

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimant

Kirkpatrick, Pettis, Smith Polian, Inc.

and

96-00746

Name of Respondent

David T. Shetterly

REPRESENTATION OF PARTIES

Kirkpatrick, Pettis, Smith Polian, Inc. ("**Claimant**") was represented by James M. Bausch, Esq., Cline, Williams, Wright, Johnson & Oldfather, Lincoln, Nebraska.

David T. Shetterly ("**Respondent**") was represented by Alan H. Simon, Esq. and Peter J. Schaffer, Esq., Denver, Colorado.

CASE INFORMATION

The Statement of Claim was filed on or about February, 20, 1996. Reply to the Counterclaim was filed on or about April 22, 1996. Submission Agreement of Claimant Kirkpatrick, Pettis, Smith Polian, Inc. was signed on February 14, 1996 by Scott C. Hoyt.

Statement of Answer and Counterclaim was filed by Respondent David T. Shetterly on or about April 10, 1996. Submission Agreement of Respondent David T. Shetterly was signed on April 9, 1996.

HEARING INFORMATION

The hearing was held on Wednesday, October 23, 1996 for two (2) sessions and Thursday, October 24, 1996 for two (2) sessions in Denver, Colorado for a total of four (4) sessions.

CASE SUMMARY

Claimant alleged that when Respondent David T. Shetterly became employed by it, he received a \$100,000 "up front" transition payment. It was further alleged that at the time he received the payment, Respondent signed a promissory note promising to repay the \$100,000 subject to the

provisions of the promissory note. In addition, Claimant alleged that after Respondent had worked for it for a period of 14 months, he received a \$36,665.56 "back-end" incentive payment. In connection with the receipt of the incentive payment, Respondent signed a promissory note promising to repay the \$36,665.56, subject to the provisions of the promissory note. Finally, Claimant alleged that on August 21, 1995, Claimant terminated his employment with Claimant rendered the unpaid and unforgiven portions of the notes due and payable..

Respondent denied the allegations set forth in the Statement of Claim. Respondent specifically stated that the amounts owed, if any, on the promissory notes are not yet due and payable. Additionally, Respondent asserted that the sums owed, if any, should be discharged due to the improper conduct of Claimant. In his Counterclaim, Respondent alleged that Claimant intended to harm and actually caused him harm by making and publishing defamatory statements about him to his future employer and to other people. Specifically, Respondent alleged that the defamatory statements included but were not limited to: comments that Respondent violated securities and insurance regulations while employed by Claimant; that Respondent had borrowed money from clients; and that Respondent was the subject of a serious complaint by a client.

In the Reply to the Counterclaim, Claimant denied the allegations set forth in the Counterclaim. Specifically, Claimant stated that the statement made regarding the allegations above were true.

RELIEF REQUESTED

Claimant requested an award in the amount of \$93,697.79, plus interest totalling \$23.30 per day from and after February 16, 1996, together with fees and costs. In the Reply to the Counterclaim, Claimant restated the above relief and that the counterclaim asserted against it be dismissed and that David T. Shetterly receive nothing on his counterclaim.

Respondent requested that the claims asserted against him be dismissed with prejudice. On his Counterclaim, Respondent requested an award in an amount between \$3,000,000 and \$5,000,000, which includes compensatory damages, punitive damages and/or treble damages. Respondents also requested an award of interest, expert witness fees, attorneys' fees, filing fees, costs and such other amounts as may be awarded by the arbitration panel.

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 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. Respondent David T. Shetterly shall be and hereby is liable for and shall pay to the Claimant, Kirkpatrick, Pettis, Smith Polian, Inc. the sum of **sixty five thousand three hundred forty dollars and thirty five cents (\$65,340.65)** as payment of principal and interest on the first promissory note.
2. Respondent David T. Shetterly shall be and hereby is liable for and shall pay to the Claimant, Kirkpatrick, Pettis, Smith Polian, Inc. the sum of **thirty two thousand six hundred nine dollars and twenty one cents (\$32,609.21)** as payment of principal and interest on the second promissory note.
3. Interest at the rate of \$22.48 per day is awarded from and inclusive of October 24, 1996 to and inclusive of the date the award is paid in full.
4. Respondent David T. Shetterly shall be and hereby is liable for and shall pay to the Claimant, Kirkpatrick, Pettis, Smith Polian, Inc. the sum of **ten thousand six hundred seven dollars and fifty nine cents (\$10,607.59)** as attorneys fees pursuant to the terms of the notes.
5. The amounts set forth in paragraphs 1 through 4 above shall be offset by the amount of **one thousand eight hundred ninety six dollars and fifty seven cents (\$1,896.57)** which represents the amount charged to Respondent David T. Shetterly for margin interest on a clients account.
6. The claims asserted in the Counterclaim filed in this matter shall be and hereby are dismissed with prejudice.
7. Each party shall bear its own costs, expenses and attorneys' fees incurred in this matter not specifically enumerated herein.

FORUM FEES

Forum fees are calculated at the rate of \$1,000 per hearing session and \$300 for each prehearing conference, if any. There were four (4) sessions x \$1,000 = \$4,000 in forum fees. Pursuant to §10205(b) 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 NASD Code of Arbitration Procedure, 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 \$600 previously deposited with the NASD Regulation, Inc. Office of Dispute Resolution by the Claimant Kirkpatrick, Pettis, Smith Polian, Inc. Respondent David T. Shetterly shall be and hereby is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution, the non-refundable filing fee in the amount of \$500. Respondent David T. Shetterly shall be and hereby is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$3,400 as the balance due for forum fees. Pursuant to §10333 of the NASD Code of Arbitration Procedure, the NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$300. **Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.**

/s/ Donald P. Loyd, Esq.
Donald P. Loyd, Esq.
Industry Arbitrator, Presiding Chair

Dated: October 24, 1996

/s/ Raymond N. Mitchell, Jr.
Raymond N. Mitchell, Jr.
Industry Arbitrator

October 24, 1996

/s/ James M. Corboy
James M. Corboy
Industry Arbitrator

October 24, 1996