

N.A.S.D. REGULATION AWARD
NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

CASE: 99-01621

Dana B. Levine, IRA, claimant vs. Muriel Siebert & Co., Inc., respondent.

ATTORNEYS:

Claimant, Dana B. Levine, IRA appeared through Dana B. Levine, La Jolla, CA.

Respondent appeared through its Senior Vice President, Kevin J. Kelly, New York, NY.

DATE FILED: 04/07/99

CASE SUMMARY: Claimant alleged that respondent took more than one month to open an IRA account and to transfer assets out of an existing IRA. Claimant also alleges that the delay caused a financial loss due to a drop in their PBHG Small Cap Value Fund NAV.

ARBITRATOR'S REPORT: This case involved a discount broker, Muriel Siebert & Co, Inc. (Muriel) and a customer. The customer seeks damages based on an alleged unreasonable delay in processing the application for the opening of an account and in completing the process of liquidating an account at another brokerage and placing the funds in the new account created at Muriel. A part of the complaint of the customer is that the administrative process was handled by mail, rather than a more efficient electronic means.

The customer had an account with the broker. The customer mailed an application to the broker for the opening of an additional account, an IRA account. The application was dated on January 19, 1999, and presumably was mailed to the broker on that date. The broker reports that the application was received on January 25, 1999.

The broker accepted the account on January 26, 1999 and, on January 28, 1999, employed the mails to inform the customer that it had accepted the application, and that the process (liquidation and credit) would take three to four weeks. The customer thereafter mailed an Authorization to liquidate and transfer to the broker or broker's clearing agent on or before February 5, 1999. The sale of the account at the other brokerage occurred on February 16, 1999. The funds were forwarded by mailed check and credited to the new account on February 22, 1999.

The application informed the broker that the account would be funded with the liquidation of the customer's account PBHG at a different brokerage. Market fluctuation occurred in the PBHG account, resulting in a claimed loss of about \$3,434.00, including the loss of some interest associated with the alleged unreasonable delay.

ARBITRATOR'S REPORT CONTINUED: The customer, at least before receipt of the letter of the broker of January 28, 1999, believed that liquidation and credit was handled electronically once customer's authorization was received by the broker and that the process would take only no more than two weeks, presumably from the acceptance of the account to the date of credit of the transfer funds.

The duties of a broker to a customer are ordinarily based on a Federal or State statute, a contractual commitment, representations or fiduciary duties of a broker and, in the absence of thereof, upon the custom and practice of the industry, the latter being sometimes guided by any applicable NASD Rules.

The issue presented relates to the time for performance, namely, a reasonable time for the broker (Muriel) to carry out the instructions of the customer in terms of liquidating the customer's account at another brokerage (the PBHG account) and crediting the IRA account of the customer.

In the instant case, there is no finding of an applicable statute, setting a specific time for performance. Moreover, there is no allegation of any contractual commitment or representation as to a time for performance, nor is there any evidence thereof, excepting the letter of the broker to the customer of January 28, 1999, informing the customer that the process would take three to four weeks.

The evidence does not show a time imperative imposed upon the broker by the customer, a time imperative that the broker might have accepted or rejected. The customer employed the U.S. Mail, as did the broker.

Accordingly, the issue may turn to the custom and practice in the industry, unless the circumstances warrant the imposition of fiduciary duties that dictate a different result.

The "custom and practice" in the industry is that a reasonable time for performance for the instant transaction would be about three to four weeks from the time the broker received the authorization to liquidate the account of another brokerage and credit the customer's account. In this case, without referring to the performance time as a matter of industry custom and practice, the broker in fact informed the customer by letter dated January 28, 1999 that the performance time would be three to four weeks. The broker completed performance within that time.

The arbitral decision process considered whether there was a basis for finding that the broker owed fiduciary duties to the customer. More particularly, whether the broker, upon accepting the account on January 26, 1999, the application having included a reference to funding the IRA account from the PBHG account, had a fiduciary duty to inform the customer of the time involved in performance and of the vicissitudes of the market, and to advise the customer to contact PBHG directly with an order for sale of the PBHG account if the customer was concerned about fluctuations in the market as to the PBHG account.

ARBITRATOR'S REPORT CONTINUED: The arbitrator does not find from the evidence the existence of such fiduciary duties in the circumstances of this case. The vicissitudes of the market are well known. Moreover, if there existed some duty to inform the customer of the time of performance, the broker performed the duty, if any, by timely informing the customer of the time it would take to complete the performance.

The customer testifies that "During this period of time, I made numerous calls to Siebert's Customer Service asking what the delay was all about. All I got was unreturned phone calls and a lack of responsiveness." The telephone call record submitted by the respondent shows phone calls by the customer to the broker. However, there is no allegation or evidence by the customer that the customer expressed concern to the broker, by telephone or otherwise, about any fluctuations in the PBHG account or that the customer declined to accept performance in the three to four week period predicted by the broker. Moreover, importantly, if the customer, at any time immediately before or after the application for the new account, was concerned about fluctuations in the PBHG account, the customer could have issued an order to sell directly to PBHG or any broker involved in the account to prevent any unacceptable risks of loss in the PBHG account.

The respondent is not liable for the losses alleged in the Statement of Claim.

Claim Data

Claim: \$3,434.00
Filing Fee: \$.00

Award Data

Award: \$.00
Filing Fee: \$87.50

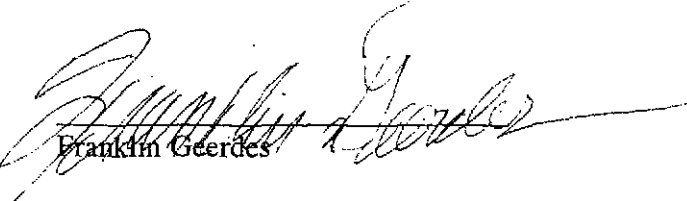
AWARD: The undersigned arbitrator has decided and determined in full and final resolution of the issues submitted for determination as follows: 1) The claims of claimant are dismissed in their entirety. 2) The \$175.00 filing fee previously deposited with the National Association of Securities Dealers Regulation, Inc. by the claimant, shall be retained by NASD Regulation, Inc. 3) Respondent is assessed one half of the NASD filing fee and shall pay claimant \$87.50 as partial reimbursement of the filing fee.

OTHER FEES: Pursuant to Rule 10333 of the Code, respondent has paid to NASD Regulation, Inc. the \$200.00 Member Surcharge previously invoiced.

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AFFIRMATION

I, Franklin Geerdes, do hereby affirm, upon my oath as arbitrator that I am the individual described herein who executed this instrument, which is my oath and award.


Franklin Geerdes

November 9, 1999

Date of award