BEFORE THE FEDERAL TRADE COMMISSION

In the matter of FTC DOCKET NO. D09438

HIWU

Vs.

Michael Hewitt (Trainer)

MICHAEL HEWITT'S BRIEF

HISA Regulations applicable to this disciplinary proceeding direct HIWU to provide a CP *written notice* as to the date, time and place of the B sample opening. Lab methods are presumed valid unless applicable law provides some legitimate challenge negating the validity of the method. [Conclusions of Law 1-9] Here HIWU's failure to provide CP written notice of the opening of the B Sample creates a legitimate challenge by CP to the validity of the laboratory method relied on to assess liability and consequences. CP rebutted the lab validity presumptions by showing a clear departure from the Laboratory Standards. (COL 4)

By using the statutory directive command words "shall" and "will," when read together, the combined Rules [Rule 3345(a)(4)(iii)] and Regulations specifically require HIWU to provide CP written notice of the B Sample opening as a condition precedent to imposition of rule violation consequences. Clearly HIWU recognizes its notice obligation. In its hearing evidence HIWU admits never providing CP written notice. However, the bulk of HIWU's remaining argument in its response to the Application for Appeal was that:

> HIWU provided CP verbal notice of
> the B Sample opening. Verbal notice

> was sufficient under these circumstances because the rules permit either "actual "notice and/or "constructive notice" with regard to its obligation to provide CP the information about the B sample opening. [ROA 178-198]

The IAP Member's findings infer a fact determination that HIWU did in fact provide -- and CP did in fact receive – "actual" notice of the B opening details. It found the "verbal notice" (disputedly) conveyed by HIWU, as communicated by its counsel only, and standing alone, was sufficient evidence to support liability and consequences (Order pg. 2). Note however the combined Rules and Regulations command written notice.

> "Agency will promptly notify the CP….**in writing** of the following [the ECM Notice]"
>
> Rule 4533(a)

Nothing in the language suggests anything other than written notice satisfies HIWU's obligation. The existence of a legal obligation is further bolstered by the notation "[ECM Notice"]. These words infer the stated task of providing the notice described Rule 4533 is part and parcel to the general notice HIWU must provide CP to satisfy due process in connection with the lab testing function. HIWU stipulates to never providing written notice. Because written notice was a conditional obligation of the prosecution – and because that type notice never occurred – HIWU failed to provide due process the Rules and Regulations command. The failure to provide due process renders the liability and consequences determination invalid. On this basis alone the case should be reversed.

Assuming verbal notice was adequate, and assuming the actual and constructive notice descriptions apply to the subject notice obligation, the clear weight of the evidence rejects the notion CP received verbal notice from HIWU. Instead, the reasonable inferences to be drawn from the Record support a finding that HIWU never provided CP *any notice at all*. [Finding of Fact 3] The clear weight of the evidence shows HIWU more than likely never provided CP actual notice – despite dozens of telephone conversations occurring over a thirty day period addressing not only this case, but two other separate cases. Mr. Hewitt stated he was wholly unfamiliar with the process. He relied on HIWU counsel Ms. Heath to provide accurate information concerning the disciplinary process [FOF 8-9]

It is apparent the IAP Member correctly honed in on the sole relevant fact issue dispute. That question was directly presented point blank by the IAP Member to Mr. Hewitt.

> "**My question is, did you have any Notice written or otherwise of the Opening of the B Sample**?"

Mr. Hewitt's response was "no." [ROA 198]

An unequivocal answer was provided. In a presumed effort to assist in judging the relevant facts, the IAP Member directly sought out Mr. Hewitt's sworn testimony on the subject. The testimony was received. The testimony was thereafter rejected in-whole as being not credible. The reasonable inference is the IAP Member determined Mr. Hewitt was misrepresenting facts. The evidence of purported notice provided by HIWU counsel was accepted as true. Mr. Hewitt's direct answer on the ultimate issue was rejected. The IAP Member found Mr. Hewitt received actual notice verbally from Ms. Heath,

presumably in the manner she testified was she gave the information during the calls. It found that after receiving this (purported) notice, Mr. Hewitt did not appear for the opening; by not appearing the right to witness was waived. By extension, Mr. Hewitt materially misrepresented facts which, if taken as true, would relieve him from liability and consequences.

Examination of Clear Weight

In an environment where CP had three separate cases and was undisputedly not familiar with the nuances of the disciplinary process, the IAP Member imbues upon CP "notice" of the "Shack's Way" opening. Note the inexperienced CP knows only what occurred in his other two cases. In those cases he received an e-mail from HIWU notifying of the opening. There is NO EVIDENCE suggesting HIWU provided verbal notice of the other two openings. The Record reflects only written notice of the other two. How then should CP expect to be imparted "notice" of these important legal details only verbally in the subject case? CP would reasonably expect that notice to arrive by e-mail, just like the other two cases. Even if the cases were reported in different sequence -- if this case B Sample "came first" as HIWU alleges through Ms. Heath -- then written notice the "first time around" would have been critical to open and clear communication. Should CP be imbued verbal notice in a situation where he had no idea what was going on? If this was indeed the "first instance," shouldn't HIWU have taken greater care to provide the "actual notice" of such important legal details? The answer is a resounding "yes." The common denominator is written notice on two cases; (purported) verbal notice on one case.

What is a fair assessment of the competing evidence forming the basis for the clear weight determination:

The veracity of Mr. Hewitt's testimony

vs.

The authenticity of HIWU counsel's evidence presented concerning the verbal notice it alleges was given.

Thus, the task of this appeal will be the fact finder must evaluate the credibility of both side's evidence and determine which between the choices "A" or "B" is more likely true than not true:

A. Is CP providing credible information on whether he was verbally notified?

B. Should the fact finder disbelieve CP's testimony in favor of finding HIWU's evidence on notice to be more probably true than not true?

Counsel as Witness

HIWU's evidence on the ultimate fact question comes exclusively from its prosecutor, and not from any other independent witness. Such evidence was insufficient to overcome the reliability which should have been attributed to Mr. Hewitt's testimony given the context of this Record.

Basic due process prohibits counsel for the prosecution from acting both as prosecutor and as a material witness for the prosecution. CITE. As it stands, CP is being assessed consequences based exclusively on "evidence" coming directly from the prosecutor in the form of personal testimony. HIWU's argument on the ultimate question is that Ms. Heath's "testimony" should be considered credible and Mr. Hewitt's testimony should be considered not credible and/or otherwise self-serving.

Stated very simply, the clear weight infers CP was not notified. During the numerous calls Ms. Heath surely endeavored in good faith to assist with CP's numerous questions about the process. Did she however adequately communicate the notice of the opening verbally during these calls? The better question might be did the confused and unknowing CP clearly understand whatever Ms. Heath contends she told him on the phone about the opening? Regulations unequivocally call for written notice. Thus, verbal notice, at a minimum, is not the preferred method, perhaps because verbal notice cannot be verified by documentation. It is therefore historically less reliable than documentary proof. If CP did not understand the communication of the notice – as could be reasonably expected when being bombarded with wholly unfamiliar information – then the verbal notice was lawfully inadequate, even under Rule 3350(b). Clear weight should have been decided in favor or CP's testimonial evidence. This evidence was more procedurally sound than what HIWU presented. CITE

The "credibility" of Ms. Heath's personal testimony on the matter is irrelevant. What should be considered is the totality of the evidence. When viewed from the clear weight perspective, the fact finding should have concluded it was more probably true CP did not receive actual notice. For these reasons the IAP Member's ruling should be reversed.

Higher Burden Created by Departure from Lab Standards

The extent of the higher burden is left undefined in the Rules and Regulations. Since it was HIWU's obligation to provide written notice, logic dictates HIWU carries the "higher burden." Failure of actual notice ensures the higher burden was not met.

CONCLUSION

The time for testing has passed. CP was not afforded his rights before testing commenced and therefore was forever denied those rights. The departure cannot be repaired, the damage has already been done. Here the B Sample testing failed to comply with the Laboratory Standard proof requirements. Reversal is the appropriate legal remedy on this evidence.

/s/ John Mac Hayes

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CERTIFICATE OF SERVICE

This is to certify that on this 19th day of November 2024, a true and correct copy of the above and foregoing document was e-mailed to the following interested parties:

HIWU Counsel
Christy Heath
John Forgy

/s/ John Mac Hayes