

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OFFICE OF FINANCIAL REGULATION,)
)
 Petitioner,)
)
 vs.) Case No. 12-1225
)
 MARINE BANK AND TRUST COMPANY,)
 A STATE-CHARTERED BANK IN VERO)
 BEACH, FLORIDA,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on August 10, 13, and 14, 2012, by video teleconference with connecting sites in Port St. Lucie and Tallahassee, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jeffrey D. Jones, Esquire
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STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed the offenses set forth in the Amended Administrative Complaint dated February 29, 2012, and, if so, what action should be taken.

PRELIMINARY STATEMENT

The Office of Financial Regulation (OFR) issued an Amended Administrative Complaint and Notice of Rights against Marine Bank and Trust Company, a State-Chartered Bank in Vero Beach, Florida (Marine Bank) dated February 29, 2012. OFR charged Marine Bank with engaging in unsafe and unsound practices within the meaning of section 655.005(1)(y), Florida Statutes, for which an order to cease and desist from engaging in the unsafe and unsound practices and to take the necessary corrective action is authorized and appropriate pursuant to section 655.033(1)(a); with violating laws relating to the operation of a financial institution for which an order to cease and desist and to take the necessary corrective action is authorized and appropriate pursuant to section 655.033(1)(b); and with breaching the written agreement between it and OFR for which an order to cease and desist from operating in violation of the

written agreement and to take the necessary corrective action is authorized and appropriate pursuant to section 655.0331(1)(e). Marine Bank disputed the material allegations of fact and requested a hearing. On April 6, 2012, this matter was referred to the Division of Administrative Hearings.

Prior to hearing, a Protective Order Governing Confidentiality of Production of Documents was issued. Additionally, the parties filed unilateral prehearing statements.

At hearing, OFR presented the testimony of three witnesses and entered 18 exhibits (Petitioner's Exhibits C, D, E-1, E-2, F-1, F-2, G, H, I-1, I-2, J-1, J-2, K, L-1, L-2, M, N, and O) into evidence. Marine Bank presented the testimony of five witnesses and recalled three witnesses whose testimony had been presented by OFR and entered 38 exhibits (Respondent's Exhibits numbered 1 through 33, and 55 through 59) into evidence. The parties entered two joint exhibits (Joint Exhibits A (OFR's A and Marine Bank's 8) and B (OFR's B) into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The transcript, consisting of three volumes, was filed on September 21, 2012. The parties timely filed their

post-hearing submissions, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. No dispute exists that OFR is the state agency authorized and charged with licensure and regulation of Florida state-chartered financial institutions pursuant to section 20.121(3) and chapters 655 and 658, Florida Statutes, and the rules promulgated pursuant thereto contained in Florida Administrative Code chapter 69U.

2. No dispute exists that Marine Bank is a Florida state-chartered bank operating under Charter Number 251-T, with its principal place of business located at 571 Beachland Boulevard, Vero Beach, Indian River County, Florida.

3. OFR began a full scope safety and soundness examination of Marine Bank on August 23, 2010 (August Examination). The August Examination was conducted concurrently with the Federal Deposit Insurance Corporation (FDIC). In essence, both OFR and FDIC determined that Marine Bank's financial condition had deteriorated; that unsafe and unsound practices existed, including operating with an excessive level of classified assets, inadequate capital in relation to classified assets, poor earnings, and ineffective management oversight; and that an initiation of a corrective action plan was needed.

4. Additionally, among other things, the August Examination revealed that Marine Bank had not obtained current appraisal reports on two properties that were acquired by Marine Bank through foreclosure, referred to as Other Real Estate Owned (OREO). The last appraisal on the two properties was December 4, 2008, and the properties were acquired on June 28, 2010. OFR determined that such failure by Marine Bank was a violation of section 658.67(9)(a), Florida Statutes.

5. Marine Bank, through its Board of Directors, entered into a Memorandum of Understanding (MOU) with the FDIC, through the Regional Director of the FDIC's Atlanta Regional Office, and OFR, through the Director, Division of Financial Institutions of the Florida OFR. The effective date of the MOU was September 17, 2010.

6. The MOU provided, among other things, that, as a result of the FDIC Report of Examination of Marine Bank, dated August 10, 2009, which showed that less than satisfactory conditions existed at Marine Bank, which, if not corrected, could result in a more severe situation, corrective action needed to be taken; that the MOU was an agreement; and that Marine Bank would, in good faith, comply with the requirements of the MOU and eliminate the problems at Marine Bank.

7. The MOU required, among other things, Marine Bank to maintain a Tier 1 Leverage Capital ratio of not less than 8

percent and a Tier 1 Risk Based Capital ratio of not less than 12 percent during the existence of the MOU. Further, the MOU required that, if the capital ratios are less than required as determined as of the date of any Report of Condition and Income (Call Report) or any OFR examination, Marine Bank will, within 30 days, present a plan to OFR to increase the capital ratios or bring them within compliance; that, after OFR provides comments to Marine Bank regarding the plan, the board of directors of Marine Bank will adopt the plan, including amendments or modifications requested by OFR; and that, after adoption of the plan, Marine Bank will implement the measures of the plan, which have not been utilized previously, to increase the amount of Tier 1 Capital sufficient to comply with the capital ratios.

8. Additionally, the MOU required, among other things, Marine Bank to reduce the balance of assets classified Substandard in the FDIC Report in relation to Tier 1 Capital and the allowance for loan and lease losses (ALLL) through specific methods within a certain time-period and a certain percentage.

9. OFR considers the MOU to be an agreement which is in writing and is, therefore, a written agreement.

10. The MOU is a written agreement.^{1/}

11. When a memorandum of understanding is presented to the board of directors of a financial institution, generally, the

board of directors is informed that a memorandum of understanding is an informal enforcement or corrective action.

12. OFR considers the MOU to be enforceable through an administrative complaint. OFR considered the MOU to be a written agreement with it and that Marine Bank had breached the written agreement. As a result, OFR considered the MOU to be enforceable through a complaint pursuant to section 655.033(1)(e), which provides that OFR may file a complaint for a breach of any written agreement with it.

13. During the discussions of the MOU and before it was finalized, Marine Bank realized that it would fall short of compliance with the capital levels presented. Before the effective date of the MOU, in August 2010, Marine Bank presented a capital plan to OFR and FDIC. OFR did not provide comments to Marine Bank regarding its capital plan.

14. In November 2010, Marine Bank commenced an offering to raise capital. The offering expired in June 2011, with insufficient capital being raised.

15. Also, in April 2011, Marine Bank revised the capital plan and provided it to OFR. Again, OFR did not provide comments to Marine Bank regarding its revised capital plan.

16. Marine Bank agrees that it needs to raise capital. It has made efforts to raise capital, and its efforts have been

ongoing. However, Marine Bank's efforts have been insufficient to raise the capital needed.

17. Marine Bank prepared and provided progress reports on its compliance with the MOU. OFR reviewed and considered Marine Bank's progress reports.

18. Also, among other things, Marine Bank was required, as a federally insured bank, to file a quarterly Call Report, which included Marine Bank's assets, liabilities, income, and the interest rate risk. Call Reports are prepared and submitted by the bank, and, therefore, Marine Bank's Call Reports were prepared and submitted by it. The quarterly Call Reports formed the basis for OFR's financial assessment of the financial health of Marine Bank. Among other things, the quarterly Call Reports reflected Marine Bank's Tier 1 Leverage Capital ratio and Tier 1 Risk Based Capital ratio.

19. The FDIC commenced another examination of Marine Bank on September 19, 2011 (September Examination). The FDIC provided a copy of its report to 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.

20. Exam and visitation documents showed, among other things, that Marine Bank's management oversight remained ineffective and needed improvement; that Marine Bank's volume of

adversely affected assets was high and reflected additional deterioration in its loan portfolio and Other Real Estate; that Marine Bank's earnings remained weak; and that Marine Bank's capital levels were deficient and below the minimum levels required by the MOU.

21. Further, the exam and visitation results showed, among other things, that Marine Bank's risk management processes were not adequate in relation to economic conditions and Marine Bank's asset concentrations; that Marine Bank's risk management processes were not adequate in relation to and consistent with Marine Bank's business plan, competitive conditions, and proposed new activities or products; and that Marine Bank's internal controls, audit procedures, and compliance with laws and regulations were inadequate.

22. Also, the exam and visitation results noted, among other things, that Marine Bank should amend its June 30, 2011, Call Report due to significant errors that were identified during the September Examination. Subsequently, Marine Bank amended the June 30, 2011, Call Report, correcting some, but not all, of the errors noted.

23. OFR began a visitation of Marine Bank on January 30, 2012, to determine Marine Bank's current financial condition and to evaluate Marine Bank's compliance with the MOU.

24. The exam and visitation documents showed that, overall, Marine Bank's financial condition remained weak. Adversely classified assets remained high, totaling \$19,338,000.00 or 14.13 percent of total assets, and could jeopardize Marine Bank's viability. Marine Bank's concentration in non-owner occupied commercial real estate (CRE) loans and land loans totaled \$32,032,000.00 or 314 percent of the Total Risk Based Capital. Marine Bank's earnings for the twelve months ending December 31, 2011, were unsatisfactory with a pre-tax net loss of \$194,000.00 or a pre-tax return on average assets of a negative 0.13 percent.

25. Further, the exam and visitation documents and Call Report showed that, as of December 31, 2011, Marine Bank's Tier 1 Capital was \$8,813,000.00 (Tier 1 Capital ratio of 6.52 percent) and Total Risk Based Capital was \$10,224,000 (Total Risk Based Capital ratio of 9.60 percent). Marine Bank failed to meet the minimum ratio levels required in the MOU.

26. The exam and visitation documents showed that Marine Bank had complied with all of the requirements of the MOU, except for the Tier Capital ratios. Moreover, no dispute exists that, since the effective date of the MOU, Marine Bank has failed to meet or exceed the minimum ratio levels (Tier 1 Capital ratio of 8 percent and Total Risk Based Capital ratio of 12 percent), as required by the MOU, for any quarter period.

27. OFR examiners determined that, based on the results of the visitation, the assessment of Marine Bank's financial condition, risk management processes, operations, and management during previous exams was justified.

28. No evidence was presented demonstrating that Marine Bank was on the verge of insolvency or substantial dissipation of assets or earnings.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2012).

30. Section 655.033, Florida Statutes (2011), provides in pertinent part:

(1) The office [OFR] may issue and serve upon any state financial institution, subsidiary, or service corporation, or upon any financial institution-affiliated party, a complaint stating charges whenever the office has reason to believe that such state financial institution, subsidiary, service corporation, financial institution-affiliated party, or individual named therein is engaging in or has engaged in conduct that is:

(a) An unsafe or unsound practice;

(b) A violation of any law relating to the operation of a financial institution;

* * *

(e) A breach of any written agreement with the office;

(f) A prohibited act or practice pursuant to s. 655.0322

* * *

(6) Whenever the office finds that conduct described in subsection (1) is likely to cause insolvency, substantial dissipation of assets or earnings of the state financial institution, subsidiary, or service corporation or substantial prejudice to the depositors, members, or shareholders, it may issue an emergency cease and desist order requiring the state financial institution, subsidiary, service corporation, or financial institution-affiliated party to immediately cease and desist from engaging in the conduct complained of and to take corrective action. . . .

31. No dispute exists that the burden of proof is upon OFR to prove the allegations in the Amended Administrative Complaint. However, the parties disagree as to whether the evidence standard is a preponderance of the evidence or clear and convincing evidence.

32. "Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as provided by statute" § 120.57(1)(j), Fla. Stat.

33. "In a case where the proceedings implicate the loss of livelihood, an elevated standard is necessary to protect the rights and interests of the accused." Ferris v. Turlington, 510

So. 2d 292, 295 (Fla. 1987). Consequently, the clear and convincing standard is applicable in proceedings involving the revocation of a professional license. Id.

34. The examination of the "nature of the proceedings and their consequences" is required to "determine the degree of proof required." Dep't. of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

35. "The denial of registration . . . is not a sanction for the applicant's violation of the statute, but rather the application of a regulatory measure." Osborne Stern, at 934. The preponderance of evidence standard is applicable in proceedings involving an application for licensure. Osborne Stern, at 935.

36. However, "an administrative fine deprives the person fined of substantial rights in property" and is "generally punitive in nature." Osborne Stern, at 935.

37. In the instant case, OFR is seeking a cease and desist order against Marine Bank based upon alleged violations of statutory provisions. Marine Bank is a Florida state-chartered bank. This proceeding is not penal in nature; whereas, a proceeding involving the violation of a cease and desist order would be. This proceeding does not implicate the loss of livelihood or implicate significant property rights; whereas, a

proceeding involving the violation of a cease and desist order would.

38. Consequently, the standard of proof is a preponderance of the evidence.

39. Hence, the burden is on OFR to prove by a preponderance of the evidence that Marine Bank committed the offenses alleged in the Amended Administrative Complaint.

40. The Amended Administrative Complaint charges Marine Bank with unsafe and unsound practices, violating laws regulating the operation of a financial institution, and breach of a written agreement, i.e., breach of the MOU.

41. Section 655.005, Florida Statutes (2010), provides in pertinent part:

(1) As used in the financial institutions codes, unless the context otherwise requires, the term:

* * *

(r) "Unsafe or unsound practice" means any practice or conduct found by the office to be contrary to generally accepted standards applicable to the specific financial institution, or a violation of any prior order of a state or federal regulatory agency, which practice, conduct, or violation creates the likelihood of loss, insolvency, or dissipation of assets or otherwise prejudices the interest of the specific financial institution or its depositors or members. In making this determination, the office must consider the size and condition of the financial institution, the gravity of the violation,

and the prior conduct of the person or institution involved.
(emphasis added).

42. Section 655.005, Florida Statutes (2011), provides in pertinent part:

(1) As used in the financial institutions codes, unless the context otherwise requires, the term:

* * *

(y) "Unsafe or unsound practice" means any practice or conduct found by the office to be contrary to generally accepted standards applicable to a financial institution, or a violation of any prior agreement in writing or order of a state or federal regulatory agency, which practice, conduct, or violation creates the likelihood of loss, insolvency, or dissipation of assets or otherwise prejudices the interest of the financial institution or its depositors or members. In making this determination, the office must consider the size and condition of the financial institution, the gravity of the violation, and the prior conduct of the person or institution involved.
(emphasis added).

43. Effective July 1, 2011, section 655.005 was amended, pertinent to the instant case, as to the definition of unsafe and unsound practice: the definition was re-alphabetized; the wording "specific financial institution" was replaced with "a financial institution"; and the wording regarding a violation was expanded beyond "any prior order" to "any prior agreement in writing or order."

44. At the time that the MOU was entered into, section 655.005 had not been amended as indicated, and a violation of a prior agreement in writing was not defined as an unsafe and unsound practice. Only the 2010 version of section 655.005 is applicable to the MOU.

45. The evidence demonstrates that the MOU is an agreement in writing of corrective action and entered into to attempt to address and correct the less than satisfactory financial condition of Marine Bank.

46. Therefore, determinations regarding unsafe and unsound practices are made without considering any alleged breach of the MOU by Marine Bank.

47. The evidence demonstrates that Marine Bank engaged in unsafe and unsound practice within the meaning of section 655.005(1)(y) by failing to diversify and prevent excessive concentrations in its loan portfolio. Such unsafe and unsound practice has resulted in Marine Bank having an excessive volume of adversely classified loans which has created the likelihood of loss, insolvency, or dissipation of assets or otherwise prejudices the interest of Marine Bank or its depositors or members.

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.

49. The evidence demonstrates that Marine Bank engaged in unsafe and unsound practice within the meaning of section 655.005(1)(y) 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. 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.

50. The evidence demonstrates that Marine Bank engaged in unsafe and unsound practice within the meaning of section 655.005(1)(y) by its Board of Directors providing ineffective oversight, supervision, and guidance to Marine Bank's management; and by its Board of Directors and management not improving Marine Bank's deficient and deteriorating financial

condition and failing to correct deficiencies noted at examinations and visitations. 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.

51. Section 658.67, Florida Statutes (2009) and (2010), provides in pertinent part:

A bank may invest its funds, and a trust company may invest its corporate funds, subject to the following definitions, restrictions, and limitations:

* * *

(9) Acquisitions of property as security.-- A bank or trust company may acquire property of any kind to secure, protect, or satisfy a loan or investment previously made in good faith, and such property shall be entered on the books of the bank or trust company and held and disposed of subject to the following conditions and limitations:

(a) The book entry shall be the lesser of the balance of the loan or investment plus acquisition costs and accrued interest or the appraisal value or market value of the property acquired which shall be determined and dated within 1 year prior to or 90 days after the date of acquisition and in compliance with s. 655.60.

52. The evidence demonstrates that Marine Bank violated the laws regarding the operation of a financial institution by failing to obtain appraisals on OREO as required by section 658.67(9)(a).

53. Regarding the MOU, section 655.033(1)(e) provides that OFR may issue a complaint for a breach of any written agreement with OFR.

54. The evidence demonstrates that the MOU is a written agreement^{2/} and the written agreement is between OFR, Marine Bank, and FDIC.

55. However, the evidence further demonstrates that a memorandum of understanding is generally an informal enforcement or corrective action; and that the board of directors of a financial institution is generally informed that a memorandum of understanding is an informal enforcement or corrective action.

56. In the instant case, the evidence demonstrates that Marine Bank's Board of Directors was not informed that the MOU was a formal enforcement or corrective action and that non-compliance would lead to a complaint by OFR. Further, the evidence demonstrates that no provision in the MOU contained wording to put the Board of Directors on notice that non-compliance would lead to a complaint. Moreover, the evidence demonstrates that the MOU required the Board of Directors to engage in good faith in complying with the MOU.

57. 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).

58. Hence, OFR has demonstrated that a cease and desist order should be issued against Marine Bank for violating section 655.033(1)(a) and (b).

59. Even if the standard was clear and convincing, OFR met its burden.

60. Also, Marine Bank argues that OFR filed the complaint for an improper purpose. Section 120.569(2), Florida Statutes (2011), provides in pertinent part:

(e) All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

61. The evidence demonstrates that Marine Bank's financial condition was not improving and remained weak and that OFR and FDIC, individually, reached this determination. Further, the evidence demonstrates grounds upon which filing a complaint was proper. Additionally, the evidence failed to demonstrate grounds upon which OFR should have delayed filing a complaint. Under the circumstances of the instant case, it was not unreasonable for OFR to file a complaint.

62. Also, the evidence demonstrates that OFR considered a breach of the MOU, which was a written agreement with OFR, to be actionable through the filing of a complaint against Marine Bank. Even though OFR failed to persuade the undersigned that its position is correct, the undersigned is also not persuaded by Marine Bank that OFR filed the complaint for an improper purpose. OFR's interpretation of section 655.033(1)(e), although erroneous, was reasonable.

RECOMMENDATION

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

RECOMMENDED that the Office of Financial Regulation may issue and is authorized to issue a cease and desist order against Marine Bank for engaging in unsafe and unsound practices and for violating laws relating to the operation of a financial institution.

DONE AND ENTERED this 20th day of November, 2012, in
Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this day 20th of November, 2012.

ENDNOTES

^{1/} Very little weight was placed upon Respondent's Exhibit 58.

^{2/} Id.

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.