

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

WESLEY T. SMALL AND FIRST )  
COMMERCIAL BANK OF TAMPA BAY, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 08-0997  
 )  
OFFICE OF FINANCIAL REGULATION, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on January 22 and 23, 2009, in Tampa, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mark Freund, Esquire  
Iglar & Dougherty, P.A.  
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For Respondent: Janet Massin Anderson, Esquire  
Lynne A. Quimby-Pennock, Esquire  
Office of Financial Regulation  
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner, Wesley T. Small's, appointment as executive vice-president and chief

operating officer for Petitioner, First Commercial Bank of Tampa Bay, should be approved by Respondent; and, more specifically, whether Respondent properly issued the Notice of Disapproval concerning that appointment.

PRELIMINARY STATEMENT

On November 21, 2007, Respondent, Office of Financial Regulation, received from Petitioner, First Commercial Bank of Tampa Bay (the "Bank"), notice of the proposed appointment and employment of Petitioner, Wesley T. Small ("Small"), as the executive vice-president and chief operating officer ("COO") for the Bank. The Bank, subsequently, submitted supplemental information to Respondent, along with a request that Small be approved on an interim basis for the COO position.

Respondent denied the request for an interim appointment. Then, on January 23, 2008, Respondent issued its Notice of Disapproval, denying the Bank's request to appoint Small as executive vice-president and COO. Petitioners Small and the Bank timely filed a Petition for Formal Administrative Hearing. The matter was forwarded to the Division of Administrative Hearings ("DOAH") and assigned to the undersigned.

Respondent filed a Motion to Relinquish Jurisdiction on the basis that the Petition for Formal Administrative Hearing did not allege disputed issues of material fact. Petitioners filed a response to the motion; the motion was denied.

Pursuant to notice, a final hearing was held in this matter in Tampa, Florida, on January 22 and 23, 2009. At the final hearing Petitioners called the following witnesses: A. George Iglar, Esquire; Wesley T. Small; Linda Charity, director of the Office of Financial Regulation; and John Alcorn, bureau chief of the Office of Financial Regulation. Petitioners' Exhibits 3, 5 through 24, and 28 were admitted into evidence. Respondent called three witnesses: John Alcorn; William C. Weyburne, compliance manager for Apex Lending, Inc.; and Linda Charity. Respondent's Exhibits 1 through 5 were admitted into evidence. Official Recognition was taken of Section 655.0385, Florida Statutes (2007).<sup>1</sup>

Upon completion of the formal hearing, the parties advised that a transcript of the proceeding would be ordered. The parties asked and were given 20 days to submit post-hearing proposed findings of fact and conclusions of law. The Transcript of the proceeding was filed at DOAH on February 13, 2009. Each party timely submitted a Proposed Recommended Order which was given due consideration in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Petitioner, Wesley T. Small, has approximately 40 years in the banking industry, including experience in director and executive officer positions. He has never been charged with any

regulatory violations or mismanagement concerning his professional activities. Small has applied to become the executive vice-president and COO of the Bank.

2. Petitioner, First Commercial Bank of Tampa Bay, is a Florida state-chartered bank subject to the Florida Financial Institutions Code, Subsection 655.005(1)(j), Florida Statutes.

3. Respondent is the state agency responsible for, inter alia, approval of appointment or employment by a banking institution of an individual as executive officer or equivalent position. Respondent is responsible for providing general regulatory oversight through the Florida Financial Institutions Code, which applies to all state-authorized or state-chartered financial institutions and to enforce all related laws.

4. On November 21, 2007 the Bank, in accordance with Section 655.0385, Florida Statutes, notified Respondent of its intent to appoint Small as its executive vice-president and COO. Respondent requested of Small an authorization for release of confidential information so that it might commence the obligatory investigation. Small immediately complied with the request.

5. The Bank submitted supplemental information concerning its intent to appoint Small on at least two occasions, December 3 and 7, 2007. On the latter date, the Bank also

requested that Small be appointed on an interim basis for the COO position pending completion of Respondent's investigation.

6. By telephone call on December 14, 2007, Respondent notified the Bank that the request for interim appointment was being denied. During that telephone call, Alcorn told Petitioners' correspondent, Igler, that his superiors at the Office of Financial Regulation were also disinclined to approve Small's permanent appointment as well. (The reasons for the disapproval will be discussed more fully below.) When talking to Igler, Alcorn was relying upon a draft letter (from another person in his office) which stated Respondent's intent to deny the application filed by the Bank and Small.

7. Alcorn told Igler that once Small's issues with the IRS were resolved and Small had repaid his debt, Respondent would consider an application for Small. However, as of the date of the telephone conversation, Small was not approvable, and Alcorn is certain he made that fact clear to Igler.

8. During the telephone conversation, Alcorn used the following language: "My superiors [or, possibly, 'higher-ups' in the office] are not inclined to approve Mr. Small's application." At that time, Linda Charity had not issued or caused to be issued a final statement as to Respondent's position regarding Small, but the intent of the office had been firmly established, i.e., that Small was not approvable until

his debt to the IRS had been paid in full, and Small had taken appropriate steps to indicate rehabilitation. Alcorn was in a position to be very aware of Respondent's intentions.

9. It appears the Bank then commenced a search for a new COO, starting, according to its then-serving CEO, in "late December, 2007, after receiving preliminary information from counsel that the OFR had indicated it may not approve Small."

10. The Bank, by letter dated January 14, 2008, then submitted additional information concerning the proposed appointment of Small. None of the information submitted in the January 14 letter was new information. Respondent was already aware of the facts set forth in that letter, so it was not considered to change Respondent's position.

11. Respondent did not respond to the January 14 letter because (1) the Bank's counsel was already aware of the impending disapproval, and (2) the letter did not address any new information which needed to be discussed.

12. Small has been in the banking business since graduating from high school in 1961. He started out as a teller and worked his way up to branch manager, then supervisor, then vice-president, executive vice-president, and, finally, president and chief executive officer in 1984. Small's experience has been in Florida since 1979, where he has worked for a number of banks, including: Madison Bank in Palm Harbor,

First Federal Savings Bank of Citrus County, and First Federal Savings and Loan Association of Lake Wales.

13. Small was employed as the president of Peoples State Bank, Lake City, Florida, from November 1999 through August 2005. Small resigned his position with Peoples State Bank effective August 9, 2005. Small resigned because of the following issue (which is the primary reason for Respondent's refusal to approve Small's application to become executive vice-president and COO of the Bank). As stated in paragraph 12 of the Notice of Disapproval:

Small filed or authorized to be filed on his behalf federal tax returns with the Internal Revenue Service (IRS) for tax years 1999, 2000, 2001, 2002, 2003 and 2004 which reported zero income and zero taxes due.

Peoples State Bank apparently felt that Small's continued service at the financial institution would be viewed negatively by the local community, a fairly small city in North Florida.

14. The reason Small failed to claim taxable income for those tax years is both simple and complicated. The simple reason is that Small heeded the advice of a seemingly legitimate organization that a loophole existed in federal law that, if relied upon, would not require a person to pay federal income tax. The loophole was essentially this: That by claiming to be an "American" citizen on your tax return (as opposed to a United States citizen), your income was not taxable.

15. The organization called Administrative Educational Services for American Citizens Regarding the Federal Income Tax (the "Tax Advisors"), operated out of Las Vegas, Nevada. Small was made aware of this group by members of his church and agreed to attend seminars to listen to their tax advice.

16. Once Small accepted the advice of the Tax Advisors, he ceased paying taxes to the IRS for a period of six consecutive years (1999-2004).<sup>2</sup> Small believed at that time that the nonpayment of taxes was legitimate and legal. He did not consider any negative ramifications to government revenue collection or the on-going ability of the government to function if he, and others, did not pay taxes.

17. At some point after or around the time of his resignation from Peoples State Bank, Small contacted the IRS to admit his error and negotiate a resolution.

18. The IRS filed tax liens against Small totaling approximately \$110,000 (although it is unclear from the record what the exact amount was or how much of that amount was unpaid taxes and how much constituted fines or penalties). The IRS seized \$27,132.02 from Small's deposit accounts in October 2005 as partial payment for some of the back taxes. In March 2006, the IRS seized \$48,040.04 from the proceeds of the sale of Small's house.



19. In September 2007, Small entered into an installment payment agreement with the IRS, agreeing to make payments of \$1,361 per month to the IRS. Small has made each of the payments when it became due and owing.<sup>3</sup> The balance owed to the IRS as of September 2008 (the latest Monthly Statement introduced into evidence) appears to be approximately \$83,000, i.e., \$18,592.84 from the 2003 tax year; \$40,185.73 for the 2004 tax year; \$2,753.60 from the 2001 tax year; and \$22,495.47 for "liabilities not shown." Small has continued to reduce that debt each month by paying \$1,361 to the IRS.

20. Small's failure to pay income taxes and his outstanding debt to the IRS create issues of integrity, credibility, and character for Respondent. Additionally, there has been, in Respondent's estimation, insufficient time for or evidence of rehabilitation.

21. For example, Respondent wonders how Small would be able to review the tax return information of an applicant for a loan at the Bank in light of his cavalier attitude about his own tax returns for six consecutive years. And, Respondent worries that Small's admittedly "bone-headed" mistake in not paying taxes may be indicative of his judgment in business decisions for the Bank.

22. Respondent is also concerned about Small's failure to list one of his places of employment, Apex Lending, Inc.

(hereinafter "Apex"), on the resume he submitted to Respondent. Small was indeed employed by Apex from September 2005 until September 2006 in a mortgage broker position and as a branch manager of an Apex branch office. However, the resume Small submitted with his application to become COO at the Bank did not include the Apex employment. Small said that the omission was because Apex was not a "banking" job, and he had never produced a mortgage or made any money at Apex as of the date of his application. At some point Small did close two loans for Apex for which he was paid a commission and compensation (a percentage of the origination fees).

23. While it is clear Small did not include Apex in his application resume, there is no evidence of intent to hide the position or to mislead Respondent. Rather, the brevity of the employment and its non-banking nature made the position irrelevant in Small's mind.

#### CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569, Subsection 120.57(1), and Chapter 655, Florida Statutes (2008).

25. The burden of proof is on the petitioner as it is the party asserting the affirmative of the issue. Department of Banking and Finance, Division of Securities and Investor

Protection v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996), citing Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778 (1st DCA 1978).

26. The standard of proof in this case is a preponderance of the evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); § 120.57(1)(j), Fla. Stat.

27. Section 655.0385, Florida Statutes, is entitled, "Disapproval of Directors and Executive Officers." It states in pertinent part:

(2) A state financial institution may not appoint any individual to the board of directors, or employ any individual as an executive officer or equivalent position, if the office issues a notice of disapproval with respect to that person.

(3) The office shall issue a notice of disapproval if the competence, experience, character, or integrity of the individual to be appointed or employed indicates that it is not in the best interests of the depositors, the members, or the public to permit the individual to be employed by or associated with the state financial institution.

\* \* \*

(5) The commission may adopt rules to implement this section.

28. Florida Administrative Code Rule 69U-100.03852(5)(b), promulgated pursuant to Section 655.0385(5), Florida Statutes, mirrors the statute. It states:

OFR shall issue a notice of disapproval if the competence, experience, character, or integrity of the proposed individual to be appointed or employed indicates that it is not in the best interests of the depositors, the members, or the public to permit the individual to be employed by or associated with the state financial institution.

29. Respondent issued a Notice of Disapproval on the basis of its belief that Small did not have the character or integrity to be a COO of a state-regulated financial institution. Respondent expressed its concern for the financial institution and for the public at large should Small be placed in the requested position at the Bank.

30. Neither Small, nor the Bank, met its burden of proof to establish that Small's integrity and character were sufficient to overturn Respondent's stated concerns. Small admittedly had a very serious lapse of judgment by attempting to avoid federal income taxes. Small knows that an individual's tax return information is critical to a review of that person's financial condition, but intentionally attempted to avoid filing a tax return or filing one with no stated income despite being gainfully employed. His admission of the mistake, which apparently came about only because his employer raised a concern, is not tantamount to proving that he would use better judgment in the future. Further, although the IRS was able to obtain portions of the indebtedness by way of liens and other

legal actions and despite the fact that Small is repaying the debt on a monthly basis, the passage of time since Small's mistake is not sufficient to establish rehabilitation.

31. There is no competent evidence that Respondent failed to satisfy its unwritten policy of contacting applicants prior to issuance of a Notice of Dismissal. Clearly, Small and the Bank's representative talked with Respondent's agent and learned of the intent to deny (even though a final denial had not been completed) on December 14, 2007. The most credible evidence in that regard is that the December 14 telephone conference constituted sufficient pre-notification. The Notice of Denial was not finalized until January 23, 2008, some 40 days later.

32. It should be noted that Small is clearly remorseful for his actions and knows, in retrospect, that following the advice of the Tax Advisors was not a wise decision. However, he did not establish by a preponderance of the evidence that, faced with a similar choice in some other aspect of his private life, he would not make a similar mistake. His professional judgment in the business of banking, notwithstanding Small's mistake concerning his federal income tax payments, is a significant error in judgment warranting Respondent's dismissal of his application.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by Respondent, Office of Financial Regulation, finding that the Notice of Disapproval was properly entered and should be upheld. Whether Respondent wishes to allow Petitioners, Wesley T. Small and First Commercial Bank of Tampa Bay, to retroactively withdraw its Interagency Notice of Change in Director or Senior Executive Officer is within the sole discretion of Respondent.

DONE AND ENTERED this 20th day of March, 2009, in Tallahassee, Leon County, Florida.



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R. BRUCE MCKIBBEN  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 20th day of March, 2009.

ENDNOTES

<sup>1/</sup> Unless otherwise stated herein, all references to Florida Statutes are to the 2007 version.

<sup>2/</sup> For some of the years in question, Small reported zero income on his tax return. For other years, Small simply did not file a tax return. In either case, the result was the same; no taxes were paid.

<sup>3/</sup> Small did not provide Respondent proof or evidence of his monthly payments during his application process.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.