

Re Percival

IN THE MATTER OF:

THE DEALER MEMBER RULES OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

AND

THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

JAMES ALEXANDER PERCIVAL

2009 IIROC 28

Investment Industry Regulatory Organization of Canada
Hearing Panel (Manitoba District Council)

Heard: September 16, 2008 at Winnipeg, MB
Settlement Agreement Accepted: September 16, 2008
Decision: June 11, 2009 (revised June 30, 2009)
(9 paras.)

Hearing Panel:

Richard L. Yaffe, Chair
Gregory Ozechowsky, Member
Donald Minarik, Member

Appearance:

Faye Emmanuel, appearing for IIROC
No one appearing for James Percival

PANEL DECISION

¶ 1 We were constituted as a Panel of the Manitoba District Council of the Investment Industry Regulatory Organization of Canada (“IIROC”), formerly, the Investment Dealers Association of Canada (“the Association”) to consider a Settlement Agreement recommended by the Association that was executed by James Alexander Percival (“Percival” or the “Respondent”) on August 18, 2008 and by Enforcement Counsel on behalf of the Association on August 21, 2008.

¶ 2 The Panel was advised that Mr. Percival was not represented by counsel during the negotiations that led to the Settlement Agreement. Further, the Panel was presented with a copy of an undated letter from Percival to Staff wherein Percival indicated that he did not fully understand what he was signing. However, the Panel was also presented with sworn evidence that Staff subsequently confirmed with Percival that he did, indeed, understand the content and effect of the Settlement Agreement.

¶ 3 The Settlement Agreement is attached to these reasons. According to the facts included in the Settlement Agreement:

- (i) At all material times, the Respondent was employed as a Registered Options Representative with the Winnipeg office of National Bank Financial Ltd. (“NBF”), a member of the Association;
- (ii) On or about January 9, 2006, NBF suspended the Respondent from trading in options in his investment account at NBF;
- (iii) At all material times, K.K. was a registered Investment Representative and was employed by NBF as the Respondent’s assistant. K.K. resigned from NBF on August 15, 2006;
- (iv) In October of 2004, C.E. became a client of the Respondent;
- (v) In early January of 2006, the Respondent and C.E. agreed that the Respondent would make trades in C.E.’s account (the “CE Account”), that each of them would contribute money to the CE Account, and that they would both share in any of the profits in the CE Account;
- (vi) On or about January 13, 2006, the Respondent purchased certain call options for the CE Account, which was contrary to the Respondent’s arrangement with C.E. The Respondent undertook to cover any losses sustained in the CE Account as a result of these call option purchases;
- (vii) In February or March of 2006, the Respondent asked C.E. not to tell NBF that the Respondent was trading options in the CE Account;
- (viii) On or about May of 2006, C.E. demanded that the Respondent repay all monies owed to C.E. and that the Respondent cease trading options in the CE Account;
- (ix) Contrary to C.E.’s instructions, the Respondent continued to trade options in the CE Account in May and June of 2006;
- (xi) On or about July 18, 2006, NBF suspended the Respondent. On August 2, 2006, NBF terminated the Respondent’s employment.

¶ 4 In this case, the details disclosed in the Settlement Agreement were somewhat sparse and, initially, the Panel was concerned that the facts may not support the violations comprising all three Counts against the Respondent. However, in response to questions posed to Staff by Panel members, the facts that were included in the Settlement Agreement were augmented by additional details introduced by Staff during the settlement hearing. The additional details include, inter alia:

- (i) The Respondent issued five cheques payable to C.E. for a total of \$44,592. Of this amount, \$20,000 had been given to the Respondent by K.K.;
- (ii) C.E. deposited these funds into an account. C.E. transferred all or most of these funds into the CE account through six deposits made between January 13, 2006 and August 9, 2006.

¶ 5 Three letters were entered as exhibits, which confirm that the Respondent had been advised by Staff that Staff might seek to provide the hearing Panel with additional information if the Respondent did not attend the hearing.

¶ 6 The Respondent acknowledges that he violated the Association By-laws, Regulations, Rulings or Policies as follows:

Count 1 – In or about January 2006 to July 2006, the Respondent, at all material times a Registered Options Representative with NBF, failed to observe high standards of ethics and/or conduct in the transaction of his business, and/or engaged in business conduct or practice that was unbecomingly contrary to Association By-law 29.1, by sharing a financial interest in an account with a client.

Count 2 – In or about January 2006 to July 2006, the Respondent, at all material times a Registered Options Representative with NBF, failed to observe high standards of ethics and/or conduct in the transaction of his business, and/or engaged in business conduct or practice that was unbecoming contrary to Association By-law 29.1, by failing to disclose his financial interest in a client account to NBF and/or by asking the client not to disclose his financial interest in the client account.

Count 3 - In or about January 2006 to July 2006, the Respondent, at all material times a Registered Options Representative with NBF, failed to observe high standards of ethics and/or conduct in the transaction of his business, and/or engaged in business conduct or practice that was unbecoming contrary to Association By-law 29.1, by entering into an agreement to compensate a client for account losses.

¶ 7 The Association recommended, and the Respondent agrees to, a permanent ban.

¶ 8 When determining whether to accept or reject a settlement agreement, the test is whether the proposed penalty is reasonable having regard to the facts disclosed and the nature of the settlement process.

¶ 9 We are satisfied that the proposed penalty is reasonable and that the Settlement Agreement should be accepted.

Dated at Winnipeg, Manitoba, this 30th day of June, 2009

Richard L. Yaffe

Gregory Ozechowsky

Donald Minarik

* * * * *

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. The Enforcement Department Staff (“Staff”) of the Investment Dealers Association of Canada (“the Association”) have conducted an investigation (“the Investigation”) into the conduct of James Alexander Percival (the “Respondent”).
2. The Investigation discloses matters for which the Respondent may be disciplined by a hearing panel appointed pursuant to Association By-law 20 Part 10 (“the Hearing Panel”).

II. JOINT SETTLEMENT RECOMMENDATION

3. Staff and the Respondent consent and agree to the settlement of these matters by way of this Settlement Agreement (“the Settlement Agreement”) in accordance with By-laws 20.35 to 20.40 inclusive and Rule 15 of the Association Rules of Practice and Procedure.
4. The Settlement Agreement is subject to acceptance by the Hearing Panel.
5. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.

6. The Settlement Agreement will be presented to the Hearing Panel at a hearing (“the Settlement Hearing”) for approval. Following the conclusion of the Settlement Hearing, the Hearing Panel may either accept or reject the Settlement Agreement.
7. If the Hearing Panel accepts the Settlement Agreement, the Respondent waives his right under the Association By-laws and any applicable legislation to a disciplinary hearing, review or appeal.
8. 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 in relation to the matters disclosed in the Investigation.
9. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.
10. Staff and the Respondent agree that if the Hearing Panel accepts the Settlement Agreement, they, or anyone on their behalf, will not make any public statements inconsistent with the Settlement Agreement.
11. Staff and the Respondent jointly recommend that the Hearing Panel accept the Settlement Agreement.

III. STATEMENT OF FACTS

(i) Acknowledgment

12. Staff and the Respondent agree with the facts set out in this Section III and acknowledge that the terms of the settlement contained in this Settlement Agreement are based upon those specific facts.

(ii) The Participants

13. The Respondent, at all material times, was a resident of the City of Winnipeg, in the Province of Manitoba.
14. The Respondent, at all material times, was employed as a Registered Options Representative with the Winnipeg office of National Bank Financial Ltd. (“NBF”), a member of the Association.
15. The Respondent’s registration history is as follows:

Registration Issue Date	Registration Termination Date	Employer	Registration Category
May 10, 2004	August 25, 2004	National Bank Financial Ltd.	Registered Representative
August 25, 2004	August 2, 2006	National Bank Financial Ltd.	Registered Options Representative

16. The Respondent had known C.E. since 2002. In October of 2004, C.E. became a client of the Respondent’s.

17. At all material times, C.E. was a student. C.E.'s networth was recorded as negative \$4,000 on the initial 2004 New Client Application Form ("NCAF") and as \$195,800 on an updated December 2005 NCAF; the increase reportedly due to the receipt of an inheritance.
18. At all material times, K.K. was a registered Investment Representative and was employed by NBF as the Respondent's assistant.
19. K.K. resigned from NBF on August 15, 2006. The Association reviewed K.K.'s conduct in this matter and determined that K.K. did not benefit from the financial dealings between the Respondent and C.E. The Association therefore did not initiate any formal disciplinary action against K.K.

(iii) The Association's Investigation

20. On August 2, 2006, the Respondent was terminated from NBF following an internal investigation, wherein the Respondent's actions during January to July 2006 inclusive were found to be contrary to NBF's Code of Ethics.
21. On or about August 9, 2006, the Association received a Notice of Termination regarding the Respondent from NBF.
22. On or about November 7, 2006, Staff commenced an investigation based on the Case Assessment review of a ComSet report filed by NBF on September 20, 2006 and the written complaint of the Respondent's former client, C.E., provided to Staff by the Manitoba Securities Commission ("the MSC") on or about October 6, 2006.
23. On or about August 8, 2007, the Respondent attended for an investigation interview with Staff. During that interview the Respondent admitted certain particulars of the alleged misconduct including that he traded options in the C.E. account. However, the Respondent presented as extremely distressed and unfocused throughout the interview.
24. In late October 2007, Staff received a letter from Dr. Robinson, the Respondent's Psychiatrist, a copy of which will be provided to the Hearing Panel at the Settlement Hearing. In this letter, Dr. Robinson states that the Respondent has been diagnosed as having Major Depressive Disorder, an element of which is risk seeking behavior, and suggests that the Respondent may not be fit for the Association's disciplinary process.

(iv) Factual Background

25. On or about January 9, 2006, NBF suspended the Respondent from trading in options in his investment account at the firm due to numerous margin calls and trading without sufficient equity.
26. On or about early January 2006, the Respondent approached C.E. about trading in her account. The Respondent and C.E. agreed that the Respondent would make trades in the C.E. account using both of their monies and they would both share in any of the profits.
27. The Respondent later advised C.E. to write an email to NBF stating that she understood and acknowledged the risks involved with the trading he was conducting in her account. C.E. complied and delivered the requested email to NBF on January 12, 2006.

28. On or about January 13, 2006, the Respondent purchased certain call options which action concerned C.E. because it was contrary to their arrangement. The Respondent consequently told C.E. that he would cover any losses sustained as a result of these call option purchases.
29. On or about mid January 2006, the Respondent borrowed \$10,000 from K.K. Specifically, the Respondent had K.K. issue a \$20,000 cheque directly to C.E. The Respondent represented to C.E. that these monies were both his and K.K.'s to be used for investment purposes in the C.E. account.
30. On or about February or March 2006, the Respondent called C.E. and told her that she would be receiving a call from the Branch Manager for NBF. The Respondent told C.E. not to tell NBF that the Respondent was trading options in her account, as he would probably lose his job and not be able to pay back any monies owing to C.E. that were lost as a result of the trading so far. When the Branch Manager for NBF called C.E., she told him that she was the one making the options trades.
31. On or about March 2006, the Respondent provided C.E. with a cheque for \$20,000 to cover a portion of losses that had been incurred in her account. However, when C.E. attempted to cash the cheque, it was returned with insufficient funds.
32. On or about March 18, 2006, the Respondent met with C.E. to determine the amount of losses incurred to date in the C.E. account, to calculate the amount of money owing to C.E. and to discuss repayment terms.
33. At that meeting, the Respondent told C.E. that he would recover the lost monies through continued options trading and that if he was not successful within the next couple of weeks, he would repay her with money from his RSP funds.
34. The Respondent also told C.E. that, in his determination, when her account returned to \$63,000 she would be repaid and he provided her with a signed document to this effect. This document also noted that interest of 10% per year would apply to the outstanding balance until it was repaid.
35. On or about May 2006, C.E. contacted the Respondent because he had defaulted on the repayment agreement. C.E. demanded that the Respondent repay all monies owed to her within 3 months and that he cease trading options in her account.
36. Contrary to C.E.'s instructions, the Respondent continued to trade options in the C.E. account in May and June 2006.
37. On or about July 18, 2006, NBF suspended the Respondent.
38. On August 2, 2006, NBF terminated the Respondent's employment with them.
39. On or about August 10, 2006, the Respondent sent an email to C.E. stating that he could not repay her the monies he lost in her account all at once, but that he would like to repay her at \$5,000 per month. The Respondent also indicated that if C.E. pursued this matter with the MSC or through the legal system, he would become bankrupt and she would not be repaid at all.
40. Staff's investigation revealed that the Respondent's trading in the C.E. account between January to July 2006 resulted in actual losses of approximately \$32,818.79 CDN and \$54,566.40 US.

41. The Respondent acknowledges that his having shared a financial interest in the C.E. account, failing to disclose that interest to NBF and/or asking C.E. not to disclose his interest in her account, and offering to compensate C.E. for account losses, demonstrates conduct which is unbecoming of a registrant, contrary to Association By-law 29.1.

IV. CONTRAVENTIONS

42. The Respondent acknowledges the following violation to the By-laws, Regulations, Rulings or Policies of the Association:

Count 1

In or about January 2006 to July 2006, the Respondent, at all material times a Registered Options Representative with National Bank Financial Ltd., failed to observe high standards of ethics and/or conduct in the transaction of his business, and/or engaged in business conduct or practice that was unbecoming contrary to Association By-law 29.1, by sharing a financial interest in an account with a client.

Count 2

In or about January 2006 to July 2006, the Respondent, at all material times a Registered Options Representative with National Bank Financial Ltd., failed to observe high standards of ethics and/or conduct in the transaction of his business, and/or engaged in business conduct or practice that was unbecoming contrary to Association By-law 29.1, by failing to disclose his financial interest in a client account to National Financial Bank and/or by asking the client not to disclose his financial interest in the client account.

Count 3

In or about January 2006 to July 2006, the Respondent, at all material times a Registered Options Representative with National Bank Financial Ltd., failed to observe high standards of ethics and/or conduct in the transaction of his business, and/or engaged in business conduct or practice that was unbecoming contrary to Association By-law 29.1, by entering into an agreement to compensate a client for account losses.

V. TERMS OF SETTLEMENT

43. The Association recommends and the Respondent agrees to a permanent ban.
44. This remedy is appropriate in the present circumstance. The medical opinion of the Respondent's psychiatrist states that the Respondent suffers from Major Depressive Disorder with panic attacks, an element of which is risk seeking behavior.
45. Both the Respondent and the Association recognize that in all the circumstances a permanent ban has the appropriate deterrent effect and will serve to protect the investing public.
46. The Association recognizes and acknowledges that the Respondent has no prior disciplinary history.

47. Therefore, for Counts 1 to 3 inclusively, as described in paragraph 40, the Respondent agrees to the following terms of settlement:

- **Permanent prohibition from approval in any registration capacity with the Association.**

VI. ASSOCIATION COSTS

48. The Association is not seeking costs in this matter.

AGREED TO by the Respondent at the City of Winnipeg, in the Province of Manitoba, this 18th of August, 2008

“Witness signature”

Witness

“James Percival”

**James Alexander Percival
Respondent**

AGREED TO by Staff at the City of Calgary, in the Province of Alberta, this 21st day of August , 2008.

“Kathleen Rhodes”

Witness

“Faye Emmanuel”

**Faye N. Emmanuel
Enforcement Counsel on behalf of Staff of
the Investment Dealers Association**

ACCEPTED BY the Manitoba District Council of the Investment Dealers Association of Canada, at the City of Winnipeg, in the Province of Manitoba, this 16th day of September , 2008.

“Richard Yaffe”

Per: Richard Yaffe

“Gregory Ozechowsky”

Per: Gregory Ozechowsky

“Donald Minarik”

Per: Donald Minarik

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