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AWARD

NASD Regulation, Incorporated Office of Dispute Resolution

In the Matter of Arbitration Between

Arthur Bice Asbury, Jr.,

Claimant,

and

No. 95-05061

Aetna Life Ins. & Annuity Co.

Respondent.

REPRESENTATION OF PARTIES

Claimant, Arthur Bice Asbury, Jr. ("Asbury"), was represented by Cynthia N. Asbury, Esquire of Arthur Bice Asbury & Asbury, located in Nashville, Tennessee.

Respondent, Aetna Life Insurance & Annuity Company ("Aetna"), was represented by Herbert B. Aetna Life Insurance Gerson, Esquire of McKnight, Hudson, Lewis & Henderson, located in Memphis, Tennessee.

CASE INFORMATION

Asbury's Statement of Claim was filed on or about October 24, 1995.

Asbury's Submission Agreement was signed on November 17, 1995.

Aetna's Statement of Answer was filed on or about January 24, 1996.

Aetna's Amended Statement of Answer was filed on or about May 28, 1997.

Aetna's Submission Agreement was signed on January 10, 1996 by James Lehan, Vice President, Annuity of Aetna Life Insurance and Annuity Company.

HEARING INFORMATION

9/11/22

A large and complex administrative conference was held on July 23, 1996 for one (1) session.

No pre-hearing conferences were held.

The hearing was held on September 8, 1997 for two (2) sessions.

The hearing was held in Nashville, Tennessee.

CASE SUMMARY

Asbury brought this action to recover damages allegedly resulting from breach of contract and conspiracy to restrain trade on the part of Aetna.

According to Asbury, he entered into an agreement with Aetna on April 17, 1981 to serve as a full-time enroller on Aetna Variable Annuity cases with the State of Tennessee. Asbury alleged that Aetna failed to provide the compensation and benefits promised, and wilfully and purposefully lied to Asbury about the terms and conditions of the relationship and was and continues to be punitive and to withhold compensation and benefits relative to the agreement. Asbury claimed that Aetna owes him for commissions, credits and benefits, plus the value of the honors clubs, meetings and contests which qualify him for health and pension benefits and expenses. Asbury contended that his supervisors harassed him to force him to quit so that they could take over his accounts. Asbury further contended that he was cheated out of income and benefits by Aetna by illegal and unfair practices, including fraud. In addition, Asbury asserted that Aetna made it impossible for him to market its products that it contracted with him to sell. Asbury stated that Aetna moved and misplaced important personal papers relating to his relationship with Aetna, and that Aetna also told his clients and customers that he was no longer with the company while he continued to represent Aetna. Asbury argued that Aetna assigned business to younger annuity agents and representatives in violation of the terms and conditions of his agreement with Aetna. Asbury also asserted that Aetna allowed participants of Aetna contract-holder, Metro, to surrender deferred compensation contracts without the approval of the contract-holder/owner authorized person in violation of the contract, Aetna and NASD policy, and in violation of Asbury's agreement with Metro and Aetna. Aetna, according to Asbury, made every effort to deprive him of the benefits given to other agents including group health insurance, pensions, profit-sharing, stock purchase, office space, and other benefits.

Pursuant to his claim for conspiracy to restrain trade, Asbury alleged that Aetna conspired with personnel of Nashville Electric Service and personnel of Hilliard & Lyons and did initiate and facilitate such conspiracy in violation of Tennessee Statutes and Metropolitan Codes for the purpose of eliminating Asbury from competition, which caused him a loss of commissions, benefits, and expenses. Asbury further claimed that this was part of a larger pattern of illegal manipulation and conspiracy to restrain trade in violation of public policy, and which prejudiced Asbury's efforts to compete.

Aetna denied the allegations set forth in the Statement of Claim as they relate to any wrongdoing on its part. It specifically denied that it failed to provide any compensation and benefits to which Asbury was entitled or that it in any way misled Asbury with respect to the terms and conditions of his independent contractor relationship with Aetna. Aetna further denied that it harassed or attempted to cause Asbury to terminate his independent contract or relationship. Aetna averred that it has at all times met the highest level of internal compliance, ethics, fairness, compliance with the NASD Rules of Fair Procedure, and § 17 of the Securities Act of 1933 with respect to the Nashville Electric Service ("NES") matter and its dealings with Asbury. Aetna further averred that it provided Asbury with office space, telephones and support for at least six months longer than he was entitled to receive said benefits. Aetna asserted that brokers such as Asbury are not eligible to participate in the pension plan and other benefit programs provided to Aetna employees, and that although there are fringe benefits available for such brokers, Asbury's production was not sufficient for him to qualify for these fringe benefits. Aetna also asserted various affirmative defenses.

RELIEF REQUESTED

Claimant requested an award for: \$200,000 in commissions, trebled, plus interest and expenses; \$1,000,000 in lost opportunity, lost benefits and mental anguish; punitive damages of \$5,000,000; and restoration of all employment benefits, service, honors, rights and privileges.

OTHER ISSUES CONSIDERED AND DECIDED

This matter was originally filed in the United States District Court for the Middle District of Tennessee. The Court was presented with Asbury's Motion for Summary Judgment, Asbury's Motion to Amend the Complaint, and Aetna's Motion for Summary Judgment. The Court denied Asbury's Motion for Summary Judgment, granted Aetna's Motion for Summary Judgment, and granted in part and denied in part Asbury's Motion to Amend his complaint. *Asbury v. Aetna Life Ins. & Annuity Co.*, No. 3:92-0633 (M.D. Tenn. Feb. 24, 1994) (order stipulating that Asbury's state law claims for breach of contract and conspiracy to restrain trade shall proceed to arbitration, and that this case is stayed pending arbitration).

On or about May 20, 1997, Aetna filed a Motion to Dismiss and for Summary Judgment of this arbitration matter. Aetna renewed its Motion to Dismiss at the arbitration hearing in this matter. After considering said motions and all timely responses thereto, the panel of arbitrators denied in part and granted in part these motions at the hearing.

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 original(s) remain on file with the NASD Regulation, Incorporated Office of Dispute Resolution.

AWARD

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

1. The Statement of Claim is denied in its entirety with prejudice;
2. Other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$1,500 per hearing session and \$300 for each pre-hearing conference, if any. There were no pre-hearing conferences and there were two (2) hearing sessions. $2 \times \$1,500 = \$3,000$ in forum fees. Pursuant to § 10205(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 § 10205(c) of the Code, the NASD Regulation, Incorporated Office of Dispute Resolution shall retain the non-refundable filing fee of \$500 and shall retain as forum fees the hearing session deposit of \$1,500 previously deposited with the NASD Regulation, Incorporated Office of Dispute Resolution by Arthur Bice Asbury, Jr.

Aetna Life Insurance & Annuity Company is liable for and shall pay the NASD Regulation, Incorporated Office of Dispute Resolution forum fees of \$1,500 (= \$3,000 total forum fees - \$1,500 hearing session deposit by Arthur Bice Asbury, Jr.).

Aetna Life Insurance & Annuity Company is liable for and shall reimburse Arthur Bice Asbury, Jr. for his hearing session deposit of \$1,500.

Pursuant to § 10333 of the Code, Aetna Life Insurance & Annuity Company is liable for and shall pay the NASD Regulation, Incorporated Office of Dispute Resolution the member surcharge of \$500.

Fees are payable to the NASD Regulation, Incorporated Office of Dispute Resolution.

Concurring Arbitrators' Signatures

/s/ Joe C. Loser

September 22, 1997

Joe C. Loser, Jr.
Chairperson
Public Arbitrator

Dated:

/s/ Hugh J. Moore

September 23, 1997

Hugh J. Moore, Jr., Esquire

Dated:

Panelist
Public Arbitrator

/s/ Milton H. Sitten

September 30, 1997

Milton H. Sitten, Esquire

Dated:

Panelist
Industry Arbitrator

For NASD use only:

Date Award was served on the parties: October 3, 1997