STATE OF FLORIDA
OFFICE OF FINANCIAL REGULATION

STATE OF FLORIDA,
OFFICE OF FINANCIAL REGULATION,

Petitioner,

vs.

OFR Admin. No. 0798-FI-11/10
DOAH Case No. 12-1225

MARINE BANK & TRUST COMPANY,
a state-chartered Bank in Vero Beach, Florida,

Respondent.
_____/

FINAL ORDER

This matter was considered by the Commissioner of the Florida Office of Financial Regulation ("the Office") following receipt and consideration of a Recommended Order issued by an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings. A copy of the Recommended Order is attached hereto as Exhibit A.

BACKGROUND

1. The Office issued an Administrative Complaint against Marine Bank & Trust Company of Vero Beach ("Marine Bank" or "Bank") charging Marine Bank with engaging in unsafe and unsound practices as defined in Section 655.005(1)(y), Florida Statutes (2011),[1] with violating laws relating to the operation of a financial institution, and with breaching a written agreement with the Office. The Office further alleged that, accordingly, the Office is authorized pursuant to Section 655.033(1)(a), (b), and (e), Florida Statutes (2011),

[1] For ease of reference, and consistent with the Recommended Order and the pleadings, this Final Order cites to Section 655.005(1)(y), Florida Statutes (2011), which, effective July 1, 2011, is the location of the definition of an "unsafe or unsound practice," even though the term as substantively defined in Section 655.005(1)(r), Florida Statutes (2010), controls in this case. See Recommended Order, Paragraphs 41-44.

respectively, to issue a Cease and Desist Order against Marine Bank. Marine Bank disputed the allegations and requested a formal hearing. The Office referred the matter to the Florida Division of Administrative Hearings ("DOAH") for assignment of an ALJ to conduct a formal evidentiary hearing on the disputed issues. The ALJ conducted the formal hearing on August 10, 13, and 14, 2012, and issued the Recommended Order on November 20, 2012.

2. The ALJ recommended that the Office of Financial Regulation may issue and is authorized to issue a Cease and Desist Order pursuant to Section 655.033, Florida Statutes (2011), against Marine Bank for engaging in unsafe and unsound practices and for violating laws relating to the operation of a financial institution.

3. Both parties timely filed exceptions to the Recommended Order. The matter is now presented to the Commissioner of the Office for final agency action.[2]

4. Having reviewed the entire record, the Commissioner accepts the recommendation of the Administrative Law Judge as to the disposition of this case.

ROLE OF THE OFFICE

5. Throughout the pendency of the formal administrative proceedings, the Office's litigation staff prosecuted the administrative complaint on behalf of the Office in the role of the Petitioner.[3] After the ALJ issued the Recommended Order, the Office assumed two functions in this matter. The attorney and staff who advocated the Office's position throughout the formal proceedings continued to perform that function. The other role is

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[2] Subsequent to the receipt of the Recommended Order, the Commissioner received an ex parte communication from Respondent Marine Bank. On January 18, 2013, the Commissioner placed the communication on the record and copied all parties pursuant to Section 120.66, Florida Statutes.

[3] For the purpose of this Final Order, the Office in its role as a Petitioner and party litigant under Chapter 120, Florida Statutes, will be referred to as the "OFR" or "Petitioner OFR."

performed by the Commissioner of the Office, and agency staff who took no part in the formal proceedings, and who have reviewed the entire record and the Recommended Order in light of the Exceptions and the Responses to the Exceptions. Based upon that review, the Commissioner must enter a final order in accordance with Section 120.57(1)(l), Florida Statutes (2012).

6. The Office of Financial Regulation, being authorized and directed to administer and enforce Chapters 655 and 658, Florida Statutes, and having reviewed the record in this case, hereby enters this Final Order ruling on all exceptions and adopting the Findings of Fact and Conclusions of Law in the ALJ's Recommended Order, with the exception of the conclusion of law in Paragraph 48 of the Recommended Order as set forth below.

STANDARD OF REVIEW OF RECOMMENDED ORDER AND EXCEPTIONS

7. The actions that the Office may take in response to a recommended order are set forth in Section 120.57(1)(l), Florida Statutes (2012). With respect to the findings of fact in the Recommended Order, the Office has limited authority:

> The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Competent substantial evidence is "'such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred' or such evidence as is 'sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.'" Heifetz v. Dep't of Bus. Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) (quoting De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957)). In reviewing findings

of fact, an agency is not authorized "to re-weigh the evidence presented, judge the credibility of the witnesses, or otherwise interpret the evidence to fit a desired ultimate conclusion." Bill Salter Adver., Inc. v. Dep't of Transp., 974 So. 2d 548, 551 (Fla. 1st DCA 2008).

8. "Neither may an agency's responsibility to determine if substantial evidence supports the administrative law judge's findings of fact be avoided by merely labeling, either by the administrative law judge or the agency, contrary findings as conclusions of law." Gross v. Dep't of Health, 819 So. 2d 997, 1001 (Fla. 5th DCA 2002). "In summary, if there is competent substantial evidence to support the findings of fact in the record . . . the agency may not reject them, substitute its findings, or make new findings." Id.

9. With respect to the conclusions of law in the Recommended Order, the Office's authority is relatively broad. The Office may reject or modify the ALJ's conclusions of law or interpretation of administrative rules, but only as permitted by Section 120.57(1)(l), Florida Statutes (2012):

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

The label assigned to a paragraph in the recommended order is not dispositive as to whether it is a conclusion of law or a finding of fact. Kinney v. Dep't of State, 501 So. 2d 129 (Fla. 5th DCA 1987). Conclusions of law, even though placed in the findings of fact section or labeled as such, may be considered under the same standard as any other conclusion of law. An agency may not, however, reject a finding of fact supported by competent substantial

evidence by labeling it a conclusion of law.

RULINGS ON EXCEPTIONS

10. On December 5, 2012, the parties filed timely exceptions to the Recommended Order. Marine Bank filed exceptions to eight findings of fact, five conclusions of law, and to the ALJ's recommendation, and the Petitioner OFR excepted to one conclusion of law. The exceptions are addressed below.

Ruling on Respondent's Exception to Paragraph 3

11. Marine Bank filed an exception to part of the ALJ's finding of fact in Paragraph 3 of the Recommended Order that the Office and the Federal Deposit Insurance Corporation ("FDIC") determined that unsafe and unsound practices existed during the August 23, 2010 Examination of Marine Bank. Specifically, Marine Bank argues that the ALJ made an unauthorized finding of unsafe and unsound practices because the Office's 2010 Report of Examination made the same determination, and the Office's determination was in contravention of the FDIC Risk Management Manual of Examination Policies, which the Office adopted as a "reference guideline" in Rule 69U-100.045, Florida Administrative Code.

12. Respondent is essentially attempting to assert an evidentiary objection, which is improper. Additionally, Respondent mischaracterizes, contorts, and complicates the ALJ's straightforward finding in Paragraph 3, that "[i]n essence, both OFR and FDIC determined [during the joint examination by the OFR and FDIC in August 2010] that . . . unsafe and unsound practices existed . . . ." This finding simply summarizes the facts and evidence accepted by the ALJ, and there is competent substantial evidence in the record to support this finding. (Resp. Ex. 8; Joint Ex. 1; Batlle, I. 26-29, 42; Townsend, II. 242-43; III. 346-47).[4]

[4] Exhibits will be cited by the offering party, followed by the exhibit number or letter. For

13. To the extent the Respondent suggests that the finding constitutes an erroneous conclusion of law, Respondent's exception is without merit. The Risk Management Manual of Examination Policies that is listed in the OFR's rule is a guideline. See Fla. Admin. Code R. 69U-100.045 ("The OFR examiners use the manuals as reference guidelines when conducting safety and soundness examinations of such financial institutions . . . ."). Finally, the Respondent cites other testimony and evidence that the Respondent believes the ALJ should have accepted and urges the Office to decide the facts, which it cannot do. Competent substantial evidence supports Finding of Fact 3. Therefore, the Respondent's exception is denied.

Ruling on Respondent's Exception to Paragraph 4

14. Respondent takes exception to the ALJ's finding of fact that the Bank failed to obtain appraisal reports on Other Real Estate Owned ("OREO") properties in accordance with Section 658.67(9)(a), Florida Statutes (2010). Specifically, Respondent states that the ALJ "fails to include" the "critical fact" that the Bank obtained the opinions of three commercial brokers as to the market value for the properties. Respondent additionally contends that the ALJ "ignored" the fact that Bank management "reviewed the statute in question [Section 658.67(9)(a), Florida Statutes] and concluded that the Bank was in compliance with the law" by determining the market value of the real property using the three brokers' opinions.

15. The Respondent's exception is without merit. The Respondent clearly re-

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example, Petitioner's Exhibit M will appear as "Pet. Ex. M," and Respondent's Exhibit 8 will appear as "Resp. Ex. 8." Joint exhibits will appear as "Joint Ex." followed by the exhibit number or letter. The transcript of the final hearing consists of three volumes (I, II, and III). Citations to the testimony in the transcript will appear by witness name, transcript volume, and page number. Accordingly, a citation to the testimony of David Batlle on page 40 of Volume I of the transcript will appear as "Batlle, I. 40."

argues the evidence, and the Respondent's contention that the ALJ failed to consider evidence is merely supposition. The Respondent invites the Office to make a factual finding contrary to that made by the ALJ based upon evidence the Respondent proposes. The question is not, however, whether the record contains competent substantial evidence to support a contrary finding, but rather whether the record contains evidence to support the finding that was made. See, e.g., Bill Salter Adver., Inc. v. Dep't of Transp., 974 So.2d 548, 551 (Fla. 1st DCA 2008); Dep't of High. Saf. & Motor Veh. v. Roberts, 938 So. 2d 513, 519 (Fla. 5th DCA 2006) ("The question is not whether substantial competent evidence exists in the record to support a conclusion contrary to the one reached by the hearing officer; the question is whether there exists in the record substantial competent evidence to support the hearing officer's conclusion, even when contrary inferences can be drawn from the evidence."). The Respondent also argues that the Office should interpret the evidence to fit the Respondent's desired ultimate conclusion. This is impermissible. See id.

16. Competent substantial evidence supports the findings in Paragraph 4. (Resp. Ex. 8; Resp. Ex. 27; Batlle, I. 57-59; Batlle, II. 331-32 (Batlle responded "no" when asked the question of whether the failure obtain the appraisal was not a violation of Section 658.67); Townsend, II. 240). Additionally, regarding Section 658.67(9), Florida Statutes (2010), Linda Townsend testified that it is "the section on other real estate of the statute, and it allows the bank to take into its possession other real estate or other assets that are collateral and they have to be booked at the lesser of book value, market, or appraisal. The appraisals relate to real estate. In market value it would relate to other kinds of assets such as securities, which gets a market value." (Townsend, II. 239-40). Accordingly, Respondent's exception to Paragraph 4 is denied.

Ruling on Respondent's Exception to Paragraph 10

17. Respondent takes exception to the ALJ's finding of fact in Paragraph 10 of the Recommended Order that the Memorandum of Understanding ("MOU") is a written agreement. Additionally, Respondent contends that the finding conflicts with Paragraph 57 of the Conclusions of Law.

18. Respondent's exception is denied. Competent substantial evidence supports this finding that the MOU is a written agreement, and the finding is consistent with the ALJ's conclusion in Paragraph 57 that the MOU is not a "written agreement" within the meaning of Section 655.033(1)(e), Florida Statutes (2011). (Joint Ex. B; Townsend, II. 247; Townsend, III. 349, 359, 399-401).

Ruling on Respondent's Exceptions to Paragraphs 19-22

19. Respondent contends that the reference to "exam and visitation documents" in the ALJ's findings of fact in Paragraphs 19 to 22 of the Recommended Order can only be construed to be a reference to the FDIC's 2011 Report of Examination ("FDIC 2011 Report"). The Respondent further contends that, because the FDIC 2011 Report was not in evidence, the findings in Paragraphs 20 through 22 cannot be supported by competent substantial evidence.

20. Respondent's argument is supposition. Notably, the ALJ referenced exam "and visitation documents." The "visitation" was conducted by the OFR in January 2012 and resulted in the OFR's 2012 Visitation Report. The OFR's 2012 Visitation Report verifies and summarizes examiner findings in the FDIC's 2011 Report,[5] and contains the ratings that the FDIC assigned in its 2011 Report. The OFR's 2012 Visitation Report further contains the

[5] In its exception the Respondent acknowledges this fact and even quotes the pertinent portions from the OFR's 2012 Visitation Report.

capital and adversely classified assets and loans ratios from the FDIC 2011 Report regarding Marine Bank's financial condition as of June 30, 2011.

21. Further, as found by the ALJ in Paragraph 19, which finding is supported by competent substantial evidence, "The FDIC provided a copy of its [2011 Report] to the OFR. OFR is authorized to accept an examination by an appropriate federal regulatory agency. OFR considered the September Examination in evaluating Marine Bank's condition." (Resp. Ex. 9; Batlle, I. 39-40 (describing the joint exam process)). The findings in Paragraph 19 place the findings in Paragraphs 20 through 22 in the proper context. Respondent's exception to Paragraph 19 is denied.

22. The Respondent additionally contends that, assuming the ALJ's reference to "exam and visitation documents" refers to other exam reports and the OFR's 2012 Visitation Report, Paragraphs 20 and 21 are still not supported by competent substantial evidence and were not proven by a preponderance of the evidence or by clear and convincing evidence.

23. The Respondent's contention is rejected, as competent substantial evidence supports the findings in Paragraphs 20 and 21. (Resp. Ex. 8; Resp. Ex. 9, page 2 ("Poor asset quality continues to jeopardize the viability of the bank. Adverse classifications total $19,338,000 and consist of $15,167,000 in loans and $4,171,000 in other real estate classified substandard. They comprise 14.13 percent of total assets and 158.40 percent of Tier 1 Capital and the allowance for loan and lease losses."); Batlle, I. 28-30, 32, 34, 52-53; Townsend, II. 174, 228, 232). Respondent's exceptions to Paragraphs 20 and 21 are denied.

24. Finally, Respondent appears to generally take exception to Paragraph 22 as part of the argument regarding the reference to "exam and visitation" documents. This argument was addressed above and is rejected. Respondent's exception to Paragraph 22 does

not otherwise claim that a specific finding (other than those already addressed) is unsupported by competent substantial evidence. In any event, competent substantial evidence supports the finding in Paragraph 22. (Pet. Ex. D). Accordingly, Respondent's exception to Paragraph 22 is also denied.

Ruling on Respondent's Exception to Paragraph 28

25. Respondent excepts to the ALJ's finding of fact in Paragraph 28 of the Recommended Order that no evidence was presented demonstrating the Marine Bank was on the verge of insolvency or substantial dissipation of assets. Respondent further states that it "elicited testimony which showed that the Bank has never even approached insolvency, much less been on the verge of insolvency."

26. Respondent's exception to Paragraph 28 is denied, as competent substantial evidence, including the evidence cited by the Respondent, supports the finding. (Townsend, III. 347).

Ruling on Respondent's Exception to Paragraph 47

27. Respondent excepts to the ALJ's conclusion of law in Paragraph 47 of the Recommended Order that Marine Bank engaged in unsafe and unsound practices by failing to diversify and prevent excessive commercial real estate ("CRE") concentrations in its loan portfolio. Respondent asserts three bases for the exception: there is no competent substantial evidence from which the ALJ could determine that CRE concentrations were excessive; even if there were, evidence to the contrary was overwhelming; and there was no legal basis from which to determine that excessive CRE levels constituted in engaging in unsafe and unsound practices.

28. The record contains competent substantial evidence from which the ALJ could

conclude as he did. (Resp. Ex. 8, p. 017483 (attributing the Bank's deficient asset quality in part to the Bank's concentrations in commercial real estate loans); Resp. Ex. 9, page 2 ("The Bank continues to exceed regulatory guidelines on commercial real estate ("CRE") loans.") Resp. Ex. 9 (Concentrations Schedule); Resp. Ex. 8; Penney, II. 171; Townsend, III. 337, 341-42; Penney, III. 417; Gould, I. 88 ("And we are aware that we have a high concentration of commercial real estate."); Townsend, III. 345 (testifying that the CRE Guidance levels are guidance and that the OFR is permitted to use such generally accepted banking practices in assessing a financial institution)).

29. The Respondent cites evidence it believes is favorable to its position and urges the Office to make a finding contrary to that of the ALJ. This, however, is impermissible. Determining the weight of the evidence, resolving conflicts in the evidence, making credibility determinations, and drawing reasonable inferences from the evidence is the function of the ALJ, not the Office. Finally, Respondent does not advance a conclusion of law that is as or more reasonable than that of the ALJ. Respondent's exception is denied.

Ruling on Respondent's Exception to Paragraph 48

30. Respondent excepts to the ALJ's conclusion of law in Paragraph 48 of the Recommended Order on the basis that "the OFR did not prove this allegation and the evidence, including the only testimony on the matter, presented weighs substantially against the ALJ's conclusion. Instead, the preponderance of the evidence is in favor of Respondent."

Paragraph 48 provides as follows:

> 48. The evidence demonstrates that Marine Bank engaged in unsafe and unsound practice within the meaning of section 655.005(1)(y) by failing to ensure that its methodology for ALLL consistently complied with regulatory guidance and adequately accounted for the level of credit risk in Marine Bank's portfolio; and that its ALLL policy fully documented the processes that management utilized in developing the quarterly ALLL methodology. Such

unsafe and unsound practices have created the likelihood of loss, insolvency, or dissipation of assets or otherwise prejudiced the interest of Marine Bank or its depositors or members.

31. Although the record contains evidence that in 2010 the Bank's ALLL methodology was inadequate, the undisputed evidence was that the Bank satisfactorily addressed the ALLL methodology by the time of the OFR's 2012 Visitation. Accordingly, the Office cannot conclude that the Bank's initial failure in 2010 to ensure an adequate ALLL methodology, that has been corrected, is an unsafe and unsound practice authorizing the entry of a cease and desist order requiring the Bank to, at this time, take corrective action. The Office's conclusion on this matter, infused with policy considerations, is as or more reasonable than that of the ALJ. Additionally, this conclusion does not change the conclusion in Paragraph 49 with respect to the unsafe and unsound practice of operating with earnings that are insufficient to increase capital and fund an adequate ALLL, nor does it change the conclusions of law or findings of fact in any other paragraphs of the Recommended Order.

32. Therefore, the Respondent's exception to Paragraph 48 is granted, and the Office substitutes the ALJ's conclusion of law in this paragraph with the following: the Office cannot conclude that the Bank's initial failure in 2010 to ensure an adequate ALLL methodology, that the undisputed evidence shows has been corrected, rises to the level of an unsafe and unsound practice authorizing the entry of a cease and desist order requiring the Bank to, at this time, take corrective action. The Office's conclusion that the facts on this matter do not rise to the level of an unsafe or unsound practice is infused with policy considerations, and is as or more reasonable than that of the ALJ. The Office's conclusion that Marine Bank's ALLL methodology does not rise to the level of an unsafe or unsound practice, does not, however, constitute a determination as to whether the methodology is

beyond reproach or without room for improvement, and the Office does not consider this issue.

Ruling on Respondent's Exception to Paragraph 49

33. Respondent excepts to the ALJ's conclusion of law in Paragraph 49 of the Recommended Order, which concluded that Marine Bank engaged in unsafe and unsound practices by operating with inadequate capital levels in relation to the risks associated with its lending practices and loan portfolio, and by operating with earnings that are insufficient to increase capital and fund an adequate ALLL.

34. Specifically, Respondent first contends that, as a matter of law, operating with inadequate capital or earnings is a "condition" and not a "practice" and therefore cannot be an unsafe or unsound practice. Respondent's characterization of operating with inadequate capital or earnings as a "condition" in order to avoid Section 655.005(1)(y), Florida Statutes (2011), is unavailing. Respondent offers no legal reasoning or authority in support of this argument, and does not advance a conclusion of law that is as or more reasonable than that of the ALJ.

35. Second, Respondent contends that there was no competent substantial evidence demonstrating the capital levels the Bank was required to meet or that the Bank failed to meet them. Third, Respondent contends that the practices referenced in the conclusion of law were not proven by a preponderance of the evidence to be unsafe and unsound.

36. The record contains ample competent substantial evidence from which the ALJ could conclude that the Bank's capital levels and earnings were inadequate and insufficient to increase capital and fund an adequate ALLL. (Resp. Ex. 8; Resp. Ex. 9; Pet. Ex. O; Batlle, I. 26, 28-30, 32, 78-79; Penney, II. 197; Townsend, II. 227-28, 232; Townsend, III. 346, 396-

97; Townsend, II. 235 (capital, not ALLL, is the first line of defense to absorb losses and ALLL is not included in capital)). Additionally, as the Respondent concedes, the Bank has not been able to achieve the capital levels in the Memorandum of Understanding. Bank directors did not dispute the need to raise capital. (Penney, II. 179-80; Hazel, II. 303, 312, 315; Penney, III. 503-04). The record is replete with evidence that the Bank has operated with inadequate capital and earnings since its deterioration in 2009 (Resp. Ex. 8; Resp. Ex. 9; Townsend, III. 396 ("The bank has lost money every year for the last several. They've had no net income on an annual basis, so there's no capital formation through income generation."); Pet. Ex. O). Accordingly, ample competent substantial evidence supports the determination that the Petitioner proved the unsafe and unsound practices at issue under either standard of proof: preponderance or clear and convincing. (Resp. Ex. 8; Resp. Ex. 9; Batlle, I. 28-30, 32; Penney, II. 197-98; Townsend, II. 235, 237-38 (testifying that the more capital you have, the faster you reduce the classified assets ratios)). Respondent's exception to Paragraph 49 is denied.

Ruling on Respondent's Exception to Paragraph 50

37. Respondent takes exception to the ALJ's conclusion of law in Paragraph 50 of the Recommended Order that Marine Bank engaged in unsafe and unsound practices by its Board of Directors providing ineffective oversight, supervision, and guidance to its management. Respondent also takes exception to the conclusion that the Bank engaged in unsafe and unsound practices by the failure of the Directors and management to improve the Bank's deficient and deteriorating financial condition and to correct deficiencies noted at examinations and visitations.

38. In this exception Respondent again re-argues the evidence, and improperly

asks the Office to reject the factual findings that the ALJ has already determined to be proven by a preponderance of the evidence.[6] There is ample competent substantial evidence from which the ALJ could properly draw the inference that he did from the testimony and exhibits presented. (Resp. Ex. 8 ("Evidenced by the deteriorating condition of the bank, management and the Board have not been effective in providing strong oversight and guidance. While the economic recession has contributed to the bank's impaired condition, management's decision to originate large volumes of commercial real estate loans funded by high cost deposits compounded the recession's effect on the Bank."); Resp. Ex. 9; Townsend, III. 346, 396-97). The Respondent does not advance any conclusion of law that is as or more reasonable of the ALJ. Respondent's exception to Paragraph 50 is denied.

Ruling on Respondent's Exception to Paragraph 52

39. Respondent takes exception to the ALJ's conclusion of law in Paragraph 52 of the Recommended Order, which concluded that "[t]he evidence demonstrates that Marine Bank violated the laws regarding the operation of a financial institution by failing to obtain appraisal on OREO as required by section 658.67(9)(a)." Respondent contends that the plain meaning of the statute is that either "appraisal value" or "market value" of the property as security acquired for a loan may be used to determine value. Therefore, Respondent contends, the Bank complied with the plain meaning by ordering three commercial real estate brokers' opinions of the market value of the property. Respondent further contends that there is no rule promulgated by the OFR interpreting the statute to require an appraisal.

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[6] The ALJ determined that the Petitioner OFR's burden of proof was the preponderance of the evidence standard, but also determined that, assuming that the clear and convincing standard applied, the facts and issues were proven by clear and convincing evidence. See Recommended Order, Paragraphs 37-39. Competent substantial evidence supports the ALJ's determinations under either standard.

40. Respondent's exception, which re-argues the evidence, is rejected. As set forth under the ruling on Respondent's exception to the ALJ's Finding of Fact in Paragraph 4 of the Recommended Order, the record contains competent substantial evidence from which the ALJ could reasonably conclude that the Bank's failure to obtain an appraisal is a violation of Section 658.67(9)(a), Florida Statutes (2010). The Respondent simply disagrees with the conclusion but advances no conclusion of law that is as or more reasonable than that of the ALJ.

41. Finally, the Respondent adds that because the ALJ found, in Paragraph 28, that there was no evidence demonstrating that Marine Bank was on the verge of insolvency or substantial dissipation of assets or earnings, this finding means that there was no evidence to make a conclusion "with regard to all the elements required by Section 655.005(1)(y), Florida Statutes, in order to meet the statutory definition of unsafe or unsound practice or case law on the subject of an 'unsafe or unsound practice.'"

42. The Respondent's argument is without merit, as the definition of an unsafe or unsound practice in Section 655.005(1)(y), Florida Statutes (2011), is a practice that creates "*the likelihood*" of loss, insolvency, or dissipation of assets, or otherwise prejudices the interest of the financial institution or its depositors or members. (Emphasis added). A financial institution that is insolvent or imminently insolvent is in a financial condition that has deteriorated to the point that it is subject to the seizure and receivership process under Sections 658.79 through 658.96, Florida Statutes, which is not at issue here. A financial institution does not have to be "insolvent or imminently insolvent" before it can be determined to be engaging in unsafe or unsound practices. Morever, the statutory definition does not contain the word "substantial" with respect to dissipation of assets or earnings.

43. The record contains ample competent substantial evidence from which the ALJ could conclude, as he properly did, that Marine Bank engaged in unsafe and unsound practices that have created the likelihood of loss, insolvency, or dissipation of assets or otherwise prejudiced the interest of Marine Bank or its depositors or members. See Section 655.005(1)(y), Florida Statutes (2011) (emphasis added). Respondent's exception to Paragraph 52 is denied.

Ruling on Petitioner's Exception to Paragraph 57

44. Petitioner OFR excepts to the ALJ's conclusion of law in Paragraph 57 of the Recommended Order that the MOU was not the type of written agreement that Section 655.033(1)(e), Florida Statutes (2011),[7] was intended to cover.

Paragraph 57 of the Recommended Order provides:

> The undersigned is persuaded that the MOU was not the type of written agreement that section 655.033(1)(e) was intended to cover. The undersigned is not persuaded that OFR was authorized to issue a complaint for Marine Bank's noncompliance with the MOU. Consequently, the undersigned is not persuaded that OFR was authorized to issue a complaint for Marine Bank's noncompliance with the MOU pursuant to section 655.033(1)(e).

45. In this exception, Petitioner OFR asserts that Section 655.033(1)(e), Florida Statutes (2011), does not designate written agreements by "type." Rather, Petitioner OFR contends, the statutory provision only refers to '[a] breach of any written agreement with the

[7] In 2010, the statutory definition of an "unsafe or unsound practice" was found in Section 655.005(1)(r), Florida Statutes (2010). Effective July 1, 2011, the definition was amended to include "a violation of any prior agreement in writing" as an unsafe or unsound practice, and was relocated to Section 655.005(1)(y). As the ALJ concluded, however, the substance of the 2010 version of "unsafe or unsound practice" set forth in Section 655.005(1)(r), Florida Statutes (2010), governs the instant proceeding because it was in effect at the time the parties entered into the MOU. Therefore, the Office has no cause to consider or interpret the amended definition set forth in Section 655.005(1)(y), Florida Statutes (2011), or its effect on this case.

office.'" Petitioner OFR further contends that there are no findings or fact or conclusions of law in the Recommended Order to show that the OFR must consider the "type" of written agreement it enters into with a financial institution before the OFR may determine that a breach of the written agreement is covered by Section 655.033(1)(e), Florida Statutes (2011). Petitioner OFR contends that in the absence of any statutory guidance as to the "type" written agreement covered under Section 655.033(1)(e), Florida Statutes (2011), the Petitioner OFR's determination that the MOU is a written agreement for purposes of the provision is proper.

46. Petitioner OFR focuses on the ALJ's use of the word "type" with respect to the written agreement. The fact that the ALJ used the word "type" with reference to the written agreement is not dispositive. Given the record evidence and arguments made before the ALJ in this case, issue is whether the MOU is a "written agreement" within the meaning of Section 655.033(1)(e), Florida Statutes (2011); in other words, whether the MOU is the type of written agreement contemplated by Section 655.033(1)(e), Florida Statutes. It is apparent from the record evidence and arguments before the ALJ that the ALJ properly considered the issue, and concluded that the MOU was not a written agreement within the meaning of Section 655.033(1)(e), Florida Statutes (2011).

47. Additionally, Petitioner OFR's argument is not persuasive, as Petitioner OFR offers no substantive policy reasoning in support beyond its argument that it is up to the Office to determine whether the MOU constitutes a "written agreement" within the meaning of Section 655.033(1)(e), Florida Statutes (2011). Petitioner OFR has not persuaded the Office that Petitioner OFR's proposed conclusion of law is as or more reasonable than that of the ALJ. The record contains competent substantial evidence from which the ALJ could conclude that the MOU, although an agreement in writing and therefore a written agreement,

is not a "written agreement" within the meaning of Section 655.033(1)(e), Florida Statutes. Petitioner OFR's exception to Conclusion of Law 57 is denied.

FINAL ORDER

Upon review of the complete record of this proceeding and based on the foregoing findings of fact and conclusions of law, and having ruled on the parties' Exceptions, it is accordingly ORDERED:

1. That Respondent's Exception to Paragraph 48 is GRANTED;

2. That the Conclusion of Law in Paragraph 48 is substituted as set forth herein;

3. That all other Exceptions filed by the Respondent are DENIED;

4. That Petitioner OFR's Exception to the Conclusion of Law in Paragraph 57 is DENIED; and

5. That the Recommended Order and recommended disposition are otherwise adopted and the Office may issue and is authorized pursuant to Section 655.033(1)(a) and (b), Florida Statutes, to issue a Cease and Desist Order requiring Marine Bank to cease and desist from engaging in unsafe and unsound practices and from violating laws relating to the operation of a financial institution.

DONE and ORDERED this 18th day of February, 2013, at Tallahassee, Leon County, Florida.

Drew J. Breakspear, Commissioner
Office of Financial Regulation

NOTICE OF RIGHTS

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK FOR THE OFFICE OF FINANCIAL REGULATION AS FOLLOWS:

By Mail or Facsimile	**OR**	By Hand Delivery
Office of Financial Regulation P.O. Box 8050 Tallahassee, Florida 32314-8050 Phone: (850) 410-9880 Fax: (850) 410-9548		*Office of Financial Regulation* General Counsel's Office The Fletcher Building, Suite 526 101 East Gaines Street Tallahassee, Florida 32399-0379 Phone: (850) 410-9889

A COPY OF THE NOTICE OF APPEAL, ACCOMPANIED BY THE FILING FEES AS REQUIRED BY LAW, MUST ALSO BE FILED WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 2000 DRAYTON DRIVE, TALLAHASSEE, FLORIDA 32399-0950, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITH BOTH THE AGENCY CLERK FOR THE OFFICE OF FINANCIAL REGULATION AND THE DISTRICT COURT OF APPEAL WITHIN 30 DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that the original of the foregoing has been filed with the Agency Clerk of the Office of Financial Regulation and that true and correct copies have been furnished to the persons listed below this 18th day of February, 2013.

Leslie E. Bryson, Fla. Bar. No. 0498831
Assistant General Counsel
Office of Financial Regulation

BY HAND DELIVERY:

The Honorable Errol H. Powell
Administrative Law Judge
Division of Administrative Hearings
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