

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OFFICE OF FINANCIAL REGULATION,)	
)	
Petitioner,)	
)	
vs.)	Case No. 10-4769
)	
ISAIAH CHECK CASHING STORE,)	
INC.,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on August 30, 2010, by video teleconference, with the parties appearing in Miami, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Diane E. Leeds, Esquire
Office of Financial Regulation
3111 South Dixie Highway, Suite 302
West Palm Beach, Florida 33405

For Respondent: Frantz Chery, pro se
19501 Northeast 19th Avenue
Miami, Florida 33179

STATEMENT OF THE ISSUE

Whether the Respondent committed the violations alleged in the Administrative Complaint for Imposition of Sanctions and

Notice of Rights ("Administrative Complaint") dated June 10, 2010, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On June 10, 2010, the Office of Financial Regulation ("OFR") issued an Administrative Complaint, in which it charged the Isaiah Check Cashing Store, Inc., with several rule and statutory violations, which are summarized as follows:

a. Failure to have in place an anti-money laundering program with policies, procedures, and internal controls addressing check cashing activities, in violation of Title 31, Section 103.125, Code of Federal Regulations, and Sections 560.114(1)(y) and 560.1235(2), Florida Statutes (2009)¹;

b. Failure to maintain a thumbprint of the customer in 56 of the 163 samples of payment instruments with a face value of \$1,000.00 or more that were accepted between February 1, 2009, through April 30, 2009, in violation of Section 560.310(1)(b)2., Florida Statutes, and Florida Administrative Code Rule 69V-560.704(4)(a);

c. Failure to maintain for five years copies of payment instruments endorsed with the legal name of Isaiah Check Cashing Store at the time the instruments were accepted, in violation of Section 560.1105, Florida Statutes, and Florida Administrative Code Rule 69V-560.704(2)(a); and

d. Failure to include in the electronic payment instrument log the name of the conductor and the amount of currency provided for transactions occurring between January 13, 2009, and May 28, 2009, in violation of Section 560.310(1)(c), Florida Statutes, and Florida Administrative Code Rule 69V-560.704(5)(a).

Isaiah Check Cashing Store timely requested an administrative hearing to resolve disputed issues of material fact, and the OFR transmitted the matter to the Division of Administrative Hearings for assignment of an administrative law judge.

The final hearing was held on August 30, 2010. The OFR presented the testimony of Maykel Rico, and Petitioner's Exhibits A, B, and C were offered and received into evidence. Isaiah Check Cashing Store presented the testimony of Frantz Chery, Carline Charles, and Colette Cesar Chery; Respondent's Exhibits 1, 2, and 3 were offered and received into evidence.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on September 20, 2009, and the parties timely filed proposed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The OFR is the state agency responsible for licensing and regulating money services businesses in Florida. See §§ 560.105(1) and 560.141(2), Fla. Stat.

2. At the times material to this proceeding, Isaiah Check Cashing Store was a Florida corporation, with its principal place of business located at 5905 Northeast Second Avenue, Miami, Florida.

3. At the times material to this proceeding, Isaiah Check Cashing Store was licensed to engage in the business of cashing payment instruments, pursuant to Chapter 560, Part III, Florida Statutes.

4. The OFR conducted an examination of Isaiah Check Cashing Store beginning on May 26, 2009, and concluding on May 29, 2009.

5. At the Isaiah Check Cashing Store office, the OFR examiner found a hard copy of a Western Union manual that contained anti-money laundering policies and procedures related to money transmissions and money orders. Upon review, the examiner determined that the Western Union Manual did not

include anti-money laundering policies and procedures related to Isaiah Check Cashing Store's check cashing activities.

6. Isaiah Check Cashing Store also had available to its employees a manual containing anti-money laundering policies and procedures specifically relating to check cashing activities. Additionally, the Internal Revenue Service conducted a Bank Secrecy Act examination of Isaiah Check Cashing Store's anti-money laundering compliance program for the period extending from March 1, 2009, through August 31, 2009, and notified Isaiah Check Cashing Store in a letter dated January 26, 2010, that "[b]ased on the scope and depth of our examination and the evaluation and testing of the implementation of your Anti-Money Laundering (AML) compliance program, no violations were identified during the examination period."² The letter specifically referenced the financial service of "check casher" as one of the activities subject to its examination.

7. As part of his examination, the OFR examiner requested on May 28, 2009, that Isaiah Check Cashing Store produce copies of original thumbprints on all payment instruments of \$1,000.00 or more that it cashed between January 13, 2009, and May 26, 2009. Out of a total of 163 payment instruments of \$1,000.00 or more that were cashed by Isaiah Check Cashing Store during the specified time period, only 107 of the payment instruments produced to the examiner included an original thumbprint.

8. With respect to the 56 payment instruments of \$1,000.00 or more that did not contain thumbprints, Frantz Chery, on behalf of his wife Colette Cesar, attested on May 28, 2009, that he had diligently searched all the records maintained by Isaiah Check Cashing Store but was unable to locate copies of the 56 payment instruments that included an original thumbprint. Isaiah Check Cashing Store did, however, subsequently locate and produce copies of five of the 56 payment instruments that did contain original thumbprints, but it failed to produce copies of the 51 remaining payment instruments.³

9. The OFR examiner reviewed all of the records made available to him by Isaiah Check Cashing Store during the examination and was unable to find copies of any payment instruments that exhibited the endorsement of Isaiah Check Cashing Store. Even though Isaiah Check Cashing Store had a stamp with which to endorse checks that were accepted for payment, Mr. Chery, on behalf of his wife Colette Cesar, attested on May 28, 2009, that he had diligently searched all the records maintained by Isaiah Check Cashing Store but was unable to locate copies of these documents.

10. Isaiah Check Cashing Store maintained an electronic payment instrument log for checks of \$1,000.00 or more that it cashed between January 13, 2009, and May 28, 2009, but, at the time of the OFR examination in May 2009, the log failed to

include fields for the name of the conductor, if the check was made payable to a corporation,⁴ and for the amount of currency provided to the person cashing the check.

11. Isaiah Check Cashing Store relied on a software company to provide the format for the electronic log it maintained. When the software was updated, the company failed to include fields for the conductor and for the amount of currency paid. In the presence of the OFR examiner, Mr. Chery telephoned the software company, which subsequently added the required fields to the electronic log format used by Isaiah Check Cashing Store.

Summary

A. Violation of Title 31, Section §103.125, Code of Federal Regulations and Sections 560.114(1)(y) and 560.1235(2), Florida Statutes.

12. The evidence presented by the OFR is not sufficient to establish that Isaiah Check Cashing Store failed to maintain, review, and update an anti-money laundering compliance program in accordance with Title 31, Section 103.125, Code of Federal Regulations. The OFR examiner testified that he did not find a manual governing Isaiah Check Cashing Store's check cashing activities during his examination, but this is not sufficient to establish that Isaiah Check Cashing Store did not have anti-money laundering policies and procedures in place at the time of

the examination. Indeed, Isaiah Check Cashing Store presented evidence establishing that, after an examination, the Internal Revenue Service had found that Isaiah Check Cashing Store's anti-money laundering policies and procedures were in compliance with the requirements of federal law during the period extending from March 1, 2009, through August 31, 2009. The policies and procedures that the Internal Revenue Service had approved included those relating to Isaiah Check Cashing Store's check cashing activities.

13. On rebuttal, the OFR examiner testified that the Bank Secrecy Act examination of Isaiah Check Cashing Store conducted by the Internal Revenue Service was "totally different" from the examination conducted by the OFR and that the finding by the Internal Revenue Service that Isaiah Check Cashing Store's anti-money laundering compliance program satisfied federal law was not determinative of whether Isaiah Check Cashing Store violated provisions of Florida law.⁵ The examiner identified several items required by Florida law that were not required under federal law, such as filing suspicious activity reports; due diligence activities that must be performed by cashiers when cashing checks of \$1,000.00 or more for corporations or third party customers; affixing thumbprints to checks of \$1,000.00 or more; endorsing checks by the money service business at the time

they are accepted; and keeping an electronic log of checks of \$1,000.00 or more.⁶

14. Significantly, the violation alleged in the OFR's Administrative Complaint was that Isaiah Check Cashing Store failed "to maintain, review, and update an anti-money laundering program in accordance with 31 C.F.R. s. 103.125." This violation did not reference the requirements of Florida law enumerated by the OFR examiner, and the examiner did not offer a persuasive explanation of the alleged difference between the requirements of the Florida and federal laws governing anti-money laundering compliance programs related to check cashing activities.

15. In addition, the testimony that the Internal Revenue Service's examination and the OFR's examination were different begs the question of whether a finding by the Internal Revenue Service that the Isaiah Check Cashing Store's anti-money laundering compliance program satisfied federal requirements is persuasive evidence that the anti-money laundering compliance program satisfied the requirements of Florida law. The testimony of the OFR examiner was, therefore, not persuasive and did not support the OFR's contention that Isaiah Check Cashing Store did not have in place anti-money laundering policies, procedures, and internal controls with respect to its check cashing activities.

Violations of Sections 560.310(1)(b)2. and (c) and 560.1105, Florida Statutes, and of Florida Administrative Code Rule 69V-560.704(2)(a), (4)(a), and (5)(a).

16. The evidence presented by the OFR is sufficient to support findings that, between January 13, 2009, and May 26, 2009, Isaiah Check Cashing Store failed to maintain copies with thumb prints for some of the payment instruments of \$1,000.00 or more that it accepted and cashed; that, between January 13, 2009, and May 26, 2009, Isaiah Check Cashing Store failed to keep copies of payment instruments of \$1,000.00 or more that it accepted and cashed that carried the endorsement of Isaiah Check Cashing Store; and that, between January 13, 2009, and May 28, 2009, Isaiah Check Cashing Store did not maintain an electronic log that included the name of the conductor or the amount of currency paid on payment instruments of \$1,000.00 or more.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2010).

18. In its Administrative Complaint, the OFR seeks to impose penalties against Isaiah Check Cashing Store that include suspension or revocation of its license and/or the imposition of an administrative fine. Therefore, it has the burden of proving by clear and convincing evidence that Isaiah Check Cashing Store

committed the violations alleged in the Administrative Complaint. Department of Banking & Finance, Division of Securities & Investor Protection v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

19. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court explained:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

Judge Sharp, in her dissenting opinion in Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998) (Sharp, J., dissenting), reviewed several pronouncements on clear and convincing evidence:

Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantitative [sic] elements. In re Adoption of Baby E.A.W.,

658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L. Ed. 2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davie, 645 So. 2d 398, 404 (Fla. 1994).

Violation One: Title 31, Section 103.125, Code of Federal Regulations and Sections 560.114(1)(y) and 560.1235(2), Florida Statutes.

20. Section 560.114, Florida Statutes, provides in pertinent part:

(1) The following actions by a money services business, authorized vendor, or affiliated party constitute grounds for the issuance of a cease and desist order; the issuance of a removal order; the denial, suspension, or revocation of a license; or taking any other action within the authority of the office pursuant to this chapter:

* * *

(y) Violations of 31 C.F.R. ss. 103.20, 103.22, 103.23, 103.27, 103.28, 103.29, 103.33, 103.37, 103.41, and 103.125, and United States Treasury Interpretive Release 2004-1.

21. Section 560.1235(2), Florida Statutes, provides:

"A licensee and authorized vendor must maintain an anti-money laundering program in accordance with 31 C.F.R. s. 103.125. The program must be reviewed and updated as necessary to ensure that the program continues to be effective in detecting and deterring money laundering activities."

22. Title 31, Section 103.125, Code of Federal Regulations, provides in pertinent part:

(a) Each money services business, as defined by § 103.11(uu), shall develop, implement, and maintain an effective anti-money laundering program. An effective anti-money laundering program is one that is reasonably designed to prevent the money services business from being used to facilitate money laundering and the financing of terrorist activities.

(b) The program shall be commensurate with the risks posed by the location and size of, and the nature and volume of the financial services provided by, the money services business.

(c) The program shall be in writing, and a money services business shall make copies of the anti-money laundering program available for inspection to the Department of the Treasury upon request.

(d) At a minimum, the program shall:

(1) Incorporate policies, procedures, and internal controls reasonably designed to assure compliance with this part.

(i) Policies, procedures, and internal controls developed and implemented under this section shall include provisions for complying with the requirements of this part including, to the extent applicable to the money services business, requirements for:

(A) Verifying customer identification;

(B) Filing reports;

(C) Creating and retaining records; and

(D) Responding to law enforcement requests.

(ii) Money services businesses that have automated data processing systems should integrate their compliance procedures with such systems.

* * *

(2) Designate a person to assure day to day compliance with the program and this part. The responsibilities of such person shall include assuring that:

(i) The money services business properly files reports, and creates and retains records, in accordance with applicable requirements of this part;

(ii) The compliance program is updated as necessary to reflect current requirements of this part, and related guidance issued by the Department of the Treasury; and

(iii) The money services business provides appropriate training and education in accordance with paragraph (d)(3) of this section.

(3) Provide education and/or training of appropriate personnel concerning their responsibilities under the program, including training in the detection of suspicious transactions to the extent that the money services business is required to report such transactions under this part.

(4) Provide for independent review to monitor and maintain an adequate program. The scope and frequency of the review shall be commensurate with the risk of the financial services provided by the money services business. Such review may be conducted by an officer or employee of the money services business so long as the reviewer is not the person designated in paragraph (d)(2) of this section.

23. Based in the findings of fact herein, the OFR has failed to prove by clear and convincing evidence that Isaiah Check Cashing Store violated Title 31, Section 103.125, Code of Federal Regulations. The Internal Revenue Service evaluated and tested the implementation of Isaiah Check Cashing Store's anti-money laundering program for check cashing for the period of March 1, 2009, through August 31, 2009, and found that Isaiah Check Cashing Store was in compliance with federal law. Given this finding by the Internal Revenue Service, it is reasonable to infer that the federal law to which the Internal Revenue Service referred included Title 31, Section 103.125, Code of Federal Regulations, and the OFR did not prove otherwise. Because the OFR failed to carry its burden of proving a violation of Title 31, Section 103.125, Code of Federal Regulations, it has also failed to prove that Isaiah Check Cashing Store violated Sections 560.114(1)(y) and 560.1235(2), Florida Statutes.

Violation Two: Section 560.310(1)(b)2., Florida Statutes, and Florida Administrative Code Rule 69V-560.704(4)(a).

24. Section 560.310, Florida Statutes, provides in pertinent part

(1) In addition to the record retention requirements specified in s. 560.1105, a licensee engaged in check cashing must maintain the following:

* * *

(b) For any payment instrument accepted having a face value of \$1,000 or more:

* * *

2. A thumbprint of the customer taken by the licensee.

25. Florida Administrative Code Rule 69V-560.704 provides in pertinent part:

(4) In addition to the records required in subsections (1) and (2), for payment instruments exceeding \$ 1,000.00, the check casher shall:

(a) Affix an original thumbprint of the conductor to the original of each payment instrument accepted which is taken at the time of acceptance;

26. Based on the findings of fact herein, the OFR has proven by clear and convincing evidence that Isaiah Check Cashing Store failed to include, in all cases, the thumb prints of persons cashing payment instruments with a face value of \$1,000.00 or more. The OFR has, therefore, carried its burden of proving that Isaiah Check Cashing Store violated Section 560.310(1)(b)2., Florida Statutes, and Florida Administrative Code Rule 69V-560.704(4)(a).

Violation Three: Section 560.1105, Florida Statutes, and Florida Administrative Code Rule 69V-560.704(2)(a).

27. Section 560.1105, Florida Statutes, provides: "Each licensee and its authorized vendors must maintain all books, accounts, documents, files, and information necessary for

determining compliance with this chapter and related rules for 5 years unless a longer period is required by other state or federal law.

28. Florida Administrative Code Rule 69V-560.704 provides in pertinent part:

(2) Every check casher shall maintain legible records of all payment instruments cashed. The records shall include the following information with respect to each payment instrument accepted by the registrant:

(a) A copy of all payment instruments accepted and endorsed by the licensee to include the face and reverse (front and back) of the payment instrument. Copies shall be made after each payment instrument has been endorsed with the legal name of the licensee. Endorsements on all payment instruments accepted by the check casher shall be made at the time of acceptance.

29. Based on the findings of fact herein, the OFR has proven by clear and convincing evidence that Isaiah Check Cashing Store failed to maintain copies of checks endorsed with its legal name. Consequently, the OFR has carried its burden of proving that Isaiah Check Cashing Store violated Section 560.1105, Florida Statutes, and Florida Administrative Code Rule 69V-560.704(2)(a).

Violation Four: Section 560.310(1)(c), Florida Statutes, and Florida Administrative Code Rule 69V-560.704(5)(a).

30. Section 560.310, Florida Statutes, provides in pertinent part:

(1) In addition to the record retention requirements specified in s. 560.1105, a licensee engaged in check cashing must maintain the following:

* * *

(c) A payment instrument log that must be maintained electronically as prescribed by rule. For purposes of this paragraph, multiple payment instruments accepted from any one person on any given day which total \$1,000 or more must be aggregated and reported on the log.

31. Florida Administrative Code Rule 69V-560.704 provides in pertinent part:

(5)(a) In addition to the records required in subsections (1) and (2) for payment instruments \$1,000.00 or more, the check casher shall create and maintain an electronic log of payment instruments accepted which includes, at a minimum, the following information:

1. Transaction date;
2. Payor name;
3. Payee name;
4. Conductor name, if other than the payee;
5. Amount of payment instrument;
6. Amount of currency provided;
7. Type of payment instrument;
 - a. Personal check;
 - b. Payroll check;
 - c. Government check;

- d. Corporate check;
 - e. Third party check; or
 - f. Other payment instrument;
8. Fee charged for the cashing of the payment instrument;
9. Branch/Location where instrument was accepted;
10. Identification type presented by conductor; and
11. Identification number presented by conductor.

32. Florida Administrative Code Rule 69V-560.704(1)(b) defines "conductor" as "a natural person who presents a payment instrument to a check casher for the purpose of receiving currency."

33. Based on the findings of fact herein, the OFR has proven by clear and convincing evidence that, on the date of the OFR examination, the electronic payment instrument log maintained by Isaiah Check Cashing Store did not include a field for the name of the conductor, if other than the payee, or for the amount of currency provided. Consequently, the OFR has carried its burden of proving that Isaiah Check Cashing Store violated Section 560.310(1)(c), Florida Statutes, and Florida Administrative Code Rule 69V-560.704(5)(a)4. and 6.

Penalties

34. Section 560.114, Florida Statutes, provides in pertinent part:

(1) The following actions by a money services business, authorized vendor, or affiliated party constitute grounds for the issuance of a cease and desist order; the issuance of a removal order; the denial, suspension, or revocation of a license; or taking any other action within the authority of the office pursuant to this chapter:

(a) Failure to comply with any provision of this chapter or related rule or order, or any written agreement entered into with the office.

35. The OFR has proven that Isaiah Check Cashing Store violated Sections 560.1105 and 560.310(1)(b)2. and (c), Florida Statutes, and Florida Administrative Code Rule 69V-560.704(2)(a), (4)(a), and (5)(a). Isaiah Check Cashing Store is, therefore, subject to disciplinary action pursuant to Section 560.114(1), Florida Statutes.

36. Section 560.114(7), Florida Statutes, provides: "The office may, in addition to or in lieu of the denial, suspension, or revocation of a license, impose a fine of at least \$1,000 but not more than \$10,000 for each violation of this chapter."

37. In its Proposed Recommended Order, the OFR has suggested that the appropriate penalties in this case are entry of an order directing Isaiah Check Cashing Store to cease and desist the above-referenced unlawful activities and imposition

of a \$1,000.00 administrative fine for each violation. The undersigned agrees that the penalties suggested by the OFR are reasonable under the circumstances and adopts these penalties.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Office of Financial Regulation enter a final order finding that Isaiah Check Cashing Store, Inc., violated Sections 560.1105 and 560.310(1)(b)2. and (c), Florida Statutes, and Florida Administrative Code Rule 69V-560.704(2)(a), (4)(a), and (5)(a); directing Isaiah Check Cashing Store, Inc., to cease and desist this unlawful activity; and imposing an administrative fine in the amount of \$3,000.00.

DONE AND ENTERED this 23rd day of November, 2010, in Tallahassee, Leon County, Florida.



PATRICIA M. HART
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of November, 2010.

ENDNOTES

^{1/} All references herein to the Florida Statutes are to the 2009 edition unless indicated otherwise.

^{2/} Respondent's Exhibit 1.

^{3/} An employee of Isaiah Check Cashing Store testified that the OFR may have been mistakenly provided with copies of some of the sample payment instruments that had been made before the instruments were cleared for payment. The employee explained that, when a check was presented to Isaiah Check Cashing Store, a copy of the endorsed check was made before the check was cleared for payment. Once the check was cleared and the payee agreed to the check-cashing fee, the payee's thumb print was placed on the check and a copy of the thumb-printed check was made. This explanation is not persuasive because Isaiah Check Cashing Store apparently undertook a diligent search of its records and failed to find copies of 51 payment instruments in the sample examined by the OFR that contained thumb prints.

^{4/} According to the OFR examiner, a "conductor" is the person cashing a check made payable to a corporation.

^{5/} Transcript at page 62.

^{6/} See Transcript at pages 61-63.

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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.