BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Tassone, 2018 BCSECCOM 212 Date: 20180703

Investment Industry Regulatory Organization of Canada and Alberto Tassone

Panel	Nigel P. Cave	Vice Chair
	George C. Glover, Jr.	Commissioner
	Suzanne K. Wiltshire	Commissioner
Hearing Date	May 17, 2018	
Submissions Completed	May 17, 2018	
Date of Decision	July 3, 2018	

Appearing

Stacy Robertson	For Investment Industry Regulatory Organization of Canada
Alberto Tassone	For himself
David Hainey	For the Executive Director

Decision and Reasons for Decision

I. Introduction

[1] This is a hearing and review under section 28 of the *Securities Act*, RSBC 1996, c. 418 of:

a) a liability decision of an IIROC hearing panel against Alberto Tassone, dated February 23, 2017 (*Re: Tassone* 2017 IIROC 14); and

b) a penalty decision of an IIROC hearing panel against Tassone, dated December 26, 2017 (*Re: Tassone* 2017 IIROC 53), but delivered to the parties on January 2, 2018.

[2] On March 29, 2017, IIROC applied to the Commission for a hearing and review of the IIROC panel's liability decision. It was agreed that a hearing of that application should await the IIROC panel's penalty decision.

[3] On January 29, 2018, IIROC applied to the Commission for a hearing and review of the IIROC panel's penalty decision.

[4] IIROC filed written submissions on its applications and attended the Commission hearing.

[5] Tassone filed written submissions on May 4, 2018 and attended the Commission hearing. In his submissions, Tassone stated that he also sought a hearing and review of the IIROC panel's liability and penalty decisions. Tassone's written submissions also included factual statements that were not part of the record before the IIROC panel.

[6] As will be discussed below, IIROC objected to Tassone's application for a hearing and review of the IIROC panel's liability and penalty decisions as being out of time pursuant to section 165(3) of the Act. IIROC also objected to what they say was effectively an application by Tassone, in his written submissions, to adduce new evidence in the hearing and review before the Commission.

[7] The Executive Director filed written submissions and attended the Commission hearing.

II. Background

a) Procedural history

[8] On April 16, 2016, IIROC issued a notice of hearing against Tassone alleging contravention of IIROC's Dealer Member Rules in two respects:

a) From 2003 to the present, Tassone participated in and managed an investment in oil and gas wells in the United States (the JED Energy Investment) without the prior knowledge or approval of his Dealer Member firm and thereby:

   i) acted contrary to Dealer Member Rules 18.14 and 29.1 (IDA bylaw 29.1 prior to June 1, 2008) by conducting an unauthorized outside business activity; and

   ii) acted contrary to Dealer Member Rule 18.15 by accepting remuneration directly from someone other than his Dealer Member firm or its affiliates or related companies.

b) In October of 2014, the Respondent misled IIROC Staff by:

   i) providing misleading information concerning the extent of his personal financial interest in the JED Energy Investment;

   ii) providing misleading information concerning his status as an officer and director of one of the constituent corporate entities of the JED Energy Investment; and

   iii) providing misleading information concerning the existence of bank accounts in the name of JED Energy Ventures,

   and thereby acted contrary to Dealer Member Rules 19.6 and 29.1 (IDA bylaw 29.1 prior to June 1, 2008).

[9] In its liability decision, the IIROC panel dismissed the allegations against Tassone as set out in subparagraphs 8(a) and 8(b)(iii) above, but found Tassone liable in respect of the allegations in subparagraphs 8(b)(i) and (ii).

[10] Following a sanctions hearing, the IIROC panel ordered that Tassone:

a) be suspended for a period of six months following which he must be subject to a six month period of close supervision;

b) pay an administrative penalty of $40,000, of which $10,000 was to be paid within 180 days of the effective date of the decision; and the balance, in 15 equal monthly instalments commencing on the first day of the first month following payment in full of the $10,000; and

c) pay an amount of $40,000 by way of reimbursement of IIROC's costs incurred in connection with the matter, of which $10,000 was to be paid within 180 days of the effective date of the decision; and the balance, in 15 equal monthly instalments commencing on the first day of the first month following payment in full of the $10,000.

[11] IIROC's application for a hearing and review of the liability decision is in respect of the IIROC panel's dismissal of the allegations set out in paragraphs 8(a)(i) and (ii) above (we generally describe the allegation in paragraph 8(a)(i) throughout as the allegation that Tassone was engaged in an unauthorized outside business activity – the allegation in paragraph 8(a)(ii) we address separately below).

[12] IIROC's application for a hearing and review of the penalty decision is in respect of the IIROC panel's order that Tassone be suspended for six months.

[13] IIROC's application for a review of the IIROC panel's penalty decision is separate and distinct from its application for review of the panel's liability decision (i.e. that the success of its application for review of the penalty decision is not dependent on it being successful on its application for review of the liability decision).

[14] During oral submissions, IIROC asked that, if it was successful on its application regarding the liability decision, we not return the matter to the IIROC panel for its determination of the appropriate penalties flowing from our findings; but rather, we allow the parties to make further submissions on that issue before the Commission for its determination of the appropriate sanctions.

[15] Tassone's application for a hearing and review of the liability decision is in respect of the IIROC panel's finding that he contravened Dealer Member Rules 19.6 and 29.1 (IDA bylaw 29.1 prior to June 1, 2008) in respect of the matters described in subparagraphs 8(b)(i) and (ii) above.

[16] Tassone's application for a hearing and review of the penalty decision is in respect of all of the orders made against him by the IIROC panel.

b) Overview of the IIROC panel's material findings

[17] For a significant number of years, Tassone worked closely with another registered representative, S. S has been retired since 2008.

[18] In or around 2003, S became involved in a business proposition to acquire an interest in certain third party owned oil and gas wells in Texas that ultimately became the JED Energy Investment.

[19] S was responsible for setting up the investment structure and finding outside investors to invest in the opportunity. S and Tassone also invested in the JED Energy Investment.

[20] The funds provided by S, Tassone and the outside investors were used to acquire an interest in a trust. That trust then used those funds to acquire the sole interest in a limited partnership. That limited partnership then used those funds to acquire interests in various oil and gas wells in the United States. The interests in those assets produced revenue which was ultimately distributed (back up through the organizational structure) to S, Tassone and the outside investors.

[21] At S' request, Tassone became both a director of one of the corporations used in the JED Energy Investment structure and an initial trustee of the trust used in the structure. Tassone was replaced by a professional trustee for the trust but this trustee subsequently resigned without another trustee being appointed. Tassone was, for some period of time, the President of the general partner of the limited partnership used in the structure. Although Tassone resigned from this position at some point in time, the IIROC panel found that Tassone's role with respect to the general partner remained the same throughout the relevant period.

[22] Tassone opened and operated bank accounts through which funds flowed to pay certain operating costs of the structure and investor returns. The IIROC panel accepted that funds were paid out essentially in a manner consistent with the interests in the investment structure.

[23] Tassone used his member firm's address for the delivery of mail related to the JED Energy Investment structure and also used his member firm's premises in other respects related to the investment but the panel found that these uses were not material.

[24] S, Tassone and Tassone's sister each held an interest in the JED Energy Investment structure and those interests (when combining Tassone's interest and the interest in the name of Tassone's sister together) were acquired at a unit cost significantly less than that paid by the outside investors (or, to put it another way, their proportionate interests were significantly larger than what the amount paid for their investments would have derived had they paid the same unit acquisition cost as the outside investors).

[25] The JED Energy Investment has ceased to produce meaningful cash flows. Tassone benefitted from the structure via receiving returns, directly and indirectly, on his investment therein.

[26] One of the outside investors filed a complaint against Tassone to IIROC which commenced an investigation. As part of the investigation, Tassone was interviewed twice by IIROC investigators. During his initial interview, Tassone was vague about his ownership interest in the investment structure and denied any suggestion that his sister had not paid anything for her purported investment in the structure. During his second interview, Tassone indicated that he wished to clarify certain of the statements that he made during his first interview regarding his ownership interest in the structure and the price his sister paid to acquire her ownership interest.

[27] Over the years, Tassone had made certain filings with IIROC staff related to his ongoing registration status. In one of those filings, he disclosed that he had previously been an officer of the general partner of the limited partnership used in the JED Energy Investment structure, that he had resigned from that position and that he no longer had any control or involvement in the operations of that company since his resignation.

[28] In its conclusions on the allegations that Tassone was engaged in unauthorized outside business activities, the IIROC panel held that Tassone participated in the JED Energy Investment but that he did not manage it (as it was a single passive investment in a revenue-producing asset and there was nothing to manage). Therefore, it held that Tassone did not conduct the business and was not required to disclose the activity or obtain approval for it.

[29] In its conclusions on the allegations that Tassone misled IIROC investigators, the IIROC panel found that Tassone's answers in his first interview regarding his ownership interest in the structure and how his sister acquired her interest in the structure were intentionally misleading and therefore in contravention of IIROC member rules. Similarly, the IIROC panel found that Tassone's filing with IIROC which indicated that he had no involvement in the general partner of the limited partner was misleading and in contravention of IIROC member rules.

[30] We note that the IIROC panel's findings with respect to the dismissal of the third allegation of Tassone providing misleading information to IIROC concerning the JED Energy Investment's bank accounts are not in question in this hearing and are therefore not material to our decision.

III. Preliminary Matters

[31] As noted above, Tassone:

a) explicitly applied for a hearing and review of both the IIROC panel's liability decision and penalty decision; and

b) implicitly applied to adduce additional evidence in the Commission hearing.

[32] Tassone made these applications in his written submissions filed with the Commission on May 4, 2018.

[33] Section 165(3) of the Act requires that an application for a hearing and review of an IIROC decision must be filed with the Commission by a person directly affected by the decision within 30 days of receipt by that party of notice of the decision for which review is sought. The IIROC panel issued its Decision and Reasons on February 23, 2017. It issued its Penalty Decision on December 26, 2017 and delivered it to the parties on January 2, 2018. Tassone's application was out of time.

[34] Tassone's only submission with respect to this issue was that he was unaware of the timing required by the Act to file his application. Although Tassone was not represented by counsel in our hearing, he was represented by counsel in the prior proceedings before the IIROC panel. He also was copied on IIROC's two applications to the Commission, made within the requisite period in each case, for a review of the liability and penalty decisions.

[35] We find that Tassone's explicit application for a hearing and a review of the IIROC panel's liability findings and penalty decision is out of time and dismiss it.

[36] Tassone's implicit application to introduce additional evidence, for all practical purposes, did not proceed.

[37] During the hearing, we made clear to Tassone that factual statements that were in his written submissions that were not before the IIROC panel did not constitute evidence, in and of themselves, that could be considered by us and that, to become evidence, oral testimony or documentary evidence of any facts not before the IIROC panel would need to be provided during our hearing. Tassone did not lead any such evidence. Therefore, there was no additional evidence for us to consider beyond that which was before the IIROC panel.

[38] For greater certainty, we did not consider, in this hearing and review, any factual statements in Tassone's written submissions that were not part of the record before the IIROC panel.

IV. Section 28 and Standard of Review

[39] Section 28 of the Act provides that a person directly affected by a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument of a self-regulatory organization (SRO) may apply by notice to the Commission for a hearing and review of the matter.

[40] Section 165(4) of the Act provides that, on a hearing and review, the Commission may confirm or vary the decision under review or make another decision it considers proper.

[41] The Commission's BC Policy 15-601 - *Hearings* sets the framework for a hearing and review under section 28 of the Act. It establishes that the standard of review is one of reasonableness. Was the decision reasonable in the context of the record, the law, the evidence and the public interest? Section 5.9 of the Policy sets out that a decision will generally not be interfered with unless the applicant can establish that the SRO has made an error in law, overlooked material evidence, there is new and compelling evidence or that the Commission's view of the public interest is different from that of the SRO.

[42] This Commission reviewed those provisions in *Re Mutual Fund Dealers Association*, 2013 BCSECCOM 362, and stated at para 13:

> The role of the Commission in a hearing and review is not to provide a second opinion of an SRO decision. The onus is on the applicant on a hearing and review to both identify the criteria in s. 5.9 of BCP 15-601 that applies to the SRO's decision, and show that the decision is unreasonable as a result. If the Commission agrees that an SRO decision under review is unreasonable, it will consider whether to confirm or vary the decision, or make another decision it considers proper. On the other hand, if the Commission finds an SRO's decision reasonable, it will not interfere in it.

[43] This standard of review suggests deference to decisions of SROs and exchanges. This deference is reflected in comments of this Commission in *Re Nichols*, 2007 BCSECCOM 319, at para 25:

> It is not enough for us to conclude that we disagree with the Exchange's decision or would have made a different decision ourselves. We should defer to the judgment of the Exchange unless its decision displays the type of error set out in the policy.

[44] While the above comments were made in the context of a hearing and review of a decision of an exchange, the same is true for a hearing and review of a decision of an SRO.

V. Parties' Positions

[45] Having decided the preliminary issues in the manner set out above, the following is a description of the parties' submissions on the remaining issues in this hearing and review.

[46] In IIROC's application for a hearing and review of the liability decision it submitted that:

a) the IIROC hearing panel erred in law by:

   i) failing to consider the entirety of the notice of hearing and particulars (setting out the allegations against Tassone) and instead focusing entirely on the wording in the first allegation;

   ii) unreasonably interpreting the word "managed" in relation to Tassone's activities related to the JED Energy Investment; and

iii) incorrectly interpreting and dismissing IIROC Member Regulation Notices and failing to consider and apply Tassone's employer's policies governing outside business activities;

b) the IIROC hearing panel overlooked and misapplied material evidence; and

c) the Commission should take a different view of the public interest in the circumstances than the IIROC panel did.

[47] While all of the grounds listed above, relating to IIROC's application for a hearing and review of the liability decision, might relate to the IIROC panel's dismissal of the allegations in both paragraphs 8(a)(i) and (ii) above, IIROC's submissions were only directed at the dismissal of the allegation in paragraph 8(a)(i) above. Therefore, we do not know the basis upon which IIROC was asking for a review of the IIROC panel's dismissal of the allegation in paragraph 8(a)(ii) above.

[48] IIROC's application for a hearing and review of the penalty decision and its submissions on that issue were limited to the length of the suspension imposed by the IIROC panel.

[49] More specifically, IIROC submitted that:

a) the IIROC panel erred in law by:

i) focusing too heavily on the principle of specific deterrence in its penalty decision, as in cases of misleading IIROC investigators, the principle of general deterrence must be a more significant factor in determining the appropriate penalty; and

ii) not following similar prior decisions to guide its penalty decision; and

b) the Commission should take a different view of the public interest in determining the appropriate penalty than the IIROC panel did.

[50] The executive director generally supported IIROC's positions in the application for a hearing and review of the liability decision and took no position with respect to the IIROC panel's penalty decision.

[51] More specifically, the executive director submitted that the IIROC panel erred in law by elevating the word "managed" in the outside business activities allegation to an essential element necessary to find a contravention of the applicable IIROC Dealer Member Rules. The executive director submitted that the panel did not consider the actual language of the Dealer Member Rules themselves in light of the totality of the allegations in the IIROC notice of hearing and evidence before the IIROC panel. The executive director submits that this error of law renders the IIROC panel's decision on that allegation unreasonable.

[52] Tassone submitted that:

a) with respect to IIROC's application for a hearing and review of the liability findings, the IIROC panel did not make any errors in law or overlook any material evidence. Further, he submitted that a finding of a contravention of IIROC Dealer Member Rule 29.1 requires a finding of quasi-criminal or unethical conduct rather than merely negligent conduct and that the IIROC panel had not made any findings that he had acted unethically or for an improper purpose; and

b) with respect to IIROC's application for a review of the penalty decision, the penalties were already excessive and overly punitive. More specifically with respect to the length of suspension, he submitted that all of the cases that IIROC cited as examples which should have been followed by the IIROC panel in this case involved misconduct more serious than his.

VI. Analysis

a) Liability Decision

Allegation in paragraph 8(a)(i)

[53] We find that the IIROC panel made an error of law that makes their dismissal of the allegation that Tassone acted contrary to Dealer Member Rules 18.14 and 29.1 (IDA bylaw 29.1 prior to June 1, 2008), by conducting an unauthorized outside business activity, unreasonable in the circumstances. Because we make this finding, it is unnecessary for us to consider the other grounds upon which IIROC has challenged the dismissal of that allegation (nor are there issues raised in those submissions that are sufficiently novel or important for us to address them even though they are not relevant to our determination on this aspect of the review).

[54] Both IIROC and the executive director framed the error of law as an overly narrow reading of the IIROC notice of hearing setting out the allegations against Tassone. They pointed to considerable precedent that highlights that notices of hearing, in the regulatory context, are not to be interpreted in the same manner as criminal indictments and are not to be read in a strict manner provided that the respondents are able to ascertain the case that they have to meet.

[55] In this vein, they submitted that the IIROC hearing panel improperly focused on the word "managed" in the notice of hearing. They say the panel determined that "management" was an essential element of making out that Tassone was engaged in an unauthorized outside business activity because that was the manner in which the allegation was set out in the notice of hearing.

[56] The executive director also submitted that the IIROC panel erred in law when it interpreted the requirements of IIROC Dealer Member Rules 29.1 (as it applied to outside business activities) and 18.14.

[57] The executive director submitted that a finding that a respondent is engaged in an unauthorized outside business activity does not require a finding that the person "managed" the business activity. He submitted that the provisions have been, and should be, interpreted broadly to capture a wide range of activities and that while "managed" may be part of that analysis, it is not an essential element of that analysis.

[58] We do not know whether the IIROC hearing panel felt compelled to interpret the allegation as requiring a finding that Tassone "managed" JED Energy Investment by virtue of the wording used in the IIROC notice of hearing. There is no explicit discussion of this issue one way or the other in its reasons.

[59] However, it is clear that it did interpret the allegation as requiring that Tassone "managed" the JED Energy Investment. The IIROC hearing panel dismissed the allegation after it determined that Tassone did not manage the JED Energy Investment as there was "nothing to be managed" (using the words of the findings).

[60] Whether viewed as an overly restrictive interpretation of the legal requirements of a notice of hearing, or an incorrect interpretation of requirements of the Dealer Member Rules relating to unauthorized outside business activities, this was an error of law that makes the IIROC hearing panel's dismissal of this allegation unreasonable in the circumstances.

[61] The IIROC hearing panel noted that IIROC has traditionally relied on Dealer Member Rule 29.1 as the principal disciplinary instrument to address concerns related to members' involvement in outside business activities.

[62] Dealer Member Rule 29.1 provides as follows:

> 29.1. Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board.
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> For the purposes of disciplinary proceedings pursuant to the Rules, each Dealer Member shall be responsible for all acts and omissions of each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member; and each of the foregoing individuals shall comply with all Rules required to be complied with by the Dealer Member.

[63] In *Re Bortolin*, 2012 IIROC 13 (CanLII) (at paragraphs 39-40), IIROC confirmed that "outside business activities without the knowledge and approval of the Member are not permitted by IIROC." The panel in that case noted that failure to disclose is a breach of Rule 29.1. The panel also noted that multiple IIROC hearing panels have held that

"engagement in outside business activities without the Member's knowledge and approval is a breach of Rule 29.1."

[64] *Bortolin* also describes the underlying policy rationale for requiring disclosure and approval of outside business activities:

> 34 Disclosure and approval are necessary in such circumstances in order to allow the Member to supervise and control a Registered Representative's activities. Not to do so can create conflicts of interest for the Registered Representative and lead to the type of improper activity found in this case. The policy also helps protect the integrity of the securities market as well as the reputation of the Member.

[65] Dealer Member Rule 18.14 codifies IIROC's expectation that Registered Representatives and Investment Representatives must disclose all outside business activities to their Dealer Member and obtain the approval of the Dealer Member before engaging in any outside business activities. The relevant provisions of Dealer Member Rule 18.14 provide as follows:

> 18.14 (1) A Registered Representative or Investment Representative may have, and continue in, any business activity outside of the Dealer Member, including another gainful occupation if:
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> (a) [...]
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> (b) The Dealer Member establishes and maintains procedures acceptable to the Corporation to ensure continuous service to clients and to address potential conflicts of interest;
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> (c) The Registered Representative or Investment Representative informs the Dealer Member of the outside business activity and obtains the Dealer Member's approval to engage in such outside business activity prior to engaging in such outside business activity;
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> (d) [...]
>
> (e) The outside business activity is not:
>
> (i) One which would bring the securities industry into disrepute [...]

[66] Finally, Member Regulation Notice 13-0163 entitled "Disclosure and approval of outside business activities" contains a very broad definition of "outside business activities." It provides that "outside business activities" include "any activities conducted outside of the Dealer Member...for which direct or indirect payment, compensation, consideration or other benefit is received or expected."

[67] None of the relevant provisions discusses or contains the requirement for the individual to have "managed" the outside business activity in order to fall within the ambit of the disclosure and approval provisions.

[68] The policy rationale for these requirements supports a broad interpretation of the term "outside business activity", particularly when that activity involves an investment in which outside investors participate. The potential conflicts of interest in that scenario are manifest and abundant.

[69] The JED Energy Investment was a complex investment structure in which Tassone ensured that payments were made to both service providers and investors. He received a benefit under that structure. This was more than the mere holding of a completely passive investment instrument. As the IIROC panel found, Tassone was both an actual, and a *de facto*, trustee and an officer of certain entities within the structure at various times and was responsible for its continued operation.

[70] The JED Energy Investment was, in fact, manifestly a situation that the outside business activities rules are designed to address. There were many potential conflicts of interest in the JED Energy Investment structure relative to Tassone's role as a registered representative employed by a member firm. A member firm is entitled to be made aware of exactly this kind of scenario so that it may assess what steps need to be taken by it or its employees in the circumstances.

[71] Tassone argued that a finding of a contravention of section 29.1 of the IIROC Dealer Member Rules requires a finding of unethical conduct that is more than mere negligence. In so doing, he referred to this Commission's decision in *Blackmont Capital Inc. et al*, 2011 BCSECCOM 490. In the *Blackmont* decision, the Commission referred, with approval, to an Ontario Securities Commission review of a previous IDA decision:

> 42. In *Octagon*, [2007] IDACD No. 16, the Ontario Securities Commission, considered whether the negligent contravention of IIROC rules would constitute a contravention of Rule 29.1. The OSC panel cited *Gareau*, [2005] IDACC No. 25:
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> "A majority of the Hearing Panel found that there was no breach in this case. By-Law 29.1 is intended to focus primarily on quasi-criminal and unethical conduct rather than negligent conduct. There was no evidence that Gareau acted unethically in the sense that he acted for an improper purpose. If anything, this was a case of negligence rather than one of personal gain or conflict of interest."
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> 43. The OSC went on to say:
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> "There is no evidence Octagon acted unethically or for an improper purpose. There is no evidence that Octagon had a conflict of interest. There is no evidence of dishonest motive or blameworthy conduct by Octagon . . . .

[72] It is sufficient to note that Tassone's circumstances involved both rampant potential conflicts of interest and personal gain.

[73] We find that the IIROC panel made an error of law in its findings with respect to whether Tassone was engaged in an outside business activity that led to the dismissal of the allegation. That dismissal was not reasonable in all of the circumstances. In the

circumstances, we are able to find that Tassone was engaged in an outside business activity for the purposes of IIROC's Dealer Member Rules.

[74] Under section 165(4) of the Act, on a hearing and review, the Commission may confirm or vary the decision under review or make another decision it considers proper. A finding that Tassone acted contrary to Dealer Member Rules 18.14 and 29.1 (IDA bylaw 29.1 prior to June 1, 2008) by conducting an unauthorized outside business activity requires both a finding that the member was engaged in an outside business activity *and* that it was unauthorized.

[75] The IIROC panel never made a finding whether Tassone disclosed to his employer and obtained its approval for the JED Energy Investment as the IIROC panel determined that Tassone was not an engaged in an outside business activity. A review of the record suggests that there was evidence before the panel that Tassone's employer was aware of his involvement in the JED Energy Investment. That evidence must be considered, along with all of the other evidence adduced during the hearing, to make a factual determination whether Tassone's conduct was "unauthorized". It is appropriate that the IIROC panel, as the body which heard all of the evidence in first instance, make that finding. We find that this matter should be returned to the IIROC panel for it to make that determination and, in the event that they determine that Tassone was in contravention, to determine any appropriate penalties.

Allegation in 8(a)(ii)

[76] As noted above, we do not know the grounds upon which IIROC was seeking a review of the IIROC panel's dismissal of the allegation in paragraph 8(a)(ii) above. IIROC did not make any written or oral submissions on this issue.

[77] The following is the entirety of the IIROC panel's reasons relating to its dismissal of this allegation:

> 41. The only allegation in Count 1(ii) is that Mr. Tassone accepted remuneration directly from someone other than his Dealer Member firm or its affiliates or related companies in breach of Dealer Member Rule 18.15.
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> 42. In our view this allegation fails for the simple reason that Dealer Member Rule 18.15 prohibits such conduct only in the case where the remuneration is in respect of "securities-related activities…[conducted] on behalf of the Dealer Member or its affiliates or its related companies" and there is no such allegation here nor, in our opinion, is there any evidence to support such a claim had it been made.

[78] We find it difficult, if not impossible, to discern (i) the nature of this allegation in the context of this case; and (ii) the basis upon which IIROC was asking for a review of the IIROC panel's dismissal.

[79] IIROC did not advance a basis for why the IIROC panel's dismissal of this allegation should be overturned as being unreasonable. As a consequence, IIROC's application for a review with respect to the IIROC panel's finding on this allegation must be dismissed.

b) Penalty decision

[80] IIROC's application for a review of the penalty decision was limited to the length of the suspension contained therein.

[81] IIROC submitted that the IIROC panel made an error in law by placing insufficient weight on the principle of general deterrence in its penalty decision.

[82] It is clear from the IIROC panel's decision that it did consider the need for its penalty decision to address both specific and general deterrence. The panel's decision expressly states that it approached its decision with reference to both specific and general deterrence (among other factors). Unsurprisingly, the panel's decision does not explicitly state exactly what weight it attached to specific versus general deterrence. Sanctioning and penalty decisions are rarely if ever that precise in their approach.

[83] We are not aware of a legal principle that requires a specific balance or weighting of the principles of specific and general deterrence (let alone the myriad of other factors that must be taken into account). A failure to explicitly consider a specific factor in reaching a decision or a decision based solely on one sanctioning factor may provide the basis for an argument that an error of law has been made. However, the particular weight attached to a particular factor in sanctioning is difficult to conceive as an *error in law* (that is not to say that it might not be unreasonable on some other grounds). Given that the panel in this case expressly considered the issue of general deterrence, we do not consider that the IIROC hearing panel made an error in law in its consideration of the principle of general deterrence.

[84] IIROC also submitted that the IIROC panel erred in law by not arriving at a suspension length for Tassone consistent with previous IIROC penalty decisions and those of other securities regulatory authorities in cases of similar misconduct. It submitted that the IIROC panel incorrectly stated that it was not particularly helpful to examine where on the spectrum of severity Tassone's misconduct fell, relative to other previous decisions. IIROC also submitted that the role of a panel in a penalty hearing is to promote consistency, fairness and transparency to guide the exercise of discretion in determining sanctions.

[85] This is what the IIROC panel said with respect to previously decided cases (paragraphs 23-25 of the penalty decision):

> 23. The parties referred us to a number of previously decided cases on sanctions for, or including, lying to regulators. In some of these cases the misconduct hampered or impeded the investigation, in others it did not. In some cases the respondent had a prior disciplinary history, in others not. In some there were several "offenses" in addition to misleading regulators, in others not. Suspensions imposed have varied from as little as 2 to as much as 12 months.

> 24. It is easy to say that, as Mr. Tassone acknowledges, his misconduct was serious. It is difficult – much more difficult – to assign to it a place on a spectrum from less to more egregious, to say it was more or less serious than the misconduct found to have occurred in other cases. For this reason, while we have read carefully the various decisions that were cited to us, we do not think it particularly helpful to examine their minutiae or attempt to calibrate the factual similarities and differences among them and the present case, to determine where. Tassone's conduct falls on a spectrum from less to more egregious and, accordingly, the appropriate period of suspension.
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> 25. In the nature of the case, such determinations have about them elements of impression, instinct and intuition. So while we agree that a suspension is appropriate, determining the duration of the suspension is best done in the context of a decision about the sanctions "package" as a whole rather than in isolation.

[86] First, IIROC's submission that the above represents an error of law stands on shaky ground on the basis that the previous regulatory decisions provided for the panel to consider do not have precedential effect in the same manner as certain common law jurisprudence does. That does not denigrate from the laudable goals of consistency, fairness and transparency that sanctions outcomes that are logically consistent with previous sanctions decisions help promote. However, the argument that the panel committed an *error of law* by not following previous decisions is difficult to accept in this context.

[87] Secondly, a review of the IIROC panel's reasons does not support an interpretation that it simply disregarded the previous decisions provided for its consideration. The reasons suggest that the panel:

a) understood that these cases set out a range (or bookends) within which suspensions for this type of misconduct have fallen;
b) understood that there were a variety of factors that appear to influence the length of suspensions within this range; and
c) considered that determining the appropriate length of the suspension for Tassone, within the totality of sanctions to be imposed upon him, such that the package of sanctions was appropriate in the circumstances, was more important that engaging in an exercise of very precisely trying to place his misconduct relative to all of the other respondents in all of the other cases.

[88] We do not see anything in that approach that constitutes an error in law or is an unreasonable application of previous decisions.

[89] Finally, IIROC says that we should take a different view of the public interest in the length of the suspension imposed upon Tassone than the IIROC hearing panel.

[90] In our view, this is really the basis upon which IIROC's two arguments regarding errors of law (described above) should be made. Put another way, IIROC is really saying that

for public interest reasons, Tassone's suspension for his misconduct should be longer because:

a) the general deterrence message for lying to IIROC investigators should be stronger; and
b) Tassone's misconduct, relative to certain previous decisions, was more serious.

[91] Added to the above, IIROC submits that there is an internal inconsistency between the length of suspensions that have been ordered in cases involving members who fail to cooperate with an IIROC investigation and the length of suspensions in cases involving respondents who mislead IIROC investigators. IIROC submits that cases involving a failure to cooperate often result in permanent suspensions. IIROC submits that respondents who are found to have misled IIROC investigators should be suspended for a minimum of at least one year and, in Tassone's case, that a suspension of at least two years would be appropriate.

[92] Where Commission panels are asked to overturn a decision in a hearing and review on the basis that it should take a different view of the public interest, they should be cautious about doing implicitly what Policy 15-601 and the *Nichols* decision say expressly that they should not do – substitute their own view for that of the decision-maker in first instance. That is particularly true in the case of a requested review of a penalty decision which, by necessity, involves the balancing of various factors and for which there should be considerable deference.

[93] We were provided with many of the same, if not all of the same, previous decisions that were put before the IIROC panel. As noted by the IIROC panel, those decisions indicate that there is a range of suspension outcomes (or market prohibitions) for lying to securities regulators from as low as two months to one year or more. At its most basic, this suggests that a six month suspension is not out of the range of reasonableness for misconduct of this type.

[94] Just as importantly, although IIROC only asked for a hearing and review of the length of the suspension imposed upon Tassone, that suspension was only one aspect of the total penalties imposed upon him. Tassone also was ordered to pay $40,000 as an administrative penalty, reimburse $40,000 in costs of the IIROC proceeding and received a requirement for close supervision for six months upon a return from his suspension. It is clear that the IIROC hearing panel considered the length of Tassone's suspension in the context of the complete package of penalties to be imposed upon him. It is appropriate for us to consider the reasonableness of his suspension in the context of the total package of penalties that he received.

[95] Tassone's misconduct was serious, and as the IIROC panel found, intentional. However, the totality of the penalties imposed by the IIROC panel, including the suspension, are also serious and significant. In particular, the financial penalties imposed upon Tassone were significant. We cannot conclude that those sanctions are unreasonable in all of the circumstances of this case.

[96] Therefore, we dismiss IIROC's application to increase the IIROC panel's six month suspension of Tassone.

VII. Summary of Rulings

[97] As set out above, we rule as follows:

a) we dismiss Tassone's applications to overturn the IIROC panel's liability findings that in two respects he lied to IIROC investigators, contrary to IIROC Dealer Member Rules 19.6 and 29.1, and the penalty decision in connection therewith;

b) Tassone's implicit application to introduce additional evidence (that was not before the IIROC hearing panel) in the hearing and review was not advanced by him and there was therefore no additional evidence for us to consider beyond that which was before the IIROC panel;

c) we grant IIROC's application to overturn the IIROC panel's dismissal of the allegation that Tassone carried out undisclosed and unapproved outside business activity contrary to IIROC Dealer Member Rules 18.14 and 29.1; we find that Tassone conducted outside business activity; and we return this matter to the IIROC panel for its determination whether Tassone's outside business activity was unauthorized;

d) we dismiss IIROC's application to overturn the IIROC panel's dismissal of the allegation that Tassone acted contrary to Dealer Member Rule 18.15 by accepting remuneration directly from someone other than his Dealer Member firm or its affiliates or related companies; and

e) we dismiss IIROC's application to increase the IIROC panel's order of a six month suspension against Tassone for providing misleading information to IIROC investigators in contravention of IIROC Dealer Member Rules 19.6 and 29.1.

July 3, 2018

For the Commission

Nigel P. Cave
Vice Chair

George C. Glover, Jr.
Commissioner

Suzanne K. Wiltshire
Commissioner