

## **AWARD**

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of Arbitration Between

Clifford D. Bequette,

Claimant and Counter-Respondent,

and

No. 95-05198

H.J. Meyers & Co., Inc.,

Respondent and Counter-Claimant.

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### **REPRESENTATION OF PARTIES**

Claimant, Clifford D. Bequette, was represented by Timothy M. McDaniel, Esquire of McDaniel & Allen, located in Houston, Texas.

Respondent, H.J. Meyers & Co., Inc. was represented by Stephen C. Voris, Esquire of Burke, Warren & MacKay, located in Chicago, Illinois.

### **CASE INFORMATION**

Clifford D. Bequette's Statement of Claim was filed on or about November 1, 1995.

Clifford D. Bequette's Response to Counterclaim was filed on or about March 18, 1997.

Clifford D. Bequette's Submission Agreement was signed on August 24, 1995.

H.J. Meyers & Co., Inc.'s Statement of Answer and Counterclaim was filed on or about April 8, 1996.

H.J. Meyers & Co., Inc.'s Submission Agreement was signed on December 4, 1995 by Michael F. Brown, General Counsel of H.J. Meyers & Co., Inc.

### **HEARING INFORMATION**

A pre-hearing conference was held on May 15, 1997 for one (1) session.

The hearing was held on: May 20, 1997 for two (2) sessions; May 21, 1997 for two (2) sessions; and May 22, 1997 for two (2) sessions.

The hearing was held in Houston, Texas.

### CASE SUMMARY

Claimant, Clifford D. Bequette, ("Claimant") brought this action to recover losses allegedly resulting from the common law fraud and deceit and breach of contract committed by Respondent, H.J. Meyers & Co., Inc. ("Respondent").

Claimant alleged that Respondent solicited him away from his previous employer, Howard, Weil, Labouisse, Friedrichs, Inc., where he was managing director of its fixed income division, in order to fulfill Respondent's desire to enter the fixed income market. According to Claimant, on approximately June 3, 1994 he entered into an employment agreement with Respondent whereby he was to receive an annual salary of \$250,000 for a term of two years, and on June 15, 1994 he began working for Respondent's Houston office of fixed income called Pinnacle. Claimant asserted that in approximately November 1994, despite his protest, his annual salary was cut to \$200,000 annually. Claimant argued that in addition to Respondent's breach of their employment agreement, Respondent also failed to fulfill its representations by not allowing its recruiters to be used to find qualified personnel for the Pinnacle office, by not allowing the Pinnacle office to use Respondent's other offices to conduct business, and by not devoting substantial funds to the Pinnacle office. Furthermore, Claimant asserted, despite his efforts and Respondent's continued assurances of commitment to its fixed income division and Claimant, Respondent further reduced his salary in February 1995 to \$150,000 annually, on approximately March 17, 1995 to \$100,000 annually, and on April 17, 1995 to \$0, at which time he was told that his income was to be based on commission only. Finally, according to Claimant, on approximately May 19, 1995, despite Respondent's representation that it was committed to Pinnacle's success, Respondent closed the Houston office of Pinnacle.

Respondent denied the allegations set forth in the Statement of Claim as they relate to any wrongdoing on its part. Respondent conceded that it entered into an employment relationship with Claimant. However, Respondent contended, Claimant's contract was not guaranteed. According to Respondent, Claimant's employment was always based upon his performing his obligations under the contract, including meeting the budget that he had prepared and that was attached to his contract. Respondent asserted that by failing to perform as he had represented, Claimant himself breached the contract thereby relieving Respondent of its obligations. Moreover, Respondent argued, the contract was void from the outset because Claimant knowingly and fraudulently induced Respondent to enter into the employment contract based upon false and misleading representations as to the amount of revenues he assured Respondent he and his colleagues Anthony Carey and James E. Winchester ("Winchester") would generate for the Pinnacle operation.

Respondent brought its counterclaim to recover amounts allegedly lost in the Pinnacle operation as a result of Claimant's negligent misrepresentation and breach of contract.

According to Respondent, Claimant and Winchester breached their duty by negligently recruiting and employing individuals whom they knew or should have known were not the most qualified candidates, and Claimant breached his employment agreement by failing to generate the revenues which he represented would be achieved. Respondent asserted that, as a result of Claimant's and Winchester's negligent misrepresentations, it suffered damages in salary paid to unqualified employees and other expenses incurred in connection with the failure of Pinnacle. Respondent further asserted that, as a result of Claimant's breach of the employment agreement, it suffered damages and was entitled to the entire amount it lost in the Pinnacle operation.

Claimant denied the allegations set forth in the counterclaim. Claimant argued that Respondent's claims should be denied because of its conduct constituting breach of contract, waiver, estoppel, negligent representation, intentional misrepresentation, and fraud. Claimant further contended that to the extent Respondent was entitled to any recovery against Claimant, which he denied, such recovery should be set off and reduced by Claimant's entitlement to recover damages against Respondent.

#### **RELIEF REQUESTED**

Claimant, Clifford D. Bequette, requested an award for: actual damages for reduction in salary for 1994 of approximately \$100,000; actual damages for salary for 1995 of \$250,000; actual damages for his share of the "net profits" of the department which, through reasonable conduct of Respondent, H.J. Meyers & Co., Inc., should have been \$158,932.00; actual damages for his share of the retail gross commission revenue which, through reasonable conduct of Respondent, H.J. Meyers & Co., Inc., should have been \$900,000.00; actual damages for expenses not reimbursed of \$3,000.00; punitive and exemplary damages; and reasonable attorney's fees and costs pursuant to § 38.001, et seq., of the Texas Civil Practice & Remedies Code. Claimant, Clifford D. Bequette, further requested that Respondent, H.J. Meyers & Co., Inc., take nothing by reason of its counterclaim, and that he recover his attorneys' fees, expenses, and costs as may be proved.

Respondent, H.J. Meyers & Co., Inc., requested an award for: salary paid to one of the unqualified employees in the amount of \$87,592; settlement paid to United Van Lines in the amount of \$11,000; salaries paid to Claimant, Clifford D. Bequette, and James E. Winchester in the amount of approximately \$275,000; all other expenses incurred in connection with Pinnacle and its failure in the amount of \$1.2 million; the total amount of loss in the Pinnacle operation in the amount of \$1,545,000; and costs and attorneys' fees incurred in this arbitration.

#### **OTHER ISSUES CONSIDERED AND DECIDED**

Prior to the hearing in this matter, Respondent, H.J. Meyers & Co., Inc., moved to consolidate this case with NASD Arbitration Case Numbers 95-04458 and 95-05274. After reviewing the submissions of all parties, and in accordance with § 10314(d)(3) of the NASD Code of Arbitration

Procedure, the Director of Arbitration preliminarily determined that the motion was denied and that these matters were to proceed separately.

Respondent, H.J. Meyers & Co., also filed claims against Third-Party Respondent James E. Winchester in this matter. Pursuant to H.J. Meyers & Co.'s letter dated May 15, 1997 and James E. Winchester's letter dated May 19, 1997, said parties agreed to voluntarily dismiss their claims against one another with prejudice.

Prior to the hearing in this matter, Respondent, H.J. Meyers & Co., Inc., moved to bar Claimant's, Clifford D. Bequette's, counsel. Respondent, H.J. Meyers & Co., Inc. withdrew this motion at the hearing in this matter.

Prior to the hearing in this matter, Respondent, H.J. Meyers & Co., Inc., moved to bar Clifford D. Bequette from attempting to use any taped telephone conversations and any transcripts thereof at the hearing in this matter. Following oral arguments at the hearing, the undersigned panel of arbitrators denied this motion with the caveat that it would entertain any specific objections at the time of offering.

Prior to the hearing in this matter, Respondent, H.J. Meyers & Co., Inc., moved to bar discovery of transcripts from the hearing in NASD Arbitration Case Number 95-05274 (which was one of the cases Respondent, H.J. Meyers & Co., Inc. previously moved to consolidate with this case). The undersigned panel of arbitrators denied this motion 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, Inc. 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. That Clifford D. Bequette's Statement of Claim is hereby denied in its entirety and dismissed with prejudice;
2. That H. J. Meyers & Co., Inc.'s Counterclaim is hereby denied in its entirety and dismissed with prejudice;
3. That the parties shall bear their own costs including attorneys' fees except for forum

fees, which are addressed below; and

4. All other claims and requests for relief not specifically awarded here are, and each of them, hereby denied in their entirety and dismissed with prejudice.

#### **FORUM FEES**

Forum fees are calculated at the rate of \$1,000 per hearing session and \$300 for each pre-hearing conference, if any. There was one (1) pre-hearing conference  $\times$  \$300 = \$300, and there were six (6) hearing sessions  $\times$  \$1,000 = \$6,000. Total forum fees are thus \$300 + \$6,000 = \$6,300. 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, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$500 and shall retain as forum fees the hearing session deposit in the amount of \$1,000 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by Clifford D. Bequette.

Clifford D. Bequette is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution additional forum fees in the amount of \$2,150.

Pursuant to § 10333 of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable member surcharge in the amount of \$500 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by H.J. Meyers & Co., Inc.

Pursuant to § 10205(c) of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fees in the amount of \$1,000 and shall retain as forum fees the hearing session deposits in the amount of \$2,000 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by H.J. Meyers & Co., Inc.

H.J. Meyers & Co., Inc. is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution additional forum fees in the amount of \$1,150.

James E. Winchester is liable for and shall pay the NASD Regulation, Inc. Office of Dispute Resolution, pursuant to § 10205(c) of the Code, the filing fee in the amount of \$500.

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

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Concurring Arbitrators' Signatures

John C. Booth, Jr.  
John C. Booth, Jr.  
Chairperson  
Industry Arbitrator

June 5, 1997  
Dated:

Jack C. Payne  
Jack C. Payne  
Panelist  
Industry Arbitrator

June 4, 1997  
Dated:

Jay M. Eshbach, II  
Jay M. Eshbach, II  
Panelist  
Industry Arbitrator

June 5, 1997  
Dated: .

For NASD use only:  
Date Award was served on the parties: June 10, 1997