

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OFFICE OF FINANCIAL
REGULATION,

Petitioner,

vs.

Case No. 13-4484

CAPITAL CITY CHECK CASHING,

AMENDED AS TO COPIES
FURNISHED

Respondent.
_____ /

AMENDED RECOMMENDED ORDER

Pursuant to notice, a final hearing was initially held in this case on April 23, 2014, and continued to May 21, 2014, in Tallahassee, Florida, before Suzanne Van Wyk, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Melinda Butler, Esquire
Office of Financial Regulation
200 East Gaines Street, Suite 550T
Tallahassee, Florida 32399

For Respondent: John O. Williams, Esquire
Williams and Holz, P.A.
The Cambridge Centre
211 East Virginia Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether Respondent violated statutory and rule provisions relating to record-keeping requirements for licensed check cashers, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On October 8, 2013, the Office of Financial Regulation (the Office) filed an Administrative Complaint against Capital City Check Cashing (Capital City), charging Capital City with seven counts of violating chapter 560, Florida Statutes, and Florida Administrative Code chapter 69V-560, the record-keeping requirements for licensed check cashers. Capital City filed a Request for Hearing with the Office on October 24, 2013. On November 20, 2013, the matter was forwarded to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct a hearing and issue a recommended order.

The final hearing was scheduled for January 14, 2014, but was rescheduled a number of times. The relevant motions and orders can be viewed on the docket for this matter. On March 26, 2014, this case was consolidated with Case No. 14-1291RU, an unadopted rule challenge filed by Capital City Check Cashing against the Office. The undersigned subsequently severed the cases, both of which were scheduled for final hearing on April 23, 2014.

The final hearing in this matter convened on April 23, 2014, but was not completed on that date. The parties reconvened on May 21, 2014, to complete the final hearing.

Petitioner offered the testimony of John O. Williams, Respondent's owner; William Morin, the Office's Financial Examiner/Analyst Supervisor; and Andrew Grosmaire, the Office's Chief of its Bureau of Enforcement. Petitioner introduced Exhibits P1 through P7, which were received into evidence.

Respondent offered the testimony of Mr. Grosmaire; Kane Fuhrman, Respondent's manager; and Mr. Williams. Respondent introduced exhibits R1 through R4, R12 through R16, and R23, which were admitted into evidence. Respondent proffered Exhibit R5, and the undersigned issued an Order accepting the exhibit on June 4, 2014.

At the close of the final hearing, the parties requested an opportunity to provide the undersigned with documents for official recognition. The undersigned granted Petitioner's request for official recognition of section 560.109, Florida Statutes (2008), and various county codes and ordinances requested by Respondent. The parties also requested, and were granted, an extension of time to file proposed recommended orders until 30 days after the date the transcript was filed.

The first two volumes of the Transcript of the proceedings were filed on April 30, 2014, and the final two volumes were

filed on June 16, 2014. On July 9, 2014, Respondent filed an Amended Motion to Interchangeably Consider Evidence (Motion), requesting the undersigned to consider the evidence introduced in Case No. 14-1291RU, Capital City's unadopted rule challenge, as evidence in the instant case. Petitioner did not file a response to the Motion. The undersigned denied the Motion on July 14, 2014. The parties timely filed Proposed Recommended Orders on July 16, 2014.

FINDINGS OF FACT

1. Petitioner, Office of Financial Regulation (the Office or Petitioner), is the state agency charged with administering and enforcing chapter 560, Florida Statutes, related to licensing of Money Services Businesses, a term that includes check-cashing businesses.

2. Respondent, Capital City Check Cashing (Capital City or Respondent), has been a licensed check casher, pursuant to chapter 560, Part III, Florida Statutes, since March 2007. Capital City is located at 458 West Tennessee Street in Tallahassee, Florida.

3. John O. Williams is the owner of Capital City and appeared as counsel for Capital City throughout these proceedings.

4. Kane Fuhrman is the manager and sole employee of Capital City and directly provides check-cashing services to Capital City's customers.

Capital City Examination

5. William Morin is employed by the Office as a Financial Examiner/Analyst Supervisor.

6. On October 23 and 24, 2012, Mr. Morin conducted an examination of Capital City's records for the period of January 1, 2010 through October 23, 2012. The examination was conducted on the premises of Capital City. Mr. Morin was accompanied by Matt Manderfield, a field analyst in training.

7. Mr. Morin conducted the examination using an examination module designed by the Office as both a checklist of required records and an electronic notebook for recording the examiners notes.

8. Mr. Fuhrman was present for the examination. Mr. Fuhrman provided voluminous records to Mr. Morin, which Mr. Morin scanned into his computer while on site at Capital City.

9. Prior to leaving the premises on October 24, 2012, Mr. Morin explained to Mr. Fuhrman that some statutorily-required documents were missing and presented Mr. Fuhrman with a written records request. The written request indicates that the missing documents were needed by October 29, 2012.

10. Through the records request, the Office sought the following documents for the examination period: (1) complete customer files for Capital City clients JNJ Service, LLC; Swift Delivery; Johnson Maintenance Service; and Charlie's Electric Service; (2) copies of payment instruments cashed, including the back of the payment instruments showing endorsement; (3) daily electronic check-cashing logs; and (4) customer thumbprints on checks cashed.

Customer Files

11. Florida Administrative Code Rule 69V-560.704(4)(d) (2009),^{1/} reads as follows:

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

* * *

(d) Create and maintain a customer file for each entity listed as the payee on corporate payment instruments and third party payment instruments accepted by the licensee. Each customer file must include, at a minimum, the following information:

1. Documentation from the Secretary of State verifying registration as a corporation or fictitious entity showing the listed officers and FEID registration number. If a sole proprietor uses a fictitious name or is a natural person, then the customer file shall include the social security number of the business owner and documentation of the fictitious name filing with the Secretary of State.

2. Articles of incorporation or other such documentation which establishes a legal entity in whatever form authorized by law. For purposes of this rule a sole proprietor operating under a fictitious name registered with the Secretary of State shall not have to present such documentation.

3. Documentation of the occupational license from the county where the entity is located.

4. A copy of the search results screen page from Compliance Proof of Coverage Query Page webpage from the Florida Department of Financial Services - Division of Workers' Compensation website
(http://www.fldfs.com/WCAPPS/Compliance_POC/wPages/query.asp)

5. Documentation of individuals authorized to negotiate payment instruments on the corporation or fictitious entity's behalf including corporate resolutions or powers of attorney. Payment instruments for insurance claims where there are multiple payees shall be exempt from this provision provided that the maker of the check is an insurance company and the licensee has obtained and retained documentation as to the identity of the natural person listed as payee on such payment instrument.

12. Capital City requires its customers to complete and sign a "Check Cashing Agreement" (Agreement). The second page of the Agreement is a form soliciting customer information, including the name, address, phone numbers, address, social security number, and driver's license number of the conductor (the person cashing the check on a corporate check), as well as the name of the person's employer, their business address and

phone number. The form includes fields for information about the check being cashed, such as the check number and amount, as well as the payor and payee names.

13. Customers are required to sign and date the Agreement, as well as place their thumbprint in a designated box on the face of the Agreement. By signing the Agreement, the customer agrees to release their personal and business information to a third-party verifier, to pay a fee for said verification, and to pay Capital City three times the face value of any instrument cashed which is returned for insufficient funds.

14. During the on-site examination, Mr. Fuhrman provided to Mr. Morin the following documents for client, JNJ Service, LLC: a copy of an executed Agreement, copies of the photographic identification and social security card of the conductor, a copy of the face of a check for \$4,471.68 cashed, a copy of the receipt for the check, and a printout from the Secretary of State's Sunbiz website for corporate status of JNJ Service, LLC. The printout shows the FEIN number for JNJ Service, LLC, and reports corporate status as "Inactive" with last event shown "Administrative Dissolution for Annual Report" on September 23, 2011.

15. During the onsite examination, Mr. Fuhrman provided to Mr. Morin the following documents for client, Swift Delivery,

LLC: copies of the face of three checks cashed in amounts exceeding \$1,000.00 and three accompanying executed Agreements.

16. During the onsite examination, Mr. Fuhrman provided to Mr. Morin the following documents for client, Johnson's Maintenance Service: copies of two checks cashed in amounts exceeding \$1,000.00, accompanying executed Agreements, and copies of the photo ID and social security card of the conductor.

17. During the onsite examination, Mr. Fuhrman provided to Mr. Morin the following documents for client, Charlie's Electric: a copy of the face of a check cashed for \$28,000.00, an executed Agreement, and a receipt for the check cashed.

18. Prior to the examination, Capital City did not routinely keep copies of the corporate information from the Secretary of State's website as part of the customer files.

19. Prior to the examination, Capital City did not request, or otherwise obtain, the Articles of Incorporation for its corporate clients.

20. Prior to the examination, Capital City did not request copies of its corporate clients' occupational license. If a corporate client presented its occupational license, Capital City kept a copy.

21. Prior to the examination, Capital City did not request, or otherwise obtain, information regarding its

corporate clients' compliance with workers' compensation insurance requirements.

22. On October 29, 2012, in response to Mr. Morin's written records request, Mr. Fuhrman printed from the Secretary of State's website, the corporate detail page for JNJ Service, LLC, Swift Delivery, LLC, Johnson Maintenance, Inc., and Charlie's Electric Company, Inc. The information showed that JNJ Service, LLC, was an active corporation having been reinstated on September 10, 2012; Swift Delivery, LLC, had been administratively dissolved on September 23, 2011; Johnson Maintenance, Inc., had been administratively dissolved on September 26, 2008; and Charlie's Electric Company, LLC, had been administratively dissolved on September 15, 2006.

23. Following the examination, and in response to Mr. Morin's records request, Mr. Fuhrman obtained articles of incorporation for JNJ Service, LLC, and Johnson Maintenance, Inc.; articles of organization for Swift Delivery, LLC; and a corporate reinstatement application for Charlie's Electric Company, Inc., filed February 29, 2008.

24. Following the examination, and in response to Mr. Morin's request for information, Mr. Fuhrman checked the Office of Financial Regulation - Division of Workers' Compensation website, and queried the name of each of its four corporate customers. Mr. Fuhrman's queries returned "0 records

found" for each client. Mr. Fuhrman printed a screen shot of each query return.

25. On November 5, 2012, Mr. Morin returned to Capital City and picked up a package of documents from Mr. Fuhrman, as well as the records request form whereon Mr. Fuhrman had written the types of records which were being provided.

26. There was conflicting testimony regarding whether the documents Mr. Fuhrman obtained in response to the records request were included in the package Mr. Morin obtained from Mr. Fuhrman on November 5, 2012. The Office maintains that the documents were not furnished. Mr. Fuhrman was unable to testify with certainty that the documents obtained were in the package of documents he gave to Mr. Morin.

27. Whether or not the documents were sent to the Office is a red herring, and the extent of testimony on this issue was largely irrelevant. The issue is whether the documents were maintained by Capital City in its customer files during the examination period, not whether Capital City was able to produce the documents following the examination. Capital City admitted that it did not maintain those documents during the examination period.

28. As such, Capital City did not maintain customer files for JNJ Service, LLC; Swift Delivery, LLC; Johnson Maintenance

Service; and Charlie's Electric Company, Inc., in compliance with rule 69V-560.704(4) during the examination period.

29. Subsequent to the examination, Capital City developed a checklist for compiling customer files on corporate customers who cash checks of \$1,000.00 or more. The checklist includes all of the information required by rule 69V-560.704.

Check Copies

30. Florida Administrative Code Rule 69V-560.704(2) reads, in pertinent part, as follows:

(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.

31. Prior to the examination, Capital City did not keep copies of the backs of checks cashed. Rather, Capital City relied upon its bank to maintain copies of the checks cashed with endorsement.

32. Capital City introduced at final hearing, a binder containing the copies of the backs of all checks cashed, with endorsements, by Capital City during the months of July, September, and October 2012. These records were provided to Respondent from its banking institution after the examination and after the Office filed its original Administrative Complaint.

33. It is unclear whether Capital City, subsequent to the examination, has changed its practice of relying upon its bank to maintain copies of the backs of checks cashed. Mr. Williams testified both that "we decided, after the audit that, to be safe, we'd go ahead and keep the backs of the checks"^{2/} and "[w]e pay \$75 a month so that the bank will produce these for us each month, and we pay extra if we have to produce them on demand during the middle of the month if we have any issues that involves law enforcement. But they are producible."^{3/}

34. Capital City's decision, prior to the examination, not to maintain copies of the backs of checks cashed, was due in part to Mr. Williams' belief that the governing statute allows a check casher to designate its bank as a third-party maintainer of records.

35. Section 560.310(3), Florida Statutes (2012),^{4/} reads as follows:

(3) A licensee under this part may engage the services of a third party that is not a depository institution for the maintenance and storage of records required by this section if all the requirements of this section are met.

36. Capital City's bank is a depository institution.

37. Capital City's decision not to maintain copies of the backs of the checks, prior to the examination, was also due in part to Mr. Williams' belief that "there is certain information that's added to the back of checks after they go through the bank"^{5/} that was more helpful to law enforcement authorities interested in the checks.

38. Capital City offered no testimony to identify what information on the backs of the checks existed at the time the checks were deposited, and what, if any, information was added during bank processing.

39. Mr. Morin prepared a Report of Examination (Report) dated January 22, 2013, summarizing the findings of the October 2012 Capital City records examination. The Report was delivered to Kane Fuhrman, on behalf of Capital City, by certified mail.

40. The Report contains the following with regard to maintenance of copies of the backs of checks cashed:

5. Section 560.1105 F.S./ Section 560.310(1)F.S./Rule 69V-560.704(2)(a), F.A.C. - The licensee failed to maintain

copies of the backs of payment instruments cashed: (Exhibit I-XV, XIX)

The licensee claims that the bank keeps copies of the backs of payment instruments cashed for them. This is also confirmed on the records request form where the licensee notes that their bank keeps these records.

41. After receipt of the Report, Mr. Williams prepared a letter to the Office with responses to the findings.^{6/} The Office did not respond in any way to his letter. Mr. Williams testified that he understood the lack of response to mean that the Office accepted his explanation that Capital City's bank was the designated record-keeper of copies of the backs of checks cashed.

Electronic Log

42. Florida Administrative Code Rule 69V-560.704(5) reads as follows:

(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.

(b) Electronic logs shall be maintained in an electronic format that is readily retrievable and capable of being exported to most widely available software applications including Microsoft EXCEL.

43. During the examination, Mr. Fuhrman provided Mr. Morin with copies of Capital City's daily payment instrument log from August 1, 2012 through August 31, 2012. Each log displays the face value of each check cashed, the net amount of cash provided to the customer, and the fee charged to the customer.

44. The Capital City daily logs provided to Mr. Fuhrman do not include the payee and payor name; the conductor name, if different from the payee; the type of payment instrument; or the identification type or number presented by the conductor.

45. Capital City argues that all the information required to be on the payment instrument log was in the possession of Capital City, thus, it is in substantial compliance with the rule. In fact, Capital City introduced at final hearing a payment instrument log for checks over \$1,000.00 accepted in August 2012. The log includes all the information required by the rule. The information used to complete the fields was pulled from Capital City's customer files, which include the copies of the face of the checks, as well as copies of conductor's photo identification and social security card.

46. The fact remains that Capital City did not maintain an electronic payment instrument log which complied with rule 69V-560.704(5), during the examination period.

Customer Thumbprint

47. Florida Administrative Code Rule 69V-560.704(4) reads, in pertinent part, as follows:

(4) In addition to the records required in subsection (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[.]

48. During the examination period, Capital City obtained customer thumbprints on the customer Agreement, rather than on the surface of the check cashed. Subsequent to the examination,

Capital City has begun obtaining customer thumbprints on the surface of the checks cashed.

49. Capital City failed to maintain customer thumbprints as required by rule 69V-560.704(4) during the examination period.

Due Process Issues

50. Capital City maintains that the Office conducted the records examination in a manner that violated Capital City's right to due process of law.

51. First, Capital City complains that the Office was required to conduct an examination of its records within the first six months after licensure, and that the Office's failure to do so prevented Capital City from a thorough understanding of the applicable record-keeping requirements.

52. Between 2008 and 2012, section 560.109(1) required the Office to examine all licensees within the first six months after licensure. See § 560.109, Florida Statutes (2011).

53. The 2012 Legislature amended section 560.109 to delete the requirement for examination within six months of licensure. See ch. 12-85, § 2, Laws of Fla.

54. The Office conducted the instant examination in October 2012, after the effective date of chapter 12-85, Laws of Florida.

55. Next, Capital City argues that the Office failed to comply with its own examination procedures.

56. Capital City introduced into evidence Petitioner's publication titled, "Chapter 560 Money Services Businesses, Examiner Manual" (Manual). The Manual is dated "Revised September 2012."^{7/}

57. The Manual requires the examiner to conduct an Exit Interview with the licensee's manager, and lists issues which must be covered, at minimum, with the licensee.

58. Section XIV of the Manual provides, in pertinent part, as follows:

XIV. Exit Conference

1. When the Examiner has completed the examination, an exit interview will be held with the manager or his or her designated representative.

a. The exit interview should consist of at least the following:

b. Identification and discussion of any findings noted and corrective action that will be requested. The manager should be allowed the opportunity to refute any finding identified. The Examiner should not engage in a debate over the law. Reiterate that the Examiner is only a fact finder.

c. Advise the licensee that an examination report will be prepared and sent to them or their main office. Notify the licensee that a written response to the examination is not required; however, the licensee should be encouraged to notify the Office of any and

all corrective action taken. If they decide to make one, it will be part of the file.

59. Respondent claims Mr. Morin did not provide a meaningful exit interview with Mr. Fuhman in which he explained the requirements with which Capital City was not in compliance.

60. The record establishes that Mr. Fuhrman was confused about the record-keeping requirements and what the Office considered to be "customer files."

61. During the examination on October 23, 2012, Mr. Morin gave a copy of rule 69V-560.704 to Mr. Fuhrman to assist with his understanding. Mr. Morin testified that he spoke with Mr. Fuhrman "in general" about the rule and explained they were the minimum requirements for customer files. Mr. Morin spoke "minimally" with Mr. Fuhrman about the purpose of the Capital City Check-Cashing Agreement relative to the customer file rule. Mr. Morin told Mr. Fuhrman that designating the bank as the record-keeper of copies of the backs of checks cashed did not satisfy the rule requirement. Finally, Mr. Morin "generally" discussed the requirements with Mr. Fuhrman on October 24, 2012, when Mr. Morin left the written records request with Mr. Fuhrman.

62. The Examiner's Manual further provides, in pertinent part, as follows:

XVI. REVIEW OF EXAMINATION TARGET'S RESPONSE

1. Although there is no direct requirement to respond to the Office concerning corrective actions taken or to refute any finding, the licensee may do so. If a licensee does respond, the following should be accomplished:

a. The Examiner who performed the examination should review the response, complete the response evaluation, and make comments as appropriate if directed to do so by the AFM or his or her designee. It is not the Examiner's responsibility to determine whether the action taken by the licensee was appropriate to correct the situation.

b. If the action is deemed to be inappropriate or insufficient by the AFM or Examiner Supervisor to correct the situation, comments should be made as to what additional action may be needed.

* * *

d. The completed response evaluation should be attached to the response and delivered to the AFM.

* * *

f. The Regional Office may either file the response or may, if required, issue a risk based examination follow-up on the information in the response.

63. Respondent maintains the Manual requires the Office to respond in writing to Capital City's response to the Office's Report of Examination. Respondent argues that if the Office had responded to his explanation that the bank maintains copies of

the checks cashed, he would have provided the copies to the Office.

64. Nothing in Section XVI of the Manual requires the Office to respond to a licensee's response to the Report of Examination.

65. Finally, Respondent argues that the Office applies a strict compliance, rather than substantial compliance, standard to review of licensee's records, and fails to collect information relative to mitigating circumstances, which can be applied in determining appropriate penalties for violations.

66. The first argument is strictly a legal argument which is dealt with in the Conclusions of Law. Findings relative to the second argument are contained herein.

67. Andrew Grosmaire, Chief of the Office's Bureau of Enforcement, calculated the administrative sanctions to be imposed on Respondent for each respective rule and statutory violation.

68. A violation of the customer file rule is a level B offense according to Florida Administrative Code Rule 69V-560.1000. Level B corresponds with a fine ranging from \$3,500.00 to \$7,500.00 per violation. Mr. Grosmaire recommended a fine of \$7,500.00 because all four customer files, or 100%, were deficient.

69. A violation of the requirement to maintain copies of the backs of checks cashed could have been penalized pursuant to section 560.114(1)(a), failure to comply with any order of the Office, which is a B-level offense. However, Mr. Grosmaire chose instead to charge Respondent under 560.1105, failure to maintain all records for five years, which is an A-level offense with a fine amount ranging from \$1,000.00 to \$3,500.00. See Fla. Admin. Code R. 69V-560.1000(150). Mr. Grosmaire recommended a fine of \$3,500.00 because all of the records reviewed, or 100% of the sample, failed to meet the requirement for copies of backs of checks cashed.

70. A violation of section 560.1105 can subject a licensee to revocation, even for a first offense, pursuant to rule 69V-560.1000(4), but Mr. Grosmaire did not recommend revocation of Respondent's license.

71. A violation of the electronic log requirement is also a B-level offense. In this case, Mr. Grosmaire considered that the electronic log produced by Capital City contained four of the 11 fields required, and translated that to 64% compliance. Applying that percentage to the range of fines, Mr. Grosmaire recommended a fine of \$6,000.

72. A violation of the requirement to obtain thumbprints on the face of checks cashed is a B-level offense. Mr. Grosmaire recommended a fine amount of \$7,500.00 because

100% of the check records reviewed failed to meet the thumbprint requirement.

73. Mr. Grosmaire considered the aggravating and mitigating factors listed in rule 69V-560.1000(148). He determined that two aggravating factors applied:

"(f) [w]hether, at the time of the violation, the licensee had developed and implemented reasonable supervisory, operational or technical procedures, or controls to avoid the violation;" and "(i) the length of time over which the licensee engaged in the violations[.]" Mr. Grosmaire determined that (f) applied because three out of four violations were found in 100% of the samples examined. He determined that (i) applied because the violations existed for the entire examination period.

74. Mr. Grosmaire recommended a total fine of \$24,500.00.

75. Mr. Grosmaire determined that one mitigating factor applied - "no disciplinary history for licensee." Mr. Grosmaire applied that factor in determining what term of suspension to impose on Respondent. Mr. Grosmaire recommended the minimum suspension of 33 days for all violations because Respondent had no disciplinary history.

76. Mr. Grosmaire testified that he relied upon the aggravating and mitigating factors "that the examiner has identified, that I've seen in the report, or the mitigating circumstances I've seen in the report."^{8/}

77. Mr. Morin testified that, during his examination, he does not make a determination of whether there are aggravating or mitigating factors.^{9/}

CONCLUSIONS OF LAW

78. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 120.569, 120.57(1), and 120.60(5), Florida Statutes (2013).

79. The Office is the state agency charged with administering and enforcing chapter 560, Florida Statutes, related to licensing of check-cashing businesses.

80. Because the Office seeks to impose an administrative penalty, which is a penal sanction, the Office has the burden of proving by clear and convincing evidence the specific allegations in the Amended Administrative Complaint. See, e.g., Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Dep't of Ins. and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

81. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re: Graziano, 696 So. 2d 744, 753 (Fla. 1997).

Specific Violations

82. Through the Amended Administrative Complaint, Respondent is alleged to have violated section 560.310(2) (a), Florida Statutes (2012), and Florida Administrative Code Rule 69V-560.704(4) (d) (2009), requiring check cashers to create and maintain customer files; section 560.310(2) (d) and rule 69V-560.704(5) (a), requiring check cashers to create and maintain a daily electronic log with minimum information on each check cashed; section 560.310(1) and rule 69V-560.704(2) (a), requiring check cashers to maintain copies of checks cashed, including the front and reverse; and section 560.310(2) (c) and rule 69V-560.704(4) (a), requiring check cashers to affix an original thumbprint of the conductor to the original of each payment instrument.

83. In each violation cited, the Office proved by clear and convincing evidence that the violation existed at the time of the examination.

84. Mr. Williams established that Respondent has taken some steps to ensure that the violations are not duplicated in the future. He established that Respondent has developed a checklist for customer files to ensure that Respondent obtains all the information required by rule 69V-560.310(4) (d); has developed and utilizes an electronic log of daily checks cashed which includes all the information required pursuant to rule

69V-560.310(5) (a); and obtains customer thumbprints on the face of checks cashed.

85. Unfortunately for Respondent, post-examination corrective measures do not qualify as mitigation. Corrective actions taken "prior to detection and intervention by the Office" can be considered mitigation. See Fla. Admin. Code R. 69V-560.1000(148) (d).

86. The undersigned has considered Respondent's claim that the Office incorrectly applied a strict compliance standard, rather than a substantial compliance standard. That argument is not persuasive.

87. Section 560.310 does not allow for substantial compliance because the statutory provisions use the mandatory terms "must" and "shall." See Dep't Bus. & Prof'l Reg. v. Whitehall Condo. of the Villages of Palm Bch. Lakes Assoc., Case No. 11-0180 (Fla. DOAH May 21, 2013); appeal pending (where statute requiring condominium association to furnish certain documents to condominium owners employs the term "shall" the statute requires strict compliance).

88. By contrast, other state agencies are given authority to determine substantial compliance with regulatory requirements. See, e.g., § 395.4001, Fla. Stat. (Department of Health verifies "substantial compliance" with trauma center and pediatric trauma center standards); and § 400.23, Fla. Stat.

(Agency for Health Care Administration surveys nursing homes to determine "substantial compliance" with licensing criteria). Chapter 560 is not a statute authorizing substantial compliance with regulatory criteria.

89. Finally, the undersigned finds no merit in Respondent's argument that the Office relied upon statements which constitute rules, pursuant to section 120.52(16), Florida Statutes (2014), but which have not been adopted as rules, in violation of section 120.57(1)(e). The undersigned previously found the alleged statements not to be rules pursuant to section 120.52(16). See Cap. City Check Cashing v. Off. Fin. Reg, Case No. 14-1291RU (DOAH July 25, 2014).

RECOMMENDATION

Based upon the aforementioned Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Office of Financial Regulation, enter a final order:

1. Finding that Respondent, Capital City Check Cashing, violated subsections 560.310(1), 560.310(2)(a), 560.310(2)(c), and 560.310(2)(d), Florida Statutes; and Florida Administrative Code Rules 69V-560.704(2)(a), 69V-560.704(4)(a), 69V-560.704(4)(d), and 69V-560.704(5)(a).

2. Imposing an administrative penalty against Respondent in the amount of \$24,500.00, payable to Petitioner within 30

calendar days of the effective date of the final order entered in this case.

3. Suspending Respondent's license for 33 days.

4. The undersigned retains jurisdiction in this matter to rule on Respondent's Motion for Sanctions pursuant to section 57.105, Florida Statutes (2014), should Respondent be the prevailing party in the final order entered in this case.

DONE AND ENTERED this 16th day of September, 2014, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of September, 2014.

ENDNOTES

^{1/} All citations herein to the Florida Administrative Code are to the 2009 version which was in effect during the examination period.

^{2/} T.511:3-5

^{3/} T.514:17-21

4/ Except as otherwise provided herein, all references to the Florida Statutes are to the 2012 version, which was in effect at the time of the examination.

5/ T.511:14-16

6/ The letter was not admitted into evidence at the final hearing because Respondent did not identify it as an exhibit in the pre-hearing stipulation in compliance with the undersigned's Order of Pre-hearing Instructions. Respondent vehemently contested this ruling, which can be reviewed in the Transcript of the final hearing.

7/ The Office argued at hearing that the Manual was not in effect on the dates of the exam in question. However, the Office did not produce evidence upon which the undersigned can make a finding that the manual was not in effect on October 23 and 24, 2012. The Office did not address this issue in its Proposed Recommended Order.

8/ T.342:16-18

9/ T.233:7-10

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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.