

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the  
Securities Agent License  
of Gary Schulte,  
CRD No. 415627

FINDINGS OF FACT  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson at 9:00 a.m. on Tuesday, January 22, 1991 at the Office of Administrative Hearings, Fifth Floor, Flour Exchange Building, 310 Fourth Avenue South, Minneapolis, Minnesota. The record on this matter closed on March 6, 1991, the date of receipt of the last post-hearing brief.

Norine (Missy) Olson-Elm, Special Assistant County Attorney, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Complainant, Minnesota Department of Commerce. Terrence J. Fleming, from the firm of Lindquist & Vennum, Attorneys at Law, 4200 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402-2205, appeared on behalf of the Respondent, Gary Schulte.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of Commerce shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Bert McKasy, Commissioner, Minnesota Department of Commerce, 133 South Seventh Street, St. Paul, Minnesota 55101.

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether the Respondent made unauthorized trades in clients' accounts in violation of Minn. Rule 2875.0910 and Minn. Stat. 80A.01(c) and 80A.07, subds. 1(b)(2) and (7).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Respondent, Gary Schulte, is 48 years old and resides at 6427 Xenium Lane North, Maple Grove, Minnesota. He has been married for 29 years and has five children, ages 15 to 28. At all times relevant herein, Mr. Schulte was licensed as a security agent by the Commissioner of Commerce, CRD

License Number 415627, pursuant to Minn. Stat. ch. 80A. At all times relevant herein, Respondent was employed by Prudential-Bache Securities, Inc.

2. Respondent has been employed for the last 22 years as a licensed securities agent. He commenced his employment in 1968 with Mutual of Omaha

selling mutual funds. In 1970, Schulte became employed by Loyal Protective Life Insurance Company and remained in its employ for approximately nine months. Mr. Schulte then joined Merrill Lynch and remained there for approximately ten months. Mr. Schulte's next employment was with John G. Kinnard and Company from 1972 through 1985. Mr. Schulte's next employment was with E. F. Hutton for approximately two and one-half years. Respondent then became employed by Prudential-Bache sometime in 1987. At the present time, Mr. Schulte is employed with Protective Group Securities.

3. On or about June 10, 1988, Thomas Lee opened an account with Mr. Schulte at Prudential-Bache. Mr. Lee solicited Mr. Schulte to open the account for the purpose of making option trades. Mr. Lee is a certified public accountant and is a professor teaching accounting at Winona State University, residing in Winona, Minnesota.

4. The account that Mr. Lee opened with Mr. Schulte through Prudential-Bache was not a discretionary-type account which would permit Mr. Schulte to make transactions without Mr. Lee's specific approval. Respondent did not obtain written authorization from Mr. Lee to engage in discretionary trading on his account although the issue of discretionary trading had been talked about between the two when the account was first opened.

5. After Mr. Lee's account was opened, he authorized Mr. Schulte to make three separate option purchases for him as follows:

| Amount | Date     | Quantity | security              |    |
|--------|----------|----------|-----------------------|----|
| 319.39 | 06/10/88 | 4 calls  | Sears June 35         | \$ |
| 205.39 | 06/10/88 | 4 calls  | Eastman Kodak June 45 |    |
| 563.49 | 06/13/88 | 4 calls  | Int'l. Paper June 45  |    |

6. Because no authorization was ever executed by Mr. Lee to allow Respondent to make discretionary trades on his account, Lee assumed that no trades would be made unless specifically authorized by him.

7. Mr. Schulte made the following 14 transactions on Mr. Lee's account without Lee's knowledge or instruction:

|            | Date     | Quantity | Security | Amount |
|------------|----------|----------|----------|--------|
| \$1,216.92 | 06/24/88 | 10 calls | K-Mart   |        |
| 689.03     | 06/27/88 | 10 calls | K-Mart   |        |

|        |          |          |             |         |
|--------|----------|----------|-------------|---------|
| 279.85 | 06/13/88 | 10 calls | K-Mart      |         |
| 599.76 | 07/18/88 | 10 calls | K-Mart      |         |
| 561.85 | 07/19/88 | 6 calls  | Control     | Data    |
| 204.58 | 08/04/88 | 10 calls | K-Mart      |         |
| 124.19 | 08/09/88 | 6 calls  | Control     | Data    |
| 402.71 | 08/10/88 | 6 calls  | Int'l.      | Paper   |
| 533.89 | 09/12/88 | 10 calls | Int'l.      | Paper   |
| 60.15  | 09/27/88 | 1 call   | K-Mart      |         |
| 421.40 | 09/27/88 | 3 calls  | Int'l.      | Paper   |
| 138.71 | 09/27/88 | TO calls | Mfgs.       | Hanover |
| 515.91 | 10/31/88 | 3 calls  | Salomon     |         |
| 137.37 | 11/03/88 | 5 calls  | PaineWebber |         |

8. Thomas Lee received transaction confirmations for each option trade set forth above and monthly statements from Prudential-Bache, but he did not review these documents until December of 1988. Mr. Lee had taken a trip to Alaska from August 3, 1988 through September 8, 1988. Mr. Schulte received commissions of between \$800 and \$900 from the trades on Mr. Lee's account.

9. After Mr. Lee reviewed the statements sent to him from Prudential-Bache and realized that he had sustained a loss on the trades made by Mr. Schulte in the amount of approximately \$4,500, he contacted Mr. Schulte. Restitution was made to Mr. Lee in the amount of \$4,500.

10. Robert Weinzettel has been a client of Mr. Schulte for 15 years and continues to do business with him to the present. In April of 1988, Respondent contacted Mr. Weinzettel, who had an account at Prudential-Bache, and recommended that Weinzettel purchase ten Wal-Mart April 30 call options. At the time of this telephone contact, Mr. Weinzettel was pressed for time, and did not wish to thoroughly discuss Schulte's recommendation. Although Weinzettel was not convinced that the purchase was what he wanted, he told Schulte to go ahead and do what he thought was best. Respondent subsequently ordered the ten Wal-Mart options at \$.50 on Weinzettel's account.

11. Mr. Schulte did not have any written authorization from Mr. Weinzettel to engage in discretionary trading on Weinzettel's account. Respondent made a commission of about \$50 from the Wal-Mart option trade.

12. Robert Klein was a client of Mr. Schulte's since approximately 1979. He was an active investor in both stock and option transactions. Mr. Klein had not executed documentation to allow either Mr. Schulte or Prudential-Bache discretionary trades on his account.

13. On the morning of July 15, 1988, Mr. Schulte contacted Mr. Klein because five Control Data options in his account were scheduled to expire at the end of the day. Mr. Klein's alternatives were to let the options expire as worthless, attempt to sell them, or to exercise the options. Mr. Klein directed Mr. Schulte to attempt to sell the options but to "do the best he (Mr. Schulte) could". Mr. Schulte was unable to sell the options and, after unsuccessfully attempting to contact Mr. Klein again, Schulte exercised the options purchasing 500 shares of Control Data common stock. The following business day, Respondent telephoned Mr. Klein to inform him that his Control Data option had been exercised. Mr. Schulte made a commission of approximately \$50 from this trade.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Administrative Law Judge and the Minnesota Commissioner of Commerce have jurisdiction over this matter pursuant to Minn. Stat. 14.50 and 80A.07. The Notice of Hearing in this matter was proper in both form and content and the Department of Commerce has fulfilled all relevant substantive and procedural requirements of law and rule.

2. Complainant bears the burden of proof to show by a preponderance of the evidence that Respondent has violated Minn. Rule 2875.0910 and/or Minn. Stat. 80A.01(c) and 80A.07, subs. 1(b)(2) and (7).

3. Minn. Rule 2875.0910, subps. 7 and 8 read as follows:

Subp. 7 Prohibitions

No broker-dealer or agent shall exercise any discretionary power in a customer's account unless such customer has given prior written authorization to a stated individual or individuals and the account has been accepted by the broker-dealer, as evidenced in writing by the broker-dealer or the partner, officer, or manager, duly designated by the broker-dealer.

The broker-dealer or the person duly designated shall approve promptly in writing each discretionary order entered and shall review all discretionary accounts at frequent intervals in order to detect and prevent transactions which are excessive in size or frequency in view of the financial resources and character of the account.

Subp. 8 Exemption. Subp. 7 shall not apply to discretion as to the price at which or the time when an order given by a customer for the purchase or sale of a definite amount of a specified security shall be executed.

Minn. Stat. 80A.01(c) and 80A.07, subd. 1(b)(2) and (7) read as follows:

80A.01. Sales and purchases

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

80A.07. Denial, suspension, and revocation of licenses

Subdivision 1. The commissioner may by order deny, suspend, or revoke any license or may censure the licensee, if the commissioner finds (a) that the order is in the public interest and (b) that the applicant or licensee or, in the case of a broker-dealer or investment adviser, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser:



(2) has willfully violated or failed to comply with any provision of this chapter or a predecessor law or any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or order under any of these statutes, of which that person has notice and is subject;

(7) has engaged in dishonest or fraudulent practices in the securities business;

4. The Complainant has proved by a preponderance of the evidence that Respondent violated Minn. Rule 2875.0910, subp. 7 and Minn. Stat. 80A.07, subd. 1(b)(2) when he made the trades on Mr. Lee's account as set forth in Finding 7 above.

S. The Complainant has not proved that Respondent violated any rules or statutes when he made transactions on the Weinzettel and Klein accounts as set forth in the Findings above.

6. The Complainant has not proved that Respondent violated Minn. Stat. 80A.08(c) or 80A.07, subd. 1(b)(7).

7. Due to the violation found in Conclusion No. 4 above, the Judge concludes that some form of disciplinary action against Respondent's license is appropriate.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Commerce take appropriate disciplinary action against the securities agent license of Gary Schulte.

Dated this day of March, 1991.

PETER C. ERICKSON  
Administrative Law Judge

#### NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped, Transcript Prepared by Jeffrey J. Watzak.

MEMORANDUM

The record in this matter is quite clear that Gary Schulte made unauthorized trades on Mr. Lee's account between June 24 and November 3, 1988.

Mr. Schulte admitted that these transactions were without specific prior authorization from Mr. Lee and that Mr. Lee had not filed any documentation giving Mr. Schulte discretionary authority to make trades on his account. The

Notice and Order for Hearing in this matter also alleges that Mr. Schulte traded ten calls of International Paper, September, \$45, and the three calls of

International Paper, October, \$45, in violation of Minn. Rule 2875.0910, subp. 7. However, a review of the record does not reveal any evidence to support those allegations.

The Judge has concluded that both Mr. Weinzettel and Mr. Klein did authorize Respondent to make the trades he did on their accounts. In Mr. Weinzettel's case, he authorized Mr. Schulte to do what he thought was best regarding the ten Wal-Mart April 30 call options. Mr. Klein authorized Mr. Schulte to do the best he could with regard to his options which were due to

expire on the day he talked to Mr. Schulte. In both situations, although the

authorization was not specific, the Judge concludes that Mr. Schulte operated

within the bounds of the authorization given. In both of these cases, Mr. Schulte talked to the client and traded in accordance with the information he

had given to the client. In neither of these cases did the client tell Mr. Schulte not to make a trade or to do something differently than what was done.

In fact, both clients generally authorized Mr. Schulte to do what he deemed appropriate. The Judge cannot find a violation of Minnesota Rules or statutes

based on these facts.

Complainant argues that the unauthorized trades on Mr. Lee's account constitute "fraud", "deceit" or "dishonesty" within the meaning of Minn. Stat.

80A.01(c) and 80A.07, subd. 1(b)(7). The Judge disagrees. The Complainant

has cited no authority for its contention that the unauthorized trades herein

fall within the meaning of fraud, deceit or dishonesty as intended by the statutes cited. Fraud is defined in Black's Law Dictionary as "a false representation of a matter of fact, whether by words or by conduct, by false or

misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall

act upon it to his legal injury." The term "deceit" is defined in Black's as

"a fraudulent and cheating misrepresentation, artifice, or device, used by one

or more persons to deceive and trick another, who was ignorant of the true facts, to the prejudice and damage of the party imposed upon." Dishonest is

defined in Webster's as a "lack of truth, honesty, or trustworthiness" and is

described as "a willful perversion of truth in order to deceive, cheat, or defraud". The Judge cannot conclude that Respondent was dishonest, deceitful

or fraudulent with respect to the unauthorized trades on Mr. Lee's account. The record shows that Mr. Schulte mailed transaction confirmations for each option trade on Mr. Lee's account to Mr. Lee a day or two following each trade. Additionally, Mr. Lee received monthly statements from Prudential-Bache concerning the trades made on his account. Mr. Schulte was neither trying to conceal anything from Mr. Lee nor did he misrepresent any facts to Mr. Lee. As the Judge as already determined above, Mr. Schulte did violate the

law when he made the unauthorized transactions on Mr. Lee's account, however,

he did not commit a dishonest, fraudulent or deceitful practice within the meaning of Minn. Stat. 80A.01(c) or 80A.07, subd. 1(b)(7).

Complainant filed a Motion in Limine in this case seeking to limit the scope of the conclusions herein to a determination of whether violations of law occurred, not extending to whether or not disciplinary action is appropriate. Complainant cites Padilla v. Minnesota State Board of Medical Examiners, 382 N.W.2d 876 (Minn. App. 1986), to support its Motion. Complainant has misread Padilla, however. The Padilla court stated clearly that the ALJ should not make a recommendation "as to the type of discipline" which should be administered. Id. at 887. The court went on to state that in that case, "The correct procedure was employed . . . based on its findings, the ALJ recommended discipline. The type and duration of the discipline was left to the . . . Board . . . ." The Judge has followed that "procedure" herein. The Conclusions above state clearly that some type of disciplinary action is warranted. However, the Judge has not recommended or concluded which "type of discipline" the Commissioner should administer.

P.C.E.