

CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 30735

This is a summary of a decision issued following the October 2017 hearings of the Disciplinary and Ethics Commission (“Commission”) of Certified Financial Planner Board of Standards, Inc. (“CFP Board”).

I. Issues Presented

Whether a CFP® professional (“Respondent”) violated the terms of the *CFP® Exam Application*, *Vendor’s Testing Center Regulations*, and CFP Board’s Non-Disclosure Agreement (“NDA”) by engaging in exam misconduct or other testing irregularity that could compromise the integrity of the exam, including when he: (a) denied that he had removed a sheet of the scratch paper from the scratch booklet; (b) failed to return the scratch paper to the TCA when requested; and (c) concealed and removed the scratch paper, with written examination information, from the Testing Center.

II. Findings of Fact Relevant to the Commission’s Decision

Testing Service (“Vendor”), administers the CFP® Exam on behalf of CFP Board. Vendor provides technology-enabled testing and assessment solutions. The CFP® Exam is a computerized test with multiple-choice questions.

When a candidate arrives at a Vendor testing center to take the CFP® Exam, he or she must check in at a reception desk and present a valid government-issued photo identification. The candidate is assigned a locker in which he or she may place personal effects. While in the reception area, the candidate is provided a laminated copy of *Vendor’s Testing Center Regulations*, which states, among other things, that “[c]ommunicating, publishing, reproducing, or transmitting any part of an examination, in any form or by any means (*e.g.*, verbal, electronic, written, etc.), for any purpose, is strictly prohibited.” The Testing Center Regulations further provides that “[a]ll materials issued by the TCA [Test Center Administrator] must be returned at the conclusion of testing. During the examination, candidates must return all used scratch paper to the TCA before new scratch paper is issued.”

The candidate is then escorted to a TCA, who has the candidate sign in for the CFP® Exam. The TCA also checks the candidate’s identification. Next, the TCA takes the candidate’s picture using an image capture machine and scans the candidate’s fingerprints using a biometric scanner. Finally, the TCA gives the candidate two pencils and a scratch paper booklet containing four sheets of paper to use during the exam. Candidates are prohibited from removing scratch paper from the Vendor Testing Center.

The CFP® Exam is composed of six parts with time restrictions: (a) five minutes to read and agree to CFP Board’s NDA; (b) a 10-minute tutorial; (c) three hours for Session 1; (d) a 40-minute break; (e) three hours for Session 2; and (f) a four-minute survey.

By agreeing to the terms of the NDA, candidates agree to behave ethically before, during, and after the exam and acknowledge, among other things, that they understand and agree that:

- A. The contents of the exam are the property of CFP Board and its contents are copyrighted under the laws of the United States;
- B. Copying, reproducing, or distributing the contents of this exam in any form is unlawful;
- C. Revealing the contents of the questions of this exam is strictly prohibited;
- D. They have not and will not retain the exam questions or disclose them in whole or in part to any other person or entity;

- E. Their exam may not be scored, the exam fee may be forfeited, and they may be barred from taking the CFP® Exam for three years if CFP Board or Vendor have reason to believe that they are involved in exam misconduct or any other testing irregularity that could compromise the integrity of the exam; and
- F. Failure to abide by the NDA's terms and conditions can and will result in the cancellation of their exam score and/or the pursuit of any other legal remedies available to CFP Board.

In the event of any irregularities in the process, the TCA is required to file a Center Problem Report. If possible, a TCA should have another TCA observe the event.

First CFP® Exam

Respondent registered to take the CFP® examination. According to the normal procedure for registering for the CFP® exam, Respondent acknowledged and agreed to the terms in the *CFP® Exam Acknowledgement*, including the provision regarding the consequences of any examination misconduct or testing irregularity. Prior to taking the examination, Respondent was required to review Vendor's *Testing Center Regulations* and to acknowledge and agree to CFP Board's *NDA*. Both documents outlined prohibited exam conduct and informed him about the potential consequences of exam misconduct. Respondent failed the examination.

Second CFP® Exam

Respondent registered to take the CFP® Exam a second time. According to the normal procedure for registering for the CFP® exam, Respondent acknowledged and agreed to the terms in the *CFP® Exam Acknowledgement*, including the provision regarding the consequences of any examination misconduct or testing irregularity.

At approximately 8:15 a.m. on exam day, Respondent arrived at Vendor Testing Center Location. He checked in at the reception desk, put his personal effects in his assigned locker, and read the *Testing Center Regulations*, which identified prohibited exam conduct. Later, Respondent was escorted to the TCA at the Administrator's Desk where he checked in using his driver's license as identification. The TCA took Respondent's picture and set him up to scan his fingerprint. While scanning his fingerprint, the TCA counted the pages of scratch paper in the booklet that Respondent was to use for the examination. Typically, each booklet contains four sheets of paper. The TCA counted a total of four sheets of paper in the booklet and gave it to Respondent along with two pencils. After Respondent's fingerprint was scanned, the TCA escorted Respondent to his seat to begin the CFP® exam. At approximately 8:18 a.m., Respondent read and electronically agreed to abide by the terms of the *NDA*.

Respondent took a break from approximately 10:40 a.m. to 11:12 a.m. and returned to the test. At approximately 11:42 a.m., Respondent ripped a sheet of paper from the scratch paper booklet and continued with the test. Between approximately 11:42 a.m. and 1:29 p.m., Respondent folded the paper three times: 11:47 a.m., 12:44 p.m., and 1:13 p.m. At some point after this, Respondent apparently placed the folded sheet of paper underneath the remaining three sheets of paper. At approximately 1:29 p.m., Respondent slid the three intact sheets of paper with the folded scratch paper underneath to the edge of his exam cubicle desk and lifted it slightly to pull the folded sheet of paper out from under the intact sheets of paper. Respondent then took the paper into his lap and while the folded paper was partially under the desk, Respondent proceeded to place the folded sheet of paper up his left shirt sleeve. Notably, while placing the sheet of folded paper up his left shirt sleeve, Respondent appeared to be looking down directly at his sleeve. Almost immediately after placing the folded sheet of paper up his left shirt sleeve, Respondent gathered up the remaining three intact sheets of paper and his calculator and began to leave his exam cubicle. Respondent testified that he believed the folded sheet of paper was in his back pocket when he walked out of the "room." Respondent also testified that he did not feel the folded sheet of paper in his sleeve when he sat down at the check-in desk after the TCA asked him to close out his exam.

At approximately 1:30 p.m., after completing his examination, Respondent carried the three intact sheets of paper to the check-out desk and placed them on the check-out desk. The TCA retrieved them from the check-out desk

and placed them next to the keyboard on the desk. At the same time, the TCA asked Respondent to produce his ID. Respondent stood up and, using both hands, reached for both back pockets and eventually produced his ID from what appeared to be his right back pocket. Respondent then signed out of the exam on a piece of paper while holding his ID in his left hand. The TCA then discovered that Respondent's exam was not showing as completed because he had not closed it out prior to going to the check-out desk. The TCA asked Respondent to return to the Testing Lab to close out his exam so that a score report could be printed. While walking back to his exam cubicle, Respondent placed his ID in his right back pants pocket. In doing so, Respondent placed almost his entire right hand in his back right pocket.

While Respondent was away from the check-out desk, the TCA counted the sheets of scratch paper in the booklet and discovered that it contained only three sheets. Upon Respondent's return to the check-out desk, the TCA asked Respondent about the missing sheet of scratch paper. Respondent claimed that the booklet he received contained only three sheets of scratch paper. The TCA looked at the booklet and said, "It was not supposed to be like this." Respondent replied, "It was attached. It wasn't like this when I gave it to you. There were staples in the bottom of it." The TCA confirmed with another TCA at the Administrator's Desk that scratch paper booklets generally contain four sheets of scratch paper. The TCA then informed Respondent that due to the testing irregularity, she would have to file a Center Problem Report about the incident and the ensuing investigation would involve a review of the video recording of his test period. At approximately 1:35 p.m., Respondent retrieved his personal effects from the locker and left the testing center.

Post-Examination Procedures and Events

The TCA reviewed the video recording of Respondent's test period and confirmed that the TCA who checked him in had counted the scratch paper in Respondent's presence during the checking-in process. At approximately 10:23 a.m. on the day after the exam, Vendor sent a Security Center Problem Report Alert to CFP Board via email.

At approximately 3:28 p.m. Respondent called CFP Board to report that he had inadvertently taken home a scratch sheet of paper from the testing center. CFP Board asked Respondent to return the scratch sheet to the testing center, but Respondent declined because of the travel time to and from the testing center location. Respondent proposed that he scan the scratch paper and send it electronically to CFP Board. CFP Board agreed and asked Respondent to also send him the original scratch paper in the mail.

At approximately 5:34 p.m., CFP Board received via email from Respondent an electronic copy of the folded sheet of paper he took from the testing center. In the scan, the folded sheet of paper appears to be crumpled. In his email, Respondent stated that he mistakenly took home the scratch sheet of paper, but it did not contain any sensitive test information. He said that he had only used the paper to jot down a quick word to help keep him focused.

The next day, in response to Respondent's email, CFP Board requested a written account of the event from Respondent. Respondent sent his response to CFP Board's request that same day. In his response Respondent wrote, "It helps with testing when my hands are occupied, such as repeatedly folding a piece of paper." Respondent added that when challenged with a test question, he often writes down one word to keep him focused on the subject matter.

CFP Board received an envelope from Respondent containing what he said was the original scratch sheet of paper. Respondent also included with the scratch sheet of paper a handwritten note in which he stated that he had mistakenly taken the paper home after the exam. On the scratch paper that Respondent sent to CFP Board, it appeared that he did not copy any questions or answers from the test. Instead, it appeared that Respondent listed various concepts covered on the CFP® Exam.

III. The Commission's Analysis and Conclusions

Respondent violated the terms of the *CFP® Exam Application*, *Vendor’s Testing Center Regulations*, and CFP Board’s NDA by engaging in exam misconduct or other testing irregularity that could compromise the integrity of the exam, including when he: (a) denied that he had removed a sheet of the scratch paper from the scratch booklet; (b) failed to return the scratch paper to the TCA when requested; and (c) concealed and removed the scratch paper, with written examination information, from the Testing Center.

The first issue addressed by the Commission was what constitutes “exam misconduct” or a “testing irregularity.” Neither the *CFP® Exam Application* nor the NDA define either term. Thus, the Commission looked elsewhere for indicia of what may constitute “exam misconduct” or a “testing irregularity.” In the *CFP® Exam Application*, it states that “[r]evealing questions” may result in disciplinary actions. Thus, it is likely that revealing exam questions would constitute “exam misconduct” or a “testing irregularity.” The NDA sheds further light on what may constitute “exam misconduct” or a “testing irregularity.” It states that a candidate agrees that:

1. Copying, reproducing, or distributing the contents of this exam in any form is unlawful;
2. Revealing the contents of the questions of this exam is strictly prohibited; and
3. The candidate has not and will not retain the exam questions or disclose them in whole or in part to any other person or entity.

All of these actions would clearly constitute “exam misconduct” or a “testing irregularity.”

Another source of guidance on what may constitute exam misconduct are *Vendor’s Testing Center Regulations*, which contain a lengthy list of actions a test taker is prohibited from undertaking, including the following:

1. Communicating, publishing, reproducing, or transmitting any part of an exam, in any form or by any means (e.g. verbal, electronic, written, etc.) for any purpose is strictly prohibited.
2. Weapons are not allowed in any Test Center.
3. Unauthorized personal items may not be brought into the test room. Such items include, but are not limited to: outerwear, hats, food, drinks, purses, briefcases, notebooks, pagers, watches, cell phones, recording devices and photographic equipment.
4. Written notes, published materials and other testing aids are strictly prohibited, except where allowed by your test sponsor. Test center staff will refer to the applicable Client Practices for allowances.
5. Only soft ear plugs (with no wires/cords attached) and center-supplied tissues are permitted in the test room.
6. Clothing or jewelry items allowed to be worn in the test room must continue to be worn at all times. Removed clothing or jewelry items must be stored in the locker provided during check-in.
7. All materials issued by the TCA must be returned at the conclusion of testing. Used scratch paper must be returned before new scratch paper will be issued by the TCA during your exam.
8. Talking to other candidates in the test room, referring to their screens, testing materials or written notes is strictly prohibited.

While not specifically referenced in the *CFP® Exam Application* or the NDA, these all appear to be instances of possible “exam misconduct.” It would be illogical to not consider the prohibitions in *Vendor’s Testing Center Regulations* to be examples of what constitutes “exam misconduct” or a “testing irregularity.” Thus, the Commission determined that violating any of *Vendor’s Testing Center Regulations* would constitute “exam misconduct” or a “testing irregularity.”

The next issue addressed by the Commission was whether the limiting phrase that appears after “testing irregularity in the *CFP® Exam Application* and the NDA – “that could compromise the integrity of the exam” – applies to “exam misconduct” and “testing irregularity.” Typically, a limiting clause or phrase should be read as modifying only the noun or phrase that it immediately follows. *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). In this situation, the application of the rule would mean that the phrase “that could compromise the integrity of the exam” would apply only to “testing irregularity.”

This rule is not absolute and can be overcome by other indicia of meaning. Here, the Commission determined that the interpretation urged by the rule of the last antecedent is not overcome by other indicia of meaning. The purpose of the phrase in the *CFP® Exam Application* and the NDA is to prohibit misconduct. In some instances, CFP Board and Vendor have gone to great lengths to define what a test taker can and cannot do. As detailed above, the procedures a candidate must go through to take the exam are detailed and extensive. It is logical that CFP Board and Vendor have determined and implemented the prohibitions because they have already decided those types of conduct would compromise the integrity of the exam.

CFP Board and Vendor appear to have realized that despite their painstaking exam procedures and efforts to define what an exam taker cannot do, they are not able to think of and address every possible type of misconduct that could occur during an exam. Thus, the need for the category “testing irregularity that could compromise the integrity of the exam.”

To override this decision and work by CFP Board and Vendor by applying the phrase “compromise the integrity of the exam” to “exam misconduct” would allow a candidate to violate a rule put in place for the CFP® Exam as long as a candidate could demonstrate the conduct did not “compromise the integrity of the exam.” This outcome would defeat the purpose of putting the prohibitions in place. Thus, the Commission determined that if a candidate engaged in “exam misconduct” CFP Board did not need to demonstrate that such conduct “could compromise the integrity of the exam” as it would be required to do so if it had alleged a “testing irregularity.”

This left as the final issue whether Respondent engaged in “exam misconduct” or a “testing irregularity that could compromise the integrity of the exam.” This issue is straightforward because Respondent violated, at minimum, item seven on Vendor’s list of prohibited actions when he removed scratch paper from the test center. This violation was further compounded by:

1. The fact that the scratch paper had information regarding the test written on it;
2. Respondent’s actions on the video clearly indicate that he attempted to conceal the scratch paper by:
 - a. Placing the folded sheet of paper underneath the remaining three sheets of paper and later sliding the three intact sheets of paper with the folded scratch paper underneath to the edge of his exam cubicle desk and lifting the papers slightly to pull the folded sheet of paper out from under the intact sheets of paper.
 - b. Taking the paper into his lap and partially under the desk where he proceeded to place the folded sheet of paper up his left shirt sleeve. Notably, while placing the sheet of folded paper up his left shirt sleeve, Respondent appeared to be looking down directly at his sleeve. Almost immediately after placing the folded sheet of paper up his left shirt sleeve, Respondent gathered up the remaining three intact sheets of paper and his calculator and began to leave his exam cubicle.
3. Respondent “played dumb” when confronted by the TCA about the missing scratch paper mere minutes after he placed the paper up his sleeve.

The Commission found it plausible that Respondent would fold a piece of paper and write down concepts to focus himself. The Commission did not find plausible Respondent’s claim that his actions in removing the folded sheet of paper from his desk cubicle and the test center were undertaken to help him focus on the exam.

Respondent claimed that he placed the folded piece of paper in his sleeve because he “wanted to do something with his hands” and “wanted to feel something pushing against [his] body that was slightly different.” Respondent further testified that his actions were “unconscious” and that he did it to “feel a little bit of physical stimulation” to help him focus. The problem with this explanation is that it is not consistent with the video evidence. The manner in which Respondent slid the three intact sheets of paper with the folded scratch paper underneath to the edge of his exam cubicle desk and lifted it slightly to pull the folded sheet of paper out from under the intact sheets of paper signals intentional action. If Respondent were engaged in innocent or innocuous conduct, there would have been no reason to retrieve the paper from his desk in that manner. Further, Respondent then placed the paper into his lap and partially under the desk where he proceeded to place the folded sheet of paper up his left shirt

sleeve. Notably, while placing the sheet of folded paper up his left shirt sleeve, Respondent appeared to be looking down directly at his sleeve. The fact that Respondent appeared to conceal the paper in his lap before placing the folded paper in his sleeve while looking directly at his sleeve, also indicates an intent to conceal his actions. Finally, the fact that Respondent almost immediately got up from his desk and began to check out calls into question his defense that he was unaware that the paper was on his person. It is also notable that despite Respondent's contention that he found the folded paper in his back pocket, Respondent can be seen digging into his back pockets on multiple occasions during his check out.

The Commission did not decide whether Respondent also engaged in a "testing irregularity that could compromise the integrity of the exam" because it deemed that question to be moot after it determined Respondent had engaged in "exam misconduct." Thus, Respondent violated the terms of the *CFP® Exam Acknowledgement* and CFP Board's *NDA*.

IV. Discipline Imposed

Pursuant to the terms of the *CFP® Exam Acknowledgement*, *Vendor's Testing Center Regulations*, and CFP Board's *NDA*, in the event that Respondent is involved in exam misconduct or any other testing irregularity that could compromise the integrity of the exam, CFP Board may: (a) not score the CFP® Exam, (b) determine that Respondent has forfeited the CFP® Exam fee, (c) impose a three-year bar on Respondent from taking the CFP® Exam; (d) impose a permanent bar on Respondent from taking the CFP® Exam; and/or (e) pursue any other legal remedies available to it against Respondent.

After careful consideration of the evidence in Respondent's matter, the Commission decided to impose a two-year ban on Respondent from taking the CFP® exam. The Commission arrived at this ban based on compelling testimony from CFP Board regarding the exam life cycle. Specifically, CFP Board administers three exams per year and that after a two-year period the likelihood of Respondent viewing the same material from the July 2017 exam on a future exam would be minimal due to CFP Board's item banking policies. CFP Board also argued that Respondent's conduct did not warrant more than a two-year ban and opined that a more severe sanction would be reserved for conduct involving a candidate using prior knowledge of material from the exam. CFP Board provided examples of such conduct including using electronic equipment to compromise the exam or where an individual relayed an entire set of questions to another individual or entity.

The Commission determined Respondent's conduct did not warrant a permanent bar from taking the exam, but rather warranted him waiting until the possibility that he would be able to use the information he removed from the exam center was mitigated.

The Commission considered several mitigating and aggravating factors but determined that none of the factors considered were of such weight that the Commission would cite them in the order.

The Commission directs Respondent and his counsel to return all copies of any written content relating in any way to this matter to CFP Board. Respondent and his counsel must also file an affidavit in which they affirm they have destroyed any and all electronic copies of any content relating in any way to this matter.