ADMINISTRATIVE PROCEEDING
FILE NO. 3-7272

UNITED STATE OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
JOHN F. GARVAN

INITIAL DECISION

July 19, 1990
Washington, D.C.

Jerome K. Soffer
Administrative Law Judge

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APPEARANCES: John F. Garvan, respondent, pro se,

Daniel P. Moakley and Patricia C. Holland, of the Chicago Regional Office, for the Division of Enforcement, Securities and Exchange Commission

BEFORE: Jerome K. Soffer
Administrative Law Judge

Introduction

On September 28, 1989, the Commission issued an order instituting public proceedings ("Order") pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934 ("Exchange Act") naming John F. Garvan as respondent.

The Order is based upon allegations of the Division of Enforcement ("Division") that Garvan, while a registered representative with several broker-dealers, engaged in illegal activities that resulted in three separate criminal convictions.

The Order directed that a public hearing be held before an administrative law judge to determine the truth of the allegations set forth and what, if any, remedial action is appropriate in the public interest and for the protection of investors. Such an evidentiary hearing was held on December 5, 1989 at the Waupun Correctional Institution, Waupun, Wisconsin, at which the Division appeared by counsel and respondent appeared pro se. He participated in the hearing by offering his own testimony. The Division offered documentary proof only.

Following the close of the hearing, the respective parties filed successive proposed findings of fact and conclusions of law together with supporting briefs. The Division also served a reply brief.

The findings and conclusions herein are based upon the evidence as determined from the record and upon observing the demeanor of the sole witness, respondent. The preponderance of evidence standard of proof has been applied. 1/

Garvan is 39 years old, divorced, and the father of five children ranging in age from 5 to 13 years. He presently is incarcerated at the Waupun Correctional Institution, a Wisconsin State prison. He has a college degree in marine biology. During the period from 1981 to 1987, Garvan worked at several registered broker-dealers as a registered representative, including IDS Corporation. Prior to going to work in the securities industries, he was a new car salesman from 1971 through 1976 and thereafter became associated with an insurance agency, "Combined Insurance Company", where he claims to have set records for producing business for the firm.

The Convictions

On April 8, 1987 respondent was convicted following a jury trial in state court of two counts of attempted theft and one count of forgery. (Wisconsin v. John F. Garvan, (Case No. CF 579- Dane Co. Cir. Ct.). This

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1/ See Steadman v. S.E.C., 450 U.S. 91 (1981).

conviction was based on the fact that the respondent, filed a false insurance claim to recover for the alleged theft of two non-existent snowmobiles. He supported this claim with a forged sales receipt purporting to show his purchase, and with a police report of the purported theft. Respondent was sentenced to serve six months in jail, received a five-year prison term which was stayed, and placed on five years' probation with a prohibition against handling other people's money during the probation period. He was ordered to pay restitution in the sum of $3,656.82.

On January 11, 1988, respondent pled no contest to a one-count information charging him with felony welfare fraud (Wisconsin v. John F. Garvan, Case No. 87 CR 397-Columbia Co. Cir. Ct.). The information charged that from October 1982 through June 1983, respondent illegally received Aid to Families and Dependent Children and food stamps from the Wisconsin Department of Social Services in excess of $2500, a class C felony under Wisconsin law (Wisconsin Statutes Annotated, Section 49.12(6). As a result of this conviction, respondent was sentenced to serve four months imprisonment to run concurrently with his prior sentence. He was also ordered to make restitution of $3,667.

On August 16, 1989, respondent pled no contest to a criminal complaint charging him with four counts of fraud, felonies under Wisconsin law, in that from July 1986 to March 1987, he obtained money and properties from persons and making intentionally false representations (Wisconsin v.Garvan - Case No. 88 CR 174- Columbia Co. Cir. Ct., filed April 25, 1988).

Specifically, respondent represented to some of his securities clients that he would invest money obtained from them in various ways, including a limited partnership which offered a 10% to 11% annual return. He received a total of $84,000 from these clients which he converted entirely to his own use, rather than invest the funds as promised. At the time, he was employed as a registered representative at Hydra Securities Corporation. On August 16, 1989, Garvan was sentenced to a term of 13 years imprisonment, followed by seven years probation, and was ordered to make restitution in the sum of $73,000 to the defrauded investors.

The Statutes

Having been convicted of the charges set forth in the various criminal proceedings cited above, respondent, as a person associated with a broker or dealer at the time of the commission of the offenses charged, may be

subject to the sanctions set forth in Section 15(b)(6) of the Exchange Act. This section authorizes the Commission to censure, or place limitations on the activities or functions of any person associated with a broker or dealer, or to suspend for a period not exceeding 12 months or bar any such person from being associated with a broker or dealer, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension or bar is in the public interest and that such person has been convicted of any of the offenses specified thereafter within ten years of commencement of the proceedings under this paragraph.

The convictions for which the sanctions may be made to apply are set forth in Section 15(b)(4)(B) and include, in addition to securities related offenses, certain non-securities related convictions including (i) the taking of a false oath or the making of a false report; or (iii) the larceny, theft, fraudulent conversion or misappropriation of funds. Clearly, the convictions herein are directly related to the crimes specified in Section 15(b), and are those for which an appropriate sanction is called for if the Commission finds that the imposition of such a sanction to be in the public interest.

Discussion and Conclusions

According to Garvan, his troubles began in 1982 when he was involved in an automobile accident causing him injuries which required six to eight months' hospital confinement. For about six months prior thereto, he had been employed as a registered representative. During this hospital confinement, his family, consisting of his wife and five children, were receiving welfare payments, food stamps and other similar benefits. At the same time, he continued earning commissions from the sales of securities at IDS.[2/] It was this circumstance which was the basis of his conviction for welfare fraud. Garvan claimed that there was no other way for him to continue supporting his family and keep up with house payments.

Respondent brought a civil action to recover for his injuries in the automobile accident and recovered between $20,000 and $25,000, all of which was quickly dissipated in order to pay legal and medical fees and other unpaid bills.

During the intervening period, his financial problems continued, compounded by the costs involved in a divorce proceeding.

2/ Respondent asserts that these were sales made by his fellow salespersons who put his name down to receive the commissions as a gesture to help him financially. It is difficult to accept this unsupported statement.

With respect to the embezzlement of $84,000 from his securities clients while at IDS, Garvan blames this on the fact that he had not been able to catch up with his outstanding bills and indebtedness and that it was not his intention to "betray anybody, or hurt anybody or anything like that" (Transcript, page 25). He claims that it was his intention to repay these monies out of future earnings.

Respondent argues that it would be necessary for him to resume his employment as a securities salesman upon his discharge from prison (for which he would be eligible in about two years) so that he could make restitution to those from whom he embezzled funds and in order to support his family. He claims that there are two firms which have indicated a willingness to employ him upon his release from prison because of his extensive experience in the sale of securities, accident and health insurance, and mutual funds, plus his experience as a certified financial planner.[3/]

Garvan further asserts that a broker-dealer in Milwaukee advised prior to his imprisonment that it would

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3/ Some of these duties would require a state licence to sell insurance. He had such a license but it was revoked in April of 1987 because of his convictions. He claims he was informed by the State authorities that the return of his license would depend upon the action of this Commission in this proceeding with respect to his securities registration.

employ him in the securities field. There is no proof in the record other than his statements that respondent had such employment offers and that they were still open.

Garvan asserts that should he be permitted to remain in the securities field upon his discharge from prison, he would not engage in criminal activity, given a repeat of similar circumstances, having had a taste of the harshness of prison confinement. Additionally, he would be on probation for the next seven years after his release. He also emphasizes his previous spotless record for 37 years as proof of his future good conduct and to the difficulties involved in learning a new trade or profession from which he would earn enough to make restitution should he be barred from the securities field. 4/

The Public Interest

It is concluded from the evidence herein that the public interest requires the imposition of a sanction upon respondent. The only question remaining is to determine the extent thereof.

4/ No testimony was given by the respondent or anyone else concerning the additional conviction involved in the fraudulent insurance claim for the theft of two non-existing snowmobiles. However, it would follow that respondent's commission of this crime occurred for the same reason he committed the other crimes, i.e., his lack of funds and need for monies to pay his ever-mounting bills.

In assessing a sanction, due regard must be given to the facts and circumstances of each particular case, since sanctions are not intended to punish a respondent but to protect the public interest from future harm. See Berko v. S.E.C., 35 F.2d 131, 141 (2nd Cir. 1963); Leo Glassman, 46 S.E.C. 209, 211 (1975); Robert F. Lynch, 46 S.E.C. 5, 10 n.17 (1975); and Collins Securities Corp., 46 S.E.C. 20, 42 (1975).

Sanctions should also serve as a deterrent to others, Richard C. Spangler, Inc., 46 S.E.C., 238, 254, n.67 (1976).

The Division urges that because of respondent's conduct and in order to provide adequate deterrence, respondent should be barred from the securities industry.

Respondent, on the other hand, urges a sanction that would, in affect, allow him to resume his employment in the securities industry immediately upon his discharge from prison. Specifically, he propose that he be "suspended" from association with any broker or dealer for a period of 5 years commencing retroactively from April, 1987 and to terminate in April of 1992. 5/

5/ Since the Commission's may not suspend for a period of more than twelve months, the proposed sanction would be deemed one to bar respondent from the securities industry with the right to re-apply for association with a broker dealer in April 1992.

The record herein offers little by way of substantiation that given a chain of similar circumstances, respondent would not repeat his fraudulent conduct. He expresses neither remorse nor contrition for his actions, blaming all of them on a need for monies. He had no compunction in receiving welfare benefits to which he was not entitled, making fraudulent insurance claims, or deliberately embezzling substantial funds from his securities clients. In his brief, respondent states that it is his concern "to be treated as an individual who had 37 years of spotless record". His past record is spotless only if you forget the three convictions embraced herein. Assuming such a spotless record, it did not prevent him from engaging in the misconduct for which he has been convicted. His proposed sanction does not even allow time for him to show that he has been rehabilitated as a basis for allowing him to continue as a registered representative with the opportunity to deal with other peoples' money. Hence, no basis exists from which to conclude that Garvan no longer would pose a threat to the public if he were allowed to remain in the securities business.

In fact, the record herein indicates that respondent could very well repeat such conduct in the future. As the Commission observed in Arthur Lipper Corporation, et al., 101 (1975):

"Congress, in writing Section 15(b) of the Exchange Act, viewed past misconduct as the basis for an inference that the risk of probable future misconduct was sufficient to require exclusion from the securities business. Having been directed by the Act to draw that inference whenever our discretion leads us to consider it appropriate, we must do so if the legislative aim it to be obtained. (Footnote omitted)

Additionally, allowing respondent to again become associated with a broker or dealer immediately upon his release from prison will fail to deter others from engaging in similar conduct.

In view of the egregious nature of the criminal convictions the appropriate sanction to achieve the required general deterrent in this case is a permanent bar. Only such a sanction would "serve the purpose of general deterrence and should act as a warning to any other participant in the securities industry who might be attempted to engage in similar conduct". Matter of Kuznetz, 48 S.E.C., 551, 555 (1986). 6/

ORDER

Under all of the circumstances herein,

IT IS ORDERED that respondent John F. Garvan be barred from association with any broker or dealer.

6/ A permanent bar order is not necessarily an irrevocable sanction; upon application the Commisssion, if it finds that the public interest no longer requires applicant's exclusion from the securities business, may permit his return. Hanly v. S.E.C., 415 F.2d 589, 598 (2nd Cir. 1969).

This order shall become effective in accordance with and subject to the provisions of Rule 17(f) of the Rules of Practice.

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to a party. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party. 7/

Jerome K. Soffer
Administrative Law Judge

July 19, 1990
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7/ In their briefs and arguments, the parties have requested the Administrative Law Judge to make findings of fact and have advanced arguments in support of their respective positions other than those heretofore set forth. All such arguments herein have been fully considered and the Judge concludes that they are without merit, or that further discussion is unnecessary in view of the findings herein.