

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

John G. Kinnard and Co., Inc.,

Claimant,

and

No. 96-01673

Mark A. Miller,

Respondent.

REPRESENTATION OF PARTIES

Claimant John G. Kinnard and Co., Inc. was represented by F. Chet Taylor, AGC of John G. Kinnard and Co., Inc. located in Minneapolis, Minnesota.

Respondent Mark A. Miller was represented by Garrett T. Geiger, Esquire of Sharp Law Firm, Ltd., located in Minneapolis, Minnesota.

CASE INFORMATION

Claimant John G. Kinnard and Co., Inc.'s Statement of Claim was filed on or about April 17, 1996. Claimant John G. Kinnard and Co., Inc.'s Reply to Counterclaim was filed on or about July 12, 1996. Claimant John G. Kinnard and Co., Inc.'s Submission Agreement was signed on April 16, 1996, by Gerald M. Gifford, Executive Vice President of John G. Kinnard and Co., Inc.

Respondent Mark A. Miller's Statement of Answer and Counterclaim was filed on or about June 28, 1996. Respondent Mark A. Miller's Submission Agreement was signed on June 13, 1996.

HEARING INFORMATION

No pre-hearing conferences were held.

The hearing was held on November 26, 1996, for two (2) sessions.

The hearing was held in Minneapolis, Minnesota.

CASE SUMMARY

Claimant John G. Kinnard and Co., Inc. ("Claimant") alleged that Mark A. Miller ("Respondent") has an unpaid balance of a promissory note that became immediately due and payable upon his termination. Claimant asserted that Respondent began working as an at will employee for John G. Kinnard and Co., Inc. on August 7, 1995, at which time he signed a promissory note for \$15,000, which was to be forgiven at the rate of 1/48th for each month Respondent was employed with Claimant, and which stipulated that the unforgiven balance would become immediately due and payable upon his termination for any reason. Claimant further stated that the promissory note also contained an attorney fee provision such that the holder was entitled to recover reasonable attorney fees and all other reasonable costs of collection in any action or proceeding based upon the note. Additionally, Claimant asserted that Respondent secured the promissory note with a confession of judgment whereby Claimant is allowed to obtain a judgment and begin collecting from Respondent without having to go through a costly and time-consuming lawsuit or arbitration. According to Claimant, by signing this confession Respondent agreed that judgment could be entered against him in any court for any unpaid amounts that might become due and payable under the promissory note, Respondent waived any right to a hearing or other process to which he may have otherwise been entitled, and Respondent agreed to pay interest and attorney fees with respect to any judgment. Based on Claimant's termination of Respondent on March 29, 1996, and Respondent's failure to pay the balance of the promissory note, Claimant made the following legal claims: (1) breach of contract; and (2) award based on confession of judgment.

Respondent denied the allegations set forth in the Statement of Claim. Respondent specifically denied that he was an at will employee, and affirmatively alleged, in the alternative, that his employment status changed to a standard of discernible cause for termination upon agreeing to submit employment disputes to arbitration. Respondent also entered a counterclaim in which he alleged the following: that Claimant terminated him without cause, in violation of his employment contract and a subsequent letter referring him to outpatient alcohol treatment; and that Claimant unlawfully discharged him due to an instance of alcohol use, in violation of the Minnesota Human Rights Act, Minn. Stat. § 363 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* Respondent asserted that he has suffered injury to his reputation, humiliation, emotional distress, and loss of wages and benefits.

Claimant denied the allegations set forth in the Counterclaim. Claimant reiterated that Respondent was an at will employee, which Respondent acknowledged on three separate occasions.

RELIEF REQUESTED

Claimant John G. Kinnard and Co., Inc. requested an award in the amount of \$12,812.50 for compensatory damages, plus interest at the legal rate of six percent (6%) per annum from March 29, 1996 through the date of final collection, plus all costs of collection, including attorney fees. Claimant John G. Kinnard and Co., Inc. also requested that the counterclaims asserted against it be denied in their entirety.

Respondent Mark A. Miller requested that the claims asserted against him be denied in their entirety. Respondent Mark A. Miller also requested an award for compensatory and exemplary damages in excess of \$50,000.

OTHER ISSUES CONSIDERED & DECIDED

At the hearing in this matter, respondent Mark A. Miller made motions requesting the following: (1) amendment of counterclaim to add defamation; (2) compulsion of a witness to testify; and (3) approval for additional witnesses to testify. However, respondent Mark A. Miller subsequently withdrew these motions.

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 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 Respondent Mark A. Miller is liable for and shall pay claimant John G. Kinnard and Co., Inc. \$12,812.50 in compensatory damages;
2. That Respondent Mark A. Miller is liable for and shall pay claimant John G. Kinnard and Co., Inc. \$512.50 in interest, which accrued from March 28, 1996, to November 26, 1996; and
3. That 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 \$600 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 x \$600 = \$1,200 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, 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 \$300 previously deposited with NASD Regulation, Inc. Office of

Dispute Resolution by claimant John G. Kinnard and Co., Inc. Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$200 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by claimant John G. Kinnard and Co., Inc.

Pursuant to §10205(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$250 and shall **retain** as forum fees the hearing session deposit in the amount of \$550 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by respondent Mark A. Miller.

Respondent Mark A. Miller is liable for and shall pay forum fees in the amount of \$350 (= \$1,200 total forum fees - \$300 hearing session deposit by claimant John G. Kinnard and Co., Inc. - \$550 hearing session deposit by respondent Mark A. Miller).

Respondent Mark A. Miller is liable for and shall reimburse claimant John G. Kinnard and Co., Inc. for its hearing session deposit in the amount of \$300.

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

Dated:

/s/ Edward C. Oliver

January 9, 1997

Edward C. Oliver
Industry Arbitrator, Presiding Chair

/s/ Allen E. Fonfara

January 17, 1997

Allan E. Fonfara, CPA
Public Arbitrator

/s/ Jacque E. Foust

January 13, 1997

Jacque E. Foust
Industry Arbitrator