

INTRODUCTION

On August 30, 2004, the Securities Department of the State Auditor's Office (hereafter, Department) issued a Notice of Proposed Agency Disciplinary Action and Opportunity for Hearing to Randall Knowles, Case No. I-08-27-04-137, alleging violations of the Securities Act of Montana, § 30-10-101, Mont. Code Ann., *et seq.* Simultaneously, the Department issued a Temporary Cease and Desist Order and Order Denying Application to Randall Knowles, Case No. I-08-27-04-137, barring him from engaging in certain activities and also denying his pending application for registration as a securities salesperson. Respondent Knowles requested a hearing to contest the Department's allegations. Ultimately, the Department issued the Second Amended Notice of Proposed Agency Disciplinary Action and Opportunity for Hearing, Case No. I-08-27-04-137. On October 22, 2004, Attorney Kellie A. Voyich was appointed by the State Auditor and Commissioner of Securities to act as the Hearing Examiner.

Upon motion by Respondent Knowles, and after oral argument and submission of proposed Findings of Fact and Conclusions of Law by both parties, Hearing Examiner Voyich issued an Order dissolving the Temporary Cease and Desist Order on January 12, 2005.

HEARING

A contested case hearing was conducted by Hearing Examiner Voyich on March 21-23, 2005, and April 29, 2005. The hearing was conducted pursuant to the hearings and appeals provisions of the Securities Act of Montana (§§ 30-10-305 and 30-10-307, Mont. Code Ann.); the contested case provisions of the Montana Administrative Procedure Act (§§ 2-4-601, Mont.

Code Ann., *et seq.*); and Montana's statutory, public participation in governmental operations notice and hearing provisions (§§ 2-3-101, Mont. Code Ann., *et seq.*).

At the contested case hearing, Roberta Cross Guns represented the Department. Brand G. Boyar represented the Respondent, Randall G. Knowles.

Testimony was presented on behalf of the Department from Lynne Egan, securities examiner for the Department; Emily Downey; Kaye Johnson; Grace Simmons; Eric Rolshoven; Mark Payton; and Doris Haaland, deceased, by video taped deposition.¹ Randall G. Knowles (Knowles) and Jeffrey Evanello provided testimony on behalf of Knowles.

The following documents were offered and received into evidence on behalf of the Department: FSC Securities Corporation account verification/update form to Emily Downey (Department's Exhibit 1); FSC Securities Corporation statements to Emily Downey (Department's Exhibit 2); FSC Securities Corporation Change of Investment form for Emily Downey (Department's Exhibit 3); Customer Account Transfer Form for Grace Simmons (Department's Exhibit 4); Confidential Personal Financial Planning form for Emily Downey (Department's Exhibit 5); and November 3, 2004 letter from Knowles to Eric Rolshoven and copy of Kaye Johnson's check #4279 (Department's Exhibit 6).

The following documents were offered and received into evidence on behalf of Knowles: Life Insurance & Annuity Durable Power of Attorney for Emily Downey (Respondent's Exhibit A); Pershing Customer Account Transfer Form for Emily Downey (Respondent's Exhibit B);

¹See Hearing Examiner Voyich's Pretrial Order dated March 15, 2005, regarding admissibility of the video taped deposition.

FSC Securities Corporation new account form signature page for Emily Downey (Respondent's Exhibit C); Request for Taxpayer Identification Number and Certification form for Emily Downey (Respondent's Exhibit D); November 8, 2004 letter from Knowles to Lynn and Kaye Johnson (Respondent's Exhibit E); Confidential Personal Financial Planning form for Doris Haaland (Respondent's Exhibit F); D.A. Davidson & Co. account statement for Doris Haaland (Respondent's Exhibit G); Doris Haaland Revocable Trust Agreement (Respondent's Exhibit H); FSC Securities Corporation new account form signature page for Grace Simmons (Respondent's Exhibit I); American Investors, an AMERUS Company, Request For Funds form for Grace Simmons (Respondent's Exhibit J); Confidential Personal Financial Planning form for Grace Simmons (Respondent's Exhibit K); D.A. Davidson & Co. account statement for Grace Simmons (Respondent's Exhibit L); American Express account statement for Grace Simmons (Respondent's Exhibit M); Investment Centers of America, Inc. account statement for Grace Simmons (Respondent's Exhibit N); FSC Securities Corporation account statements for Grace Simmons (Respondent's Exhibit O); American Investors, an AMERUS Company, Request For Funds form for Emily Downey (Respondent's Exhibit P); D.A. Davidson & Co. account statement for Emily Downey (Respondent's Exhibit Q); and Wells Fargo account statement for Grace Simmons (Respondent's Exhibit R).

**HEARING EXAMINER'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER
AND EXCEPTIONS FILED BY THE PARTIES**

The Hearing Examiner issued proposed Findings of Fact, Conclusions of Law, and Order on December 15, 2005, and served counsel for the Department and for Respondent Knowles by

mail. On December 20, 2005, State Auditor and Commissioner of Securities John M. Morrison (hereafter, Commissioner) issued a Scheduling Order for the parties to file exceptions and briefs to the Hearing Examiner's proposed decision and for oral argument on the same. Both parties filed exceptions to the Hearing Examiner's proposed decision. Subsequently, on February 1, 2006, the Commissioner issued an Amended Scheduling Order for Oral Argument.

On February 27, 2006, the Commissioner heard oral argument regarding the Hearing Examiner's proposed decision and the exceptions filed by the parties. Counsel for both parties were present and argued. During the oral argument, the Commissioner requested supplemental briefs on whether a necessary element of fraud under § 30-10-301(1)(c), Mont. Code Ann., is damage or injury to a person. The Commissioner also issued a written Order for Additional Briefs on the same and both parties filed briefs by the March 10, 2005 deadline set out in the Order.

RESPONDENT'S ASSERTION THAT ANY DECISION IS UNTIMELY

Respondent Knowles asserts that any decision in this matter is untimely under § 2-4-623(1)(a), Mont. Code Ann., of the Montana Administrative Procedure Act, §§ 2-4-101, Mont. Code Ann., *et seq.* Section 2-4-623(1)(a), Mont. Code Ann., provides:

A final decision or order adverse to a party in a contested case must be in writing. A final decision must include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings. A final decision must be issued within 90 days after a contested case is considered to be submitted for a final decision unless, for good cause shown, the period is extended for an additional time not to exceed 30 days.

More than 120 days elapsed between the parties' submission of post-hearing briefs on August 10, 2005, and Hearing Examiner Voyich's proposed decision dated December 15, 2005. Therefore, Knowles asserts that Hearing Examiner Voyich's proposed decision and any subsequent decision issued by the State Auditor and Commissioner of Securities are both untimely.

However, the 2005 legislative history of SB 260, which added the time requirements to § 2-4-623(1)(a), Mont. Code Ann., does not support Knowles's position. The initially proposed amendment to § 2-4-623(1), Mont. Code Ann., required that the agency final decision be issued within 90 days *after the contested case hearing* with a possible 90 day extension. (emphasis added) See SB 260, Introduced Bill. After state agencies and the Governor's Office expressed their concerns, SB 260 was amended to provide that a final agency decision be issued within 90 days, with a possible 30 day extension, *after the contested case is considered submitted for a final agency decision*. (emphasis added) See Senate Committee on Judiciary Minutes regarding Hearing on SB 260 on January 27, 2005; Conference Committee on House Amendments to SB 260 meeting minutes and report dated April 20, 2005; April 15, 2005 letter from Governor Schweitzer to Senate President Tester and Speaker of the House Matthew; Second Reference Bill which included Conference Committee Report dated April 20, 2005.

A contested case can only be "considered to be submitted for a final decision" under § 2-4-623(1)(a), Mont. Code Ann., after the parties have been given an opportunity to file exceptions and present briefs and oral argument in regard to a hearing examiner's proposed decision to the officials who will render the final agency decision pursuant to § 2-4-621(1), Mont. Code Ann. In the present, contested case, the Commissioner is the final agency decision maker. If the

Commissioner had delegated his final agency decision making authority to Hearing Examiner Voyich, as in Hoven, Vervick & Amrine, P.C. v. Commissioner of Labor (1989), 237 Mont. 525, 534, 774 P.2d 995, 1001, then Knowles's assertion that the time requirements under § 2-4-623(1)(a), Mont. Code Ann., began to run after the parties' submission of post-hearing briefs to Hearing Examiner Voyich would be correct. However, the Commissioner did not delegate his authority as the final agency decision maker in this contested case and, pursuant to § 2-4-621(1), Mont. Code Ann., the parties have been afforded the opportunity to file exceptions and supporting briefs, to have oral argument, and even to supplement briefs in this matter. Accordingly, this contested case was submitted for a final agency decision by the Commissioner, starting the time requirements in § 2-4-623(1)(a), Mont. Code Ann., after the filing of the supplemental briefs.

CEASE AND DESIST ORDER

Respondent Knowles asserts that the Temporary Cease and Desist Order, issued August 30, 2004, expired and was void 30 days after the Department received his request for a hearing on the same pursuant to Rule 6.2.122, Mont. Admin. R. The Department asserts that Rule 6.2.122, Mont. Admin. R., implements § 30-10-305(1), Mont. Code Ann., and that the statute, in particular the language that a cease and desist order remains in effect until 10 days after the hearing examiner issues a proposed decision, takes precedent over the rule.

Rule 6.2.122, Mont. Admin. R., provides:

If the commissioner issues a temporary cease and desist order, the respondent has 15 days from receipt of the order to make a written request for a contested case hearing on the allegations contained in the order. The hearing must be held within 30 days of the commissioner's receipt of the hearing request unless the time is

extended by agreement of the parties or by order of the hearing examiner. If the respondent does not request a hearing within 15 days of receipt of the order by the respondent and the commissioner does not order a hearing, the order becomes final.

On or about September 10, 2004, Respondent Knowles faxed and mailed a written request for a hearing to contest the Temporary Cease and Desist Order. Subsequently, on November 19, 2004, Knowles moved to dissolve the Temporary Cease and Desist Order asserting that: (1) more than 30 days had passed since he requested a hearing; (2) the parties had not agreed to an extension; (3) the Hearing Examiner had not ordered an extension; and (4) Rule 6.2.122, Mont. Admin. R., required the dissolution. The Department opposed the motion and on December 28, 2004, the Hearing Examiner held a telephonic hearing during which counsel for both parties appeared and argued. Then the parties submitted proposed Findings of Fact, Conclusions of Law, and Order to the Hearing Examiner in which both parties proposed that the Temporary Cease and Desist Order be dissolved for failure to timely hear the matter pursuant to Rule 6.2.122, Mont. Admin. R. On January 12, 2005, the Hearing Examiner issued an Order dissolving the Temporary Cease and Desist Order for failure to timely hear the matter citing Rule 6.2.122, Mont. Admin. R.

Subsequently, after the March 21-23, 2005, and April 29, 2005 hearing, the Hearing Examiner found in her proposed decision that the Cease and Desist Order was in effect when Knowles met with Lynn and Kaye Johnson on or about October 30, 2004, and subsequently sent a letter and the Johnsons' check to Eric Rolshoven on their behalf. Therefore, the Hearing Examiner determined that the Cease and Desist Order did not automatically terminate after 30

days had elapsed, but instead remained in effect until it was dissolved by her January 12, 2005 Order.

In regard to temporary restraining orders that are filed without notice to the adverse party, § 27-19-316(4), Mont. Code Ann., provides that the order will “expire by its terms within the time after entry, not to exceed 10 days, as the court or judge fixes.” The expiration date of the order may be extended, “for good cause shown, for a like period or, if the party against whom the order is directed consents, for a longer period.” § 27-19-317, Mont. Code Ann. The expiration of temporary restraining orders is automatic. In re George Trust (1992), 253 Mont. 341, 346, 834 P.2d 1378; In re Marriage of Mangold (1999), 1999 Mont. LEXIS 126, ¶ 37 (unpublished opinion).

Similarly, § 30-10-305, Mont. Code Ann., provides for issuing a cease and desist order without prior notice to the respondent. Rule 6.2.122, Mont. Admin. R., was adopted to implement and interpret this statute. Although the statute provides that the cease and desist order will expire 10 days after a hearing, Rule 6.2.122, Mont. Admin. R., clarifies that, after a hearing request is received, the hearing must be held within 30 days unless the time is extended by agreement of the parties or order of the hearing examiner. In the present case, the parties did not agree to extend the time for hearing and Hearing Examiner Voyich was not appointed until October 22, 2004, more than 30 days after the Department received Knowles’ request for hearing. Accordingly, the Hearing Examiner could not issue an order extending the hearing date within the initial 30 day deadline.

The Commissioner believes that the 30 day requirement in Rule 6.2.122, Mont. Admin. R., is intended to provide the same due process protections as §§ 27-19-316 and 27-19-317, Mont. Code Ann., specifically to provide the respondent with a prompt hearing on the merits of the cease and desist order or the automatic expiration of the cease and desist order. Further, Rule 6.2.122, Mont. Admin. R., provides that the cease and desist order will become permanent if a hearing is not timely requested. A fair interpretation of Rule 6.2.122, Mont. Admin. R., requires that the cease and desist order expire if a hearing is requested but not held within the 30 day requirement (or extended as set out in the rule). As epitomized in a maxim of jurisprudence, “[t]he law helps the vigilant before those who sleep on their rights.” § 1-3-218, Mont. Code Ann.

Accordingly, the Commissioner determines that the Cease and Desist Order expired by operation of law after 30 days had passed from the Department’s receipt of Knowles’ request for hearing. Knowles made a written request for hearing on or about September 10, 2004. Allowing time for mailing of the hearing request, the 30 days would have run and the Cease and Desist Order would have expired on October 14, 2004.²

**STATUTORY FRAUD AT SECTION 30-10-301(1), MONT. CODE ANN.,
DOES NOT REQUIRE A SHOWING OF DAMAGE**

Respondent Knowles asserts that § 30-10-301(1)(a) and (c), Mont. Code Ann., pertaining to fraudulent and prohibited practices, necessarily incorporates the common law fraud elements. *See Kinjerski v. Lamey* (1979), 185 Mont. 111, 117, 604 P.2d 782, 785. Knowles further asserts

²However, Rule 6.2.122, Mont. Admin. R., does not apply to the Order Denying Application and so it remained in effect.

that if the common law element of damage to a person has not been established, there can be no violation of this statute.

To support his argument, Knowles asserts that the Montana legislature adopted the antifraud provision of the Uniform Securities Act, but did not adopt the definition of fraud and, therefore, the common law fraud elements must be applied. The antifraud provision at § 30-10-301(1), Mont. Code Ann., of the Securities Act of Montana, is substantively identical to § 101 (antifraud) of the Uniform Securities Act of 1956 and the Compiler's Comments to Mont. Code Ann. § 30-10-301 indicate that §§ 101 and 102 of the Uniform Securities Act were the source for the statute.

The Uniform Securities Act of 1956 (1956 Act) and both subsequent versions, the Revised Uniform Securities Act of 1985 (RUSA) and the Uniform Securities Act of 2002 (2002 Act),³ provide in the definition section that “[f]raud,’ ‘deceit,’ and ‘defraud’ are not limited to common law deceit.” Uniform Securities Act (U.L.A.) § 102(9) and Official Comments (Section 401(d) of the 1956 Act; Section 101(6) of the RUSA; Section 102(9) of the 2002 Act). Although appearing in the definition sections of these three Acts, this provision hardly defines the terms “fraud,” “deceit,” and “defrauded” in that it does not specifically state what they “mean.”⁴ Additionally, the Official Comments to the 2002 Act indicate that, “[t]his definition, which is identical to the 1956 Act and RUSA, codifies the holdings that ‘fraud’ as used in the federal and

³The 1956 Act, RUSA, and the 2002 Act and Official Comments were promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL).

⁴In contrast, other definitions in these Acts clearly state what a word or phrase “means.”

state securities statutes is not limited to common law deceit. See generally 7 Louis Loss & Joel Seligman, Securities Regulation 3421-3448 (3d ed. 1991).” Uniform Securities Act (U.L.A.) § 102(9).

The antifraud provisions in the 1956 Act (§ 101), RUSA (§ 501), and the 2002 Act (§ 501) are the same and these are modeled on SEC Rule 10b-5, under section 10(b) of the federal Securities Exchange Act of 1934, and also on § 17(a) of the federal Securities Act of 1933. 2 Blue Sky Regulation (2d ed. 2005), § 13.01, page 13-2. Courts have found that a violation of the antifraud provisions of the federal Securities Act of 1933 does not require proof of the common law elements of fraud, such as damage to a person. Bobbroff v. United States, 202 F.2d 389 (9th Cir. 1953); Farrell v. U.S., 321 F.2d 409, 419 (9th Cir. 1963).

In Bobbroff v. United States, the defendant appealed his conviction for mail fraud, under the Mail Fraud Statute at 18 U.S.C. § 1341, and securities fraud, under § 17(a)(1) of the federal Securities Act of 1933 (15 U.S.C. § 77(q)(a)(1)). 202 F.2d 389 (9th Cir. 1953). Section 17(a)(1) provides that it is “unlawful for any person in the sale of any securities . . . by the use of the mails . . . to employ any device, scheme or artifice to defraud.” Bobbroff, 202 F.2d at 390 (*citing* § 17(a)(1) of the Securities Act of 1933, 15 U.S.C. § 77(q)(a)(1)). In upholding the convictions, the appellate court found that the facts clearly showed that Bobbroff “used the mails directly in the employment of scheme to defraud in an ‘offer’ to dispose of further shares of Eversharp Launwhiz, Inc. to three different shareholders of that corporation in violation of the Securities Act of 1933.” Bobbroff, 202 F.2d at 390. Bobbroff asserted that the fraudulent offers were not enough and that the shareholders had to be deceived to their detriment to constitute a violation of

§ 17(a)(1). The appellate court found that the common law fraud cases relied on by Bobbroff were not applicable and that “the Securities Act is violated upon the mere mailing of letters containing such offers.” Bobbroff, 202 F.2d at 390 (citations omitted). *See also Farrell v. U.S.*, 321 F.2d 409, 419 (9th Cir. 1963) (In appealing their convictions for mail fraud, 18 U.S.C. § 1341, and securities fraud, § 17(a)(1) of the federal Securities Act of 1933 (15 U.S.C. § 77(q)(a)(1)), defendants alleged that the district court erred in allowing evidence of customer witnesses’ losses. The appellate court upheld the convictions and found that, “it appears to be well settled that in a prosecution of this type, the government is not required to prove that anyone was defrauded or that any investor sustained a loss.”)⁵

Although “state and federal antifraud provisions have their genesis in the principles of common law fraud and deceit,” such common law principles are then “expanded in a manner

⁵Also of interest are Wisconsin v. Temby, 322 N.W.2d 522 (Wisc. 1982), and Idaho v. Shama Resources Ltd. Partnership, 899 P.2d 977 (Id. 1995). Both cases rely on Aaron v. Securities and Exchange Commission, 446 U.S. 680 (1980), interpreting §§ 17(a)(2) and (3) of the Securities Act of 1933, in holding that the common law fraud element of intent to defraud or deceive, scienter, is not required for violations of each state’s securities act antifraud provisions which are nearly identical to § 30-10-301(1)(b) and (c), Mont. Code Ann.

Similarly, in SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963), the United States Supreme Court broadly construed and applied the federal Investment Advisers Act of 1940 in finding that failure to disclose material facts was fraudulent and in violation of the Act without requiring a showing of deliberate dishonesty. Additionally, the Supreme Court indicated that the Investment Advisers Act of 1940, the Securities Act of 1933, and several others were designed to eliminate abuses in the securities industry and that:

A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosures for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry. As we recently said in a related context, ‘It requires but little appreciation . . . of what happened in this country during the 1920’s and 1930’s to realize how essential it is that the highest ethical standards prevail’ in every facet of the securities industry.

375 U.S. at 186-87 (citation omitted).

designed to achieve the protective mission of Blue Sky laws.” 2 Blue Sky Regulation (2d ed. 2005), § 13.01, pages 13-2 through 13-3. Further, “[t]he nature of the Blue Sky laws virtually demands that they be interpreted liberally in order to effectuate their broad remedial purposes.” 2 Blue Sky Regulation (2d ed. 2005), § 13.01, page 13-5 (citing People v. Federated Radio Corp., 154 N.E. 655, 657 (N.Y. 1926)). Accordingly, through courts applying and enforcing Blue Sky antifraud provisions:

[S]ubstantive elements derived from the common law have likewise been liberalized, such that issues of scienter, reliance, and causation are approached in a manner that take statutory fraud beyond its common law antecedents. The drafters of the Uniform Act made clear that rules governing common law fraud are to be used to assist, not to limit, the interpretation of the antifraud purposes of the Act.

2 Blue Sky Regulation (2d ed. 2005), § 13.01, pages 13-5 through 13-6. And with regard to the common law element of damage:

Generally, in order to obtain injunctive relief or impose criminal sanctions in securities cases, there is often no need to prove reliance or an injury proximately caused by the violation. Rather the party seeking relief (most often the state administrator) need only show fraudulent conduct in connection with the sale of securities which presents a potential for damages.

2 Blue Sky Regulation, § 13.04, p. 13-51 thru 13-52 (citations omitted).

Accordingly, from the inception of the 1956 Act, and continued in RUSA and the 2002 Act, the terms “fraud,” “deceit,” and “defrauded” were intended to be broadly construed, not limited to common law deceit or fraud, in order to effectuate the protective purpose of the antifraud provisions. Therefore, the Montana legislature’s omission of the definition of fraud from the Securities Act of Montana, as “not limited to common law deceit,” contained in the 1956 Act, RUSA, and 2002 Act, is inconsequential.

Courts interpreting antifraud provisions similar to § 30-10-301(1)(a) and (c), Mont. Code Ann., have found that damage to a person is not necessary to establish a violation. Additionally, the specific language of § 30-10-301(1)(c), Mont. Code Ann., of the Securities Act of Montana, does not require damage or injury to be found in order for a violation occur in that it provides that the “act, practice, or course of business that operates *or would* operate as a fraud or deceit upon any person.” (emphasis added) Therefore, and in accord with the underlying purpose of the Securities Act of Montana expressed in § 30-10-102(1), Mont. Code Ann., “to protect the investor, persons engaged in securities transactions, and the public interest,” the Commissioner finds that the common law element of damage to a person is not necessary to establish a violation of Mont. Code Ann. § 30-10-301(1)(a), (b) or (c).

**RELATIONSHIP BETWEEN MARK PAYTON AND RANDALL KNOWLES
REGARDING SUITABILITY AND AUTHORIZATION**

Mark Payton (hereafter, Payton) met with prospective new clients to try to sell annuities issued by a life insurance company that he represented. Trans. at 271:22-25; 272:1-2. Payton and Knowles, then a registered securities salesperson, had an arrangement whereby Payton carried securities transaction forms provided by Knowles to be completed and signed if securities could be liquidated to purchase the annuity. Trans. at 272:11-14; 282:25-283:20. Then Knowles would use the forms to effectuate the securities transaction (liquidation) to fund the purchase of the annuity from Payton. Trans. at 286:11-287:5; 375:11-378:10; 383:2-6.

In the present case, Payton met with Emily Downey, Grace Simmons, and Doris Haaland at each of their homes to attempt to sell annuities. Trans. at 280:10-18; 285:23-286:2; 288:5-25. After Ms. Downey, Ms. Simmons, and Ms. Haaland expressed an interest in the annuities that

Payton was selling, he asked how the annuity purchases would be funded. Trans. at 281:1-10. All three had securities investments and were considering liquidating the securities to purchase the annuities. Trans. at 281:23-24; 289:1-4. Payton then collected financial and securities investment information and obtained their signatures on securities transaction forms provided by Knowles. Trans. at 274:25-275:7; 284:17-285:22; 289:21-290:17. Subsequently, Knowles used the information and signed forms to engage in securities transactions for Ms. Downey and Ms. Simmons. Trans. at 286:11-287:5; 375:11-378:10; 383:2-6.

The Commissioner believes, and the parties agreed in the oral argument regarding exceptions, that the extent to which a registered salesperson may use an emissary is a legal question. Therefore, the Commissioner's review of this issue is *de novo*.

Payton acted as an emissary of Knowles when he met with potential new clients, gathered financial information and securities investment information and obtained their signatures on securities transaction documents including the Confidential Personal Financial Planning form, the Change of Investment objectives form, the Account Transfer form, and the Durable Power of Attorney form. Exhibits A, B, C, F, G, I, J, K, L, P, 3, 4 and 5. The Commissioner finds that these are not ministerial, administrative tasks. The financial and securities investment information gathered and the securities transaction forms completed and signed during Payton's meetings with new clients are the crux of a securities transaction. Additionally, the

Commissioner finds that these securities transactions were solicited by Payton as an emissary of Knowles and that a suitability analysis was required.⁶

A suitability analysis, in which a registered salesperson makes a reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other relevant information, is required before effectuating a securities transaction. See Rule 6.10.126(2)(f), Mont. Admin. R. (suitability analysis). Once the new client indicated a desire to make a securities transaction, a suitability analysis should have been made. After the client had already signed the account transfer form, Change of Investment objectives forms, and a Durable Power of Attorney to effectuate the securities transaction, it was too late to conduct a suitability analysis because the decision had already been made and the documents to effectuate the securities transaction had already been completed.

As a registered salesperson, Knowles should have completed the Confidential Personal Financial Planning form with the prospective new clients and should have completed a suitability analysis prior to the new client signing the account transfer form, Change of Investment objectives form, and Durable Power of Attorney. Although both Knowles and Payton assert that Payton talked with Knowles by phone when Payton collected a new client's financial and securities information and obtained his/her signature on securities transaction forms (Trans. at 282:25-283:8; 286:21-287:3; 289:12-16; 301:20-302:16.), the Commissioner finds this to be inadequate and not a substitute for a suitability analysis.

⁶ The Commissioner is reserving the issue of whether a suitability analysis is required in unsolicited securities transactions or just certain unsolicited securities transactions depending on the sophistication of the client.

Knowles asserts he completed a suitability analysis after he received the new client's financial and securities information and the signed securities transaction documents from Payton. Trans. at 355:2-4; 355:24-356:1; 359:2-4; 362:5-7; 366:18-21; 368:22-369:3; 379:6-8. The Department asserts that, based on the unsuitable securities transactions effectuated by Knowles for Ms. Downey and Ms. Simmons, it is implausible that Knowles performed a suitability analysis. See Department's Exceptions and Objections. Aside from the issues of whether or not Knowles performed a suitability analysis after receiving the new client information and documents from Payton and whether or not such a suitability analysis was performed competently, the Commissioner believes that such a suitability analysis would ultimately be untimely. As explained previously, the suitability analysis should have occurred prior to the new client signing the securities account transfer form, Change of Investment objectives form, and the Durable Power of Attorney.

Additionally, authorization of the client is required prior to executing a securities transaction on behalf of that client. See Rules 6.10.126(1)(d) and 2(f), Mont. Admin. R. The Commissioner finds that authorization to engage in securities transactions on behalf of a client must be obtained by a registered salesperson; it cannot be obtained by an unlicensed person any more than an unlicensed person can engage in a securities transaction on behalf of that client.

In the present case, Payton, as an unlicensed, unregistered emissary of Knowles, could not obtain authorization from Ms. Downey and Ms. Simmons to engage in securities transactions. However, the Hearing Examiner found that Knowles spoke with Ms. Downey and Ms. Simmons prior to transacting securities on their behalf to "confirm" their consent. See Hearing Examiner's

proposed decision, p. 3 and p. 5. Therefore, the Commissioner will defer to the Hearing Examiner's determination that Knowles spoke with Ms. Downey and Ms. Simmons and obtained their authorization.

In summary, the Commissioner finds that the extent of Payton's actions as an emissary of Knowles was improper and in violation of Montana law. Knowles facilitated Payton's attempts to effectuate securities transactions as an unregistered salesperson. § 30-10-103(20), Mont. Code Ann. (salesperson definition); § 30-10-201, Mont. Code Ann. (registration requirement). Additionally, the Commissioner finds that Knowles did not complete a timely suitability analysis. See Rule 6.10.126(2)(f), Mont. Admin. R.

STANDARD OF REVIEW

In reviewing the Hearing Examiner's proposed decision, the Commissioner is guided by the Montana Administrative Procedure Act (MAPA) regarding contested cases. § 2-4-621, Mont. Code Ann. Section 2-4-621(3), Mont. Code Ann., of MAPA provides:

The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

As noted in Ulrich v. Board of Funeral Service (1998), 289 Mont. 407, 412, 961 P.2d 126, 129:

“When conducting a review of the Board's decision, we note that the Board, which did not personally hear or observe the evidence, does not have the authority to conduct a *de novo* review of the hearing examiner's decision. Rather, it may

reject the examiner's findings only if they are not based upon competent, substantial evidence. Additionally, the Board must state with particularity that the findings are not based upon competent, substantial evidence. . ." [omitting partial quote of § 2-4-621, Mont. Code Ann.]

"A rejection of the hearing examiner's findings in violation of § 2-4-621(3) Mont. Code Ann., constitutes an abuse of discretion pursuant to § 2-4-704(2)(a)(vi). [omitting citation]"

In interpreting MAPA, however, the Montana Supreme Court has held that a hearing examiner's findings of fact may be modified or rejected in other circumstances. See In the Matter of the Grievance of Brady (1998), 295 Mont. 75, 983 P.2d 292. The Commissioner may determine that certain of the Hearing Examiner's findings of fact have no substantive value in determining the legal issues in this matter and therefore may reject those findings as immaterial. See Brady, 295 Mont. at 79-80, 983 P.2d at 295. Additionally, the Commissioner may determine that certain of the Hearing Examiner's findings of fact are based on an interpretation of law and therefore such findings of fact may be rejected or modified like conclusions of law by the Commissioner. See Brady, 295 Mont. at 79-80, 983 P.2d at 295.

With regard to the Hearing Examiner's conclusions of law interpreting and applying the Securities Act of Montana, §§ 30-10-101, Mont. Code Ann., *et seq.*, and rules promulgated thereunder, the Commissioner may determine that the Hearing Examiner misinterpreted the law and may modify or reject the Hearing Examiner's proposed Conclusions of Law. See Brady, 295 Mont. at 83, 983 P.2d at 297; Steer, Inc. v. Department of Revenue (1990), 245 Mont. 470, 474, 803 P.2d 601, 603. Further, the Commissioner may accept or reduce the recommended penalty in the Hearing Examiner's proposed decision but may not increase it without a review of the complete record. § 2-4-621(3), Mont. Code Ann.

After due consideration of the complete record, including the testimony offered at the March 21-23, 2005, and April 29, 2005 hearing and the documentary evidence, the Commissioner hereby issues the following:

FINDINGS OF FACT

1. Respondent Knowles was a registered investment advisor representative with the State of Montana; said registration terminated on or about December 31, 2003.

2. Knowles was a registered securities salesperson with the State of Montana; said registration terminated on or about June 7, 2004, due to Knowles being terminated from employment with FSC Securities Corporation (FSC) and thereby losing his broker-dealer firm's authority to act.⁷

3. On or about August 24, 2004, Knowles submitted an application for registration as a securities salesperson with Signal Securities, Inc., to the Montana Securities Department (the Department).

4. The Department rejected said application and issued a Temporary Cease and Desist Order and Order Denying Application (Orders) on August 30, 2004, barring Knowles from operating in the securities industry in Montana. Knowles has been barred from acting as a securities salesperson since his employment with FSC terminated and since the issuance of those Orders.⁸

⁷The Commissioner added the name of Knowles's former employer, FSC Securities Corporation, to the Hearing Examiner's proposed Finding of Fact #2.

⁸The Commissioner modified the Hearing Examiner's proposed Finding of Fact #4 for clarity. As explained previously, the Temporary Cease and Desist Order expired automatically

DORIS HAALAND

5. Doris Haaland sent in a card requesting information about annuities and was later contacted by Mark Payton regarding the same. Haaland Dep. at 6:8-9. Ms. Haaland purchased an annuity product from Mark Payton and used her D.A. Davidson money market account (via a direct transfer) to fund this purchase. Trans. at 339:13-15; 341:8-10; 342:5-8; 411:19; 412:15.

6. Ms. Haaland selected the funds used for the annuity purchase on her own and was happy with the annuity product she received. Haaland Dep. at 36-37.

7. Knowles did not sell any securities on behalf of Ms. Haaland. Trans. at 339:13-15; 341-342.

EMILY DOWNEY

8. Emily Downey sent in a card requesting information about annuities and was later contacted by Mark Payton regarding the same. Trans. at 279-280. Ms. Downey met with Mark Payton and indicated she wanted to sell a security and buy an annuity. Trans. at 281-282. Ms. Downey purchased an annuity from Mark Payton. Trans. at 136; 149; 288.

9. Ms. Downey desired to fund this purchase through the sale of securities held in her D.A. Davidson and Wells Fargo accounts and directed that liquidation occur. Trans. at 149:14-24; 289:1-4.

10. Once it was determined Ms. Downey wished to fund her annuity purchase with securities, Ms. Downey (with the assistance of Mark Payton) executed various account transfer

but the Order Denying Application remained in effect. Also, without being registered as a securities salesperson representing a specific broker-dealer, Knowles was prohibited from acting as securities salesperson. §§ 30-10-103(20) and 30-10-201(10), Mont. Code Ann.

documents, to be finalized by Knowles, allowing her accounts to be transferred to a securities account with Knowles so he could liquidate the accounts to pay for the annuity product. Exhibits B, C, D, and P.

11. In conjunction with her execution of the account transfer documents, Mark Payton gathered financial information from Ms. Downey, including account statements and information on her net worth, income, and investment objectives (collectively as the Downey Documents).

12. Knowles spoke with Ms. Downey prior to executing any sales in her account to obtain her consent for the sales and further recommended to Ms. Downey that she retain two investments, and liquidate the remainder if she wanted.⁹ Trans. at 383:9-17; 390:7-9.

13. Knowles received and reviewed the Downey Documents (such as her D.A. Davidson statements, and a personal financial statement) prior to completing any sales transactions on her

⁹Although not identified by number, the Department appears to take exception to the Hearing Examiner's proposed Finding of Fact #12. See Department's Exceptions and Objections. Upon reviewing the complete record, the Commissioner finds that there is competent substantial evidence to support the Hearing Examiner's proposed factual determinations.

However, the Commissioner finds that the Hearing Examiner included a conclusion of law regarding Ms. Downey's consent/authorization to the securities transactions in her proposed Finding of Fact #12. A finding of fact that includes a legal interpretation or is based on a legal interpretation may be rejected or modified like a conclusion of law by the Commissioner. See Brady, 295 Mont. at 79-80, 983 P.2d at 295. As explained previously, Payton, as an unregistered individual, could not obtain Ms. Downey's authorization and therefore Knowles could not "confirm" it. See foregoing discussion concerning authorization in the section regarding the Relationship Between Mark Payton and Randall Knowles Regarding Suitability and Authorization. Knowles, as a registered securities salesperson, could obtain Ms. Downey's authorization. Accordingly, the Commissioner modified this Finding of Fact to clarify that Knowles obtained the authorization.

behalf. Knowles further indicated he spoke with Ms. Downey regarding the same and recalled she wanted to protect her capital and was adamant about liquidating.¹⁰ Trans. at 375-391.

14. Knowles followed Ms. Downey's wishes to liquidate some of her securities.¹¹ Trans. at 386:11-14; 391:1, 20.

15. Ms. Downey did not claim to have suffered any loss as a result of her dealings with Knowles, and the Department has not alleged financial losses on her behalf. Trans. at 111-112.

GRACE SIMMONS

¹⁰Although not identified by number, the Department appears to take exception to the Hearing Examiner's proposed Findings of Fact #13 and #14. See Department's Exceptions and Objections. The Commissioner finds that proposed Finding of Fact #13 is based on an interpretation of law regarding whether a suitability analysis was required. See the foregoing discussion concerning suitability in the section regarding the Relationship Between Mark Payton and Randall Knowles Regarding Suitability and Authorization. A finding of fact that includes a legal interpretation or is based on a legal interpretation may be rejected or modified like a conclusion of law by the Commissioner. See Brady, 295 Mont. at 79-80, 983 P.2d at 295. Therefore, the Commissioner has removed the Hearing Examiner's proposed Finding of Fact #13 and renumbered the remaining Findings of Fact.

With regard to the Hearing Examiner's proposed Finding of Fact #14, renumbered here as Finding of Fact # 13, the Commissioner finds that, upon reviewing the complete record, there is competent substantial evidence to support it.

¹¹Although not identified by number, the Department appears to take exception to the Hearing Examiner's proposed Finding of Fact #15, renumbered here as Finding of Fact #14. See Department's Exceptions and Objections. The Commissioner finds that this proposed Finding of Fact is based on an interpretation of law regarding whether a suitability analysis was required. See the foregoing discussion concerning suitability in the section regarding the Relationship Between Mark Payton and Randall Knowles Regarding Suitability and Authorization. A finding of fact that includes a legal interpretation or is based on a legal interpretation may be rejected or modified like a conclusion of law by the Commissioner. See Brady, 295 Mont. at 79-80, 983 P.2d at 295. Accordingly, the Commissioner modified Finding of Fact #14 to remove the interpretation of law but retained the fact determination which, upon review of the complete record, is based on competent, substantial evidence.

16. Grace Simmons sent in a card requesting information about annuities and was later contacted by Mark Payton regarding the same. Trans. at 279-280. Ms. Simmons purchased an annuity product from Mark Payton. Trans. at 208:2-15; 286:5-10.

17. Ms. Simmons desired to fund this purchase through the sale of securities held in her various securities accounts due to her dissatisfaction with the market and in an effort to consolidate her investments for ease of administration, and directed that this occur. Trans. at 286:3-20; 342:15-20.

18. Once it was determined Ms. Simmons wished to fund the annuity purchase with securities, Ms. Simmons (with the assistance of Mark Payton) executed various account transfer documents, to be finalized by Knowles, allowing her accounts to be transferred to a securities account with Knowles so that Knowles could liquidate the same to pay for the annuity product. Trans. at 286-287; Exhibits 4, I, and J.

19. In conjunction with her execution of the account transfer documents, Mark Payton gathered financial information from Ms. Simmons, including account statements and information on her net worth, income, and investment objectives (collectively as the Simmons Documents). Trans. at 287-288.

20. Knowles spoke with Ms. Simmons prior to executing sales in her account to obtain her consent for the sales and further recommended against liquidating all her accounts based upon his analysis.¹² Trans. at 360-362.

¹²Although not identified by number, the Department appears to take exception to the Hearing Examiner's proposed Finding of Fact #21, renumbered here as Finding of Fact #20. See Department's Exceptions and Objections. Upon reviewing the complete record, the

21. Knowles received and reviewed the Simmons Documents prior to completing any sales transactions on her behalf. Knowles further indicated he spoke with Ms. Simmons regarding the same.¹³ Trans. at 361:4-7; 368-372.

Commissioner finds that there is competent substantial evidence to support the Hearing Examiner's proposed factual determinations.

However, the Commissioner finds that the Hearing Examiner included a conclusion of law regarding Ms. Simmons's consent/authorization to the securities transactions in her proposed Finding of Fact #21. A finding of fact that includes a legal interpretation or is based on a legal interpretation may be rejected or modified like a conclusion of law by the Commissioner. *See Brady*, 295 Mont. at 79-80, 983 P.2d at 295. As explained previously, Payton, as an unregistered individual, could not obtain Ms. Simmons's authorization and therefore Knowles could not "confirm" it. *See* foregoing discussion concerning authorization in the section regarding the Relationship Between Mark Payton and Randall Knowles Regarding Suitability and Authorization. Knowles, as a registered securities salesperson, could obtain Ms. Simmons's authorization. Accordingly, the Commissioner modified this Finding of Fact to clarify that Knowles obtained the authorization.

The Department also appears to take exception to the Hearing Examiner's proposed Finding of Fact #22. *See* Department's Exceptions and Objections. The Commissioner finds that this proposed Finding of Fact is based on an interpretation of law regarding whether a suitability analysis was required. *See* the foregoing discussion concerning suitability in the section regarding the Relationship Between Mark Payton and Randall Knowles Regarding Suitability and Authorization. A finding of fact that includes a legal interpretation or is based on a legal interpretation may be rejected or modified like a conclusion of law by the Commissioner. *See Brady*, 295 Mont. at 79-80, 983 P.2d at 295. Therefore, the Commissioner has removed the Hearing Examiner's proposed Finding of Fact #22 as being a conclusion of law and renumbered the remaining Findings of Fact.

¹³Although not identified by number, the Department appeared to take exception to the Hearing Examiner's proposed Finding of Fact #23, renumbered here as Finding of Fact #21. *See* Department's Exceptions and Objections. Upon reviewing the complete record, the Commissioner finds that there is competent substantial evidence to support Finding of Fact #21.

22. Knowles followed Ms. Simmons's wishes to liquidate some of her securities.¹⁴

Trans. at 361:11-14.

23. Ms. Simmons did not claim to have suffered any loss as a result of her dealings with Knowles, and the Department has not alleged financial losses on her behalf. Trans. at 111-112.

24. In relation to Ms. Simmons, her testimony was at times in conflict with that of Knowles and Mark Payton. More weight is afforded to Knowles and Mark Payton, however, because Ms. Simmons appeared confused and forgetful during her testimony.¹⁵ Trans. at 202-205; 207:23-209:6.

MARK PAYTON

25. Prior to the current action, the Department, together with the Montana Insurance Department, brought multiple claims against Mark Payton alleging various violations of both the

¹⁴Although not identified by number, the Department appears to take exception to the Hearing Examiner's proposed Finding of Fact #24, renumbered here as Finding of Fact #22. See Department's Exceptions and Objections. The Commissioner finds that this proposed Finding of Fact is based on an interpretation of law regarding whether a suitability analysis was required. See the foregoing discussion concerning suitability in the section regarding the Relationship Between Mark Payton and Randall Knowles Regarding Suitability and Authorization. A finding of fact that includes a legal interpretation or is based on a legal interpretation may be rejected or modified like a conclusion of law by the Commissioner. See *Brady*, 295 Mont. at 79-80, 983 P.2d at 295. Accordingly, the Commissioner modified Finding of Fact #22 to remove the interpretation of law but retain the fact determination which, upon review of the complete record, is based on competent, substantial evidence.

¹⁵Although not identified by number, the Department appears to take exception to the Hearing Examiner's proposed Finding of Fact #26, renumbered here as Finding of Fact #24. See Department's Exceptions and Objections. Upon a review of the complete record, the Commissioner concurs with the Hearing Examiner's determination that Ms. Simmons was confused and forgetful during her testimony and that more weight should be afforded to the testimony of Payton and Knowles.

Montana Insurance Code and the Securities Act of Montana. *See Payton Consent Agreement, Case No. 9-20-02-103-I and 2002-303-SEC* (September 20, 2004).

26. Mr. Payton settled that matter without admitting to any of the allegations, including those related to the Securities Act of Montana. *See Payton Consent Agreement, Case No. 9-20-02-103-I and 2002-303-SEC* (September 20, 2004).

27. The Department did not point to any actual violations of the Securities Act of Montana by Mr. Payton, and Mr. Payton is not a party to the current proceeding. Trans. at 110-111.

28. Mr. Payton, who did not possess a securities license, collected financial information from Grace Simmons and Emily Downey. Once those individuals expressed a desire to liquidate a security to purchase an annuity product, Mr. Payton had them execute securities account transfer documents and change of investment objective forms which were to be completed by Knowles. Additionally, Mr. Payton had Ms. Downey execute a Life Insurance & Annuity Power of Attorney, naming Knowles as the attorney in fact, and witnessed the same. The forms used by

Mr. Payton were provided to him by Knowles.¹⁶ Trans. at 267; 282-285; 287-291; Exhibits 3, 4, 5, A, B, K, L, M, N, Q, and R.

29. Materials and information collected by Mr. Payton were sent directly to Knowles for his review. Trans. at 290:9-14; 287-288.

KAYE JOHNSON

30. Kaye and Lynn Johnson had been long time clients of Knowles's prior to October, 2004. Trans. at 178:2-7.

31. Lynn Johnson contacted Knowles to set up a meeting to discuss the Johnsons' portfolio. The meeting took place on or about October 30, 2004. Trans. at 314-316.

32. The Johnsons also wanted to meet with Knowles to give him an IRA contribution and have him take care of a pre-existing issue related to the Johnson's IRA accounts. Trans. at 185-186.

¹⁶Although not identified by number, the Department appears to take exception to the Hearing Examiner's proposed Finding of Fact #30, renumbered here as Finding of Fact #28. See Department's Exceptions and Objections. The Commissioner finds that this Hearing Examiner's proposed Finding of Fact includes an interpretation of law, specifically that Payton performed an "administrative function." Collecting financial information from new clients and obtaining their signatures on securities transaction forms is the crux of a securities transaction and therefore proper registration is required. See the foregoing discussion concerning the Relationship Between Mark Payton and Randall Knowles Regarding Suitability and Authorization. An interpretation of law may be rejected or modified like a conclusion of law by the Commissioner. See Brady, 295 Mont. at 79-80, 983 P.2d at 295. Accordingly, the Commissioner modified this Finding of Fact to remove the improper legal conclusion.

Upon review of the complete record, the Commissioner finds that the factual determinations in this proposed Finding of Fact are supported by competent substantial evidence. Based on his review of the complete record, however, the Commissioner further modified Finding of Fact #28 to include additional factual information regarding the securities transaction forms signed.

33. During Knowles's meeting with the Johnsons, they discussed the Franklin AGE High Income Fund, and Knowles suggested the same would be one place the Johnsons could put their money.¹⁷ Trans. at 180-81.

34. During the meeting, the Johnsons inquired why Eric Rolshoven, an FSC manager, was now appearing on their FSC account statements instead of Knowles, to which Knowles stated Mr. Rolshoven "had always been his supervisor."¹⁸ Trans. at 182-183.

¹⁷Knowles filed an exception to the Hearing Examiner's proposed Finding of Fact #35, renumbered here as Finding of Fact #33, alleging that it is incomplete, because the Johnsons allegedly already held an investment in the Franklin fund, and therefore it is misleading. After reviewing the complete record, the Commissioner finds that Finding of Fact #33 is based on competent substantial evidence and is not incomplete or misleading. Kaye Johnson testified that she did not know if they already had an investment in the Franklin fund. Trans. at 195:14-19. Additionally, whether the Johnsons already had an investment in the Franklin fund and would be buying additional shares or making an initial investment (in the Franklin fund) with the IRA check is immaterial to the legal conclusion that Knowles acted as an unregistered securities salesperson in attempting to effectuate a securities transaction on behalf of the Johnsons. Accordingly, the Commissioner adopts the Hearing Examiner's proposed Finding of Fact #35, renumbered here as Finding of Fact #33.

¹⁸Knowles filed an exception to the Hearing Examiner's proposed Findings of Fact #36 and #37, renumbered here as Findings of Fact #34 and #35, alleging that these are incomplete and therefore misleading. After reviewing the complete record, the Commissioner finds that Findings of Fact #34 and #35 are based on competent substantial evidence. The Hearing Examiner, who was able to observe the witnesses, found Kaye Johnson's testimony to be more credible than Knowles's testimony with regard to these aspects of their meeting. The Commissioner will defer to the Hearing Examiner's determination with regard to the credibility of the witnesses on these points. Additionally, the Commissioner concurs with the Hearing Examiner's proposed Special Findings and Comments that Knowles had an obligation to inform the Johnsons that he was no longer employed by FSC, was not a registered securities salesperson and could not effectuate or attempt to effectuate any securities transactions on their behalf, and that they should conduct their securities business through Eric Rolshoven at FSC. *See gen. SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. at 186-87 (the federal Securities Act of 1933 and other Acts designed to eliminate abuses in the securities industry have a common purpose "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry. . . [i]t requires but little appreciation .

35. Knowles did not tell the Johnsons he was under a Cease and Desist Order, or that he was not licensed to conduct securities business (because he was no longer affiliated with FSC). Knowles indicated he was going to change companies and was looking for another company so he could do trusts.¹⁹ Trans. at 180-183; 190.

36. Knowles did not tell the Johnsons he was no longer employed by FSC and Mrs. Johnson was not aware he needed such employment to maintain his securities license. Trans. at 191.

37. At the close of the October 30, 2004 meeting, Mrs. Johnson asked Knowles to take her IRA contribution check and to fix the on-going "coding" problem with that account. Trans.

... of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail in every facet of the securities industry." (citations omitted)). The Hearing Examiner determined that Knowles failed to do this and instead lead the Johnsons to believe and assume that his position and authority to act on their behalf had not changed.

Knowles's assertion that his November 8, 2004 letter to the Johnsons, Exhibit E, is "objective and substantial evidence" that Kaye Johnson knew or should have known that Knowles was no longer employed by FSC Securities and could not effectuate securities transactions on their behalf is unpersuasive. The letter was written after the October 30, 2004 meeting and does not mention this meeting, does not affirmatively state that Knowles is no longer employed by FSC Securities, and does not state that – without being employed by a broker-dealer – Knowles is no longer a registered securities salesperson and cannot effectuate any securities transactions on their behalf. Exhibit E. Additionally, Kaye Johnson testified she did not understand that Knowles needed to be employed by a broker-dealer firm to maintain his registration and she thought that Knowles would invest their check for them "like he always has." Trans. at 191-192. The Commissioner finds that Knowles's November 8, 2004 letter further supports the Hearing Examiner's proposed Special Findings and Comments above.

Accordingly, the Commissioner adopts the Hearing Examiner's proposed Findings of Fact #36 and #37, renumbered here as Findings of Fact #34 and #35.

¹⁹See previous footnote.

at 319-320. Mrs. Johnson testified she assumed Knowles was going to invest the check for them “like he always has.” Trans. at 192.

38. On November 3, 2004, Knowles subsequently forwarded Mrs. Johnson’s IRA check to Eric Rolshoven, along with a letter which stated the enclosed check was to be applied to Mrs. Johnson’s account. Exhibit 6.

39. The letter further stated “[w]e discussed purchasing \$7,000 of Franklin AGE high income B shares.” Exhibit 6. The letter to Mr. Rolshoven was insufficient for him to effect a sale of the Franklin shares.²⁰ Trans. at 250:6-18.

²⁰Knowles filed an exception to the Hearing Examiner’s proposed Finding of Fact #41, renumbered here as Finding of Fact #39, alleging that it is incomplete, misleading, and also improperly includes a conclusion of law. The Commissioner concurs that the Hearing Examiner improperly inserted a conclusion of law by including her determination that Knowles’s letter and forwarding the Johnsons’ check “constitute an attempt to effectuate a securities transaction.” Findings of Fact which include an interpretation of law may be rejected or modified by the Commissioner like a conclusion of law. See Brady, 295 Mont. at 79-80, 983 P.2d at 295. The Commissioner modified this Finding of Fact to remove the interpretation of law. But see Conclusion of Law #14.

Knowles’s assertion that the letter was intentionally drafted to prompt Mr. Rolshoven to call the Johnsons before transacting any securities and therefore is not an attempt to effectuate a securities transaction is unpersuasive. Mr. Rolshoven did testify that Knowles’s letter was not authorization. Trans. at 250:6-18. As discussed previously, however, authorization to engage in securities transactions cannot be obtained by an unregistered third-party. Mr. Rolshoven, as a registered salesperson, could not obtain the Johnsons’ authorization to engage in securities transactions on their behalf through a letter from Knowles, an unregistered salesperson. See the foregoing discussion concerning the Relationship Between Mark Payton and Randall Knowles Regarding Suitability and Authorization. Regardless of the contents of Knowles’s letter, Mr. Rolshoven would have to contact the Johnsons to obtain authorization to engage in securities transactions on their behalf.

Upon review of the complete record, the Commissioner finds that the factual determinations in this proposed Finding of Fact are supported by competent substantial evidence. Based on his review, however, the Commissioner further modified Finding of Fact #39 to clarify that the letter was insufficient, without stating that the insufficiency was lack of authorization, for Mr. Rolshoven to effect a sale of the Franklin shares on behalf of the Johnsons.

40. Mrs. Johnson trusted and relied upon Knowles (based upon their prior years of working together), and was deceived by him through his omissions related to his employment, securities registration, and the type of business he was lawfully able to transact on her behalf.²¹

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commissioner hereby makes the following Conclusions of Law:²²

1. The Securities Act of Montana, §§ 30-10-101, Mont. Code Ann., *et seq.*, shall be construed to protect investors, persons engaged in securities transactions, and the public interest. § 30-10-102, Mont. Code Ann.

2. The Montana State Auditor is the Securities Commissioner (Commissioner). § 30-10-107, Mont. Code Ann.

Knowles also filed an exception to the Hearing Examiner's proposed Finding of Fact #42 alleging that it is more properly a conclusion of law. The Commissioner concurs that this proposed Finding of Fact is an interpretation of law and therefore may be rejected or modified like a conclusion of law. See Brady, 295 Mont. at 79-80, 983 P.2d at 295. Accordingly, the Commissioner removed the Hearing Examiner's proposed Finding of Fact #42. But see Conclusion of Law #12.

²¹Knowles filed an exception to the Hearing Examiner's proposed Finding of Fact #43, renumbered here as Finding of Fact #40, alleging that it is more properly a conclusion of law. The Commissioner disagrees and finds that, after reviewing the complete record, there is competent substantial evidence to support the Hearing Examiner's finding that Mrs. Johnson was deceived by Knowles's omissions. See Findings of Fact #30 through #37. However, the Commissioner did not find evidence that Mrs. Johnson was damaged financially and has modified Finding of Fact #40 accordingly. The Commissioner adopts Finding of Fact #40.

²²The Commissioner has modified the Conclusions of Law section to affirmatively state the violations. Therefore, any of the Hearing Examiner's proposed Conclusions of Law that did not support the violations have been removed.

3. The administration of the Securities Act of Montana is under the supervision and control of the Commissioner. § 30-10-107, Mont. Code Ann.²³

4. Pursuant to § 30-10-103(20), Mont. Code Ann., a salesperson is an individual who represents a broker-dealer in effecting or attempting to effect sales of securities.²⁴

5. It is unlawful to act as a salesperson without being registered as such with the Department. § 30-10-201(1), Mont. Code Ann.²⁵

6. Pursuant to § 30-10-201(13)(g), Mont. Code Ann., a salesperson may not engage in dishonest or unethical practices in conducting securities business. Additionally, the Commissioner may deny, suspend, or revoke the registration of any salesperson found to have engaged in dishonest or unethical practices. § 30-10-201(13)(g), Mont. Code Ann.²⁶

7. Pursuant to Rule 6.10.126(2)(f), Mont. Admin. R., it is unethical for a salesperson to recommend to the client the purchase, sale or exchange of a security without conducting a suitability analysis – specifically, without grounds to believe that the transaction or recommendation is suitable for the client based upon a reasonable inquiry concerning the client's

²³Although not identified by number, the Department appears to take exception to the Hearing Examiner's proposed Conclusions of Law #4 and #5. See the Department's Exceptions and Objections. See the Commissioner's Conclusions of Law #10 and #11.

²⁴The Commissioner added Conclusions of Law #4, #5, #6, #7, and #8 to clarify the requirements of the Securities Act of Montana, §§ 30-10-101, Mont. Code Ann., *et seq.*, and to support subsequent Conclusions of Law listing violations.

²⁵See Footnote #24.

²⁶See Footnote #24. *See gen. SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. at 186-87 (full disclosure is necessary in the securities industry; it is essential that the highest ethical standards prevail in every facet of the securities industry).

investment objectives, financial situation and needs, and any other relevant information known by the salesperson.²⁷

8. Pursuant to § 30-10-301(1), Mont. Code Ann., regarding fraudulent and prohibited practices:

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

- (a) employ any device, scheme, or artifice to defraud;
- (b) make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
- (c) engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.²⁸

9. Payton acted as an emissary of Knowles when he (Payton) met with Ms. Downey, Ms. Simmons, and Ms. Haaland, gathered financial information and securities investment information from them, obtained Ms. Downey's and Ms. Simmons's signatures on securities transaction documents, and provided the information and signed documents to Knowles to effectuate the securities transactions. Payton solicited these securities transactions on behalf of Knowles and therefore Knowles should have performed a suitability analysis before Ms. Downey and Ms. Simmons signed the securities transaction documents. After the documents were signed, it was too late to conduct a suitability analysis because the decision had already been made and the documents to effectuate the securities transaction had already been completed. By failing to

²⁷See Footnote #24.

²⁸See Footnote #24.

conduct a timely suitability analysis, Knowles violated § 30-10-201(13)(g), Mont. Code Ann., and Rule 6.10.126(2)(f), Mont. Admin. R.²⁹

10. By failing to advise Ms. Downey and Ms. Simmons that he was required by Montana law to complete a suitability analysis (make a reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other relevant information) before they signed the securities transaction forms, Knowles omitted a material fact in violation of § 30-10-301(1)(b), Mont. Code Ann.³⁰

11. By failing to perform a suitability analysis before the securities transaction documents were signed by Ms. Downey and Ms. Simmons and by failing to advise them that he was required by Montana law to complete a suitability analysis before they signed the securities

²⁹Although not identified by number, the Department appears to take exception to the Hearing Examiner's proposed Conclusions of Law #6, renumbered here as Conclusion of Law #9. See the Department's Exceptions and Objections. The Commissioner finds that the Hearing Examiner misinterpreted and misapplied the law to the established facts. See previous discussion concerning the Relationship Between Mark Payton and Randall Knowles Regarding Suitability and Authorization. Accordingly, the Commissioner rejects the proposed Conclusion of Law and instead concludes that Knowles violated this statute and rule in his course of conduct with Ms. Downey and Ms. Simmons.

³⁰Although not identified by number, the Department appears to take exception to the Hearing Examiner's proposed Conclusion of Law #4, renumbered here as Conclusion of Law #10. See the Department's Exceptions and Objections. The Commissioner finds that the Hearing Examiner misinterpreted and misapplied the statute to the established facts. See previous discussion concerning the Relationship Between Mark Payton and Randall Knowles Regarding Suitability and Authorization. Accordingly, the Commissioner rejects the proposed Conclusion of Law and instead concludes that Knowles violated § 30-10-301(1)(b) in his course of conduct with Ms. Downey and Ms. Simmons.

transaction documents, Knowles engaged in a course of conduct and practice that operated as a fraud and/or deceit in violation of § 30-10-301(1)(c), Mont. Code Ann.³¹

12. Knowles's omissions of fact before, during, and after the October 30, 2004 Johnson meeting, regarding his employment (no longer employed by FSC), salesperson registration (no longer registered), and the type of business he was lawfully able to transact on her behalf (no longer able to transact securities business on her behalf), were material and constitute a scheme and/or artifice to defraud. § 30-10-301(1), Mont. Code Ann.³²

13. By his knowing and willing failure to tell the Johnsons that he was no longer employed by FSC, was no longer a registered salesperson, and could not attempt to effectuate or effectuate securities transactions on their behalf, all with the intent that the Johnsons would rely and act upon the same, Knowles violated § 30-10-301(1)(a), (b), and (c), Mont. Code Ann., in that he:

- (i) employed a scheme and/or artifice to defraud (in violation of subsection (1)(a));

³¹Although not identified by number, the Department appears to take exception to the Hearing Examiner's proposed Conclusion of Law #5, renumbered here as Conclusion of Law #11. See the Department's Exceptions and Objections. The Commissioner finds that the Hearing Examiner misinterpreted and misapplied the statute to the established facts. See previous discussion concerning the Relationship Between Mark Payton and Randall Knowles Regarding Suitability and Authorization. Accordingly, the Commissioner rejects the proposed Conclusion of Law and instead finds that Knowles violated § 30-10-301(1)(c) in his course of conduct with Ms. Downey, Ms. Simmons, and Ms. Haaland.

³²The Commissioner added this Conclusion of Law which is substantially similar the Hearing Examiner's proposed Finding of Fact #42. Also see Footnote #20. The Hearing Examiner's proposed Finding of Fact #42 was properly a conclusion of law and therefore should have been listed as a conclusion of law. Further, the Hearing Examiner correctly interpreted and properly applied the law to the established facts. Accordingly, the Commissioner adopts Conclusion of Law #12.

(ii) omitted to state material facts (in violation of subsection (1)(b)); and

(iii) engaged in a course of conduct and practice that operated as a fraud and/or deceit (in violation of subsection (1)(c)).³³

14. Knowles's November 3, 2004 letter to Mr. Rolshoven regarding discussing the purchase of Franklin fund shares with the Johnsons, the Johnsons' IRA check and instructions to apply the same to Mrs. Johnson's account, constitute an attempt to effectuate a securities transaction in violation of § 30-10-201(1), Mont. Code Ann. (acting as an unregistered salesperson).³⁴

³³Knowles filed an exception to the Hearing Examiner's proposed Conclusion of Law #9, renumbered here as Conclusion of Law #13. The Commissioner finds that the Hearing Examiner correctly interpreted and properly applied § 30-10-301(1), Mont. Code Ann., to the established facts. See the foregoing discussion concerning Statutory Fraud at Section 30-10-301(1), Mont. Code Ann., Does Not Require a Showing of Damage. Accordingly, the Commissioner adopts the Hearing Examiner's proposed Conclusion of Law but with some modifications for clarity.

³⁴The Commissioner added Conclusion of Law #14. Upon review of the complete record, the competent substantial evidence established at the hearing supports this determination that Knowles acted as an unregistered salesperson in violation of § 30-10-201(1), Mont. Code Ann., with regard to the November 3, 2004 letter to Mr. Rolshoven (the content of the letter and the enclosed check with instructions to apply the same to Mrs. Johnson's account). Additionally, the Hearing Examiner made the same determination but inappropriately listed it as proposed Finding of Fact #41.

The Department did allege that Knowles acted as an unregistered salesperson in violation of § 30-10-201, Mont. Code Ann. The Department made this allegation in regard to other letters and also in regard to Knowles's conduct when he attempted to effectuate the sale of the Franklin fund shares to Mrs. Johnson. See the Second Amended Notice of Proposed Agency Disciplinary Action and Opportunity for Hearing. With regard to the other letters, the Hearing Examiner determined in proposed Conclusion of Law #7 that these letters were not introduced into evidence and therefore Knowles did not commit any violations in regard to the same. (The Commissioner has modified the Conclusions of Law section to affirmatively state the violations and has removed the Hearing Examiner's proposed Conclusion of Law #7.)

The Commissioner finds that the issue of whether Knowles acted as an unregistered salesperson in his conduct with the Johnsons was properly before the Hearing Examiner. The

15. Knowles's course of conduct with the Johnsons demonstrates a willful failure to comply with parts 1 through 3 of the Securities Act of Montana in violation of § 30-10-201(13)(b), Mont. Code Ann.³⁵

ORDER

The Hearing Examiner's proposed Special Findings and Comments have been incorporated into this Order where applicable. Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered:

1. Pursuant to § 30-10-305, Mont. Code Ann., for his violations of § 30-10-201(13)(g), Mont. Code Ann., and Rule 6.10.126(2)(f), Mont. Admin. R., in regard to his conduct with Ms. Simmons and Ms. Downey, Knowles is fined \$2,500.³⁶

Department made the allegation in the Second Amended Notice of Proposed Agency Disciplinary Action and Opportunity for Hearing and Knowles testified regarding his conduct with regard to the Johnsons. See Rule 15(b), Mont. R. Civ. P. ("issues not raised in the pleadings may be tried by the express or implied consent of the parties"); *Armbrust v. York* (2003), 314 Mont. 260, 65 P.3d 239 (York impliedly consented to trial of an issue by testifying about it in his direct exam.). Accordingly, the Commissioner adopts this Conclusion of Law.

³⁵Knowles filed an exception to the Hearing Examiner's proposed Conclusion of Law #8, which the Commissioner has modified and renumbered here as Conclusion of Law #15. Although the Cease and Desist Order had automatically expired before Knowles met with the Johnsons, Knowles's course of conduct with the Johnsons demonstrates a willful failure to comply with parts 1 through 3 of the Securities Act of Montana, §§ 30-10-101, *et seq.*, Mont. Code Ann., in violation of § 30-10-201(13)(b), Mont. Code Ann. See Findings of Fact #1 through #4, #30 through #40, and Conclusions of Law #12, #13, and #14. The Department did allege that Knowles willfully violated the Securities Act of Montana when he attempted to effectuate securities sales to Mrs. Johnson. See the Second Amended Notice of Proposed Agency Disciplinary Action and Opportunity for Hearing. This issue was properly before the Hearing Examiner. Accordingly, the Commissioner adopts this Conclusion of Law.

³⁶Upon review of the complete record, the Commissioner found that Knowles violated § 30-10-201(13)(g), Mont. Code Ann., and Rule 6.10.126(2)(f), Mont. Admin. R., by failing to

2. Pursuant to § 30-10-305, Mont. Code Ann., for his violations of § 30-10-301(1)(b), Mont. Code Ann., in regard to his conduct with Ms. Simmons and Ms. Downey, Knowles is fined \$2,500.³⁷

3. Pursuant to § 30-10-305, Mont. Code Ann., for his violation of § 30-10-301(1)(a), Mont. Code Ann., in regard to his conduct with the Johnsons, Knowles is fined \$2,500.³⁸

conduct a timely suitability analysis in his course of conduct with Ms. Simmons and Ms. Downey. Accordingly, the Commissioner added this paragraph and imposed a fine for the violation. See § 2-4-621(3), Mont. Code Ann.

Although a maximum fine of \$5,000 per each violation of statute and rule is possible pursuant to § 30-10-305, Mont. Code Ann., the Commissioner believes that the total fine of \$20,000 imposed by the Hearing Examiner is sufficient and did not wish to increase the total fine levied on Knowles while correcting the Hearing Examiner's proposed decision. Therefore, the Commissioner reduced the fines proposed by the Hearing Examiner (from \$5,000 to \$2,500 for each violation), while imposing fines for the additional violations, in order to retain the total fine of \$20,000.

³⁷Upon review of the complete record, the Commissioner found that Knowles violated § 30-10-301(1)(b), Mont. Code Ann., by failing to advise Ms. Simmons and Ms. Downey that he was required by Montana law to conduct a suitability analysis before they signed the securities transaction forms. Accordingly, the Commissioner added this paragraph and imposed a fine for the violation. See § 2-4-621(3), Mont. Code Ann. Also see Footnote #36 regarding the Commissioner's determination of the fine amount.

³⁸Knowles asserted that no conclusion of law and no penalty should be made with regard to § 30-10-301(1)(a), Mont. Code Ann., because the Department did not allege such a violation. Rule 15(b), Mont. R. Civ. P., provides that, "issues not raised in the pleadings may be tried by the express or implied consent of the parties." In Armbrust v. York, the Montana Supreme Court found that, under Rule 15(b), Mont. R. Civ. P., York impliedly consented to trial of an issue by testifying about it in his direct exam. 314 Mont. 260, 65 P.3d 239. Additionally, the Court found that Rule 15(b) provides that a motion to amend the pleadings may be made at any time, even after judgment and an appeal, and that failure to so amend does not affect the trial of the issues. Armbrust, 314 Mont. at 266, 65 P.3d at 243 (citations omitted).

In the present case, Knowles testified about his conduct in regard to the Johnsons, including his knowledge that he was unregistered when he met with the Johnsons and subsequently forwarded their check to Mr. Rolshoven. Trans. at 314-329; 397-405. Additionally, the Hearing Examiner specifically found, and the Commissioner agrees, that

4. Pursuant to § 30-10-305, Mont. Code Ann., for his violation of § 30-10-301(1)(b), Mont. Code Ann., in regard to his conduct with the Johnsons, Knowles is fined \$2,500.³⁹

5. Pursuant to § 30-10-305, Mont. Code Ann., for his violation of § 30-10-301(1)(c), Mont. Code Ann., in regard to his conduct with the Johnsons, Knowles is fined \$2,500.⁴⁰

Knowles was obligated to be fully honest with the Johnsons and tell them (even at the time Mr. Johnson called him to set up a meeting) that he was no longer employed with FSC, that he was no longer licensed as a securities salesperson, and further that the Johnsons should conduct their investment/securities business through Mr. Rolshoven. *See gen. SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. at 186-87 (full disclosure is necessary in the securities industry; it is essential that the highest ethical standards prevail in every facet of the securities industry). See also Findings of Fact #30 through #40, Conclusions of Law #12 through #15, and Order # 9.

The Commissioner finds that the issue of whether Knowles violated § 30-10-301(1)(a), Mont. Code Ann., was properly before the Hearing Examiner. The Commissioner further finds that the Hearing Examiner correctly interpreted and applied the law to the established facts and appropriately imposed a fine of \$5,000 for the violation. See Hearing Examiner's proposed Order, paragraph #1. Although a maximum fine of \$5,000 per each violation of statute and rule is possible pursuant to § 30-10-305, Mont. Code Ann., the Commissioner believes that the total fine of \$20,000 imposed by the Hearing Examiner is sufficient and does not wish to increase the total fine levied on Knowles while correcting the Hearing Examiner's proposed decision. Therefore, the Commissioner reduced the fine for this violation from \$5,000 to \$2,500, while imposing fines for the additional violations, in order to retain the total fine of \$20,000.

³⁹The Commissioner finds that the Hearing Examiner correctly interpreted and applied the law to the established facts and appropriately imposed a fine of \$5,000 for the violation. See Hearing Examiner's proposed Order, paragraph #2. However, the Commissioner reduced the fine for this violation from \$5,000 to \$2,500, while imposing fines for the additional violations, in order to retain the total fine of \$20,000. See Footnote #38 regarding the Commissioner's determination of the fine amount.

⁴⁰Knowles asserted that no conclusion of law and no penalty should be made with regard to § 30-10-301(1)(c), Mont. Code Ann., because the Department did not allege such a violation. Rule 15(b), Mont. R. Civ. P., provides that, "issues not raised in the pleadings may be tried by the express or implied consent of the parties." In *Armbrust v. York*, the Montana Supreme Court found that, under Rule 15(b), Mont. R. Civ. P., York impliedly consented to trial of an issue by testifying about it in his direct exam. 314 Mont. 260, 65 P.3d 239. Additionally, the Court found that Rule 15(b) provides that a motion to amend the pleadings may be made at any time, even after judgment and an appeal, and that failure to so amend does not affect the trial of the issues.

6. Pursuant to § 30-10-305, Mont. Code Ann., Knowles is fined \$2,500 for acting as a salesperson while not properly licensed to do so in violation of § 30-10-201, Mont. Code Ann.⁴¹

7. Pursuant to § 30-10-305, Mont. Code Ann., for his willful failure to comply with the Securities Act of Montana in violation of § 30-10-201(13)(b), Mont. Code Ann., Knowles is fined \$5,000.⁴²

Armbrust, 314 Mont. at 266, 65 P.3d at 243 (citations omitted)

In the present case, Knowles testified about his conduct in regard to the Johnsons, including his knowledge that he was unregistered when he met with the Johnsons and subsequently forwarded their check to Mr. Rolshoven. Trans. at 314-329; 397-405. Additionally, the Hearing Examiner specifically found, and the Commissioner agrees, that Knowles was obligated to be fully honest with the Johnsons and tell them (even at the time Mr. Johnson called him to set up a meeting) that he was no longer employed with FSC, that he was no longer licensed as a securities salesperson, and further that the Johnsons should conduct their investment/securities business through Mr. Rolshoven. See *gen. SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. at 186-87 (full disclosure is necessary in the securities industry; it is essential that the highest ethical standards prevail in every facet of the securities industry). See also Findings of Fact #30 through #40, Conclusions of Law #12 through #15, and Order # 9.

The Commissioner finds that the issue of whether Knowles violated § 30-10-301(1)(c), Mont. Code Ann., was properly before the Hearing Examiner. The Commissioner further finds that the Hearing Examiner correctly interpreted and applied the law to the established facts and appropriately imposed a fine of \$5,000 for the violation. See Hearing Examiner's proposed Order, paragraph #3. However, the Commissioner reduced the fine for this violation from \$5,000 to \$2,500, while imposing fines for the additional violations, in order to retain the total fine of \$20,000. See Footnote #38 regarding the Commissioner's determination of the fine amount.

⁴¹The Commissioner finds that the Hearing Examiner correctly interpreted and applied the law to the established facts and appropriately imposed a fine of \$5,000 for the violation of § 30-10-201, Mont. Code Ann. See Hearing Examiner's proposed Order, paragraph #4. However, the Commissioner reduced the fine for this violation from \$5,000 to \$2,500, while imposing fines for the additional violations, in order to retain the total fine of \$20,000. See Footnote #38 regarding the Commissioner's determination of the fine amount.

⁴²Upon review of the complete record, the Commissioner finds that Knowles violated § 30-10-201(13)(b), Mont. Code Ann. (willful failure to comply with parts 1 through 3 of the Securities Act of Montana), and imposes a fine of \$5,000 for the violation. See Findings of Fact

8. Knowles shall pay the total fine of \$20,000 to the Department within 90 days following the signing of this Order.

9. The above sanctions are in the public interest and necessary for the protection of Montana investors. Additionally, these sanctions are warranted given that Knowles had over 18 years prior experience in the securities business serving hundreds of clients, and acting as chair and/or officer to a number of professional organizations. Trans. at 310-314. He is highly educated and has imparted his knowledge and experience to others in not only the insurance industry but also the securities field. Trans. at 310-314. Despite this, however, Knowles acted in a fraudulent and deceitful manner in his dealings with the Johnsons. Knowles was clearly on notice of being unregistered when he received the call from Mr. Johnson, met with the Johnsons, and then subsequently forwarded a letter and check to Eric Rolshoven on their behalf. While it is understandable he wished to maintain business ties with them, he was under an ethical and legal duty to be fully honest with them by telling them (even at the time Mr. Johnson called him to set up a meeting) that he was no longer employed with FSC, that he was no longer licensed as a securities salesperson, and further that the Johnsons should conduct their investment/securities business through Mr. Rolshoven.⁴³ The Johnsons could have then made an informed decision

#1 through #4, #30 through #40, Conclusions of Law #12 through #15, and Order # 9. See also § 2-4-621(3), Mont. Code Ann. The Commissioner believes that Knowles's education, experience, and willful failure to comply with the Securities Act of Montana merit imposition of the maximum fine allowable.

⁴³See § 30-10-201(13)(g) (a salesperson may not engage in dishonest or unethical practices in conducting securities business); *see gen. SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. at 186-87 (full disclosure is necessary in the securities industry; it is essential that the highest ethical standards prevail in every facet of the securities industry).

about how to proceed. Knowles failed to do this and instead lead the Johnsons to believe and assume Knowles's position and authority to act on their behalf had not changed. Knowles's course of dealing was wrong and infringed upon the protections afforded to all investors in this State.⁴⁴

10. Knowles's request for costs and attorney's fees pursuant to § 25-10-711, Mont. Code Ann., is denied. Section 25-10-711, Mont. Code Ann., provides that costs and attorney's fees may be awarded against the state if the opposing party prevails and the court finds that the claim or defense pursued by the state was frivolous or pursued in bad faith. Although Knowles prevailed on some issues, the Commissioner finds that the Department's actions were not frivolous or pursued in bad faith. Claims or defenses are frivolous or in bad faith under § 25-10-711, Mont. Code Ann., when such claims or defenses are outside the bounds of legitimate argument on a substantial issue. *See Jones v. City of Billings* (1996), 279 Mont. 341, 344, 927 P.2d 9, 11 (driver who prevailed against city in claim that city negligently failed to properly maintain traffic light was not awarded attorney's fees). Further, there is substantial evidence that the Department's claims were well within the bounds of legitimate argument on substantial issues on which there was a bona fide difference of opinion. *See Jones*, 279 Mont. at 344, 927 P.2d at 11. Even the Hearing Examiner found that the Department was correct in questioning Knowles's actions in regard to Grace Simmons and Emily Downey, despite also finding that

⁴⁴This paragraph is substantially similar to the Hearing Examiner's proposed Special Findings and Comments #1, #2, and #4. However, some modifications have been made to conform to the Findings of Fact and Conclusions of Law as determined by the Commissioner.

Knowles did not commit any violations with regard to the same.⁴⁵ Accordingly, the Commissioner does not abuse his discretion in refusing to award costs and attorney's fees to Knowles in regard to the issues on which he prevailed. *See Jones*, 279 Mont. at 345, 927 P.2d at 11.

NOTICE OF RIGHT TO JUDICIAL REVIEW

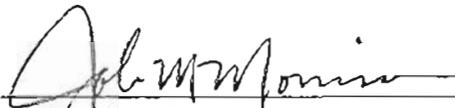
Respondent Knowles is hereby notified that he has the right to request judicial review of this Order by filing a petition for judicial review within 60 days of service of this Order with the

⁴⁵See paragraph #3 in the Special Findings and Comments section in the Hearing Examiner's proposed Findings of Fact, Conclusions of Law and Order. The Commissioner found that the remainder of paragraph #3 in the proposed Special Findings and Comments section is based on an interpretation of law and therefore may be rejected or modified like a conclusion of law by the Commissioner. *See Brady*, 295 Mont. at 79-80, 983 P.2d at 295. The foregoing discussion regarding the Relationship Between Mark Payton and Randall Knowles Regarding Suitability and Authorization addresses the activities for which registration as a salesperson is required. Additionally, the foregoing discussion regarding Statutory Fraud at Section 30-10-301(1), Mont. Code Ann., Does Not Require a Showing of Damage indicates that not every term or phrase can be defined precisely in that such precision would tend to defeat the protective purposes of the Act. The Commissioner finds that suitability analysis is just such a phrase. The specifics of a suitability analysis vary depending on each individual client as indicated in the Rules 6.10.126(1)(c) and (2)(f), Mont. Admin. R. (reasonable grounds to believe that the transaction is suitable for the client based on the client's investment objectives, financial situation and needs, and any other relevant information known). Additionally, the Commissioner has addressed the timing of the suitability analysis in the foregoing discussion regarding the Relationship Between Mark Payton and Randall Knowles Regarding Suitability and Authorization. Therefore, the Commissioner rejects the remainder of paragraph #3 in the Hearing Examiner's proposed Special Findings and Comments.

district court in Lewis and Clark County, Montana, or where the petitioner resides, as provided in §§ 30-10-308 and 2-4-702, Mont. Code Ann.⁴⁶

DATED this 24th day of May, 2006.

State Auditor and Commissioner of Securities



JOHN M. MORRISON

⁴⁶MAPA at § 2-4-702(2), Mont. Code Ann., provides that a respondent must file a petition in district court for judicial review of a written final agency decision within 30 days after service of the decision. The Securities Act of Montana at § 30-10-308, Mont. Code Ann., provides that the respondent may obtain judicial review of a final order of the Commissioner by filing a petition with the court within 60 days after the entry of the order. In the case of conflicting statutes, the more specific will govern over the general. *See Whalen v. Montana Right to Life Assoc.* (2002), 313 Mont. 204, 207, 60 P.3d 972, 974; Mont. Code Ann. § 1-2-102 Accordingly, the Commissioner believes that the Securities Act of Montana controls and that Respondent Knowles has 60 days to petition for judicial review.

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May, 2006, I served a true and accurate copy of the foregoing **CORRECTED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER AND NOTICE OF OPPORTUNITY FOR JUDICIAL REVIEW** upon the legal counsel for the Respondent by hand-delivery at the following address:

Brand G. Boyar
Browning, Kaleczyc, Berry & Hoven, P.C.
139 Last Chance Gulch
Helena, MT 59601
(Legal Counsel for Respondent)

And upon counsel for the Securities Department by hand-delivery at the following address:

Roberta Cross Guns
Securities Department
State Auditor's Office
840 Helena Avenue
Helena, MT 59601

Susan Paulson-Davis