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State of Washington

DEPARTMENT OF FINANCIAL INSTITUTIONS

IN THE MATTER OF DETERMINING
Whether there has been a violation of the
Securities Act of Washington by:

Matthew Kelleher and Wendi DuBois,

Respondents.

Final Order No. S-19-2770-24-FO01

OAH No. 11-2022-DFI-00147

FINAL DECISION AND ORDER

THIS MATTER comes now before CHARLES E. CLARK, Director ("Director") of the WASHINGTON STATE DEPARTMENT OF FINANCIAL INSTITUTIONS ("Department"), on Petition for Review of Initial Order issued by Administrative Law Judge Joni Derifield ("ALJ Derifield"), dated October 30, 2023, against Respondents, MATTHEW KELLEHER and WENDI DUBOIS (collectively "Respondents"). Respondents filed a Petition for Review of the Initial Order dated November 20, 2023, ("Respondent's Petition"). The Securities Division ("Division") filed a Reply to Respondents' Petition for Review of Initial Order on December 5, 2023¹ ("Division's Reply to Review of Initial Order").

1.0 PROCEDURAL HISTORY

On May 23, 2022, the Division issued a Statement of Charges and Notice of Intent to Enter Order to Suspend Registrations, Impose Fines, and Charge Costs ("Statement of Charges") to Respondents. Respondents submitted timely Requests for Administrative Hearing, and the

¹ The Division timely filed a Motion to Extend Time to File Reply Brief. The Director granted a five-day extension to the Division for its reply.

Statement of Charges was referred to the Office of Administrative Hearings (“OAH”) for adjudication.

The Division filed Department’s Motion on Summary Judgment on August 22, 2023, and Respondents filed Respondents’ Opposition to Department’s Motion for Summary Judgment on September 12, 2023. The Division filed Department’s Reply to Respondents’ Opposition to Department’s Motion for Summary Judgment on September 19, 2023.

ALJ Derifield issued an Initial Order on Summary Judgment, which was issued and served by mail on Monday, October 30, 2023.

On November 20, 2023, Respondents filed its Petition for Review of Initial Order. On December 5, 2023, the Division filed its Reply to Respondents’ Petition for Review of Initial Order.

2.0 RECORD ON REVIEW

The record on review (“Record on Review”) before the Director includes the entire OAH Record in the above-captioned matter including, but not limited to the following:

- 2.1 Statement of Charges;
- 2.2 Department’s Motion for Summary Judgment and supporting exhibits;
- 2.3 Respondents’ Opposition to DFI’s Summary Judgment Motion and supporting exhibits;
- 2.4 Department’s Reply to the Respondents’ Opposition to DFI’s Summary Judgment Motion; and
- 2.5 Initial Order on Summary Judgment Motion.

The Director also considered:

- 2.6 Respondents’ Petition for Review of Initial Order and

2.7 Department's Response to Respondents' Petition for Review of Initial Order.

3.0 ISSUES ON REVIEW

3.1 Whether the Initial Order properly applied the public interest element and drew all inferences most favorably to the Respondents.²

3.2 Whether the Presiding Officer incorrectly found that no material dispute of fact existed as to whether Kelleher and DuBois engaged in a dishonest and unethical practice.³

3.3 Whether a "draconian" sanction is unwarranted.⁴

3.4 Whether the Initial Order failed to include findings and conclusions relating to Respondents' due process evidence and arguments.⁵

3.5 Whether the Initial Order failed to separately consider DuBois' liability.⁶

4.0 DIRECTOR'S CONSIDERATION ON REVIEW

The Director reviews this matter *de novo* under RCW 34.05.464(4). Further, under WAC 10-08-211(3), a Petition for Review of an Initial Order must specify portions of the Initial Order where exception is taken and shall refer to the evidence in the record that supports the petition.

WAC 10-08-135 sets forth the standard for Summary Judgment which provides, "[a] motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

² Respondent's Petition for Review, Page 9.

³ Respondents' Petition for Review, Page 15.

⁴ Respondents' Petition for Review, Page 23.

⁵ Respondents' Petition for Review, Page 27.

⁶ Respondents' Petition for Review, Page 29.

In evaluating the application of this standard, the Director may rely on applicable law from sources other than WAC 10-08-135 itself and must be respectful of the constitutional rights of respondents.⁷ To that end, the Director is required to weigh all pleadings, evidence, and argument in a light most favorable to the non-moving party.⁸ If there is any inference of a triable issue of fact, then summary judgment is inappropriate.⁹ Litigants are entitled to a dispositive hearing on all issues of fact and law.¹⁰ These principles apply equally to the Administrative Law Judge and to the Director evaluating the Petition for Review.¹¹

5.0 ANALYSIS

In this case, the Division has charged two acts against each Respondent that violate the Securities Act. Essentially, these acts are making off-the-books payments in violation of their employer's policies and failing to accurately answer their employer's annual questionnaire for three consecutive years. The Division successfully established that both Kelleher and DuBois engaged in a dishonest and unethical practice in the Securities industry as defined by WAC 460-22B-090 and WAC 460-22B-220, by making off-the-books cash payments in violation of UBS policies.

However, while the language of the UBS disclosure question at issue here is clear, the Reviewing Officer is concerned that the heading for the question was titled "Gifts." Respondents should both have carefully read the plain language of the disclosure question, and they appear to

⁷ WAC 10-08-220 declares, "Nothing in chapter 10-08 WAC is intended to diminish the constitutional rights of any person or to limit or modify additional requirements imposed by statute, including the Administrative Procedure Act."

⁸ *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014).

⁹ *Davis v. W. One Auto. Group*, 140 Wn. App. 449, 456 (2007).

¹⁰ *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002), citing to *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

¹¹ *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

have provided a false answer. However, the heading creates some confusion around this issue as the payments made to Sells were undisputedly not gifts.

Reviewing the facts most favorably to Respondents, the Reviewing Officer cannot conclude that Respondents engaged in dishonest and unethical practices in the Securities industry as related to their answers on the UBS disclosure question titled "Gifts."

While this case comes very close to supporting a suspension as a sanction, with the modification of Conclusions of Law (COL) 5.11 and 5.15, the Reviewing Officer is exercising his discretion and reducing the sanction in this case to the imposition of a fine, assessment of investigation costs, and censure.

6.0 FINDINGS OF FACT

The Director having considered the Record on Review, together with Respondents' Petition for Review and the Department's Response to the Petition, hereby affirms Facts for Purpose of Summary Judgment 4.1 – 4.20, inclusive, at pages 3 – 6 of the Initial Order.

7.0 CONCLUSIONS OF LAW

The Director having considered the Record on Review contained in Section 2.0 of this Final Decision and Order, hereby *affirms* the Initial Order's Conclusions of Law 5.1 – 5.21, inclusive at pages 6 – 13 of the Initial Order with the exception of COL 5.11 and COL 5.15.

- COL 5.11 is hereby replaced as follows: Both Respondents acknowledge that they should not have made the payments to Sells without running the payments through the firm's payroll system. Respondents attempted to justify their actions by claiming that they answered the annual UBS questionnaires honestly and accurately because the question was titled "Gifts." It is undisputed that the payments made to Sells were not gifts. Respondents' reading of the "Gifts" question is a plausible, albeit careless, reading of the question. The confusion around the language of the title of the question as compared to the question itself coupled with the requirement to view facts most favorably to Respondents, requires a conclusion that Respondents did not act dishonestly as related to the "Gifts" question.

- COL 5.15 is hereby stricken.

8.0 FINAL DECISION AND ORDER

For all of the reasons set forth above, IT IS HEREBY ORDERED THAT:

8.1 The Findings of Fact set forth in Section 6.0 above and as set forth in the Initial Order are AFFIRMED.

8.2 The Conclusions of Law set forth in Section 7.0 above and as set forth in the Initial Order are AFFIRMED, with the exception of COL 5.11 and COL 5.15 as laid out in Section 7.0 above.

8.3 Respondents' Petition for Review is denied in part and granted in part, and the ALJ's Initial Order granting Summary Judgment is affirmed, in part.

8.4 Respondent Kelleher engaged in dishonest and unethical practice in the securities business, in violation of WAC 460-22B-090 and WAC 460-24A-220 by making off-the-books payments to another UBS employee with knowledge that this conduct violated UBS's policies.

8.4.1 Respondent Kelleher is censured for engaging in a "dishonest and unethical" practice.

8.4.2 Respondent Kelleher must pay a fine in the amount of \$10,000.

8.4.3 Respondent Kelleher must pay investigation costs in the amount of \$5,000.

8.5 Respondent DeBois engaged in dishonest and unethical practice in the securities business in violation of WAC 460-22B-090 and WAC 460-24A-220 by making off-the-books payments to another UBS employee with knowledge that this conduct violated UBS's policies.

8.5.1 Respondent DuBois is censured for engaging in a "dishonest and unethical" practice.

8.5.2 Respondent DuBois must pay a fine in the amount of \$2,500.

8.5.3 Respondent DuBois must pay investigation costs in the amount of \$2,500.

9.0 RECONSIDERATION

Pursuant To RCW 34.05.470, Respondent has the right to file a Petition for Reconsideration stating the specific grounds upon which relief is requested. The Petition must be filed in the Office of the Director of the Department of Financial Institutions by courier at 150 Israel Road SW, Tumwater, Washington 98501, or by U.S. Mail at P.O. Box 41200, Olympia, Washington 98504-1200, within ten (10) days of service of this Final Order upon Respondent. The Petition for Reconsideration shall not stay the effectiveness of this order nor is a Petition for Reconsideration a prerequisite for seeking judicial review in this matter. A timely Petition for Reconsideration is deemed denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on a petition.

10.0 STAY OF ORDER

The Director has determined not to consider a Petition to Stay the effectiveness of this order. Any such requests should be made in connection with a Petition for Judicial Review made under chapter 34.05 RCW and RCW 34.05.550.

11.0 JUDICIAL REVIEW

Respondent has the right to petition the superior court for judicial review of this agency action under the provisions of chapter 34.05 RCW. For the requirements for filing a Petition for Judicial Review, see RCW 34.05.510 and sections following.

12.0 SERVICE

For purposes of filing a Petition for Reconsideration or a Petition for Judicial Review, service is effective upon deposit of this order in the U.S. mail, declaration of service attached hereto.


13.0 EFFECTIVENESS AND ENFORCEMENT OF FINAL ORDER

Pursuant to the Administrative Procedures Act, at RCW 34.05.473, this Final Decision and Order shall be effective immediately upon deposit in the United States Mail.

Dated at Tumwater, Washington, on February 14, 2024.

WASHINGTON STATE DEPARTMENT
OF FINANCIAL INSTITUTIONS

By:



Charles E. Clark, Director