Re Dykeman

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Richard Dykeman

2017 IIROC 49

Investment Industry Regulatory Organization of Canada
Hearing Panel (Pacific District)

Hearing date: September 20, 2017
Decision: September 20, 2017
Reasons: October 26, 2017

Hearing Panel:
Stephen D. Gill, (Chair), Brian Field and Douglas Stewart
Appearances:
Stacey Robertson, IIROC Enforcement Counsel;
Paul J.B. Smith, IIROC Enforcement Counsel;
Owais Ahmed, Counsel for the Respondent

REASONS FOR DECISION

BACKGROUND

¶ 1 This Hearing Panel was constituted pursuant to the Rules of the Investment Industry Regulatory Organization of Canada ("IIROC") to accept or reject a Settlement Agreement negotiated by IIROC staff and the Respondent. The procedural rules for settlement hearings are set forth in IIROC Dealer Member Rule 8400. Rule 8403(1) provides:

> "The Rules of Procedure shall be interpreted and applied to secure a fair hearing and just determination of a proceeding on its merits and the most expeditious and least expensive conduct of the proceeding."

Rule 8428 sets forth the procedure for Settlement Hearings.

¶ 2 IIROC and the Respondent, Richard Dykeman, entered into a Settlement Agreement, an undated copy of which is attached hereto as Appendix "A".

¶ 3 In summary, the Respondent executed trades in a client account without the proper authorization from his client, and without the account being properly designated or approved as a discretionary account. At paragraph 24 of the Settlement Agreement, the Respondent admits to the following contravention of IIROC's Rules:

> From September, 2013 to June, 2015 the Respondent executed discretionary transactions in a client account contrary to IIROC Dealer Member Rule 1300.4.

¶ 4 Further, the Respondent agreed to the following sanctions and costs:

(a) A fine in the amount of $10,000; and

(b) $1,500 in costs.

¶ 5 The Respondent was first registered in the industry in 1983 and has been employed with PI Financial Corp. ("PI Financial") since March, 2002. The Panel was informed the Respondent is currently registered with IIROC as a Registered Representative and is working out of the Victoria office of PI Financial. He was at that location during the period from September, 2013 to June, 2015, the relevant period under review.

¶ 6 The circumstances are set out, in detail, in paragraphs 6 to 20 of the Settlement Agreement. The following is a brief summary.

¶ 7 The Respondent had known Client NS, and been his investment advisor for 25 years except for a brief period when the Respondent was not registered in the industry. NS was born in 1925 and was retired in the relevant period. He only had one RRIF account with the Respondent and the updated account information forms from 2009 disclosed a net worth of $600,000; annual income of $50,000; 80% medium risk tolerance and 20% high risk tolerance; and investment objectives with 10% short-term, 10% medium-term and 80% long-term.

¶ 8 NS had not authorized any PI Financial employee to use discretion in handling his account and that no one other than he had any authority over any financial interest in the account. Further, there is no written authorization from NS for the Respondent or his firm to have discretionary authority over his account.

¶ 9 In September, 2013 the Respondent was informed by NS's wife that NS had moved into a care home and that he was having issues with his health. Sometime after April, 2014 the Respondent was advised that NS was exhibiting some cognitive difficulties. No further particulars of the "cognitive difficulties" were provided.

¶ 10 In September, 2013 NS's account had an approximate market value of $110,000. From September, 2013 to June, 2015, 48 buy-and-sell orders were executed in NS's account. The account of NS was not designated as a discretionary account and did not comply with the requirements for discretionary accounts set out in Dealer Member Rule 1300.4. Further, the Respondent did not obtain specific instructions from NS regarding the security being bought or sold, the quantity, price or timing of the transaction prior to executing many of the orders in the account from September, 2013 to June, 2015. For some of the transactions during the relevant period, the Respondent obtained instructions from NS's wife. NS's wife did not have trading authority over NS's account and did not hold a power of attorney that would be applicable to NS's account. For some of the transactions during the relevant period, the Respondent would notify either NS or NS's wife after he had executed a transaction. Further, the Respondent did not keep detailed notes of his contact with either NS or NS's wife and cannot identify specific transactions which were conducted without full instructions from NS. Notes that the Respondent did keep indicate he spoke to NS's wife in relation to four of the transactions and that he may have spoken to NS in relation to six of the transactions. There were no notes for 38 of the transactions in NS's account during the relevant period.

¶ 11 The Panel acknowledges that the Settlement Agreement is a negotiated document and contains language chosen or accepted by both parties. The Settlement Agreement must contain sufficient information to support the reasonableness of the agreed upon penalty, and this negotiated Settlement Agreement complies with that requirement.

¶ 12 The Respondent has accepted full responsibility for his conduct in this matter. He admitted to PI Financial that he engaged in the misconduct described in the Settlement Agreement, and consequently the Respondent voluntarily agreed to the following internal sanction by PI Financial:

(a) The Respondent paid a $10,000 fine in the form of a charitable donation, and did not receive a tax receipt for the donation;

(b) The Respondent rewrote and passed the Conduct and Practice Handbook exam; and

(c) The Respondent has been under strict supervision at PI Financial from July, 2015 to date.

¶ 13 IIROC does not take any issue with the suitability of the discretionary transactions in the account of NS, and there was no financial loss. Further, the Respondent has no prior disciplinary record with IIROC.

¶ 14 In the Settlement Agreement, the Respondent agreed to the following sanction and costs:

(a) A fine in the amount of $10,000; and

(b) $1,500 in costs.

¶ 15 Counsel for IIROC referred the panel to the decision of *Re: Deutsche Bank Securities Ltd.*[1] In that case the Hearing Panel correctly articulated its duty upon a settlement hearing as follows:

> "9 It is clear from jurisprudence emanating from the courts and from Hearing Panels of IIROC, Investment Dealers Association and the Mutual Fund Dealers Association, that our task is not to decide whether, in this case, we would have arrived at the same decision as that reached by the parties. Rather, our duty is to determine whether the penalty is a reasonable one and that it meets the objectives of the disciplinary process which are to maintain the integrity of the investment industry."

¶ 16 Further, counsel referred to the decision of *Re: Clark*[2]:

> "It was submitted by staff and accepted by the panel that its role under By-law 20.26 is not the same as its role under By-law 20.10 following a hearing. In considering a settlement under By-law 20.26 the panel should not simply substitute its discretion for that of staff who negotiated the settlement. The panel must be cognizant of the importance of the settlement process and should not interfere lightly in a negotiated settlement. In our view, as a result, panels must also be careful in using previous settlements as precedent. The settlement process is one of negotiation and compromise and the penalty imposed following a settlement will often be less onerous than one imposed following a hearing where similar findings are made."

¶ 17 Counsel also referred the Panel to the decision of *Re: Milewski*[3]:

> "Although a settlement agreement must be accepted by a District Council before it can become effective, the standards for acceptance are not identical to those applied by a District Council when making a penalty determination after a contested hearing. In a contested hearing, the District Council attempts to determine the correct penalty. A District Council considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject the settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness. Put another way, the District Council will reflect the public interest benefits of the settlement process in its consideration of specific settlements.
>
> This understanding is reflected in paragraph 20.26 of the By-laws which authorizes the District Council to "accept", rather than approve, a settlement agreement. In each case a District Council must determine appropriateness, but the standards applicable to its doing so on a settlement hearing differ from those in a contested hearing. Thus, the penalties imposed under settlement agreements, while relevant to a District Council exercising its discretion to penalize, provide only limited assistance in a hearing like this one."

¶ 18 Counsel also referred the Panel to the decision of *Re: Edward Jones*[4]:

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[1] *Re: Deutsche Bank Securities Ltd.* 2013 IIROC 07

[2] *Re: Clark* [1999] I.D.A.C.D. No. 40 at page 4.

[3] *Re: Milewski* [1999] I.D.A.C.D. No. 17.

In *Re Edward Jones*, the Panel provided a summary of the standard for reviewing the Settlement Agreement at paragraphs 25 to 27:

> "25 A Hearing Plan can either accept or reject a Settlement Agreement. It cannot modify it. The standard for reviewing a Settlement Agreement was well-stated in a Pacific District hearing, *Re Johnson* (2012 IIROC 19), where the panel stated:
>
> > "The test applicable to a decision whether to accept or reject a settlement is well-known. Simply put, a panel should accept such an agreement unless it considers the penalty provided for clearly to fall outside a reasonable range of appropriateness."
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> 26 There are many similar statements. See, for example, *Re Taggart* (2013 IIROC 24); *Re Scotia Capital* (2013 IIROC 38); *Re Jiwa and Hoffar* (2012 IIROC 9); *Re Rotstein and Zackheim* (2012 IIROC 27); *Re Portfolio Strategies Securities Inc.* (2012 IIROC 36), and *Re Ast* (2012 IIROC 38), all stemming from *Re Milewski* ([1999] I.D.A.C.D. No. 17) and the paragraphs cited herein paragraph 17 of the Reasons.
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> 27 A recent Panel, *Re Donnelly*[5], rightly observed in accepting a Settlement Agreement (paragraphs 7 and 8):
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> > "It is usually in the public interest that matters be settled where possible rather than be determined through contested hearings. The reasons for this are often that an earlier determination of a dispute is better than a later determination. Settlements are usually less expensive than contested litigation, and there is less congestion in the dispute settling system when matters are taken out of the system through settlements. Finally where both parties agree, the result is often more palatable to the parties and society than in a contested hearing where the winner takes all.
> >
> > For these reasons, a panel considering the acceptance of a settlement agreement will try to reach a determination of acceptance. It will recognize that settlements are often hotly debated with much compromise and give-and-take between the parties in order to reach an acceptable position agreeable to both parties. Furthermore, the panel will recognize that it is not privy to all the facts and the motivations and considerations that each of the parties have in coming to a solution of the dispute that is agreeable to them."

¶ 19 Counsel referred us to the case of *Re: Shamseer*[6]:

> "26 In Re *Wenzel [2005] A.S.C.D. No. 153*, the Alberta Securities Commission stated that "when a person effects a securities transaction for a client without obtaining from the client, in advance, specifics as to four elements of the transaction – quantity, security, price and timing – that person is exercising "discretion"."
>
> "27 Whenever registrants exercise discretion in clients' accounts, they are making decisions on behalf of clients. These decisions could, and often do, have a profound impact on these accounts. These decisions may, and often do, give rise to conflicts of interest between the clients and the registrants."

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[4] *Re: Edward Jones* 2016 IIROC 42

[5] *Re: Donnelly* 2016 IIROC 23

[6] *Re: Shamseer* [2011] IIROC No. 5 at para. 26

¶ 20 Further, counsel referred the Panel to the decision of *Re Beck*[7].

¶ 21 In that case the account of the client was not recorded as discretionary but the client was not aware that her specific consent was required for each trade and assumed that her broker could exercise discretion to manage her portfolio. The Panel ordered a fine of $20,000, disgorgement of commissions of $3,315; close supervision for 12 months; rewrite CPH; and costs of $15,000.

¶ 22 In that case, Beck did not confirm the specifics of each trade as to price, security, quantity and timing, when he effected the trades in the client's account.

¶ 23 Counsel referred us to two decisions of *Re Brodie*[8] *and Re Brodie 2013*[9]. The case involved three counts against the RR, namely unsuitable recommendations, discretionary trading, and unauthorized compensation to clients. The clients were one couple, over a time period of 4 years. The portfolio was too risky and was concentrated in oil and gas and mining stocks that did not fit the clients' investment objectives and risk tolerance.

¶ 24 In that case the Panel cited a Supreme Court of Canada case:

> In *Re Cartaway Resources Corp [2004] S.C.J. No. 22 at para 60* the Supreme Court of Canada said:
>
> > "In my view, nothing inherent in the Commission's public interest jurisdiction, as it was considered by this Court in *Asbestos, supra*, prevents the commission from considering general deterrence in making an order. To the contrary, it is reasonable to view general deterrence as an appropriate, and perhaps necessary consideration in making orders that are both protective and preventative."

¶ 25 In the Brodie case the Panel ordered a fine of $20,000 for each count totaling $60,000; 6 months suspension; 12 months strict supervision; rewrite CPH, and costs of $20,000.

¶ 26 Counsel referred the Panel to the case of *Re Karim*[10]; that case involved the acceptance of a settlement agreement for discretionary trading over a four year period in two clients' RRSP accounts. There were numerous trades and they were made without written authorization from the clients. The Respondent was not registered or qualified to operate discretionary accounts nor were the accounts discretionary or managed accounts. The penalty included a fine of $22,500; close supervision for 12 months; rewrite the CPH within 6 months; and costs of $1,500. The case involved 473 trades in one account and 546 trades in another account over the four year period.

¶ 27 Counsel also referred the Panel to the case of *Re Li*[11] where the Panel accepted a Settlement Agreement relating to discretionary trading which involved two sets of client accounts and 587 transactions which the Respondent acknowledged the majority were done on a discretionary basis. The Panel accepted a fine of $40,000; a one year suspension; rewrite the CPH course; and one year of strict supervision upon any registration with IIROC.

¶ 28 Counsel also referred the Panel to the IIROC Sanction Guidelines. The Sanction Guidelines state they are intended to assist:

(a) IIROC Enforcement Staff and respondents in the negotiation of settlement agreements;

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[7] *Re: Beck* 2012 IIROC 41

[8] *Re: Brodie* 2013 IIROC 12

[9] *Re: Brodie* 2013 IIROC 39

[10] *Re: Karim* 2015 IIROC 04

[11] *Re: Li* 2016 IIROC 10

(b) Hearing panels in determining whether to accept settlement agreements; and

(c) Hearing Panels in the fair and efficient determination of appropriate sanctions after disciplinary hearings.

¶ 29 Clearly the appropriate sanction depends on the facts of a particular case and the circumstances of the conduct.

¶ 30 Counsel submitted that in this case there were both aggravating and mitigating factors. The aggravating factors submitted were:

(a) The client involved was elderly, living in an assisted care facility, had health issues and was experiencing some cognitive difficulties;

(b) The Respondent took instructions from the Respondent's wife without the proper authorization on the accounts;

(c) The Respondent sent the account statements to an address where he knew the account holder did not reside;

(d) The Respondent entered trades in the a client's account on a discretionary basis after being advised that the client was exhibiting some cognitive difficulties.

¶ 31 Counsel submitted the mitigating factors were as follows:

(a) The Respondent has no prior disciplinary record with IIROC;

(b) IIROC did not take issue with the suitability of the discretionary transaction in the client account;

(c) The Respondent accepted his conduct was in breach of IIROC rules and entered into a Settlement Agreement with IIROC;

(d) The Respondent was fined $10,000 by his firm, which he has paid;

(e) The Respondent was required to rewrite the CPH exam by his firm which he successfully completed in September, 2015;

(f) The Respondent was placed under strict supervision by PI Financial from July, 2015 to December, 2015; and

(g) There was no financial loss to the client.

¶ 32 Counsel submitted the Sanction Guidelines referred to IIROC's Staff Policy Statements in relation to internal discipline by a dealer member. Staff Policy Statement state that internal fines may reduce the quantum of regulatory sanctions to be sought. The agreed upon fine in this case has taken the internal fine assessed against the Respondent by the firm into account.

¶ 33 Counsel submitted, and we agree, that the agreed upon penalty in this case sends an appropriate message that registrants should not engage in any form of trading without the full instruction of the account holder even if some form of instruction is received from a related person or family member. Client individuality and confidentiality must be respected at all times and when there are issues regarding the mental capacity of the account holder, strict procedures need to be followed.

¶ 34 The Panel has carefully considered the submissions of counsel, and the cases to which we had been referred, and the IIROC Rules and Policies.

¶ 35 In this case, the Respondent has agreed to a fine in the amount of $10,000 and $1,500 in costs. Following the submissions of counsel for the parties, the Panel retired and carefully reviewed the submissions and authorities and rules that had been cited. We concluded that the penalty is a reasonable one and that it meets the objectives of the disciplinary process, namely to maintain the integrity of the investment industry.

¶ 36 Having concluded that the penalty set forth in the Settlement Agreement in this matter was reasonable, the Panel reconvened the Settlement Hearing and gave our decision to the parties, namely that we accepted the Settlement Agreement.

Dated at Vancouver, British Columbia this 26th day of October, 2017.

This Decision may be signed in counterpart.

Stephen D. Gill

Brian Field, Panel

Douglas Stewart

APPENDIX A

SETTLEMENT AGREEMENT

PART I – INTRODUCTION

1. The Investment Industry Regulatory Organization of Canada ("IIROC") will issue a Notice of Application to announce that it will hold a settlement hearing to consider whether, pursuant to Section 8215 of the Consolidated Enforcement, Examination and Approval Rules of IIROC, a hearing panel ("Hearing Panel") should accept the settlement agreement ("Settlement Agreement") entered into between the staff of IIROC ("Staff") and Richard Dykeman ("Respondent").

PART II – JOINT SETTLEMENT RECOMMENDATION

2. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement in accordance with the terms and conditions set out below.

PART III – AGREED FACTS

3. For the purposes of this Settlement Agreement, the Respondent agrees with the facts as set out in Part III of this Settlement Agreement.

Overview

4. The Respondent executed trades in a client account without the proper authorization from his client and without the account being properly designated or approved as a discretionary account.

Registration History

5. The Respondent was first registered in the industry in 1983 and has been employed with PI Financial Corp. ("PI Financial") since March 2002. The Respondent is currently registered with IIROC as a Registered Representative and is working out of the Victoria office of PI Financial. He was at that location during the period from September 2013 to June 2015 (the Relevant Period).

The Client

6. The Respondent had known Client NS and been his investment advisor for over 25 years except for a brief period when the Respondent was not registered in the industry.

7. NS was born in 1925 and was retired for the entire Relevant Period. He only had one RRIF account with the Respondent and the updated account information forms from 2009 provided the following information:

   a. net worth of $600,000;

   b. annual income of $50,000;

   c. 80% medium risk tolerance and 20% high risk tolerance;

d. Investment objectives of 10% short term, 10% medium and 80% long term;

8. The 2009 client account information also stated that NS had not authorized any PI Financial employee to use discretion in handling of his account and that no one other than himself had any authority over or any financial interest in the account.

9. NS did not provide any prior written authorization pursuant to Dealer Member Rule 1300.5 for the Respondent or his firm to have discretionary authority over his account.

10. In September 2013 the Respondent was informed by NS's wife that NS had moved into a care home as he was having issues with his health.

11. Sometime after April 2014 the Respondent was advised that NS was exhibiting some cognitive difficulties.

The Account Activity

12. In September 2013 NS's account had an approximate market value of $110,000. From September 2013 to June 2015, 48 buy and sell orders were executed in NS's account.

13. The account of NS was not designated as a discretionary account by PI Financial and did not comply with the requirements for discretionary accounts set out in Dealer Member Rule 1300.4.

14. The Respondent did not obtain specific instructions from NS regarding the security being bought or sold, the quantity, price or timing of the transaction prior to executing many of the orders in the account from September 2013 to June 2015.

15. For some of the transactions during the Relevant Period the Respondent obtained instructions from NS's wife. NS's wife did not have trading authority over NS's account. NS's wife did not hold a power of attorney that would be applicable to NS's account at PI Financial Corp.

16. For some of the transactions during the Relevant Period, the Respondent would notify either NS or NS's wife after he had executed a transaction.

17. The Respondent did not keep detailed notes of his contact with either NS or NS's wife and cannot identify specific transactions which were conducted without full instructions from NS.

18. Notes that the Respondent did keep indicate that he spoke to NS's wife in relation to four of the transactions. These same notes indicate that he may have spoken to NS in relation to six of the transactions. The Respondent has no notes for 38 of the transactions in NS's account during the Relevant Period.

19. After learning that NS was living in a care facility, the Respondent continued to mail NS's account statements to NS's wife's address.

20. In or around November 2013 the Respondent met NS's daughter while they were both visiting NS in the care home. The Respondent obtained NS's daughter's contact information and emailed her several account performance reports. The Respondent did not obtain NS's consent or authorization to send these reports to NS's daughter.

Mitigating Factors

21. The Respondent admitted to PI Financial that he had engaged in the misconduct described herein. Consequently, the Respondent voluntarily agreed to the following internal sanction by PI Financial:

    a. the Respondent paid a $10,000 fine in the form of a charitable donation, and did not receive a tax receipt for the donation;

    b. the Respondent re-wrote and passed the Conduct and Practice Handbook exam; and

    c. the Respondent was under strict supervision at PI Financial from July 2015 to December 2015.

22. IIROC does not take issue with the suitability of the discretionary transactions in the account of NS.

23. The Respondent has no prior disciplinary record with IIROC.

PART IV – CONTRAVENTIONS

24. By engaging in the conduct described above, the Respondent committed the following contravention of IIROC's Rules:

    From September 2013 to June 2015 the Respondent executed discretionary transactions in a client account contrary to IIROC Dealer Member Rule 1300.4.

PART V – TERMS OF SETTLEMENT

25. The Respondent agrees to the following sanctions and costs:

    a. Fine in the amount of $10,000; and

    b. $1,500 in costs.

26. If this Settlement Agreement is accepted by the Hearing Panel, the Respondent agrees to pay the amounts referred to above within 30 days of such acceptance unless otherwise agreed between Staff and the Respondent.

PART VI – STAFF COMMITMENT

27. If the Hearing Panel accepts this Settlement Agreement, Staff will not initiate any further action against the Respondent in relation to the facts set out in Part III and the contraventions in Part IV of this Settlement Agreement, subject to the provisions of the paragraph below.

28. If the Hearing Panel accepts this Settlement Agreement and the Respondent fails to comply with any of the terms of the Settlement Agreement, Staff may bring proceedings under Rule 8200 against the Respondent. These proceedings may be based on, but are not limited to, the facts set out Part III of this Settlement Agreement.

PART VII – PROCEDURE FOR ACCEPTANCE OF SETTLEMENT

29. This Settlement Agreement is conditional on acceptance by the Hearing Panel.

30. This Settlement Agreement shall be presented to a Hearing Panel at a settlement hearing in accordance with the procedures described in Sections 8215 and 8428, in addition to any other procedures that may be agreed upon between the parties.

31. Staff and the Respondent agree that this Settlement Agreement will form all of the agreed facts that will be submitted at the settlement hearing, unless the parties agree that additional facts should be submitted at the settlement hearing. If the Respondent does not appear at the settlement hearing, Staff may disclose additional relevant facts, if requested by the Hearing Panel.

32. If the Hearing Panel accepts the Settlement Agreement, the Respondent agrees to waive all rights under the IIROC Rules and any applicable legislation to any further hearing, appeal and review.

33. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondent may enter into another settlement agreement or Staff may proceed to a disciplinary hearing based on the same or related allegations.

34. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.

35. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel and IIROC will post a full of copy of this Settlement Agreement on the IIROC website. IIROC will also publish a summary of the facts, contraventions, and the sanctions agreed upon in this Settlement

Agreement.

36. If this Settlement Agreement is accepted, the Respondent agrees that neither he nor anyone on his behalf, will make a public statement inconsistent with this Settlement Agreement.

37. The Settlement Agreement is effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.

PART VIII – EXECUTION OF SETTLEMENT AGREEMENT

38. This Settlement Agreement may be signed in one or more counterparts which together will constitute a binding agreement.

39. A fax or electronic copy of any signature will be treated as an original signature.

DATED this __8th__ day of June, 2017.

_____	"Richard Dykeman"
Witness	Richard Dykeman Respondent
"Paul Smith"	"Stacy Robertson"
Witness	Stacy Robertson Enforcement Counsel on behalf of Enforcement Staff of the IIROC

The Settlement Agreement is hereby accepted this _20th__ day of _September_, 2017 by the following Hearing Panel:

Per: "Stephen Gill"
Panel Chair

Per: "Brian Field"
Panel Member

Per: "Doug Stewart"
Panel Member