ADMINISTRATIVE PROCEEDING
FILE NO. 3-6556

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

DAVID D. CAREY

INITIAL DECISION

August 4, 1987
Washington, D.C.

Jerome K. Soffer
Administrative Law Judge

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APPEARANCES: Bobby C. Lawyer and Claudia Belcher, of the San Francisco Branch Office, attorneys for the Division of Enforcement of the Securities and Exchange Commission.

David D. Carey, *pro se*

BEFORE: Jerome K. Soffer
Administrative Law Judge

On August 30, 1985, the Commission issued an Order for Public Proceedings (Order) pursuant to Sections 15(b), 15B and 19(h) of the Securities Exchange Act of 1934 (Exchange Act), naming David D. Carey as respondent.

The Order is based upon allegations of the Division of Enforcement (Division) that Carey, an associated person of a municipal securities dealer and later registered with the National Association of Securities Dealers (NASD) as a salesman, was convicted of felonies involving the purchase and sale of securities and the misappropriation of securities.

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 appropropriate in the public interest and for the protection of investors. Such a hearing was held on May 13, 1986, in San Francisco, California, at which the Division appeared by counsel and respondent appeared *pro se*. He participated in the hearing by cross-examining the witness for the Division and by offering his own testimony and exhibits.

Following the close of the hearing, the respective parties filed successive proposed findings of fact and conclusions of law together with supporting brief. 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 witnesses. The preponderance of evidence standard of proof has been applied. 1/

Respondent

Carey is 50 years of age, married, with three children. He had been employed in the investment business for almost 25 years. He has been honorably discharged from the submarine service of the U.S. Navy where he had served for eight years in a reserve capacity. He is a graduate of San Francisco University and holds a B.A. degree in marketing. He also has a junior college teaching credential and had taught investments at a junior college for several years.

Respondent began his investment career in 1960 with Sutro & Company (Sutro), a registered broker-dealer, where he eventually was promoted to the position of general sales manager in charge of Sutro's eight offices employing more than 100 brokers. He worked at Sutro from 1960 to 1971 and left to become a partner and general sales manager of a small New York stock exchange member firm.

From April 11, 1983 until March 1, 1984, Carey was employed as a registered (with the Comptroller of Currency)

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

municipal securities representative at the Bank of America's Bank Investment Securities Division (BISD) in San Mateo, California. Thereafter, he registered with the NASD as a salesman, working for a registered broker dealer, A.G. Becker Parabas, from March until August, 1984. His most recent employment has been with an investment adviser where he has been the regional marketing director of sales. He has never been convicted of any other crime nor has he ever been cited for violations by any federal or state securities regulatory agency.

The Conviction

In an indictment filed November 9, 1984 in the United States District Court, Northern District of California, [2/] respondent was charged with one count of securities fraud under Section 10(b) and Rule 10b-5 of the Exchange Act [3/] and

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2/ No. CR84-0873 CAL.

3/ Section 10(b) of the Exchange Act makes it unlawful, in connection with the purchase or sale of any security, to use or employ "any munipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5 promulgated thereunder, makes it unlawful, *inter alia*, to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

two counts of employee misapplication of securities entrusted to a bank under Title 18 U.S. Code Section 656. [4/]

The first of the charges of misapplication of securities asserts that in or about February 1984 respondent, being employed by the Bank of America, San Mateo, California, wilfully misapplied forty-one California State General Obligation Bearer Bonds having an aggregate face value of approximately $205,000 which were entrusted to the custody and care of the Bank and of Carey.

The second misapplication charge asserts that on or about March 1, 1984 Carey misapplied fifty of the same bearer bonds having an aggregate face value of approximately $250,000.

The count relating to the securities fraud violation alleges that Carey misappropriated and converted to his own use the forty-one bearer bonds described in the first count for use as collateral in connection with the purchase and sale of securities.

4/ §656 Theft, embezzlement, or misapplication by bank officer or employee

"Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, * * * embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; * * *."

Following a trial before a jury, respondent was convicted on all counts of the indictment in February 1985. On April 1, 1985 he was sentenced to 5 years' imprisonment, with the execution of the sentence suspended and Carey placed on 5 years of supervised probation. The provisions of probation included, among other things, a $5,000 fine to be paid at a rate of $100 a month and restitution to Bank of America the sum of $79.44. No appeal has been taken from this judgment.

The Statutes

Having been convicted of the charges set forth in the indictment respondent, as a person currently associated with a broker or dealer and, as a person who at the time of the commission of the offenses charged was a person associated with a municipal securities dealer, may be subject to the sanctions set forth in Section 15(b)(6) and Section 15B(c)(4) of the Exchange Act.

Section 15(b)(6) 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.

Similarly, Section 15B(c)(4) authorizes the Commission to apply the same sanctions as to association with municipal dealers (with the exception of the placing of limitations on activities or functions) on any person associated with a municipal securities dealer arising from a similar conviction within the 10-year period.

The convictions for which the sanctions may be made to apply are set forth in Section 15(b)(4) and include any felony or misdemeanor which the Commission finds involves the purchase or sale of any security, or involves the misappropriation of securities.

Discussion and Conclusions

The crimes for which Respondent has been convicted are those for which an appropriate sanction is called for if the Commission finds the imposition of such a sanction to be in the public interest. To this end, it is appropriate to inquire into the circumstances and the activities engaged in by respondent which resulted in the findings of guilt by the jury.

These crimes relate to the misappropriation of municipal bearer bonds, the property of a BISD customer, Dr. Stanley Lourdeaux, on two separate occasions. At the time of their

occurrence, respondent was employed as a registered municipal bond representative at BISD, the subsidiary formed by Bank of America to deal in these bonds. BISD had just established it branch at San Mateo, in space contained within a regular Bank of America facility. There was one other sales person and a sales assistant assigned to this office. The nearest supervisor was located in the Bank's San Francisco headquarters.

The first instance of misappropriation took place on January 24, 1984 when respondent discovered some forty-one bearer bonds as described in the indictment, having an aggregate face value of $205,000, lying on a desk at BISD. They had been transferred from San Francisco to San Mateo for the account of Dr. Lourdeaux. As such, they were assets and securities entrusted to the custody and care of the Bank and of respondent, its employee. Respondent placed the bonds in his desk and several days later removed them from the BISD office and took them to his personal residence. It is conceded that neither any official or employee of the bank, nor the owner, nor anyone else knew of this removal, or authorized the same. [5/]

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5 / It should be noted that in taking the bonds from the San Mateo Office of BISD respondent circumvented the bank's procedures for the receipt and accounting of bonds transferred between bank offices. Such a transfer was accompanied by a so-called "Bond 40 Form" which listed the bonds being delivered and required that the recipient (Footnote continued)

On February 6, 1984 respondent deposited the bonds into his personal margin trading account at Sutro where they became collateral for a personal stock purchase by respondent. Since the deposit left a credit balance, he was able to withdraw, on March 13, 1984, about $11,000 from his Sutro account which he first deposited in his personal checking account and thence into an escrow account at the Bank of America maintained to cover payments required under a second mortgage on respondent's home held by the Bank. On March 30, 1984, the bank did in fact withdraw the $11,000 in part payment of the second mortgage, by which time, the bonds were no longer securing the Sutro account.

In the meantime, respondent resigned from his employment at BISD on March 1, 1984 and went to work immediately as a registered representative at A.G. Becker Parabas in San Francisco.

On March 15, 1984, respondent took out of his Sutro account the bonds of Dr. Lourdeaux, which were no longer needed as security. He took them to his former place of employment at BISD and secretly hid them behind a free-standing closet

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5/ (FOOTNOTE CONTINUED)
notify the sending office (in this case, San Francisco) within three days whether the listed bonds had been received. Respondent, instead of notifying the San Francisco office, placed the "Bond 40 Form" in a file relating to Dr. Lourdeaux's stock purchases.

in a conference room at the Bank. He told no one what he had done and hence was the only person who for the ensuing period knew of their location. In fact, the bonds remained in their secret location behind the cabinet for the next five months.[6/]

On August 24, 1984, he was visited by an agent of the Federal Bureau of Investigation who was seeking to locate the bonds. At first, believing the agent to be an employee of BISD, he denied any knowledge as to the bonds' whereabouts. When the agent disclosed his true identity and confronted him with the knowledge that he had deposited the bonds in his Sutro account, respondent thereupon admitted taking them and eventually hiding them behind the closet at the Bank's San Mateo office. He then drew a map as to their location which enabled the FBI agent to recover the bonds the same day from the place where respondent had hidden them.

In explanation of his conduct, respondent states that his intent in taking the Lourdeaux bonds was to bring to the attention of Bank of America glaring weaknesses in the BISD system of internal controls. He stated that he was very disturbed over the fact that there was no supervision at the San Mateo office, so that the bearer bonds in question were allowed to lay exposed on a salesman's table where anyone

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6/ In actuality, there was a vault or safe at the Bank branch in San Mateo where the bonds would normally have been placed for safekeeping.

could have taken them. According to Respondent, he hoped to develop a consultant business whereby he and an associate would be engaged by Bank of America to set up and advise them on a proper system of internal control. He claims to have previously called these matters to the attention of his immediate superiors on a number of occasions without satisfaction. He states that he took the bonds for shock value in later pointing out to BISD the relative ease with which one could make off with them. He further asserts that he considered his Sutro account and, later, the space behind the closet at BISD, to be safe places to keep the bonds.

Respondent does not explain why he did not notify the Bank sooner about taking and hiding the bonds, having thus made his point as to lax controls. Nor did he explain at all why he allowed them to remain some five months hidden behind a closet where he admits that they would have been subject to destruction by fire, for example. [7/] He concedes that while the bonds were in his Sutro account as collateral for other securities, they were subject to market risk. He also recognizes that his "plan" to be hired by Bank of America to set up an advisory agency would have resulted in personal financial benefit to himself.

7/ If anything had happened to Carey, it might have been years before these bearer bonds would have been discovered.

From the foregoing, it is concluded that the story told by respondent as to his reason for taking and then hiding the bonds for so long a period is totally unbelievable. From the facts of record, it could be concluded that respondent, who at the time was in some financial difficulties, took the bonds in order to serve as collateral for an investment from which he hoped to profit, and that when they were no longer needed for this purpose, he was faced with the problem of in some way returning them without being caught. By hiding the bonds behind the closet, he felt, (as he in fact asserted) that he was returning them to the Bank's premises and control. He then proceeded to await some opportunity to disclose their location without liability to himself, or perhaps to keep the bonds for himself if the affair had blown over. It was only when he was finally confronted by the FBI agent did he disclose the story, which he had probably concocted in advance, as to an intent to shock the Bank management into retaining him as a consultant.

In any event, the jury in his criminal trial did not believe this story, but rather that he unlawfully and with criminal intent misappropriated these bonds, since an intent to injure and defraud is an element of a violation of

Section 656.[8/] The jury also found this conduct to be a violation of Exchange Act Section 10(b) and Rule 10b-5.

The second instance of misappropriation charged in the indictment occurred on March 1, 1984, the date respondent resigned his position at BISD, to take employment elsewhere. On that day, there were $250,000 worth of bearer bonds from the same issuer in the San Mateo BISD office for delivery to Dr. Lourdeaux, their owner, or to be picked up by him. Respondent claims that he wanted to personally deliver the bonds to Dr. Lourdeaux with the idea of persuading him to send some of his brokerage business to respondent at his new employer, A.G. Becker. To this end, Carey directed one of the administrative trainees at BISD to prepare the bonds and a written receipt therefor for delivery by him.

Respondent then took these bonds to his residence and contacted the home of Dr. Lourdeaux to arrange a delivery time. He was advised by the doctor's wife that he was not at home but would convey the message.[9/] Dr. Lourdeaux, on the other hand, when he learned that Carey had the bonds, contacted one Dolph Stieber, the manager of the Bank of America's San

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8/ See U.S. v. Cleary, (2nd Cir. 1977), 565 F.2d 43, cert. den. 435 U.S. 915.

9/ Respondent asserts that Mrs. Lourdeaux gave him permission tc deliver the bonds to her home. There is nothing in the record to justify this statement.

Mateo branch, complaining of the fact that the bonds were out of the Bank's possession. At Stieber's request, respondent returned the bonds to the bank the next day.

It is clear that the taking of the second set of bonds into his possession, without the owner's or the custodian's consent, at a time when he knew he would no longer be in the employ of BISD, and subjecting them to the risk of loss or destruction, allegedly for the selfish purpose of trying to obtain brokerage business from Dr. Lourdeaux, constitutes reckless and unjustifiable conduct on his part. The jury found his actions to be criminal.

Public Interest

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

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., 315 F.2d, 137, 141 (2d Cir. 1963); Leo Glassman, 46 SEC 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 SEC, 238, 254, n.67 (1976).

The Division urges that based upon respondent's conduct and for reasons of deterrence and of public and securities industry perception of Commission sanctions and fiduciary concepts, respondent should be barred from the securities industry.

Respondent, on the other hand, although recognizing that on the basis of his conviction he can be subject to a sanction, urges a somewhat lesser one. Specifically, he offers that he be barred from the securities industry with the right to apply for the lifting of the bar after three years, and further, that during the period of the bar, he be permitted to work as a wholesaler of investment adviser services, i.e., not to the retail trade but to broker-dealers only. He points to his employment in the securities industry for over 25 years with an unblemished record, to have until this point faithfully abided by the terms of his probation including timely payments of the fine that was assessed and the reimbursement of Bank of America of its loss resulting from his actions in the sum of $79.44. As further support for a sanction which would permit him to engage in somewhat securities-related employment, he points to the fact that under the terms of his probation he is subject to possible incarceration should he commit further violations of the

securities laws.[10/] He continues to assert a lack of any intent on his part to have deprived Bank of America or Dr. Lourdeaux of the bonds and repeats his contention that he took the $205,000 worth of bonds in the first instance for possible shock value to Bank of America and thereby to induce the Bank to engage his advisory services.

This last assertion indicates a persistence on respondent's part in a story which is palpably ludicrous on its face, was so rejected by the trial jury and one that is inconsistent with the conclusions to be fairly drawn from the facts developed. It is this sticking to so fanciful a story that indicates a lack of understanding on respondent's part of the seriousness of the acts he has committed, for which he was convicted by a jury after trial, and which requires the imposition of the severest sanction.

Although it is clear from the record that in both instances when he misappropriated the bonds he was acting from purely selfish motives (i.e., in the first instance to secure a purchase of stock in his own securities account and to derive funds to shore up the balance in his mortgage equity

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10/ Respondent offered a series of some nine letters, received in evidence without Division objection, from various long-time friends and associates, being copies of letters furnished to the sentencing judge in his criminal case, attesting to his honesty, loyalty, and devotion to family and business. Consideration has been given to them.

account, and in the second instance to have an introduction into some brokerage business) respondent has persistently and falsely attributed his acts as being for the benefit of the Bank. 11/ If this were so, he had many an opportunity to make his point during the months that the bonds were kept hidden from every one's view or knowledge. He even lied initially to the FBI agent as to the whereabouts of the bonds, until he realized he was not dealing with a BISD employee.

This failure on the part of respondent to recognize the magnitude of his misconduct and this continued assertion of a totally unbelievable explanation, indicates that he could very well repeat such conduct in the future. As the Commission observed in Arthur Lipper Corporation, et al., 46 S.E.C. 78, 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 is to be obtained. (footnote omitted)

11/ Thus he testified that he could not have intended to harm Dr. Lourdeaux, claiming that the bonds did not belong to him until actual physical delivery of them into his hands by the Bank.

Under all of the circumstances, it is concluded that in order to protect the investing public from future harm and to deter respondent and all others who may be tempted to engage in similar misconduct, respondent should be barred from association with a broker or dealer or with a municipal securities dealer. 12/

ORDER

Under all of the circumstances herein,

IT IS ORDERED that respondent David D. Carey be barred from being associated with a broker or dealer or a municipal securities dealer.

This order shall become effective in accordance with and subject to the provisions of Rule 17(f) of the Commission's 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

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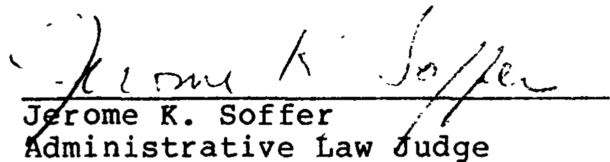
12/ A permanent bar order is not necessarily an irrevocable sanction; upon application the Commission, if it finds that the public interest no longer requires applicant's exclusion from the securities business, may permit his return. Hanly v. S.E.C., 415 F.2d 589, 598 (2d Cir. 1969).

to Rule 17(c), determines on its own initiative to review this initial decision as to him. 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. 13/



Jerome K. Soffer
Administrative Law Judge

August 4, 1987
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13/ 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.