2004 BCSECCOM 608

COR#04/129

Decision

Robert Peter Gawthrop

Investment Dealers Association of Canada

Application under section 28 of the *Securities Act*, RSBC 1996, c. 418

Hearing

Panel	Douglas M. Hyndman	Chair
	Marc A. Foreman	Commissioner
	Robert J. Milbourne	Commissioner
Date of Hearing	August 25, 2004	
Date of Decision	October 25, 2004	

Appearing

Barbara G. Lohmann	For the Investment Dealers Association of Canada
Ralph Sahrmann	For the Executive Director

Introduction

¶ 1 The staff of the Investment Dealers Association has applied under section 28 of the *Securities Act*, RSBC 1996, c. 418, for a hearing and review of a penalty decision by an IDA district council hearing panel regarding Robert Peter Gawthrop.

¶ 2 On July 18, 2003, the IDA panel imposed on Gawthrop:

- A fine of $5,000
- Disgorgement of $7,500
- Costs of $3,500
- A requirement to rewrite the conduct and practices handbook examination before re-entering the industry.

¶ 3 IDA staff asks us to increase the penalties imposed by the hearing panel, by increasing the fine to $30,000 and the disgorgement amount to $23,500, on the basis that the panel misapprehended the evidence, erred in determining the fine and disgorgement amounts, and failed to impose a fit and proper penalty.

¶ 4 Commission staff supports the application.

¶ 5 Gawthrop did not appear. He sent an e-mail to the Commission, saying he would be away on holidays. He criticized the IDA staff position and offered the alternative that he would agree not to seek any securities registration for at least five years in exchange for the IDA's waiving all financial penalties.

Standing

¶ 6 Section 28 permits "a person directly affected by a decision, direction, order or ruling made under a bylaw, rule or other regulatory instrument or policy of a self regulatory body" to apply for a hearing and review of the decision. The IDA is recognized as a self regulatory body under the Act. The Commission has not previously considered whether the staff of the IDA is a person directly affected by an IDA hearing panel decision. The Ontario Securities Commission accepted a hearing and review application from IDA staff in *Staff of the Investment Dealers Association of Canada v. Dimitrios Boulieris* (2004), 27 O.S.C.B. 1597, under the equivalent provision of the Ontario *Securities Act*, but it does not appear from the decision that the question of the IDA staff's standing to bring the application was specifically considered.

¶ 7 Commission staff advises that IDA staff is applying for a hearing and review in another matter to be heard this month in which standing will be contested.

¶ 8 Whether or not the IDA staff has standing to apply under section 28, we have authority to hear and decide this matter under section 27 of the Act, which empowers the Commission to make any decision about a decision of the IDA. Accordingly, it is not necessary for us to decide whether the IDA staff is a person directly affected by the IDA panel decision.

Background

¶ 9 Gawthrop was for many years registered under the Act and licensed to sell insurance. He was a representative with a series of firms, joining Dundee Securities in August 1999. After the events at issue in this hearing, Dundee terminated him in August 2001. He joined another firm in September 2001. He left that firm in April 2003 and is no longer registered or employed in the securities industry. He has no disciplinary history other than this matter.

¶ 10 Between May and August 2001, Gawthrop arranged for nine clients to subscribe to a private placement by Qwest Emerging Biotech (VCC) Fund Ltd. The clients invested $235,000 and Gawthrop received a commission of 10% ($23,500.) Gawthrop also invested $10,000 himself.

¶ 11 Gawthrop had dealt with Qwest in previous offerings before he joined Dundee and some of his clients still held securities from those offerings. This time, Gawthrop's father and some of his clients expressed interest in the new Qwest offering. He attended a presentation, at which Qwest representatives asked him to help market the offering. Gawthrop says he told them to approach Dundee to get the offering approved. Qwest later told him they did not do that, so Gawthrop simply referred his interested clients to deal directly with Qwest, which paid him the commission as a finders fee for the referrals.

¶ 12 Gawthrop did not tell Dundee about the client investments in Qwest or the commissions he received. Dundee found out about it when a cheque from Qwest came to the office while Gawthrop was away on vacation.

¶ 13 When Dundee confronted him about it, Gawthrop admitted what he had done. Dundee terminated him for violating company policy against selling "off-book" products and violating both company policy and IDA rules by accepting a fee for selling the securities.

¶ 14 Almost two years later, on June 4, 2003, the IDA initiated disciplinary proceedings against Gawthrop, alleging three infractions under the IDA rules:

- He participated in the sale of shares in a private placement not approved by his employer and without the knowledge of his employer.
- He accepted remuneration for placing securities from a person other than his employer.
- He purchased securities from a private placement without the knowledge or consent of his employer.

¶ 15 At the discipline hearing on June 25, 2003, Gawthrop admitted to the allegations, so the hearing focused only on penalty. IDA staff argued for a fine of $30,000 ($10,000 for each infraction), disgorgement of the full $23,500 in commissions, payment of $3,500 in costs, and a requirement to rewrite the Conduct and Practices Handbook examination.

¶ 16 Gawthrop did not testify but answered some questions from the hearing panel. His counsel submitted that the penalty should be lower because: Gawthrop's misconduct was at the low end of the scale; his was a first infraction; he had

cooperated fully and admitted his misconduct; he had already been disciplined by Dundee through termination; and he had lost his clients, business and income. After reviewing sanctions in previous cases of outside selling, he submitted that an appropriate penalty would be a fine of $5,000, payment of $3,500 in costs, and a requirement to rewrite the Conduct and Practices Handbook examination.

¶ 17 The hearing panel issued a decision on August 19, 2003. After briefly reciting the facts, the hearing panel said:

> Counsel have referred us to a number of recent cases but few of them are really on point. In one case, ("Guidoccio") there was a $5,000 fine and no order for disgorgement even though the facts seem far more serious than this case. In other cases, where there were more severe penalties, the respondent had previous disciplinary difficulties or there were very substantial losses.
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> Counsel for the IDA suggested substantial fines plus disgorgement of $23,500 paid to the Respondent and costs of $3,500. With respect to disgorgement, we were advised that, had these transactions been placed with the employer, the greater part of this amount would have been returned to him because of the high commissions he received in return for carrying all his own expenses.
>
> In our view the Respondent should not be visited with a serious fine because he has not had previous disciplinary difficulties, he cooperated fully with the IDA, he admitted his responsibility, and because he and his family have suffered severe hardship. We believe the appropriate penalty would be a fine of $5,000 plus net disgorgement (to IDA) of $7,500 and the payment of $3,500 for costs.
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> We also direct that, as a condition of future registration with the IDA, the Respondent be required to write and pass the Conduct and Practice examination.

Submissions

¶ 18 IDA staff argues that we should intervene in the hearing panel's decision for the following reasons:

- The panel failed to impose a fit and proper penalty.
- The panel erred by not ordering disgorgement of the entire amount of the commissions Gawthrop received.
- The panel erred in considering Gawthrop's financial circumstances.

- The panel misapprehended the evidence in finding that Gawthrop stopped working in the industry after he was fired by Dundee, when in fact he worked for over eighteen months at another firm before leaving the industry.

¶ 19 IDA staff says that, in making these errors, the panel proceeded on incorrect principles and clearly failed to protect the public interest.

¶ 20 IDA staff notes that, if we conclude that the hearing panel erred, we could choose either to impose a different decision ourselves or to remit the matter to the IDA to have a hearing panel reconsider the decision. In this case, IDA staff submits that we should make the decision ourselves because the record consists mainly of written documents and we are in as good a position as the IDA hearing panel to assess the evidence.

¶ 21 Commission staff concurs with the IDA staff submissions.

Analysis

¶ 22 The commission has in previous decisions adopted a standard for reviewing decisions of a self regulatory organization like the IDA. This standard is set out in BC Policy 15-601, as follows:

> In a hearing and review of a decision of an SRO when the Commission does not proceed by way of a new hearing, the Commission will generally confirm the decision of the SRO unless
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> (1) the SRO has erred in law,
> (2) the SRO has overlooked material evidence,
> (3) compelling evidence is presented to the Commission that was not tendered at the original hearing, or
> (4) the Commission's view of the public interest is different from the SRO's.

¶ 23 In *Re the Vancouver Stock Exchange and Brian Biles* [1997] 27 BCSC Weekly Summary 13, the commission heard an application from commission staff, supported by the Vancouver Stock Exchange, to increase a penalty imposed by an Exchange hearing panel that staff and the Exchange submitted was inadequate. In that case, as in this one, it was argued that the hearing panel had proceeded on an incorrect principle.

¶ 24 In discussing an earlier version of the policy described above, the commission panel in *Biles* said, "The purpose of this policy is to prevent the hearing and review process being used simply to obtain a second opinion from the

Commission on a matter decided by the Exchange. Each case must be considered on its own merits but, to ensure the integrity of the Exchange's decision making process, we do not consider it appropriate to interfere with an Exchange decision simply because we might have made a different decision in the circumstances."

¶ 25 With respect to the "public interest" basis for interfering, the commission panel said, "This discretion should be used sparingly to deal with circumstances where the decision has clearly failed to protect the public interest, and not to simply impose our own view where we might have a difference of opinion."

¶ 26 The essence of the commission panel decision in *Biles* is set out in the following passage:

> In the matter before us there are no evidentiary issues and no apparent error in law. The question comes down to whether, in imposing the penalty it chose, the hearing panel proceeded on an incorrect principle or whether the penalty is, in our view, inadequate to protect the public interest.
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> Before the hearing panel, the Exchange argued for a lifetime suspension of Biles as an approved person. The details of the argument were not put before us and the hearing panel gave no explanation for the decision to reject it.
>
> The hearing panel acknowledged Biles had engaged in serious professional misconduct but, in deciding on a penalty, the panel took into account what it regarded as mitigating factors: the apparent change in Biles' business practices after the citation was issued in 1993; the support given to Biles by the member firm; and the fact there was no evidence Biles' activities caused losses to clients or the member firm. The panel decided "there are mitigating factors here that will allow the imposition of a significant penalty, provide adequate protection to the public, and yet perhaps not end Mr. Biles' career." The panel imposed a $40,000 fine and a five year withdrawal of approval, the latter to be suspended provided certain conditions were met.
>
> We should be slow to intervene in a decision by a hearing panel. The members of the hearing panel heard the oral evidence of Biles and other witnesses directly, where we did not. Nevertheless, we must also look at the facts of this case in the context of the broader public interest. For seven years Biles ran clandestine trading accounts for himself and a friend, concealed from his employer by means of fraudulent signatures. After he was caught, he lied on several occasions to Exchange investigators. This type of conduct must be dealt with firmly, both to protect investors and to

> send a message to others similarly inclined that it simply will not be tolerated. In our view, the penalty imposed by the hearing panel falls well short of what is necessary to achieve those goals and is prejudicial to the public interest.
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> The hearing panel imposed a $40,000 fine and a five year withdrawal of approval rather than the $25,000 fine and lifetime withdrawal requested by the Exchange. Although we might have imposed a different penalty in the circumstances, we would not interfere with that part of the hearing committee's decision.
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> The hearing panel then went on to suspend completely the withdrawal of approval provided that Biles remain under strict supervision, that his firm file monthly performance reports on Biles' activities with the Exchange, and that Biles successfully complete the Canadian Securities Course Examinations and the Conduct and Practices Handbook Examinations within six months. It is this aspect of the decision that we find prejudicial to the public interest. Although it appears that Biles has missed the opportunity to qualify for the suspension, we consider it appropriate to deal with it to provide guidance to future hearing panels.
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> There may well be cases in which a complete suspension of a withdrawal of approval would be an appropriate recognition of mitigating factors or an individual's rehabilitation. However, in this case, the hearing panel found significant and repeated lapses of honesty and integrity. These character traits are critical to an individual's fitness for registration. Biles' misconduct demands that there be at least some period during which he would be completely excluded from participating in the industry. We might question whether there should be even a partial suspension of the five year withdrawal of approval but, in the interests of minimal interference in the hearing panel's decision, we will vary that decision only to say that any suspension of the withdrawal of approval should not commence until at least two years have elapsed from the date of the decision.

¶ 27 The decision in *Biles* makes clear that we should set a high threshold for intervening in a hearing panel's penalty decision. The commission panel chose not to interfere in the fine or the basic withdrawal of approval but concluded that Biles' conduct, consisting of "significant and repeated lapses of honesty and integrity," was so bad that he should have to spend at least some time out of the industry.

¶ 28 The hearing panel in the present case chose to impose a lower penalty than IDA staff requested, but did it clearly fail to protect the public interest?

¶ 29 Paragraph 20.10 of the IDA's By-Laws empowers a hearing panel to impose a variety of penalties. In January 2003 (after the events in this case but before the hearing) the IDA issued guidelines that a hearing panel may take into account when determining the appropriate penalties, but it is clear that the hearing panel has the discretion to determine the penalty "in light of the circumstances of each case."

¶ 30 Under "General Principles" the guidelines say:

> As set out in *Re Derivative Services Inc.*, [2000] I.D.A.C.D. No. 26, at page 3, a District Council's main concerns in determining an appropriate penalty are:
>
> 1. Protection of the investing public;
> 2. Protection of the Investment Dealers Association's membership;
> 3. Protection of the integrity of the Investment Dealers Association's process;
> 4. Protection of the integrity of the securities markets, and
> 5. Prevention of a repetition of conduct of the type under consideration.
>
> The penalty imposed in a specific proceeding should reflect the District Council's assessment of the measures necessary in the specific case to accomplish these goals, ranging from a reprimand to an absolute bar, and may take into account the seriousness of the respondent's conduct and specific and general deterrence.

¶ 31 We will now examine each of the errors that IDA staff says the panel made.

¶ 32 In determining the fine, the hearing panel said, "In our view, the respondent should not be visited with a serious fine because he has not had previous disciplinary difficulties, he cooperated fully with the IDA, he admitted his responsibility, and because he and his family have suffered severe hardship." It is also clear from the tone of the decision, including the way the hearing panel recited the facts, that the panel did not consider the infractions particularly serious.

¶ 33 IDA staff says that hearing panel made several errors here:

- The $5,000 fine imposed by the panel does not reflect the seriousness of Gawthrop's misconduct and ignores both the IDA's penalty guidelines, which

suggest a minimum $10,000 fine for each of the three infractions, and previous sanction decisions.

- The hearing panel incorrectly considered Gawthrop's financial circumstances in determining the fine. This submission is based on the panel's phrase "and because he and his family have suffered severe hardship." IDA staff notes that the financial circumstances of a respondent is not listed in the guidelines as a key consideration in determining sanctions and that a previous panel rejected a submission that a respondent's penalty should reflect "his present difficult financial state."

- The manner in which the hearing panel cited Gawthrop's employment history incorrectly makes it appear that he has not worked in the industry since Dundee fired him. The panel said, "The Respondent was, of course, discharged as soon as all this became known and he is no longer registered with the IDA." This misapprehension of the evidence, says IDA staff, contributed to the panel's error in relation to considering financial circumstances.

¶ 34 Dealing with the last point first, IDA staff is asking us to read more into the hearing panel's words than is there. The panel did not say Gawthrop had not worked in the industry since he was fired, it said "he is no longer registered." That wording suggests the panel was quite aware that Gawthrop had worked in the industry after leaving Dundee.

¶ 35 With respect to financial circumstances, IDA staff says that, in citing a mitigating factor that "he and his family have suffered severe hardship," the hearing panel committed an error in principle. IDA staff says it is settled that a hearing panel should not consider financial circumstances in imposing a fine and that the guidelines do not list a respondent's financial circumstances as one of the "key considerations" that a panel should consider in determining sanctions. Considering financial circumstances, IDA staff says, weakens the general deterrent value of a penalty. In the alternative, IDA staff says the panel erred because Gawthrop's financial circumstances are not all that bad.

¶ 36 We interpret the point here to be that a sanction should fit the circumstances of an infraction, without regard to the respondent's ability to pay a fine. However, it is not clear to us that the hearing panel was considering ability to pay. The reference to "severe hardship" seems to refer to the fact that Dundee had already disciplined Gawthrop by firing him and that he ultimately lost part of his livelihood. A similar course was followed in a previous case that was presented to the hearing panel as a precedent (*Behan and Barnum*), where the hearing panel reduced the fines that

would otherwise have applied to two brokers involved in an off-book private placement because their employer had already fined them. We are therefore not convinced that the panel made any error in principle with respect to Gawthrop's financial circumstances.

¶ 37 IDA staff asks us to conclude that the $5,000 fine ignores the suggested minimum fine of $10,000 for each of 3 infractions and does not reflect the seriousness of Gawthrop's misconduct. The hearing panel did not say much about how it arrived at $5,000 but, clearly, it did not consider the misconduct to be particularly serious. The panel could reasonably have concluded that the 3 infractions were really one, because they all related to the same transactions and that, in the circumstances of this case, a lower fine would be sufficient to accomplish the goals of prevention and deterrence. There is certainly no basis for us to conclude that the fine clearly failed to protect the public interest.

¶ 38 In determining the amount Gawthrop should disgorge, the hearing panel said, "we were advised that, had these transactions been placed with the employer, the greater part of this amount would have been returned to him because of the high commissions he received in return for carrying all his own expenses."

¶ 39 The hearing panel apparently concluded that, if Gawthrop had brought the Qwest offering to Dundee, the firm would have approved it and Gawthrop would have received most of the amount received in commissions.

¶ 40 IDA staff says that disgorgement should deprive a wrongdoer of ill-gotten gains to prevent unjust enrichment and that the panel's decision defeated the deterrent effect of disgorgement by removing only the portion of the commissions that Dundee would have kept if the securities sales had been put through the firm.

¶ 41 Although we understand IDA staff's concerns, and we might well have made a different determination of disgorgement, we cannot say that the hearing panel's decision on disgorgement is clearly wrong or that it clearly failed to protect the public interest. We would not interfere with it.

Decision

¶ 42 Accordingly, we dismiss the IDA staff application.

¶ 43 October 25, 2004

¶ 44 **For the Commission**

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Douglas M. Hyndman
Chair

Marc A. Foreman
Commissioner

Robert J. Milbourne
Commissioner