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CEA CASES

NAME: DOUGLAS STEEN

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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re: Douglas Steen, Respondent

CEA Docket No. 104

COMPLAINANT'S REPLY BRIEF

Due date:

August 2, 1962

Earl L. Saunders

Attorney for Complainant

UNITED STATES DEPARTMENT OF AGRICULTURE

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Complainant's Reply Brief

Comes now complainant and files this its reply to respondent's answering brief heretofore filed in this proceeding. Most of the arguments presented in respondent's brief have been anticipated and refuted in the brief filed in support of the complainant's suggested findings of fact, conclusions, and order (hereinafter referred to as complainant's main brief) and, therefore, a comprehensive reply brief is not necessary. We shall reply in this brief to the principal contentions presented in the respondent's brief.

1. Respondent's first contention is that he acted in good faith in placing the orders in question to the Carl H. Hopkins' account, and, therefore, is not guilty of cheating or defrauding, as alleged by complainant (Resp. brief 7, 8, 9, 13-14, 15-16). In support of this contention the respondent argues: (a) that the evidence shows that he never received the typewritten letter from Mrs. Erna Hopkins dated November 15, 1960, but, rather, shows that he received "a handwritten letter from a Mrs. Hopkins, illegible on the whole, and which indicated that something had occurred to Carl H. Hopkins" (Resp. brief 7); (b) that the testimony of complainant's witness Pado "indicates that the order [the order to sell December eggs] was placed and assigned among

the various accounts including the Carl H. Hopkins' account, both on November 18, 1960" (Resp. brief 11); (c) that the evidence shows that "there was an error made in the placing of the December egg sell order in the Hopkins' account" (Resp. brief 14); and (d) that the evidence shows that the respondent "honestly believed that soybean oil versus soybean meal was a 'spread', and that his actions were conservative" (Resp. brief 15).

As we show in our main brief, pp. 8-16, contention (a) is a complete fabrication without any basis whatever in fact. Respondent, however, attempts to breathe some plausibility into such contention by stating in his brief that "in her no doubt distraught state as a result of her husband's death she [Mrs. Hopkins] may well have chosen not to send the typewritten document, but instead chose to compose a handwritten letter giving vent to feelings of anger over losses she knew had occurred in the account" (Resp. brief 8). This is a further fabrication. There is absolutely no evidence in the record to suggest that respondent received a letter from Mrs. Hopkins which expressed "feelings of anger over losses she knew had occurred in the account." The respondent testified that "the impression I had [of the letter] was that the party was the separated wife of Mr. Hopkins, and was writing to inquire as to the nature of the business relation I had with Mr. Hopkins, because an event of some sort had transpired with regard to Mr. Hopkins" (Tr. 134). Respondent, in his answer to the complaint, states that "this letter indicated that Mrs. Tracy Hopkins had learned indirectly of respondent's business connection with Carl H. Hopkins, and that the writer wanted respondent to write an explanation of his business connection with Carl H. Hopkins so the writer could understand it" (Answer, par. III).

Contention (b) is a flagrant distortion of Mr. Pado's testimony. There is no statement, inference or suggestion by this witness that the instructions for the allocation of the order to sell December eggs were given on November 18, 1960. Mr. Pado testified that "the egg order instructions were given after the execution was reported" (Tr. 204). It is an undisputed fact that the order to sell December eggs was executed on November 21, 1960. However, respondent argues that his version of Mr. Pado's testimony "is substantiated by respondent's testimony that the egg order was given prior to November 21, 1960" (Resp. brief 12). This is completely misleading. Obviously, the fact that the order was given prior to November 21 has no possible tendency to show that the allocation of the order was also made prior to such date. The order (Comp. ex. 7a) shows no allocation.

Contention (c) is refuted by the testimony of witness Pado. On direct examination, this witness testified:

Two contracts of eggs were assigned to the Hopkins' account because of the instructions given to me by Douglas Steen that the egg contracts were to be assigned to the accounts that had previously had the soybean accounts that were liquidated" (Tr. 204).

On cross-examination, Mr. Pado testified that he could not remember ever making a mistake in handling an order for the respondent (Tr. 207). The respondent insists, however, that his contention is proven "by the fact that on November 22, 1960 . . . respondent placed with Mr. Pado an individual liquidating buy order to the Hopkins' account (Resp. brief 14). The answer to this argument is that it is clear from Mr. Pado's testimony that such liquidating order was for the purpose of reducing the amount of margin required for the Hopkins' account and was not for the purpose of correcting a mistake (Tr. 83-84).

With respect to contention (d), we point out in our main brief, pp. 18-20, that there was no possible basis for a belief by the respondent that the sale of soybean meal was a spread against the long soybean oil position in the Hopkins' account. Moreover, if the respondent had actually entertained such a belief, he would have closed out the soybean meal position at the same time he closed out the soybean oil position (See complainant's main brief, p. 20). It is undisputed that the position in the Hopkins' account in soybean meal was not closed out at the same time as the position in soybean oil (Tr. 98-99, 125-126).

2. The respondent states that "assuming that the Findings of Fact urged by complainant are adopted, respondent nevertheless did not attempt to cheat or

defraud, nor cheated or defrauded" (Resp. brief 17). In this connection respondent argues that "respondent misrepresented nothing to Mrs. Hopkins" and "did absolutely nothing to create in her mind

a mistaken view of the facts" and that "having not made a misrepresentation respondent did not 'cheat or defraud' anyone within the meaning of the Commodity Exchange Act" (Resp. brief 22). This contention is discussed at length in the complainant's main brief, pp. 21-28. A portion of such discussion is as follows:

"'Cheat and defraud' include every kind of trick, device, artifice, or deception from false representation and intimidation to suppression and concealment of fact or information, used for the purpose of depriving another of his property or other known right contrary to the plain rules of common honesty." State v. Gerich, 138 Conn. 292, 83 A. 2d 488, 490; State v. Parker, 114 Conn. 354, 158 A. 797, 800.

"'It is established law that acts in violation of the fiduciary duties of an agent are regarded as fraudulent." Ramey v. Myers, 159 Cal. App. 2d 82, 323 P. 2d 805, 808. Acts which tend to violate the "fiduciary obligation" of an agent to a principal "are considered, in law, as 'frauds upon confidence bestowed." Myers v. Ellison, 249 Ala. 367, 31 So. 2d 353, 355. The "vital principle [relating to agency] is good faith; without it the relation of principal and agent cannot exist; and so sedulously is this principle guarded, that all departures from it are esteemed frauds upon the confidence bestowed." Nagel v. Todd, 185 Md. 512, 45 A. 2d 326, 328.

A person may "defraud" someone irrespective of whether there is an "attempt to secure any monetary advantage" United States v. Tommasello, 160 F. 2d 348, 350 (C. A. 2)), and irrespective of whether the defrauded person would "suffer a pecuniary loss" (Johnson v. Warden, 134 F. 2d 166, 167 (C. A. 9), certiorari denied, 319 U.S. 763; see, also, United States v. Buckner, 108 F. 2d 921, 926 (C. A. 2); United States v. Goldsmith, 68 F. 2d 5, 7 (C. A. 2)). Specifically, it was held in Braatelien v. United States, 147 F. 2d 888, 890-894 (C. A. 8), that the defendant was guilty of defrauding a person (the United States)by taking unauthorized action intended to promote the defendant's business even though the defrauded person suffered no "property or pecuniary loss by the fraud" (147 F. 2d at 893-894).

However, the respondent says that the cases of Ramey v. Myers, Myers v. Ellison and Nagel v. Todd, cited by complainant, "point out the distinction between civil fraud which had a very broad meaning (including constructive and implied fraud), and criminal fraud which requires the making of a material misrepresentation and is narrowly construed. (Cf. C.J.S. Fraud Sec. 2, pp. 208-214)." This is not an accurate statement. No such distinction is pointed out in the cases cited by the complainant or in the authority cited by the respondent. The respondent further says that "the statute in question should be narrowly construed in accordance with the accepted meaning of the terms 'cheat or defraud' in the criminal law" (Resp. brief 19). This argument has no possible merit. Cheat and defraud have no meaning in criminal law that is different from their ordinary meaning. Respondent would have us believe that cheating and defrauding are classified as criminal and civil. This is not true. See 37 C.J.S. Fraud §§ 1, 154. To be sure, various acts and transactions of a fraudulent nature have been made criminal by statute. Among these is obtaining money by false pretense. However, these are offenses distinct from cheating and defrauding and have not changed the meaning of cheating and defrauding.

Respondent's statement that he made no misrepresentation and did nothing to create in Mrs. Hopkins' mind a mistaken view of the

facts is a complete fabrication. In his letter of November 19, 1960, to Mrs. Hopkins the respondent stated, in part:

I would strongly urge that this successful growth account is the best manner of handling a large part of his [Mr. Carl H. Hopkins'] estate. My record is indicated by the enclosure. Please advise me after reading it and thinking it over.

The respondent referred to the account as a "successful growth account" notwithstanding the fact that by November 19, 1960, the account had declined from approximately $ 8200 to approximately $ 4800 (Tr. 5, 59). The respondent did not disclose this fact to Mrs. Hopkins. Moreover, the respondent pretended not to receive Mrs. Hopkins' typewritten letter of November 15, and by means of this device or scheme, he handled the money in the Hopkins' account in accordance with his views instead of following the plain instructions of Mrs. Hopkins to have the account liquidated.

3. The respondent states that the sanction recommended by complainant is excessive (Resp. brief 22). As we point out in our main brief, the offenses proved against the respondent are flagrant. They violate a basic part of the measures designed in the Commodity Exchange Act to "insure fair practice and honest dealing on the commodity exchanges" (H. Rep. No. 421, 74th Cong., 1st Sess., p. 1). However, the

respondent says that "he has learned full well that a breach of the rules of law pertaining to an agent's duty results in severe consequences such as have happened to him" and that "it is apparent that he would never in the future breach a fiduciary duty" (Resp. brief 23). This argument should be rejected. If the respondent had frankly admitted his wrongdoing and made his plea for leniency, the plea would deserve consideration. The situation is entirely different. The respondent's actions in this case are characterized by neither candor nor fairness. He has denied any wrongdoing. He has tried to obscure the truth and escape the consequences of his acts by various explanations and arguments, all of which have proved to be unfounded. So far as the record shows, he has given no indication that he realizes the gross impropriety and wrongfulness of his conduct, nor is there anything to warrant the view that he has any desire to change his conduct in the future. These are all facts to be taken into consideration in what disciplinary action should be taken. Under the circumstances, the sanction recommended by complainant is none too severe and should be ordered.

Complainant submits that the respondent's answering brief does not refute the case for the complainant as established by the evidence at the hearing and the arguments in its main brief, and that the

respondent says that "he has learned full well that a breach of the rules of law pertaining to an agent's duty results in severe consequences such as have happened to him" and that "it is apparent that he would never in the future breach a fiduciary duty" (Resp. brief 23). This argument should be rejected. If the respondent had frankly admitted his wrongdoing and made his plea for leniency, the plea would deserve consideration. The situation is entirely different. The respondent's actions in this case are characterized by neither candor nor fairness. He has denied any wrongdoing. He has tried to obscure the truth and escape the consequences of his acts by various explanations and arguments, all of which have proved to be unfounded. So far as the record shows, he has given no indication that he realizes the gross impropriety and wrongfulness of his conduct, nor is there anything to warrant the view that he has any desire to change his conduct in the future. These are all facts to be taken into consideration in what disciplinary action should be taken. Under the circumstances, the sanction recommended by complainant is none too severe and should be ordered.

Complainant submits that the respondent's answering brief does not refute the case for the complainant as established by the evidence at the hearing and the arguments in its main brief, and that the

complainant's suggested findings of fact, conclusions and order should be adopted by the referee.

Attorney for the Commodity

Exchange Authority

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