

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 79016 / September 30, 2016

Admin. Proc. File No. 3-17404

In the Matter of the Application of

KEVIN M. MURPHY

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF FINRA ACTION

Registered securities association barred individual under rule providing expedited procedure for addressing failures to provide requested information. *Held*, proceedings are *remanded* for further consideration.

APPEARANCES:

Nina Targovnik of Community Legal Services, Phoenix, Arizona, for Kevin M. Murphy

Alan Lawhead, Michael Garawski, and Celia L. Passaro for FINRA.

Appeal filed: August 17, 2016
Last brief received: September 2, 2016

Kevin M. Murphy appeals from a FINRA order barring him from association with any FINRA member in any capacity for failing to provide information and documents in connection with a FINRA investigation. FINRA requests that we dismiss Murphy's application for review because he failed to exhaust his administrative remedies before FINRA. For the reasons stated herein, we remand this case to FINRA.

I. Background

On December 17, 2015, BMO Harris Financial Advisors (“BMO”) terminated Murphy for purportedly violating firm policy by using its name in a personal situation. After BMO filed a Form U5 disclosing Murphy’s termination, FINRA commenced an inquiry to determine whether violations of the federal securities laws or FINRA, NASD, NYSE, or MSRB rules had occurred.

On February 26, 2016, FINRA requested that Murphy provide certain documents and information bearing on his termination and other matters by March 11, 2016.¹ FINRA served the request on Murphy by both certified and first-class mail at his address of record in its Central Registration Depository (“CRD”) system and a second address also noted in the system.²

On March 14, 2016, FINRA sent a second request after Murphy failed to respond. FINRA again served its second request on Murphy by both certified and first-class mail at his CRD address and the second address. Each of these eight mailings was returned to FINRA. The United States Postal Service (“USPS”) marked the mailings to Murphy’s CRD address as “not deliverable as addressed” and “unable to forward.” USPS also marked each of the mailings to the second address as “unable to forward,” and the first-class mailings to that address contained a handwritten notation stating “Return to Sender! Not at this address.” USPS records³ show that it returned the certified mailings sent to Murphy’s CRD address to FINRA on March 30, 2016,⁴ and the certified mailings sent to the second address to FINRA on April 5, 2016.⁵ The mailings sent by first-class mail were returned to FINRA around the same time as the certified mailings.

¹ See FINRA Rule 8210(a) (stating that “FINRA staff shall have the right” to require a “person associated with a member” to provide specified testimony, information, or documents).

² “The Central Registration Depository (CRD) is a computerized database that contains information about most brokers, their representatives, and the firms they work for.” Investor Publication, *Protect Your Money: Check Out Brokers and Investment Advisers*, <https://www.sec.gov/investor/brokers.htm>.

³ The record contains the tracking numbers for the letters that FINRA sent by certified mail. We take official notice of the tracking information provided for those numbers on USPS’s website. See Rule of Practice 323, 17 C.F.R. § 201.323 (providing that “[o]fficial notice may be taken of any material fact which might be judicially noticed by a district court of the United States”); *NYKCool A.B. v. Pac. Int’l Servs., Inc.*, 12 Civ. 5754, 2013 WL 6799973, at *6 n.8 (S.D.N.Y. Dec. 20, 2013) (taking judicial notice of carrier tracking information).

⁴ See https://tools.usps.com/go/TrackConfirmAction?qt_c_tLabels1=9314869904300020859460 (first request); https://tools.usps.com/go/TrackConfirmAction?qt_c_tLabels1=9314869904300021334522 (second request).

⁵ See https://tools.usps.com/go/TrackConfirmAction?qt_c_tLabels1=9314869904300020859484 (first

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On April 18, 2016, FINRA sent Murphy a notice pursuant to FINRA Rule 9552 notifying him that he would be suspended from association with any FINRA member on May 9, 2016, if he did not provide the requested information and documents (the “Presuspension Notice”).⁶ The basis for the notice was Murphy’s failure to provide the information and documents FINRA requested he provide in its two previous requests. In the Presuspension Notice, FINRA explained to Murphy that he could stay the suspension before it took effect by requesting a hearing.⁷ FINRA also informed Murphy that if he were suspended, he could file a written request for termination of his suspension on the grounds that he had fully complied with FINRA’s requests. FINRA explained that if the suspension took effect and Murphy failed to request that it be terminated by July 18, 2016, he would be barred automatically.⁸

FINRA sent the Presuspension Notice by certified and first-class mail to Murphy’s CRD address. According to a declaration submitted with its motion to dismiss, FINRA searched the LEXIS Public Records database before sending the notice; the database listed Murphy’s CRD address as his current address.⁹ Neither the declaration nor any other portion of the record shows what consideration, if any, FINRA gave to the returned mailings or why it sent the Presuspension Notice to no address other than Murphy’s CRD address.¹⁰ FINRA’s mailings of the

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request);

<https://tools.usps.com/go/TrackConfirmAction?qtclLabels1=9314869904300021334577>

(second request).

⁶ See FINRA Rule 9552(a) (stating that if a “person associated with a member” fails to provide information requested pursuant to FINRA rules then FINRA staff may provide written notice to such person “specifying the nature of the failure and stating that the failure to take corrective action within 21 days after service of the notice will result in suspension of membership or of association of the person with any member”).

⁷ See FINRA Rule 9552(e) (stating that a “request for a hearing shall be made before the effective date of the notice,” which is 21 days after service of the notice).

⁸ See FINRA Rule 9552(h) (“A member or person who is suspended under this Rule and fails to request termination of the suspension within three months of issuance of the original notice of suspension will automatically be expelled or barred.”). July 18, 2016, is three months after the date of the April 18, 2016 Presuspension Notice.

⁹ FINRA requests that we admit the declaration under Rule of Practice 452. Rule 452 provides that a party may file a motion for leave to adduce additional evidence that shows that the evidence is “material and that there were reasonable grounds for failure to adduce such evidence previously.” 17 C.F.R. § 201.452. We find that the declaration is material to our consideration of the issue of service in this case and that FINRA acted quickly to supplement the record once the issue of service was first raised in Murphy’s application for review.

¹⁰ See FINRA Rule 9134(b)(1) (“When a Party or other person responsible for serving such person has actual knowledge that the natural person’s Central Registration Depository address is out of date, duplicate copies shall be served on the natural person at the natural person’s last

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Presuspension Notice were again returned to it as “not deliverable as addressed” and “unable to forward.” USPS records show that it returned the certified mailing to FINRA on May 2, 2016.¹¹

On May 9, 2016, FINRA sent Murphy a letter by certified and first-class mail to his CRD address informing him that he had been suspended from association with any FINRA member in any capacity due to his failure to comply with FINRA’s requests (the “Suspension Notice”). FINRA again informed Murphy that he would be barred automatically if he did not request termination of the suspension on the ground of full compliance by July 18, 2016. Before sending the Suspension Notice, FINRA searched the LEXIS database which continued to list Murphy’s CRD address as his current address. But that search also listed a former address for Murphy (the “third address”) that was not previously listed. FINRA sent the Suspension Notice only to Murphy’s CRD address, but not to the third address, and its mailings were again returned.

On July 18, 2016, FINRA sent Murphy a notice notifying him that he had been barred automatically from association with any FINRA member in any capacity (the “Bar Notice”) and stating that he could appeal the decision to the Commission within 30 days of his receipt of the notice. Before sending the Bar Notice, FINRA again searched the LEXIS database, which now listed the third address referenced above as Murphy’s residential address. FINRA sent the Bar Notice to Murphy by certified and first-class mail at his CRD address and the third address. Although the mailings to Murphy’s CRD address and the certified mailing to the third address were returned to FINRA, the first-class mailing to the third address was not returned.

On August 17, 2016, Murphy filed a timely application for review of the bar order. In his application, Murphy asserts that he asked BHO to update his CRD address in December 2015 before he was terminated and that BHO had told him it would process the change. In his application for review, Murphy provided some of the information FINRA requested under Rule 8210 and asserted that he did not have various requested documents.

II. Analysis

FINRA requests that we dismiss Murphy’s application for review because he failed to exhaust his administrative remedies before FINRA before appealing its action to us.¹² As

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known residential address and the business address in the Central Registration Depository of the entity with which the natural person is employed or affiliated.”).

¹¹

See

https://tools.usps.com/go/TrackConfirmAction?qt_c_tLabels1=9314869904300022314127.

¹²

In this regard, “we will not consider an application for review if that applicant failed to exhaust FINRA’s procedures for contesting the sanction at issue.” *Caryl Trewyn Lenahan*, Exchange Act Release No. 73146, 2014 WL 4656403, at *2 (Sept. 19, 2014) (quoting *Ricky D. Mullins*, Exchange Act Release No. 71926, 2014 WL 1390384, at *3 (Apr. 10, 2014) and citing other authority) (internal quotation marks omitted). We have explained that it is “clearly proper to require that a statutory right to review be exercised in an orderly fashion, and to specify procedural steps which must be observed as a condition to securing review.” *MFS Sec. Corp.*,

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support for this argument, FINRA relies on two principal contentions. First, FINRA contends that Murphy failed to follow its procedures by “[1] taking corrective action” by producing the information and documents it asked him to provide, “[2] requesting a hearing in response to the notice of suspension, or [3] filing for termination of the suspension.”¹³ Murphy does not assert in his application for review that he did any of these things. Rather, the crux of his application is that he did not receive FINRA’s requests for information or Presuspension or Suspension notices.

Second, FINRA contends that it properly served the Presuspension Notice on Murphy. Although FINRA does not directly address Murphy’s assertion that he relied on BHO to update his CRD address, FINRA correctly notes that it is the individual’s responsibility to ensure that his CRD address is current.¹⁴ FINRA argues that because it is entitled to rely on its records,¹⁵ it properly served Murphy at his CRD address, and that it did so consistent with its rules.

FINRA Rule 9552(b) required FINRA to serve the Presuspension Notice on Murphy “in accordance with Rule 9134.”¹⁶ Rule 9134(b)(1) provides that “Papers served on a natural person may be served at the natural person’s residential address, as reflected in the Central Registration Depository, if applicable.”¹⁷ FINRA asserts that it therefore properly served the Presuspension Notice on Murphy at his CRD address and that it went above and beyond its obligations under Rule 9134 by also searching the LEXIS database to determine Murphy’s current address.

Rule 9134(b)(1) also provides, however, that if there is “actual knowledge that the natural person’s Central Registration Depository address is out of date, duplicate copies shall be served on the natural person at the natural person’s last known residential address” That the requests for information sent to Murphy’s CRD address were returned to FINRA suggests that FINRA had actual knowledge that Murphy’s CRD address was out of date. But the record does not contain any information as to what FINRA did to satisfy its obligation under Rule 9134(b)(1) to send the Presuspension Notice to Murphy’s “last known residential address.” The record does not indicate whether FINRA believed that the second address, also listed in the CRD, was

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Exchange Act Release No. 47626, 2003 WL 1751581, at *5 & n.29 (Apr. 3, 2003) (quoting *Royal Sec. Corp.*, Exchange Act Release No. 5171, 1955 WL 43159, at *2 (May 20, 1955)) (internal quotation marks omitted), *aff’d*, 380 F.3d 611 (2d Cir. 2004).

¹³ *Lenahan*, 2014 WL 4656403, at *2.

¹⁴ *See, e.g., Aliza A. Manzella*, Exchange Act Release No. 77084, 2016 WL 489353, at *3 & n.15 (Feb. 8, 2016) (stating that “Manzella, as a former employee of a FINRA member, was required to keep her Web CRD address of record current, and to receive mail there”).

¹⁵ *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 WL 4518588, at *7 (July 27, 2015) (stating that “[t]he purpose of the CRD address requirements is to ensure that FINRA is able to rely on its records when sending notices”).

¹⁶ FINRA Rule 9552(b).

¹⁷ FINRA Rule 9134(b)(1).

Murphy's "last known residential address." Nor does the record contain FINRA's rationale for sending the Presuspension Notice only to his CRD address and not to the second address despite having sent the two requests for information to both addresses.

In addition, before it served the Suspension Notice, FINRA had knowledge of the third address. But FINRA does not explain—and the record contains no indication—why it did not serve the Suspension Notice on Murphy at the third address, a new address it discovered after conducting a LEXIS Public Records search. FINRA did serve the Bar Notice at the third address, once it was listed as a residential address, but it did not serve "duplicate copies" of any of the prior mailings, including the two requests for information on which the suspension and bar were predicated or the Presuspension Notice, on this newly discovered residential address. Again FINRA does not explain—and the record is silent as to—why it did not do so, or whether it believes that its rules require it to mail all previously returned mailings to a new address once it becomes aware that such an address is a current residential address.

We "have previously remanded to [FINRA] proceedings brought under similar [FINRA] provisions where, among other things, the record raised questions about whether [FINRA] was aware that its information requests and notices were not reaching the respondent."¹⁸ Because the record does not contain sufficient evidence for us to determine if FINRA complied with its service rules, we similarly remand this case to FINRA for further consideration of the basis for its action and the appropriateness, under the circumstances, of barring Murphy in an expedited proceeding.¹⁹ Should FINRA determine it is appropriate to bar Murphy using this expedited process, it should explain (1) what it did to satisfy its obligation to send the Presuspension Notice to Murphy's "last known residential address," whether it believed the second address listed in the CRD was Murphy's "last known residential address," and its rationale for not sending the Presuspension Notice to the second address; (2) why it was not required to mail the Suspension Notice to the third address despite having knowledge of that address; and (3) whether it was

¹⁸ *Dennis A. Pearson, Jr.*, Exchange Act Release No. 54913, 2006 WL 3590274, at *6 n.32 (Dec. 11, 2006).

¹⁹ *See Robert J. Langley*, Exchange Act Release No. 50917, 2004 WL 2973866, at *3 (Dec. 22, 2004) (remanding matter to NASD to develop facts bearing on service of notice under Rule 8210 where it was "unclear whether [respondent] received any notice of NASD's information requests or of NASD's subsequent expedited proceedings to bar him" and to provide "an opportunity to determine whether a bar is the appropriate sanction"); *see also Ryan R. Henry*, Exchange Act Release No. 53957, 2006 WL 1565128, at *3 (June 8, 2006) (remanding for similar inquiry where "certain factual aspects of this case [relating to service] [wer]e unclear from the record" and applicant was barred pursuant to expedited procedures); *cf. James L. Bari, Jr.*, Exchange Act Release No. 48292, 2003 WL 21804686, at *2 (Aug. 6, 2003) (remanding for similar inquiry where it was unclear from the record whether NASD sent its requests for information to the most current residential address that it had on file for the respondent).

required to provide “duplicate copies” of the prior undelivered requests for information and notices to the third address, once it became aware that it was Murphy’s current residential address. In remanding, we do not intend to suggest any view as to a particular outcome.

An appropriate order will issue.²⁰

By the Commission (Chair WHITE and Commissioners STEIN and PIWOWAR).

Brent J. Fields
Secretary

²⁰ We have considered the arguments that Murphy advanced in his petition for review and that FINRA advanced in its motion to dismiss for failing to exhaust administrative remedies. Given the state of the record, we find that it would not significantly aid the decisional process to order full briefing on Murphy’s appeal. We find that it would serve the interests of justice and cause no prejudice to FINRA under the circumstances to dispense with further briefing. *See* Rule of Practice 100(c), 17 C.F.R. § 201.100(c) (“The Commission, upon its determination that to do so would serve the interests of justice and not result in prejudice to the parties to the proceeding, may by order direct, in a particular proceeding, that an alternative procedure shall apply or that compliance with an otherwise applicable rule is unnecessary.”).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 79016 / September 30, 2016

Admin. Proc. File No. 3-17404

In the Matter of the Application of

KEVIN M. MURPHY

For Review of Action Taken by

FINRA

ORDER REMANDING PROCEEDING TO FINRA

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

ORDERED that the proceedings with respect to Kevin M. Murphy be, and they hereby are, remanded to FINRA for further consideration.

By the Commission.

Brent J. Fields
Secretary