

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Claimant

Everen Securities, Inc. f/k/a Kemper Securities, Inc.,

and

96-01002

Respondent

Gregory P. Newton.

REPRESENTATION OF PARTIES

For Claimant: Claimant Everen Securities, Inc. ("Everen") was represented by A. Brad Busscher, Esq. of Everen Securities, Inc., located in Chicago, Illinois.

For Respondent: Respondent Gregory P. Newton ("Newton") was represented at hearing by Peter S. Lubin, Esq. of McConnell Mendelson, located Chicago, Illinois .

CASE INFORMATION

Statement of Claim filed: March 8, 1996.

Respondent Everen's Submission Agreement signed on: March 5, 1996 by A. Brad Busscher, Senior Vice President and Senior Attorney, Everen Securities, Inc..

Respondent Newton's Statement of Answer filed on: April 9, 1996.

Respondent Newton's Submission Agreement signed on: April 25, 1996.

Newton's Motion for Summary Judgment and Motion to Strike Claimant's Prayer for Attorneys' Fees filed: April 25, 1996.

Claimant Everen's Response to Respondent's Motions filed: May 21, 1996.

Newton's Reply to Everen's Response filed: May 31, 1996.

HEARING INFORMATION

Prehearing conference: November 4, 1996 before One (1) arbitrator for One (1) session..

Hearing Date/Sessions: November 11, 1996 for Two (2) sessions.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Everen, Inc. alleged that Respondent Gregory Newton has failed to comply with his employment agreement. Everen, Inc. specifically alleged that:

1. Everen Securities Inc. employed Newton as a sales agent from January 1995 through August 18, 1995;
2. A signed Memorandum of Understanding ("MOU") governed Newton's compensation;
3. Pursuant to the signed MOU, Newton was compensated with a \$4,000.00/month forgivable draw for his first three months of employment. Thereafter, Everen, Inc. compensated the Newton with a \$4,000.00/ month recoverable draw. Unlike the forgivable draw, the recoverable draw requires repayment; and
4. Newton voluntarily resigned on August 18, 1995 and has not repaid the recoverable draw totaling \$13,708.00;

Newton denied the allegations set forth in the Statement of Claim. Newton specifically stated that:

1. The MOU does not state that Everen, Inc. may recover the draw if employees fail to generate sufficient commissions;
2. Everen, Inc. twice attempted to get Newton to sign an agreement that would explicitly require recoverable draw repayment. Such an attempt is an implicit admission that the MOU does not require recoverable draw repayment; and
3. Further, Everen, Inc. wrongfully frustrated Newton's ability to generate commissions by removing customer accounts.

RELIEF REQUESTED

Everen, Inc. requested an award in the amount of \$13,708.00 including costs and attorney's fees.

Newton denied the claims asserted against him and asked the panel to award him costs and attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

The panel reviewed Respondent's Motion for Summary Judgment and Motion to Strike Prayer for Attorneys' Fees, as well as all subsequent pleadings. The Panel determined that the Motions would be considered with the case. Based upon the decision of the Panel on the merits, the Motions are moot.

After the hearing was completed and the Panel had made its determination, but before the award was rendered, Respondent Newton filed a Motion to Reopen the hearing on December 2, 1996, supplementing the same on December 4, 1996. On December 11, 1996, Everen responded to the Motion. On January 6, 1997, Newton reargued the Motion. Everen responded on January 16, 1997. Further correspondence was received from Newton on January 17, 1997, January 21, 1997, January 24, 1997, and January 28, 1997. Additional filings were made by Everen on January 23, 1997 and January 27, 1997. After review of the filings, the Panel determined that the Motion would be denied and that its original decision would stand.

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 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 Statement of Claim is dismissed with prejudice and denied in its entirety;
2. The parties shall bear their 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 \$ 600.00 per hearing session and \$300 for each prehearing conference, if any. Two (2) hearing sessions x \$600.00 = \$1,200.00; One (1) prehearing session x \$300.00 = \$300.00; Total Forum fees = \$ 1,500.00. Pursuant to §10332(b) a hearing session is any meeting between the parties and the arbitrator(s), including a prehearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10332(c) of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$500.00 and shall **retain** as forum fees the hearing session deposit in the amount of \$ 600.00 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant, Everen Securities, Inc. In addition, Claimant Everen Securities, Inc. is liable for and shall pay to the Office of Dispute Resolution the sum of \$150.00. Respondent Gregory P. Newton is liable for and shall pay to the Office of Dispute Resolution the sum of \$750.00 as forum fees.

Pursuant to §10333 of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$200.00.

Concurring Arbitrators

Dated:

/s/ Denis A. Dunne
Denis A. Dunne
Industry Arbitrator, Presiding Chair

March 5, 1997

/s/ Robert H. Stachura, CPA
Robert H. Stachura, CPA
Industry Arbitrator

March 10, 1997

/s/ Mark C. Hutchinson
Mark C. Hutchinson
Industry Arbitrator

March 5, 1997