

FILE COPY

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

34 1721, 1567 (C)
FILED

APR - 5 1963

SECURITIES & EXCHANGE COMMISSION

In the Matter of :

HERBERT RAPP, d/b/a :

WEBSTER SECURITIES COMPANY :
37 Wall Street :
New York, New York :

File No. 8-4722 :

RECOMMENDED DECISION

Sidney Ullman
Hearing Examiner

Washington, D. C.
April 5, 1963

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
:
HERBERT RAPP, d/b/a :
WEBSTER SECURITIES COMPANY :
37 Wall Street :
New York, New York :
:
File No. 8-4722 :
:

BEFORE: Sidney Ullman, Hearing Examiner

APPEARANCES: Andrew N. Grass, Jr., Esq., David W. Smith, Esq.,
and Richard F. Burke, Esq. for the Division
of Trading and Exchanges of the Commission.

David F. Lubell, Esq., Lewis Goldstein & Lubell,
on behalf of registrant.

I. NATURE OF PROCEEDING

The Securities and Exchange Commission instituted this proceeding pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether it is in the public interest to revoke the broker-dealer registration of Herbert Rapp, d/b/a Webster Securities Company ("registrant") and whether, pursuant to Section 15(b) of the Exchange Act, pending final determination of the question of revocation it is necessary or appropriate in the public interest or for the protection of investors to suspend his registration.

The Order for this proceeding was originally issued on August 8, 1962, and was amended on September 26, 1962. As amended, the Order raises the following matters for determination under the broader issues of the revocation or suspension of the broker-dealer registration:^{1/}

(1) Whether registrant failed to file with the Commission for the calendar years 1958, 1959, 1960 and 1961,

^{1/} As applicable to this proceeding, Section 15(b) of the Exchange Act provides that the Commission shall revoke the registration of any broker or dealer if it finds it is in the public interest and such broker or dealer is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security, or has willfully violated any provision of the Securities Act of 1933 or the Exchange Act or any rule thereunder.

reports of his financial condition as required by Section 17(a) of the Exchange Act and Rule 17 CFR 240.17a-5 thereunder, and thereby willfully violated the section of the statute and rule;^{2/}

(2) Whether registrant was permanently enjoined by a decree of the United States District Court for the Southern District of New York, entered on August 13, 1962,^{3/} from further violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") in connection with the offer and sale of the common stock of Taylorcraft, Inc.; and

(3) Whether Herbert Rapp was temporarily enjoined by a decree of the United States District Court for the District of New Jersey, entered on August 22, 1962, from further violations of Section 17(a) of the Securities Act in connection with the offer and sale of the common stock of Federated Holding Company, Inc.

A public hearing was held in New York City before the undersigned Examiner, at which both the Division of Trading and Exchanges ("Division") and registrant were represented by counsel. The evidence of the Division in support of the above issues was substantially documentary. Registrant introduced no evidence and did not testify,

2/ Section 17(a) of the Exchange Act requires every registered broker or dealer to make such reports as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 17a-5 requires every broker or dealer to file, during each calendar year, a report of his financial condition as of a date not more than 45 days prior to the filing.

3/ During the hearing the date of entry of this decree was amended from August 9, 1962 to August 13, 1962, to conform to the proof.

but through his counsel he requested that the hearing be postponed because of his asserted lack of appropriate notice of the proceeding, in order that his counsel might prepare a defense to the charges. Under the circumstances and to the extent indicated below the request was denied by the Examiner.

Proposed Findings of Fact, Conclusions of Law and supporting briefs were submitted by the Division and by registrant. Registrant's brief did not dispute the contentions of the Division's brief that the matters in issue had been proved at the hearing, but urged, rather, that an arbitrary abuse of discretion occurred and a denial of due process of law resulted from the Hearing Examiner's refusal to grant a further adjournment of the hearing; and that this refusal prevented registrant from offering mitigating evidence bearing upon public interest in the revocation. The brief urges the Examiner to reopen the hearing so that mitigating evidence may be presented, suggesting vaguely that according to Rapp the failure to file the reports resulted from a misunderstanding between Rapp and his accountants and former counsel. As indicated, infra, the Examiner deems the request hollow and groundless, and regards it as failing completely to show that additional material evidence would be produced if the hearing were reopened and that there were reasonable grounds for failure to produce such evidence at the hearing.

Based upon the evidence adduced at the hearing and the entire record, including the briefs and arguments of counsel, the Examiner finds as follows.

II. FINDINGS OF FACT

1. Herbert Rapp, d/b/a Webster Securities Company, became registered as a broker-dealer pursuant to Section 15(b) of the Exchange Act on November 29, 1955, and this registration is still in effect.
2. At all times hereinafter mentioned, Herbert Rapp has been the sole proprietor of Webster Securities Company.
3. On August 8, 1962, the Commission ordered that private proceedings be held pursuant to Section 15(b) of the Exchange Act to determine whether registrant willfully violated the several Federal statutes and rules set forth in the Order.
4. In his registration application, registrant consented that notice of any proceeding before the Commission in connection with his registration may be sent by registered mail to the following:

Herbert Rapp, D/B/A
Webster Securities Company
37 Wall Street
New York, New York
5. Service of the Order for Private Proceedings of August 8, 1962, was effected by the Commission by mailing a copy by registered mail to the above name and address.
6. On September 26, 1962, the Order of August 8, 1962 was amended and the Commission ordered that a public hearing be held on October 15, 1962.

7. A copy of the Order of September 26, 1962, was sent by registered mail to the above name and address.^{4/} A copy was also sent to the following name and address:

Herbert Rapp
c/o Ralph Rapp
Park Royal Hotel
23 West 73rd Street
New York, New York

8. A third copy of the Order dated September 26, 1962, was sent by registered mail to Rapp's last-known attorney at the following address:

Herbert Rapp
c/o Lewis, Goldstein & Lubell
4 East 43rd Street
New York, New York

This letter was returned by David E. Lubell, of the above firm, who is Rapp's attorney in this proceeding, with the advice that his firm did not then represent registrant in the matter and that he was unable to contact him.

9. During the calendar years 1958, 1959, 1960 and 1961, registrant failed to file with the Commission annual financial reports pursuant to Section 17(a) of the Exchange Act and Rule 17a-5 thereunder.

10. On August 13, 1962, registrant, and Rapp individually, were permanently enjoined by the United States District Court for the

^{4/} None of the Orders sent to registrant by registered mail could be delivered by the Post Office.

Southern District of New York from further violations of Section 17(a) of the Securities Act in connection with the offer or sale of the common stock of Taylorcraft, Inc. The Court of Appeals for the Second Circuit agreed with a finding by the District Court that Rapp was responsible for a brochure containing false and misleading material in key statements.^{5/}

11. On September 10, 1962, Rapp was preliminarily enjoined by the United States District Court for the Southern District of New Jersey from further violations of Section 17(a) of the Securities Act in connection with the offer and sale of the common stock of Federated Holding Company, Inc.

Discussion:

A. Failure to File Financial Reports.

12. It is certainly not a requisite to the revocation of a broker-dealer's registration under Section 15(b) of the Exchange Act that the broker or dealer be personally notified of the requirement for filing annual reports with the Commission.^{6/} Nevertheless,

^{5/} S.E.C. vs. Rapp & Shuman, 304 F. 2d 786 (1962).

^{6/} Even where brokers had registered prior to the adoption of Rule 17a-5, the Commission has held that proof of actual knowledge of the rule was not necessary for a finding of willfulness if ignorance of the rule resulted from an indifference to the obligations of registration demonstrated by failing to claim registered mail and placing themselves beyond the reach of communications. William Monroe Layton, 29 S.E.C. 36 (1949); Sidney Ascher, 31 S.E.C. 753 (1950). Cf. John B. Sullivan, 38 S.E.C. 643 (1958).

for such value or import as it may have as a matter of public interest in this proceeding, it is noted in the pertinent docket that a letter was sent to registrant (in accordance with the Commission's practice) on November 29, 1955, notifying him of the effective date of his registration as a broker-dealer, and calling his attention to the requirement for filing annual financial reports. It is noted, with like effect, that the record indicates that registrant filed such a report of his financial condition as of December 31, 1957. That he had knowledge of the Commission's requirement is clear.

13. Registrant has furnished no indication that his failure to file the financial reports for the years 1958, 1959, 1960 and 1961 was not a willful violation of Section 17(a) of the Securities Act. Conversely, his failure to file the reports and his inability to explain the failure indicates a disregard if not a contempt for the filing requirement. As stated in the Conclusions of Law which follow, the failure to file was a willful violation of the statute and rule establishing a requirement which the Commission regards as an important and necessary means of affording protection to investors.^{7/}

B. The Injunctions

14. No question exists with regard to the issuance of the injunctions as alleged. Registrant's proposed Findings of Fact concede,

7/ John J. Murphy, 38 S.E.C. 430 (1958); Seymour J. Schlesinger, Securities Act Release No. 6957 (1962).

with respect to the Taylorcraft injunction, that the injunction issued, but suggest vaguely that:

" . . . if Registrant were given an opportunity to present a defense, evidence would be adduced to the effect that Registrant had no personal knowledge or information that any violations may have been made in connection with the efforts and sales of the common stock of Taylor Craft, Inc."

15. With respect to the Federated Holding Co. injunction, again registrant concedes its issuance, but states that:

" . . . if Registrant were given an opportunity to present a defense, the evidence would show that Registrant was in no sense violating any provisions of the Securities Law, but rather was an innocent, victimized purchaser of the securities of this Company."

16. And although no charge is made in the Order for Proceedings that registrant further violated the Exchange Act and Rules issued thereunder by failing to amend his registration application to reflect the issuance of the injunctions,^{8/} it is interesting to note that his proposed Findings of Fact continue the development of the same vague theme by asserting that while registrant concedes that no amendment was filed,

" . . . if Registrant were given an opportunity to present a defense, evidence would be adduced to show mitigating circumstances materially bearing upon the aforementioned failure to so amend the Registration statement."

^{8/} The violation (of Section 15(b) of the Exchange Act and Rule 15b-2 thereunder) resulting from the failure to amend the registration form to reflect the injunctions was proposed as a Finding of Fact by the Division. However, the Division's Brief recognized that this violation "was not urged by the Division" in the Order for Proceedings. No Finding is made with regard to this failure.

17. With respect to the injunctions, no indication is given of the nature of any defense which could materially affect the instant proceeding. Conversely, registrant's assertion that he had no personal knowledge or information of violations in connection with the sales of Taylorcraft stock is directly contrary to the conclusion reached by the Court of Appeals that he prepared the misleading brochure and "conveyed an admittedly false picture of financial and physical reserves [of Taylorcraft]." S.E.C. vs. Rapp & Shuman, supra.^{9/}

C. Lack of Due Process

18. From the standpoint of its merit, the charge that the Examiner abused his discretion and denied due process of law should be dismissed without extended discussion, especially because no credible indication is offered of material evidence which would have been produced at an adjourned hearing and which was not available to respondent at the time of this hearing. Under Rule 11(d) of the Commission's Rules of Practice the Hearing Examiner may reopen the hearing prior to the filing of a recommended decision, and under Rule 21(d) the Commission may hear additional evidence

^{9/} See R. V. Klein Company, Securities Exchange Act Release No. 6415 (1960) to the effect that it is appropriate to take official notice of the Court's findings and that they are res judicata in a subsequent hearing between the parties who participated in the litigation.

Rapp's testimony at the trial in the District Court was discredited and rejected in this and in other respects in the Appellate Court decision.

or refer the proceeding to the Hearing Examiner to take additional evidence where it is shown that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence at the hearing . . . (underscoring supplied.) See Matter of Breeze Corporation, 3 S.E.C. 733 (1938).

19. However, the Examiner believes the charge of abuse of discretion should be examined fully in the light of the circumstances, inasmuch as it is made by a fellow member of the Bar and asserts that the Examiner's action "would represent a victory for the forces of injustice and a loss to the guardians of a most cherished principle of law which requires that due process of law be afforded to all." Following are the circumstances of the alleged abuse of discretion, as reflected in the record in the proceeding:

20. On the date originally fixed for the hearing of this matter, October 15, 1962, the Examiner traveled from Washington, D. C. to New York City, and upon arrival at the place of hearing was informed by Division counsel that Mr. Lubell had called a short time earlier that day, advising that he had just been retained to represent registrant for the purpose of making application for an adjournment. The Examiner and Division counsel thereafter spoke with Mr. Lubell by telephone. Mr. Lubell represented that Mr. Rapp had communicated with him earlier that day and advised that he had just learned of the hearing. At the telephone request of Mr. Lubell,

the Examiner adjourned the hearing to 11:00 A.M., October 25, 1962, after reading to Mr. Lubell the pertinent portions of the Order in order to acquaint him with the nature of the proceeding, Mr. Lubell having stated as one reason for the adjournment application that he was not aware of the nature of the proceeding. Mr. Lubell thereafter signed a qualified notice of appearance to the effect that he represented registrant for the purpose of making application for an adjournment of the hearing.

21. On the adjourned date, October 25, 1962, the Examiner again traveled from Washington, D. C. to New York City, and on arriving at the place of hearing was informed by Division counsel that Mr. Lubell had called earlier that morning and had indicated that he would again make application for an adjournment. At the request of Mr. Lubell, as communicated to the Examiner by Division counsel, the Examiner adjourned the hearing for a brief period, pending the arrival of Messrs. Lubell and Rapp. Upon their arrival at 11:30 A.M., Mr. Lubell made application for an adjournment, contending that Mr. Rapp had not communicated with him on October 15, as had been previously arranged between them, that only on October 25 did Rapp again contact him, advising that he had been ill at a relative's home and had not known of the adjourned hearing date until "a couple [of] days ago" when he returned home and found a letter from Mr. Lubell advising of the adjourned date.

22. Mr. Lubell then stated that Rapp claims to have called his (Lubell's) office the day before, but the message was not received by Mr. Lubell, possibly because he was out of the office and because his office has shifts of secretaries and "There may have been some confusion".

23. The Examiner adjourned the hearing for approximately two hours to give Mr. Lubell an opportunity to study the Order for Proceedings and confer further with his client, suggesting to Mr. Lubell that if he intended to make application for a further continuance he should be prepared to indicate in the record the nature of the defense he would be able to make at an adjourned date but which he was unable to make at that time.

24. Further application was made by Mr. Lubell when the hearing reconvened, but he offered no indication of a defense which he would present at an adjourned date but was unable to present at that time. Perhaps the closest he came to an explanation on the merits of an anticipated defense was the statement pertaining to the Taylorcraft injunction proceeding, determined against Rapp by the Court of Appeals for the Second Circuit, that "Mr. Rapp relays to me that there is another appeal or that he is making another appeal from that decision." Registrant's brief says nothing about such an appeal by Rapp.

25. It is the Examiner's view that every reasonable effort was made to accomodate registrant and that no abuse of discretion or denial of due process was indicated by the refusal of a further adjournment. On the contrary, it would seem that a claim of lack of due process would inevitably follow any and all adjournments that might have been granted registrant. This view seems especially appropriate because registrant is able to offer no indication of a defense on the merits of the proceeding.

26. Registrant's disregard of the Commission's requirements for filing extended to and encompassed his failure to file an amended current address in violation of Rule 15b-2(b) issued under the Exchange Act. Although registrant was not charged with a violation of this rule, his present effort to use this violation and failure on his part as the basis for a claim that he had no adequate knowledge of the proceeding is little less than absurd.

27. In any event, the registered letter enclosing notice of the proceeding and directed to the address which Rapp set forth in his application for registration constituted adequate notice of the hearing to be held on October 15, 1962.^{10/} And as indicated in Finding of Fact No. 4, registrant consented to notice of any proceeding being given by registered mail at that address.

^{10/} Rudolph V. Klein, Securities Exchange Act Release No. 6415 (1960), Earl Albert Haltham, Securities Exchange Act Release No. 6484 (1961); International Investment, Inc., Securities Exchange Act Release No. 6598 (1961).

III. CONCLUSIONS OF LAW

28. Registrant willfully violated Section 17(a) of the Exchange Act and Rule 17 CFR 240.17a-5 thereunder in that he did not file with the Commission reports of his financial condition for the calendar years 1958, 1959, 1960 and 1961.

29. Registrant is permanently enjoined by a decree of the United States District Court for the Southern District of New York, entered on August 13, 1962, from further violations of Section 17(a) of the Securities Act in connection with the offer and sale of the common stock of Taylorcraft, Inc.

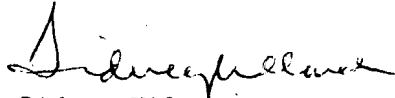
30. Herbert Rapp is preliminarily enjoined by a decree of the United States District Court for the District of New Jersey entered on September 10, 1962, from further violations of Section 17(a) of the Securities Act in connection with the offer and sale of the common stock of Federated Holding Company, Inc.

IV. RECOMMENDATION

It is in the public interest that the broker-dealer registration of registrant be revoked pursuant to the provisions of Section 15(b)

of the Exchange Act, and the Examiner so recommends. The record indicates, through argument of counsel for registrant not contraverted by counsel for the Division, that registrant is not engaged in business as a broker-dealer and has not been so engaged for some period of time. Accordingly, the Examiner does not believe it necessary or appropriate in the public interest or for the protection of investors that the Commission suspend the registration at this time pending final determination of the question of revocation. ^{11/}

Respectfully submitted,



Sidney Ullman
Hearing Examiner

Washington, D. C.
April 5, 1963

11/ To the extent that the proposed findings and conclusions submitted to the Hearing Examiner are in accord with the views set forth herein they are sustained, and to the extent that they are inconsistent therewith they are expressly rejected.