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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND SECURITIES

PA DEPARTMENT OF
BANKING AND SECURITIES

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF BANKING AND
SECURITIES, BUREAU OF SECURITIES
COMPLIANCE AND EXAMINATIONS

Docket No.: 210076 (SEC-OSC)

v.

G. EARL MOWREY & CO., LLC,
GEORGE EARL MOWREY

NOTICE OF RIGHT TO APPEAL

You have the right to appeal the attached Final Order issued by the Commonwealth of Pennsylvania, Banking and Securities Commission. ("Commission")

If you wish to appeal this Final Order, you may file a petition for review with the Commonwealth Court of Pennsylvania that complies with the format and timing requirements of Chapter 15 of the Pennsylvania Rules of Appellate Procedure, Pa.R.A.P. 1511-1561. Failure to file a petition for review within 30 days of the mailing date of this Order will result in this Final Order becoming final and unappealable. The telephone number for the Commonwealth Court is 717-255-1650.

All Commonwealth Court filings must be made with the Court's filing office in Harrisburg. Filing must be made in person, by mail as provided by general rules, or electronically via the PACFile appellate court electronic filing system. The address of the Court is as follows:

Pennsylvania Judicial Center
601 Commonwealth Ave.
Suite 2100
P.O. Box 69185
Harrisburg, PA 17106

A party may submit a request to the Commission for rehearing or reconsideration no later than fifteen (15) days after the decision mailing date in accordance with section 35.241 of the General Rules of Administrative Practice and Procedure, 1 Pa. Code § 35.241. However, submitting a reconsideration request does not extend the time limit for filing a petition for review with the Commonwealth Court.

You may wish to consult an attorney regarding your legal rights.

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PA DEPARTMENT OF
BANKING AND SECURITIES

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COMPLIANCE AND EXAMINATIONS

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v.

G. EARL MOWREY & CO., LLC,
GEORGE EARL MOWREY

FINAL ORDER

AND NOW, the Pennsylvania Banking and Securities Commission ("Commission") pursuant to the final adjudication authority granted to the Commission under section 1122-A of the Department of Banking and Securities Code, 71 P.S. § 733-122-A, the Commission issues this Final Order, adopting the Hearing Officer's proposed report except as stated below:

The Commission deletes the Hearing Officer's proposed Findings of Fact No. 52, and replaces it with the following:

52. Respondent Firm earned \$213,668.51 in fees from Pennsylvania clients from the time Respondents' U.S. Securities and Exchange Commission registration ended until they filed their IA Application with the Department in 2020. (N.T. 51; Exhibit F).

In the Discussion section of the Hearing Officer's report, at page 18, the figure \$213,608 is replaced with \$213,668.51, as the advisory fees received.

Also, in the Discussion section of the Hearing Officer's report, at page 20, the figure \$231,668.51 is replaced with \$213,668.51 as the administrative assessment that is warranted.

ORDER

AND NOW, this 11th day of February, 2024, in accordance with the proposed report of the Hearing Officer, as amended in this Final Order, it is **ORDERED** that:

All counts in the Order to Show Cause are **SUSTAINED**. Respondents G. Earl Mowrey & Co., LLC, and George Earl Mowrey, shall pay an **ADMINISTRATIVE ASSESSMENT** of **\$213,668.51**, for violations of Section 301(c), 70 P.S. § 1-301(c) as set forth in the OSC.

Respondents shall be jointly and severally liable for payment of this assessment.

Payment of the administrative assessment shall be by certified check, attorney's check, or U.S. Postal Service money order, made payable to "Commonwealth of Pennsylvania," and shall be mailed within thirty (30) days of the effective date of the Commission's Final Order in this matter to the counsel for the Bureau at:

Pennsylvania Department of Banking and Securities
Office of Chief Counsel
17 N. Second Street
Suite 1300
Harrisburg, PA 17101

This Final Order shall be effective 30 days after the Commission mails it.

BY ORDER OF THE COMMISSION:

Redacted

James R. Biery
Chairman
Pennsylvania Banking and Securities Commission

So **ORDERED** this 11 day of February, 2024

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING

PA DEPARTMENT OF
BANKING AND SECURITIES

Commonwealth of Pennsylvania
Department of Banking, Bureau of Securities
Compliance and Examinations

v.

G. Earl Mowrey & Co., LLC
and George Earl Mowrey,
Respondents

Docket No. 210076 SEC-OSC

PROPOSED ADJUDICATION AND ORDER

Jason C. Giunifano
Hearing Officer

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF HEARING EXAMINERS
P.O. Box 2649
Harrisburg, PA 17105-2649

HISTORY

On September 27, 2021, the Commonwealth of Pennsylvania Department of Banking and Securities ("Department"), Bureau of Securities Compliance and Examinations ("Bureau") issued an Order to Show Cause ("OSC") to G. Earl Mowrey & Co., LLC ("Respondent Firm") and George Earl Mowrey ("Respondent Mowrey") (collectively, "Respondents"). The OSC alleged that Respondents committed violations of the Pennsylvania Securities Act of 1972, 70 P.S. § 1-101 *et seq.* ("1972 Act"). Specifically, it is alleged that Respondents violated Section 301(e) of the 1972 Act, 70 P.S. § 1-301(e), by transacting business in Pennsylvania as an unregistered investment advisor ("IA") from September 2012 to September 2021. At no time were Respondents exempt from registration.

The procedural history of this case is somewhat convoluted and will be explained in detail. On September 27, 2021, the OSC was filed. On November 2, 2021, Respondents, through their initial counsel,¹ Paul Lynch, Esquire, filed an Answer to Order to Show Cause ("Answer"). The undersigned Hearing Officer was appointed to hear this matter on December 28, 2021. By order dated April 6, 2022, the Hearing Officer scheduled a prehearing conference for May 2, 2022. A telephonic hearing for this matter was then scheduled for October 28, 2022.

The hearing commenced as scheduled. The Bureau was represented by Attorney Veronica Hoof. Respondents were represented by Attorney Lynch. The Bureau presented its case through documentary evidence and the testimony of Wendy Deimler ("Deimler"), a Securities Compliance Examiner. However, during the course of the October 28, 2022, telephonic hearing, communication was inexplicably lost with Attorney Lynch as he was preparing to cross-examine

¹ Attorney Paul Lynch initially represented Respondents. However, Respondents are now represented by Attorney Eric Phillips.

Deimler. Notwithstanding efforts to call Attorney Lynch back, as well as email him, all methods of communicating with Attorney Lynch were unsuccessful. Thus, on that date, Attorney Lynch never had the opportunity to cross-examine Deimler or present Respondents' case.

The Hearing Officer was therefore compelled to continue the hearing and keep the record open to afford Respondents due process in presenting their case. An Order rescheduling the balance of the telephonic hearing for November 8, 2022, was mailed via USPS to Attorney Lynch. The reconvened telephonic hearing on November 8, 2022, proceeded as scheduled. At that hearing, Attorney Lynch cross-examined Deimler. *However, Attorney Lynch (i) did not call any witnesses on Respondents' behalf, including Respondent Mowrey, and (ii) otherwise presented no evidence whatsoever when it was the time for Respondents' case in chief.* On December 28, 2022, after the filing of the Notes of Testimony ("N.T."), the Hearing Officer issued an Order for Briefs.

At some point after the Order for Briefs was issued, but before the due date for their post-hearing brief, Respondents obtained new counsel, Attorney Eric Phillips. On March 13, 2023, Respondents' new counsel filed a (i) Motion to Extend Time for Briefing as well as a (ii) Petition to Reopen the Record. The gist of Respondents' new counsel's contentions were that (i) Attorney Lynch's failure to present any evidence whatsoever, including calling Respondent Mowrey to testify, and (ii) Attorney Lynch's lack of meaningful engagement in these proceedings deprived Respondents of due process. The Bureau filed timely responses to the motions.

Upon consideration of the motions, and out of an abundance of caution to the due process rights of Respondents, the Hearing Officer permitted the record to be reopened for the limited purposes of allowing Respondent Mowrey to provide testimony. On April 19, 2023, the record

was reopened and the testimony of Respondent Mowrey was taken.² At the conclusion of that hearing, another briefing schedule was issued to afford the parties the opportunity to file supplemental briefs in light of the testimony taken.

Both parties have since filed timely post-hearing briefs, the Notes of Testimony for all hearings have been filed, and this matter is ripe for consideration.

² The title page of the Notes of Testimony for the April 19, 2023, hearing erroneously indicates that the hearing took place on May 5, 2023, when in fact the hearing took place on April 19, 2023. To further confuse matters, the pagination on the Notes of Testimony for the first two hearing dates, *i.e.*, October 28, 2022, and November 8, 2022, are consecutive. In other words, the Notes of Testimony for October 28 conclude on page 66, and the Notes of Testimony for November 8 commence on page 67. However, the pagination for the Notes of Testimony for the April 19, 2023, hearing commences on page 1. Accordingly, the citation to the April 19, 2023, testimony will be "April N.T. x" whereas the citation to the October 28 and November 8 hearings will be cited as "N.T. x."

FINDINGS OF FACT

1. The Department is the Commonwealth of Pennsylvania's administrative agency authorized and empowered to administer and enforce the 1972 Act. (OSC and Answer, P1).

2. The Bureau is primarily responsible for administering and enforcing the 1972 Act for the Department. (OSC and Answer, P2).

Respondents' Background

3. Respondent Firm, CRD# 120802, was, at all material, an Ohio limited liability company with a principal place of business at 4964 Belmont Avenue, Suite A, Youngstown, Ohio 44505. (OSC and Answer, P4).

4. Respondent Mowrey, CRD# 1567213, was, at all times material herein, the owner and chief compliance officer of the Respondent Firm with an address at 4964 Belmont Avenue, Suite A, Youngstown, Ohio 44505. (N.T. 114; OSC and Answer, P5).

5. Respondent Mowrey turned 80 years old on August 27, 2023. (April N.T. 6-7).

6. Respondent Mowrey is a certified financial planner, and registered investment advisor. (April N.T. 7).

7. Respondent Mowrey began in the investment advisory business in 1987. (April N.T. 7).

8. Respondent Firm began sometime in the late 1990's to early 2000's. (April N.T. 7).

9. Respondent Mowrey is the owner and manager of Respondent Firm. (April N.T. 8).

10. Respondent Mowrey testified that his duties as chief compliance officer included overseeing registration form submissions on behalf of Respondent Firm. (April N.T. 26).

11. Respondent Firm currently has one employee besides Respondent Mowrey. (April N.T. 8).
12. Respondent Firm currently has somewhere between 120-130 clients. (April N.T. 9).
13. Respondent Firm currently has 11 clients in Pennsylvania. (April N.T. 9).
14. The Firm does not advertise in Pennsylvania, have an office in Pennsylvania, nor actively seek clients in Pennsylvania. (April N.T. 9-10).
15. Respondents' registration as an IA with the U.S. Securities and Exchange Commission ended in 2012. (April N.T. 20).
16. Respondents were previously noticed filed in Pennsylvania and Ohio. (April N.T. 27).
17. Julie Liddle ("Liddle") is listed as an additional regulatory contact on Respondent Firm's Form ADV³ and is authorized to communicate on behalf of Respondent Firm. (April N.T. 29, 31; Exhibit H).

Alleged Violations and Investigation

18. Deimler has been employed by the Department for over 15 years; Deimler is a Securities Compliance Examiner. (N.T. 19).
19. On or about October 28, 2020, Respondent Firm filed an Investment Advisor ("IA") Application (the "IA Application") on the CRD IARD⁴ website. (N.T. 20; Exhibit A).
20. Deimler is familiar with Respondent Firm's IA application. (N.T. 21).

³ Form ADV is the form used by IAs to register with the SEC as well as state security authorities. (N.T. 20).

⁴ The CRD IARD System is the Central Registration Depository and Investment Advisor Registration Depository. (N.T. 21).

21. The IA Application includes Form ADV -- Parts 1A and 1B and the brochure documents Part 2A and 2B. (N.T. 20; Official Notice- Department Records⁵).

22. The IA Application review process included reviewing the Form ADV on the CRD IARD database, the Respondent Firm's business continuity plan, sustainability documents and all agreements for services offered. (N.T. 20-21).

23. Delmler was assigned to review Respondent Firm's IA Application on October 29, 2020. (N.T. 21).

24. Delmler's initial review of Respondent Firm's IA Application included reviewing Parts 1A and 1B, the brochure documents 2A and 2B on the CRD IARD database, and issuing a deficiency letter. (N.T. 21).

⁵ Official notice of such matters as might be judicially noticed by courts is permissible under the General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.1 *et. seq.*, at §35.173, which provides, in pertinent part, as follows:

§35.173. Official notice of facts.

Official notice may be taken by the agency head or the presiding officer of such matters as might be judicially noticed by the courts of this Commonwealth, or any matters as to which the agency by reason of its functions is an expert. . . .

1 Pa. Code §35.173.

Official notice is also permitted under case law. *See, for example, Falasco v. Commonwealth of Pennsylvania Board of Probation and Parole*, 521 A. 2d 991 (Pa. Cmwlth. 1987), in which the Commonwealth Court explained:

"Official notice" is the administrative counterpart of judicial notice and is the most significant exception to the exclusiveness of the record principle. The doctrine allows an agency to take official notice of facts that are obvious and notorious to an expert in the agency's field and those facts contained in reports and records in the agency's files, in addition to those facts that are obvious and notorious to the average person. Thus, official notice is a broader doctrine than judicial notice and recognizes the special competence of the administrative agency in its particular field and also recognizes that the agency is a storehouse of information on that field consisting of reports, case files, statistics, and other data relevant to its work.

521 A. 2d at 994 n. 6.

25. Delmler reviewed Respondent Firm's registration status on the CRD IARD System. (N.T. 22).

26. Liddle and Respondents provided documentation to the Department in response to the Department's requests for additional information. (April N.T. 18-20).

27. Respondent Firm was registered with the U.S. Securities and Exchange Commission from October 9, 2008, through August 10, 2012. (N.T. 24).

28. The SEC is the regulator on the federal level and the Department is the regulator on the state level. (N.T. 28).

29. Firms that are registered with the U.S. Securities and Exchange Commission must "notice file" with the states in which they conduct business. (N.T. 28).

30. Respondent Firm's notice was filed in Pennsylvania while Respondent Firm was registered with the U.S. Securities and Exchange Commission. (N.T. 28).

31. Mowrey is the sole owner and chief compliance officer of Respondent Firm. (N.T. 29-30).

32. On November 5, 2020, Delmler sent the Respondent Firm a deficiency letter ("deficiency letter") requesting additional information regarding the IA Application. (N.T. 30-31; Exhibit A).

33. On January 4, 2021, Respondents sent Delmler an e-mail responding to the deficiency letter. (N.T. 33, 40; Exhibit B).

34. On January 4, 2021, Respondents provided an insufficient list of Pennsylvania clients that failed to include all of the fees Respondent Firm collected to date. (N.T. 42, 43; Exhibit G).

35. On March 25, 2021, Delmler sent the Respondent Firm an e-mail requesting additional information regarding Respondent Firm's Pennsylvania clients. (N.T. 43, 45; Exhibit C).

36. Between March 2021 and May 2021, Delmler exchanged e-mails with Respondents attempting to obtain complete and accurate information regarding the Respondent Firm's Pennsylvania clients. (N.T. 45, 48; Exhibit D).

37. Respondents provided further information regarding the Pennsylvania clients. (N.T. 48, 51; Exhibit E).

38. Joyce Ream, a current Pennsylvania client, originally lived in Ohio when she became a client of Respondent Firm then later moved to Pennsylvania. (April N.T. 10-11).

39. Little Beaver Cemetery, a current Pennsylvania client, was originally located in Ohio but relocated to Pennsylvania "a few years back." (April N.T. 11).

40. The Firm has multiple clients who are beneficiaries of an Ohio pension plan, with some of the beneficiaries living in Pennsylvania. (April N.T. 13).

41. Connie and Paul Smartlaso, current Pennsylvania clients, became clients as beneficiaries of one of Respondent Firm's clients who lived in Ohio before passing away. (April N.T. 13-14).

42. Ninety percent of Respondent Firm's 120-130 clients reside in Ohio. (April N.T. 14).

43. The Firm has clients in approximately seventeen (17) states. (April N.T. 14-15).

44. The Firm is only licensed in Ohio and Pennsylvania. (April N.T. 15).

45. Prior to the current action, Respondent Firm was never subject to customer complaints, fines, sanctions, or disciplinary action. (April N.T. 16).

46. Respondents first discovered there may be an issue with their Pennsylvania licensure in August 2020 via a letter received from the Ohio Department of Commerce. (April N.T. 17; Respondents' Exhibit B).

47. After receiving the Ohio Department of Commerce's letter, Respondents reached out to Pennsylvania to correct any potential issues. (April N.T. 18-19).

48. Respondents cooperated fully with all information requests the Department made in response to Respondent Firm's request to rectify the potential issue. (April N.T. 19).

49. Respondent Mowrey admitted that Respondent Firm was not registered in Pennsylvania from September 2012 to September 2021. (April N.T. 35).

50. Respondent Mowrey's testimony is that the lapse in licensure was due to an inadvertent error. (April N.T. 21).

51. In total, Respondent Firm operated as an unregistered IA for nine (9) years. (N.T. 53).

52. Respondent Firm had a total of 11 Pennsylvania clients. (N.T. 40, 43; Exhibit G).

53. Respondent Firm earned \$231,668.51 in fees from Pennsylvania clients from the time Respondents' U.S. Securities and Exchange Commission registration ended until they filed their IA Application with the Department in 2020. (N.T. 51, 53; Exhibit F).

Procedural Due Process

54. On September 27, 2021, the Bureau's OSC was filed. (Official Notice- Department Records).

55. On November 2, 2021, Respondents, through their counsel at the time, Attorney Paul Lynch, filed an Answer. (Official Notice- Department Records).

56. A telephonic hearing for this matter was scheduled for October 28, 2022. (Official Notice- Department Records).

57. The hearing commenced as scheduled and the Bureau was represented by Veronica Hoof, Esquire; Respondents were represented by Attorney Lynch. (N.T., *passim*).

58. During the course of the October 28, 2022, telephonic hearing, communication was inexplicably lost with Attorney Lynch as he was preparing to cross-examine Delmler. (N.T. 60-65).

59. Notwithstanding efforts to call Attorney Lynch back, as well as email him, all methods of communicating with Attorney Lynch were unsuccessful. (N.T. 60-65).

60. Thus, on that date, Attorney Lynch never had the opportunity to cross-examine Delmler or present Respondents' case. (N.T., *passim*).

61. The Hearing Officer continued the hearing and kept the record open; an Order rescheduling the balance of the telephonic hearing on November 8, 2022, was mailed via USPS to Attorney Lynch. (Official Notice- Department Records).

62. The reconvened telephonic hearing on November 8, 2022, proceeded as scheduled; Attorney Lynch cross-examined Delmler. (N.T., *passim*).

63. At the November 8, 2022, hearing Attorney Lynch (i) did not call any witnesses on Respondents' behalf, including Respondents, and (ii) otherwise presented no evidence whatsoever when it was the time for Respondents' case in chief. (N.T., *passim*).

64. On December 28, 2022, after the filing of the Notes of Testimony ("N.T."), the Hearing Officer issued an Order for Briefs. (Official Notice- Department Records).

65. On March 13, 2023, Respondents, *via* new counsel Attorney Phillips, filed a (i) Motion to Extend Time for Briefing as well as a (ii) Petition to Reopen the Record; the Bureau filed timely responses to the motions. (Official Notice- Department Records).

66. On April 19, 2023, the record was reopened and testimony of Respondent Mowrey was taken. (April N.T., *passim*).

67. At the conclusion of the April 19, 2023, supplemental hearing, another briefing schedule was issued to afford the parties the opportunity to file supplemental briefs in light of the testimony taken. (Official Notice- Department Records).

68. Both parties have since filed timely post-hearing briefs and the Notes of Testimony for all hearings have been filed. (Official Notice- Department Records).

CONCLUSIONS OF LAW

1. The Department has jurisdiction in this matter: 70 P.S. §§ 1-601 (a) and 1-702. (Findings of Fact No. 1-2).
2. Respondents received notice of this proceeding and were afforded an opportunity to be heard in accordance with Section 504 of the Administrative Agency Law, 2 Pa. C.S. § 504. (Findings of Fact No. 54-68).
3. As the owner and chief compliance officer of Respondent Firm, Respondent Mowrey acted as an "affiliate" of Respondent Firm within the meaning of Section 102(b) of the 1972 Act, 70 P.S. § 1-102(b), and, as such, caused Respondent Firm to commit the herein stated acts which violated the 1972 Act. (Findings of Fact No. 3-53).
4. From September 2012 to September 2021, Respondents wilfully transacted business as an IA; said business being without the benefit of registration in violation of Section 301(c) of the 1972 Act, 70 P.S. § 1-301(c). (Findings of Fact Nos. 3-53).
5. 70 P.S. § 1-602.1(o)(1)(iv)(A) permits the Department to impose an administrative assessment of up to \$50,000.00 for each act or omission constituting a wilful violation of 70 P.S. § 1-301(c).

DISCUSSION

Burden of Proof

The Bureau has the burden of proof in this matter; the preponderance of the evidence standard is the correct burden of proof to be applied in this administrative action. *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A. 2d 600 (Pa. Cmwlth. 1990), petition for allowance of appeal denied, 529 Pa. 654, 602 A. 2d 863 (1998); *Suber v. Pennsylvania Commission on Crime and Delinquency, Deputy Sheriff's Education and Training Board*, 885 A. 2d 678 (Pa. Cmwlth. 2005). A preponderance of the evidence is generally understood to mean that the evidence demonstrates a fact is more likely to be true than not to be true, or if the burden were viewed as a balance scale, the evidence in support of the Commonwealth's case must weigh slightly more than the opposing evidence. *Se-Ling Hostery, Inc. v. Margulies*, 70 A.2d 854, 856 (Pa. 1950). For reasons set forth more fully below, the Bureau has met its burden as to the counts in the OSC.

Credibility of Witnesses and Weight of the Evidence

In an administrative proceeding, the fact finder determines questions of the credibility of witnesses and the weight of the evidence. *See e.g., Nepa v. Department of Public Welfare*, 551 A.2d 354 (Pa. Cmwlth. 1988) (determination of credibility of witnesses in health care providers' appeal is the province of the fact finder). In weighing any evidence, a factfinder "may rely on his or her experience [and] common sense" to arrive at a proper conclusion. *Commonwealth v. Segida*, 985 A.2d 871, 879 (Pa. 2009). *See also, Summers v. Certainteed Corp.*, 997 A.2d 1152, 1161 (Pa. 2010) ("The credibility of witnesses, professional or lay and the weight to be given their testimony is strictly within the proper province of the trier of fact."). In that regard, the Hearing Examiner

has determined that Respondent Mowrey was credible, honest, and trustworthy. Bureau witness Deimler was also found to be credible, honest, and trustworthy.

Alleged Violations

At the outset, Attorneys Hoof and Phillips are to be commended for their civility and thoroughness in bringing forth the material facts in this case. Based upon the testimony and evidence presented at the Hearing, the Bureau has proven the Counts in the OSC by a preponderance of the evidence, *i.e.*, Respondents violated Section 301(e) of the 1972 Act.

The material facts are relatively simple and undisputed. From September 2012 until September 2021, Respondents transacted business in Pennsylvania as an IA while not registered or exempt from registration.⁶ In doing so, Respondents acted as an "investment advisor" in Pennsylvania within the meaning of Section 102(j) of the 1972 Act, 70 P.S. § 1-102(j), by conducting business with Pennsylvania clients during the above period.

Further, Respondents did so "willfully" within the meaning of Section 102(w)(1) of the 1972 Act, 70 P.S. § 1-102(w)(1). Section 102(w)(1) defines "willful" and "willfully" as "the person acted intentionally in the sense that they intended to do the acts and were aware of what they were doing. Proof of evil motive or intent to violate the act or knowledge that the person's conduct violated the act is not required." Put another way, the "willful act" at issue here was, *in and of itself*, the mere "act" of transacting of business as an IA.

⁶ There can be no dispute that, at all material times, Respondent Mowrey was acting on behalf of Respondent Firm. The Act provides that, "[a]n 'affiliate' of, or a person 'affiliated' with, a specified person, means a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the person specified." 70 P.S. § 1-102(b). A "person" is defined in the 1972 Act as "an individual, corporation, partnership, association, joint stock company, syndicate, trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, government, political subdivision of a government, or any other entity." 70 P.S. § 1-102(u). "Control... means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 70 P.S. § 1-102(g).

Respondents' contention—albeit incorrect—appears to be that the controlling statutory scheme should instead be interpreted as akin to “willfully *intending* to violate the statute when transacting business.” In other words, Respondents suggest that the alleged violator's intent/motive/*mens rea* behind the violation of the statute should be considered. Such a suggested interpretation will be dismissed in turn.

Prior decisions have held that “[r]equiring regulators to prove that providers have a knowledge of... registration requirements go against the obvious intent of the law. It would place an untenable burden of proof on regulators that simply does not comport with the regulatory scheme.” *Dept' of Banking & Sec. v. Phila. Investment Partners, LLC, and Peter Zeull*, SEC-OSC Docket No. 210008 (August 16, 2022). The black letter of the 1972 Act provides clear and unambiguous guidelines. If business is transacted, without proper registration or valid exemption, the 1972 Act is violated. It is beyond the scope of authority of the undersigned Hearing Officer to overturn, strike, or otherwise ignore a valid statutory mandate.

Respondents' position in this regard is better suited for mitigating any administrative assessment, as opposed to the threshold question of whether a violation of the 1972 Act occurred. As will be addressed more fully below, the Hearing Officer *does* find as credible Respondents' contentions that the failure to register, although willful, was not done with the intent to violate the 1972 Act. Candidly speaking, Respondents' failure to register was unquestionably negligent, perhaps bordering on reckless given the number of years that passed without proper registration. However, in assessing the credibility of Mr. Mowrey, in conjunction with his cooperation with the Bureau, the Hearing Officer believes that Respondent Mowrey did not intend to defraud the public, his clients, or the bureau, and this will be reflected in the suggested administrative assessment below.

Respondents here make a "lack of due process" argument, suggesting that the Bureau's failure to advise Respondents that any documents and information Respondents filed/provided could be used to prove a violation of the 1972 Act. The Bureau is statutorily obligated to request information from IAs. Further, the Bureau is obligated to investigate and prosecute violations of the 1972 Act.

To suggest that the Bureau may not use the documents, filings, and information provided to it by its regulated IAs is illogical and certainly violative of public policy. Any such argument will be dismissed in turn as it seeks to impose requirements upon the Department that are neither required nor supported by any legal standard. The elements of due process in an administrative hearing are notice and an opportunity to be heard and defend. *Gutman v. State Dental Council and Examining Board, Bureau of Professional Affairs*, 463 A.2d 114 (Pa.Cmwlth. 1983). Respondents therefore are entitled to receiving notice, as the opportunity to be heard and provide a defense. These were afforded to Respondents here. Respondents received the OSC and, through counsel, filed their Answer. Respondents had three separate hearings: (1) the initial hearing on October 28, 2022; (2) continued hearing on November 8, 2022; and (3) reopened record hearing on April 19, 2023.

Undersigned Hearing Officer is aware of no case law holding that an agency's use of documents filed with it for an administrative action/investigation somehow violates due process protections. Extrapolated to its logical conclusion, Respondents suggest that tax returns could never be used as evidence in a tax fraud case because the party filing those returns was not told, ahead of time, that they were being investigated for tax fraud.

Ultimately, in transacting business as an unregistered IA, Respondents' violation of Section 301(o) of the 1972 Act was willful. Consequently, Respondents' unregistered IA activity warrants an administrative assessment.

Administrative Assessment

The only question remaining is the administrative assessment to be imposed. The purpose for imposing administrative sanctions includes protecting the public, maintaining the integrity of the profession, and deterring future violations by Respondents and those similarly situated to Respondents. See, e.g., *Barran v. State Bd. of Medicine*, 670 A.2d 765, 767 (Pa. Cmwlth, 1996); appeal denied; 679 A.2d 230 (Pa. 1996); *Nicoletti v. State Bd. of Vehicle Mfrs., Dealers and Salespersons*, 706 A.2d 891, 894-895 (Pa. Cmwlth. 1998).

70 P.S. §1-602.1(o)(1)(iv)(A) permits the Department to impose an administrative assessment of up to \$50,000.00 for each act or omission constituting a willful violation of 70 P.S. § 1-301(o). 70 P.S. §1-602.1(o)(2)(i)-(v) sets forth factors the Department shall consider in arriving at an appropriate assessment as follows:

§1-602.1. Assessments

* * *

(2) For purposes of determining the amount of administrative assessment to be imposed in an order issued under this subsection, the department shall consider:

- (i) The circumstances, nature, frequency, seriousness, magnitude, persistence and willfulness of the conduct constituting the violation.
- (ii) The scope of the violation, including the number of persons in and out of this Commonwealth affected by the conduct constituting the violation.
- (iii) The amount of restitution or compensation that the violator has made and the number of persons in this Commonwealth to whom the restitution or compensation has been made;
- (iv) Past and concurrent conduct of the violator that has given rise to any sanctions or judgment imposed by, or pleas of guilty or nolo contendere or settlement with, the department or any securities administrator of any other state or other country, any court of competent jurisdiction, the Securities and Exchange Commission, the Commodity Futures Trading Commission, any other Federal or State agency or any national securities

association or national securities exchange as defined in the Securities Exchange Act of 1934 (48 Stat. 881, 15 U.S.C. § 78a et seq.).

(v) Any other factor that the department finds appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of this act.

* * *

§1-602.1(c)(2)

These five (5) considerations will be addressed in turn.

(i) The circumstances, nature, frequency, seriousness, magnitude, persistence and willfulness of the conduct constituting the violation.

This factor leans against Respondents. In this case, Respondents violated the 1972 Act. Respondent's unregistered IA activity transpired over a roughly nine-year period during which time he received \$213,608 in advisory fees. Although the number of years and number of Pennsylvania clients advised is known, it is not clear from the evidentiary record the number of *specific* instances Respondents advised each client. For example, was each client advised 50 times per year? Once per year? Once every three years? Lastly, although not dispositive toward demonstrating a violation of the 1972 Act *per se*, it was unclear if these individuals suffered any pecuniary harm beyond what they were charged in advisory fees, and if so, how much. A demonstration of pecuniary loss beyond advisory fees, e.g., theft of their accounts/funds, would have been material to any potential administrative assessment recommended here. A reasonable assumption is that had Respondents been properly registered in Pennsylvania, they would have still charged advisory fees for their services in any event.

(ii) The scope of the violation, including the number of persons in and out of this Commonwealth affected by the conduct constituting the violation.

There were 11 clients in Pennsylvania that were serviced while Respondents were unregistered. However, although those clients were "affected" inasmuch as they received advice from the unregistered Respondents, there is no evidence on the record these 11 individuals suffered

any pecuniary harm beyond what they were charged advisory fees, and if so, how much. Again, a reasonable assumption is that had Respondents been properly registered in Pennsylvania, they would have still charged advisory fees for their services in any event.

(iii) The amount of restitution or compensation that the violator has made and the number of persons in this Commonwealth to whom the restitution or compensation has been made.

This factor weighs in Respondents' favor. Based upon information and belief, there were never any criminal proceedings against Respondent, and thus, there was never any type of formal restitution order entered.

(iv) Past and concurrent conduct of the violator

This factor weighs in Respondents' favor. There was no evidence set forth on the record that Respondents had any prior administrative violations, with the Bureau or otherwise. There was no evidence set forth that Respondents had any criminal history, before or after the incidents in question. This would appear to be Respondents' first administrative disciplinary entanglement.

(v) Any other factor that the department finds appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of this act.

This factor weighs in Respondents' favor. The role of the Bureau in enforcing the 1972 Act is important. It is necessary to act to protect the public and deter future violations, which is the Bureau's paramount duty. However, mitigating factors must also be considered. To that end, the Hearing Officer takes into account that Respondent Mowrey is a gentleman who is now 80 years old. At the time of the violations, he was in his 70s. It appears as though his office consisted of him and one other individual.

Further, Respondents are based in Ohio. A majority of the 11 Pennsylvania clients at issue had, at one point, at least some tangential connection to Ohio. Does this excuse Respondents from

the mandates of the 1972 Act and permit him to conduct unregistered IA activity in Pennsylvania? Of course not. However, it does not shock the conscience that a gentleman in his 70s, with little to no office support staff, could, on occasion negligently/inadvertently overlook the current or past residences of 11 of his clients- especially given these persons at one time did have connections with Ohio. Again, this does not excuse his conduct, however, it will be considered when determining a potential assessment.

Importantly, there is no evidence on the record about prior administrative violations or criminal history. To the contrary, this episode, although regrettable, appears to be Respondents' only administrative disciplinary entanglement with the Bureau. He appears to have cooperated fully with the Bureau when asked to do so, even to his detriment. When Respondents realized that they were not in compliance they took significant and meaningful steps to remain in compliance.

When all these factors are considered, an administrative assessment of \$231,668.51 is warranted. This amount reflects a disgorgement of the advisor fees he accrued from Pennsylvania clients while unregistered in Pennsylvania. Given that Respondent Mowrey is now 80 and has not been a "frequent flier" with the Bureau in regard prior disciplinary actions, this significant amount will serve to deter any similar conduct on his part, as well as others, in the future. It is obvious that Respondents' actions, although willful in the sense that they affirmatively happened, were not conducted with the intent to harm or defraud the public.

Accordingly, based upon the above findings of fact, conclusions of law, and discussion, the following proposed order shall issue:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING

Commonwealth of Pennsylvania
Department of Banking, Bureau of Securities
Compliance and Examinations

v.

G. Earl Mowrey & Co., LLC
and George Earl Mowrey,
Respondents

Docket No. 210076 SEC-OSC

PROPOSED ORDER

AND NOW, this 1st day of November 2023, upon consideration of the foregoing findings of fact, conclusions of law, and discussion, it is **ORDERED** as follows:

All Counts in the Order to Show Cause are **SUSTAINED**. Respondents to G. Earl Mowrey & Co., LLC, and George Earl Mowrey, shall pay an administrative assessment of \$231,668.51, for the violations of Section 301(o), 70 P.S. § 1-301(o) as set forth in the OSC. Respondents shall be jointly and severally liable for payment of this assessment.

Payment of the administrative assessment shall be by certified check, attorney's check, or U.S. Postal Service money order made payable to the "Commonwealth of Pennsylvania," and shall be mailed within thirty days of the effective date of the Commission's Final Order in this matter, unless otherwise directed to:

Banking and Securities Commission
Market Square Plaza
17 N. Second Street, Suite 1300
Harrisburg, PA 17101

BY ORDER:

Redacted

Jason C. Giuritano
Hearing Examiner

For the Department:

Veronica N. Hoof
Assistant Counsel
Pennsylvania Department of Banking and Securities
17 N. Second Street, Suite 1300
Harrisburg, PA 17101

For Respondent:

Eric Phillips, Esquire
298 Wissahickon Drive
North Wales, PA 19454

Docket Clerk:

Eileen Smith
Pennsylvania Department of Banking and Securities
17 N. Second Street, Suite 1300
Harrisburg, PA 17101

Date of Mailing:

11/2/2023

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND SECURITIES

FILED

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND
SECURITIES, BUREAU OF SECURITIES
COMPLIANCE AND EXAMINATIONS

PETITIONER,

v.

G. EARL MOWREY & Co., LLC
AND GEORGE EARL MOWREY

RESPONDENTS

PA DEPARTMENT OF
BANKING AND SECURITIES

Docket No. : 210076 (SEC-OSC)

CERTIFICATE OF SERVICE

I hereby certify that on November ^{17th} 2023, I served a true and correct copy of the attached Letter and Proposed Report in accordance with the requirements of 1 Pa. Code § 33.31 (relating to service by agency), in the manner indicated below:

By Hand Delivery Mail:

Veronica N. Hoof
Assistant Counsel
PA Department of Banking and Securities
17 North Second Street, Suite 1300
Harrisburg, PA 17101

By United States First Class Mail:

Eric Phillips, Esquire
298 Wissahickon Drive
North Wales, PA 19454

By:

Redacted

Linnea Freeberg, Docket Clerk
PA Department of Banking and Securities
17 North Second Street, Suite 1300
Harrisburg, Pennsylvania 17101

FILED

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND SECURITIES
DEPARTMENT OF BANKING AND SECURITIES

COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF BANKING AND :
SECURITIES, BUREAU OF SECURITIES :
COMPLIANCE AND EXAMINATIONS :

v.

Docket No. 210076 (SEC-OSC)

G. EARL MOWREY & CO., LLC :
GEORGE EARL MOWREY :

CERTIFICATE OF SERVICE

On behalf of the agency, I certify that I have this day caused to be served a copy of the foregoing *Final Order* upon the following persons pursuant to 1 Pa. Code § 33.31:

BY CERTIFIED, EMAIL AND
FIRST-CLASS MAIL:

VIA HAND DELIVERY

Thomas C. Dyer, Esquire (tdyer@hoflawgroup.com)
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Counsel for the Dept. of Banking
of Banking and Securities

Date: 2/27/2024

Redacted

Linnea Freeberg, Docket Clerk
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