

BEFORE THE NATIONAL ADJUDICATORY COUNCIL  
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Thomas John Lykos, Jr.  
Houston, Texas,

Respondent.

DECISION

Complaint No. 2018059510201

Dated: December 16, 2021

**Registered representative acted unethically by cheating on a qualification examination and violating the Rules of Conduct governing examinations. Held, findings and sanctions affirmed.**

**Appearances**

For the Complainant: Megan P. Davis, Esq., Jennifer Crawford, Esq., Jennifer Wang, Esq., Penelope Blackwell, Esq., Financial Industry Regulatory Authority

For Respondent: Lawrence Rothenberg, Esq.

**Decision**

Respondent Thomas John Lykos, Jr., appeals, pursuant to FINRA Rule 9311, a May 1, 2020 Hearing Panel decision. The Hearing Panel found that Lykos violated NASD Rule 1080 and FINRA Rule 2010 by cheating on a general securities principal qualification examination and violating the Rules of Conduct governing the exam. Specifically, the Hearing Panel found that Lykos received outside assistance on the exam and violated the Rules of Conduct by taking an unscheduled break outside the test center premises, writing exam material on his driver's license, fingers, and forearm, and by leaving the test center with writing on his fingers and forearm. The Hearing Panel barred Lykos for these violations.

After an independent review of the record, we affirm the Hearing Panel's findings of violation and the sanctions that it imposed.

I. Background and Facts

A. Thomas John Lykos, Jr.

Lykos is a veteran of the securities and banking industry. He previously worked as an enforcement attorney with the Securities and Exchange Commission, as oversight counsel for Congressional committees with jurisdiction over the securities laws, and as deputy director of the Federal Home Loan Bank Board.

Lykos first registered with FINRA in 1989 when he associated with a FINRA member based in Dallas, Texas. After passing the general securities representative and uniform securities state law examinations, Lykos registered as a general securities representative. In September 1993, Lykos failed the general securities principal examination. In 2009, after approximately four years working outside the securities industry, Lykos joined another FINRA member based in Dallas, Texas. Because his registrations had lapsed, Lykos again passed the general securities representative and uniform combined state law examinations and registered as a general securities representative.

B. Lykos Associates with Sanders

In 2017, Lykos was living in Houston and commuting to Dallas for work. While working on a transaction, Lykos came to know several individuals associated with Sanders Morris Harris, LLC (“Sanders”), a Houston-based FINRA member, and its affiliates. Lykos testified that Sanders recruited him, and he ultimately accepted a position as Sanders’s chief compliance officer (“CCO”) and general counsel for Sanders and its affiliated entities.

On or around January 26, 2018, Sanders’s chairman and chief executive officer, George Ball, sent Lykos a draft employment agreement with an attached memorandum.<sup>1</sup> The agreement stated that it was an offer of employment on behalf of Sanders. The agreement stated that Lykos’s job title would be CCO, Ball would be his supervisor, and his start date would be February 1, 2018. Under “Job Scope,” the agreement provided that Lykos would “perform such duties as are required to serve as [CCO] of [Sanders].” The agreement required Lykos to possess and maintain a general securities representative and uniform combined state law licenses and a state insurance license.<sup>2</sup>

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<sup>1</sup> The copy of the employment agreement in evidence is dated December 11, 2019. Ball testified that this date was automatically inserted when Sanders printed the agreement and provided it to FINRA in response to a FINRA Rule 8210 request. Ball testified that the draft employment agreement was sent to Lykos, along with the attached memorandum, on or around January 26, 2018.

<sup>2</sup> The employment agreement did not mention the general securities principal license. Ball testified that the agreement was a form document, and it was not amended to add that requirement. Ball also testified, however, that Lykos knew he had to register as a principal to serve as Sanders’s CCO.

The memorandum attached to the employment agreement further explained Lykos's duties. The memorandum was printed on Sanders's letterhead and was addressed to Lykos from Ball and the chief executive officer of Sanders's affiliate. The memorandum stated that Lykos would act as the CCO for Sanders and its two affiliated registered investment advisors ("RIAs"), and serve as the general counsel of each. The memorandum included a chart with three sections listing pending legal matters, items to be completed in connection with Lykos taking over as CCO, and on-going compliance obligations for which Lykos would be responsible. In a section titled "compliance transition," the chart provided that Lykos would continue to work with Sanders's outgoing CCO to get a "full download" of the firm's compliance files and checklists, and that Lykos would take the general securities principal qualification examination "at some point."

Sanders structured its business by assigning to the CCO ultimate responsibility for compliance at the firm, and Lykos was thus required under FINRA rules to register as a general securities principal.<sup>3</sup> Ball testified that, before he hired Lykos, he told him that he expected him to register as a general securities principal within the first four months of his employment.

#### C. Lykos Fails the General Securities Principal Examination in April 2018

Ball testified that after giving Lykos some time to "settle into" his new position, he prompted Lykos to take the general securities principal examination. Lykos registered to take the examination in April 2018.<sup>4</sup>

On April 2, 2018, Lykos received a confirmation email for his scheduled examination. The email explained that during check-in and return from any breaks, test center staff would "inspect any and all eyeglasses, jewelry and other accessories to look for camera devices that could be used to capture exam content." The email further directed that Lykos "refrain from" wearing various accessories, including cuff links. The email referenced FINRA's Rules of Conduct and provided a website link to the complete rules. The email stated that:

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<sup>3</sup> The General Securities Principal Qualification Exam, also known as the Series 24, "assesses the competency of an entry-level principal to perform their job as a principal" and "measures the degree to which each candidate possesses the knowledge needed to perform the critical functions of a principal, including the rules and statutory provisions applicable to the supervisory management of a general securities broker-dealer." See <https://www.finra.org/registration-exams-ce/qualification-exams/series24> (last visited Dec. 14, 2021).

<sup>4</sup> CRD reflects that in November 2017, around the time Lykos was negotiating employment with Sanders, he opened a window to take the general securities principal examination on February 15, 2018. Lykos did not take the test and the window to do so expired on March 28, 2018.

FINRA requires that all candidates attest to the FINRA Rules of Conduct, which prohibit assistance on a test, the use of study materials and misconduct at any time during the testing event. The FINRA Rules of Conduct strictly prohibits cellular phones, hand-held computers or any other devices, electronic or otherwise, including wrist watches, to be taken into the testing room or used during the qualification examination and/or restroom breaks. If you violate any of these rules, you will be advised of the violation and the test center administrators will report the violation to FINRA. Any violation of the FINRA Rules of Conduct will subject you to possible disciplinary action by FINRA, another self-regulatory organization, or the Securities and Exchange Commission.

Lykos received a second confirmation email on April 6, 2018, that contained the same information.

Lykos took the general securities principal examination on April 9, 2018. In accordance with the rules prohibiting cuff links and unscheduled breaks for anything other than restroom use, Lykos wore a sweatshirt to the exam and did not take a break during the test. Before beginning the test, Lykos agreed to follow each Rule of Conduct by clicking “agree” on the test screen. The rules which Lykos agreed to follow included that: (1) he would not use any devices, notes, or study materials during the examination; (2) he understood unscheduled breaks were for restroom use only and that he would not leave the building during the examination; (3) he would not receive any assistance during the examination; and (4) he would “not remove or attempt to remove, whether through physical means, a recording device or otherwise, any written, printed, electronic or recorded materials” from the test center. Lykos also acknowledged that he had reviewed all the Rules of Conduct and that he understood any violation of the rules or suspicion of cheating would be reported to FINRA and could result in him being barred from employment in the financial services industry.

Lykos failed the April test. As a result, Sanders removed him as CCO. Ball told Lykos he needed to obtain the general securities principal license and resume his duties as CCO as soon as possible.

#### D. Lykos Takes the General Securities Principal Examination in July 2018

Lykos registered to retake the general securities principal examination on July 20, 2018. Prior to the test date, Lykos received two confirmation emails containing the same instructions as those he received before the April exam. The emails explained to Lykos that he would be inspected when checking in for the test and when returning from any breaks, and instructed him to refrain from wearing certain accessories, including cuff links. Like the earlier emails, these emails also contained the statement about FINRA’s Rules of Conduct and contained a link to the full rules.

1. Lykos Arrives for the Examination

On July 20, 2018, Lykos arrived at the Prometric Test Center (“Prometric”) in Houston at approximately 10:07 a.m., and signed in at 10:25 a.m.<sup>5</sup> A video recording provided by Prometric shows that Lykos arrived wearing a jacket and a shirt with cufflinks. At a primary check-in desk, a proctor told Lykos that he must put all personal items in a locker, which he could not access during the exam. At a secondary check-in desk, the proctor gave Lykos a calculator, two dry erase boards, and two dry erase pens for use during the test. Lykos can be seen on the video testing one of the dry erase pens and asking the proctor if the pens work. The proctor told Lykos that if he needed anything during the exam, he should raise his hand.

The proctor next examined Lykos. She looked at his eyeglasses and asked Lykos to turn out all his pockets. She also asked Lykos to raise his pants so she could see his legs, looked at Lykos’s hands and wrists, and scanned him with a metal detecting wand. During this process, the proctor did not ask to see Lykos’s arms above his wrist. Other than the materials provided by Prometric, the only item Lykos brought into the testing room was his driver’s license.

Upon arriving at his workstation, Lykos placed his driver’s license on his desk and spent about five minutes taking notes on a dry erase board with one of the dry erase pens. Next, Lykos completed the computer orientation, which included information about a computer calculator and notepad function that Lykos could use to take notes as an alternative to the dry erase board. Lykos then reviewed and agreed to the FINRA Rules of Conduct by checking a box. By doing so, Lykos acknowledged and agreed to the following rules:

- I understand and acknowledge that unscheduled breaks are permitted only for restroom use. If I take an unscheduled break during my session, I will not access my locker or leave the building . . . Repeated or lengthy departures from the test room for unscheduled breaks will be reported to FINRA for investigation.
- I will not receive or attempt to receive assistance related to the examination . . . from any person for the duration of my session.
- I acknowledge that [the] examination [is] the property of FINRA and/or the organization(s) that developed the materials. I will maintain the confidentiality of these materials, including the questions and my answers to the questions.
- I will not remove or attempt to remove, whether through physical means, a recording device or otherwise, any written, printed, electronic or recorded materials from the Test

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<sup>5</sup> The record contains video from the test center, including from the reception areas, Lykos’s workstation, and neighboring workstations. Portions of the video also contain audio. The time stamp of the video is displayed in Eastern Time even though Houston is in the Central Time Zone. Accordingly, the correct time is one hour earlier than the time reflected in the video.

Center (“Test Center Materials”) other than the score report provided by the Test Center Staff.

- If I do not follow these rules or I am suspected of cheating or tampering with the score report, the incident will be reported to FINRA and will subject me to possible disciplinary action by FINRA, another self-regulatory organization, the Securities and Exchange Commission, or any other regulator (government or private) that has jurisdiction over my activities and could result in my being barred from employment/association within the financial services industry and forfeiture of my session results.
- I understand that I will be monitored at all times during the session to ensure that strict adherence to security measures is maintained by all persons. Monitoring may include audio and video recording.

Over the course of the morning, Lykos periodically wrote additional notes on the dry erase boards with the dry erase pen. During the morning, Lykos also began writing on his driver’s license with the dry erase pen. At one point, the video shows Lykos looking at his computer screen, writing on his driver’s license, and then flipping the driver’s license over when two individuals walk by. Lykos acknowledged during his testimony that he wrote on his driver’s license multiple times.

At approximately 11:40 a.m., Lykos pulled up his shirtsleeve, made a mark on his left wrist, and then rubbed it off. Lykos then looked around the test room, wrote on his left thumb, and rubbed off the writing. Lykos then wrote between the fingers of his left hand. Lykos acknowledged during his testimony that he wrote on his fingers during the examination.

## 2. Lykos Takes an Unscheduled Break

At approximately 12:00 p.m., Lykos put his driver’s license in his pocket, got up from his workstation, and exited the testing room. The proctor asked to see Lykos’s identification as part of the check-out process, and Lykos responded that he left his driver’s license at his workstation. Lykos returned to his workstation, ostensibly to retrieve his driver’s license, but instead removed the license from his jacket pocket, before reaching his desk, and then licked and rubbed it to remove the writing on it. Lykos then proceeded to the next test question on his computer screen, after which he left the testing room a second time.

Lykos signed out at 12:05 and left the test center. Throughout the check-out process, Lykos kept his left hand in his pocket. Lykos returned to the test center and signed back in at 12:28. During his approximately 24-minute unscheduled break, Lykos’s activities outside the test center were not monitored by video or test center staff.

## 3. Lykos Gives Contradictory Accounts of His Activities During the Break

Lykos testified that he took a break because he was experiencing pain and side effects from medication he had taken for a recent dental surgery. Lykos testified that, during the break,

he visited a bank office in the same building as Prometric, where he knew a bank teller. He said that he asked the bank teller if he could use her office, where he said he rested for approximately 15 minutes and took another painkiller that he had in his pocket.<sup>6</sup> Lykos testified that he did not take any notes while in the bank office and did not access any information about the examination he was taking.

Lykos testified that after resting, he left to walk back to the test center. On the way, Lykos claimed, he passed the desk for the building's leasing office. Lykos testified that he picked up a card from the leasing agent because he knew two people who were looking for office space. Lykos denied that he wrote anything on the business card.

Lykos's testimony on this subject at the hearing contradicted his previous on-the-record ("OTR") testimony. At the OTR, Lykos testified that he "may have made notes on a business card" related to the test while he was in the bank office. Lykos also testified that he could not remember specifically what he wrote, but that he recalled using "an engraving pen" while sitting at the bank teller's desk. Lykos offered to return to the bank to get a similar pen because "[s]he probably has a ton of them."

At the hearing, Lykos claimed that his prior OTR testimony differed because he "went back and retraced [his] steps[.]" Lykos testified "the more I think about it, the more I think I did not sit down and make notes at that point in time." Lykos did not notify FINRA that his OTR testimony was inaccurate until the hearing.

#### 4. Lykos Returns from His Unscheduled Break

Upon returning from his unscheduled break, the proctor at the secondary reception desk examined Lykos. She checked Lykos's eyeglasses, asked him to empty his pockets, and scanned him with a wand. The proctor noticed a business card in Lykos's pocket. Lykos tore the card in half and threw it in a trash can.<sup>7</sup> The proctor also checked Lykos's hands and wrists. The Proctor did not look at Lykos's arms above his wrist, and Lykos kept his fingers closed, concealing the area between his fingers.

Lykos returned to his workstation at approximately 12:31 p.m. He answered one new question—the question to which he had advanced after returning to his workstation before the break ostensibly to retrieve his driver's license.<sup>8</sup> Lykos then spent approximately 14 minutes

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<sup>6</sup> Lykos acknowledges that keeping the painkiller in his pocket violated the rules, which required him to keep medication and anything else he needed to access during the exam on top of the lockers in Prometric's reception area.

<sup>7</sup> Test center staff did not retrieve the business card from the trash. During FINRA's investigation, a Prometric account manager told FINRA that the proctor did not recall seeing handwriting on the business card.

<sup>8</sup> Lykos answered this question wrong.

reviewing questions he had answered previously. During this review, Lykos changed two answers—one from a wrong answer to the correct answer and another from a wrong answer to another wrong answer. This was the only time during the exam that Lykos reviewed questions he had answered previously, and the only time he changed his answers.

After returning from the break, Lykos looked at his fingers and then licked and rubbed them. Lykos then resumed writing on his fingers after viewing questions and also removed the cufflink from his left sleeve to write on his left forearm. After writing on his arm, Lykos pulled his shirt back down.

At approximately 12:50 p.m., Lykos looked around the room before leaning forward to write on his arm. Lykos then looked up directly at the camera monitoring his workstation, stopped writing on his arm, and started writing on the white boards provided by the test center. This was the first time Lykos looked directly at the camera. After that, Lykos no longer wrote on his body.

At the hearing, Lykos claimed that he struggled to use the dry erase pens because the pens were dry and did not have a fine tip and, for this reason, he wrote on his driver's license and hands.

#### 5. Lykos Checks Out and the Proctor Notices Writing on His Hands

Shortly before completing the test, Lykos fastened the cufflink on his left sleeve. Lykos completed the test with a passing score and then left the testing room without cleaning the writing on his forearm or between his fingers.

During checkout, the proctor noticed writing on Lykos's hands and asked to see his hands. Lykos objected, telling the proctor, "I do not have writing on my hands," and blamed the pens for being "dry." When the proctor asked Lykos to hold out his hands so that she could photograph them, Lykos began licking and rubbing his fingers. The proctor told Lykos to stop and gestured to the video camera, reminding Lykos that everything was being recorded. Lykos then allowed her to photograph his hands. The proctor did not photograph the writing on Lykos's left forearm because she did not know about the writing above his shirt cuff.

Lykos asked the proctor, "are you going to say I cheated?" The proctor responded that she had to report the writing on his hand. Lykos continued to object, saying the pens "were leaking all over the place." Lykos asked the proctor "what happens now?" and the proctor responded that she would report the incident, the video footage throughout the test center would be examined, and a FINRA representative would contact him. Lykos was incredulous, asking "you're kidding?" and asking the proctor not to report what happened, telling her his job "depends on this." The proctor responded that it was her job to make the report and she had no choice.



## II. Procedural History

### A. The Complaint

On September 17, 2019, the Department of Enforcement (“Enforcement”) filed a single-cause complaint against Lykos alleging that he cheated while taking the general securities principal qualification exam. Specifically, Enforcement alleged that Lykos violated FINRA’s Rules of Conduct by writing on his hands and his driver’s license while taking the test and by taking an extended unscheduled break. Enforcement further alleged that, after this break, Lykos attempted to bring into the test center a business card on which he had written notes, and that after returning to the testing room, Lykos reviewed questions he had previously answered and changed his answers to two questions. Enforcement alleged that Lykos’s conduct violated NASD Rule 1080 and FINRA Rule 2010.

The Hearing Panel held a two-day hearing in January 2020, during which Lykos and four other witnesses testified. The Hearing Panel issued its decision on May 1, 2020, finding that Lykos violated NASD Rule 1080 and FINRA Rule 2010 by cheating on the test and violating the Rules of Conduct. For these violations, the Hearing Panel imposed a bar.

This appeal followed.

## III. Discussion

### A. The Hearing Panel’s Credibility Findings Are Supported by the Record

The Hearing Panel made several key credibility findings, rejecting Lykos’s explanations for his behavior during the exam. While we conduct a *de novo* review of the Hearing Panel’s decision, we give substantial weight and deference to the Hearing Panel’s credibility findings. *See Eliezer Gurfel*, 54 S.E.C. 56, 62 n.11 (1999), *aff’d*, 205 F.3d 400 (D.C. Cir. 2000). It is well settled that the “credibility determinations of an initial fact-finder, which are based on hearing the witnesses’ testimony and observing their demeanor, are entitled to considerable weight and deference, and can be overcome only where the record contains substantial evidence for doing so.” *Dep’t of Enf’t v. Luo*, Complaint No. 2011026346206, 2017 FINRA Discip. LEXIS 4, at \*14 (FINRA NAC Jan. 13, 2017), *quoting*, *John Montelbano*, 56 S.E.C. 76, 89 (2003). We find the record does not contain substantial evidence to warrant overturning the Hearing Panel’s credibility determinations.

The Hearing Panel found not credible Lykos’s testimony that he wrote on his driver’s license and hands because the pens were dry and did not have a fine tip. The record amply supports the Hearing Panel’s credibility finding. Immediately upon arriving at his workstation, Lykos used the pen to take notes on the dry erase board for approximately five minutes without any apparent problem. He continued to use the pen throughout the exam and never appeared to use the second pen he was given. Moreover, Lykos never asked the proctor for new pens, despite being told he could raise his hand if he needed anything, and he did not use the notepad function on the computer to take notes. The video shows that a proctor walked through the testing room more than 20 times while Lykos was taking the exam. Lykos never asked for

another pen while taking the test or when he was leaving for or returning from his break. Indeed, Lykos made no mention of any problem with the pens until the proctor noticed the writing on his hands, when he claimed the pens were both “dry” and also “leaking like crazy.”

The Hearing Panel also found not credible Lykos’s claim that he was only writing letters to eliminate answers to the multiple-choice questions. As the Hearing Panel noted, the video shows more extensive writing than only letters, and the photographs taken of Lykos’s hands show more than just letters written between his fingers. Additionally, the actions Lykos took to conceal the writing contradict his claims that he was not writing on his license and hands, but just making “markings” to eliminate answers. Lykos wrote between the fingers of his left hand where the writing would be harder to detect, and kept his left hand in his pocket while checking out for his break. When the proctor asked to see his driver’s license during check-out, Lykos pretended he had left it at his workstation so that he could go back and clean the writing on it. Lykos leaned forward when writing on his license and hand to conceal what he was doing, flipped his license over to hide the writing when two individuals approached his workstation, and only wrote on his license or hand when the proctor was not in the room. At his workstation, Lykos covered his left hand or put it in his lap to conceal the writing and, during the latter part of the test, wrote on his forearm in an area the proctors had not looked at during his previous check-in and check-out. Finally, when Lykos noticed the camera, he stopped writing on anything other than the white boards. As the Hearing Panel found, Lykos’s actions are consistent with his “consciousness of guilt,” and fully support the Hearing Panel’s credibility finding.

B. Lykos Cheated and Violated FINRA’s Rules on Conduct Applicable to Qualification Examinations

We affirm the Hearing Panel’s findings that Lykos violated NASD Rule 1080 and FINRA Rule 2010.

NASD Rule 1080 provides:

NASD considers all of its Qualification Examinations to be highly confidential. The removal from an examination center, reproduction, disclosure, receipt from or passing to any person, or use for study purposes of any portion of such Qualification Examination, whether of a present or past series, or any other use which would compromise the effectiveness of the Examinations and the use in any manner and at any time of the questions or answers to the Examinations are prohibited and are deemed to be a violation of Rule 2110. An applicant cannot receive assistance while taking the examination. Each applicant shall certify to the Board that no assistance was given to or received by him during the examination.<sup>9</sup>

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<sup>9</sup> NASD Rule 1080 was superseded by FINRA Rule 1210.05, effective October 1, 2018. *See Notice of Filing of a Proposed Rule Change To Adopt Consolidated FINRA Registration*

FINRA Rule 2010 provides that “[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.”<sup>10</sup> FINRA Rule 2010 is a broad ethical rule that covers a wide range of unethical conduct, even if that conduct is not connected with a securities transaction. *See Dep’t of Enf’t v. Olson*, Complaint No. 2010023349601, 2014 FINRA Discip. LEXIS 7, at \*7 (FINRA Bd. of Governors May 9, 2014), *aff’d*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629 (Sept. 3, 2015); *see also Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (affirming the finding that an associated person violated just and equitable principles of trade by misappropriating funds from a political organization for which he served as the treasurer). Cheating or attempting to cheat on a qualification exam and failure to comply with the Rules of Conduct violate FINRA Rule 2010. *See Dep’t of Enf’t v. Shelley*, Complaint No. C3A050003, 2007 NASD Discip., LEXIS 8, at \*12 (NASD NAC Feb. 15, 2007)

1. Lykos Violated Multiple Rules of Conduct

It is largely undisputed that Lykos violated multiple Rules of Conduct. The Rules of Conduct allowed unscheduled breaks for bathroom use only. Lykos took a more than 20-minute unscheduled break, during which he admittedly left the test center premises and accessed the office of a bank teller he knew. Lykos wrote on his driver’s license, between the fingers on his left hand, and on his left forearm, and he left the test center with this writing on his fingers and forearm. Additionally, rather than keep the medication he claimed to have taken during the break on the lockers as instructed, Lykos testified that he had his medication in his pocket. Lykos’s actions subverted the integrity of the examination process and violated several Rules of Conduct.

2. Lykos Cheated on the Examination

Lykos’s primary argument on appeal is that Enforcement failed to prove he cheated because there is no direct evidence that he accessed outside information during the test. Lykos argues that anything he wrote on his license or body came from his own mind and he asserts that the Hearing Panel’s conclusion that he cheated is based on “inference and conjecture.” Lykos’s arguments have no merit.

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*Rules, Restructure and Representative Qualification Examination Program and Amend the Continuing Education Requirements*, SR-FINRA-2017-007, Exchange Act Release No. 80371, 2017 SEC LEXIS 1110 (Apr. 4, 2017). NASD Rule 1080 applies to Lykos’s conduct because it occurred before this date.

<sup>10</sup> FINRA Rule 0140 provides that all FINRA rules, including FINRA Rule 2010, also apply to persons associated with a member.

We have previously held that “circumstantial evidence may be probative, reliable, and sufficient to prove a violation” of FINRA rules. *Dep’t of Enf’t v. Braeger*, Complaint No. 2015045456401, 2019 FINRA Discip. LEXIS 55, at \*32 (FINRA NAC Dec. 16, 2019); *see also Dep’t of Enf’t v. Butler*, Complaint No. 2012032950101, 2015 FINRA Discip. LEXIS 35, at \*24-25 (FINRA NAC Sept. 25, 2015) (finding that circumstantial evidence was sufficient to prove respondent converted a customer’s funds), *aff’d*, 2016 SEC LEXIS 1989 (June 2, 2016).

We have also found circumstantial evidence sufficient to prove cheating on a qualification exam. *See Shelley*, 2007 NASD Discip. LEXIS 8, at \*12-14 (finding that where respondent put study materials in the restroom, entered the restroom during a break, and a test center employee subsequently discovered the materials the “documentary, testimonial, and circumstantial evidence” supported the conclusion that respondent cheated). Indeed, cheating often involves concealment, which makes direct evidence difficult to obtain. *See, e.g., id.* at \*12-14 (finding that respondent cheated despite the lack of direct evidence that he accessed study materials during a break); *DBCC v. Harris*, Complaint No. C10960149, 1998 NASD Discip. LEXIS 56, at \*12-13 (NASD NAC Dec. 22, 1998) (finding, based on circumstantial evidence, that respondent violated the Rules of Conduct by removing scratch paper from the test center).

We agree with the Hearing Panel that there is compelling circumstantial evidence that Lykos cheated by receiving assistance on the exam during his unscheduled break. Lykos had a motive to cheat because passing the qualification examination was a prerequisite to keeping his job as Sanders’s CCO. Indeed, when he failed the test in February 2018, Sanders removed him as CCO until Lykos could retake it. Lykos testified that failing the test was embarrassing for him and he apologized to Ball for it.<sup>11</sup>

Lykos’s conduct during the examination establishes, by a preponderance of the evidence, that he cheated. While viewing test material on the computer, Lykos wrote on his driver’s license and between the fingers of his left hand. Lykos then tried to leave the test room, but had to return to his workstation to rub the writing off his license when the proctor asked for his identification in order to check out. Lykos was able, however, to leave the test center with writing between his fingers because he concealed it by keeping his hand in his pocket during the checkout process. Lykos then went to a bank where he knew a teller and asked to use her office—an area unmonitored by test center staff or cameras. Lykos attempted to come into the test center with a business card and tore it in half and discarded it when the proctor noticed it during check in. The evidence shows that Lykos had writing between his fingers when he reentered the test room after this break. Upon returning from the break, Lykos spent

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<sup>11</sup> Lykos argued that he did not have a motive to cheat because Ball made statements to him about having “three strikes” and he believed if he failed, he could take the test again the following month. Lykos also argued that even if he did not pass the test, he could have remained with Sanders as a general counsel. We are unpersuaded by these arguments. Ball testified that 90 percent of Lykos’s responsibilities were as Sanders’s CCO, and that he told Lykos he expected him to pass the test within four months from his start date. The record demonstrates that Lykos was under significant pressure to pass the test and, accordingly, had a motive to cheat.

approximately 14 minutes reviewing questions he had already answered and changed his answers to two questions, the only time during the exam that he changed an answer. These facts provide sufficient circumstantial evidence that Lykos cheated by receiving some form of assistance during his unscheduled break.

In arguing that there is insufficient evidence that he cheated, Lykos points out that one of the answers he changed after the break was still wrong, and that the majority of the new questions he answered after the break were also wrong. That Lykos may have cheated unsuccessfully, however, does not negate the abundant evidence that he cheated, nor does it excuse his misconduct. *See e.g., Dep't of Enf't. v. Rubino*, Complaint No. 2008014873201, 2010 FINRA Discip. LEXIS 36, at \*8 (FINRA OHO June 15, 2010) (explaining that the fact that the respondent's attempt to cheat was unsuccessful does not excuse his conduct). Moreover, whether he gave wrong answers to questions he had not viewed before his break is immaterial to whether he cheated.<sup>12</sup>

We find that Lykos cheated on the Series 24 exam and violated the Rules on Conduct, in violations of NASD Rule 1080 and FINRA Rule 2010.<sup>13</sup>

#### IV. Sanctions

In determining the appropriate sanctions, we consider FINRA's Sanction Guidelines ("Guidelines"), including the General Principles Applicable to All Sanction Determinations (the "General Principles") and the Principal Considerations in Determining Sanctions (the "Principal Considerations").<sup>14</sup> We agree with the Hearing Panel that a bar is the appropriate sanction for Lykos's violations.<sup>15</sup>

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<sup>12</sup> Lykos also argues that when an adjudicator relies on circumstantial evidence, and particularly where the sanction imposed is a bar, the applicable standard of proof is clear and convincing evidence. Lykos is mistaken. It is well settled that the standard of proof applicable to FINRA disciplinary proceedings is the preponderance of the evidence, regardless of whether the violation is proved by direct or circumstantial evidence or whether a bar is sought. *See DBCC v. Bruno*, Complaint No. C10970007, 1998 NASD Discip LEXIS 51, at \*8-11 (NASD NAC July 8, 1998).

<sup>13</sup> In his appeal brief, Lykos argues that he was denied "substantive due process." It is well-established, however, that FINRA disciplinary proceedings are not subject to the Constitution's due process requirements. *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at \*51 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010). The Exchange Act requires instead that FINRA provide fair procedures for disciplining its members and their associated persons. 15 U.S.C. § 78o-3(b)(8). We find that Lykos was provided with fair procedures in this case.

<sup>14</sup> *See FINRA Sanction Guidelines* (2020), [https://www.finra.org/sites/default/files/Sanctions\\_Guidelines.pdf](https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf) [hereinafter "Guidelines"]. We apply the Guidelines in effect at the time of the NAC's decision.

The Guidelines for cheating on a qualification examination provide that a bar is standard.<sup>16</sup> The Guidelines direct us to consider whether the nature of the misconduct makes it clear that the respondent did not intend to cheat, and in that case recommends a lesser sanction.<sup>17</sup> As discussed above, the record demonstrates that Lykos intended to cheat, and accordingly, this consideration is not mitigating.<sup>18</sup>

Several aggravating factors apply to Lykos's misconduct. Lykos tried to conceal his misconduct by writing between his fingers and on his forearm, an area he knew test center employees would not look.<sup>19</sup> Lykos wrote on his driver's license and hand when proctors were not in the testing room and concealed the writing by flipping over his license and keeping his hand out of sight. Lykos wore a shirt with cufflinks, contrary to the instructions he received from FINRA prior to the exam, which helped him conceal the writing on his left forearm. Lykos licked and rubbed his driver's license clean before leaving for his break. When a proctor noticed the writing on his fingers, Lykos licked and rubbed his fingers to remove the writing before she could photograph his hands, thereby attempting to thwart the test center's investigation of his conduct. Most importantly, Lykos also took an extended break in an area where he was unmonitored by test center employees or cameras, from which he returned with unauthorized material—a business card—which he tore up and disposed of when it discovered by test center employees.

Lykos engaged in violations of the Rules of Conduct, including the prohibition on taking a break for any purpose other than using the bathroom, despite multiple reminders about the rules

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[cont'd]

<sup>15</sup> The Hearing Panel imposed a unitary sanction for Lykos's violations of NASD Rule 1080 and FINRA Rule 2010. Imposition of a unitary sanction is appropriate here because Lykos's violations arose out of the same facts and course of conduct. *See Dep't of Enf't v. Milberger*, Complaint No. 2015047303901, 2020 FINRA Discip. LEXIS 24, at \*19 (FINRA NAC Mar. 27, 2020).

<sup>16</sup> Guidelines, at 40.

<sup>17</sup> *Id.*

<sup>18</sup> Lykos points to his background and argues that he has an unblemished disciplinary history. We have repeatedly held, however, that a lack of prior disciplinary history is not mitigating. *See, e.g., Dep't of Enf't v. Corvallis*, Complaint No. 2015046759201, 2019 FINRA Discip. LEXIS 2, at \*25 (FINRA NAC Jan. 8, 2019) (finding that it was not mitigating that the respondents had no disciplinary history or customer complaints over a 25-year career.)

<sup>19</sup> *Id.* at 7 (Principal Consideration No. 10).

from FINRA.<sup>20</sup> Lykos received two emails prior to both the April and July exams, which provided him with links to the Rules of Conduct and warned him that failing to follow the rules could result in disciplinary action by FINRA. Before he started the exam, Lykos completed a computer orientation which reviewed each rule and required Lykos to agree to each by checking a box.

Lykos's violations were intentional and Lykos has not acknowledged or accepted responsibility for his misconduct.<sup>21</sup> To the contrary, as the Hearing Panel notes, Lykos "persisted at the hearing in characterizing his conduct in ways that directly contradicted the video footage." For example, Lykos testified that he returned to his workstation before his break because he thought he had forgotten his driver's license at his desk. The video, however, shows Lykos removing the license from his pocket before even reaching his desk, where he licked and rubbed it clean. Contrary to Lykos's claims at the hearing, the video demonstrates that he pretended to have left the driver's license at this desk so that he could remove the writing from it before showing it to the proctor.

We find it particularly troubling that Lykos cheated on the general securities principal exam for the purpose of being allowed to continue working as Sanders's CCO—a position in which he would be primarily responsible for compliance at the firm. The Commission has stated that FINRA's "examination process provides a basic protection for the investing public" ensuring the registered persons are "qualified to perform the functions they undertake on the public's behalf." *Shelley*, 2007 NASD Discip. LEXIS 8, at \*13, *citing*, *L.C. Thomas*, 49 S.E.C. 1052, 1054 (1989). Given the importance of the examination process, cheating is grave unethical misconduct that demonstrates Lykos's unfitness to remain in the securities industry. *See Hugh M. Casper*, 42 S.E.C. 471, 473 (1964) (explaining that cheating on a qualification examination is "so grave" that the Commission would not find a bar excessive or oppressive "unless the more extraordinary mitigating facts were shown"); *see also See Ronald H.V. Justiss*, 52 S.E.C. 746, 750 (1996) (stating that cheating "flouts the ethical standards to which members of this industry must adhere . . . and cannot be countenanced"). Accordingly, we find that a bar is an appropriately remedial sanction for Lykos's violations.

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<sup>20</sup> *Id.* at 8 (Principal Consideration No. 14).

<sup>21</sup> *Id.* at 7-8 (Principal Consideration Nos. 2, 13).

V. Conclusion

Lykos violated NASD Rule 1080 and FINRA Rule 2010 by engaging in unethical conduct during a general securities principal qualification examination. For these violations, Lykos is barred in all capacities.<sup>22</sup> We also affirm the Hearing Panel's order that Lykos pay \$5,110.44 in hearing costs, and we order that he pay appeal costs in the amount of \$1,496.79.

On Behalf of the National Adjudicatory Council,

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Jennifer Piorko Mitchell,  
Vice President and Deputy Corporate Secretary

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<sup>22</sup> The bar will be effective immediately upon issuance of this decision.