

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OFFICE OF FINANCIAL REGULATION,

Petitioner,

vs.

Case No. 16-2490

AMJAD J. HIJAZ, d/b/a MEXICAN
AMERICAN GROCERY,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on June 8, 2016, via video teleconference sites in Lakeland and Tallahassee, Florida, before Lynne A. Quimby-Pennock, Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: William Michael Oglo, Esquire
Office of Financial Regulation
Fletcher Building, Suite 550
200 East Gaines Street
Tallahassee, Florida 32399-0376

For Respondent: Eric O. Husby, Esquire
2001 West Cleveland Street
Tampa, Florida 33606

STATEMENT OF THE ISSUE

Whether Respondent timely filed a quarterly report as required under chapter 560, Florida Statutes (2015), or related rules.

PRELIMINARY STATEMENT

On April 6, 2016, the Office of Financial Regulation (OFR or Petitioner), issued an Administrative Complaint to Respondent, Amjad J. Hijaz, d/b/a Mexican American Grocery. The Administrative Complaint alleged that Respondent untimely filed a quarterly report in violation of section 560.118(2) and Florida Administrative Code Rule 69V-560.602. OFR was seeking a \$1,000 fine for Respondent's failure to timely submit a quarterly report as required. On April 27, 2016, Respondent filed an Election of Proceeding (EOP) with OFR. In addition to other information, the EOP contained three boxes which provided Respondent with options on how to resolve the Administrative Complaint. Respondent checked box number 3 which provided the following:

I do dispute one or more of the Office's factual allegations. I request a section 120.57(1), Florida Statutes, formal hearing before the Division of Administrative Hearings. Pursuant to the requirements of Rule 28-106.2015(5)(c), Florida Administrative Code, I am attaching the material facts that I dispute (SEE PAGE 2).

TO PRESERVE THE RIGHT TO A HEARING, A RESPONSE MUST BE FILED WITH THE OFFICE OF FINANCIAL REGULATION WITHIN TWENTY-ONE (21) DAYS OF THE RECEIPT OF THE ADMINISTRATIVE COMPLAINT. THE RESPONSE MUST BE RECEIVED BY THE OFFICE NO LATER THAN 5:00 P.M. ON THE TWENTY-FIRST DAY AFTER THE RECEIPT OF THE ADMINISTRATIVE COMPLAINT.

The additional page 2 provided the following instructions

(Respondent's response is underlined):

****YOU ARE TO COMPLETE THE FOLLOWING ONLY IF YOU HAVE CHECKED NUMBER 3 ON THE PRECEDING PAGE. If you need more space, you may provide additional pages.**

As the licensee or the authorized representative of the licensee, I am disputing the following material facts:

General allegation 5. "On or about February 24, 2015, the Office began a limited scope examination (#58649) of Respondent for failing to timely file a quarterly report" is hereby disputed [sic].

Signature of Mr. Hijaz and dated April 25, 2016. (Emphasis supplied).

On May 5, 2016, OFR referred the matter to DOAH for purposes of hearing.

On May 12, 2016, Respondent's Response to Initial Order and Notice of Unavailability was filed. Respondent advised the undersigned that he was unaware of any related cases, that the case should not take more than three hours, and he requested the location for the final hearing to be in Tampa, Florida, in-person. Respondent also stated "that his spouse was currently overseas and expecting a maternity delivery. Respondent is expected to join his spouse and is unavailable between June 15th, 2016 and August 15th, 2016." Later that same day, OFR's counsel filed a response to the Initial Order, indicating that the two parties had conferred and offered the following dates for hearing: June 8, 9, and 10. OFR's counsel also requested that

the hearing be conducted via video teleconferencing. On May 13, 2016, the hearing was set for June 8, 2016.

On June 1, 2016, Respondent's counsel filed a Notice of Appearance. On June 7, 2016, Respondent (via counsel) filed a Motion for Extension of Time to Respond to Requests for Production of Documents, Interrogatories and Request for Admissions and to Continue Hearing, and a Motion to Disqualify the Administrative Law Judge (ALJ). Petitioner filed responses to both motions, and Orders denying both motions were issued.

At the final hearing, held on June 8, 2016, Petitioner offered the testimony of Jesse Liu, an OFR financial specialist, and Andrew Grosmaire, OFR's chief of enforcement for its Bureau of Enforcement. Petitioner's Exhibits A and C were admitted into evidence over objection. Respondent did not present any witnesses. Respondent's Exhibits A and B were admitted into evidence over objection.

The one-volume Transcript was filed with DOAH on June 14, 2016, and a Notice of Filing Transcript was issued the following day. Both parties timely submitted their proposed recommended orders, and each has been considered in the preparation of this Recommended Order.

Unless otherwise indicated, all references to the Florida Statutes are to the 2015 version.

FINDINGS OF FACT

1. OFR is the state agency responsible for the administration and enforcement of chapter 560, related to licensing of money services businesses, a term that includes money transmitter services, and the rules promulgated thereunder.

2. Respondent is a money services business and has license number FT30800590. Respondent operates as a check casher, and is located at 3220 Sydney Dover Road, Dover, Florida.

3. Every Florida licensed check casher is required to submit quarterly reports to OFR in a format which includes information specified by rule. See § 560.118(2), Fla. Stat.

4. The due date for a check casher to have filed its money services business quarterly report for the quarter ending December 31, 2014, was February 16, 2015.

5. OFR sent a reminder to Respondent within ten days following December 31, 2014, to file the quarterly report. OFR sent seven additional e-mails before the deadline advising Respondent to file the quarterly report within the deadline.

6. On March 6, 2015, Respondent filed the quarterly report in the proper format; however, it was 18 days after the applicable filing deadline.

7. OFR determined that Respondent's late filing of the quarterly report is a "Class A" violation pursuant to rule 69V-560.1000(39) and (150). OFR determined the appropriate penalty

to be a \$1,000 fine. Mr. Grosmaire's testimony on the basis of OFR's imposition of the \$1,000 fine is credible.

CONCLUSIONS OF LAW

8. 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.

9. OFR is charged with administering and enforcing the provisions of chapter 560 and conducting examinations and investigations to determine whether any provision of chapter 560 or the rules adopted thereunder have been violated.

10. Because Petitioner seeks to impose an administrative penalty, which is a penal sanction, Petitioner has the burden of proving by clear and convincing evidence the specific allegations in the 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).

11. In Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity, such a definition would need to contain "both qualitative and quantitative standards." The court held that:

[C]lear and convincing evidence requires that the evidence must be found to be

credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal has also followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992) (citation omitted). OFR has met its burden in this case.

12. Section 560.105(2) provides the following authority to OFR:

(2) The commission may adopt rules pursuant to ss. 120.536(1) and 120.54 to administer this chapter.

13. Rule 69V-560.602 provides the following:

Every money services business licensed pursuant to Chapter 560, F.S., shall submit a quarterly report to the Office by filing a completed Form OFR-560-04, Money Services Business Quarterly Report Form, which is incorporated by reference in Rule 69V-560.1012, F.A.C. A completed quarterly

report form shall be received by the Office no later than forty-five (45) days after the conclusion of each quarter. Should the forty-fifth day fall on a Saturday, Sunday or holiday, the reports must be received by the Office no later than the next business day. A report is "past due" if it is received by the Office one or more days beyond the period set forth in this rule.

Specific Authority 560.105, 560.118 FS. Law Implemented 560.118(2) FS. History-New 9-24-97, Amended 12-30-98, 11-4-01, Formerly 3C-560.602, Amended 7-15-07, 1-13-09.
(Emphasis added).

14. Section 560.114(1)(a) and (7) is applicable and states that the failure of a money services business to comply with any provision of chapter 560 or related rules constitutes grounds for suspension of a license and the imposition of an administrative fine of at least \$1,000, but not more than \$10,000.

15. Respondent failed to comply with rule 69V-560.602 by submitting the quarterly report more than 45 days after the conclusion of the quarter. Therefore, the \$1,000 administrative fine sought by OFR is within OFR's authority to impose under section 560.114(1)(a) and (7).

16. Section 560.118(2) provides:

Each licensee must submit quarterly reports to the office in a format and include information as specified by rule. The rule may require the report to contain a declaration by an officer, or any other responsible person authorized to make such declaration, that the report is true and correct to the best of her or his knowledge and belief.

17. The undersigned has considered Respondent's claim that Petitioner's reliance on section 560.118(2) is inapplicable. That argument is unpersuasive as rule 69V-560.602 clearly states the 45-day filing requirement.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Office of Financial Regulation enter a final order imposing an administrative fine of \$1,000.

DONE AND ENTERED this 19th day of July, 2016, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of July, 2016.

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.