning the panel's credibility determination or its finding of liability.

Moreover, Gray has not shown that he suffered prejudice by not calling Mrs. Wierzbicki to testify about the report³² because other evidence establishes that he has threatened and/or harassed the Wierzbickis. As noted, the Hearing Panel found Mr. Wierzbicki to be credible. Moreover, Gray admitted that he called Mrs. Wierzbicki and blamed her for losing his job, and he has continued to threaten the Wierzbickis with a lawsuit because of the complaint she filed and for their involvement in this proceeding. We sustain NYSE's finding that Gray harassed and/or threatened the Wierzbickis.

3. Harassment of Konieczko

Konieczko testified that Gray called her and her parents repeatedly, and that, on one particular day, a caller from a private number she believed was Gray called more than forty times. Konieczko, "frightened and nerve-racked," answered the phone and felt compelled to record the call. Despite instructions to stop calling her home, Gray called again within minutes and told her in a message that her children "would be ashamed" of her. Gray admitted calling her "ten to fifteen times" but denied calling her after being instructed to stop. The Hearing Panel credited Konieczko's testimony over Gray's, and "found the similarities among the experiences of the three unrelated complaining customers to be significant." We find no reason to disagree with the Panel's credibility assessment here,³³ and we affirm NYSE's finding that Gray harassed and/or threatened Konieczko.

4. Summary

NYSE determined that "[t]he frequency and tone of the telephone calls [Gray] placed to these three customers and their family members were unreasonable and inconsistent with the behavior that is expected of a registered representative." It concluded that "[y]elling, cursing, harassing and threatening are inappropriate and unprofessional – especially, as here, when such behavior is repeated – and constitute acts detrimental to the interests of the [Exchange], which requires that customers be treated with respect, even during difficult times." We agree. We

³² In fact, descriptions of the complete copy of the report, as discussed briefly during oral argument before NYSE's Board of Directors, suggest that the narrative section of the report provides further details about Gray's alleged harassment of Mrs. Wierzbicki, including calling her "on a steady basis six times a day, requesting money and threatening a lawsuit."

³³ See *supra* note 25 and accompanying text.

sustain NYSE's findings that Gray violated NYSE Rule 476(a)(7) by threatening and/or harassing one or more complaining customers and/or their family members.³⁴

IV.

Gray contends that NYSE "abandoned precedent and common reason when it imposed a penalty of a censure and a three-year bar against Mr. Gray," requesting that we reduce the bar against him to a period of "no greater than six months." Exchange Act Section 19(e)(2) directs us to sustain the sanctions imposed by the NYSE unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.³⁵

In imposing sanctions for Gray's violations, NYSE was guided by the Second Circuit's decision in *McCarthy v. SEC*, which states:

The seriousness of the offense, the corresponding harm to the trading public, the potential gain to the broker for disobeying the rules, the potential for repetition in light of the current regulatory and enforcement regime, and the deterrent value to the offending broker and others are all relevant factors to be considered in deciding whether the sanction is appropriately remedial and not excessive or oppressive.³⁶

Based on these considerations, NYSE deemed Gray's misconduct "serious," finding that the unauthorized trades "jeopardized one customer's account in order to benefit another" and "put the

³⁴ Gray asserts that the NYSE hearing officer who presided at his hearing "biased herself and others" because she stated the Konieczko trade was unsuitable. He also asserts that, during his appeal to the NYSE Board of Directors, a security escort was detailed to him and that the escort "sat directly next to me, . . . announced his name and his title for the [Board, and] stated 'this is the first time this has ever been done,'" thereby causing the Board to be "prejudice[d] into believing I was guilty."

The Hearing Panel decision found Gray liable for the Konieczko trade on the sole basis that it was unauthorized. Moreover, the transcript of the oral argument before the Board does not show that any security escort announced his title or commented on the unusual nature of that assignment. In any event, our *de novo* review of the record in this case leads us to conclude the NYSE's findings against Gray were well supported by the evidence, as discussed herein, and we have found no suggestion of bias or prejudice by NYSE.

³⁵ 15 U.S.C. § 78s(e)(2). Gray does not allege, and the record does not show, that NYSE's action imposed an undue burden on competition.

³⁶ 406 F.3d 179, 190 (2d Cir. 2005).

tuition fund of [a customer] at risk." NYSE, moreover, found Gray's handling of customer complaints "even more troubl[ing]," stating that "rather than allowing complaints to run their course through appropriate channels inside and outside the firms, [Gray] repeatedly called complaining customers and their family members, at times yelling at them and threatening them."³⁷ NYSE stated that Gray's "interference with NYSE's investigatory process threatened both the integrity of that process and the confidence of investors therein."

Gray argues that certain facts should serve to mitigate the sanction imposed. He points out that neither Ricotta nor Konieczko, in whose accounts Gray made unauthorized trades, were financially harmed by his conduct and that he himself made no profit from the trades, earning no commissions on them. He also claims that he expressed remorse for his misconduct at the hearing and cites, as evidence of his remorse, his acknowledgment that he made an unauthorized trade in Ricotta's account.

We find that NYSE appropriately considered the mitigating and aggravating factors present in this case and that the sanction imposed is not excessive or oppressive. Although Ricotta and Konieczko suffered no actual financial harm because of Gray's actions, as the Hearing Panel noted, the unauthorized transactions put these customers' funds at risk. Further, although Gray did not ultimately profit from the trades, he would have earned thousands of dollars in commissions had the transactions not been cancelled. Moreover, Gray admitted the Ricotta trade to his manager only after Lynch discovered it by "surprise" and confronted him, and after Gray had at first sought to conceal his misconduct by asking Ricotta if she wanted to correct the "error" in her account by selling the shares for a small profit. The panel also explained that, in assessing sanctions, it gave significant weight to the aggravating circumstances surrounding Gray's harassment of customers and their families, conduct that caused distress to those persons and for which Gray has not accepted responsibility or expressed remorse.

The panel explicitly considered Gray's assertions that he "has taken responsibility for his actions by voluntarily removing himself from the retail securities industry," but, "having observed [Gray's] testimony and comportment at the hearing," the panel determined that it did "not believe that [Gray] truly understands the gravity of his actions or has learned from his experience such that he will not engage in such conduct in the future." Gray has subsequently demonstrated that he does not, in fact, understand the gravity of his actions and that he has not learned from his conduct: Gray has continued to harass Mr. Wierzbicki after the hearing by threatening him with litigation if he does not retract his testimony.³⁸

Gray asserts that he is no longer in the securities industry and therefore poses no threat to the NYSE or the investing public. The Central Registration Depository ("CRD") indicates that,

³⁷ NYSE further noted, "That two of those [harassed] customers were elderly makes Respondent's actions even more egregious."

³⁸ *See supra* note 17.

after leaving H&R Block, Gray worked for Summit Brokerage Services for five months and then became employed by a venture capital firm. Gray testified at the hearing (in January 2008) that his work at the venture capital firm focused on the "institutional side of the business," because, though he "love[d] the financial services industry, . . . the retail world isn't for me." Gray's CRD record indicates he was terminated by the venture capital firm in February 2008 for "violation of firm's written supervisory procedures."³⁹ Thus it appears that his decision to leave the securities industry in 2008 was not voluntary. We are not persuaded, therefore, that Gray's remorse is genuine or that the threat he poses to the industry has attenuated.⁴⁰

Gray's conduct was unacceptable in a representative of the securities industry. As NYSE pointed out in its decision, "NYSE's ability to police its members necessarily relies on the willingness of customers to file complaints," and that Gray's "interference with the NYSE's

³⁹ Gray's CRD record indicates that he is not currently associated with any FINRA-registered entity.

⁴⁰ We note in this regard that Gray represented in a letter to the Commission on January 22, 2009 that he has filed a "grievance with the New York State Bar Association" against the attorneys prosecuting the case against Gray on behalf of NYSE. In addition, Gray notes in his April 29, 2009 reply brief, without explanation, that one of those prosecuting attorneys "filed a police report against Mr. Gray because Mr. Gray wished her congratulations on the upcoming birth of her second child." There is no further information about this police report in the record. We see no basis for finding that NYSE staff acted improperly during these proceedings.

investigatory process threatened both the integrity of that process and the confidence of investors therein." We conclude, therefore, that the sanctions imposed by NYSE to redress the risk posed by Gray serve the public interest and are neither excessive nor oppressive.⁴¹

We sustain NYSE's findings of violation and imposition of sanctions.⁴² An appropriate order will issue.

By the Commission (Commissioners CASEY, WALTER, AGUILAR, and PAREDES; Chairman SCHAPIRO not participating).

Elizabeth M. Murphy
Secretary

⁴¹ We note that, although Gray argues that a three-year bar is "clearly inconsistent with NYSE and NASD precedent," none of the cases he cites in support of his argument involve brokers who threatened or harassed their customers. NYSE argues that "Gray's readiness to abuse his customers and his continuing reluctance to acknowledge his misconduct would support a higher sanction – consistent with [NYSE and NASD precedent] – even Gray's permanent exclusion from the securities industry." Exchange Act Section 19(e)(2), 15 U.S.C. § 78s(e)(2), permits us to "cancel, reduce, or require the remission of" a sanction imposed by a self-regulatory organization but does not permit us to increase the sanction.

⁴² We have considered all of the arguments of the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 60361 / July 22, 2009

Admin. Proc. File No. 3-13344

In the Matter of the Application of

GREGORY W. GRAY, Jr.

c/o Marni Weiss
Weiss Imbesi PLLC
462 Seventh Avenue, 12th Floor
New York, NY 10018

For Review of Disciplinary Action Taken by

NYSE Regulation, Inc.

ORDER SUSTAINING DISCIPLINARY ACTION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action by NYSE against Gregory W. Gray, Jr. be, and it hereby is, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary