

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

Kirkpatrick Pettis Smith Polian, Inc.

[illegible]

The hearing was held in: Omaha, NE.

CASE SUMMARY

Mary Jochim ("Claimant") brought this action to recover monies from Kirkpatrick Pettis Smith Polian, Inc. ("Respondent") for an alleged breach of an employment compensation agreement with Claimant.

In the early 1980's, Respondent allegedly focused its business efforts on bringing in so-called "managed money" or fee based accounts by creating a new division called Kirkpatrick Pettis Smith Polian Investment Management ("KPM") and by encouraging its brokers to find new clients for KPM as these accounts would greatly benefit both Respondent and its brokers. As alleged, a broker would be credited 100% of the gross fee for a new account, paid 30% of this amount and would receive credit for any commissions placed through Respondent as broker-dealer at the standard payment rate for commissions. Claimant maintained that since she was motivated by the potential financial gain to be realized by bringing in managed accounts, she actively pursued the State of Nebraska's Investment Funds ("State Account"). Claimant contended that after two years of researching the investments contained in the State Account and lobbying members of the Nebraska Legislature to change state law to allow state or county employees to invest their defined contribution retirement dollars in investments other than insurance contracts, the law was changed in 1984 to permit placement of such accounts with private investment firms like KPM. Claimant allegedly actively pursued and secured the State Account in 1985 and secured the Nebraska County Retirement Plan ("County Account") in 1986.

According to Claimant, KPM underwent significant changes in 1986 including the alteration of broker compensation for future managed accounts yet, in a memorandum dated May 2, 1986, brokers were assured that existing KPM advisor accounts would be grandfathered and would not change unless requested by the broker. Respondent allegedly repeatedly assured brokers, orally and in writing, that compensation arrangements for brokers would remain the same on existing managed accounts as long as the accounts remain with Respondent.

Claimant stated that she played a key role in managing the State Account and the County Account which had grown from zero in 1985 to a combined value of more than \$80 million dollars from about 1995. On January 18, 1996, Respondent proposed a new compensation package which significantly decreased Claimant's income generated from the State Account and County Account. Claimant contended that her loss in compensation for the first half of 1996 was in excess of \$25,000 -- an annualized loss for 1996 of nearly \$50,000. Claimant further contended that her losses would accelerate through the years as the managed accounts for which she was responsible continued to grow. Claimants would also allegedly be credited with a significantly decreased percentage of the

annual gross fee on these accounts as production and this lower production credit would result in a lower bonus at year end.

Claimant asserted that Respondent's repeated oral and written promises constituted enforceable, binding and legal obligations to continue to pay the compensation promised for as long as she was employed by Respondent and while the State Account and County Account remained with Respondent. According to Claimant, Respondent's unilateral modification of the commission plan constituted a breach of Respondent's agreement with Claimant.

Respondent denied the allegations set forth in the Statement of Claim. Respondents specifically stated that the Statement of Claim ignored two basic, essential principles. First, an employer retains the right to unilaterally modify the terms and conditions of employment for employees-at-will as a matter of hornbrook law. Respondent allegedly reinforced this right by specifically reserving in writing the right to unilaterally modify all of its policies and procedures. Second, Respondent maintained that Claimant and Respondent did not enter into any agreement so the requisite contractual elements did not exist in this case. Respondent claimed that Claimant relied on three random, isolated memoranda in a ten year period while the employee handbook provided that all policies and programs were summarized and were subject to change, with or without advance notice, at the sole discretion of Respondent. Respondent contended that Nebraska common law supported the proposition that an employer may expressly retain control over its policies and procedures, and subsequently change such policies and procedures, without risking a breach of contract claim.

RELIEF REQUESTED

Claimant requested an award in an undisclosed amount for unpaid wages plus interest, attorney's fees and all costs of arbitration pursuant to Neb. Rev. Stat § 48-1231. In addition, Claimant requested recovery of two times the amount of the unpaid wages pursuant to Neb. Rev. Stat. § 48-1232 to be placed in a fund and distributed to the common schools of Nebraska. Finally, Claimant requested an order compelling Respondent to pay 30% on all KPM fees generated as a result of the accounts for as long as the accounts remain with Respondent and crediting Claimant with 100% of the gross annual fee as well as an award for the usual and customary benefits on production.

Respondent requested that the claims asserted against it be denied in its entirety and that it be awarded its costs and attorney's fees.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that a handwritten, signed Award may be entered. The parties have agreed to receive conformed copies of the award while the original remains 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 Kirkpatrick Pettis Smith Polian, Inc. is liable for and shall pay to Claimant Mary Jochim the sum of \$53,537 in actual damages;
2. With the exception of forum fees which are specifically addressed below, the parties shall bear their own costs including attorney' fees; and
3. Any relief not specifically awarded herein is hereby denied in its entirety.

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 four (4) hearing sessions x \$600 = \$2,400 in forum fees. Pursuant to §10205(b) of the 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 National Association of Securities Dealers Regulation, Inc. ("NASD Regulation") 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 Mary Jochim. Claimant Mary Jochim is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the sum of \$600 in additional forum fees.

In accordance with §10333 of the Code, the NASD Regulation, Inc. Office of Dispute Resolution shall retain the \$350 member surcharge previously paid by Respondent Kirkpatrick Pettis Smith Polian, Inc. Pursuant to §10205 of the Code, Respondent Kirkpatrick Pettis Smith Polian, Inc. is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the amount of \$1,200 in forum fees.

Fees are payable to the National Association of Securities Dealers Regulation, Inc. Office of Dispute Resolution.

Signatures:

Dated:

Patrick E. Hartigan, Esq.
Patrick E. Hartigan, Esq.
Industry Arbitrator, Presiding Chair

April 24, 1997

Roy J. Burr, Jr.
Roy J. Burr, Jr.
Industry Arbitrator, Panelist

April 29, 1997

Donald L. Frankenfeld
Donald L. Frankenfeld
Industry Arbitrator, Panelist

April 25, 1997

Date served by the NASD Regulation, Inc. Office of Dispute Resolution: April 29, 1997