

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Albert Joseph Prisco

Case Number: 21-02194

vs.

Respondent
Federated Securities, Inc.

Hearing Site: New York, New York

Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award.

Nature of the Dispute: Associated Person vs. Member

The evidentiary hearing was conducted by videoconference.

REPRESENTATION OF PARTIES

Claimant Albert Joseph Prisco appeared pro se.

For Respondent Federated Securities, Inc.: Denise Goldsmith, Federated Securities, Inc.,
Huntington, New York.

CASE INFORMATION

Statement of Claim filed on or about: August 28, 2021.

Albert Joseph Prisco signed the Submission Agreement: August 25, 2021.

Statement of Answer filed by Respondent on or about: October 15, 2021.

Federated Securities, Inc. signed the Submission Agreement: October 22, 2021.

CASE SUMMARY

In the Statement of Claim, Claimant asserted the following causes of action: breach of contract; and unpaid commissions.

Unless specifically admitted in the Statement of Answer, Respondent denied the allegations made in the Statement of Claim.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested \$7,500.00 in compensatory damages.

In the Statement of Answer, Respondent requested that Claimant's claim be denied.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrator acknowledges having read the pleadings and other materials filed by the parties.

The Arbitrator has provided an explanation of the decision in this award. The explanation is for the information of the parties only and is not precedential in nature.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and any post-hearing submissions, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claims are denied in their entirety.

ARBITRATOR'S EXPLANATION OF DECISION

There is no controversy about the facts. In years prior to 2005, Claimant then residing in Europe built a book of business before returning to the United States. Between November 2005 and 2011, Claimant was a registered representative of Respondent. He resigned from Respondent by letter announcing his retirement dated July 27, 2011. In the letter, Claimant stated that "I understand that I may continue to receive 60% pay out on my commissions". This constituted a reduction of 10% from the amount he had previously been receiving. Claimant alleges he had an oral agreement with the President of Respondent, but there is no responsive correspondence acknowledging such an agreement. However, Respondent continued paying Claimant at the 60% rate through the end of its fiscal year, September 30, 2019. At the evidentiary hearing and in its documentary submissions Respondent acknowledges that it continues to service the book-customers.

In two letters respectively dated May 28 and June 4, 2014, Respondent advised Claimant that "it will no longer pay you commissions on your retired status [after 2014]". It nevertheless continued payments through 2019 as already noted. None of these facts are contested. One interpretation of Respondent's continuing payments is that it acquiesced to Claimant's "understand[ing] that I may continue to receive 60% pay out on my commissions" thereby supporting an argument that it acknowledged a continuing liability.

The Arbitrator interprets Claimant's claim as 1) a breach of contract for failing to make annual payments on trailing commissions generated from the book of business he brought to Respondent in 2005; and 2) a declaration that he is entitled to continue receiving payments for the duration of his life. Respondent's defense is that its continued payments to Claimant were "completely voluntary." Further, it argues that it had and has no obligation to make any such payments and refers the Arbitrator to FINRA Rule 2040 (Payments to Unregistered Persons). Claimant argues that Rule 2040 does not apply to these circumstances since he was not an

“Unregistered Person.” However, the Arbitrator finds that the Rule is not limited to Payments to Unregistered Persons.

Rule 2040(b) concerns “Retiring Representatives” and regulates continued payments of trailing commissions post-retirement payments of registered representatives. There is no issue that upon Claimant’s retirement he ceased being a registered representative. Therefore, the question before the Panel is whether Rule 2040(b) applies or whether Respondent’s acquiescence in continuing to pay trailing commissions establishes a legal basis for Claimant’s claim despite the language of FINRA Rule 2040(b).

Rule 2040(b) reads:

(b)(1) A member may pay continuing commissions to a retiring registered representative of the member, after he or she ceases to be associated with such member, that are derived from accounts held for continuing customers of the retiring registered representative regardless of whether customer funds or securities are added to the accounts during the period of retirement, provided that:

(A) a bona fide contract between the member and the retiring registered representative providing for the payments was entered into in good faith while the person was a registered representative of the member and such contract, among other things, prohibits the retiring registered representative from soliciting new business, opening new accounts, or servicing the accounts generating the continuing commission payments; and

(B) the arrangement complies with applicable federal securities laws, SEA rules and regulations.

(2) The term "retiring registered representative," as used in this Rule shall mean an individual who retires from a member (including as a result of a total disability) and leaves the securities industry. In the case of death of the retiring registered representative, the retiring registered representative's beneficiary designated in the written contract or the retiring registered representative's estate if no beneficiary is so designated may be the beneficiary of the respective member's agreement with the deceased representative.

Rule 2040 became effective on August 25, 2015. Claimant questioned whether Rule 2040 is applicable since he was not an unregistered representative and also because he retired in 2011, four years earlier than its effective date. The Arbitrator finds that the Rule applies to Claimant in that it codifies existing FINRA and SEC staff guidance construing Section 15(a) of the Securities Exchange Act of 1934 regarding payment by member firms of continuing commissions to retiring registered representatives.

As noted above, there is a question as to whether a bona fide contract exists as a result of Respondent’s continuing payment to Claimant and whether this complies with the Rule. The Rule expressly makes the payment voluntary: “A member may pay” absent an agreement that it unconditionally agrees to do so. Moreover, the prior FINRA and SEC guidance on the issue of retiring registered representatives expressly construe the meaning and requirements of Rule 2040(b). A FINRA Interpretive Letter dated February 4, 2002, underscores that the agreement between the retiring registered representative and a member firm be “duly executed. This guidance is also reflected in NASD IM-2420-2 ("Continuing Commissions Policy"),” thus

signifying that the bona fide agreement is intended to be in a writing signed by the parties. The parties did not execute a written agreement.

Thus, as the terms of Rule 2040(b) were not fulfilled, Claimant’s claims must be denied.

FEES

Pursuant to the Code of Arbitration Procedure (“Code”), the following fees are assessed:

Filing Fees

FINRA Dispute Resolution Services assessed a filing fee* for each claim:

Initial Claim Filing Fee = \$ 325.00

**The filing fee is made up of a non-refundable and a refundable portion.*

FINRA Dispute Resolution Services previously deferred Claimant’s filing fee of \$325.00. Upon conclusion of the matter, the Arbitrator determined to waive the \$75.00 non-refundable portion of the filing fee.

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as a party, Respondent is assessed the following:

Member Surcharge = \$ 325.00

Hearing Session Fees and Assessments

The Arbitrator has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the Arbitrator, including a pre-hearing conference with the Arbitrator, which lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) pre-hearing sessions with a single Arbitrator @ \$250.00/session = \$ 500.00
Pre-Hearing Conferences: January 5, 2022 1 session
January 12, 2022 1 session

Two (2) hearing sessions @ \$250.00/session = \$ 500.00
Hearings: January 19, 2022 1 session
March 2, 2022 1 session

Total Hearing Session Fees = \$ 1,000.00

The Arbitrator has assessed the total hearing session fees to Respondent.

ARBITRATOR

Gerald M. Levine

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Sole Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

Arbitrator's Signature

Gerald M. Levine

Gerald M. Levine
Sole Public Arbitrator

03/14/2022

Signature Date

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March 15, 2022

Date of Service (For FINRA Dispute Resolution Services use only)