STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CAPITAL CITY CHECK CASHING,

Petitioner,

vs. Case No. 14-1291RU

OFFICE OF FINANCIAL REGULATION,

Respondent.
_______________________________/

FINAL ORDER

A duly-noticed hearing was held in this matter on May 22, 2014, in Tallahassee, Florida, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: C. Michael Marschall, Esquire
Office of Financial Regulation
200 East Gaines Street
Fletcher Building, Suite 550
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

Whether Respondent, Office of Financial Regulation, has made certain agency statements with regard to record-keeping requirements for licensed check cashers, which are agency rules

as defined in section 120.52(16), Florida Statutes, but have not been adopted as rules in violation of section 120.54(1)(a), Florida Statutes; and if so, whether costs and attorney's fees should be awarded.

PRELIMINARY STATEMENT

Respondent, Office of Financial Regulation conducted an examination of Petitioner's business records for the time period of January 1, 2010, through October 23, 2012. Respondent found Petitioner in violation of certain record-keeping requirements, and filed an Administrative Complaint seeking to impose administrative fines against Petitioner. That license disciplinary action is pending with the Division of Administrative Hearings (Division) as Case No. 13-4484.

On March 18, 2014, Petitioner filed a Petition to Determine Two Agency Statements are Unadopted Rules, alleging that Respondent requires strict compliance with the record-keeping requirements of chapter 560, Florida Statutes; and that check cashers are prohibited from using banks to maintain certain records, both of which constitute unadopted rules.

Respondent filed a Motion for More Definite Statements on April 15, 2014, which was granted. On April 18, 2014, Petitioner filed an Amended Petition to Determine Agency Statements are Unadopted Rules, this time alleging that the

agency maintains the following statements which constitute unadopted rules:

(a) The Office mandates strict compliance with record-keeping requirements;

(b) The Office prohibits check cashers from using banks as third-party record keepers;

(c) The Office requires check cashers to keep a daily check-cashing log in spreadsheet format;

(d) The Office prohibits check cashers from affixing the customer's thumbprint to the payment instrument with a staple;

(e) The Office prohibits check cashers from using a government agency as a third-party record keeper;

(f) The Office requires check cashers to maintain records received from government data bases; and

(g) The Office uses a scoring system to determine punishment for violations of chapter 560, Florida Statutes.

On April 22, 2014, the Office filed a Motion to Dismiss Petitioner's Amended Petition (Motion) on several grounds. Following a telephonic hearing on the Motion, the undersigned entered an Order granting the Motion in part, and striking the allegation labeled (f), above. In an Amended Order on the Motion, the undersigned also struck the allegation labeled (e), above. The final hearing on the matters was scheduled for May 22, 2014 in Tallahassee, Florida.

The final hearing convened as scheduled. Petitioner presented the testimony of Andrew Grosmaire, Chief of Respondent's Bureau of Consumer Finance; and John O. Williams,

Petitioner’s owner. Respondent presented the testimony of Gregory Oaks, Director of the Division of Consumer Finance. Petitioner’s Exhibits P1, P2, and P4 were admitted into evidence. The undersigned granted both Petitioner’s and Respondent’s Requests for Official Recognition.

At the close of the final hearing, the parties agreed to file Proposed Final Orders within 30 days following the date the Transcript was filed with the Division. The Transcript of the final hearing was filed with the Division on June 16, 2014. The parties timely filed Proposed Final Orders on July 16, 2014, which have been considered by the undersigned in preparing this Final Order.

FINDINGS OF FACT

1. Petitioner, Capital City Check Cashing (Capital City) is a licensed check casher, pursuant to chapter 560, Part III, Florida Statutes.

2. Respondent, Office of Financial Regulation (the Office), is the state agency charged with administering and enforcing chapter 560, Florida Statutes, related to licensing of Money Services Business, at term that includes check-cashing businesses.

License Disciplinary Case

3. On or about October 23, 2012, the Office conducted an examination of Respondent's business records for the period January 1, 2010, through October 23, 2012. The examination ultimately culminated in an Amended Administrative Complaint (Complaint) filed by the Office against Petitioner, a matter which is pending before the undersigned in Case No. 13-4484.

4. The Complaint charges, among other alleged violations, that Petitioner failed to (1) keep a daily payment instrument log including all the information required by section 560.3110(2)(d) and Florida Administrative Code Rule 69V-560.704(5)(a); (2) maintain copies of payment instruments cashed as required by section 560.310(1) and rule 69V-560.704(2)(a); and (3) maintain records of conductor's thumbprints on payment instruments as required by section 560.310(2)(c) and rule 69V-560.704(4)(a).

5. The Complaint against Petitioner prompted Petitioner to file the instant unadopted rule challenge.[1/]

Examination Process

6. The Office examines licensees' records to ensure compliance with the record-keeping requirements of section 560.310.

7. The general process for an examination is a site visit from an examiner, a report from the examiner of his or her

findings to the Chief of the Bureau of Enforcement, and a recommendation from the Bureau Chief to the Director of the Division of Enforcement whether to file a complaint against a licensee, and if so, recommended sanctions.

Examination Module[2/]

8. William Morin is the examiner who conducted the examination of Petitioner's records in the underlying license disciplinary case. Mr. Morin utilized an "examination module" to track compliance with various statutory and rule requirements during the examination.

9. The examination module is a chart divided into four columns. The columns are labeled, from left to right, "Area of Review," "Results of Review," "Findings," and "Report Reference." The first column is pre-filled with the particular record-keeping statutory and rule requirements, along with directions to the examiner, such as "[t]he examiner should access the FinCEN registration list to determine if the licensee has registered with FinCEN as a money services business (MSB)."

10. The second column allows the examiner to note the results of his or her review of the particular requirement found in the first column. For example, in his review of Petitioner's records, Mr. Morin noted in column 2 "[n]o branch offices" in response to the requirement noted in column 1, that he "verify

all branch locations have been properly and timely reported to the Office.”

11. The examination module also allows the examiner to input detailed notes regarding the results of the review. In the case at hand, Mr. Morin made notes regarding the records reviewed for each of approximately 10 of Petitioner’s named customers. The notes reflect observations such as “[d]id not provide consumer with full amount of cash;” “[n]o customer file;” and “[n]o thumbprint from consumer.”

12. The examination module is a work plan used by an examiner to document the findings of each examination. The examination module is used consistently by the Office’s examiners.

13. The examination module is an internal agency document used to assist in conduct of examinations of licensee’s records.

14. The examination module does not, in and of itself, create rights, require compliance, or otherwise have the direct and consistent effect of law.

Sanction Computation Worksheet

15. Andrew Grosmaire is the Office’s Chief of the Bureau of Enforcement. Mr. Grosmaire reviews examiners’ reports of examination.

16. When Mr. Grosmaire receives an examination report, he utilizes a sanction computation worksheet to calculate a

recommended sanction amount based on violations noted in the examination report. The sanction computation worksheet is a spreadsheet developed for him by Jay Newton, a financial administrator with the Office.

17. Mr. Grosmaire uses the sanction computation worksheet with every examination report that is referred to him.

18. Florida Administrative Code Rule 69V-560.1000 establishes the disciplinary guidelines applicable to each ground for disciplinary action that may be imposed against a licensee for violating chapter 560. The rule establishes both administrative fines associated with violations of particular statutory sections, as well as levels of suspension or revocation, if applicable to the corresponding violation. Administrative fines and levels of suspension are classified as A, B, and C. Generally, the guidelines increase the severity of the recommended administrative fine and level of suspension for repeat violations of the same requirements.

19. The rule establishes a range of administrative fines, as well as a range of days of suspension, that corresponds with A, B, and C penalties. For example, an A-level administrative fine ranges between $1,000 and $3,500. An A-level suspension ranges between 3 to 10 days.

20. The rule authorizes the Office to consider a list of enumerated circumstances when determining an appropriate penalty

within the range of penalties prescribed for each violation, as well as when determining whether to impose a penalty outside of the established range. These circumstances are generally referred to as "mitigating and aggravating factors."

21. Mr. Grosmaire uses the sanction computation worksheet to calculate an overall recommended penalty against a licensee based on the particular violations noted in the examiner's report, the range of sanctions for those particular violations as established in rule 69V-560.1000, and any mitigating or aggravating factors.

22. For each finding noted in the examiner's report, Mr. Grosmaire inputs the corresponding statute or rule, the level of sanction from the corresponding rule, a description of the violation, the minimum and maximum fine established by the rule, the minimum and maximum suspension established by the rule, and whether or not revocation is authorized by the rule for the specific violation. The chart also contains fields for Mr. Grosmaire to input the sample size utilized by the examiner, the number of violations of a particular requirement within the particular sample, and the percentage of the sample containing the same violation.

23. Finally, Mr. Grosmaire inputs a recommended fine and recommended sanction in their respective columns. The spreadsheet automatically calculates the total recommended fine

and recommended days of suspension for all the violations. This sum can be compared with the total of the minimum and maximum fine and days of suspension for each violation based on the range established by rule.

24. Mr. Grosmaire exercises discretion in determining the recommended sanctions against a licensee based upon the range of penalties provided in the rule and any mitigating or aggravating circumstances. After completing the sanction computation worksheet, Mr. Grosmaire makes a written recommendation of appropriate penalties against the licensee to the Division Director and the Office's legal counsel.

Payment Instrument Log

25. Section 560.310, Florida Statutes (2012), provides in pertinent part:

> (1) A licensee engaged in check cashing must maintain for the period specified in s. 560.1105 a copy of each payment instrument cashed.
>
> (2) If the payment instrument exceeds $1,000, the following additional information must be maintained:
>
> * * *
>
> d) The office shall, at a minimum, require licensees to submit the following information to the check cashing database or electronic log, before entering into each check cashing transaction for each payment instrument being cashed, in such format as required by rule:

1. Transaction date.

2. Payor name as displayed on the payment instrument.

3. Payee name as displayed on the payment instrument.

4. Conductor name, if different from the payee name.

5. Amount of the payment instrument.

6. Amount of currency provided.

7. Type of payment instrument, which may include personal, payroll, government, corporate, third-party, or another type of instrument.

8. Amount of the fee charged for cashing of the payment instrument.

9. Branch or location where the payment instrument was accepted.

10. The type of identification and identification number presented by the payee or conductor.

11. Payee’s workers’ compensation insurance policy number or exemption certificate number, if the payee is a business.

12. Such additional information as required by rule.

For purposes of this subsection, multiple payment instruments accepted from any one person on any given day which total $1,000 or more must be aggregated and reported in the check cashing database or on the log.

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

> (5)(a) In addition to the records required in subsections (1) and (2) for payment instruments $1,000.00 or more, the check casher shall create and maintain an electronic log of payment instruments accepted which includes, at a minimum, the following information:
>
> 1. Transaction date;
>
> 2. Payor name;
>
> 3. Payee name;
>
> 4. Conductor name, if other than the payee;
>
> 5. Amount of payment instrument;
>
> 6. Amount of currency provided;
>
> 7. Type of payment instrument;
>
> a. Personal check;
> b. Payroll check;
> c. Government check;
> d. Corporate check;
> e. Third party check; or
> f. Other payment instrument;
>
> 8. Fee charged for the cashing of the payment instrument;
>
> 9. Branch/Location where instrument was accepted;
>
> 10. Identification type presented by conductor; and
>
> 11. Identification number presented by conductor.
>
> (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.

27. Petitioner alleges that the Office requires check cashers to keep the daily payment instrument log in a spreadsheet format, a statement Petitioner argues is an unadopted rule.

28. In his exam notes, Mr. Morin wrote "Licensee maintains an electronic log; however, it lacks the information and data fields required by rule."

29. Petitioner was not charged with failing to maintain an electronic log in a spreadsheet format.

30. Gregory Oaks is the Office's Director of the Division of Consumer Finance, and oversees the Bureau of Enforcement, as well as the Bureau of Registration. Mr. Oaks testified that if a licensee kept an electronic log in some format other than a spreadsheet, the Office would look at whether the information was "readily retrievable and capable of being exported into some software application, including or similar to Excel" in determining compliance.[3/]

31. Andrew Grosmaire is the Office's Chief of the Bureau of Enforcement. Mr. Grosmaire testified that software other than a spreadsheet program might comply with the statute and rule if it was searchable, allowed for sampling, and aggregation

of multiple checks cashed for less than $1,000 by the same person on the same day.

32. Mr. Grosmaire conceded that a .pdf copy of documents would likely not meet the requirement of rule 69V-560.704 that the information be "easily retrievable and capable of being used in the format the same way that an application such as Microsoft Excel would do."[4/] Mr. Grosmaire testified consistently that the determinative factor is that the data on the electronic log be "retrievable and capable of being exported."[5/]

33. Petitioner did not demonstrate by a preponderance of the evidence that the Office maintains a statement that check cashers must maintain the electronic log in a spreadsheet format.

Copies of Checks

34. Section 560.301(1) provides, "[a] licensee engaged in check cashing must maintain for the period specified in s. 560.1105 a copy of each payment instrument cashed."

35. Section 560.301(3) provides, "[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. Florida Administrative Code Rule 69V-560.704(2) provides 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.

37. Petitioner was cited by the Office as follows: "Respondent's records from July 2012 failed to show copies of the back of all accepted payment instruments."[6/]

38. In the examination module for examination of Petitioner's records, Mr. Morin noted as follows:

> Licensee claims that the copies of the back of the checks are on their bank statements. <u>The licensee cannot rely on their financial institution to keep these records for them</u>. Reviewed bank statements and saw no copies of backs of customer checks. (emphasis added).

39. Petitioner alleges the Office prohibits check cashers from designating a bank as a third-party record keeper of the documents required to be kept by section 560.301(1) and rule 69V-560.704(2), i.e., copies of the checks cashed. Petitioner claims that this policy constitutes a rule, pursuant to section

120.52(16), but has not been adopted as a rule in violation of section 120.54(1)(a).

40. The Office maintains that it has no such policy. Rather, the statute prohibits check cashers from designating a bank as a third-party record keeper.

41. Neither chapter 560 nor rule 69V-560.704 defines "depository institution."

42. Section 494.001 defines "depository institution" to have the same meaning as in section(3)(c) of the Federal Deposit Insurance Act, and to include any credit union. See § 494.001(9), Fla. Stat. Chapter 494 provides for regulation of loan originators, mortgage brokers, and lenders.

43. Section(3)(c) of the Federal Deposit Insurance Act defines "depository institution" to include any bank or savings association. See 12 U.S.C. § 1813(c) (1989).

44. Further, section 560.104 provides, in pertinent part, as follows:

> **560.104 Exemptions.**—The following entities are exempt from the provisions of this chapter:
>
> (1) Banks, credit card banks, credit unions, trust companies, associations, offices of an international banking corporation, Edge Act or agreement corporations, or other financial depository institutions organized under the laws of any state or the United States.

§ 560.104(1), Fla. Stat.

45. Chapter 560, Part I, provides for general regulation of money services business, a term which specifically includes check cashing businesses. See § 560.104(22), Fla. Stat.

46. The Office's practice of prohibiting check cashers from designating banks as third-party record keepers of copies of the checks cashed, is a simple reiteration of the statutory prohibition.

Thumbprints

47. Section 560.310(2) provides, in pertinent part, as follows:

> (2) If the payment instrument exceeds $1,000, the following additional information must be maintained or submitted:
>
> * * *
>
> (c) A thumbprint of the customer taken by the licensee when the payment instrument is presented for negotiation or payment.

48. Florida Administrative Code Rule 69V-560.704(4), provides, in pertinent part:

> (4) In addition to the records required in subsections (1) and (2), for payment instruments exceeding $1,000.00, the check casher shall:
>
> (a) Affix an original thumbprint of the conductor to the original of each payment instrument accepted which is taken at the time of acceptance[.]

49. Petitioner was cited for violating section 560.310(2)(c) and rule 69V-560.704(4) by failing "to maintain records of conductors' thumbprints from approximately twenty-two (22) accepted payment instruments exceeding $1,000." Off. of Fin. Reg. v. Capital City Check Cashing, Case No. 13-4484, Amd. Admin. Comp. at 7 (Dec. 4, 2013).

50. In the examination module for examination of Petitioner's records, Mr. Morin noted as follows: "Thumbprint is not affixed to the payment instrument. It is affixed to the check cashing agreement."

51. It is Petitioner's practice to obtain the customer's thumbprint on a check-cashing agreement at the time a check is presented. Petitioner then staples a copy of the check-cashing agreement to a copy of the check cashed, which is kept for his records.

52. Mr. Grosmaire testified it is his understanding that the rule requires the original thumbprint be placed on the original check.

Strict Compliance

53. Finally, Petitioner argues that the Office requires strict compliance with the regulations applicable to check cashers, a requirement which is in and of itself a rule.[7/]

54. The Office does not distinguish between "strict compliance" and "substantial compliance" in determining whether

a licensee has complied with the applicable statutory and administrative record-keeping requirements.

CONCLUSIONS OF LAW

Jurisdiction

55. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this proceeding pursuant to sections 120.56(4), 120.569, and 120.57(1), Florida Statutes (2013).[8/]

Parties and Standing

56. The Office is the state agency charged with administering and enforcing chapter 560, Florida Statutes, related to licensing of Money Services Businesses, including check cashers. See § 560.105, Fla. Stat.

57. Subsection 120.56(4) provides that a person substantially affected by an agency statement that comes within the definition of a rule, but which has not been adopted by rulemaking procedures, may challenge that statement.

58. In order to prove standing, Petitioner must show that: 1) the agency statement of policy will result in a real or immediate injury in fact; and 2) the alleged interest is within the zone of interest to be protected or regulated. Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

59. Petitioner has standing to bring this proceeding pursuant to paragraph 120.56(4)(a). The statements at issue,

such as they exist, factored into the Office’s determination to seek penalties against Petitioner for violation of specified statutes and rules.

Burden of Proof

60. An agency statement that comes within the definition of a rule must be adopted according to rulemaking procedures. Envtl. Trust, Inc. v. Dep’t of Envtl. Prot., 714 So. 2d 493 (Fla. 1st DCA 1998); Christo v. Dep’t of Banking & Fin., 649 So. 2d 318 (Fla. 1st DCA 1995). Section 120.54(1)(a) provides in relevant part:

> Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

61. Subsection 120.52(16) defines "rule" in relevant part as follows:

> “Rule” means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

62. Petitions seeking relief under section 120.56(4), Florida Statutes, if found by DOAH’s director to meet the pleading requirements of the statute, are assigned to an administrative law judge, who has the authority to determine, by

Final Order, "whether all or part of [the] statement [being challenged] violates [section] 120.54(1)(a) [Florida Statutes]." § 120.56(4)(c), Fla. Stat.

63. The petitioner bears the burden of proving by a preponderance of the evidence, as determined by the administrative law judge, that the challenged "agency statement" actually exists and is operative and effective; that it constitutes a "rule," within the meaning of section 120.52(16), Florida Statutes; and that it has not been adopted in accordance with section 120.54. See Dep't of Banking & Fin. v. Osborne Stern and Co., 670 So. 2d 930, 934 (Fla. 1996)("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."); and § 120.56(1)(e), Fla. Stat. ("Hearings held under this section shall be de novo in nature. The standard of proof shall be the preponderance of the evidence.").

Examination Module

64. The examination module utilized by the Office's field examiners is not a rule as defined by section 120.52(16). The module is an internal document used to ensure a thorough review of licensee records and to capture the examiners' findings at the examination site. See Humphrey v. Dep't. of Law Enf., Case No. 13-1037RU (Fla. DOAH June 25, 2013); aff'd, 132 So. 3d 224 (Fla. 1st DCA 2014)(form that prompts inspectors to visually

review the physical condition of each instrument and to guide inspectors through a review of the mechanical function of an instrument by a series of "quality checks" is not a rule); Wissel v. State, 691 So. 2d 507 (Fla. 2d DCA 1997)("procedures that are implicit and incidental to procedures otherwise explicitly provided for in a properly adopted rule or regulation do not require further codification by a further adopted rule or regulation").

65. The examination module does not impose any requirement on licensees, nor does it solicit any information from licensees that is not already required by statute and the existing rules. The governing statute and rules, rather than the examination module, require licensees to maintain the records at issue.

66. In sum, the examination module does not purport in and of itself to create rights or adversely affect licensees. The examination module itself has no consequence beyond prompting the examiner to check for each statutory and rule record-keeping requirement, and acting as a centralized note-keeping database.

Sanction Computation Worksheet

67. Like the examination module, the sanction computation worksheet does not constitute an agency rule. The worksheet is nothing more than Mr. Grosmaire's notes of the sanctions to be applied, within the range of sanctions established by rule, for each requirement the licensee is found to be in violation, as

well as a tool for calculating the total sanctions. The worksheet, in and of itself, creates no rights and imposes no penalties on licensees. If Mr. Grosmaire abandoned use of the sanction computation worksheet, he would use a calculator to add the sanction amounts for each violation to arrive at the final total.

68. Likewise, the worksheet, in and of itself, does not require compliance with any statute, rule, or regulation, or otherwise have the direct and consistent effect of law. Rule 69V-560.1000 establishes a range of penalties by type of violation, allowing the Office to exercise its discretion to apply a penalty within the range, or exceeding the range, if circumstances warrant. The worksheet does not eliminate the exercise of discretion or pre-determine the penalty for any particular violation.

Payment Instrument Log

69. Unlike the examination module and sanction computation worksheet, Petitioner has no written instrument to present as evidence of the Office's alleged unadopted agency statement requiring a payment instrument log to be kept in spreadsheet format.

70. To qualify as a "rule," an "agency statement" need not have been reduced to writing. See Dep't of High. Saf. & Motor Veh. v. Schluter, 705 So. 2d 81, 86 (Fla. 1st DCA 1997)("[W]e

find no support for Judge Benton's argument that an agency's policy statement must be in writing before it can be considered an nonadopted rule.") Absent such direct evidence, the petitioner must resort to relying on circumstantial evidence from which the statement's existence may be reasonably inferred or extrapolated. Such circumstantial evidence may include agency conduct. See Pembroke Pines v. Broward Cnty. Sch. Bd., 09-5626RU (Fla. DOAH Feb. 26, 2010); aff'd, 53 So. 2d 1024 (2011)(City failed to prove by a preponderance of the evidence that the school board had an unwritten policy of categorically excluding charter schools from consideration in distributing funds under section 1011.71(2)).

71. In the instant case, Petitioner alleges that the Office requires the daily electronic log required by section 560.310 and rule 69V-560.704(5)(a), must be in a spreadsheet format. As noted in the Facts section of this Final Order, there has been an inadequate showing that such a statement or policy exists. Petitioner was not charged with failing to keep an electronic log in a spreadsheet format, but rather with failing to keep a log with all the information required by rule.[9/] The testimony offered at hearing was that the crucial factor is whether the information contained in the log is "easily retrievable and capable of being exported to most widely available software applications including Microsoft EXCEL."

Fla. Admin. Code R. 69V-560.704(5)(a). The operative issue is whether the data can be manipulated to aggregate multiple same-day payments from the same payor below the $1,000 threshold, or used for similar regulatory purposes.

Copies of Checks

72. Next, Petitioner alleges that the Office maintains a statement, which has not been adopted by rule, prohibiting a check casher from designating a bank as the record-keeper of records required by section 560.310(1) and rule 69V-560.704(2)(a), to wit: a copy of each check cashed.

73. The Office counters that the licensing statute, rather than agency policy, prohibits the designation of a bank as the record-keeper of copies of the checks cashed. The Office maintains it is simply enforcing the statute as written.

74. Section 560.310(3) provides, "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." § 560.310(3), Fla. Stat. (emphasis added).

75. Neither section 560.310 nor rule 69V-560.704 defines the term "depository institution." Petitioner admits that a bank "may well be" a depository institution, but argues that the Office should undertake rulemaking to flesh out the issue.[10/]

76. The undersigned does not agree that the issue requires fleshing out. Section 560.104 provides, in pertinent part, as follows:

> **560.104 Exemptions.**—The following entities are exempt from the provisions of this chapter:
>
> (1) Banks, credit card banks, credit unions, trust companies, associations, offices of an international banking corporation, Edge Act or agreement corporations, or other financial depository institutions organized under the laws of any state or the United States. (emphasis added)

77. There is no need to resort to either other chapters of the Florida Statutes, or to federal regulations, to decipher the meaning of the term "depository institution" as applied to regulation of check cashers. Section 560.104 is found in Part I of chapter 560, the general provisions governing licensed money services businesses, including check cashers.

78. In interpreting a statute, all parts of a statute must be read together, or in pari materia, to achieve a consistent whole. See Knowles v. Beverly Enter., 898 So. 2d 1, 14 (Fla. 2004)(citations omitted). Reading the two statutes together, it is clear that the Legislature intended to prohibit designation of a bank as a keeper of the records required by section 560.310(1). The Office's policy of prohibiting check cashers from doing so is a simple reiteration of the governing statute.

79. As stated by the First District Court of Appeal in State Board of Administration. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010):

> As we said in St. Francis Hospital, Inc. v. Department of Health and Rehabilitative Services, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989):
>
> > It is well established that an agency interpretation of a statute which simply reiterates the legislature's statutory mandate and does not place upon the statute an interpretation that is not readily apparent from its literal reading, nor in and of itself purport to create certain rights, or require compliance, or to otherwise have the direct and consistent effect of the law, is not an unpromulgated rule, and actions based upon such an interpretation are permissible without requiring an agency to go through rulemaking.

See North Star Assoc., Inc. v. Dep't of Fin. Servs., Case No. 11-2433RU (Fla. DOAH July 1, 2011)(agency's statement that registrations as a claimant's representative are licenses is apparent from a literal reading of the statute); My Friend Home Care, Inc. v. Agency for Health Care Admin., Case No. 10-2657RU (Fla. DOAH July 6, 2010)(agency's denial of licensee's renewal application based upon actions occurring within two years of the renewal application date was readily apparent from the plain language of the statute and, thus, not an unadopted rule); cf.

Leonard v. Dep't of Mgmt. Servs., Case No. 11-1529 (Fla. DOAH Sept. 8, 2011; Fla. DMS Nov. 10, 2011)(agency's definition of the phrase "active" employment as synonymous with perfect attendance is an interpretation not readily apparent from a literal reading of the statute); Vazquez v. Dep't of Health, Case No. 08-0490RU (Fla. DOAH April 9, 2008); aff'd, 11 So. 3d 994 (Fla. 1st DCA 2009)(agency statement that statute imposes a "rebuttable presumption" and establishes what will be considered a "prima facie case" was not a simple reiteration of the statutory mandate and was, in fact, "contrary to any reasonable interpretation of the statute").

80. The meaning of the term "depository institution" in section 560.310 is well-defined in the regulatory statute itself. The agency's statement that a check casher may not designate a bank as a record-keeper of records required to be kept pursuant to section 560.310 is simply a reiteration of the statutory mandate and is not an unadopted rule.

Thumbprints

81. Petitioner's next contention is that the Office requires check cashers to maintain a copy of the customer's thumbprint on the check itself.

82. Rule 69V-560.704(4) provides, in pertinent part, 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:
>
> (a) Affix an original thumbprint of the conductor to the original of each payment instrument accepted which is taken at the time of acceptance;
>
> (b) Secure and maintain a copy of the original payment instrument, including the thumbprint of the conductor[.] Fla. Admin. Code R. 69V-560.704(4)

83. Petitioner insists that the term "affix" is subject to differing interpretations, including one in which the check casher can obtain the customer's original thumbprint on a check-cashing agreement and staple the agreement to the check cashed, which is Petitioner's practice. Respondent responds that the rule, not the Office's interpretation thereof, requires the thumbprint be placed directly on the check cashed.

84. It is axiomatic that statutory terms should be given their plain and ordinary meaning. *See* *Beverly Enter.*, 898 So. 2d at 10-11 (citations omitted). "When necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary." *Nehme v. Smithkline Beecham Clinical Labs*, 863 So. 2d 201, 204-205 (Fla. 2003).

85. The term "affix" is a transitive verb meaning "to attach (something) *to* something else"; "to attach physically <*affix* a stamp to a letter>"; "to attach in any way: add, append

<affix a signature to a document>”; “impress <affixed my seal>.” MERRIAM-WEBSTER n.d., www.Merriam-Webster.com.

86. Given its common and ordinary meaning, then, the rule requires the thumbprint be physically attached to the check being cashed by adhesion, impression, or other similar means. Physical attachment is the key.

87. Under Petitioner’s interpretation, the thumbprint itself is made on a customer check-cashing agreement, which is then stapled to the check. Following this practice, the thumbprint is physically attached to a document other than the check. Under the agency’s interpretation, the thumbprint must be placed physically on the check surface.

88. An agency’s interpretation of a statute must be adopted as a rule when the interpretation adds details that are not otherwise apparent from the reading of a statute. See SW Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000)(use of the term “interpret” in subsection 120.52(8), Florida Statutes, suggests that a rule will be more detailed than the applicable enabling statute); Fla. Fine Wine and Spirits, LLC. v. Dept. of Bus. and Prof’l Reg., Case No. 07-1858RU (Fla. DOAH July 20, 2007); aff’d, 2008 Fla. App. LEXIS 15016 (Fla. 1st DCA 2008)(statements made by various employees of the Division of Alcoholic Beverages and Tobacco that the “Tied House Evil” laws do not exclude in-house

servicing of distilled spirits do not establish, nor add details to, the legal prohibition against in-store servicing of distilled spirits).

89. The Office's interpretation does not add any details which are not apparent from a literal reading of rule 69V-560.704(4)(a), which requires the check casher to "[a]ffix an original thumbprint of the conductor to the original of each payment instrument accepted." The Office's interpretation is further supported by section 560.704(4)(b) requiring the check casher to maintain a copy of the original check "including the thumbprint of the conductor[.]" The statute plainly requires that the check casher keep a copy of the check that includes the thumbprint.

Substantial Compliance

90. Finally, Petitioner argues that the Office requires strict compliance with the record-keeping requirements of the statute and rule, which in and of itself is an unpromulgated rule. Petitioner maintains that substantial compliance is the standard in the regulatory context and should be applied in determining compliance with the applicable regulations. Petitioner concludes that the Office's departure from this "industry standard" is a rule.

91. Petitioner's argument, while creative, is not persuasive. Section 560.310 does not allow for substantial

compliance in that the said 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).

92. 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.

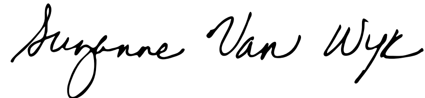
93. The Office's requirement of strict compliance with the record-keeping requirements of section 560.310 is not a rule because it simply reiterates the legislative mandate. See St. Francis Hosp., 553 So. 2d at 1354.

FINAL ORDER

Upon consideration of the above Findings of Fact and Conclusions of Law, it is ORDERED that Capital City Check

Cashing's Amended Petition to Determine Agency Statements are Unadopted Rules is dismissed.

DONE AND ORDERED this 25th day of July, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of July, 2014.

ENDNOTES

[1/] Petitioner also challenged a number of the Office's administrative rules which he allegedly violated, as contrary to the Office's rulemaking authority. See Capital City Check Cashing v. Off. of Fin. Reg., Case No. 13-4739RX (Fla. DOAH May 6, 2014).

[2/] Although the parties did not include in the pre-hearing statement the issue of whether the examination module constitutes an unadopted rule, Petitioner presented considerable evidence on the issue. It is unclear whether Petitioner intended to abandon the issue. Therefore, the undersigned includes Findings of Fact and Conclusions of Law on that issue.

[3/] T.106:9-11.

[4/] T.27:22-24.

[5/] T.31:21-22.

[6] See Off. of Fin. Reg. v. Cap. City Check Cashing, Case No. 13-4484, Amd. Admin. Complaint at 6 (Dec. 4, 2013)

[7] Petitioner has alleged in the underlying license disciplinary action that the standard in the industry is "substantial compliance" and that his due process rights have been violated by the Office's application of strict compliance. See, Id. Resp. Proposed Rec. Order at 35-36.

[8] Unless otherwise noted herein, all statutory references are to the 2013 version of the Florida Statutes.

[9] Even if the Office had cited Petitioner for failure to keep an electronic log in a spreadsheet format, that statement, in and of itself, would not necessarily be sufficient to prove that the statement constituted a rule. It is well-established that allegations in an agency administrative complaint meant to enforce regulatory statutes do not constitute agency statements defined as rules. See George Marshall Smith v. Alex Sink, Case No. 07-4746RU (DOAH Jan. 25, 2008), aff'd, 993 So. 2d 522 (Fla. 1st DCA 2008)(allegations in Department of Financial Services complaint against the Petitioner for selling unregistered securities in violation of chapter 517, Florida Statutes, are not agency statements defined as rules); United Wisconsin Life Ins. v. Dep't of Ins., Case No. 01-3135RU (DOAH Nov. 27, 2001), aff'd, 831 So. 2d 239 (Fla. 1st DCA 2002)(particular allegations in the Department of Insurance complaint against Petitioner for committing unfair and deceptive practices in violation of chapter 626, Florida Statutes, are not agency statements defined as rules); Dayspring Village, Inc. v. Ag. for Health Care Admin., Case No. 13-1836RU (DOAH June 24, 2013)(allegations in AHCA's administrative complaint that Petitioner, a licensed Assisted Living Facility "failed to provide adequate and appropriate health care consistent with the established and recognized standards within the community by allowing diabetic residents to use the same glucometer without disinfecting or cleaning the glucometer device" was not an agency statement defined as a rule).

[10] Petitioner emphatically maintains, and argued vehemently both at the final hearing and in his proposed final order, that there is no logical reason to prohibit banks from maintaining the records at issue, thus, the Legislature could not have meant to prohibit this practice. While the legislature's logic, or lack thereof, is not squarely before the undersigned in this proceeding, the fact that the legislature exempted banks from regulation under chapter 560 appears to be a logical reason for

excluding banks as record-keepers under the statute. Allowing an entity unregulated by the Office to act as record-keeper for licensees would likely present problems with exercise of the Office's jurisdiction.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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 one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.