

NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

Claimant alleged that he was associated with Respondent from January 1994 through February 1995 as a consultant, and was then hired in March 1995 as Executive Vice-President, Operations Manager. Claimant alleged that at the time he was hired in that position, Lee Kimmell ("Kimmell"), president of Respondent, represented to Claimant that his employment package would include an annual base salary of \$240,000.00 and a guaranteed bonus of \$100,000.00 to be earned as of December 31, 1995, but paid by March 1996. Claimant accepted the position based upon those representations. In addition, Claimant alleged that his employment package provided for four weeks paid vacation, and a severance package, consistent with Respondent's usual and customary practice, of three to four weeks pay. Claimant asserted

that in December 1995, Respondent informed him that the guaranteed bonus of \$100,000.00 would be the same for calendar year 1996.

Claimant further alleged that in February 1996, Claimant's employment with Respondent was terminated because Respondent was cutting its staff. Claimant alleged that he was advised of the termination on February 23, 1996, but that Gary Jacobs ("Jacobs"), a member of Respondent's Board of Directors, requested that he remain employed through the end of February 1996 so that Claimant could answer any questions which Respondent's Board of Directors may have and assist in an orderly transition of Respondent's affairs. In addition, Claimant alleged that Jacobs represented that during the last week of February 1996, he would sit down with Claimant and discuss the sums due to Claimant, including his guaranteed bonus, severance pay and unpaid vacation pay. Claimant reported to work during the last four days of February 1996, as requested, however, Respondent failed to pay Claimant the funds owed to him.

Claimant alleged that at the time of his termination Respondent owed him (a) the guaranteed bonus of \$100,000.00 earned as of December 31, 1995; (b) the guaranteed bonus of \$16,667.00 earned as of February 29, 1996; and (c) three months severance pay in the amount of \$60,000.00; (d) unpaid vacation benefits for three weeks in 1995 in the amount of \$13,846.00; (e) unpaid vacation benefits for 2/3 of one week in 1996 in the amount of \$3,077.00; and (f) unpaid salary for the last four days of employment (2/26/96-2/29/96) with Respondent in the amount of \$3,692.00.

Respondent denied the allegations of a breach of contract as asserted in the Statement of Claim. Respondent maintained that Claimant was a consultant for over a year before becoming a full time employee and that Claimant received salary payments approaching a quarter of a million dollars during the year Claimant was an employee. Respondent further maintained that Claimant was an employee at will, with no fixed term of employment, who could be terminated at any time. Respondent maintained that Claimant's breach of contract is founded on an alleged oral "understanding" Claimant had with Kimmell. Respondent asserted that contrary to Claimant's allegations, Claimant's employment never included a guaranteed bonus of any amount, let alone \$100,000.00 nor an alleged second guaranteed bonus of another \$100,000.00 for 1996. Respondent maintained that it is not their practice to pay severance pay nor to pay for unused vacation to senior executives. In addition, Respondent maintained that Claimant did not report to work after February 23, 1996, which is why he was paid his salary only until that date.

Respondent maintained that any guaranteed bonus to an employee would be in writing and not a verbal agreement. Respondent asserted that in those cases in which an employee was provided a guaranteed bonus, it was to a revenue producing employee and done as part of a standard employment contract, but Claimant had no such contract and Claimant, as Operations Manager, did not hold a revenue producing position. Respondent maintained that bonuses for those employees with contracts to that affect, were awarded those bonuses only if they were still employed by Respondent at the time bonuses were paid. While Claimant may have discussed bonuses with Kimmell, the discussion could only have involved an estimate of the bonus he thought Claimant might receive. Respondent maintained that no discretionary bonuses were paid in 1995. Respondent further maintained that as Tierney ceased employment as of February 23, 1996, and any bonuses would be determined as of the last day of the calendar year, he could not have any guaranteed bonus as he was not employed as of the last day of 1996.

Respondent asserted that there was never any system for keeping track of vacation time used and therefore, no employee ever received payment for "unused" vacation time. In addition, Respondent does not have a policy of paying its senior executives severance pay. Respondent stated that it has, from time to time, on an ad hoc basis, paid some severance pay to an employee. And Respondent maintained that

Claimant's employment ceased as of February 23, 1996 and he did not report for work after that day nor was he requested to work after that day by Jacobs or anyone else. Respondent asserted that all the claims are based on Claimant's unilateral understanding of discussions he deemed as oral promises. Respondent maintained that Claimant had no written contract and all of his claims are meritless and should be dismissed.

RELIEF REQUESTED

Claimant seeks \$197,282.00 from Respondent due to the breach of his employment contract; all the costs, expenses and disbursements, including attorneys' fees, associated with this arbitration; preaward interest; and any other relief the panel deems appropriate and just.

Respondent requested that the Statement of Claim be dismissed in its entirety.

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 originals remain on file with the NASD.

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 is liable to and shall pay to Claimant \$43,692.00.
2. That each party shall bear its own costs and expenses, including attorney's fees, with the exception of the Forum Fees as discussed below.
3. That any and all relief not specifically addressed herein is denied.

OTHER COSTS

Pursuant to Rule 10333 of the Code of Arbitration Procedure ("Code"), Respondent is assessed a member surcharge of \$350.00. Respondent shall receive credit for the \$350.00 surcharge deposit previously submitted to the NASD Regulation, leaving no further surcharge due.

FORUM FEES

Pursuant to Rule 10205(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed:

4 sessions x \$750.00 = \$3,000.00

Forum Fees are assessed at \$1,500.00 to Claimant and \$1,500.00 to Respondent.

Claimant is to receive credit for the \$750.00 hearing session deposit previously submitted to the NASD Regulation, leaving a net assessment due from Claimant of \$750.00.

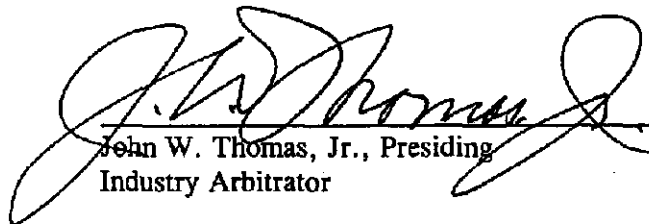
Respondent has a net assessment due of \$1,500.00.

Fees are payable to the National Association of Securities Dealers, Inc.

DATE

12/1/97

CONCURRING ARBITRATORS' SIGNATURES


John W. Thomas, Jr., Presiding
Industry Arbitrator

Morris Levine
Industry Arbitrator

James J. Noone
Industry Arbitrator

Date Decision Served by NASD Regulation:

December 4, 1997

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11/15/97

John W. Thomas, Jr., Presiding
Industry Arbitrator

Morris Levine

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Morris Levine
Industry Arbitrator

11/14/97

James J. Noone
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Industry Arbitrator

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December 4, 1997