

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

JUDD B. HIRSCHBERG

CFTC Docket No. CRAA 02-03

v.

OPINION AND ORDER

NATIONAL FUTURES ASSOCIATION

Judd B. Hirschberg ("Hirschberg") appeals from a National Futures Association ("NFA") order denying his application for registration as a floor broker. Hirschberg argues that NFA erred in finding him statutorily disqualified despite his having been granted a presidential pardon for a criminal conviction. Our review of the record and the parties' appellate submissions establishes that NFA's findings and conclusions are supported by the weight of the evidence and consistent with the purposes of the Commodity Exchange Act ("Act"); we therefore adopt them. *See* Commission Rule 171.34(c).

Hirschberg applied for registration in July 2001. Pursuant to Section 8a(2)(A) of the Act, NFA was authorized to deny his application based on the Commission's revocation in 1995 of his prior floor broker registration.¹ In accordance with Commission Rule 3.60, NFA provided Hirschberg with an appropriate opportunity to show that notwithstanding the 1995 revocation, renewing his registration at this time would not pose a substantial threat to the public.

¹ *See In re Hirschberg*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,573 (Dec. 27, 1995) ("*Hirschberg I*"). In that proceeding, the Commission found Hirschberg statutorily disqualified from registration under Section 8a(2)(D) of the Act, because of his 1991 conviction on four felony counts of federal mail fraud. The convictions arose from the "faked theft" of Hirschberg's automobile in 1984 and the attendant filing by Hirschberg of a false police report and a fraudulent insurance claim. *Hirschberg I*, 126,573 at 43,519. In rejecting Hirschberg's argument that, despite his felony convictions, his continued registration would not pose a substantial threat to the public, the Commission noted that in 1989, four years after the faked theft of his car, Hirschberg was found to have engaged in prearranged trading in violation of Chicago Mercantile Exchange rules. In the Commission's view, this additional wrongdoing was an "aggravating factor ... which evidence[d] a lack of rehabilitation following the crime." [Id. at 43,523](#).

On appeal, Hirschberg focuses on the fact that in December 2000, he received a presidential pardon for the felony convictions that resulted in his registration being revoked in 1995. Relying on the Supreme Court's decision in *Ex Parte Garland*, 71 U.S. 333 (1866), Hirschberg argues that the pardon removed any penalties or disabilities arising from his convictions, including his right to pursue his chosen profession. He argues that Congress cannot limit the effect of presidential pardons. Therefore, he contends, treating his revocation as a statutory disqualification under Section 8a(2)(A) amounts to an unconstitutional restriction of his December 2000 pardon. Appeal Brief at 10 (citing *Bjerkan v. United States*, 529 F.2d 125, 128 (7th Cir. 1975)).

Hirschberg overstates the impact of a presidential pardon. His error begins with his overly broad reading of *Ex Parte Garland*. That case involved a statute enacted by Congress in 1865 providing that no person could practice law in a federal court without taking an oath asserting that he or she had never borne arms against the United States or given aid or comfort to the nation's enemies.

The law was challenged successfully by an attorney who had served as a Confederate official and later received a full pardon from President Johnson. In admitting the petitioner to the bar, the Supreme Court held that "[a] pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence." 71 U.S. at 380.²

² The Court explained that the relevant question was not whether Congress can prescribe qualifications for professions where it has jurisdiction, but rather "whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution." *Ex Parte Garland*, 71 U.S. at 380. Based on its expansive reading of a pardon's effect, the Court found that President Johnson's pardon had placed the petitioner "beyond the reach of punishment of any kind" and concluded that the challenged statute could not be used to preclude him from practicing law without violating the Constitution. 71 U. S. at 381.

In Burdick v. United States, 236 U.S. 79 (1915), however, decided a half-century later, the Court stated that there is a "confession of guilt implied in the acceptance of a pardon." 236 U.S. at 91. Consistent with this view, federal courts hold that once a conviction has been pardoned, although the conviction itself cannot be taken into account in a subsequent proceeding, the commission of the crime that resulted in the conviction may be considered. *Bjerkan v. United States*, 529 F.2d at 128 n.2; *United States v. Noonan*, 906 F.2d 952, 958-59 (3d Cir. 1990).³

Thus, in *Grossgold v. Supreme Court of Illinois*, 557 F.2d 122 (7th Cir. 1977), an appeals panel of the Seventh Circuit refused to order the Illinois Supreme Court to reinstate an attorney whose license to practice law had been suspended because of a mail fraud conviction, despite the fact that President Ford subsequently granted the attorney a full pardon. Citing *Bjerkan v. United States, supra*, the panel stated that the pardon "did not wipe out the moral turpitude inherent in the factual predicate supporting plaintiff's mail fraud convictions." [Id. at](#) 125. It noted, however, that the disbarred attorney was free to "urge the pardon as a consideration for reinstatement" under Illinois [law. Id. at](#) 126; cf. *Nixon v. United States*, 506 U.S. 224, 232 (1993) (although a pardon *does not overturn* a judgment of conviction, it is "[a]n executive action that mitigates *or sets aside punishment* for a crime") (quoting Black's Law Dictionary 1113 (6th ed. 1990)) (emphasis added by Court).

In deciding whether or not to register Hirschberg as a floor broker, NFA correctly acknowledged that a presidential pardon "can, when combined with other evidence, indicate that the applicant or registrant does not pose a substantial risk to the public." NFA Order at 11. Citing abundant Commission precedent, however, NFA found that Hirschberg's other evidence

³ Cf. *Hawker v. New York*, 170 U.S. 189, 198 (1898) (noting that because the oath at issue in *Garland* had no relation to petitioner's fitness to act as an attorney, it was not a "legitimate test of qualification," but an impermissible "penalty for a past offense").

of mitigation or rehabilitation was "minimal," and it noted unfavorably the absence of any evidence in the record suggesting that Hirschberg "acknowledges that he did anything wrong, accepts any responsibility for his conduct, or has taken any steps to change his behavior." *Id.* Hirschberg's unwillingness or inability to recognize the nature of his misconduct-irrespective of the pardon-suggests strongly that his character lacks the probity and uprightness required of a commodity professional, particularly one seeking registration in a fiduciary capacity. His refusal during the intervening years to take responsibility for his missteps confirms that suggestion. In *re Akar* [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) 122,927 at 31,709 (CFTC Feb. 24, 1986)(registrant seeking to establish rehabilitation must "do more than show that time passed without the occurrence of further wrongful conduct") (footnote omitted).

Accordingly, we dismiss Hirschberg's appeal and affirm NFA's denial of his application for registration as a floor broker.

IT IS SO ORDERED.

By the Commission (Chairman NEWSOME and Commissioners LUKKEN and BROWN-HRUSKA).

Jean A. Webb
Secretary of the Commission
Commodity Futures Trading Commission

Dated: June 8, 2004