Commodity Futures Trading Commission
CEA CASES

NAME: SY B. GAIBER & CO., SY B. GAIBER, AND MICHAEL R. HEMPEL

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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re: Sy B. Gaiber & Co., Sy B. Gaiber, and Michael R. Hempel, Respondents

CEA Docket No. 165

Ruling on Petition for Reconsideration

The respondents filed a Petition for Reconsideration on June 8, 1972, requesting the Judicial Officer to reconsider the administrative sanction imposed in this case. However, for the reasons set forth in the Decision and Order filed herein on April 12, 1972, the Petition for Reconsideration is denied.

The respondents contend that their violations were not intentional or wilful, but for the reasons set forth in the Decision and Order, I adhere to the view that the respondents knowingly, intentionally, deliberately, and wilfully engaged in serious violations of the Commodity Exchange Act and regulations.

The respondents state that "[clearly] very serious charges have been filed against Respondents" (Petition for Reconsideration, P. 14), but that "it is the Hearing Examiner who is in the most advantageous position to view the witnesses, weigh the evidence, and mete out an appropriate sanction" (Petition for Reconsideration, PP. 13-14). The respondents state that it "is the Hearing Examiner who had the opportunity to view the demeanor of the witnesses, and to glean the implicit tenor of their testimony" (Petition for Reconsideration, p. 14). However, the Hearing Examiner resolved all of the issues of credibility against the respondents. She found that the respondents deliberately and intentionally violated the Act, as alleged in the complaint. Specifically, the Hearing Examiner concluded (Decision and Order, pp. 34-35):

Our consideration of the entire record evidence leaves us with the opinion that the [respondents'] statements set forth in Complainant's Exhibits C-8, C-9, C-10, C-18, C-19, C-29, C-30, C-31, C-32, C-34, C-35, and C-36, were both false and misleading of material facts effecting Respondents' right to continued registration as a futures commission merchant under the Act. Certainly the Respondents were aware that such statements were inaccurate as to the source of the $ 27,000 in issue, and one can only conclude that they were submitted for the purpose of showing proper financial status when, in fact, the Respondents were operating below the minimum financial requirements of the Act. Thus, Respondents, having full knowledge of the true facts intended, and did, in fact perform those acts which constitute the violation of the Act. Goodman v. United States, 286 F.2d 896 (7th Cir., 1961); Great Western Food Distributors, Inc. v. Brannan, 201 F.2d 476 (7th Cir., 1953), cert denied, 345 U.S. 997 (1953).

* * *

We have considered these and all contentions advanced by Respondents, but our careful study and review of the entire record compel us to conclude, as set

forth above, that the Respondents operated as a registered futures commission merchant under the Commodity Exchange Act while failing to meet prescribed minimum financial requirements, in violation of section 4 f (2) of the Act and section 1.17 of the regulations, and that with a view to furtherance of such violation willfully made false and misleading statements of material facts in

reports filed with the Secretary of Agriculture in violation of section 6(b) of the Act, and willfully furnished false and misleading information and reports as to the meaning and contents of the Respondents' records of financial transactions relating to their business, in violation of section 1.35 of the regulations.

Hence the Hearing Examiner and I are in agreement as to the nature of the respondents' deliberate violations -- we differ only as to the sanction.

An agency may impose a sanction substantially more severe than that recommended by the Hearing Examiner if it determines that the recommended sanction is inadequate to protect the public interest. Gross v. Securities and Exchange Commission, 418 F.2d 103, 107 (C.A. 2); Fink v. Securities and Exchange Commission, 417 F.2d 1058, 1059 (C.A. 2).

I have given little weight to the Hearing Examiner's recommended sanction in this case for a number of reasons.

First, the recommended denial of trading privileges "for the account of others" for 60 days would not even be a "slap on the wrist" because the respondents are no longer trading for the account of others. The administrative officials charged with the responsibility for administering the Commodity Exchange Act, on the other hand, recommended a denial of trading privileges for two years applicable to the respondents' trading for their own account and for the account

of others. I believe that the administrative officials' recommendation is entitled to greater weight in this case than the Hearing Examiner's recommendation. As I stated in a Tentative Decision and Order filed on July 14, 1972, in the case of In re Arthur N. Economou, CEA Docket No. 167, pp. 175-176:

The recommendation of the officials charged with the responsibility for administering a federal regulatory program is entitled to considerable weight in determining the sanction that should be imposed against a violator. Such administrative officials, during the day-to-day administration of a regulatory program, develop a "feel" for the severity of sanctions needed to serve as a deterrent to violations that cannot be developed by the Hearing Examiners or the Judicial Officer, who come in contact with only a small part of the regulatory program.

The recommendation of the complainant is not, of course, controlling. For example, if some of the allegations are not proven or if there are mitigating circumstances not taken into consideration by the administrative officials, the sanction may be considerably less than that recommended by them. See, e.g., In re American Fruit Purveyor's, Inc., 30 Agriculture Decisions 1542.

In the present case, there are no mitigating circumstances that would warrant reducing the sanction recommended by the complainant. The respondents' underfinancing reached its peak after they were advised by the complainant that they were underfinanced.

Second, I have given little weight to the Hearing Examiner's recommended sanction because, although I regard the Hearing Examiner in this case as one of the ablest Hearing Examiners in federal service today, I am not unmindful of the fact that this was her first case under the Commodity Exchange Act and, therefore, I have given greater weight to her findings and conclusions with

respect to the respondents' violations -- which I have adopted verbatim -- than I have given to her recommended sanction.

Third, this case is the first contested case in which a decision has been issued under the new minimum financial requirement regulations which became effective in March of 1969. Hence there were no precedents directly in point with respect to the sanction to be imposed for violations of the minimum financial requirement.

Fourth, the prior decisions under this Act are not particularly helpful in determining the sanction to be imposed in this case. The respondents rely in their Petition for Reconsideration, pp. 9-10, on seven cases decided under the minimum financial protection requirements by consent without a hearing. However, I give no weight whatsoever to consent cases in determining the sanction to be issued in a contested case. As I stated in the Tentative Decision and Order filed on July 14, 1972, in the case of In re Arthur N. Economou, supra, p. 174, fn. 80:

Consent orders issued without a hearing will be given no weight whatsoever in determining the sanction to be issued in a litigated case. In a case where a consent order is agreed to by the parties, there is no record or argument to establish the basis for the sanction. It may seem less severe than appears warranted because of problems of proving the allegations of the complaint or because of mitigating circumstances not revealed to the Hearing Examiner or to the Judicial Officer. Conversely, it may seem more severe than appears warranted because of aggravated circumstances not revealed by the complaint.

The respondents rely in their Petition for Reconsideration, pp. 11-12, on four cases involving reporting requirements of the Act and one case involving speculative limits, but the factual situations involved in those cases are not sufficiently close to the facts in the present case to be helpful in determining the sanction to be imposed in this case. The respondents correctly observe in their Petition for Reconsideration, pp. 11-12, that the facts in the cases of In re Louis Romoff, 31 Agriculture Decisions 158, and In re Douglas Steen, 21 Agriculture Decisions 1076, cited in the Decision and Order herein, pp. 44-46, are distinguishable from the facts in the present case. However, no great reliance was placed upon those cases in determining the sanction to be issued in this case. The closest prior case relied on was In re Dunbeath-Hagen Corp., et al., 26 Agriculture Decisions 465, in which the Judicial Officer suspended the firm's trading privileges for one year for its own account and for the account of others because it knowingly submitted a false financial statement on a single occasion in connection with its application for registration as a futures commission merchant. In that case, no warning was given to the respondent prior to the institution of the complaint. The violations of the respondents in the present case are much more serious than in the Dunbeath-Hagen case for the reasons set forth in the Decision and Order herein. n1

n1 Although it is my intention to impose sanctions as uniform as possible for similar violations unless there are adequate reasons for a change of policy (see In re American Fruit Purveyor's Inc., 30 Agriculture Decisions 1542, 1595-1596), a respondent has no inherent right to a sanction no more severe than that applied to others. See Hiller v. Securities and Exchange Commission, 429 F.2d 856, 858-859 (C.A. 2); G. H. Miller & Co. v. United States, 260 F.2d 286, 296 (C.A. 7), certiorari denied, 359 U.S. 907.

Fifth, I have given little weight to the Hearing Examiner's recommended sanction because in this case, as in all -- or at least most -- disciplinary cases under the Department's regulatory programs, the record is not particularly helpful in determining the sanction that should be issued. I have observed for 23 years that the Department's administrative agencies go to great lengths to

prove that a particular violation occurred but introduce no evidence to aid the Hearing Examiners and the Judicial Officer in determining the sanction to be issued. The administrative officials are disappointed when they know from their expertise that the sanctions imposed in particular cases are too lenient to effectuate the purposes

of the regulatory programs; but when they fall to share the benefit of their administrative expertise with the Hearing Examiners and the Judicial Officer, they have no one but themselves to blame for their disappointment as to the sanction.

In In re American Fruit Purveyor's, Inc., 30 Agriculture Decisions, 1542, 1596, fn. 39, filed on October 29, 1971, I stated:

It would be helpful in determining the sanction in a case if the record contained testimony as to how serious or detrimental the particular violation involved in the case is to the regulated industry. In addition, testimony as to the nature of the respondent's business would also be helpful so that the Judicial Officer would have some idea as to how "costly" a particular suspension would be to the respondent. For example, in the absence of any evidence as to the nature of the respondent's business, the Judicial Officer might not know whether a particular suspension order would "cost" the respondent $ 100 or $ 10,000.

Similarly, in the Decision in the present case, p. 46, fn. 20, I stated:

It has not been the general practice in administrative disciplinary cases to introduce evidence in support of the sanction recommended by the complainant. I believe that such evidence would aid the Hearing Examiners and the Judicial Officer in determining the sanction to be imposed. Such evidence could explain, e.g., the nature of the regulation or administrative program involved in the case, the administrative reasons for the regulation or program, the flagrancy or seriousness of the violation, and the effect of a particular sanction on the respondent in view of the nature and extent of his business activities. It may be appropriate to introduce such evidence at the conclusion of the case so that appropriate consideration can be given

to the respondent's defense. The respondent should also be permitted to introduce evidence as to the appropriate sanction to be issued, assuming that the complainant prevails in the case.

On further consideration, I believe such evidence should be introduced by the complainant after it has completed presenting its evidence as to the violations, rather than at the conclusion of the case.

Some elaboration on the nature of the evidence that I believe should be presented by the administrative officials may be helpful.

In a case involving failure to meet the minimum financial requirements of the Act and regulations, the complainant should explain the administrative necessity for the regulations and the damage or potential damage caused by violations of the regulatory requirements. Where a particular provision such as the proprietary safety factor is involved, an explanation as to the administrative reasons for the proprietary safety factor should be given.

If a case involves failure to file required reports, the administrative reasons for requiring the reports should be given.

In a case under the Perishable Agricultural Commodities Act involving failure to pay promptly for produce, the evidence should show whether failure to pay promptly is a serious problem in the industry and what damage, if any, it causes to the marketing system.

In a case involving false weighing under the Packers and Stockyards Act, the evidence should show whether false weighing is a serious problem in the livestock industry. For example, what damage is being done from false weighing and to whom? What is the estimated loss to livestock sellers from false weights? What percentage of the livestock markets investigated on a routine spot check basis appears to be falsely weighing livestock? n2 Have the sanctions imposed in prior proceedings served as a deterrent to false weighing, e.g., how does the current percentage of false weighing compare with the percentage in the past five years?

n2 Although such testimony would be subject to reasonable cross-examination as to the basis for the complainant's statistics, e.g., the methods and procedures used in determining markets falsely weighing livestock, it would not be reasonable to mention the names of particular firms that the complainant found falsely weighing livestock, or to prove the exact details of violations by persons who are not parties to the pending proceeding.

In cases under all regulatory programs, if the administrative officials believe that the sanctions previously imposed for similar violations have not been adequate to serve as a deterrent to the regulated industry, the evidence should set forth their views in this respect. Similarly, if industry conditions change so that a sanction once adequate is no longer deemed adequate by the administrative officials, the evidence should establish that fact.

The foregoing illustrations are not meant to be complete, but merely to serve as a guide to the type of background information I believe the agencies should introduce in order to aid the Hearing Examiners and the Judicial Officer in arriving at an appropriate sanction. Such background information is more important than an opinion expressed by an administrative official as to the exact number of days that a suspension order should embody. However, an opinion by an expert witness, e.g., a Branch Chief or Area Supervisor thoroughly familiar with the administrative program, as to the exact sanction necessary to effectuate the purposes of the Act, would be proper. Particularly in a proceeding in which there is no jury, it is permissible for an expert witness to express an opinion on the ultimate issue to be decided. See, e.g., Builders Steel Co. v. Commissioner of Internal Rev., 179 F.2d 377, 379-380 (C.A. 8). However, no recommendation is made to the administrative officials as to whether such an opinion should be given by way of testimony rather than argument.

In any case in which the Judicial Officer determines that the sanctions previously imposed for similar violations are not adequate under present circumstances to effectuate the purposes of the regulatory program, a more severe sanction will be imposed in that case, rather than merely announcing that in future cases the sanction will

be increased. An administrative agency is free to reconsider sanctions previously imposed without prior notice (see In re Louis Romoff, 31 Agriculture Decisions 158, 186, and cases cited therein), and such practice will be routinely followed. Persons who intentionally violate a regulatory program are not playing a game under which they are entitled to consider the sanctions previously imposed for similar violations and determine whether they want to run the risk of detection and the imposition of such a sanction. They run the distinct risk that a more severe sanction will be imposed against them.

Congress enacted the remedial regulatory programs administered by the Department because of a need for economic law and order in the marketplace. The administrative sanctions imposed against violators of such regulatory programs should tend to achieve that purpose.

Persons who engage in a regulated business have been granted a privilege. Suspension or revocation of the privilege for failure to comply with the statutory standards is a necessary power granted to the Secretary to assure a proper adherence to the regulatory program (see the cases cited in the Decision and Order herein, p. 47). Just as a lawyer may lose his privilege to practice law if he embezzles a client's funds or engages in other serious violations, a futures commission merchant, broker, or trader who manipulates a futures market or engages in other serious violations may lose his privilege to engage in futures trading.

The House Report on the 1968 amendments to the Commodity Exchange Act states that it is the view of the committee that serious violations "should be subject to severe penalties" (H. Rep. No. 743, 90th Cong., 1st Sess., p. 5). The administrative sanctions should be severe enough to serve as a deterrent to future similar violations by the respondents and by other persons.

For the foregoing reasons, and for the reasons set forth in the Decision and Order herein, the Petition for Reconsideration is denied. The stay order issued in this proceeding on May 22, 1972, is vacated, and the denial of trading privileges to the respondents specified in the order previously entered on April 12, 1972, shall become effective on the 30th day after the date of this order.

A copy of this Decision and Order shall be served on each of the parties and each contract market.

Done at Washington, D. C.,

July 20, 1972

[SEE SIGNATURE IN ORIGINAL]

Donald A. Campbell

Judicial Officer

Office of the Secretary

LOAD-DATE: June 16, 2008