

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of:)
)
COMMISSIONER OF CORPORATIONS) File 923-2196
OF THE STATE OF CALIFORNIA,)
) OAH No. L2003080264
Complainant,)
v.)
)
SVL INVESTMENT MANAGEMENT)
(SVL HOLDING CORPORATION DBA))
)
Respondent.)
_____)

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated March 29, 2004, is hereby adopted by the California Corporations Commissioner as his Decision in the above-entitled matter with the following technical and clarifying changes pursuant to Section 11517(c)(2)(C) of the Government Code:

On page 1 of the Proposed Decision, the second paragraph is rewritten to read:

Nicholas Lanza, Senior Corporations Counsel, appeared on behalf of the Corporations Commissioner ("Commissioner") of the Department of Corporations ("Department").

In item 2 under "Order" on page 6 of the Proposed Decision, "Respondent" is substituted for "Responded."

This Order shall become effective on APR 29 2004.

IT IS SO ORDERED APR 29 2004.

WILLIAM P. WOOD
California Corporations Commissioner



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COMMISSIONER OF CORPORATIONS)	File 923-2196
OF THE STATE OF CALIFORNIA,)	
)	OAH Case No. L2003080264
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SVL INVESTMENT MANAGEMENT)	
(SVL HOLDING CORPORATION DBA))	
)	
Respondent.)	
_____)	

PROPOSED DECISION

This matter regularly came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Los Angeles, California, on February 23, 2004.

Nicholas Lanza, Senior Corporations Counsel, appeared on behalf of Demetrios A. Boutris, Corporations Commissioner ("Commissioner"), Department of Corporations ("Department").

Respondent represented himself.

This matter involves respondent's challenge to two orders issued by the Commissioner, an Order to Discontinue Violations Pursuant to Corporations Code¹ section 25249 and a Notice of Intention to Issue Order Levying Administrative Penalties Pursuant to Corporations Code section 25252 ("Section 25249 Order" and "Section 25252 Order," respectively, or Orders collectively). The Orders arise out of respondent's alleged failure to file required financial reports with the Department. Respondent presented his belief the reports had been submitted and sought modification or rescission of the Orders.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument on respondent's motion for protective order. The argument was received on March 4, 2004, and has been marked, for identification only, as Exhibit 21 (Complainant's) and E (Respondent's). The matter was submitted for decision on March 4, 2004.

¹ Unless otherwise stated, all further statutory references are to the Corporations Code.

FACTUAL FINDINGS

1. The Commissioner filed the Orders and accompanying documents solely in his official capacity.
2. Respondent SVL Investment Management dba SVL Holding Corporation holds an Investment Adviser Certificate issued by the Commissioner on September 21, 1990. Steven V. Le, Ph.D., is President of respondent.
3. Respondent is engaged in business as a financial adviser, with offices located at 1620 North Placentia Avenue, Placentia, California. As of March 1999, respondent managed approximately \$5,140,000, using his discretion to invest on behalf of 65 clients. The funds under management and number of clients have remained relatively constant through 2002.
4. Respondent's clients have entered into written agreements with respondent for the management of their money, which documents include Investment Advisory Agreements and Trading Authorizations, and Powers of Attorney. The clients authorized respondent to make trades on their behalf with funds held by third-party custodians, such as stock brokerage firms and banks.
5. On January 27, 1999, the Department conducted a regulatory examination of respondent's records. The examination, conducted by Examiner Cheryl Brian, confirmed respondent had not filed annual financial reports since 1995.
6. On March 9, 1999, the Department issued a letter formally informing respondent of the examination's findings and affording him the opportunity to respond.
7. On March 29, 1999, respondent provided the Department with the 1997 and 1998 financial reports and assured the Department that financial reports would be filed in a timely manner in the future.
8. On November 4, 2002, the Department conducted another regulatory examination. Examiner Steven Galet reviewed documents presented by respondent, which documents did not include proof of filing of required annual reports for 1999, 2000, or 2001.
9. Examiner Galet reviewed reports regularly maintained by the Department and concluded respondent had not filed any financial reports for 1999, 2000, or 2001.
10. During an exit interview with examiner Galet, Dr. Le agreed to prepare the reports and to submit them to the Department. On November 20, 2002, respondent submitted financial reports for the 1996 through 2001 calendar years.

11. On January 27, 2003, the Department issued another letter formally informing respondent of the examination's findings, including the absence of annual financial reports. On February 10, 2003 respondent submitted a statement of compliance, including the statement "In the future, SVL shall submit the required reports annually within the prescribed time period."

12. At the time of the 2002 examination respondent had not filed the required 1999, 2000, or 2001 annual financial reports to the Department.

13. Dr. Le testified he had relied on his bookkeeper to submit the reports, as he had been very busy with other matters, including overseas consulting for the Socialist Republic of Vietnam.

14. Dr. Le also testified that the bookkeeper had reported to him that he had filed the financial reports. The bookkeeper did not testify and respondent presented no other evidence to corroborate this hearsay statement, such as business records or postal receipts evidencing mailing or receipt of the documents. This evidence is insufficient to establish the reports were mailed, particularly in light of the contrary examination Department testimony and findings, and respondent's contemporaneous agreement with the Department's findings.

15. On July 23, 2003, the Commissioner issued the Section 25249 Order, finding that respondent has continued to violate the books and records requirements of the Corporate Security Law of 1968. Also on July 23, 2003, the Commissioner issued the Section 25252 Order, seeking to levy administrative penalties in the sum of \$1,500 for respondent's failure to maintain true, accurate and current books and records.

16. Respondent filed a timely notice of defense, requesting a hearing on the matters subject of the Commissioners order and notices.

LEGAL CONCLUSIONS

1. Section 25241 contains the statutory record-keeping requirement. It provides, in pertinent part:

"(a) Every broker-dealer and every investment adviser licensed under Section 25230 shall make and keep accounts, correspondence, memorandums, papers, books, and other records and shall file financial and other reports as the commissioner by rule requires...."

The Commissioner has promulgated the following relevant regulation, Title 10, California Code of Regulations ("CCR"), section 260.241.2, pursuant to his authority under section 25241:

“(a) General rule. Subject to the provisions of subsection (c) of this section, every licensed broker-dealer, and every licensed investment adviser subject to the provisions of Section 260.237.1 or Section 260.237.2, as applicable, of these rules, shall file an annual financial report containing the information required by a form or forms to be supplied or approved by the Commissioner, as follows:

...

(2) The annual report for investment advisers shall contain a Statement of Financial Condition. Supporting schedules shall contain computations of net capitals, aggregate indebtedness and ratios required under Section 260.237.1 or minimum financial requirements required under Section 260.237.2, as applicable, and the certificate of the accountant required under subsection (e) of Section 260.237 of these rules.”

Title 10, CCR, sections 260.237.1 and 260.237.2, referred to in Title 10, CCR, section 260.241.2(a) above, contain minimum capitalization and net worth requirements for investment advisers who exercise discretion pursuant to a power of attorney to execute transactions on behalf of clients. Review of financial records enables the Commissioner to discharge oversight of the capitalization requirements.

2. Respondent is subject to the requirements of Title 10, CCR, section 260.237.1, and thereby to the requirements of Title 10, CCR, section 260.241.2, because he has the power to execute transactions on behalf of clients, by reason of factual finding numbers 2 through 4.

3. As set forth in factual finding numbers 8 through 14, respondent failed to file annual financial reports for 1999, 2000, or 2001, as required by section 25241 and Title 10, CCR, sections 260.237.1 and 260.241.2.

4. Section 25249 authorizes the Commissioner to order discontinuance of activity deemed violative of securities law, which order may become final after hearing pursuant to section 25251. The Commissioner has established respondent violated the record-keeping requirements of section 25241 and Title 10, CCR, sections 260.237.1 and 260.241.2 by failing to file annual financial reports for 1999, 2000, or 2001, as set forth in factual finding numbers 8 through 14 and legal conclusion number 3, and the Section 25249 Order may become final.

5. Section 25252 authorizes the Commissioner to levy administrative penalties for willful violation of rules adopted by the Commissioner. In this matter, cause exists for levying administrative penalties because respondent has willfully violated the record-keeping requirements of section 25241 and Title 10, CCR, sections 260.237.1 and 260.241.2, by reason of factual finding numbers 8 through 14 and legal conclusion numbers 3 and 4.

6. Section 25252(b) authorizes levying not more than \$5,000 for the first violation and not more than \$10,000 for the second violation. The Commissioner seeks \$1,500 in penalties, \$750 for each violation. This sum is within the statutory limit and is reasonable in light of respondent's repeated violations. The Commissioner's request to levy administrative penalties is therefore granted.

7. Respondent seeks to have the administrative record sealed on the bases that public disclosure of the record would reveal sensitive or proprietary information, damage Dr. Le's academic and financial career, and lead to increased insurance costs.

Government Code section 11425.20(a) provides "a hearing shall be open to public observation," but allows the presiding officer discretion to grant protective orders (1) to satisfy constitutional or statutory requirements, including laws protecting privileged, confidential, or other protected information; (2) to ensure a fair hearing; and (3) to protect minor witnesses. In its report regarding this section, which report constitutes reliable guidance to legislative intent,² the Law Review Commission stated: "[C]losure of a hearing should be done only to the extent necessary under this section, taking into account the substantial public interest in open proceedings..." 25 Cal. Law Revision Comm. Rep. (1995), reprinted in West's California Ann. Gov. Code (2004 Supp), following section 11425.20, page 172.

The instant matter did not involve minor witnesses, so the motion cannot be granted on that basis. Respondent did not object to the open hearing, nor does he seek sealing of the record, to ensure a fair hearing. Although arguing that sensitive or proprietary information could be disclosed, respondent has not articulated how the evidence received at the hearing falls within this category. The evidence received at the hearing primarily involved financial records required to be filed and available to the public, Department examinations and determinations pertaining to this information, and respondent's explanation for failure to file the reports. The public nature of this information and the importance of public disclosure of this information cannot be questioned. More importantly, however, respondent failed to establish how any item of evidence is required to be protected by federal or state laws protecting privileged or confidential information. Thus, respondent has not presented any evidence, authority, or persuasive argument that his request for protective order falls within one of the statutory exceptions. Absent such statutory exception, respondent's concerns about the impact of the record at the hearing or the issuance of the instant Decision on his academic or financial career must yield to the strong legislative desire for public hearings. Respondent's motion is therefore denied.

² In re Bryce C., 12 Cal.4th 226, 241 (1995); California Youth Authority v. State Personnel Board, 104 Cal.App.4th 575, 588 (2002).

ORDER

1. The Section 25249 Order shall become a final order of the Commissioner.
2. Responded shall pay an administrative penalty of \$1,500.
3. Respondent's motion to seal the administrative record is denied.

DATED: 3/29/04

SAMUEL D. REYES ✓
Administrative Law Judge
Office of Administrative Hearings