

State of Missouri  
Office of Secretary of State

Case No. AP-04-91

IN THE MATTER OF:

ROBERT J. HERBERT,  
CRD# 2758055

Respondent,

Serve at:

946 Hawkins  
Lake Grove, New York 11755

**SUMMARY ORDER TO CEASE AND DESIST, SUMMARY ORDER OF CENSURE,  
AND ORDER TO SHOW CAUSE WHY CIVIL PENALTY AND COSTS SHOULD NOT  
BE IMPOSED**

On the 23<sup>rd</sup> day of November, 2004, Mary S. Hosmer, Assistant Commissioner for Enforcement as counsel for the Enforcement Section, submitted a Petition for Administrative Relief, alleging cause for discipline or disqualification of Robert J. Herbert. After reviewing the petition, the Commissioner issues the following findings of fact, conclusions of law and summary order:

**FINDINGS OF FACT**

1. Respondent has a residence address of 946 Hawkins Avenue, Lake Grove, New York 10755.
2. Respondent has been a registered agent in Missouri with GunnAllen Financial, Inc. ("GunnAllen") a Missouri-registered broker-dealer since February 3, 2003.
3. Respondent was an agent of Continental Broker-Dealer Corp. ("Continental") from April 25, 2002 to September 27, 2002. Respondent was registered through Continental in most states and with the National Association of Securities Dealers ("NASD"), however, Respondent was not registered in the State of Missouri while he was at Continental.
4. On September 27, 2002, Continental submitted a Uniform Termination Notice for Securities Industry Registration ("Form U-5") to the Central Registration Depository ("CRD") for agent number 2758055 and reported Respondent's voluntary termination from the firm.
5. On January 28, 2003, GunnAllen submitted a Uniform Application for Securities Industry Registration or Transfer ("Form U-4") to the CRD for agent number 2758055 seeking to register Respondent as an agent in Missouri.
6. On January 16, 2003, the Missouri Commissioner of Securities issued a Summary Order to Cease and Desist, Summary Order to Condition and Limit Broker-Dealer Registration, and order to show cause why civil penalties should not be imposed against Continental. On June 24, 2004, the Missouri Commissioner of Securities issued a Final Order ordering Continental to Cease and Desist violations of the act, permanently barring Continental from registration and ordering Continental to pay civil penalties.
7. Question 14 of the Form U-4 requests information about customer complaints. This question states:
  - (1) **Have you ever been named as a respondent/defendant in an *investment-related* consumer-initiated arbitration or civil litigation which alleged that you were *involved* in one or more *sales practice violations* and which:**
    - (a) is still pending, or;
    - (b) resulted in an arbitration award or civil judgment against you, regardless of amount, or;
    - (c) was settled for an amount of \$10,000 or more?
  - (2) **Have you ever been the subject of an *investment-related*, consumer-initiated complaint, not otherwise reported under question 14I(1) above, which alleged that you were *involved* in one or more *sales practice violations*, and which complaint was settled for an amount of \$10,000 or more?**
  - (3) **Within the past twenty four (24) months, have you been the subject of an *investment-related*, consumer-initiated written complaint, not otherwise reported under question 14I(1) or 14I(2) above, which:**
    - (a) alleged that you were *involved* in one or more *sales practice violations* and contained a claim for compensatory damages of \$5,000 or more (if no damage amount is alleged, the complaint must be reported unless the *firm* has made a good faith determination that the damages from the alleged conduct would be less

than \$5,000), or;

(b) alleged that you were *involved* in forgery, theft, misappropriation or conversion of funds or securities?  
(Emphasis in original)

8. Each of these questions should be answered "YES" or "NO". Any question with a "YES" response requires the filing of a Disclosure Reporting Page for each reportable event.
9. Pursuant to the instructions to Form U-4, an amendment to the application should be made as changes occur.
10. The Form U-4 page entitled, *Individual/ Applicant's Acknowledgment and Consent* states, in part, the following:

I agree to update this form by causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported. Further, I represent that to the extent that any information previously submitted is not amended, the information provided in this form is currently accurate and complete.
11. The Form U-4 requires that prior to submission to the CRD System the applicant or applicant's agent must attest to the completeness and accuracy of the record.
12. A review of Respondent's record with the CRD System revealed that Respondent filed an application that failed to disclose customer complaints and that prior to filing the application, Respondent failed to timely report customer complaints on his Form U-4.

### **Count 1**

(Failing to Timely Amend Form U-4 Disclosing Complaint from Client 1 - Making or causing to be made false or misleading statements in an application with the Commissioner)

13. On August 19, 2002, Respondent, while employed with Continental, received a complaint from Client 1 that alleged Respondent made misrepresentations in the sale of securities. Client 1 alleged compensatory damages of \$57,000.
14. On April 15, 2004, more than 20 months after receiving this complaint and after registration in Missouri was granted, Respondent filed an amendment to his Form U-4 and disclosed the complaint by Client 1.
15. By not reporting this complaint for more than 20 months after receiving the complaint, Respondent failed to timely amend his Form U-4, and submitted an application for registration in Missouri containing statements that were false and misleading in a material respect.

(Failing to Timely Amend Form U-4 Disclosing Settlement with Client 1)

16. On July 23, 2003, Respondent and Continental settled with Client 1 and agreed to pay Client 1 \$11,000.
17. On April 15, 2004, more than 20 months after receiving this complaint and more than 8 months after settling the complaint, Respondent filed an amendment to his Form U-4 and disclosed the settlement of the complaint by Client 1.
18. Respondent's Form U-4 contained the statement, "I represent that to the extent that any information previously submitted is not amended, the information provided in this form is currently accurate and complete."
19. Respondent had a duty to timely amend his Form U-4 when the change occurred.
20. By not reporting this complaint for more than 20 months after receiving the complaint and more than 8 months after settling the complaint, Respondent failed to timely amend his Form U-4.

### **Count 2**

(Failing to Timely Amend Form U-4 Disclosing Complaint from Client 2 - Making or causing to be made false or misleading statements in an application with the Commissioner)

21. On September 13, 2002, Respondent, while employed with Continental, received a complaint from Client 2 that alleged Respondent made misrepresentations in the sale of securities. Client 2 alleged compensatory damages of \$200,000.
22. On April 15, 2004, more than 19 months after receiving the complaint, and after registration in Missouri was granted, Respondent filed an amendment to his Form U-4 and disclosed the complaint by Client 2.
23. By not reporting this complaint for more than 19 months after receiving the complaint, Respondent failed to timely amend his Form U-4, and submitted an application for registration in Missouri containing statements that were false and misleading in a material respect.

(Failing to Timely Amend Form U-4 Disclosing Settlement with Client 2)

24. On November 12, 2003, Respondent and Continental settled with Client 2 and agreed to pay Client 2 \$10,000.

25. On April 15, 2004, more than 19 months after receiving the complaint and more than 5 months after settling the complaint, Respondent filed an amendment to his Form U-4 and disclosed the complaint by Client 2 and the settlement of this complaint.
26. Respondent's Form U-4 contained the statement, "I represent that to the extent that any information previously submitted is not amended, the information provided in this form is currently accurate and complete."
27. Respondent had a duty to timely amend his Form U-4 when the change occurred.
28. By not reporting this complaint for more than 19 months after receiving the complaint and more than 5 months after settling the complaint, Respondent failed to timely amend his Form U-4.
29. This summary order is in the public interest.

### CONCLUSIONS OF LAW

1. §409.4-412, RSMo Cumulative Supp. 2003, provides that:

(c) If the commissioner finds that the order is in the public interest and subsection (d) (1). authorizes the action an order under this act may censure, impose a bar or impose a civil penalty in an amount not to exceed a maximum of five thousand dollars for a single violation or fifty thousand dollars for several violations.

(d) A person may be disciplined under subsections (a) to (c) if the person:

(1) Has filed an application for registration in this state under this act or the predecessor act within the previous ten years, which as of the effective date of registration or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained a statement that, in light of the circumstances under which it was made, was false or misleading with respect to a material fact; [or]

(2) Willfully violated or failed to comply with this act or the predecessor act or a rule adopted or order issued under this act or the predecessor act within the previous ten years..

(f) The commissioner may suspend or deny an application summarily; restrict, condition, limit, or suspend a registration; or censure, bar, or impose a civil penalty on a registrant before final determination of an administrative proceeding. Upon issuance of the order, the commissioner shall promptly notify each person subject to the order that the order has been issued, the reasons for the action and that within fifteen days after the receipt of a request in a record from the person the matter will be scheduled for a hearing. If a hearing is not requested and none is ordered by the commissioner within thirty days after the date of service of the order, the order becomes final by operation of law. If a hearing is requested or ordered, the commissioner, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend the order until final determination.

2. Rule 15 CSR 30-51.160(3) provides:

Continuing Duty of Applicants and Registrants to Disclose Material Information.

(A) Amendments to Applications for Material Change.

During the pendency of any application, or effectiveness of any registration, every broker-dealer, agent, investment adviser, or investment adviser representative shall immediately report to the commissioner in writing any material change in any information, answers, responses, exhibits, or schedules submitted or circumstances disclosed in its last prior application. A correcting amendment shall be filed with the division at the time of occurrence or discovery of these changes, and not later than thirty (30) days following the specified event or occurrence. If the application was submitted through the CRD System or IARD System, any amendment shall be submitted in accordance with the guidelines of the CRD or IARD System.

3. §409.5-505, RSMo Cumulative Supp. 2003, provides that:

It is unlawful for a person to make or cause to be made, in a record that is ...filed under this act, a statement that, at the time and in the light of the circumstances under which it was made, is false or misleading in a material respect, or, in connection with the statement, to omit to state a material fact necessary to make the statement made, in the light of the circumstances under which it was made, not false or misleading.

4. §409.6-604(a), RSMo Cumulative Supp. 2003, provides:

If the commissioner determines that a person has engaged, is engaging, or is about to engage in an act, practice or course of business constituting a violation of this act or a rule adopted or order issued under this act or that a person has materially aided, is materially aiding, or is about to materially aid an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act, the commissioner may:

(1) Issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or to take other action necessary and appropriate to comply with this act.

5. §409.6-604(d), RSMo Cumulative Supp. 2003, provides:

In a final order...the commissioner may impose a civil penalty up to one thousand dollars for a single violation or up to ten thousand dollars for more than one violation.

6. §409.6-604(e), RSMo Cumulative Supp. 2003, provides:

In a final order, the commissioner may charge the actual cost of an investigation or proceeding for a violation of this act or a rule adopted or order issued under this act. These funds may be paid into the investor education and protection fund.

7. Because Respondent filed a Form U-4 application for registration through the CRD System on January 28, 2003 containing a statement that was false and misleading in a material respect by submitting false answers to questions regarding past complaints and not disclosing the complaints from Client 1 and Client 2 as alleged in Counts 1 and 2, Respondent is subject to disqualification or discipline under §409.4-412(d)(1), RSMo Cumulative Supp. 2003 and may be barred or censured and ordered to pay a civil penalty pursuant to §409.4-412 (b) and (c), Cumulative Supp. 2003.

8. Because Respondent did not amend the Form U-4 disclosing the complaints from Client 1 and Client 2 as alleged in Counts 1 and 2, Respondent violated §409.5-505, RSMo Cumulative Supp. 2003 by making or causing to be made false or misleading statements in a filing with the Commissioner, specifically in connection with responses to questions in Form U-4 submitted through the CRD System in his application for registration on January 28, 2003, Respondent is subject to disqualification or discipline under §409.4-412(d)(2), RSMo Cumulative Supp. 2003 and may be barred or censured and ordered to pay a civil penalty pursuant to §409.4-412 (b) and (c), Cumulative Supp. 2003. In addition, the Commissioner is authorized to issue a cease and desist order, impose civil penalties and a charge for investigative costs pursuant to §409.6-604, RSMo Cumulative Supp. 2003.

9. Because Respondent failed to timely amend the Form U-4 disclosing the settlements of the complaints from Client 1 and Client 2 as alleged in Counts 1 and 2 and in violation of 15 CSR 30-51.160(3), Respondent is subject to disqualification or discipline under §409.4-412(d)(2), RSMo Cumulative Supp. 2003 and may be barred or censured and ordered to pay a civil penalty pursuant to §409.4-412 (b) and (c), Cumulative Supp. 2003. In addition, the Commissioner is authorized to issue a cease and desist order, impose civil penalties and a charge for investigative costs pursuant to §409.6-604, RSMo Cumulative Supp. 2003.

## **ORDER**

IT IS THEREFORE ORDERED that Respondent is immediately prohibited from violating, failing to comply with, or materially aiding others in violating or failing to comply with Rule 15 CSR 30-51.160(3), and shall immediately report through an amendment to his Form U-4 any material change in any information, answers, responses, exhibits, or schedules submitted or circumstances disclosed in Respondent's Form U-4 and further shall file any correcting amendment at the time of occurrence or discovery of these changes, and not later than thirty (30) days following the specified event or occurrence.

IT IS FURTHER ORDERED that Respondent is immediately prohibited from violating, or materially aiding others in violating §409.5-505, RSMo Cumulative Supp. 2003 by making or causing to be made false or misleading statements in any filing with the commissioner, and specifically in connection with responses to questions in Form U-4 submitted through the CRD System.

IT IS FURTHER ORDERED that Robert J. Herbert is CENSURED.

IT IS FURTHER ORDERED that the Enforcement Section has petitioned for civil penalties, specifically, an award of ten thousand dollars (\$10,000) and for investigative costs against the Respondent in this proceeding, and further, the Commissioner intends to issue a final order awarding a civil penalty of two thousand dollars (\$2,000) pursuant to §§409.4-412(d) and 409.6-604(d) and investigative costs pursuant to §409.6-604(e), unless Respondent requests a hearing and shows cause why a penalty and costs should not be imposed.

SO ORDERED:

WITNESS MY HAND AND OFFICIAL SEAL OF MY OFFICE AT JEFFERSON CITY, MISSOURI THIS 29TH DAY OF NOVEMBER, 2004.

MATT BLUNT  
SECRETARY OF STATE

(Signed/Sealed)  
DOUGLAS M. OMMEN  
COMMISSIONER OF SECURITIES

