



Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

**IN THE MATTER OF A DISCIPLINARY HEARING
PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

Re: Gregory James Richard Burner

Heard: July 19-20, 2010 in Winnipeg, Manitoba
Reasons for Decision: August 3, 2010

**REASONS FOR DECISION
(Misconduct)**

Hearing Panel of the Prairie Regional Council:

Robert Hucal
Kathleen Jost
Elaine Bradley

Chair
Industry Representative
Industry Representative

Appearances:

Clement Wai)
)

For the Mutual Fund Dealers Association of
Canada

Gregory Burner)
)

Appeared in Person

1. By Notice of Hearing dated March 16, 2010, Gregory Burner (the “Respondent”) was advised of the commencement of a disciplinary hearing pursuant to MFDA By-law No. 1. The allegations were that the Respondent failed to comply with the Member’s Policies and Procedures, and the terms and conditions placed on the Respondent’s employment by the Member, by processing transactions in clients’ accounts directly with mutual fund companies, contrary to MFDA Rules 1.1.2 and 2.5.1 and 2.1.1.
2. The allegations were the result of extensive investigations carried out by the MFDA investigators and material provided by the Respondent’s employer, it having conducted its own investigation as to the Respondent’s actions.
3. The Respondent appeared on his own behalf. No counsel appeared in respect of his interests.
4. At the First Appearance on April 16, 2010, affidavits were filed indicating that the Notice of Hearing was sent to and received by the Respondent, who acknowledged receipt. The July 19, 2010 hearing date was set.
5. At the commencement of the proceedings, materials were provided to the Panel and the Respondent concurrently. The Respondent complained that he had not been given the opportunity to review the delivered material. The Panel immediately offered that proceedings would be delayed in order for the Respondent to review the material. The offer was declined and proceedings therefore commenced.
6. It should be noted that in addition to offering a delay for review of the delivered material, the Panel strongly suggested that the Respondent retain counsel, but he confirmed he did not require such assistance and wanted to proceed on his own.
7. The primary evidence before the Hearing Panel was that of Sue Nimegeers and Harry Wenzel, supported by a series of exhibits. Both were made available as witnesses and therefore available for cross-examination.
8. The Respondent was registered between October 2000 and January 2008 in Manitoba,

Alberta and British Columbia as a mutual fund salesperson with Peak Investment Services Inc. (“Peak”) and as Branch Manager in Manitoba for Peak, which became a MFDA Member in March 2003.

Failure to Comply with Member’s Procedure

9. The Respondent, as Winnipeg Branch Manager and mutual fund salesperson at Peak, was requested to ensure that all trade orders were entered for processing at Peak’s office in Weyburn, Saskatchewan.

10. In January 2007, Peak’s compliance department noticed an “unusual” pattern of trading activity in a client account served by the Respondent, which resulted in substantial deferred sale charge (DSC) fees being incurred by the client.

11. Peak subsequently determined, by monitoring the Respondent’s daily trading activity, that in numerous instances:

- (a) the Respondent was processing redemptions in client accounts which resulted in DSC fees being incurred by the clients;
- (b) the proceeds of these redemptions were being used to purchase similar DSC mutual funds sold by other mutual fund companies, resulting in the Respondent earning a sales commission on the purchase of the new DSC mutual funds and the client commencing a new DSC schedule in respect of the reinvested redemption proceeds;
- (c) the Respondent was not rebating to the clients the DSC fees incurred by the clients on the redemptions; and
- (d) the Respondent was processing many of the redemptions and re-purchase transactions directly with the mutual fund companies instead of through Peak’s electronic order entry system.

12. By processing the redemption and re-purchase transactions directly with the mutual fund companies instead of through Peak's electronic order entry system, the Respondent interfered with and delayed the ability of Peak to supervise the Respondent's trading activity in a timely manner through its regular supervisory processes.

13. By letter dated May 14, 2007, Peak advised the Respondent of the results of its review of his trading activity and placed the following terms and conditions (collectively, the "Terms and Conditions") on the Respondent's employment:

- (a) the Respondent was required to process all transactions in client accounts through Peak's office in Weyburn, Saskatchewan;
- (b) the Respondent was not permitted to process any client order directly with a mutual fund company;
- (c) the Respondent was not permitted to reinvest the proceeds of a redemption in a client account which resulted in the client incurring a DSC fee into a new DSC mutual fund, unless the client received a commission rebate equivalent to 100% of the DSC fees incurred by the client and the Respondent provided the client with appropriate disclosure in respect of the transaction and obtained the client's prior consent to the transaction; and
- (d) all transactions submitted by the Respondent would be reviewed by Peak trade processing staff and, if necessary, by Peak compliance staff, prior to being sent to any mutual fund company.

14. Peak also put the Respondent on notice that:

- (a) any breach of the Terms and Conditions would result in the immediate suspension of the Respondent's trading privileges and a possible referral of the matter to the MFDA;
- (b) any breach of his business agreement with Peak might result in disciplinary action

against him by Peak, including termination; and

- (c) any violation of securities law or regulations would result in his termination by Peak.

15. The evidence showed that no other salesperson was placed under similar employment terms and conditions.

16. The Respondent, in a written response, acknowledged that the trades were placed directly and indicated he would continue to so do “unless I am given a good reason to do otherwise”. He also stated that all transactions, including fees incurred, were placed with “full and informed consent of the client”. No evidence of client approval in writing or otherwise was produced when requested. The Respondent continued to process transactions contrary to policies and procedures. In November 2007, the Respondent was terminated effective January 11, 2008.

17. Sue Nimegeers, the Peak employee in Weyburn, Saskatchewan who investigated the Respondent’s transactions, testified that Peak’s informal policy prior to the May 2007 letter was to “rebate commission” where DSC fees were incurred. In the Respondent’s transactions, the Respondent did not do so and, according to her investigation, at least 45 clients were affected. In her opinion, the Respondent refused to follow policies and procedures despite the fact that they were published in the Peak internal website as well as delivered in writing. Additionally, the Peak Compliance Manual was delivered to the Respondent. Again, he refused to follow guidelines for processing transfers.

Complaint of AB (“AB”)

18. By letter dated June 30, 2008, AB made a complaint to Peak about the conduct of the Respondent. AB was formerly a client of Peak and the Respondent had been the mutual fund salesperson responsible for servicing AB’s accounts (AB had an open account, a RRIF account and a joint open account with her sister).

19. In October and November 2007, AB had authorized the Respondent to process three redemptions in AB’s accounts and direct the redemption proceeds to an insurance company to be

used to purchase segregated funds. The Respondent processed the redemptions directly with the mutual fund company and not through Peak's electronic order entry system. AB incurred DSC fees in the approximate amount of \$9,872 and realized capital gains in the amount of \$6,971 as a result of the redemptions. The Respondent did not rebate the DSC fees to AB.

20. The basis of AB's complaint was that she had not been made aware of or agreed to incur DSC fees and realize the capital gains that resulted from the redemptions. AB was seeking repayment of the DSC fees.

21. By letter dated July 17, 2008, the Respondent denied the substance of AB's complaint, but was unable to produce or refer Peak to any notes or other documentation that he had prepared in respect of his meeting with AB which recorded that he had made AB aware of, and she had consented to, the DSC fees and capital gains that resulted from the trading in her accounts.

22. Peak paid AB \$10,000 to reimburse her for the DSC fees she incurred as a result of the redemptions processed by the Respondent in her accounts.

23. The Respondent was advised of the settlement but did not reimburse Peak. The Respondent's stance was, as indicated, that AB, along with all his other clients, were always aware of the full details of the transactions completed on their behalf. He stated that he had four or five meetings annually with AB and regularly (5 or 6 times) with her prior to the transactions which generated the complaint and that all transactions were prompted by AB. No evidence was provided to that effect. The Respondent, in his examination responding to questions, characterized any fees or losses in accounts as "costs" – simply a cost of doing business.

24. Harry Wenzel, the MFDA investigator, confirmed the results of his review of the Respondent's various transactions and reviewed Peak's actions regarding the Respondent's behaviour based on the correspondence and documentation before the Panel. Mr. Wenzel also confirmed that Peak's compliance procedures were adequate in supporting their actions against the Respondent.

Summation

25. The Respondent's position was that he was concerned that this Hearing was not "fair-minded" because the hearing material arrived late – that is, just before commencement of the Hearing. In that regard, the Respondent was offered an adjournment in order to review the material. This was rejected. The Respondent was also reminded, prior to commencement of the proceedings, that he was entitled to representation. This was also rejected. During the course of the Hearing, the Respondent was reminded, more than once, that he was entitled to a lawyer and that the Panel was prepared to adjourn proceedings in order for the Respondent to retain counsel. On all occasions, the offers were rejected.

26. The Respondent, not surprisingly, since it became apparent as the Hearing progressed that the Respondent had little evidence other than his opinion, suggested that a conspiracy existed, that Peak manipulated the MFDA into firing him to stop him from leaving, that Peak was not truthful, that no clients were harmed, but that his reputation was harmed, that all MFDA evidence was irrelevant and that his position was misunderstood, ignored and mischaracterized and when expressed, answered with threats. He said he did not follow Peak's rules because he did not accept them and that therefore MFDA has no business being involved in this matter and if it was, it failed "the burden of proof". The Respondent obviously could not address any of the allegations except in the manner aforesaid. No evidence was provided other than his denial. The Respondent's position is imaginative, but unequivocally rejected by this Panel.

27. The Respondent failed to comply with Peak's procedures. Those procedures were in place during the Respondent's employment with Peak and were clearly reiterated in writing when the Respondent was placed under terms and conditions relating to his business practices and although he acknowledged the terms and conditions, indicated he would continue to disregard them. MFDA Rule No. 2 – Business Conduct, specifically 2.1.1 Standard of Conduct, requires that the Respondent, *inter alia*, deal fairly, honestly and in good faith and observe high standards of ethics and conduct, as may be prescribed by Peak. The Respondent chose to ignore these standards and indicated in writing that he would so do. Failure to comply is a breach and inconsistent with appropriate standards of conduct, notwithstanding the Respondent's position that he did not accept the rules. His only evidence was that he did not agree with Peak's position.

28. Contrary to the Respondent's position that no clients were harmed, such was not the case. Every DSC fee borne by a client, which was not reimbursed in accordance with Peak's rules, was harm to the client, not a "cost of doing business", as characterized by the Respondent. Additionally, the Respondent argued that all transactions were in the best interests of and approved by the clients, but again, no evidence was provided.

29. MFDA evidence showed that \$83,000 in DSC fees were paid by 45 clients and that the Respondent benefited by receiving approximately \$120,000 in commission by reason of the transactions where DSC fees were not reimbursed.

30. The evidence clearly establishes that the Respondent: (a) failed to comply with the By-laws and Rules of the MFDA as they related to him; (b) breached the policy and procedures manual of his employer, Peak; (c) failed to deal fairly and honestly and in good faith with his clients, as required by Rule 2.1.1(a); and (d) failed to "observe high standards of ethics and conduct in the transaction of business as required by Rule 2.1.1(b).

31. We unanimously find that the allegations set out in the Notice of Hearing have been proved.

32. We expect a further Hearing will be convened with respect to the penalty and we will have a supplementary Decision in that regard, as necessary.

DATED this 3rd day of August, 2010.

"Robert Hucal"

Robert Hucal,
Chair

"Kathleen Jost"

Kathleen Jost,
Industry Representative

"Elaine Bradley"

Elaine Bradley,
Industry Representative