Re Van Hee

IN THE MATTER OF:

THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

PETER DERUYTER VAN HEE

2009 IIROC 34

Investment Dealers Association of Canada
Hearing Panel (Alberta District Council)

Heard: April 30, 2009
Decision: July 22, 2009
(111 paras.)

Hearing Panel:
D. Brian Foster - Chair
Peter McWilliams - Member
Bruce Calvin - Member

PENALTY DECISION

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I. INTRODUCTION

¶ 1 A Hearing Panel was appointed pursuant to By-law 20 of the Investment Dealers Association of Canada (the "Association").

¶ 2 The disciplinary hearing was held in November and December, 2007. The parties later provided written argument. In a decision dated November 26, 2008, the Hearing Panel found that the Association had proved its case on Counts 1 through to 4 of the Amended Notice of Hearing but that the Association had not proved its case in relation to Count 5.

¶ 3 On April 30, 2009, the hearing resumed to hear evidence and submissions with respect to the penalty phase of the hearing.

¶ 4 Prior to resuming the hearing, the Hearing Panel was provided with a Hearing Book that contains Association By-law 29.1, Association Policy No. 2, Association Regulation 1300.1, 1300.2 and 1900. We were also provided with the Association's Disciplinary Sanction Guidelines (the "Guidelines"), including the General Principles section which contains the "Key Considerations When Determining Sanctions" which provides a list of factors that should be considered when imposing sanctions. We were also given Section 4.3 of the Guidelines "Failure to Supervise – Regulation 1300.2, Policy 2, Policy 4 and By-law 29.27" that contains "Recommended Sanctions." The Hearing Book also contains a number of prior decisions, some of which are referred to below.

II. FURTHER EVIDENCE

¶ 5 At the Penalty Hearing, the following further evidence was received:

A. Exhibit 1 – Affidavit of Martin Lang, Chief Compliance Officer ("CCO") and Ultimate Designated Person for Union Securities Ltd.

¶ 6 Mr. Lang has been the CCO for Union Securities since April, 2005 and his Affidavit contains the following evidence:

(a) He has had no issues or concerns regarding the conduct of the Respondent as it pertains to his supervision responsibilities as the DROP;

(b) It is his observation that the Respondent takes his supervisory responsibilities very seriously;

(c) The Respondent initiated changes to the firm's option approval form which now contains more client information which aids in assessing suitability and assigning option approval codes. The client now has to specifically indicate that they intend to carry out spread trading in order to receive Level 3 approval;

(d) Since 2005, none of the sales compliance reviews of the firm have indicated that there are any deficiencies that require a response with respect to options trading supervision;

(e) Since October, 2006 and at the Respondent's request, the firm now has a dedicated AROP who conducts head office reviews of options trading in the same manner as the Respondent. So there are now two persons at head office who conduct options supervision of trading; and

(f) He refers to the Association's March 9, 2007 Notice to Public: Set Date Application in which the Association had incorrectly described allegations against the Respondent. Within a day or so, the incorrect Notice to Public was removed from the Association website, but it was still published in print media including Stock Watch and to Mr. Lang's knowledge, it was not removed from electronic news providers such as Canada Newswire Services. We will not repeat the incorrect allegations, but it can be said that the allegations were of a serious nature and were clearly incorrect.

B. Exhibit 2 – Affidavit of the Respondent

¶ 7 In the Respondent's Affidavit, he provides the following evidence:

(a) His income at Union Securities has been what could be considered to be "modest." He has a few active retail accounts;

(b) On or about January 19, 2007, he received a draft Notice of Hearing that contained several factual inaccuracies, including allegations that there were uncovered calls in the DM and LB accounts;

(c) He refers to the March 9, 2007 publication by the Association of the Notice to Public: Set Date Application which contained false allegations. He states that the incorrect information in the Notice to Public gave rise to several calls from industry colleagues and clients who were surprised by the allegations. This caused a great deal of personal and professional embarrassment to him because the allegations incorrectly suggested that he had engaged in intentional misconduct and other serious activities;

(d) The Association has never provided to him a public apology nor did they publish a retraction or correction notice;

(e) The proceedings have caused him "a great deal of stress and anxiety. Part of this has been caused by the uncertainties and delays in getting a decision in this matter which, among other things, has made it difficult for me to develop new and existing retail accounts."; and

(f) He states that there have been an unusually large number of publications concerning the matter and he attaches to his Affidavit a printout from the IIROC website showing not less than 19 publications concerning the matter.

¶ 8 The Respondent was cross-examined on his Affidavit. With respect to the incorrect Notice to Public that contained incorrect allegations, he acknowledged that the Association removed the Notice to Public from

its website and placed a new Notice to Public on its website either on the same day or very shortly after the error was brought to the Association's attention.

¶ 9 With respect to the number of publications concerning this matter, the Respondent acknowledged that there were a number of applications brought by the Respondent, including an application for the recusal of the first panel chair, a motion for a change of venue, a date change for the hearing due to unexpected family matters that the Respondent faced and a motion to adjourn due to his counsel's injury. All of these events gave rise to publication of notices in the normal course by the Association.

¶ 10 Counsel for the Association cross-examined the Respondent on the statement in Mr. Lang's Affidavit that since 2005 there have been no issues with respect to options trading supervision in the sale compliance reports. It appears that there might have been some issues related to options trading, that may not have been brought to the Respondent's attention. The issues appear to be relatively minor.

C. Exhibit 3 – May 19, 2006 Correspondence from the Association to the Respondent's former counsel

¶ 11 Nothing really turns on this correspondence.

D. Exhibit 4 – 2006 Sales Compliance Review

E. Exhibit 5 – 2006 Sales Compliance Review

¶ 12 The Reviews do not show any material issues with respect to options trading.

III. SUMMARY OF THE HEARING PANEL DECISION

¶ 13 The decision of this Hearing Panel will not be repeated in full, and this summary is not intended to describe all of the findings that are relevant to the setting of the penalty. However, some of the facts are:

Count 1

1.0 ROR – E.L., registered for a short period of time before opening of the client accounts of D.M. and L.B.

(a) **Client – D.M. –**
Single, 2 dependents;
annual income - $70,000.00
Investment Knowledge – Poor/Nil;
Investment Objectives – 100%
Venture Speculative;
Risk Factors – 100% High.

Level 3 options approval given

(b) **Client – L.B. –**
Married, 2 dependents;
annual income - $40,000.00;
Investment Knowledge – Basic/Limited;
Investment Objectives – 100%
Venture Speculative;
Risk Factors – 100% High.

Level 3 options approval given; OA updated to reflect Level 4 options approval (5 days after initial approval)

2. The nature of trading in the D.M. and L.B. accounts was speculative and aggressive. Within months of the account openings, both the D.M. and L.B. accounts suffered significant losses.

3. This Hearing Panel made a finding of supervisory failure by the Respondent relating to both the D.M. and L.B. accounts.

Count 2

1 ROR – S.B.

(a) 12 client accounts;

(b) 74 Level 4 options trades, when accounts not approved for Level 4 options trades; and

(c) many of these trades involved a put option strategy with Dynegy shares.

2. The Respondent's admissions (paragraphs 141 to 143 of the Agreed Statement of Facts ("ASF")) are reproduced below:

141. At all material times, the Respondent knew, or ought to have known, of S.B.'s options trading strategies, the options authorization codes and specific options trading activity of each, or any, of the identified twelve (12) S.B. client accounts.

142. The Respondent did not take or maintain adequate notes or records (evidence) of his conversations with S.B.

143. The Respondent admits that he did not take the following steps during the material time:

(a) Did not speak with all or any of the 12 S.B. clients;

(b) Did not cross-reference every options trade executed in each, or any, of the twelve (12) accounts with the options authorization code for the particular client account;

(c) Did not contact S.B. to discuss whether updates to the options authorization codes for any, or all, of the twelve (12) client options accounts was required and appropriate, upon becoming aware that options trades outside options trading approval levels had been executed in those accounts;

(d) Did not contact the branch manager, R.T. (who was options qualified) to discuss whether updates to the options authorization codes for any, or all, of the identified twelve (12) trades outside options trading approval levels had been executed in those accounts;

(e) Did not restrict or make recommendations to restrict trading activity in any, or all, of the identified twelve (12) client accounts, upon becoming aware that options trades outside options trading approval levels had been executed in those accounts;

(f) Did not cancel options trades outside options trading approval levels that were executed in each, or any, of the identified twelve (12) S.B. client options accounts; and

(g) Did not maintain adequate records (evidence) of supervisory activities relating to the S.B. client options accounts.

3. This Hearing Panel found, in relation to Count 2, that the Respondent failed to reasonably supervise the accounts of S.B.

Count 3

1. ROR (J.E.)

(a) **1 client (B.S.) –**
23 years old;
annual income - $25,000;
total net assets - $34,000;
Investment Knowledge – Good;
Investment Experience – None;
Investment objectives – 100%
Venture Speculative;
Risk factors – 100% high

Level 2 options approval, updated to Level 4 options approval (approximately 2 years after account opening)
27 Level 4 options trades during period prior to options approval update

2. In the admissions found in the ASF the Respondent stated that he approved the execution of the Level 4 options trading on the basis of information from J.E. that the client's father was trading the account and was a sophisticated investor. The Respondent had requested written confirmation of these facts but the written confirmation was not provided within a reasonable period of time.

3. This Hearing Panel found in relation to Count 3 that there was a failure to reasonably supervise the account.

Count 4

1. 1 ROR (R.L.) –

   (a) **1 client (E.B.)**
   84 years old and retired;
   Investment knowledge – Sophisticated;
   Investment experience – Limited for Stock Options, Bonds & Options

   (a) **R.B. –**
   73 years old and retired;
   Investment knowledge – Good;
   Investment experience – Limited for Stock Options, Stocks, Bonds & Options

   Level 2/3 options approval, update to Level 4 options approval
   (no material change to the personal or financial circumstances of the client)

   9 Level 4 options trades during the period prior to the options approval update

2. This Hearing Panel found in relation to Count 4 that there was a failure to reasonably supervise the account.

¶ 14 The supervisory failures of the Respondent involve multiple incidents of misconduct over an extended period of time. The Respondent's failure to meet his supervisory obligations is a serious matter.

IV. FACTORS TO BE CONSIDERED WHEN ASSESSING A PENALTY

¶ 15 The Hearing Panel was provided with prior decisions of hearing panels that are instructive with respect to the factors that should be considered in the penalty phase of the hearing.

¶ 16 In the decision of *Re Graham* [2005] I.D.A.C.D. No. 21, the hearing panel stated a number of principles and factors to be considered including:

(a) While cases presented during argument may be helpful, they are not decisive. The integrity of the process does however require that any penalty that is imposed should be consistent with prior cases, to the extent that they have been correctly decided, and to the extent that the Hearing Panel believes that the decision is consistent with the other cases;

(b) Penalties imposed following settlements have a somewhat limited value in determining an appropriate penalty following a hearing. As is stated in *Milewski (Re)* 22, O.S.C.B. at 5407, one must recognize the nature of settlement discussions and the necessary "give and take" of that process. As a result, while penalties imposed following settlements can be taken into account, they do not provide the same level of guidance as cases where penalties follow a hearing;

(c) The Guidelines should be the primary source of guidance for a Hearing Panel when considering a penalty. The Guidelines were created by the Association, a self-regulatory body with responsibility for discipline of its members; and

(d) The Guidelines, by design, provide hearing panels with significant latitude while at the same time prescribing certain matters that should be considered before the imposition of a penalty by a hearing panel. The preamble to the Guidelines is instructive:

> The minimum fine suggested within the individual Guidelines are intended to establish the "baseline" fine for specific offences – in other words, the lowest fine that can be expected by a respondent where there are no aggravating factors and all mitigating factors have already been taken into account.
>
> However, nothing in these Guidelines shall fetter the discretion of a District Council to impose a letter or greater penalty in specific circumstances.

¶ 17 In the decision of *Youden (Re)*, [2005] I.D.A.C.D. No. 52 the panel stated the following with respect to principles guiding the determination of an appropriate penalty:

> 105 As discussed in *Re Derivative Services Inc.*, [2000] I.D.A.C.D. No. 26, at page 3, the main considerations in determining an appropriate penalty are:
>
> 1. Protection of the investing public;
> 2. Protection of the Investment Dealers Association's membership;
> 3. Protection of the integrity of the Investment Dealers Association's process;
> 4. Protection of the integrity of the securities market; and
> 5. Prevention of a repetition of conduct of the type under consideration.
>
> 106 The Panel accepts that the IDA's *Disciplinary Sanction Guidelines* (the "Guidelines") are intended to provide guidance in making a determination as to an appropriate penalty that reflects the industry's understanding and expectations.
>
> 107 The Guidelines, however, are not binding and are not meant to be applied arbitrarily. We agree that this Panel's responsibility is to individualize the penalty to the precise circumstances of this particular case: *Re Gareau* (July 27th, 2005). More will be said below about the key considerations set out in the Guidelines.
>
> 108 The responsibility of the Panel is to determine an appropriate penalty that reflects the primary purpose of prevention and protection of the public, rather than punishment.
>
> 109 The Panel has also found guidance in previous decisions referred to by the parties. While such precedents may be of assistance, as stated above, an appropriate penalty must in the end be based on the specific facts of this matter.
>
> 110 The Panel further notes that it would be inappropriate to subject Mr. Youden to increased penalties simply because he chose to exercise his right to defend himself against the allegations contained in the Notice of Hearing: *Re Mills*, [2001] I.D.A.C.D. No. 7.
>
> …
>
> 114 In determining the appropriate penalty in this matter, the Panel is mindful of the numerous key considerations set out in the Guidelines. We agree with the comments of the Panel in *Gareau*, *supra*, at para 52:
>
> > While we agree that the Guidelines are not binding on us, we do accept that they offer a touchstone to assess an appropriate penalty.

¶ 18 In the decision of *Re Mills*, [2001] I.D.A.C.D. No. 7, the Hearing Panel considered the need to address principles of specific and general deterrence. A Hearing Panel should seek to "strike an appropriate balance by addressing a registrant's specific misconduct, but also being in line with industry expectations." The Hearing Panel in *Mills* stated:

> Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry expectations would lead its Members to expect for the conduct under consideration, it may undermine the goals of the Association's disciplinary process; similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the District Council in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is prevention rather than punishment.

¶ 19 This Hearing Panel agrees with the above-noted principles and factors to be considered when determining an appropriate penalty.

¶ 20 Below is a summary of the submissions made with respect to the Key Considerations When Determining Sanctions as described in the Guidelines.

3.1 Harm to Clients, Employer and/or the Securities Market

Submissions of the Association

¶ 21 The Association submits that this is a relevant factor for consideration as the misconduct had an impact on the reputation of the member firm and "the reputation of the Canadian Securities industry as a whole." The Association cites this as an aggravating factor.

Submissions of the Respondent

¶ 22 The Respondent says that the impugned conduct had no impact on the reputation of the Member firm and the Canadian Securities industry as a whole. The Respondent says that his conduct will affect his own reputation, not that of the firm. Further, there was no harm to Union Securities or to the Canadian Securities industry as a whole that has been identified. The Respondent further says that the harm to clients was limited to the D.M. and L.B. accounts and the client T.G., with whom Union Securities entered into a settlement.

Analysis and Findings

¶ 23 There were three clients that suffered losses, with a settlement having been entered into with T.G. Both D.M. and L.B. suffered losses through numerous and significant transactions. Those losses were significant relative to their financial circumstances. It is true that in relation to other client accounts there is no evidence of losses or complaints by clients.

¶ 24 While the harm to the employer and the securities market is less clear, where there are losses to investors that are significant in relation to their financial circumstances, and that have some connection to a failure to supervise, it cannot be said that there has been no harm to the reputation of the employer or the securities market. However, the degree of harm to the reputation of the member firm and the securities market is in this case not a significant aggravating factor.

3.2 Blame Worthiness

Submissions of the Association

¶ 25 The Association submits that this is a relevant factor for consideration. It is admitted by the Association that the Respondent's conduct cannot be said to have been "manipulative, fraudulent or deceptive, but the misconduct can be characterized as 'negligent'." Further, the Association submits that the misconduct involved "repeated, pervasive and arguably systemic contraventions of the rules." The Association cites this as an aggravating factor.

Submissions of the Respondent

¶ 26 The Respondent says that while the findings of the Hearing Panel were that "he should have done more," the Respondent submits that there was "no bright line standard which could have been applied to the circumstances of this case." The Respondent further submits that his conduct should not be characterized as "repeated, pervasive or systemic." In relation to the supervision of the D.M. and L.B. accounts, the Respondent submits that there was a "limited, single issue." It is pointed out that the Respondent did take some steps to control the options trading in that account and to bring his concerns to the attention of E.L. (the ROR) and R.C. (the COO).

¶ 27 In relation to the other counts involving trading outside of approved option levels, the Respondent says that the misconduct amounts to a single or isolated decision made by the Respondent in the exercise of his discretion. While there were a number of client accounts and trades which were identified in the hearing, all related to the Respondent's initial decisions.

Analysis and Findings

¶ 28 The Respondent characterizes the misconduct as errors in the exercise of his discretion. As is stated in paragraph 22 of the decision in *Re Mills*, [2001] I.D.A.C.D. No. 7, errors in judgment can cover a wide spectrum from mere oversight to conscious decisions. The errors of the Respondent in this case were closer to

the latter end of that spectrum and are therefore more serious. In relation to Count 1, there were numerous "red flags" that were ignored by the Respondent and that required the Respondent to do more in the circumstances. In the circumstances of the L.B. and D.M. accounts, a high level of supervision was required. There was excessive high risk unprofitable trading, exceptional levels of commission and significant risk in the transactions.

¶ 29 In the case of Count 2, there were 74 Level 4 options trades when the accounts were not approved for Level 4 options trades. The Respondent did not speak with any of the 12 S.B. clients or with the branch manager. The Respondent had at most a general understanding of S.B.'s strategy with respect to Dynegy, and made no determination about whether that strategy was appropriate for each of the 12 S.B. clients. Further, a number of the impugned trades did not involve Dynegy so any exercise of discretion with respect to those transactions could not be based on discussions with S.B. about a Dynegy strategy.

¶ 30 With respect to Count 3, failure to obtain further information from the father to support the information given to the Respondent by the ROR was not an oversight. The Respondent continued to allow trades in the account outside of the Level 2 approval when he did not have confirmation about the father's experience that had been requested for many months.

¶ 31 With respect to Count 4, the Respondent allowed a sophisticated derivative strategy to occur in the accounts outside of the options level approval.

¶ 32 Overall, the handling of the supervisory responsibilities for all of the accounts suggests a pattern of supervisory failure beyond mere oversight which, as was found in the *Re Mills* decision, "constituted a serious departure from his supervisory obligations." The Respondent's failures were serious and this factor is an aggravating factor.

¶ 33 The Respondent does raise the issue of a lack of a "bright line" standard. It was submitted by the Respondent that prior to the decision in this matter, the Respondent believed that he was exercising his discretion appropriately. In cases dealing with supervisory obligations, it is rare to find "bright line standards" that can be applied to the exact fact situation in issue. This Hearing Panel concluded that there were clear breaches of the Respondent's supervisory obligations for Counts 1 through to 4 of the ANOH. It is, however, acknowledged that prior to the decision in this matter, there apparently were no other decisions that dealt with supervisory obligations of DROP's and perhaps to some extent the decision in this matter has given some clarity concerning the standards expected of a DROP in relation to supervision.

3.3 Degree of Participation

Submissions of the Association

¶ 34 The Association does not consider this a relevant factor. The focus of the case was on the Respondent's conduct in his capacity as DROP.

Submissions of the Respondent

¶ 35 The Respondent says that this is a not a relevant factor in this case.

Analysis and Findings

¶ 36 The Hearing Panel agrees that this is not a relevant factor.

3.4 Extent to Which the Respondent was Enriched by the Misconduct

Submissions of the Association

¶ 37 The Association says that this is not a relevant factor.

Submissions of the Respondent

¶ 38 The Respondent submits that this is a relevant and mitigating factor since the Respondent was not enriched by the impugned conduct and was not motivated by any personal gain.

Analysis and Findings

¶ 39 The wording in the Guidelines under this heading states:

> In cases where the registrant benefitted financially from the misconduct in question, it may be appropriate to require that any profits, commissions, fees, or any other compensation earned be disgorged.

This is not a case where the registrant benefitted financially from the misconduct in question and this factor is not a relevant consideration. The fact that the Respondent did not participate in misconduct to enrich himself is expected of all participants in the industry and should not be used as a mitigating factor to argue for a lower range of sanctions than would otherwise apply.

3.5 Prior Disciplinary Record

Submissions of the Association

¶ 40 The Association submits that this is a relevant factor and that the Hearing Panel can presume that the Respondent "was of good moral character prior to the misconduct." However, the Association also states that there were serious repeated incidents of failure to properly supervise options trading which neutralizes the mitigating value of the lack of the prior disciplinary record.

Submissions of the Respondent

¶ 41 The Respondent submits that this Key Consideration is relevant and is a mitigating factor. The Respondent has been a registered representative since 1983 and the DROP at his firm since 1993, without a prior disciplinary record. Further, since 2003 there have been at most minor deficiencies noted in the Sales Compliance Reviews in relation to options trading.

Analysis and Findings

¶ 42 As is stated in the Guidelines, a good employment or internal discipline record should be a mitigating factor because it demonstrates responsibility and conformity to professional norms. The Guidelines do provide that where the misconduct is very serious or egregious then it can nullify the mitigating effect of the Respondent having no prior disciplinary history. In this case it cannot be said that the misconduct at issue is so serious or egregious that it nullifies the mitigating effect of the Respondent's long history of good employment with a lack of a discipline record. Therefore, the Respondent's prior good record is a mitigating factor.

3.6 Acceptance of Responsibilities, Acknowledgment of Misconduct and Remorse

Submissions of the Association

¶ 43 The Association submits that this is a relevant consideration as the Respondent has not acknowledged responsibility for the misconduct. The Association admits that the Respondent was entitled to defend the allegations brought against him. The Association states that this factor is "neutralized; and neither mitigating or aggravating."

Submissions of the Respondent

¶ 44 The Respondent says that he was entitled to defend the allegations against him.

Analysis and Findings

¶ 45 The Respondent should not be subject to increased penalties simply because he chose to exercise his right to defend himself against the allegations made by the Association. This consideration is therefore neither mitigating nor aggravating.

3.7 Credit for Cooperation

Submissions of the Association

¶ 46 The Association admits that the Respondent's conduct in cooperating with Staff in the course of the investigation is a mitigating factor but characterizes it as "only minimally mitigating, as this is not a situation of 'self reporting and self correcting' of misconduct or 'self identification' of Rule violations."

Submissions of the Respondent

¶ 47 The Respondent notes that he made a significant number of admissions as set out in the Agreed Statement of Facts (Exhibit 36) which considerably reduced the amount of time required for the Hearing.

Analysis and Findings

¶ 48 There were a significant number of admissions made by the Respondent. There also appears to have been a significant level of cooperation during the investigation. However, as is stated in the Guidelines, full cooperation with Association investigations by registrants is expected. Respondents or potential respondents should be given credit for cooperation "if they act in a reasonable manner during the course of investigation and disciplinary process by self-reporting and self-correcting the misconduct in question." This Panel finds that this factor is mitigating to some degree but is not as significant a mitigating factor as it would have been had there been "self-reporting" or "self-identification" of the violations.

3.8 Voluntary Rehabilitative Efforts

Submissions of the Association

¶ 49 The Association submits that this is a relevant consideration. There was evidence of a change in the practices followed by the Respondent since 2002. He now makes additional inquiries of the ROR when a client requests Level 2 options approval and if the client anticipates doing spread options in the future, then the Respondent will assign a Level 3 options approval to the account. The Respondent also now uses Level 4 options approval for uncovered put writing.

Submissions of the Respondent

¶ 50 The Respondent submits that he has changed his practices in a number of ways which demonstrate that the impugned conduct is not likely to be repeated. The Respondent also refers to the evidence given in his Affidavit and the Affidavit of Martin Lang which refers to changes in the Respondent's practices. The Respondent submits that all of these changes should be considered as strong mitigating factors.

Analysis and Findings

¶ 51 There is evidence of subsequent efforts that show a recognition of the misconduct and a commitment to remedy it. Overall, this is a mitigating factor.

3.9 Reliance on the Expertise of Others

Submissions of the Association

¶ 52 The Association says that this is neither mitigating nor aggravating as the Respondent acted alone as the DROP and his reliance on supervision of the ROR's by the branch managers or the compliance personnel was found not to be reasonable in the circumstances.

Submissions of the Respondent

¶ 53 The Respondent states that in relation to the D.M. and L.B. accounts, it is a relevant factor to take into account that the COO at the time, R.C., told the Respondent that he would follow up with the branch manager. The Respondent also submits that at the time in question the computer system did not have a "hard edit" with respect to option approval codes. The Respondent was instrumental in making changes to the firm's computer system in that regard.

Analysis and Findings

¶ 54 This Panel finds that this consideration is neither mitigating nor aggravating. As the DROP, the Respondent was expected to use proper care and exercise independent professional judgment. While there were some inquiries made by him of the COO and of the branch manager, those inquiries were not sufficient to meet his supervisory obligations.

3.10 Planning and Organization

Submissions of the Association

¶ 55 The Association states that this is not a relevant consideration as there was no evidence of "planning and pre-meditation" or "calculated and delivered acts" of misconduct.

Submissions of the Respondent

¶ 56 The Respondent agrees that this consideration is not a relevant factor.

Analysis and Findings

¶ 57 This Panel agrees that this is not a relevant consideration. There was no degree of organization and planning associated with the misconduct and we are not here dealing with calculated and deliberate acts.

3.11 Multiple Incidents of Misconduct over an Extended Period of Time

Submissions of the Association

¶ 58 The Association submits this is a relevant consideration. The Association says that the Respondent's culpability is compounded by the findings of a pattern of misconduct over a period of approximately two years and therefore this is a significant aggravating factor.

Submissions of the Respondent

¶ 59 The Respondent says that "almost all of the findings of the Hearing Panel relate to single decisions of Mr. Van Hee to exercise his discretion in a certain way." Therefore, it would only be natural that there would be multiple incidents arising from the exercise of similar decisions.

Analysis and Findings

¶ 60 This Panel agrees that there were multiple incidents of misconduct over an extended period of time. When looking at all four of Counts 1 through to 4, there were multiple incidents of failure that should not be characterized as arising from "single decisions of Mr. Van Hee to exercise his discretion in a certain way." Looking at all of the evidence, without repeating all of the findings of this Panel in the disciplinary decision, there were numerous "red flags" that were ignored by the Respondent and that required the Respondent to do more in the circumstances. There was a pattern of supervisory failure that cannot be fairly characterized as arising from single decisions to exercise discretion in one way or another. This Panel considers this factor to be an aggravating factor.

3.12 Vulnerability of Victim

Submissions of the Association

¶ 61 The Association states that this is a relevant consideration particularly in relation to the supervision of E.L.'s management of the D.M. and L.B. accounts. The personal and financial information disclosed on the NCAF's for the two clients discloses that they were "particularly vulnerable." The Association considers this to be an aggravating factor.

Submissions of the Respondent

¶ 62 The Respondent says that with respect to the D.M. and L.B. accounts, the vulnerability of those clients has not been determined as those clients did not give evidence. The Respondent says that while those clients may have had limited financial resources, they did sign NCAF's which stated that their investment objectives

were 100% speculative and high risk and there was no evidence that they were not able to sustain the losses that they did. In any event, the Respondent submits that even if they were vulnerable in some way, their vulnerability did not depend upon the conduct of the Respondent but, rather, on their ROR.

Analysis and Findings

¶ 63 The Guidelines state that the disciplinary process must be seen to provide some degree "of protection for the investing public, and in particular, the client with a lower level of sophistication. Consequently, the vulnerability of a victim should be taken into account in determining relative culpability, and hence the relative measure of the sanction imposed." This is not a case where the Respondent sought out vulnerable clients. The creation of the role of a DROP was done in recognition that trading in options can have very high levels of risk. It is the responsibility of the DROP to carry out an additional level of supervision and it is the DROP who has ultimate responsibility for overseeing options trading within the firm. In the case of D.M. and L.B., the NCAF's show that they were both very inexperienced with poor to basic or limited investment knowledge. The Respondent admitted at the disciplinary hearing that "trading options can be a highly speculative, risk oriented, investment strategy not recommended for the inexperienced investor." D.M. and L.B. were inexperienced investors who, based on the NCAF information available, did not have significant liquid assets that could afford to be put at risk. Having regard to the risk associated with options trading, and their investment characteristics as disclosed in the NCAF, D.M. and L.B. were particularly vulnerable and therefore this consideration is an aggravating factor.

¶ 64 With respect to the submission of the Respondent that even if D.M. and L.B. were vulnerable in some way, their vulnerability did not depend on the conduct of the Respondent, but rather on the conduct of the ROR, E.L., that submission is rejected. The requirement to supervise in the case of these two accounts was high. E.L. had is own obligations in relation to these two accounts. But any failures of E.L. cannot excuse or take away from the obligation of the Respondent to take steps to protect those who are vulnerable, which would include D.M. and L.B.

¶ 65 D.M. and L.B. were not the only clients that could be considered to be vulnerable. There were other clients, referred to in the decision involving all of Counts 2 through to 4, who also had characteristics that could be considered to place them in a vulnerable position. Those clients have not made any complaints and but for T.G., have not claimed that they have suffered losses. However, some of those clients were vulnerable and deserved the protection offered by the supervisory obligations of a DROP.

¶ 66 To conclude, this Panel finds that this consideration is an aggravating factor.

3.13 Failure to Cooperate with the Association's Investigation

Submissions of the Association

¶ 67 The Association states that this is not a relevant consideration and there is no evidence that the Respondent failed to cooperate with Staff. However, the Association submits that this is not a mitigating factor as the Respondent has already been given "credit for cooperation" as indicated under 3.7 Credit for Cooperation noted above.

Submissions of the Respondent

¶ 68 The Respondent submits this is not a relevant factor.

Analysis and Findings

¶ 69 The Guidelines for this consideration state that failure to cooperate with the Association's investigation can form the grounds for a separate disciplinary offence under Association By-law 19.5. However, if the primary misconduct being investigated can be proven without the cooperation of the registrant, a failure to cooperate can be taken into account as an aggravating factor. We are not dealing with that fact situation here and in any event, there was cooperation. This Hearing Panel finds that this factor is neither mitigating nor aggravating.

3.14 Significant Economic Loss to the Client and/or Member Firm

Submissions of the Association

¶ 70 The Association submits that there were significant losses to D.M. and L.B. and therefore this is an aggravating factor.

Submissions of the Respondent

¶ 71 The Respondent submits that the only clients who lost money are D.M. and L.B. However, a significant amount of the losses in the accounts were caused by the equity trades in their accounts.

Analysis and Findings

¶ 72 There were significant losses to the clients in the D.M. and L.B. accounts, and also losses that were compensated in the T.G. account. This Hearing Panel finds that this consideration is an aggravating factor. In relation to D.M. and L.B., there were losses in the options trading, not just the equity trading.

V. SUBMISSIONS OF THE ASSOCIATION WITH RESPECT TO AN APPROPRIATE PENALTY

¶ 73 The Association refers to Guideline 4.3 that provides for recommended minimum sanctions of:

(a) Minimum fine of $25,000.00;

(b) Re-write of the PDO;

(c) Period of suspension or permanent bar from supervisory responsibilities; and

(d) Permanent bar from approval in all capacities in an egregious case.

¶ 74 The Association submitted that an appropriate sanction in this case is:

(e) Fine of $50,000.00;

(f) Re-write of the Options Supervisor Course within 6 months

(g) Six month suspension; and

(h) A contribution of $20,000.00 to costs.

¶ 75 In support of its position with respect to an appropriate penalty, the Association relied on a number of decisions of hearing panels that dealt with branch managers that failed to reasonably supervise. The decisions relied on by the Association are:

***Racine* (Re) [2006] I.D.A.C.D. No. 24**

Racine involved the approval of a settlement agreement. The respondent was a branch manager that had failed to use due diligence in his supervision to learn the essential facts relative to every client in every account accepted, when approving new options accounts for seven clients, and a failure to question changes to the client profiles after the opening of the accounts and a failure to ensure that the degree of risk associated with the types of options strategies requested was suitable for the clients. Of note, the client objectives were very conservative, they had no experience in trading of options and then in a short period of time, the stated client knowledge of options went from low to high. The ROR effected spreading strategies, generally involving 50 contracts. Later, the ROR significantly increased the number of contracts traded in the accounts to as many as 300 contracts in some cases, without obtaining client authorization. The respondent had not adequately questioned the options strategies used by the ROR.

The Association stated that there were similarities between the supervisory deficiencies in *Racine* and in those of the Respondent.

The penalties imposed were:

- Fine of $30,000.00;

- Suspension of registration as branch manager for a period of six months;
- As a condition to his re-approval as branch manager or for any new approval in such capacity, there was to be a rewrite of the Branch Manager Course and of the Options Supervisor Course; and
- Payment of costs in the amount of $5,000.00.

There are similarities between the supervisory deficiencies identified in the *Racine* case and the case before this Hearing Panel. In particular, the inconsistencies in the investment profiles of the clients and the approval of options accounts without ensuring that the proposed options trading was suitable. Also, there was a failure to intervene or make inquiries in the face of complex and high risk option strategies in the client accounts in the *Racine* decision, as there was here.

***Guilbault* (Re), [2006] I.D.A.C.D. No. 23**

The penalty imposed involved the approval of a settlement agreement. The penalty imposed was:

- A permanent ban on approval in any capacity with a member of the Association;
- A fine of $35,000.00; and
- Payment of the Association's costs in the amount of $5,000.00.

In the *Guilbault* decision, the respondent was an ROR who had been found to fail to use due diligence to learn and remain informed of the essential facts relative to his clients, and who had with respect to eight clients recommended and implemented speculative spreading strategies which were unsuitable for the client and who had also on two occasions failed to ensure that transactions made for six clients were really in the interest of those clients. There was also an admission that the ROR had effected discretionary trades in the accounts of seven clients. There was an element of deceit in relation to the ROR's circumvention of verification of the compliance and suitability approval of the options accounts for seven clients. The ROR had listed speculative investment goals and the same risk tolerance for seven clients without regard to the true financial position of each client. He also failed to obtain the prior approval of the designated officers of the Member in accordance with the Member's compliance policies. Further, the ROR misled clients when he produced his own reports which were given to the clients to illustrate the results of option strategies effected in their accounts without including the open positions, thus providing an incomplete representation of the transactions that have been made and the results achieved by those strategies. The ROR also failed to obtain the prior authorization of a designated officer before producing those unofficial reports for the clients.

It is the element of the discretionary trading and of the deception that makes the conduct in the *Guilbault* matter more serious than that of the Respondent in this case. That more serious misconduct likely explains the permanent ban portion of the penalty that was imposed in the *Guilbault* decision.

***Schillaci* (Re), [2007] I.D.A.C.D. No. 6**

This decision is of note since it involves the branch manager who failed to supervise the D.M. and L.B. accounts that are the subject of Count 1 in this Decision. After a contested hearing, it was found that Schillaci had failed to adequately supervise E.L. in relation to the accounts of D.M. and L.B. and had failed to maintain adequate supervision records and establish appropriate procedures and controls. The penalty assessed against Schillaci was:

- Fine of $15,000.00 (payable within six months of the decision);
- Successful completion of the Effective Management Seminar and the Options Supervision Course (within one year of the date of the decision); and

- Failure to successfully complete the Effective Management Seminar and the Options Supervision Course within the one year period resulting in immediate suspension from approval as Branch Manager; and
- Payment of costs of $10,000.00 within six months of the decision.

The mitigating factors in the *Schillaci* case were that Schillaci had taken the Effective Management Seminar and had developed procedures for supervision and follow-up. Also of note was a finding that Schillaci had not been adequately trained or supported by the firm and that he had provided cooperation. The panel found that the misconduct of Schillaci was at the lower end of the spectrum. With respect to blameworthiness, the panel found that the conduct of Schillaci occurred through negligence and naivety and that Schillaci was new to his position of Branch Manager and was not supervised. There was also a finding that Schillaci, albeit late, did elevate his concerns with respect to E.L.'s conduct to responsible persons within Union Securities but did not receive response or direction. It was held that the conduct in question with respect to Schillaci was an isolated incident. Of particular note is that the hearing panel determined that Schillaci did not act alone in his misconduct, and that his head office had a responsibility to supervise him and not only failed to do so but failed to provide him with policy and procedures to ensure that he supervised effectively as is required. We note these factors, not as findings of this panel with respect to any conduct of the Respondent in this case, but as mitigating factors that were present in the *Schillaci* penalty determination.

The *Schillaci* decision can be distinguished from the facts in this case. In this case, we are dealing with more failures to reasonably supervise than in *Schillaci*. We are also dealing with an experienced industry participant that had held the position of DROP for many years. Whereas in *Schillaci*, the respondent was new to his position and had not been adequately trained and supported by his member firm. This may explain why the penalty in *Schillaci* is at the lower end of appropriate penalties for a failure to supervise, and in fact is lower than the sanctions recommended in the Guidelines.

***Youden* (Re), [2005] I.D.A.C.D. No. 52**

In *Youden* the penalty imposed, after a penalty hearing, was:

- $70,000.00 fine;
- Re-write and pass the Branch Manager's Qualifying examination within eight months;
- Payment of $15,000.00 toward costs.

In *Youden* the respondent was the Branch Manager who had failed to adequately supervise the trading activities of one of the RR's in his branch. Two of the clients of the RR had sustained losses over a two year period. There was no suggestion of any fraudulent or deceptive conduct on the part of the Branch Manager. It was held that there were numerous red flags that the Branch Manager should have recognized and acted upon. The red flags included unusual trading activity in the accounts of the RR. The Branch Manager had spoken with the RR and repeatedly accepted the RR's explanations "in spite of numerous red flags which cried out for investigation and action." It was held that the Branch Manager should have called the RR's clients directly to confirm the suitability of the trading activity in the face of repeatedly high turn ratios, high commissions, significant losses and trading activity that was inconsistent with the client objectives on file as evidenced by the KYC's.

In the penalty decision the panel noted that as a supervisor the Branch Manager had a lesser level of complicity than the RR who was the more direct perpetrator. There was no evidence of deceit or fraudulent conduct. There was no prior disciplinary record during the Branch Manager's 37 years of involvement in the securities industry. There was no evidence of any voluntary rehabilitative efforts, as there is in this case. With respect to the issue of whether a suspension was warranted, the panel rejected the Association's submission that a four year suspension was warranted. As to whether or not a suspension of shorter duration was warranted, the panel stated:

> The panel finds, not without some hesitation, that a suspension is not warranted. Certainly, we would not be of this view if there was even a hint that the lack of supervision resulted from the potential of personal gain or by using deceit or dishonesty. Having said this, the panel accepts that there need not be deceitful conduct to ground a finding that a suspension is warranted in an appropriate case.
>
> As set out above, and in addition to the other factors considered in this decision, we note that Mr. Youden did not completely fail to supervise Mr. Bagnell. While not sufficient, Mr. Youden took some supervisory actions in respect of Mr. Bagnell. Mr. Youden was not dishonest. Both before and after the events which are the subject of the within proceeding, Mr. Youden has had no further disciplinary matters before the IDA. The panel believes that a suspension is not necessary in order to avoid a repetition of the conduct in question. While a branch manager occupies a significant position in the securities industry, and transgressions of the sort committed by Mr. Youden may be seen as causing some measure of harm to the industry as a whole, ultimately, on the facts of this case, the imposition of a suspension would be, in our opinion, unduly punitive. Without attempting to minimize the seriousness of the offence found in this matter, Mr. Youden's misconduct does not rank in the worst category of offences.
>
> * * *
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> While it is the panel's decision that a suspension is not appropriate in the circumstances of this particular case, we are of the view that the penalty imposed should demonstrate that Mr. Youden's failure to properly supervise Mr. Bagnell's activities is a serious matter. Furthermore, the penalty must be severe enough to act as a general deterrent to those in the industry with supervisory responsibilities.

The panel imposed a fine of $70,000.00 which it believed was significant and struck a balance by addressing the specific misconduct while at the same time being in line with industry expectations and previous decisions. The panel stated "branch managers must closely monitor the activities of those they supervise. In our opinion, a fine of this magnitude will act as a general deterrent in the industry and further the interest of the protection of the public by promoting general adherence to industry rules and standards."

The Association states that the *Youden* case can be distinguished in part from the matter before this Hearing Panel in that the supervisory failures related to one RR and two client accounts, whereas in this case we are dealing with supervisory failures relating to four ROR's and 17 client accounts. The Association also states that although a suspension was not imposed in the *Youden* case, the fine that was imposed was much higher than the Association seeks in this matter and may be seen as off-setting the lack of a suspension in this case.

***Graham* (Re), [2005] I.D.A.C.D. No. 21**

Graham was a Co-Branch Manager with supervisory responsibility for a registered representative. Graham was to ensure that the RR performed sufficient due diligence with respect to a Bell Canada International Inc. security, and in particular, the allegations related to a failure to take steps to remain informed of the essential facts with respect to the security. The respondent failed to conduct further research into the terms of the security. The security was purchased in 14 different client accounts and the losses in relation to the security were $724,803.46. The Association argued that an appropriate penalty was a fine of $100,000.00 plus a suspension of five years. The panel in *Graham* imposed the following penalty:

- Fine of $50,000.00;
- Re-write and pass all of the Canadian Securities course exam and the Conduct and Practices Handbook exam and the Partners, Directors and Officers exam. Failure to successfully complete the examinations would result in the respondent's suspension of his ability to act in a supervisory capacity until the exams were successfully completed; and
- Costs of $15,000.00.

The panel concluded that the conduct of the respondent was not deceptive and was closer to negligence. The respondent accepted responsibility and was remorseful. The panel did note the significant losses to the clients were an important consideration. Of note, the panel found that in relation to the four client accounts, there was really "just one error, our view is that the error was seminal and grave and was repeated over and over." The panel noted that Graham was presented with many red flags in relation to the security and had many occasions to revisit his first decision but chose not to. Those factors were aggravating factors that placed the matter well above the minimum fine level. Further, even though the initial error was negligent and not deceitful, the panel seriously questioned "that initial judgment."

On the important issue of whether a suspension should be imposed, the panel refused to direct a suspension. On that issue the panel stated:

> That said, if there was even a hint that this was done for personal gain, we would agree with Ms. Lohman. However, that does not end the issue. We need to ask ourselves whether a shorter period of suspension would serve the purposes of the IDA and the securities markets and the public good. With some hesitation, we find that it would not. We are of the view that Graham is now, through this process, fully cognizant of not just his responsibilities as a supervisor, but also the requirement to execute those responsibilities well and fully and the potential consequences if one does not….
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> * * *
>
> There is an argument that while a period of suspension is not required for Graham, in that he has "learned his lesson", a period of suspension should be considered to "send a signal" to others who might be inclined to pay only lip service to their supervisory responsibilities. We believe that there is some validity in that point of view and that is what creates some hesitation on our part with respect to whether or not a period of suspension is required in this matter. That said, we believe that on balance, and following the Guidelines, we should not impose a period of suspension only to address matters of general deterrence, particularly in a matter related to supervision where no personal gain or deceit was involved. We would not hold this view if we were reviewing overt conduct not involving a lack of supervision or in a situation that where there was a lack of supervision occasioned by the prospect of personal gain or utilizing deceit.

The Association argues that the *Graham* decision only dealt with one failure to supervise in relation to one RR. The suggestion is that a greater penalty, or suspension, may be warranted in the present case. While it is true that there was one seminal decision that gave rise to the failures in the *Graham* decision, and only one RR, the losses suffered by clients were far more significant than in our case.

***Dunn* (Re), [2004] I.D.A.C.D. No. 22**

Dunn was a Branch Manager who allowed a non-registered person to act in furtherance of trades, who also failed to supervise client accounts. The following penalty was assessed:

- $10,000.00 fine for allowing a non-registered person to act in furtherance of trade;
- A $50,000.00 fine for failing to supervise client accounts;
- A $15,000.00 fine for failing to use due diligence to ensure that the recommendations made for a client account were appropriate;
- A $25,000.00 for failing to provide clients with objective or unbiased information regarding their investments in certain securities;
- Costs of $15,000.00;
- A permanent ban from ever acting in any supervisory capacity;
- Re-write and pass the Conduct and Practice Handbook before re-approval by the Association in any capacity; and
- A prohibition on any re-approval in any capacity until the fine and costs are paid.

Dunn failed to supervise at least two client accounts. The accounts became overly concentrated in aggressive high risk securities. Some of the transactions completed by the RR were outside the stated investment objectives for the accounts. There were also issues of concentration in some other client accounts.

Of note, the *Dunn* decision was an uncontested case. The failures in *Dunn* appear to be more serious than the failures that we are dealing with in this case. The Association argues that there are many similarities between the *Dunn* decision and the case that we are dealing with. Those similarities include:

- A failure to question trades outside of stated investment objectives;
- A failure to document supervisory discussions;
- A failure to contact clients to discuss account trade activity or changes to client account profiles; and
- A failure, generally, to act on numerous "red flag" warnings.

The Association argues that this case is instructive insofar as the imposition of a fine of $50,000.00 for the failure to supervise client accounts. There was also a permanent ban from ever acting in a supervisory capacity in the *Dunn* decision.

***Morrison* (Re), [2003] I.D.A.C.D. No. 13**

This was a penalty imposed pursuant to a settlement agreement that was approved by the panel. The penalty included:

- Fine of $35,000.00;
- Prohibition of re-approval by the Association to act in any supervisory capacity for a period of three years;
- As a condition of re-approval by the Association in any supervisory capacity the respondent was required to successfully rewrite the Branch Manager examination; and
- $4,000.00 towards costs.

Morrison was a Branch Manager that failed to adequately supervise. There were nine accounts for five clients in which there was undue concentration, short-term day trading and a significant decrease in value in the accounts. Some large single trades exceeded the net asset value of the account. There had been no review of the NCAF's. There was a failure to follow internal policy of the Member firm for approval for large trades.

In addition to the fine imposed by the IDA, the respondent had already been fined $15,000.00 by his employer and was removed for an indefinite period from a position requiring regulatory supervision. Little analysis of the penalty decision is provided in the decision. Of note to this Panel, there was evidence that an internal review by his employer had previously noted that the respondent was not providing written evidence of his daily and monthly reviews. Then the following year the Association Sales Compliance department also noted that the respondent was not providing written evidence of his daily and monthly reviews. After being notified of the results of both of those reviews, the respondent did not amend his supervisory practices. This in the view of this Panel elevates the seriousness of the misconduct in the *Morrison* case beyond that of the level of misconduct in the case that we are dealing with. This may explain why there was acceptance of a prohibition for three years to act in any supervisory role.

***Mills* (Re), [2001] I.D.A.C.D. No. 7**

Mills was a Branch Manager that was found to have failed to adequately supervise. The decision pre-dates the disciplinary Guidelines. The penalty imposed was:

- A fine of $50,000.00; and
- Costs in the amount of $35,000.00;
- As a condition of his continued approval, the Respondent to re-write and pass the Partners, Directors and Officer examination.

Of note, the panel found that the supervisory failures of Mills would ordinarily result in a suspension of some nature. However, due to his genuine attempts to supervise the RR's conduct and because the failure was unlikely to be repeated, the panel found that there was no need for suspension.

In *Mills* the panel accepted that the failures of Mills were errors of judgment. He had placed too much trust in an aggressive registered representative and he failed to respond to a number of indications that should have led him to take further steps. That said, the panel stated that a failure to supervise involving errors in judgment does not mean that it is a mitigating factor.

With respect to the errors of judgment, the panel did note that Mills made a determination not to follow the coding required by his employer's manual and that Mills concluded that he was entitled to ignore the manual. That was a conscious decision that "constituted a serious departure from his supervisory obligations…." The losses paid in relation to the client accounts were in total about $170,000.00.

The *Mills* decision is also commented on in argument by the Respondent in this case. The respondent in both *Mills* and in this case argued that this Panel should take into account the industry and public attention, including press coverage, that the proceedings and decision would have on their reputation. Counsel for the respondent argued that this Panel should take that factor into account when assessing a penalty. In *Mills* the panel stated:

> The District Council does not accept this submission. In the District Council's view the effect of this proceeding on Mr. Mills' reputation will result from the findings contained in its prior decision and in the reasons for this one. The impact of a penalty on a respondent's reputation is a function of its appropriateness. Treating this as a factor in determining the penalty would involve circularity of reasoning and would substitute subjective factors relating to a respondent for the proportionality implied in the role of general deterrence and industry expectations described above. In the District Council's view, this type of consideration is not relevant to a penalty determination.

This Panel agrees with the above comments in *Mills*. The impact on the Respondent's reputation, whether caused by notices published by the Association, the prior decision in this matter or this penalty decision are not relevant considerations.

There are some similarities between the facts in *Mills* and the facts in this case. It can be said that the failures of the Respondent in this case were errors of judgment, but they were serious errors of judgment. As stated in *Mills*, a branch manager's obligations to supervise the opening of new accounts and subsequent trading in them is intended to provide protection to member firms and their clients. A failure to fulfill those obligations may expose both to unwarranted losses. While Mills dealt with the branch manager "on the front line of investor protection when performing these functions," the Respondent, as the DROP, also had an important supervisory role. A failure to fulfill supervisory responsibilities is a serious matter.

The decision of *Mills* also considered whether a suspension was warranted. As is stated in the decision, supervisory failures like those of Mr. Mills would ordinarily result in a suspension of some nature. The District Council stated a suspension would also be consistent with industry expectations. The District Council in *Mills* then stated:

> Nevertheless, in the circumstances of this case, the District Council has concluded that it is not necessary to suspend Mr. Mills, in part because of his genuine attempts to supervise Mr. Roy's conduct. It is the District Council's view that Mr. Mills is neither dishonest nor lackadaisical, and counsel for the Association did not suggest otherwise. His failure resulted from a misguided sense of his own authority and a misplaced confidence in a trusted employee, errors of judgment which,

> although serious, are not likely to be repeated in view of this proceeding and the District Council's assessment of Mr. Mills based on his testimony and conduct during the hearings.
>
> This conclusion is also influenced by the change in Mr. Mills' responsibilities at Nesbitt Burns. In his current position he does not perform the functions of a branch manager. Supervisory activities constitute only a small part of his responsibilities and he does not perform them alone. Indeed, Ms. McManus conceded in reply that in view of Mr. Mills' current position, it is not necessary to suspend him in order to avoid a repetition of his conduct. Rather, she argued that a suspension is necessary to send a message to Mr. Mills' firm and, presumably, to branch managers in other firms.
>
> As the District Council has concluded that a suspension is not necessary for purposes of specific deterrence, suspending Mr. Mills in order to send a signal to other branch managers would punish him for purpose of general deterrence and would in these circumstances be unfair to him. The same is true of a suspension aimed at deficiencies in his firm's culture….

The above quotations were referred to in argument by counsel for the Respondent in support of his submission that no suspension is warranted. We agree that in relation to this matter there were some attempts to supervise. We agree that in this case the conduct of the Respondent was not dishonest. We also note the evidence provided at the penalty hearing with respect to the changes made by the Respondent and the fact that he no longer performs his role alone. These are all factors mitigating against a suspension.

VI. SUBMISSIONS OF THE RESPONDENT WITH RESPECT TO AN APPROPRIATE PENALTY

¶ 76 The Respondent submits that there was a dereliction of duty as he did carry out supervision but accepts that the level of supervision was insufficient. Further, at least in relation to Count 2, and the evidence with respect to the Dynegy strategy employed by S.B., the Respondent submits that there was a single decision that led to the failures, not a repeated pattern of behaviour. Further, the errors occurred during the period of significant growth at Union Securities which should be considered and there was evidence of significant improvements to the process.

¶ 77 The Respondent also submits that there is no prior decision that clarified the supervisory responsibilities of a DROP and therefore the industry expectations and understandings had not previously been tested. The Respondent submits that the decision in this case has brought clarity to at least some of those responsibilities.

¶ 78 The mitigating factors that the Respondent emphasizes are:

(a) The length of time since the impugned conduct occurred in 2001 and 2002, with no incidents since that time;

(b) No prior disciplinary history of the Respondent;

(c) No further issues of any significance have been uncovered by the Sales Compliance Reviews;

(d) The evidence of Mr. Lang concerning his observations that the Respondent is a thorough and diligent supervisor and takes his supervisory responsibilities very seriously, the changes to the policies and procedures implemented since the date of the impugned conduct and the addition of an AROP at the Respondent's request;

(e) The Respondent earns a modest income;

(f) The significant number of publications made by the Association in relation to the matter;

(g) The notice provided by the Association with incorrect allegations made against the Respondent;

(h) The alleged uncertainty with respect to industry expectations, particularly with respect to options approval codes and whether put options and covered puts are Level 4 or Level 2;

(i) The Respondent's cooperation throughout and the numerous admissions made in the ASF;

(j) Letters from a number of the clients that were entered at the hearing that demonstrate that the impugned trades were brought to the attention of the clients after the investigation commenced and none brought forward a complaint; and

(k) It is unlikely that the Respondent will ever offend again. He has improved his level of supervision.

¶ 79 With respect to the penalty proposed by the Association, the Respondent makes the following submissions:

Fine

¶ 80 The Respondent submits that a fine of $50,000.00 is not remedial but is punitive. The Respondent refers to his age of 63 years and his modest income. The Respondent submits that a fine of that magnitude would effectively bar the Respondent from working in the industry having regard to his modest income. While this Panel was provided with evidence about the Respondent's modest income, it was not provided with any evidence about the assets of the Respondent. While his income might make it difficult to pay a fine, an equally relevant factor is whether the Respondent has assets sufficient to pay the fine and no information was provided by the Respondent on that issue.

Suspension

¶ 81 The Respondent submits that there is no justification for the imposition of any form of suspension. It is unlikely that the Respondent will ever offend again and he has improved his level of supervision. The Respondent refers to portions of the cases referred to above (particularly the *Youden, Graham and Mills* decisions) to argue that no suspension is warranted on general deterrence grounds where there is no deceit or personal gain.

Rewrite of Examinations

¶ 82 The Respondent submits that there is no justification for a requirement that the Respondent rewrite the Options Supervisor Course. It is submitted that he has been a DROP since 1993 and we that are dealing with "isolated issues" in the period 2001 until 2002. The Respondent's supervision has evolved since and to require him to rewrite the examinations would "punitive," not "rehabilitative."

¶ 83 The Respondent relied on the following decisions:

Re: *Bond* and *Deluca*, *Market Regulation Services Inc*. Decision No. 2007 - 001

In this decision the hearing panel considered proceedings against a bond trader in which it was alleged that the bond trader created an artificial bid price for three securities by entering day orders on 83 trading sessions, 45% of which were entered within the last minute of the trading session. The regulator alleged that the entry of these day orders was done to create an artificial bid price for the three stocks. The panel concluded that the bid orders that were entered improved the best bid price and that the shares of the three securities were thinly traded. The effect of these orders was to increase the bid price. Additionally, the bid price had an impact on the Respondent's compensation arrangement.

In relation to the bond trader's trading supervisor, the allegation was that the supervisor failed to take steps that a reasonable compliance officer would have taken to ensure the trader's compliance with the rules. Market Regulation Services Inc. ("RS") did not present any evidence which showed that RS staff's expectation was that unfilled orders should be monitored at all times. The supervisor admitted that he did not make any attempts to supervise unfilled orders. The supervisor made much of the fact that there was no technological tool available to the industry to monitor unfilled orders, although there was no evidence to substantiate that position. The panel found that the supervisor should have done more with respect to his supervisory obligation to uphold the integrity of the marketplace. Closer vigilance would have detected the issues at an early point in time. The panel concluded that the supervisor made an honest effort to supervise but his failure to review unfilled orders was a failure to fully and properly supervise the trader.

With respect to sanctions, Staff sought a fine of $50,000.00 and a prohibition from trading supervision for one year and costs of $71,000.00. The panel concluded that a fine or prohibition was not proper or appropriate for the following reasons:

- The supervisor was not guilty of any dishonest actions;
- He cooperated with RS in all respects;
- He had no previous discipline issues or complaints about contraventions; and
- He made an effort to supervise the activities of his staff.

The hearing panel ordered that the supervisor be reprimanded for his conduct (see RS decision No. 2007 - 003).

Counsel for the Respondent submits that the above factors are present in this case and therefore there should be no fine or suspension. Counsel for the Association suggests that this case can be distinguished on the grounds that there were no red flags available to alert the supervisor to the problem that was identified. Further, RS did not provide guidelines as to the necessity to include unfilled orders in the daily reviews. The panel stated that "if RS had provided a clear reaction to the conduct of this aspect of his supervision, we believe that DeLuca would not be before us." There was no evidence presented of any impact on the market or complaints of loss. The panel recognized that the lack of these factors does not excuse the failure to supervise. On balance this Panel believes that the failures in the *Bond* and *DeLuca* decision are less serious than those of the Respondent.

Re: *Global Securities Corporation, Robert Semple, Robert Tassone and Bruce McConnachie*

This is a March 13, 2003 decision of the Canadian Venture Exchange (the "Exchange"). The allegation against one of the respondents, the branch manager, was that he failed to diligently supervise trading in an options account, that he did not ensure that its DROP approved the new client application form for options trading and that he failed to diligently supervise trading in the account. The evidence established that the branch manager did not review the client NCAF's, did not review the trading in the accounts, did not look at the several NCAF's and their different objectives for the same client and even argued that he was not required to do so because he shared in commissions from the account and therefore was in a conflict of interest. The panel found that the alleged conflict of interest did not justify the branch manager's decision to not review the account and that there was a failure to reasonably supervise. The panel imposed a fine of $20,000.00, costs of $5,000.00 and a requirement that the branch manager rewrite the Branch Manager's course. Since this was an Exchange decision, the panel did not refer to the Guidelines.

The Respondent argues that the conduct in this decision is more egregious than the Respondent's conduct in this case. In this case it is argued by the Respondent that he did carry out his supervisory obligations although he should have done more.

In the penalty decision in Re: *Global Securities*, released January 5, 2004, the panel noted that the branch manager exhibited no remorse and continued to believe that neither he nor those he supervised engaged in misconduct. The panel noted that the branch manager's failure to take any steps to undertake any reviews of the client account could be more serious than actually doing them and failing to detect a problem. In relation to the sanctions imposed, the panel stated:

> This panel notes that the penalty ordered against Mr. McConnachie would have been significantly higher, had it not been for his personal circumstances, which understandably interfered with his ability to discharge his obligations respecting Ms. Keevil's and Sailview's accounts in and after December, 1995.

There was therefore an element of compassion due to difficult personal circumstances that the branch manager faced. That could explain a sanction at the lower end of the range that one would otherwise expect. No such compassionate issues were raised by the Respondent in this case.

***Nesbitt Thomson Inc* (Re) [1995] I.D.A.C.D. No. 1*; Levesque Beaubien Geoffrion Inc.* (Re), [1990] I.D.A.C.D. No. 28; *Buzzell* (Re), [1990] I.D.A.C.D. No. 30**

The Respondent states that these are the only previous cases which have involved the trading of options in excess of the options approval codes. The penalties were very nominal in these three cases. The Respondent states that these cases reflect industry expectations.

Unfortunately, all of these decisions were made many years ago and in this Panel's opinion, do not reflect current industry expectations. Much has changed with respect to expectations for compliance and sanctions since the 1990's and these decisions are therefore of no assistance to this Panel. Further, none of these decisions involve disciplinary proceedings brought against branch managers or DROP's.

***Brighten* (Re)**

This is a 2005 penalty decision. The respondent was the Executive Vice-President of the Member, the Branch Manager, Compliance Manager and Ultimate Designated Person. The penalty imposed was by way of approval of a settlement agreement. The respondent failed to ensure that Debtor Certificates of a corporation that were sold by an RR complied with the prospectus requirements of the Act and the respondent also failed to ensure that the RR had done sufficient due diligence to qualify the investment for clients. The agreed penalty between the Association and the respondent was a fine of $10,000.00 and costs of $2,500.00.

It was noted that the respondent had a prior sanction in 1998 by the Vancouver Stock Exchange for failing to diligently supervise the activities of an RR. In the *Brighten* decision the Chair dissented, but the settlement was approved by the majority without significant analysis. The majority approved the settlement having regard to the following mitigating factors:

- The events which gave rise to the proceeding occurred before the adoption of a by-law that governs such conduct; and
- The lack of clarity in the industry concerning requisite procedures for dealing with non-brokered private placements.

This decision is of lesser weight having regard to the fact that it was a not a unanimous ruling and that it was an approval of a settlement. Further, there is no significant analysis found in the majority decision.

***Janiewicz* (Re)**

This is a November 22, 2005 decision of a hearing panel of the Association. This decision is of little assistance since it involves an RR that made recommendations for a client that were not suitable and also participated in discretionary transactions in the account of a client without client authorization. The Respondent does however rely on this decision for the finding that the re-write of industry courses and exams is meant to be rehabilitative, and not punitive. The panel in the decision found that the respondent's actions were not due to an inability to understand or properly trade on his client's behalf in the options market. It is also of note that the respondent failed to attend the hearing. The penalty imposed was:

- A fine of $50,000.00;
- Payment of $8,345.00 (USD) constituting repayment of commissions earned on unsuitable trades;
- Suspension from approval in any registered capacity with the Association for a period of six months;
- The requirement that the respondent's re-approval in any registered capacity with the Association be subject to the condition that he successfully complete a 12 month period of close supervision; and

- The requirement that the respondent re-write and pass the exam following completion of Conduct and Practices Handbook course, but was not required to rewrite the Options course.

The Association's counsel points out that this decision involved fewer clients and the impugned conduct occurred over a short time period of five months. With respect to the failure of the panel in the *Janiewicz* decision to impose an obligation to rewrite examinations, the Association stated that the Respondent in our case demonstrated a lack of knowledge with respect to supervisory obligations concerning options approval levels and therefore a requirement to rewrite examinations would not be punitive but would be rehabilitative.

VII. CONCLUSION WITH RESPECT TO THE PENALTY, EXCLUDING COSTS WHICH ARE DEALT WITH BELOW

¶ 84 The imposition of a penalty is not an exact science and is not subject to formula. It is noted from the above findings with respect to the "Key Considerations When Determining Sanctions" that there are some aggravating factors and some mitigating factors. The most significant aggravating factors are the multiple incidents of misconduct over an extended period of time. The more significant mitigating factors are the Respondent's long-term participation in the industry without prior disciplinary proceedings; his cooperation during the investigation; his admission to a significant number of facts at the hearing, and evidence of his subsequent efforts that show a recognition of the misconduct and the commitment to remedy it. Based on the Affidavit evidence given at the penalty hearing, this Hearing Panel believes it unlikely that the Respondent will ever offend again. There is evidence of an improved level of supervision.

¶ 85 Having regard to prior decisions, it is apparent that absent very unusual circumstances, a failure to supervise will result in a fine. The Guidelines recommend a minimum fine of $25,000.00 and there are no circumstances in this case that would support a fine of less than that amount. A number of decisions dealing with a failure to supervise have imposed fines that are more generally in the range of $35,000.00 (*Guilbault*) to $50,000.00 (*Graham, Dunn, Mills*) to a high of $70,000.00 (*Youden).* Some decisions combine a fine in that range together with a suspension and an obligation to rewrite examinations.

¶ 86 With respect to permanent bans or suspensions, in most decisions dealing with a failure to supervise, suspensions and bans have not been imposed, unless there is some element of a potential of personal gain or of deceit or dishonesty (see *Youden* and *Graham* where no suspension was imposed). Suspensions and permanent bans are the most serious of the available sanctions. In this case, the Respondent did not act out of personal gain and did not use deceit or dishonesty. It is this Panel's view that a suspension is not necessary in order to avoid a repetition of the conduct in question. A suspension or permanent ban is not appropriate in this case.

¶ 87 With respect to an obligation to rewrite examinations, particularly the Options Supervisors Course, this Panel agrees with the Association's counsel that a requirement to rewrite that examination would not be punitive but would instead be "rehabilitative."

¶ 88 To conclude, the obligation of this Panel is to determine a penalty appropriate to the conduct and the Respondent before it. The penalty imposed should demonstrate that the Respondent's failure to meet his supervisory obligations is a serious matter. The sanctions imposed must strike a balance by addressing the specific misconduct while at the same time being in line with industry expectations and previous decisions. It is therefore the decision of this Panel that the penalty to be imposed shall be:

- Fine of $40,000.00;
- No suspension; and
- Rewrite and pass the Options Supervisors Course within six months of the date of this Decision. Failure to successfully complete the examination will result in the Respondent's suspension of his ability to act in a supervisory capacity until the course is successfully completed.

¶ 89 The issue of costs is dealt with below.

VIII. COSTS

¶ 90 At the penalty hearing the Association tendered a summary prepared by the Association setting out particulars of the costs of the investigation and the prosecution costs. The Association provided what it referred to as "actual cost" numbers as well as reduced numbers that it was seeking. The costs presented were:

Description	Actual Amount	Amount Relied On
Investigation and complaint costs	$50,163.00	$36,246.70
Prosecution costs	$174,265.00	$130,816.00
TOTAL	**$224,428.00**	**$167,062.70**

¶ 91 The above information was not provided in an Affidavit or through a witness. The Respondent had no opportunity to cross-examine on this information.

¶ 92 The Association has asked for costs of $20,000.00. The Respondent submits that no costs should be awarded.

¶ 93 The Panel asked for written submissions on costs. Submissions were subsequently provided by the Association and the Respondent.

¶ 94 The authority for awarding costs is found in the Association's Member Rule 20.49, which states:

> **20.49 Assessment of Costs**
>
> (1) In addition to imposing any of the penalties set out in Rule 20.33, Rule 20.34, or Rule 20.45, the Hearing Panel may assess and order any Corporation Staff investigation and prosecution costs determined to be appropriate and reasonable in the circumstances.
>
> (2) Costs shall not be assessed where the Hearing Panel has not made a finding against the Respondent based on any of the grounds set out at Rule 20.33(1) or Rule 20.34(1) or where an expedited decision is quashed upon review pursuant to Rule 20.48(1).

¶ 95 The Association submits that this Hearing Panel has the discretion to assess appropriate costs to be paid by the Respondent. The Association submits that the exercise of the discretion in determining costs is similar to the exercise of discretion in imposing sanctions. The Association says that a hearing panel may therefore make a determination of the costs for both the investigation and the prosecution which are appropriate and reasonable in the circumstances.

¶ 96 The Association further submits that there is no one case that defines the phrase "appropriate and reasonable in the circumstances" or that sets out an exhaustive list of the factors for a Hearing Panel to consider when assessing costs in a particular case.

¶ 97 The Association refers to the following summaries of prior decisions with respect to guidance for imposing an award of costs:

- An assessment of the amount of costs to be borne by the Respondent is made in relation to the actual costs incurred in the matter.

> The amount of costs the respondent is required to pay should be a function of the actual costs incurred by the Association and what portion of that amount the District Council believes the respondent should bear. The costs incurred by the Association will vary from case to case, but will be a sum certain introduced in evidence by the Association at a discipline hearing. It will then be left for the District Council to determine what portion of those costs are to be borne by the respondent.

Jeske (Re) , [2004] I.D.A.C.D. No. 40, (at para 25)

See also *McMillan (Re),* [2007] I.D.A.C.D. No. 14 (para. 32-34)

- In any particular case, a hearing panel may also consider such factors as:
  - Gravity of the offence,
  - Cooperation of the Respondent in the investigation,
  - Financial hardship caused by the actions of the Respondent, and
  - Benefit received by the Respondent.

Jeske (Re), supra

  - Reasonableness of the costs amount; hourly rates and hours billed.

Union Securities Ltd. (June 22, 2005)

- There may be other factors, unique to the matter before it, that a hearing panel may choose to consider when assessing costs. If relevant, these other factors could include:
  - seriousness of the charges,
  - the degree of success in resisting charges,
  - nature and scope of the hearing,
  - facilitation of proof at the hearing,
  - conduct of the parties,
  - issues of delay,
  - reasonableness of the costs amounts,
  - financial impact on the Respondent,
  - and other factors.

K.C. v. College of Physical Therapists of Alberta (1999), 72 Alta. L.R. (3rd) 77 (Alta. C.A.)

Jaswal v. Newfoundland Medical Board, [1996] N.J. No. 50 (Nfld. S.C. Trial Div.)

Wachtler v. College of Physicians and Surgeons (Alberta), [2009] A.J. No. 347, (Alta. C.A.)

¶ 98 In support of its submission that costs of $20,000.00 should be awarded, the Association submits the following:

- The actual amount of costs incurred for the investigation and prosecution, after deduction for potential overlap in applied resources, is $167,062.70;
- The "modest hourly rates" applied to calculate Staff time, as detailed below:

Hourly Rates/Dates	**2003-2005**	**2006-2007**	**2007-2009**
Investigations Manager	$100.00/hr	$128.50/hr	$131.00/hr
Investigator	$77.00/hr	$104.50/hr	$106.00/hr
Enforcement Counsel	$96.00/hr	$126.00/hr	$131.00/hr
Litigation Assistant	$64.00/hr	$80.50/hr	$83.00/hr
Investigations Analyst	$50.00/hr	$71.50/hr	$73.00/hr

- The Association time recording for the three related matters, E.L., Schillaci, and Van Hee was maintained separately and according to the specific file numbers assigned to each matter, so there is no overlap or duplication of costs between the three matters;
- No amounts have been claimed for hearing room facilities, court reporter and registrar fees, Hearing Panel expenses, witness expenses, and Staff disbursements;
- The five allegations brought against the Respondent were serious and related to similar supervisory failures, and 4 of the 5 allegations were proven;
- Delay in the prosecution proceedings related to several applications for adjournments and other matters as brought by the Respondent;
- The Respondent was otherwise generally cooperative during the investigation and prosecution;
- There was an analysis error at the investigation stage;
- A lengthy Agreed Statement of Facts was submitted, wherein the Respondent provided admissions to specific facts and misconduct;
- There were many contested factual and legal issues addressed at the hearing;
- There were no findings of industry systemic problems relating to option approval code issues; and
- The actual current income of the Respondent has not been established, as he agreed at the hearing that his employment income from Union forms only a portion of the monies he generates on an annual basis.

¶ 99 The Association does not argue for costs on an indemnity basis and recognizes that such an award would not be appropriate in this case. The Association also recognizes that while it can seek costs from a respondent in a successful prosecution, a respondent does not have the same ability to seek costs where the Association has not been successful. The Association submits that a $20,000.00 cost award in this case, considering the relevant factors noted above, and as a function of the actual costs incurred, is appropriate and reasonable in all of the circumstances.

¶ 100 The Respondent argues that the power to award costs is discretionary. The Respondent referred this Panel to the Alberta Court of Appeal decision in *K.C. v. College of Physical Therapists of Alberta*, [1999] A.J. No. 973 in which the Court stated the following with respect to the imposition of costs in that case:

> The fact that the Act and Regulation permit the recovery of all hearing and appeal costs does not mean that they must be ordered in every case. Costs are discretionary, with the discretion to be exercised judicially. Costs awards of disciplinary bodes are subject to judicial review on a standard of reasonableness: *Brand v. College of Physicians and Surgeons* (1990) 86 Sask. R. 18 at 24 (Sask. C.A.). Costs awarded on a full indemnity basis should not be the default, nor, in the case of mixed success, should costs be a straight mathematical calculation based on the number of convictions divided by the number of charges. In addition to success or failure, a discipline committee awarding costs must consider such factors as the seriousness of the charges, the conduct of the parties and the reasonableness of the amounts. Costs are not a penalty, and should not be awarded on that basis. When the magnitude of a costs award delivers a crushing financial blow, it deserves careful scrutiny: *Nassar v. College of Physicians and Surgeons* (Manitoba) (1994), 96 Man. R. (2d) 141 (Q.B.), affirmed [1995] M.J. No. 548, (C.A.), online: QL (MJ). If costs awarded routinely are exorbitant they may deny an investigated person a fair chance to dispute allegations of professional misconduct: *Lambert v. College of Physicians and Surgeons* (Saskatchewan) (1992), 100 Sask. R. 203 at 204-05 (Sask. C.A.).
>
> (emphasis added)

¶ 101 An award of costs should not constitute an additional penalty against the Respondent but should be reflective of the time and effort expended by the Association and the Hearing Panel's assessment of how much of those costs the Respondent should be asked to bear. While there may be some cases where it would be appropriate to award substantial costs, as stated in *Credifinance Securities Ltd.*, [2006] I.D.A.C.D. No. 30 at paragraph 56:

> In recent years, there has been a trend to the awarding of quite substantial costs in these cases. We think that care should be exercised so that the fear of attracting an award of very large costs does not have the effect of inhibiting a Member, or an approved person, from advancing a defence which it thinks is meritorious. It is also worth keeping in mind, when thinking about costs, that a successful respondent cannot get its costs from the IDA. Since the power to award costs is one sided, we think that a conservative approach to costs is not unwarranted.

¶ 102 This Hearing Panel agrees with the above statement in *Credifinance*.

¶ 103 Another issue that supports the taking of a conservative approach with respect to costs is the level of proof provided by the Association of the total investigation and prosecution costs claimed by the Association. In the decision of *Toban (Re)*, a July 18, 2005 decision of a hearing panel of the Pacific District Council, the Association asked for an award of costs. The Association counsel tendered a summary of timesheets kept by the Association naming the employees involved, the number of hours worked by each and the applicable hourly rate for each employee, claiming a total time cost to the Association of approximately $60,000.00. In *Toban*, the hearing panel stated:

> As the tendered documents were somewhat imprecise and as Mr. Pelletier had not before seen these documents, Mr. Smith suggested that an appropriate figure would be $26,000.00 in Association and employee costs and $1,000.00 for hearing costs for a total of $27,000.00. He therefore recommended that the respondent be ordered to pay the sum of $27,000.00 towards the Association's costs.
>
> ***
>
> Mr. Pelletier expressed great concern that an award of costs should not merely constitute an additional penalty against a respondent, but should in fact be reflective of the time and effort expended by the Association in making its case and the hearing panel's assessment of how much of those costs the respondent should be asked to bear. In this matter, he was not aware of what costs had been incurred by the Association and what, therefore, was the case that his client had to meet with respect to such costs. He submitted that the Association had a higher obligation to the respondent than merely presenting a summary of internal timesheets and bills for a hearing at the conclusion of a hearing.
>
> We agree with Mr. Pelletier. Even though Mr. Smith reduced the costs claimed by the Association to less than half, we do not believe that we are in a position to properly comply with the provisions of By-law 20.49 and "assess" the costs. We believe that the Association must be held to a higher standard of evidence of costs than those submitted and must make the respondent aware of these costs prior to the hearing so that the respondent is prepared to face the Association's request for an Order pursuant to By-law 20.49.

¶ 104 In *Toban* the hearing panel was not at all satisfied with the Association's submissions but believed that the respondent should make a contribution towards costs. They assessed Association costs at an amount in excess of $5,000.00 and ordered that the respondent pay the sum of $5,000.00 towards those costs.

¶ 105 The Association in this case appears to have followed the same procedure in *Toban.* A summary of the costs claimed was provided but not in Affidavit form. We are not aware of these costs having been submitted to the Respondent's counsel prior to the penalty hearing. There were concerns expressed at the penalty hearing by Respondent's counsel about the level of proof of the costs. There were issues with respect to investigations of other related parties that could have contributed to the costs, although the written submissions of the Association attempt to address this issue. However, if the Association does not provide sufficient evidence of the actual costs of the investigation and prosecution, that be fairly tested by the Respondent, then a Hearing Panel should take a conservative approach when determining an "appropriate and reasonable" level of costs to be awarded.

¶ 106 Based on the decisions referred to us, this Panel agrees that the factors to be considered when determining costs include:

(a) The degree of success of the Respondent in resisting any or all of the charges;

(b) The necessity for calling all of the witnesses who gave evidence or for incurring other expenses associated with the hearing;

(c) Whether the persons presenting the case against the Respondent could reasonably have anticipated the result based upon what they knew prior to the hearing;

(d) Whether those presenting the case against a member could reasonably have anticipated the lack of need for certain witnesses or incurring certain expenses in light of what they knew prior to the hearing;

(e) Whether the member cooperated with respect to the investigation and offered to facilitate proof by admissions or other means;

(f) Financial circumstances of the member and the degree to which his financial position has already been affected by other aspects of any penalty that has been imposed;

(g) The seriousness of the charges;

(h) Whether the amount of the costs proposed would in effect be a "penalty", and if so, they should not be awarded on that basis;

(i) Whether the amount of the costs proposed are so large that they would deny an innocent person a fair chance to dispute allegations made against them;

(j) Costs awarded on a full indemnity basis should not be the default position, nor, in the case of mixed success, should cost be a straight mathematical calculation based on the number of convictions divided by the number of charges; and

(k) The evidence of the actual costs submitted by the Association.

¶ 107 There may be other considerations that can be properly considered by a Hearing Panel and the above considerations are not intended to be an exhaustive list.

¶ 108 The information about the actual costs was provided by the Association's counsel, and we do not doubt her thoroughness or belief in the accuracy of the calculations presented. However, the calculations were submitted in argument without supporting documents and the Respondent had no opportunity to cross-examine on the information. This Panel must therefore take a conservative approach to determining an appropriate and reasonable level of costs.

¶ 109 On the other hand, there were a number of pre-hearing applications. There was a six day hearing. There were 112 exhibits that filled many boxes. The Counts involve a number of clients with different ROR's in different offices. The Association called an expert witness and evidence from an expert witness was provided by the Respondent. Extensive written argument was prepared by both parties. This Panel is satisfied, even without the information provided by the Association, that the Association's investigation costs and costs of conducting the hearing were very substantial.

¶ 110 In the penalty decisions referred to by both the Association and the Respondent, there are a range of penalties applied, and that range applies as well to awards of costs. In some cases, no costs are awarded. In this case, having regard to all of the relevant factors, including the serious nature of the charges, the success of the Association on four out of five of the counts, the length of the Hearing (six days plus written argument), the significant cooperation given by the Respondent when he made numerous admissions in the ASF, and the regard to other awards in penalty decisions, this Panel finds that it is appropriate to award costs in this matter and that an appropriate and reasonable award of costs is in the amount of $15,000.00.

IX. CONCLUSION

¶ 111 To conclude, this Hearing Panel directs the following penalty:

(a) Fine of $40,000.00;

(b) No suspension;

(c) Rewrite and pass the Options Supervisors Course within six months of the date of this Decision. Failure to successfully complete the examination will result in the Respondent's suspension of his ability to act in a supervisory capacity until the exams are successfully completed; and

(d) An award of costs of $15,000.00.

DATED this 22nd day of July, 2009.
D. Brian Foster - Chair
Peter McWilliams - Member
Bruce Calvin - Member