

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration Between

Name of Claimant

David W. Freelove

93-02940

Name of Respondents

Kidder, Peabody & Co., Incorporated  
Kidder Peabody Group, Inc.

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REPRESENTATION

For Claimant David W. Freelove appeared Daniel A. Pollack, Esq. and Martin I. Kaminsky, Esq. of the law firm of Pollack & Kaminsky, New York City, NY.

For Respondents Kidder Peabody & Co., Inc. and Kidder Peabody Group, Inc. appeared Brian F. McDonough, Esq. of the law firm of Shanley & Fisher, New York City, NY.

CASE INFORMATION

The Statement of Claim was filed on July 29, 1993 and Claimant's Uniform Submission Agreement was signed on July 27, 1993.

Respondents Kidder Peabody & Co., Inc. and Kidder Peabody Group, Inc. filed a joint statement of answer and counterclaim on September 23, 1993. Kidder Peabody & Co., Inc.'s Uniform Submission Agreement was signed on September 7, 1993 and Kidder Peabody Group, Inc.'s Submission Agreement was signed on September 8, 1993.

Claimant's Reply to the Statement of Answer and Counterclaim was filed on October 21, 1993.

HEARING INFORMATION

Pre-hearing Date/ Sessions: March 18, 1994 - One Session

Hearing Dates/ Sessions:	May 4, 1994	-	Two Sessions
	May 5, 1994	-	Two Sessions
	July 18, 1994	-	Two Sessions
	July 19, 1994	-	Two Sessions
	July 20, 1994	-	Two Sessions

The hearings were held at the National Association of Securities Dealers, Inc. offices located in New York City, New York.

### **CASE SUMMARY**

Claimant David W. Freelove ("Freelove") alleged that in 1990, 1991 and 1992 he earned and was awarded supplemental bonuses which were credited to his personal account in the Supplemental Bonus plans of February 1991, January 1992 and December 1992 by Respondents Kidder Peabody & Co., Inc., Freelove's former employer, and Kidder Peabody Group, Inc. (hereinafter collectively referred to as "Kidder Peabody"). Claimant also alleged that these plans afforded senior executives a tax-deferral mechanism for their supplemental bonuses. Claimant further alleged that at the end of 1992, he had a balance in his account of \$1,549,925.00; that on February 5, 1993, Freelove received a memorandum from Kidder Peabody advising him of the amount to be credited to his account as a supplemental bonus for 1992; and that a mere three days later, on February 8, 1993, Freelove was summarily reduced to a mere functionary.

Further, Freelove alleged that Kidder Peabody advised him, by memo dated February 8, 1993, that Freelove had violated a fundamental principle of Kidder Peabody's trading approach which had been made clear to him and, therefore, his conduct was unauthorized and unacceptable to the firm; that Freelove was forbidden from having any contact with any client of Kidder Peabody; and that attempts were made to pressure Freelove into counter-signing this memorandum and into consenting to "penalties" for his alleged "conduct", which Freelove refused to do. Freelove also alleged that the statement as to Kidder Peabody's trading approach which was contained in the memorandum was false; that Kidder Peabody acquiesced in and ratified Freelove's trading approach which involved taking unhedged positions from time to time; and that such "fundamental principle" that there must be no unhedged positions was never communicated to Freelove.

Moreover, Freelove alleged that after staying on in Kidder Peabody's employ for several weeks the situation did not change, and finally Freelove left Kidder Peabody; that Kidder Peabody refused to pay over to Freelove his \$690,000.00 supplemental bonus; and that Kidder Peabody also refused to pay over to Freelove his accumulated supplemental bonuses for the two previous years.

Kidder Peabody denied all allegations of wrongdoing as asserted in the Statement

of Claim. Kidder Peabody maintained that Freelove lost over \$3 million dollars of the firm's funds by taking a \$30 million dollar unhedged net short position in direct violation of the trading strategy he was suppose to follow. Further Kidder Peabody maintained that in response to Freelove's multimillion dollar violation of trading procedures, Kidder Peabody decided that it should impose certain minimal checks and balances on Freelove to prevent a recurrence of this conduct. These conditions, Kidder Peabody maintained, did not prevent Freelove from continuing to effect the trading strategies which had made him a multimillionaire; that they simply implemented a system whereby his trades would be executed by designated employees other than Freelove in order to provide an additional safeguard to Kidder's capital; and that most traders in Freelove's department operated under the same procedure.

Additionally, Kidder Peabody maintained that rather than accept the reprimand which followed this \$3 million violation of firm procedures, Freelove resigned and obtained a new position with another firm. Kidder Peabody asserted that Freelove was not entitled to a supplemental bonus under either the memorandum or the spirit of the Supplemental Bonus Plan; that if the employee remains with the firm for three years after the award is made, the supplemental bonus will be paid to the employee in cash; and that a participant who voluntarily resigns from the firm, as opposed to one who is involuntarily terminated, is expressly not eligible for a supplemental bonus.

Kidder Peabody further maintained that Freelove argues that he was "constructively dismissed" by Kidder Peabody in an effort to bring himself within the terms of the Plan; that Freelove is arguing that the disciplinary measures and precautions which Kidder Peabody took in this case made his working conditions so oppressive and intolerable that no reasonable person could have been expected to remain with the firm under similar circumstances; and that because of Freelove's violation of clearly understood trading guidelines, it was Kidder Peabody's prerogative to take whatever measures it deemed appropriate to avoid such a loss from occurring again.

As its Counterclaim, Kidder Peabody alleged that Freelove owed his employer a duty to exercise reasonable care and honesty in adhering to the limitations and guidelines involved in the trading strategy which he was pursuing on the firm's behalf; that Freelove acted negligently and carelessly in departing from these guidelines and allowing a \$30 million unhedged short position to develop; and that as the direct and proximate result of his negligence and carelessness, the firm lost in excess of \$3 million.

In his reply to the Counterclaim, Freelove denied any and all wrongdoing in connection with the transaction which is the subject of the counterclaim. Freelove stated that if the notion that Freelove should pay Kidder for a loss on a particular transactions is to be followed, the firm should pay him \$25 million for the profits on all of his other transactions.

### **RELIEF REQUESTED**

Claimant Freelove request an award in the sum of \$1,457,900.00, with interest from and after March 31, 1993 to the date of payment, plus the costs of this arbitration proceeding.

Respondents Kidder Peabody & Co., Inc. and Kidder Peabody Group, Inc. requested that the Statement of Claim be dismissed. Kidder Peabody also requested an award on their Counterclaim for reimbursement of the approximately \$3 million dollars in losses incurred.

Freelove requested that the Counterclaim against him be dismissed summarily at the outset of the hearings, and Freelove should be awarded sanctions against Kidder Peabody and its attorneys.

### **OTHER ISSUES CONSIDERED & DECIDED**

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

### **AWARD**

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. All claims by Claimant David W. Freelove against Respondents Kidder Peabody & Co., Inc. and Kidder Peabody Group, Inc. be and hereby are denied.
2. All claims by Respondents Kidder Peabody & Co., Inc. and Kidder Peabody Group, Inc. against David W. Freelove be and hereby are denied.
3. Each party shall bear their respective costs, including attorneys' fees.
4. All other claims be and hereby are denied.

### FORUM FEES

Pursuant to Section 44c of the Code of Arbitration Procedure, the arbitrators have determined that the following Forum Fees are assessed:

1 pre-hearing session X \$300.00 = \$300.00

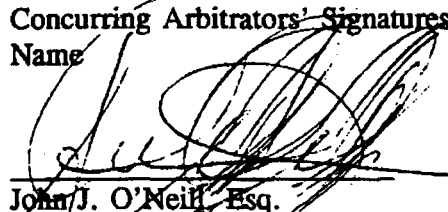
10 sessions X \$1,000.00 = \$10,000 minus Claimant's hearing session deposit of \$1,000.00 and Respondent's hearing session deposit of \$1000.00 = net \$8,000.00 due.

TOTAL OUTSTANDING FEES = \$ 8, 300.00

1. Claimant David W. Freelove be and hereby is liable and shall pay to the NASD the sum of \$4, 150.00 representing one-half of all outstanding forum fees.
2. Respondent Kidder Peabody & Co., Inc. and Kidder Peabody Group, Inc. be and hereby are jointly and severally liable and shall pay to the NASD the sum of \$4, 150.00 representing one-half of all outstanding forum fees.

Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures  
Name

  
\_\_\_\_\_  
John J. O'Neill Esq.  
Industry Arbitration - Chairperson

\_\_\_\_\_  
Stuart Kingoff  
Industry Arbitrator

Dissenting Arbitrator's Signature

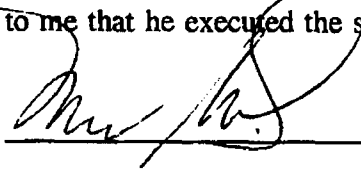
\_\_\_\_\_  
William O'Mara  
Industry Arbitrator

Date of Decision: October 26, 1994

STATE OF NEW YORK

COUNTY OF NASSAU

On this 21<sup>ST</sup> day of OCTOBER, 1994, before me personally  
appeared JOHN J. O'NEILL known to me to be the individual  
described in and who executed the foregoing instrument and duly acknowledged  
to me that he executed the same.



MARIA BRODY  
Notary Public, State of New York  
No. 4932588  
Qualified in Nassau County  
Commission Expires July 25, 1996

Date of Decision: \_\_\_\_\_

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Name

\_\_\_\_\_  
John J. O'Neill, Esq.  
Industry Arbitration - Chairperson

  
\_\_\_\_\_  
Stuart Kingoff  
Industry Arbitrator

Dissenting Arbitrator's Signature

\_\_\_\_\_  
William O'Mara  
Industry Arbitrator

Date of Decision: October 26, 1994

STATE OF NEW YORK

COUNTY OF NASSAU

On this 24TH day of OCTOBER, 1994, before me personally appeared STUART N KINGOFF known to me to be the individual described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same.



STEPHEN REINHARDT  
Notary Public, State of New York  
No. 30-4634170  
Qualified in Nassau County  
Commission Expires

12/31/94

Date of Decision: \_\_\_\_\_



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Concurring Arbitrators' Signatures  
Name

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John J. O'Neill, Esq.  
Industry Arbitration - Chairperson

\_\_\_\_\_  
Stuart Kingoff  
Industry Arbitrator

Dissenting Arbitrator's Signature

William E. O'Mara  
William O'Mara  
Industry Arbitrator

Date of Decision: October 26, 1994

STATE OF

COUNTY OF

On this 25 day of OCTOBER, 1994, before me personally appeared William O'Mara known to me to be the individual described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same.

Deborah A. Jesus

DEBORAH A. DEJESUS  
Notary Public, State of New York  
No. 02DE5022979  
Qualified in New York County  
Commission Expires January 24, 1996

Date of Decision: \_\_\_\_\_