

9711024

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of Arbitration Between

Sherwin J. and Shirley A. Fischer;
Sherwin J. Fischer, as trustee of the Esquire Personal Services, Inc.
Defined Pension Plan, DTD 3/6/85; and
Esquire Personal Services, Inc.;

Claimants,

and

No. 95-05035

Gruntal & Co., Inc.

Respondent.

REPRESENTATION OF PARTIES

For Claimants: Esquire Personal Services, ("Esquire"), Sherwin J. Fischer, as trustee of the Esquire Personal Services, Inc. Defined Pension Plan, DTD 3/6/85 ("Plan"), Sherwin J. Fischer and Shirley A. Fischer, ("Fischer") were represented by Nicholas Iavarone, Esq. of Bellows and Bellows in Chicago, Illinois.

For Respondent: Gruntal & Co., ("Gruntal") was represented by Timothy J. Carey, Esq. of Champman and Cutler in Chicago, Illinois.

CASE INFORMATION

Claimants' Statement of Claim was filed on: October 24, 1995.
Claimants' Amended Statement of the Claim was filed on: December 7, 1995.
Claimants' Second Amended Statement of the Claim was filed on: May 24, 1996.
Claimant Esquire's Submission Agreement was signed on: October 19, 1995.
Claimants Fischers' Submission Agreement was signed on: November 10, 1995.
Claimant Plan's Submission Agreement signed on: May 23, 1996.

Respondent Gruntal's Answer to Amended Statement of the Claim was filed on: January 16, 1997.
Respondent Gruntal's Answer to the Second Amended Statement of the Claim was filed on: June 24, 1996.
Respondent Gruntal's Submission Agreement was signed on: January 16, 1995.

HEARING INFORMATION

Pre-hearing conference:	None Held.
Hearing Dates/Sessions:	May 28, 1997 for one (1) session; September 17, 1997 for two (2) sessions; and September 18, 1997 for two (2) sessions.

Hearings Location: Chicago, Illinois.

CASE SUMMARY

Claimants brought this action against Respondent Gruntal for breach of fiduciary duty, omissions and misrepresentations. Claimants alleged that Fischer, who was president of Esquire, was solicited by Wayman, a close friend of Fischer and a broker employed by Gruntal in its Chicago office, to open accounts individually and for the business. At the time, Fischer explained to Wayman that while he was successful at running his business and had securities accounts, he was not a sophisticated investor and relied upon his brokers to make the appropriate decisions for him. In response, Wayman told Fischer that he understood and that Fischer could rely on both Wayman and Gruntal to make appropriate investment decisions for him. As a result of this conversation, Claimants alleged that a fiduciary relationship arose between Gruntal and the Claimants whereby the Claimants entrusted a highest degree of trust and confidence in Gruntal to make the proper investment decisions and manage any securities account opened at Gruntal. In turn, Respondent Gruntal owed the Claimants the highest degree of loyalty, honesty and diligence in connection with the various securities accounts opened by the Claimants at Gruntal.

When Fischer's account was opened, the only account covered by a margin agreement was the corporate account, and Fischer explained on behalf of Esquire that he would be using the funds in the account, and Fischer account to meet company expenses. Wayman told him that this would be no problem and that Esquire should have a margin account, as it might be possible that Esquire would be required to liquidate a margin account security positions premature. Furthermore, Fischer explained to Wayman that he was only interested in investing stocks of good, blue chip companies for both growth and income in safe, high quality stocks of good, bonds. In addition, Fischer advised that the Plan's funds were to be invested only in the safest and most conservative investments as this Plan represented the pension money of various Esquire employees and that it could not be invested in anything but the highest quality stocks and bonds. Wayman understood and stated that he would not place any of the Claimants' funds in risky or speculative securities or bonds, and that he and Gruntal would "take care of the account."

Almost immediately, Wayman and Gruntal began to breach their fiduciary duty by investing in a number of below investment grade stocks and bonds for the Claimants. Rather than fulfilling their fiduciary obligations and make an immediate and full disclosure of their actions, Gruntal and Wayman misled Fischer as to the quality of their securities purchases and the status of all accounts, deceiving the Claimants of the state of their accounts. Even as late as April, Gruntal sent Claimant's a "review" of the accounts he had opened and falsely represented the profitability of the accounts. Based upon the above allegations, the Claimants asserted that the mismanagement of the accounts, the failure to disclose the nature and type of investments made in the accounts and the intentional misrepresentations made to Fischer, that each constitute a further breach of fiduciary duty, and that the acts, misrepresentations and omissions constituted violations of the Illinois Securities Law of 1953, 815 ILCS 5/13.

Respondent Gruntal denied the material allegations of the Claim, stating that the Accounts were not discretionary accounts, but rather each transaction in the accounts was discussed and approved by Fischer. In addition, the Respondent stated that the Claimants do not allege that Wayman or any other

Gruntal employee bought or sold any securities for the accounts without first being authorized. Furthermore, the Respondents asserted that the Claimants' assertion that they "were only interested in stocks of good, blue-ship companies for both growth and income in safe, high quality bonds" is untrue because the quality of the challenged securities is largely indistinguishable from the quality of those that the Claimants' do not challenge. Respondents also asserted that the Claimants' assertions that they were only interested in stocks of good, blue companies" is preposterous on its face, since virtually none of the stocks purchases in the accounts fit this description. In addition, the Respondents asserted that from the outset, the Claimants bought and sold securities that did not meet the specifications allegedly given to Wayman by the Claimants, and that the Claimants invested without complaint in various limited partnerships and mutual funds. Furthermore, the Plan received prospectuses that plainly disclosed the nature and risks of those securities.

The Respondent also asserted various affirmative defenses, including that the claims are barred by the doctrine of ratification, waiver and estoppel, the claimant failed to take reasonable steps to mitigate the alleged damages or losses incurred, and that the Second Amended Statement of the Claim should be dismissed in its entirety pursuant to the equitable doctrine of laches.

RELIEF REQUESTED

Claimants requested an award for \$45,000.00 in compensatory damages for the Fischers, \$44,000.00 in compensatory damages for the Plan, \$27,000.00 in compensatory damages for Esquire, \$50,000.00 in punitive damages and interest and costs, including reasonable attorneys fees.

Respondent Gruntal requested that the claims asserted against it be dismissed in their entirety and that it be awarded its costs and attorneys' fees.

OTHER ISSUES CONSIDERED AND 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 Regulation, Inc. Office of Dispute Resolution.

AWARD

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

1. The claims asserted by the Claimants, Esquire Personnel Services, Inc., Sherwin J. Fischer, as trustee of the Esquire Personal Services, Inc. Defined Pension Plan, DTD 3/6/85, Sherwin J. Fischer and Shirley A. Fischer are dismissed with prejudice and denied in the entirety;

2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein; and
3. Any relief not specifically awarded is hereby denied.

FORUM FEES

Forum fees are calculated at the rate of \$500.00 per hearing session and \$300 for each pre-hearing conference, if any. There were 5 hearing sessions x \$500.00 = \$2500.00 in forum fees. Pursuant to § 10332(b) of the NASD Code of Arbitration Procedure (the "Code") a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to § 10332(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee of \$150.00 and shall retain as forum fees the hearing session deposit of \$500.00 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Claimant Esquire and Fischer. In addition, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the additional \$200.00 excess deposit previously paid by Claimants. Claimants Esquire Personnel Services, Inc., Sherwin J. Fischer, as trustee of the Esquire Personal Services, Inc. Defined Pension Plan, DTD 3/6/85, Sherwin J. Fischer and Shirley A. Fischer are jointly and severally liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$550.00 as forum fees. Respondent Gruntal & Co., Inc. is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$1,250.00 as forum fees.

Pursuant to § 10333 of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable member surcharge of \$350.00 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Respondent Gruntal & Co., Inc. In addition, the NASD Regulation, Inc. Office of Dispute Resolution shall retain postponement fees of \$500.00 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Gruntal & Co., Inc. on January 22, 1997. Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.

Concurring Arbitrators' Signatures

Dated:

/s/ Lee H. Goodman
Lee H. Goodman
Chairperson
Public Arbitrator

October 27, 1997

/s/ Gene L. Waas
Gene L. Waas, M.A., Esq.
Public Arbitrator

October 27, 1997

/s/ Dwight R. Erskine, II, CFP
Dwight R. Erskine, II, CFP
Industry Arbitrator

November 6, 1997