

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OFFICE OF FINANCIAL REGULATION,

Petitioner,

vs.

Case No. 19-2943

PAYSERVICES.COM, INC., d/b/a
PAYSERVICES.COM, AND LIONEL
DANENBERG,

Respondents.

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings ("DOAH") for final hearing by video teleconference on October 16, 2019, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Joaquin Alvarez, Esquire
Office of Financial Regulation
Fletcher Building
200 East Gaines Street
Tallahassee, Florida 32399-0370

For Respondents: Lionel Danenberg, pro se
Payservices.com, Inc.,
d/b/a Payservices.com
14061 Pacific Point Place, Suite 204
Delray Beach, Florida 33484

STATEMENT OF THE ISSUES

Whether Respondents violated the statutes and rules alleged in the Second Amended Administrative Complaint; and, if so, what is the appropriate penalty to be imposed against Respondents.

PRELIMINARY STATEMENT

On April 22, 2019, Petitioner, Office of Financial Regulation, Division of Consumer Finance ("OFR"), issued a four-count Amended Administrative Complaint against Respondents Payservices.com, Inc., d/b/a Payservices.com and Lionel Danenberg.^{1/} Subsequently, Respondents filed a "Response by Respondents" and "Notice to Cease and Desist." On May 31, 2019, OFR referred the matter to DOAH to assign an Administrative Law Judge to conduct the final hearing.

On June 11, 2019, the undersigned set the final hearing for August 20, 2019. On June 11, 2019, Respondents filed a motion to dismiss the Amended Administrative Complaint and motion for summary judgment. On June 17, 2019, OFR filed a response in opposition to Respondents' motions. On June 18, 2019, the undersigned entered an Order granting Mr. Danenberg's motion to dismiss without prejudice and with leave to amend. On June 19, 2019, the undersigned entered an Order denying Payservices' motions.

On July 8, 2019, OFR filed a motion for leave to file its Second Amended Administrative Complaint. On July 11, 2019,

Respondents filed a response in opposition to the motion. On July 15, 2019, the undersigned entered an Order granting the motion.

The Second Amended Administrative Complaint contains three counts against Respondents. In Count I, OFR alleges that Respondents failed to submit their annual financial audit report within 120 days after the end of their fiscal year, in violation of section 560.202(2), Florida Statutes. In Count II, OFR alleges that Respondents failed to timely submit their Security Device Calculation Form by January 31, 2018, as required by OFR Form 560-07, incorporated by reference in Florida Administrative Code Rule 69V-560.1012 pursuant to rule 69V-560.402. In Count III, OFR alleges that Respondents failed to notify OFR of a change in Payservices' registered agent name and address within 30 days, in violation of section 560.126(2) and rules 69V-560.1012 and 69V-560.102(5).

As to Count I, OFR seeks an administrative fine of \$3,500 and a ten-day license suspension. As to Count II, OFR seeks an administrative fine of \$3,500 and a ten-day license suspension. As to Count III, OFR seeks an administrative fine of \$2,000. Thus, OFR seeks a total administrative fine of \$9,000 and a 20-day license suspension.

On July 30, 2019, OFR filed a motion to compel Mr. Danenberg's deposition and to continue the final hearing

scheduled for August 20, 2019, based on Mr. Danenberg's failure to cooperate in the setting of his deposition. On July 31, 2019, Payservices filed a response in opposition to the motion. On August 1, 2019, the undersigned entered an Order granting OFR's motion to compel and ordered Mr. Danenberg to appear for his deposition on August 20, 2019, the date Mr. Danenberg had represented he was available for the final hearing. The Order also granted the motion for continuance, and the final hearing was rescheduled for October 16, 2019.

The next day, August 2, 2019, Respondents filed a motion for protective order, seeking to prevent OFR from requiring Mr. Danenberg to travel from outside the United States to West Palm Beach, Florida for his deposition on August 20, 2019. In the motion, Mr. Danenberg stated that he "is not a U.S. Citizen and neither a permanent resident of the United States of America." He further stated that he "has an E-2 Treaty Investor Visa which allows him to come and go to the United States for certain periods of time, up to 2 years at once within the limits of his visa." Mr. Danenberg further stated that to require him to appear in south Florida for his deposition on August 20, 2019, would cause a financial burden. On August 5, 2019, OFR filed a response in opposition to the motion.

On August 5, 2019, the undersigned entered an Order granting the motion for protective order, concluding that

Mr. Danenberg is not required to appear in south Florida on August 20, 2019, for his deposition. Nevertheless, because the final hearing was continued to October 16, 2019, the undersigned ordered that the parties confer within the next seven business days and discuss, in detail, future arrangements for the taking of Mr. Danenberg's deposition because of OFR's right to depose Mr. Danenberg prior to the final hearing. In this regard, the undersigned ordered that:

[T]he parties should determine whether there is a mutually convenient date prior to the October [16], 2019, final hearing, in which Mr. Danenberg will be in the south Florida area and, therefore, available to be deposed in south Florida prior to the final hearing. If not, the parties should determine alternative arrangements for taking Mr. Danenberg's deposition prior to the final hearing, such as by video teleconference or telephone. In any event, by no later than August 15, 2019, the parties shall file a joint status report advising the undersigned of the results of their conferral.

On August 15, 2019, the parties filed unilateral status reports, which show they were unable to reach an agreement regarding the rescheduling of Mr. Danenberg's deposition.

In his continuous efforts to reschedule Mr. Danenberg's deposition, OFR's counsel emailed Mr. Danenberg on Thursday, August 22, 2019, at 12:33 p.m., requesting that by noon on Monday, August 26, 2019, Mr. Danenberg provide answers to various questions, including:

1. When will you be in south Florida?
2. Where are you currently?
3. When are you available for a telephonic or video teleconference deposition?

Having not received a response by noon on Monday, August 26, 2019, at 12:48 p.m., that same day, OFR's counsel emailed Mr. Danenberg, indicating his intent to file a motion to compel or in the alternative a motion for an order to show cause. OFR's counsel inquired of Mr. Danenberg whether he agreed or objected. In response, on August 26, 2019, Mr. Danenberg emailed OFR's counsel. In his response, Mr. Danenberg refused to even acknowledge or address any of the aforementioned questions previously asked of him that prior Thursday. Nevertheless, on August 27, 2019, at 4:45 p.m., OFR's counsel emailed Mr. Danenberg again requesting whether he would object to a motion to compel regarding the requested deposition information.

On August 29, 2019, OFR filed a Motion to Compel Production of Documents and to Compel Deposition Information. On September 3, 2019, Payservices filed a response in opposition to the motions. In the motion to compel deposition information, OFR asked for nothing more than for Mr. Danenberg to provide basic information necessary for the scheduling of his deposition

and to specify all dates, that are at least three weeks prior to the final hearing, on which he is available for deposition.

On September 6, 2019, the undersigned entered an Order denying OFR's motion to compel production of documents and granting the motion to compel deposition information. In granting the motion to compel deposition information, the undersigned ordered that by no later than Friday, September 13, 2019, Mr. Danenberg must provide to OFR's counsel, in writing, information which will permit OFR to schedule his deposition, including, but not limited to, answering the three questions above, and specifying all dates, that are at least three weeks prior to the hearing, on which he is available for deposition. The Order specifically stated: "Failure to provide this information will result in the imposition of sanctions, including the preclusion of Mr. Danenberg testifying as a witness or party at the final hearing in this matter." On September 16, 2019, OFR filed a motion to preclude Mr. Danenberg from testifying at trial based on Mr. Danenberg's repeated refusal of OFR's efforts to depose him prior to the final hearing and failure to comply with the undersigned's September 6, 2019, Order.

On October 11, 2019, OFR filed its witness and exhibit lists. Respondents did not file any witness or exhibit list.

The final hearing was held on October 16, 2019, with all parties present. At the outset of the hearing, which commenced at 9:00 a.m., the undersigned addressed OFR's motion to preclude Mr. Danenberg from testifying at trial. Even though Mr. Danenberg had failed to comply with the undersigned's September 6, 2019, Order, the undersigned indicated that he could order that a break be taken which would allow Mr. Danenberg to be deposed by video teleconference that morning. Mr. Danenberg stated he would not abide by such an order. Accordingly, the undersigned granted OFR's motion to preclude Mr. Danenberg from testifying at trial and Mr. Danenberg was precluded from testifying at hearing on his individual behalf and on behalf of Payservices.

At the hearing, OFR presented the testimony of William C. Morin, Jr., and Andrew Grosmaire. OFR's Exhibits 1, 2, and 4 through 8 were received into evidence. Respondents did not present any witness testimony and no exhibits were received into evidence.^{2/} The undersigned granted OFR's ore tenus motion for official recognition of section 560.1401.

At the conclusion of the hearing, the undersigned informed the parties that "within ten days after the final hearing transcript is filed at the Division of Administrative Hearings," they will have the opportunity to file proposed recommended orders, which should consist of proposed findings of fact and

conclusions of law based on the evidence presented at the hearing. Tr. p. 200.^{3/}

The one-volume final hearing Transcript was filed on November 14, 2019. The parties timely filed proposed recommended orders, which were considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes and Florida Administrative Code provisions are to those versions in effect at the time of the alleged violations.

FINDINGS OF FACT

1. OFR is the state agency charged with administering and enforcing chapter 560, Florida Statutes, including part II related to money services businesses.

2. At all times material hereto, Payservices has been a foreign corporation and part II licensee pursuant to chapter 560, specifically a "money services business," as defined in section 560.102(22), and "money transmitter," as defined in section 560.102(23).^{4/}

3. At all times material hereto, Mr. Danenberg has been the chief executive officer, compliance officer, and an owner of Payservices. As such, Mr. Danenberg is an "affiliated party" and a "responsible person" as defined in sections 560.103(1) and 560.103(33).

Count I

4. Licensees, such as Payservices, are required to annually file a financial audit report within 120 days after the end of the licensee's fiscal year.

5. The financial audit report is prepared by a certified public accountant and is used to demonstrate to OFR that the licensee has the financial health to conduct its business and transmit funds within the State of Florida.

6. Payservices' fiscal year ends December 31st.

7. Respondents were required to provide Payservices' 2016 financial audit report to OFR by no later than May 1, 2017.

8. On December 20, 2017, William C. Morin, Jr., OFR's Chief of the Bureau of Registration, contacted Payservices by email with regard to Payservices' failure to timely file a financial audit report within 120 days after the 2016 fiscal year ended.

9. Mr. Danenberg responded by email that same day, telling Mr. Morin that Payservices' accountant had prepared a financial audit report "many months ago," and that it was his "impression" that it had been uploaded to the REAL system "at some point when we filed the quarterly reports." Mr. Danenberg attached to his December 20, 2017, email what OFR accepted as the financial audit report that same day. Notably, the document indicated it

was prepared by a certified public accountant on June 15, 2017, after the May 1, 2017, deadline.

10. In any event, Mr. Morin reviewed the REAL system regarding Payservices and determined there were no problems with the REAL system's ability to accept uploaded documents.

11. Mr. Morin testified that he could see on the REAL system that Payservices successfully uploaded a quarterly report and Security Device Calculation Form on January 26, 2017, which created a transaction number. Mr. Morin also observed that Payservices started to upload its financial audit report, which would create a transaction number, but no financial audit report was actually attached and uploaded to the REAL system on January 26, 2017, under that transaction number.

12. According to Mr. Morin, Payservices may have attempted to start to file a financial audit report on January 26, 2017, but it did not complete the transaction because no financial audit report was attached. At hearing, Mr. Morin acknowledged that: "When I looked at the Financial Audit Report transaction, nothing was attached. And I also know that the functionality of the REAL system will kind of allow for the transaction to be completed and nothing attached." Tr. p. 100.

13. Mr. Morin testified that Mr. Danenberg was cooperative when he was contacted on Decemeber 20, 2017, and submitted the financial audit report.

14. The persuasive and credible evidence adduced at hearing clearly and convincingly establishes that Respondents did not submit their financial audit report to OFR until December 20, 2017, almost eight months after the May 1, 2017, deadline.

Count II

15. Licensees, such as Payservices, are required to annually file Form OFR-560-07, Security Device Calculation Form, by January 31st of each calendar year for the preceding calendar year.

16. The Security Device Calculation Form requires licensees to report to OFR the dollar amount of transactions with Florida consumers. The dollar amount of transactions identified in the form is then utilized by OFR to determine if additional collateral is necessary to protect Florida consumers in the event a claim is made against the collateral for monies that were not properly transmitted by the licensee.

17. Andrew Grosmaire, OFR's Chief of Enforcement in the Division of Consumer Finance, acknowledged at hearing that a licensee has 60 days to amend the face value of its surety bond, should an increase be required, and that at all times material hereto, the value of Payservices' surety bond has been correct for the minimum amount required.

18. Nevertheless, Mr. Morin testified that Respondents did not file Form OFR-560-07, Security Device Calculation Form, until February 10, 2018, ten days late.

19. The persuasive and credible evidence adduced at hearing clearly and convincingly establishes that Respondents did not file Form OFR-560-07, Security Device Calculation Form, until February 10, 2018, ten days late.

Count III

20. Licensees, such as Payservices, are required to update information contained in an initial application form, or any amendment to such application, within 30 days after the change is effective.

21. In Payservices' initial application dated September 25, 2015, Respondents identified Corporate Access, Inc., as its registered agent with an address for service of process at 236 East 6th Avenue, Tallahassee, Florida 32303.

22. According to the Department of State, Division of Corporation's records, on January 10, 2017, Mr. Danenberg was appointed as Payservices' registered agent with a new address for service of process at 300 West Palmetto Park Road, A210, Boca Raton, Florida 33432.

23. Respondents filed an amended license application with OFR on August 28, 2017, which still listed Corporate Access, Inc., as the registered agent for service of process.

24. On February 26, 2018, Respondents amended their registered agent information with the Department of State listing a new address for Mr. Danenberg at 14061 Pacific Pointe Place, No. 204, Delray Beach, Florida 33484.

25. Mr. Morin testified that at no time have Respondents updated their initial application with OFR to reflect Mr. Danenberg as the registered agent for Payservices and his address as the registered agent.^{5/}

26. Mr. Morin and Mr. Grosmaire testified that the reason a licensee needs to update a change in the registered agent's name and address is so that OFR may effectuate service of process against the licensee. Yet, Mr. Grosmaire acknowledged that OFR has access to the Division of Corporation's records.

27. Nevertheless, the persuasive and credible evidence adduced at hearing clearly and convincingly establishes that Respondents did not update their initial application with OFR to reflect Mr. Danenberg as the registered agent for Payservices and his address as the registered agent.

CONCLUSIONS OF LAW

28. DOAH has jurisdiction over the parties and subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2019).

29. Pursuant to section 560.105, OFR is charged with the responsibility of administering and enforcing the provisions of chapter 560.

30. OFR has the burden of proving its allegations by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The "clear and convincing evidence" standard requires that:

[T]he 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.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

31. Pursuant to section 560.114(1)(a), failure of a money services business or affiliated party to comply with any provision of chapter 560 or related rules constitutes grounds for disciplinary action.

32. The phrase "Affiliated party" is defined in section 560.103(1) as follows:

(1) "Affiliated party" means a director, officer, responsible person, employee, or foreign affiliate of a money services business, or a person who has a controlling

interest in a money services business as provided in s. 560.127.

§ 560.103(1), Fla. Stat. (2016).

33. As to Count I, section 560.209(2) specifically provides, in pertinent part:

(2) A licensee must obtain an annual financial audit report, which must be submitted to the office within 120 days after the end of the licensee's fiscal year, as disclosed to the office.

§ 560.209(2), Fla. Stat. (2016).

34. Rule 69V-560.606 further provides:

(1) Each licensed money transmitter and payment instrument seller shall annually submit financial audit reports to the Office in accordance with section 560.209(2), F.S., for the licensee's most recent fiscal year.

(2) Annual financial audit reports must be received by the Office within one hundred twenty (120) days after the licensee's fiscal year end.

(3) A report is "past due" if it is received by the Office one or more days beyond the period defined in subsection (2).

Fla. Admin. Code R. 65V-560.606.

35. As detailed above, the persuasive and credible evidence adduced at hearing clearly and convincingly establishes that Respondents did not submit their financial audit report to OFR until December 20, 2017, almost eight months after the May 1, 2017, deadline.

36. As to Count II, pursuant to rules 69V-560.402 and 69V-560.1012(g), licensees, such as Payservices, are required to annually file Form OFR-560-07, Security Device Calculation Form, by January 31st of each calendar year for the preceding calendar year. As detailed above, the persuasive and credible evidence adduced at hearing clearly and convincingly establishes that Respondents did not file Form OFR-560-07, Security Device Calculation Form, until February 10, 2018, ten days late.

37. As to Count III, pursuant to section 560.126(2), licensees, such as Payservices, are required to report, on a form adopted by rule, any change in the information contained in an initial license application form, or any amendment to such application within 30 days after the change is effective. Rule 69V-560.102(5) further provides that if the information contained in an application form for licensure as a money services business, or in any amendment thereto, becomes inaccurate for any reason, the applicant must file an amendment correcting such information within 30 days of the change on Form OFR-560-01, which is incorporated by reference in rule 69V-560.1012. As detailed above, the persuasive and credible evidence adduced at hearing clearly and convincingly establishes that Respondents did not update their initial application to reflect Mr. Danenberg as the registered agent for Payservices and his address as the registered agent.

Penalty

38. Pursuant to sections 560.114(1)(a) and 560.1141, OFR imposes penalties upon licensees in accordance with disciplinary guidelines set forth in rule 69V-560.1000.

39. As to Count I, the penalties are within a range of an administrative fine between \$3,500 to \$7,500, a ten-day to 20-day suspension, or revocation. As to Count II, the penalties are within a range of an administrative fine between \$3,500 to \$7,500, a ten-day to 20-day suspension, or revocation. As to Count III, the penalty is within a range of an administrative fine between \$1,000 to \$3,500.

40. Rule 69V-560.1000(148) requires that OFR consider the following circumstances in determining an appropriate penalty within the range of penalties for each violation. Rule 69V-560.1000(148) also requires that OFR consider these circumstances in determining a penalty that deviates from the range of penalties for each violation:

(a) Whether the violation rate is less than 5% when compared to the overall sample size reviewed;

(b) The degree of harm to the customers or the public;

(c) The disciplinary history of the licensee;

(d) Whether the licensee detected and voluntarily instituted corrective responses or measures to avoid the recurrence of a

violation prior to detection and intervention by the Office;

(e) Whether the licensee's violation was the result of willful misconduct or recklessness;

(f) Whether at the time of the violation, the licensee had developed and implemented reasonable supervisory, operational or technical procedures, or controls to avoid the violation;

(g) Where the violation is attributable to an individual officer, director, responsible person, or authorized vendor, whether the licensee removed or otherwise disciplined the individual prior to detection and intervention by the Office;

(h) Whether the licensee attempted to conceal the violation or mislead or deceive the Office;

(i) The length of time over which the licensee engaged in the violations;

(j) Whether the licensee engaged in numerous violations or a pattern of misconduct;

(k) The number, size and character of the transactions in question;

(l) Whether the licensee provided substantial assistance to the Office in its examination or investigation of the underlying misconduct;

(m) Other relevant, case-specific circumstances.

41. Applying the relevant circumstances to the particular facts of the instant case, each of the violations entailed the failure to comply with various reporting requirements. As to

Count I, Mr. Danenberg was cooperative with Mr. Morin on December 20, 2017, the same day he was contacted by Mr. Morin. In fact, Mr. Danenberg filed a document that same day, which was accepted by OFR as Payservices' financial audit report.

42. As to Count II, Respondents' filing of Form OFR-560-07, Security Device Calculation Form, was only ten days late. Even then, Payservices' surety bond was correct for the minimum amount required. Had an increase been required, Payservices would have had a 60-day grace period to amend the face of its surety bond. Taking these mitigating factors into account, and pursuant to the second sentence of rule 69V-560.1000(148), a downward deviation of the penalty is appropriate for Count II.

43. As to Count III, the failure to update the registered agent name and address is only one question among many within the initial application. No evidence was presented at hearing that OFR was unable to serve Payservices because of the change of the registered agent name and address and OFR has had access to the Division of Corporation's records and actual knowledge of the changes.

44. There was no proven harm to the customers or the public resulting from any of the violations. There is no disciplinary history. Indeed, OFR concedes that the lack of any disciplinary history is a mitigating factor.

45. Based on the particular case-specific circumstances and facts of this case, the undersigned recommends an administrative fine of \$3,500 for Count I, an administrative fine of \$1,500 for Count II, and an administrative fine of \$1,000 for Count III, for a total administrative fine of \$6,000, with no suspension or revocation for any of the violations.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that OFR impose an administrative fine against Respondents in the amount of \$6,000.

DONE AND ENTERED this 16th day of December, 2019, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of December, 2019.

ENDNOTES

^{1/} Respondents shall be referred to herein collectively as "Respondents" or by their individual names ("Mr. Danenberg" and "Payservices").

^{2/} At hearing, Respondents requested to question Mr. Joaquin Alvarez, Ms. Melinda Butler, Assistant General Counsel for OFR, and Ms. Wilkinson, Chief Counsel of OFR. OFR objected at the hearing and made an ore tenus motion for protective order, which was granted.

^{3/} The undersigned further stated at the hearing:

Now, if you want to order a copy of the transcript, then I believe you will need to get with the court reporter who's there today to make those arrangements. And you should monitor the docket to see when the transcript is filed. Sometimes the court reporter files it herself. Sometimes the agency files it.

But you just need to realize that the deadline to file your Proposed Orders turn on--the clock starts ticking ten days from the date the transcript is filed at DOAH. So just keep an eye on the docket. Since you're both registered for electronic filing, you should be notified when that's done.

Tr. P. 200.

^{4/} Pursuant to section 560.103(22), Florida Statutes, a "money services business" includes a corporation, qualified to do business in Florida, which receives currency, monetary value, or payment instruments for the purpose of transmitting the same by any means, within this country, or to or from this country.

Pursuant to section 560.103(23), a "money transmitter" includes a corporation, qualified to do business in Florida, which receives currency, monetary value, or payment instruments for the purpose of transmitting the same by any means, within this country, or to or from this country.

^{5/} Notably, the Amended Administrative Complaint referred by OFR to DOAH indicated it was served on Mr. Danenberg at 14061 Pacific Point Place, No. 204, Delray Beach, Florida 33484.

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.