IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES A. POEHLMANN,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
DEUTSCHE BANK AMERICAS	:	
SEVERANCE PAY PLAN, et al.,	:	**No. 04-2669**
Defendants.	:	
	:	

MEMORANDUM & ORDER

Schiller, J. **August 8, 2005**

Plaintiff James Poehlmann brings this action pursuant to the Employee Retirement and Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461 (2005), to recover $41,800.00 in severance pay that he asserts Defendants Deutsche Bank Americas Severance Pay Plan ("the Plan") and Deutsche Bank Americas Holding Corporation ("the Bank") unlawfully denied him. Now before the Court are the parties' cross-motions for summary judgment. For the reasons set forth below, the Court grants Plaintiff's motion and denies Defendants' motion.

I. BACKGROUND

The following facts are undisputed. From 1996 until 2003, Plaintiff was employed by Scudder Investments ("Scudder") and its predecessors as a mutual fund wholesaler. (Pl.'s Mot. for Summ. J. Ex. J (Dep. of James Poehlmann) at 7-8.) In this capacity, he sold Scudder mutual funds and annuities to brokerage firms, banks, and independent financial advisors. (*Id*. at 8-10.) Scudder assigned each of its mutual fund wholesalers a specific geographic territory within one of four

regions: Northeast, Central, Southern, and West. (Pl.'s Mot. for Summ J. Ex. B (Wholesaler Sales Figures) at 3.)

A. Plaintiff's Career with Scudder

Scudder assigned Plaintiff to the Northeast region, where he sold its products to customers in Pennsylvania and New Jersey. (Poehlmann Dep. at 23-25.) In 1998 and 1999, Plaintiff's sales ranked third among fourteen Northeast regional wholesalers, while in 2000 and 2001, Plaintiff's sales placed him fifth among eighteen Northeastern wholesalers. (Pl.'s Mot. for Summ. J. Ex. B at 1.) Through May 31, 2003, Plaintiff's sales were second highest among thirteen Northeast wholesalers, and sixth highest among forty-nine wholesalers nationwide.[1] (*Id*. at 3.)

Throughout Plaintiff's career with Scudder, the firm merged with and acquired various other firms. (Poehlmann Dep. at 2, 17.) The last of these mergers occurred in April 2002, when Deutsche Bank A.G., Defendants' parent company, acquired Scudder. (Pl.'s Mot. for Summ. J. Ex. K (Dep. of Bernadette Whitaker) at 26.) In connection with that purchase, "wholesale changes were made at the top" of Plaintiff's office, and a new management team assumed control. (Poehlmann Dep. at 60.) Beginning in the fourth quarter of 2002, Dwight Jacobsen became the Northeast region's sales manager and Plaintiff's direct supervisor. (*Id*. at 18, 50.)

On July 10, 2003, Plaintiff was fired. (Defs.' Mot. for Summ. J. Ex. 4 (Jacobsen's Termination Meeting Notes).) In a short meeting at the Philadelphia Airport Marriott restaurant, Jacobsen told Plaintiff that he was being involuntarily terminated for three reasons: First, Plaintiff

[1] The parties have not submitted sales figures from 2002. Plaintiff represents, however, that "they are comparable to each other year from 1998 through 2003." (Pl.'s Mem. in Supp. of Summ. J. at 2.)

was falling short of his 2003 sales goals; second, Plaintiff's presentation skills were poor; and third, Plaintiff's "passion, drive, activity level and presence are not what they need to be." (*Id.*)

B. The Deutsche Bank Severance Policy

At the end of 2003, Deutsche Bank employed 67,682 people worldwide and netted €1,365 million on total revenues of €21,268 million. (Defs.' Opp. to Pl.'s Mot. for Summ. J. Ex. 1 (Deutsche Bank 2003 Annual Review Fin. Summ.).) In January 2002, the Bank instituted the Plan, which provides severance benefits "for eligible employees of the Bank whose employment is involuntarily terminated." (Pl.'s Mot. for Summ. J. Ex. A (the Plan) § 1; Whitaker Dep. at 12.) The Bank serves as Plan Administrator, but has delegated responsibility for the daily operation of the Plan to an Oversight Committee (the "Committee"). (Pl.'s Mot. for Summ. J. Ex. A § 7.) As Plan Administrator, the Bank, or the Committee acting on the Bank's behalf, makes the rules and regulations necessary to administer the Plan. (*Id.*) In addition to day-to-day administration of the Plan, the Committee also considers all appeals of severance decisions filed by employees. (Whitaker Dep. at 16.) At the time of Plaintiff's termination, the Committee consisted of four senior members of Defendants' Human Resources department.[2] (*Id.* at 16-17.)

All United States employees of the Bank who are involuntarily terminated are presumed to be eligible for the Plan's benefits. (Pl.'s Mot. for Summ. J. Ex. A § 2.) If, however, an employee is terminated for unsatisfactory performance, that employee will not be eligible for benefits under the Plan. (*Id.* § 2.f.v.) The Plan grants the Bank and the Committee "the discretionary authority and

[2] The members were: Don Jones, the Global Chief Operating Officer of Human Resources; Bernadette Whitaker, the Chief Operating Officer of Human Resources in the Americas; Robert Dibble, the most senior Human Resources advisor for the Corporate and Investment Banking Group; and Katherine Thompson, the most senior advisor for the Private Clients and Asset Management Group. (Whitaker Dep. at 17.)

responsibility to determine eligibility for benefits and the amount of such benefits, and to construe the terms of the Plan." (*Id*. § 7.) Accordingly, the determination of what constitutes unsatisfactory performance "shall be in the Plan Administrator's sole discretion." (*Id*. § 2.f.v.) These determinations and constructions "will be final, binding and conclusive as to all parties, unless found by a court of competent jurisdiction to be arbitrary and capricious." (*Id*.)

In the event that an employee disagrees with the Bank's determination of his benefits, the Plan provides for a four-step Claims Procedure. (*Id*. § 8.) First, the employee has sixty days to submit a written statement to the Committee describing the basis of his claim. (*Id*.) Second, the employee's written statement is reviewed and the claim is investigated by a Human Resources "advisor" who works in the claimant's department. (Whitaker Dep. at 10, 29.) The Committee has delegated this initial level of investigation to the Human Resources advisor to streamline the claims process. (*Id*.; *see also* Defs.' Opp. to Pl.'s Mot. for Summ. J. Ex. 2 (Whitaker Decl.) at 2.) If the Human Resources advisor denies an employee's claim, the Committee must notify the claimant within 90 days, setting forth the specific reasons for the denial, a description of any additional material or information necessary for the claimant to perfect the claim, and the claims review procedure. (Pl.'s Mot. for Summ. J. Ex. A § 8.) Third, if the employee receives notification that his claim has been denied, he has sixty days to submit a written request to the Committee for a review of the denial. (*Id*.) Fourth, the Committee then has sixty days to make a final decision on the employee's request for review. (*Id*.) This final decision is reached after a meeting of the four-member Committee. (Whitaker Dep. at 28.) The Committee's final decision must be in writing and must set forth both the specific reasons for the denial and a statement of the employee's right to bring an ERISA action if his claim is denied. (Pl.'s Mot. for Summ. J. Ex. A § 8.)

C. Plaintiff's Claim for Severance Benefits

As noted, Plaintiff was fired on July 10, 2003. (Defs.' Mot. for Summ. J. Ex. 4.) Plaintiff was informed that he was being fired for unsatisfactory performance (considered a termination "for cause") and was therefore not eligible for severance benefits. (*Id*.) On July 22, 2003, pursuant to step one of the Plan's Claims Procedure, Plaintiff sent a letter to Kathleen Spiller, Scudder's Director of Human Resources, requesting that the Plan Administrator review his termination because he felt that his termination was improperly categorized as "for cause." (Defs.' Mot. for Summ. J. Ex. 6 (Poehlmann Letter of July 22, 2003).) In his letter, Plaintiff set forth his yearly sales performance, which he asserted was consistently excellent, and also stated that he had "never received any written notice or oral discussion of my sales performance . . . to indicate there was any dissatisfaction, leaving the numbers to stand for my work." (*Id*. at 2.)

As mandated by step two of the Claims Procedure, Spiller forwarded this letter to Bernadette Whitaker, Defendants' Chief Operating Officer for Human Resources in the Americas, and assigned David Denaro to "work with [Plaintiff's] manager on a response so that you and the committee can have the other side of the story." (Defs.' Mot. For Summ. J. Ex. 7 (Spiller Letter of Aug. 11, 2003).) Denaro, the Scudder Human Resources vice-president responsible for Plaintiff's business line, became the designated "Human Resources Advisor" for Plaintiff's claim. Denaro wrote a memorandum for the Committee regarding Plaintiff's termination in which he described the circumstances surrounding Plaintiff's termination as "straightforward." (Defs.' Mot. for Summ. J. Ex. 8 (Memorandum of David Denaro) [hereinafter "the Denaro Memo"] at 1.)

The Denaro Memo stated that Plaintiff's "termination was clearly performance related" as Plaintiff "had a sales goal he needed to attain [in 2003] . . . [but] was not on track to meet his goals."

(*Id*.) The Memo further asserted that despite a warning from Jacobsen, Plaintiff did not increase his effort or production and was then fired for cause. (*Id*.) Denaro indicated that several other employees were also terminated due to poor performance at around the same time as Plaintiff and none had received severance pay. (*Id*.) Finally, the Denaro Memo stated that "a superficial comparison of [Plaintiff's] 2003 sales numbers to his peers places his performance in about the middle of the group." (*Id*.) Upon "closer analysis," however, "a large percentage of his sales come from Alex Brown referrals . . . a channel that requires very little effort . . . as those sales automatically get credited to whom ever [sic] works the territory." (*Id*.) Without the Alex Brown sales, the Denaro Memo continued, Plaintiff's "production was among the lowest in his region and shows that he had not met expectations with regard to developing new sales." (*Id*.)

On October 17, 2003, based solely on the Denaro Memo, Whitaker sent Plaintiff a letter stating that the Committee had "reviewed the claims set forth in your July 22, 2003 letter . . . in accordance with the procedures set forth in section 8" of the Plan. (Def's Mot. for Summ. J. Ex. 10 (Committee Letter of Oct. 17, 2003).) Whitaker concluded that "[y]ou are not eligible for Severance Pay in accordance with the Plan because you were terminated for performance and not as the result of restructuring." (*Id*.) The letter concluded that Plaintiff had been treated identically to other Scudder employees terminated for performance, who also did not receive severance pay. (*Id*.)

By letter dated November 10, 2003, and in accordance with step three of the Claims Procedure, Plaintiff requested that the Committee review this denial. (Defs.' Mot. for Summ. J. Ex. 11 (Poehlmann Letter of Nov. 10, 2003).) Plaintiff's letter again specifically referenced his sales numbers and concluded that his "sales performance as of May 31, 2003, was better than the vast majority of the other" wholesalers around the country. (*Id*.) Moreover, Plaintiff reiterated that he

had "never received any written or oral notices that his sales performance was in any way in doubt." (*Id*. at 2.)

On January 9, 2004, the Committee informed Plaintiff that it had denied his appeal, ending the Claims Procedure. (Defs.' Mot. for Summ. J. Ex. 12 (Committee Letter of Jan. 9, 2004).) The Committee rejected Plaintiff's assertions of high sales numbers by stating simply that "your production was well below the potential numbers available to you in your region and you failed to meet the expectations regarding developing new sales." (*Id*.) The letter concluded by asserting that Plaintiff was treated in a similar fashion to other employees terminated at about the same time. (*Id*.) The denial informed Plaintiff that he had the right to bring an ERISA action challenging the decision, which he did on June 14, 2004, by initiating the instant lawsuit.

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c) (2005). The moving party bears the initial burden of identifying those portions of the record that it believes illustrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the moving party makes such a demonstration, then the burden shifts to the nonmovant, who must offer evidence thatestablishes a genuine issue of material fact that should proceed to trial. *Id.* at 324; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986). "Such affirmative evidence – regardless of whether it is direct or circumstantial – must amount to more than a scintilla, but may amount to less (in the evaluation of

the court) than a preponderance." *Williams v. Borough of West Chester*, 891 F.2d 458, 460-61 (3d Cir. 1989).

When evaluating a motion brought under Rule 56(c), a court must view the evidence in a light most favorable to the nonmovant and draw all reasonable inferences in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see also Pollock v. Am. Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986). A court must, however, avoid making credibility determinations or weighing the evidence. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000); *see also Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 665 (3d Cir. 2002).

III. DISCUSSION

The Court first holds that it will apply the arbitrary and capricious standard of review to Defendants' factual determination that Plaintiff was properly terminated "for cause" and was therefore ineligible for severance benefits. The Court also holds, however, that under even this deferential standard the Plan's decision must be overturned because it was made in an unreasonable manner.

A. Arbitrary & Capricious Review is Appropriate

ERISA permits a beneficiary of a benefits plan to bring an action to recover benefits due to him under the terms of the plan or to enforce his rights under the plan. 29 U.S.C. § 1132(a)(1)(B) (2005). Unfortunately, ERISA "is silent on the proper standards by which the district court should review fact findings made by plan administrators." *Luby v. Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1179 (3d Cir. 1991). The Supreme Court has stepped into this breech and held that the standard of review depends on whether the plan grants its administrator discretion

to interpret the plan's terms. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). If the administrator lacks discretionary authority to determine eligibility for benefits or to construe the terms of the plan, then a denial of benefits "is to be reviewed under a de novo standard." *Id*. at 115. If, however, the plan *does* grant the administrator or fiduciary discretionary authority, then a reviewing court shall use an "arbitrary and capricious" standard, which means that the administrator's interpretation of the plan "will not be disturbed if reasonable." *Id*. at 111. A plan's grant of discretion may be either express or implied. *See Luby*, 944 F.2d at 1180; *see also De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1187 (4th Cir. 1989).

Therefore, "the appropriate standard of review here depends on whether the terms of this Plan grant the Administrator discretion to act as a finder of facts" regarding the causes and circumstances of Plaintiff's termination. *Mitchell v. Eastman Kodak Corp.*, 113 F.3d 433, 438 (3d Cir. 1997) (citation omitted). A court must construe the Plan's terms "without deferring to either party's interpretation." *Luby*, 944 F.2d at 1180. Plaintiff argues that a de novo standard is appropriate, while Defendants respond that the clear terms of the Plan require that arbitrary and capricious review be employed.

The Third Circuit has stated that a "broad grant of discretionary authority to the Administrator" may be "sufficient to preclude de novo review of both interpretative and factual determinations made in the course of applying the benefit provisions of the Plan to a particular application for benefits." *Mitchell*, 113 F.3d at 438. In this case, the Plan's terms grant the Committee just such broad authority to both determine questions of fact and to interpret the Plan's terms. First, the Plan states that "an employee will not be eligible for benefits under this Plan if his or her termination is the result of . . . unsatisfactory performance . . . which determination shall be

in the Plan Administrator's sole discretion." (Pl.'s Mot. for Summ. J. Ex. A § 2.f, § 2.f.v.) Next, the Plan's language directly tracks the Supreme Court's definition of circumstances in which arbitrary and capricious review is proper. In *Bruch*, the Supreme Court stated that arbitrary and capricious review is applicable if a plan grants the administrator "discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at 115. Here, the Plan states precisely that the Committee "shall have the discretionary authority . . . to determine eligibility for benefits and the amount of such benefits, and to construe the terms of the plan." (Pl.'s Mot. for Summ. J. Ex. A § 7.)

Accordingly, the Court holds that the Plan's sweeping grant of authority to the Committee to both interpret the Plan and to make factual determinations mandates arbitrary and capricious review. *See Mitchell*, 113 F.3d at 438 (applying arbitrary and capricious standard when plan provided that administrator "shall have full discretionary authority to determine all questions arising in the administration, interpretation, and application of the plan"); *Nazay v. Miller*, 949 F.2d 1323, 1335 (3d Cir. 1991) (applying arbitrary and capricious standard to administrator's decisions when plan granted administrator "discretion and authority to interpret and construe the provisions of the Plan, to determine eligibility to participate . . . and to decide such questions as may arise in connection with the operation of the Plan"); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 119 n.5 (3d Cir. 1990) (using arbitrary and capricious standard to review plan which granted administrator power to "decide all questions arising out of and relating to the administration of" plan).

The Court also rejects Plaintiff's argument that, even assuming arbitrary and capricious review is appropriate, a heightened form of that review must be applied here. Plaintiff relies on *Pinto v. Reliance Std. Life Ins. Co.*, 214 F.3d 377 (3d Cir. 2000), for the proposition that when any

defendant both funds and administers a plan, that defendant operates under a conflict of interest warranting heightened review. Plaintiff, however, reads *Pinto* too broadly. That case involved an insurer, not an employer, who both funded and administered a plan. *Id*. at 378. In contrast, when an employer funds and administers a plan, the Third Circuit has squarely "applied the unmodified arbitrary and capricious standard in reviewing a denial of benefits." *Id*. at 386 (*citing Nazay*, 949 F.2d at 1335). Moreover, when "a benefits committee within a company administered the company's benefit plan . . . unmodified arbitrary and capricious review was appropriate in the absence of specific, tangible evidence that the structural relationship had tainted the review process." *Id*. (*citing Kotrosits v. GATX Corp. Non-Contributory Pension Plan for Salaried Employees*, 970 F.2d 1165, 1173 (3d Cir. 1992)).[3]

The instant Plan is funded and administered by the Bank. (Pl.'s Mot. for Summ. J. Ex. A § 7.) Accordingly, under *Nazay*, unmodified arbitrary and capricious review is appropriate. The Bank has delegated day-to-day administration to the Committee, however (*id*.), and so an argument can be made that the Plan is more akin to the situation in *Kotrosits*. Even if that were true, however, unmodified arbitrary and capricious review is still the correct standard in the absence of "specific, tangible evidence" of a tainted review process. *Kotrosits*, 970 F.2d at 1173. The burden of proof is on Plaintiff to show that a heightened standard of review is warranted. *See Schlegel v. Life Ins. Co. of N. Am.*, 269 F. Supp. 2d 612, 617 (E.D. Pa. 2003). Plaintiff has presented no such evidence

[3] The Court is aware that several District Courts in this Circuit have expanded *Pinto* by holding that heightened scrutiny is not limited solely to plans that are funded and administered by insurance companies. *See, e.g., Rendulic v. Kaiser Aluminum & Chem. Corp.*, 166 F. Supp. 2d 326, 336 (W.D. Pa. 2001); *Frieberg v. First Union Bank of Del.*, Civ. A. No. 99-571-JJF, 2001 U.S. Dist. LEXIS 10365, 2001 WL 826549 (D. Del. July 18, 2001). The Court need not address these cases because, as set forth below, the Court holds that Defendants acted unreasonably under even an unmodified arbitrary and capricious standard.

here, and therefore, even under *Kotrosits*, unmodified arbitrary and capricious review is the proper standard.

B. The Committee's Actions Were Arbitrary & Capricious

The arbitrary and capricious standard is a deferential one and is "essentially the same as the 'abuse of discretion' standard." *Abnathya v. Hoffman-LaRoche Inc.*, 2 F.3d 40, 45 n.5 (3d Cir. 1993); *see also Nazay*, 949 F.2d at 1336; *Daniels v. Anchor Hocking Corp.*, 758 F. Supp. 326, 330 (W.D. Pa. 1991). "Under the arbitrary and capricious [] standard, the district court may overturn a decision of the Plan administrator only if it is without reason, unsupported by substantial evidence or erroneous as a matter of law." *Abnathya*, 2 F.3d at 45 (quotation omitted). A decision is supported by substantial evidence "if there is sufficient evidence for a reasonable person to agree with the decision." *Courson v. Bert Bell NFL Player Ret. Plan*, 214 F.3d 136, 142 (3d Cir. 2000) (quotation omitted).

To analyze the reasonableness of the administrator's decision, a court examines the record as a whole, which consists of "that evidence that was before the administrator when he made the decision being reviewed." *Mitchell*, 113 F.3d at 440. A court may not, however, "substitute its own judgment for that of the administrator in determining eligibility for benefit plans." *Id*. at 439. Instead, the "task as a reviewing court is to determine first, whether the administrator considered all the relevant factors, and second, whether the decision constituted a clear error of judgment." *Daniels*, 758 F. Supp. at 331. In other words, "it is important to recognize that ERISA does not make the judges the decisionmakers. It merely assures that the appropriate procedure is followed." *Pinto*, 214 F.3d at 387. Accordingly, this Court may not pass judgment upon the decision to terminate Plaintiff, or decide whether Plaintiff was a "good" mutual fund wholesaler. Instead, the

sole question for this Court is whether the Committee's review of that termination, and its decision to uphold the termination's classification as one made for "unsatisfactory performance," was reasonably made based on the evidence before it.

1. Interpretation of the Plan's Terms

The Committee, serving in its capacity as Plan administrator, had discretion to interpret ambiguous Plan terms. (*See* Pl.'s Mot for Summ J. Ex. A § 2.f.v.) Therefore, its definitions of such terms are entitled to deference. *See Skretvedt v. E.I. DuPont de Nemours & Co.*, 268 F.3d 167, 177 (3d Cir. 2001) (holding that administrator's interpretation of ambiguous provision is entitled to deference unless contrary to plan's plain language); *cf. Lasser v. Reliance Std. Life Ins. Co.*, 344 F.3d 381, 385-86 (3d Cir. 2003) (holding that insurer's definition of unambiguous term is not entitled to deference). The Plan term in question here is "unsatisfactory performance," which neither the Plan nor the Committee defined. (*See* Pl.'s Mot. for Summ. J. Ex. A § 2.f.v.; *see also* Whitaker Dep. at 22.) The Court finds that this term is ambiguous because "unsatisfactory performance" can be defined differently for each individual job covered by the Plan. Moreover, even within one job, the definition of what constitutes unsatisfactory performance may change over time. Therefore, the Committee's definition of unsatisfactory performance will be accorded deference if reasonable. *See Lasser*, 344 F.3d at 386 (deferring to reasonable definitions of ambiguous Plan terms); *Skretvedt*, 268 F.3d at 177 (deferring to interpretation that is not arbitrary and capricious).

In this case, Whitaker testified that the Committee was given two reasons why Plaintiff's performance was classified as unsatisfactory: First, Plaintiff's sales figures were inadequate; and second, Plaintiff's presentation skills were inadequate. (Whitaker Dep. at 30-31.) Because Plaintiff was a salesman, the Court holds that these two deficiencies may reasonably constitute "unsatisfactory

performance." (*See* Poehlmann Dep. at 11-13 (stating that sales numbers and presentation skills were important attributes for a good wholesaler to possess).) Therefore, the decision to use these bases for terminating Plaintiff will be accorded deference. *See Lasser*, 344 F.3d at 386.

The Court will now proceed to consider the Committee's review of whether these two bases were properly applied to Plaintiff. The Court concludes that the Committee unreasonably failed to provide meaningful review as to each of these reasons.

2. The Committee's Review of Plaintiff's Sales Performance

Examining the record as a whole, *see Mitchell*, 113 F.3d at 440, the Court concludes that the committee unreasonably failed to provide meaningful review of Plaintiff's sales performance. Whitaker stated that the "first thing" the Committee reviewed was Plaintiff's appeal. (Whitaker Dep. at 19.) This included Plaintiff's two letters, dated July 22, 2003 and November 10, 2003. (Defs.' Mot. for Summ. J. Exs. 6 & 11.) The July 22, 2003 letter included a bullet-pointed section in which Plaintiff detailed his yearly sales performance. (Defs.' Mot. for Summ. J. Ex. 6 at 1.) The November 10, 2003 letter again referenced Plaintiff's sales numbers and stated that his "sales performance as of May 31, 2003 was better than the vast majority of other" wholesalers. (*Id.* Ex. 11 at 1.)

Next, the Committee contacted David Denaro, the appropriate Human Resources advisor, who provided the Committee with a two page memorandum entitled "Mr. James Poehlmann's Separation from the Firm." (Defs.' Mot. for Summ. J. Ex. 8.) Whitaker testified that the Committee reviewed the Denaro Memo. (Whitaker Dep. at 29-30.) The Denaro Memo made four statements regarding Plaintiff's sales figures. First, it stated that "Mr. Poehlmann had a sales goal he needed to attain this year. Mr. Poehlmann was not on track to meet his goals." (Defs.' Mot. for Summ. J.

Ex. 8 at 1.) Second, the Denaro Memo stated that sales goals for all wholesalers were increased for 2003 "in an effort to increase revenue." (*Id*.) "Poorer performers [were] warned they [we]re not meeting expectations, then terminated if they d[id] not improve." (*Id*.) Third, it asserted that while a "superficial comparison of [Plaintiff's] 2003 sales numbers to his peers places his performance in about the middle of the group," a "closer analysis showed that these numbers were misleading." (*Id*.) According to the Denaro Memo, a large portion of Plaintiff's sales came from a Deutsche Bank subsidiary called Alex Brown, and without those sales, Plaintiff's "production was among the lowest in his region." (*Id*.) Finally, the Denaro Memo states that Plaintiff's performance showed no improvement despite a warning from Jacobsen. (*Id*.)

Although Plaintiff did not have access to the Denaro Memo, his two letters explicitly disputed the characterizations of his sales performance contained therein. (Defs.' Mot. for Summ. J. Exs. 6, 11.) In fact, Plaintiff's July 22, 2003 letter broke down his sales performance by listing his yearly sales rankings, all of which were near the top of Scudder's wholesalers: "Through 5/31/03 my territory ranked #4 out of 50 RVP's [Regional Vice Presidents] as a percentage of target;" "[a]s of the end of the 3[rd] quarter 2002, my territory (#004) was in the top 10% of all territories;" "in 2001, I had the #5 territory in overall mutual fund production in the division;" and "in 2000, my territory was #4 in mutual fund production in the division." (Defs.' Mot. for Summ. J. Ex. 6 at 1-2.) Plaintiff also explicitly disputed Denaro's contention that he had been warned that his 2003 sales performance was deficient. He stated, "I never received any written notice or oral discussion of my sales performance from [Jacobsen] to indicate there was any dissatisfaction . . . . I never had a discussion with any member of management about sales performance until the day of my termination." (*Id*. at 2.)

Accordingly, when the Committee began its review of Plaintiff's termination, it had before it two sharply divergent accounts of Plaintiff's sales performance and completely contradictory statements regarding whether Jacobsen ever warned Plaintiff to improve his performance. Faced with conflicting evidence on these critical issues, the Committee wholly abdicated its responsibility to make even a cursory investigation into Plaintiff's claim, and thereby unreasonably concluded that Plaintiff's claim should be denied.

i. Sales Figures

Although the Committee's January 9, 2004 letter denying Plaintiff's claim confidently asserted that Plaintiff was "not meeting expectations" regarding sales, Whitaker admitted that the Committee did not rely on any particular numbers to make this assertion. (*Id*. at 63.) In fact, Whitaker flatly conceded that "the Committee did not at any time review sales figures for Mr. Poehlmann." (*Id*. at 59.) Rather, the Committee relied solely on information supplied by Denaro regarding Plaintiff's sales. (*Id*. at 63.) Yet, when asked whether Denaro ever reviewed Plaintiff's sales figures, Whitaker replied "I have no idea . . . . I do not know what Mr. Denaro would have reviewed." (*Id*. at 42, 60.)

The Committee thus failed to examine a single sales figure despite Plaintiff's claims regarding those figures, claims that diverged significantly from Denaro's characterizations. Plaintiff was claiming to be in the top ten percent of wholesalers, while Denaro placed him "among the lowest" in that class. (*Compare* Defs.' Mot. For Summ J. Ex. 6 at 1-2 *with* Defs.' Mot. for Summ. J. Ex. 8 at 1.) The Committee's decision to simply credit the Denaro Memo, in the face of a serious challenge to that Memo's veracity, was not reasonable. In this regard, the Committee behaved similarly to the defendant administrator in *Rosen v. Provident Life & Accident Ins. Co.*, Civ. A. No.

02-591, 2003 U.S. Dist LEXIS 17402, 2003 WL 22254805 (E.D. Pa. Sept. 30, 2003). There, in denying plaintiff's claim under ERISA for disability benefits, the administrator "selectively relied on certain evidence unfavorable to Plaintiff's claim, while ignoring and failing to explain evidence that plainly supports her claim for benefits." *Id*. at *24. As a result, the court found the administrator's decision to be arbitrary and capricious. *Id*. at *24-*29. Similarly, here, the Committee was faced with conflicting accounts regarding Plaintiff's sales performance, yet relied exclusively on the Denaro Memo and conducted no independent review whatsoever. (*See* Whitaker Dep. at 63.) Then, after eschewing an independent review, the Committee concluded that Plaintiff's production "was well below the potential numbers available to you in your region." (Defs.' Mot. for Summ. J. Ex. 12.) This conclusion, made without the benefit of any examination of Plaintiff's sales numbers despite conflicting constructions of those numbers, is the epitome of an arbitrary and capricious decision.

The Committee's behavior here can be contrasted with the situation presented by *Abnathya*, 2 F.3d at 43-46, where the Third Circuit held that an administrator's decision was not arbitrary or capricious even though the administrator was faced with conflicting evidence regarding an important issue. There, defendant reviewed plaintiff's ERISA claim for disability benefits by, inter alia, having plaintiff evaluated by two independent medical examiners. *Id*. at 43. These doctors opined that plaintiff was capable of working. *Id*. Plaintiff disagreed with these determinations, and questioned the adequacy of the examiners' evaluations. *Id*. at 46. Plaintiff contended, and the district court agreed, that defendants' Committee had abused its discretion by failing to give adequate consideration to Plaintiff's questions. *Id*. The Third Circuit reversed because "undisputed sworn testimony" provided by a Committee member and a benefits analyst showed "that the Committee

considered Abnathya's arguments regarding the inadequacy of the [independent medical] examinations." *Id*. at 47. Here, on the other hand, Whitaker explicitly stated that the Committee "did not at any time review sales figures for Mr. Poehlmann," (Whitaker Dep. at 59), and therefore it could not have assessed the relative merit of his arguments regarding his sales figures versus that of the Denaro Memo.

Moreover, the Third Circuit stated that plaintiff in *Abnathya* "submitted no evidence to support her allegation that the two evaluations were inadequate or unreliable." 2 F.3d at 47. In contrast, had the Committee in the present case examined any sales figures, or discussed Plaintiff's sales either with him or with his direct supervisor (which it undisputedly did not do), it would have realized that Plaintiff's claims had significant merit. The Denaro Memo stated that a "superficial comparison" of Plaintiff's 2003 sales numbers "places his performance in about the middle of the group." (Defs.' Mot. for Summ. J. Ex. 8.) The sales figures, however, actually reflect that for the first six months of 2003, Plaintiff's sales ranked him third out of thirteen Northeast regional wholesalers. (Pl.'s Mot. for Summ. J. Ex. F (Northeast Regional RVP 2003 Sales Figures).) The Denaro Memo also stated that Plaintiff "had a sales goal he needed to attain this year" but "was not on track to meet his goals." (Defs.' Mot. for Summ. J. Ex. 8.) In reality, though, out of forty-nine nationwide wholesalers, Plaintiff ranked *first* in the Northeast region, and fourth nationwide, as a percentage of annual sales target reached for the period ending May 31, 2003. (Pl.'s Mot. for Summ. J. Ex. B (Scudder Investments Sales Summary Report For the Period Ending 5/31/03) at 4.) This discrepancy demonstrates the arbitrary and capricious nature of the Committee's decision. The 2003 sales figures show that five months into the year (or with about 40% of the year finished), Plaintiff had reached 36.5% of his sales target. (*Id*.) If the Committee had examined the numbers, however,

it would have seen that only one wholesaler out of forty-nine, Jeff McGee, was "on track" to meet his target, with 42.4% of his target reached. Accordingly, along with Plaintiff, forty-seven other wholesalers were not on target either, and Plaintiff was closer to his goal than forty-five wholesalers. (*Id*.) Thus, while it is technically true that Plaintiff was "not on track to meet" his sales target, the figures demonstrate the misleading nature of that statement. Finally, Denaro stated that without his Alex Brown sales, Plaintiff's production was "among the lowest in his region." (Defs.' Mot. for Summ. J. Ex. 8.) In fact, subtracting his Alex Brown sales left Plaintiff in eighth place out of thirteen Northeast regional wholesalers. (Pl.'s Mot. for Summ. J. Ex. F.) Furthermore, if all other wholesalers had their largest customers' orders subtracted from their sales totals, Plaintiff's ranking would return to fourth out of thirteen. (*Id*.)

Therefore, if the Committee had engaged in any examination of the 2003 sales figures, it would have seen that Plaintiff's characterization of his performance was more than plausible. For the purposes of this Court's review, though, it is the Committee's failure to engage in *any* analysis, with two conflicting accounts presented to it, which was unreasonable.

ii. Jacobsen's Alleged Warning

Plaintiff's letters and the Denaro memo also presented contradictory accounts of whether Jacobsen, Plaintiff's supervisor, had ever warned him about his sales performance before terminating him. (*Compare* Defs.' Mot. for Summ. J. Ex. 6 *with* Defs.' Mot. for Summ. J. Ex. 8.) Plaintiff asserted that he had "never received any written notice or oral discussion of my sales performance from my regional director to indicate there was any dissatisfaction." (Defs.' Mot. for Summ. J. Ex. 6.) The Denaro memo claimed that "Jacobsen warned [Plaintiff] that improvement was expected." (Defs.' Mot. for Summ. J. Ex. 8.) Again, the Committee did nothing to consider the relative merits

of these contradictory positions. Whitaker conceded that throughout the Committee's review of Plaintiff's claim, "no member of the Committee spoke to anyone involved in supervising" Plaintiff. (Whitaker Dep. at 38.) Moreover, she stated that "I never spoke to Mr. Poehlmann [and] I have no recollection of anyone else on the committee ever speaking with Mr. Poehlmann." (*Id*. at 40.) Finally, Whitaker admitted that she did not even know whether Denaro had ever spoken to Plaintiff. (*Id*.) Accordingly, the Committee unreasonably conducted no inquiry into the relative merits of Plaintiff's contentions vis-a-vis the Denaro Memo, but rather simply swallowed Denaro's version whole. Under the circumstances, the Committee's lack of inquiry was arbitrary and capricious.

3. Review of Plaintiff's Presentation Skills

The second purported reason that Plaintiff's termination was characterized as "for cause" was that Plaintiff had deficiencies in his presentation skills. Presentation skills were "critical" to Plaintiff's job because a wholesaler must convince his clients that the funds he is offering are superior to those of competing companies.. (*Id*. at 10, 13.) As an initial matter, the Court notes that the Denaro Memo did not list presentation skill deficiencies as a reason that Plaintiff was terminated – rather, it referred only to his sales performance. (*Cf*. Defs.' Mot. for Summ. J. Ex. 8.) Nor were presentation skills referenced in either of the Committee's two letters to Plaintiff during the Claims Procedure. (*Cf*. Defs.' Mot. for Summ. J. Exs. 10, 12.) Rather, the only time that presentation skills were mentioned in this action as a demonstration of Plaintiff's unsatisfactory performance was during Whitaker's deposition. (Whitaker Dep. at 31-33, 42-43.) Nevertheless, because Whitaker indicated that performance skills may have played a role in the Committee's decision to uphold the characterization of Plaintiff's termination, the Court addresses it here.

The Committee's review of Plaintiff's presentation skills was unreasonable. As with its treatment of Plaintiff's claim regarding sales figures, the Committee was faced with two diametrically opposed accounts, but wholly credited one and ignored the other without performing any investigation. In his July 22, 2003 letter, Plaintiff stated that Jacobsen "was present for one presentation that I gave to clients. We did speak about the presentation briefly, which his comments centering on how to improve certain aspects of the presentation . . . again, no dissatisfaction of any type was mentioned." (Defs.' Mot. for Summ. J. Ex. 6 at 2.) Whitaker testified, however, that Denaro told her that Plaintiff "performed poorly when asked to present in a sales meeting." (Whitaker Dep. at 33.) Therefore, during the Committee's review of Plaintiff's claim, it had before it two versions of Plaintiff's performance at the sales meeting.

The Committee performed no analysis whatsoever of the relative merits of these two positions. At her deposition, Whitaker defined "presentation skills" to mean "someone's ability to stand up in front of an audience and effectively make a presentation that people are interested in and respond to." (*Id*. at 43.) The following exchange then occurred:

> Q: To your knowledge, in this business how is that measured?
> A: I have no idea.
> Q: Did Mr. Denaro ever indicate how it was measured?
> A: He did not.
> Q: Did Mr. Denaro indicate whether anybody informed him how that was measured as part of his summary?
> A: He did not.

(*Id*.) Clearly, then, the Committee did no investigation regarding whether Plaintiff actually had a deficiency in his presentation skills, but rather accepted that he did simply because Denaro told Whitaker that this was so. Again, at no point during the Committee's work did its members speak

with Plaintiff or with anyone involved in supervising Plaintiff. (*Id*. at 37, 40.) In the context of Plaintiff's appeal, with directly contradictory assertions made by Plaintiff, this was unreasonable.

Moreover, assuming the Committee did rely upon Plaintiff's alleged presentation deficiencies in making its decision, this reliance was unreasonable because it was directly contradictory to the Plan's terms and the procedures set forth therein. Because a court engaged in arbitrary and capricious review in an ERISA case must assure that the proper procedures have been followed, a breach of these procedures can result in a determination that the decision was made unreasonably. *See Pinto*, 214 F.3d at 387 (holding that "ERISA does not make the judges the decisionmakers. It merely assures that the appropriate procedure is followed."). As noted above, the Plan includes a Claims Procedure which mandates that if a claim for benefits is denied, the Committee must notify the claimant and "[s]uch notification shall set forth . . . the specific reasons for the denial." (Pl.'s Mot. for Summ. J. Ex. A § 8.) The reason that such notification is essential, of course, is that for the claimant to intelligently respond to the Committee, he must be apprised of the bases for the Committee's decisions. By failing to inform Plaintiff that his presentation skills were an issue in his termination, the Committee violated the plain terms of the Plan's requirements.

IV. CONCLUSION

For the reasons set forth above, Plaintiff's motion for summary judgment is granted, and Defendants' motion for summary judgment is denied. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES A. POEHLMANN,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
DEUTSCHE BANK AMERICAS	:	
SEVERANCE PAY PLAN, et al.,	:	**No. 04-2669**
Defendants.	:	
	:	

ORDER

AND NOW, this **8th** day of **August, 2005**, upon consideration of Plaintiff's Motion for Summary Judgment (Document No. 10), Defendants' Motion for Summary Judgment (Document No. 9), the responses thereto, the replies thereon, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Plaintiff's Motion for Summary Judgment is **GRANTED**.

2. Defendants' Motion for Summary Judgment is **DENIED**.

BY THE COURT:

_____

Berle M. Schiller, J.