

Decision and Reasons (Penalty)

File No. 200814



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: Gary Alan Price

Heard: July 13, 2011 in Toronto, Ontario
Decision and Reasons (Penalty): September 19, 2011

DECISION AND REASONS (PENALTY)

Hearing Panel of the Central Regional Council:

Thomas J. Lockwood, Q.C.
Gary Legault
Robert Guilday

Chair
Industry Representative
Industry Representative

Appearances:

Michelle Pong)
)

For the Mutual Fund Dealers Association of
Canada

Gary Alan Price)
)

In Person

I. INTRODUCTION

1. On April 18, 2011, we issued our Decision and Reasons (Misconduct) with respect to this matter. For the reasons given, we concluded the following Allegations had been established against Gary Alan Price (the “Respondent”):

Allegation #1: Between April 2003 and May 2007, the Respondent failed to observe high standards of ethics and engaged in business conduct or practice that was unbecoming by obtaining and possessing pre-signed forms, contrary to MFDA Rules 2.1.1(b) and 2.2.1(c).

Allegation #2: Between April 2003 and May 2007, the Respondent failed to observe high standards of ethics and conduct in the transaction of business by using pre-signed forms to execute trades, contrary to MFDA Rule 2.1.1(b).

Allegation #3: Between April 2003 and May 2007, the Respondent engaged in discretionary trading by selecting mutual funds for purchase without the necessary instructions from clients RH and LH and completing sections of pre-signed forms to process such trades for clients RH and LH, contrary to MFDA Rule 2.3.4 and the terms of his registration as a mutual fund salesperson.

Allegation #4: Between January 2004 and May 2007, the Respondent failed to comply with the Member’s directives to destroy all pre-signed blank investment forms, contrary to MFDA Rules 2.1.1(b), 1.1.2 and 2.5.1.

2. After considering submissions from the parties as to the manner of conducting the Penalty Hearing, the Hearing Panel made the following Decision on May 26, 2011:

- (a) Staff will serve and file any Written Submissions which it wishes to make, on or before Friday, June 17, 2011;

- (b) The Respondent will serve and file any Written Submissions which he wishes to make, on or before Thursday, June 30, 2011;
- (c) Staff will serve and file any Written Reply Submissions which it wishes to make, on or before Friday, July 8, 2011;
- (d) The parties will be at liberty to make Oral Submissions to the Hearing Panel on Wednesday, July 13, 2011. The Hearing Panel will convene in the MFDA Hearing Room in Toronto at 10:00 a.m. to hear the Oral Submissions;
- (e) The Respondent will be given the option of making his Oral Submissions either in person or by way of telephone.

3. After receiving and carefully reviewing the Written Submissions of the parties, the Hearing Panel convened in Toronto on July 13, 2011, at which time it heard and considered extensive Oral Submissions from the parties. At the conclusion of the Oral Submissions, the Hearing Panel reserved its Decision, which it indicated would be given in writing in due course.

4. The following is our Decision on Penalty and the Reasons for same.

II. FACTORS CONCERNING THE APPROPRIATENESS OF THE PENALTY

5. In their Written Submissions, the parties agreed with the following statements:

- (a) The primary goal of securities regulation is the protection of the investor.

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557 (QL) *per* Iacobucci J. at paras. 59, 68.

- (b) Factors that Hearing Panels frequently consider when determining whether a penalty is appropriate include the following:

- (i) The seriousness of the allegations proved against the Respondent;
- (ii) The Respondent's past conduct, including prior sanctions;
- (iii) The Respondent's experience and level of activity in the capital markets;

- (iv) Whether the Respondent recognizes the seriousness of the improper activity;
- (v) The harm suffered by investors as a result of the Respondent's activities;
- (vi) The benefits received by the Respondent as a result of the improper activity;
- (vii) The risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
- (viii) The damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
- (ix) The need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;
- (x) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
- (xi) Previous decisions made in similar circumstances.

In the Matter of Arnold Tonnies, [2005] Hearing Panel of the Prairie Regional Council, MFDA File No. 200503, Panel Decision dated June 27, 2005, at pg. 23 (“*Tonnies*”).

In the Matter of Stephan Headley, [2006] Hearing Panel of the Ontario Regional Council, MFDA File No. 200509, Panel Decision dated February 21, 2006 at pp. 25-26.

III. MFDA PENALTY GUIDELINES

6. Both parties referred to the MFDA Penalty Guidelines with specific reference to the introduction, which provides, in part, as follows:

“Range Is Guideline Only

The penalty types and ranges stated in the Guidelines are not mandatory. The Guidelines suggest the types and ranges of penalties that would be appropriate for particular case types. The Guidelines are intended to provide a basis upon which discretion can be exercised consistently and fairly in like circumstances but are not binding on a Hearing Panel.”

IV. POSITION OF THE PARTIES ON PENALTY

7. Although the parties agreed on what factors should guide the Hearing Panel on Penalty, they diverged substantially on the conclusion a consideration of those factors should lead to.

8. Staff submitted that the following penalties should be imposed on the Respondent:

- (a) a prohibition from acting in a supervisory capacity, including specifically from acting as a branch manager, a designated or an alternate branch manager with a Member for a period of two years, pursuant to section 24.1.1(f) of MFDA By-law No. 1;
- (b) a fine in the range of \$7,500 to \$10,000, pursuant to section 24.1.1(b) of MFDA By-law No. 1; and
- (c) costs attributable to conducting the investigation and prosecution of this matter in the range of \$3,500 to \$5,000, pursuant to section 24.2 of MFDA By-law No. 1.

9. The Respondent submitted that the Hearing Panel should take the following action with respect to Penalty:

- (a) no further penalty to be imposed on the Respondent;
- (b) his case taken down from the MFDA website immediately and permanently;
- (c) costs attributable to conducting the defence of a second Hearing, payable to him in the range of \$3,500 to \$5,000; and
- (d) a letter of apology on MFDA letterhead for “violating” his rights to have this matter determined as speedily as possible.

V. APPLICATION OF FACTORS TO THE PRESENT CASE

- (a) Nature of Misconduct

10. As detailed in our Decision and Reasons (Misconduct), we have found, on the admissible evidence before us, that, between April 2003 and May 2007, the Respondent failed to observe

high standards of ethics and engaged in business conduct or practice that was unbecoming by obtaining and possessing pre-signed forms. We also found, in the same time frame, that he failed to observe high standards of ethics and conduct in the transaction of business by using pre-signed forms to execute trades. He also engaged in discretionary trading in the accounts of two clients. Finally, between January of 2004 and May of 2007, he consciously and deliberately failed to comply with the Member's directives to destroy all pre-signed forms in his possession. The Respondent went further. He agreed that he advised the Member in writing that he would immediately destroy all pre-signed forms in his possession when he had no intention of doing so. He knowingly continued to obtain, possess and use pre-signed forms after January of 2004. We found that he deliberately deceived his Member.

11. In his written and oral submissions, the Respondent stated that there was no serious misconduct. On the contrary, we find that the Respondent engaged in serious misconduct over a lengthy period of time.

(b) The Respondent's Past Conduct and Level of Activity in the Capital Markets

12. The Respondent has been registered in Ontario with Select Financial Services Inc. ("Select") as a mutual fund salesperson since February 6, 1991. The Respondent was registered with Select as a branch manager from August 22, 1993 to March 14, 2003 and from November 18, 2003 to January 23, 2009. The Respondent has never previously been the subject of a disciplinary proceeding by the MFDA.

(c) Client Harm

13. The Hearing Panel was advised that there were no client complaints and no evidence of client harm.

(d) Benefits Received by the Respondent

14. The Hearing Panel was advised that there was no evidence that the Respondent received any benefits as a result of his misconduct.

(e) The Respondent's Recognition of the Seriousness of his Misconduct

15. It is clear that the Respondent has no recognition of the seriousness of his misconduct. In his Written Submissions, he stated: "Because there were no client complaints, because there was no client harm, and because there was no personal benefit for me, it really begs the question of why we are going through this process." In his Oral Submissions, the Respondent stated that there was "no misconduct of any kind."

16. We agree with the submission of Staff that the "Respondent's misconduct occurred while he was a mutual fund salesperson as well as a branch manager and was aware of, or ought to have been aware of, his obligations, duties and restrictions as prescribed by the MFDA. As a branch manager, the Respondent was responsible for the supervision of others and was required to play an important compliance role."

(f) Previous Decisions Made in Similar Circumstances

17. In its submissions, Staff referred us to the following Decisions:

(i) *In the Matter of Rodney Jacobson*, [2007] Hearing Panel of the Prairie Regional Council, MFDA File No. 200712, Panel Decision dated July 13, 2007 at pp. 8-12.

(ii) *In the Matter of John Moro*, [2007] Hearing Panel of the Central Regional Council, MFDA File No. 200714, Panel Decision dated November 19, 2007 at pp. 2-3.

(iii) *In the Matter of Brian Somerset Campbell*, [2008] Hearing Panel of the Pacific Regional Council, MFDA File No. 200805, Panel Decision dated June 26, 200[8].

(iv) *In the Matter of Hill & Crawford Investment Management Group Ltd. and Albert Rodney Hill*, [2009] Hearing Panel of the Central Regional Council, MFDA File No. 200834, Panel Decision dated June 23, 2009 at pp. 4-7.

(v) *Tonnies* at pp. 16-19, 25-27.

(vi) *In the Matter of Carmen G. Moerike*, [2010] Hearing Panel of the Prairie Regional Council, MFDA File No. 200912, Panel Decision dated July 28, 2010 at pp. 5-6, 7-8.

(g) Risk to Investors

18. The submission of the Respondent is that there was no risk to investors. We disagree. As we stated in our Decision and Reasons (Misconduct):

“122. Pre-signed forms present a legitimate risk that they may be used by an Approved Person to engage in discretionary trading. . . . the Respondent, in this case, did not have the proper authority to engage in discretionary trading of any nature or kind on behalf of his clients.

123. At its worst, pre-signed forms create a mechanism for an Approved Person to engage in acts of fraud, theft or other forms of harmful conduct towards a client. While there is absolutely no suggestion that the Respondent engaged in any of these activities, the rationale for the prohibition on pre-signed forms becomes clear.”

(h) Damage to the Integrity of the Capital Markets

19. The submission of the Respondent is that there was no damage to the integrity of the capital markets. Again, we disagree. As we stated in paragraph 124 of our Decision and Reasons (Misconduct):

“124. Pre-signed forms also subvert the ability of a Member to properly supervise trading activity. They destroy the audit trail. The presence of the client’s signature on a trade form can no longer be taken as confirmation that the client authorized a particular trade. It also compromises the ability of the Member to subsequently investigate and respond to a client complaint concerning the propriety of trading activity in his or her account.”

VI. DECISION ON PENALTY

20. We have carefully considered the written and oral submissions of the parties, as well as all of the cases referred to us.

21. In our view, the following represents a fair and reasonable disposition of this matter, taking into account all of the circumstances:

- (a) a prohibition from acting in a supervisory capacity, including from acting as a branch manager, a designated or an alternate branch manager with a Member for a period of two years, from the date of this Decision and Reasons, pursuant to Section 24.1.1(f) of MFDA By-law No. 1.

22. We are concerned that the Respondent's misconduct occurred during a period of time when he was a Branch Manager. We are also concerned by the fact that the Respondent still does not seem to appreciate the seriousness of his misconduct. We are hopeful that this period of prohibition will provide the Respondent with an opportunity to fully reflect on his misconduct so that he may come to the realization that his actions were inappropriate, not only for a mutual fund salesperson but, more particularly, for a person in a supervisory capacity.

- (b) a fine in the amount of \$5,000, pursuant to Section 24.1.1(b) of MFDA By-law No. 1. This fine is to be paid in full on or before December 31, 2011. If this fine is not paid, as ordered, there will be a suspension of the authority of the Respondent to conduct securities related business until this fine is so paid, pursuant to Section 24.1.1(c) of MFDA By-law No. 1

23. We recognize that this fine is lower than that requested by Staff and, obviously, higher than the position put forward by the Respondent. However, after reviewing all of the relevant facts and the precedent cases submitted, we feel that this quantum of fine is what is appropriate in the circumstances.

- (c) Costs

24. Section 24.2 of By-law No. 1 provides, in part, that:

“A Hearing Panel may in any case in its discretion require that the . . . Approved Person pay the whole or part of the costs of the proceedings before the Hearing Panel . . . and any investigations relating thereto.”

25. With respect to the Respondent's request for costs attributable to conducting the defence of a second Hearing, this was addressed by the previous Hearing Panel in October of 2009 and by this Hearing Panel in our Reasons for Decision (Motion), dated September 30, 2010. Both Hearing Panels concluded that they were precluded from considering a request that costs be assessed against the MFDA.

26. Further, even if we had the power to award costs against the MFDA, we would not do so in the particular circumstances of this case, where all of the Allegations have been established against the Respondent.

27. It is normal in cases of this nature for a portion of the costs, attributable to conducting the investigation and prosecution, to be awarded against the Respondent.

28. The amount requested by Staff is modest, given the resources that would have been required to conduct a contested Hearing and to respond to the six (6) Motions brought by the Respondent. In requesting this figure, Staff submitted that it was "acknowledging the costs incurred by the Respondent as a result of the disciplinary proceedings being remitted for a new hearing due to unprecedented circumstances and through no fault of the Respondent or Staff."

29. This Hearing Panel is also mindful of these "unprecedented circumstances" and, accordingly, has decided to exercise the discretion granted to it by Section 24.2 of MFDA By-law No. 1 and grant no costs of these proceedings.

VII. PENALTIES IMPOSED

30. In summary, the penalties which we impose on the Respondent are the following:

- (a) a prohibition from acting in a supervisory capacity, including from acting as a branch manager, a designated or an alternate branch manager with a Member, for a period of two years from the date of this Decision and Reasons, pursuant to Section 24.1.1(f) of MFDA By-law No. 1;

- (b) a fine in the amount of \$5,000, pursuant to Section 24.1.1(b) of MFDA By-law No. 1. This fine is to be paid in full on or before December 31, 2011. If this fine is not paid, as ordered, there will be a suspension of the authority of the Respondent to conduct securities related business until this fine is so paid, pursuant to Section 24.1.1(c) of MFDA By-law No. 1; and
- (c) no costs.

DATED this 19th day of September, 2011.

“Thomas Lockwood”

Thomas J. Lockwood, Q.C.,
Chair

“Gary Legault”

Gary Legault,
Industry Representative

“Robert Guilday”

Robert Guilday,
Industry Representative

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