

BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

In the Matter of the Order Imposing Penalties
Under Financial Code section 17408 Against

JD ESCROW, INC.

Respondent.

Escrow License No. 963-2341

OAH No. 2016080144

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated November 16, 2016, is hereby adopted by the Department of Business Oversight as its Decision in the above-entitled matter.

This Decision shall become effective on March 16, 2017.

IT IS SO ORDERED this 14 day of February 2017.

/s/
JAN LYNN OWEN
Commissioner of Business Oversight

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PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on October 31, 2016, in Los Angeles. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Blaine A. Noblett, Senior Counsel, represented Jan Lynn Owen (complainant).

JD Escrow, Inc. (respondent) was represented by its president and owner Julie Dao.

SUMMARY

Complainant issued an order imposing a \$30,000 monetary penalty against respondent for filing its 2015 annual audit report late. Respondent provided no substantial justification for doing so and is therefore subject to a monetary penalty. However, respondent offered mitigating facts justifying a lower daily penalty amount. It was therefore established by a preponderance of the evidence that respondent's monetary penalty should be reduced to \$7,900.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Order Imposing Penalties Under Financial Code section 17408 (Order) was issued on complainant's behalf in her official capacity as the Commissioner of Business Oversight (Commissioner). The Order is based on the Commissioner's finding that respondent failed to timely file its annual audit report containing audited financial statements (audit report) for its fiscal year ending December 31, 2015, as required by Financial Code section 17406. The Order demands penalties in the sum of \$30,000.00. At hearing, complainant requested penalties totaling \$37,500.

2. Respondent timely submitted a request for a hearing to challenge the Order. The hearing in this matter was timely scheduled and completed pursuant to applicable law.

The Filing of Respondent's Annual Audit Report for 2015

3. Financial Code section 17406 requires Department licensees to file with the Commissioner an audit report containing audited financial statements covering the calendar or fiscal year (whichever is applicable) within 105 days after the close of the calendar or fiscal year.

4. On November 18, 2015, Department staff sent written notification to respondent, reminding it of the audit report's due date, as well as the possibility of the imposition of fines if respondent filed the audit report late. (Ex. D & attach. D-1.)

5. Respondent uses a calendar year, meaning its 2015 financial year ended on December 31, 2015. Therefore, its audit report was due April 15, 2016. (Testimony of Sultanna Wan.)

6. Respondent failed to submit an audit report to the Commissioner on or before April 15, 2016. (Wan testimony.)

7. Department Specialist Sultanna Wan was assigned to investigate the matter. On April 27, 2016, she sent respondent a demand letter requesting its audit report within 10 days from the date of the letter, i.e., May 7, 2016. The demand letter warned respondent that monetary penalties would be incurred if the report was not received within the 10-day deadline. (Ex. D & attach. D-2.)

8. Respondent did not submit its 2015 audit report on or before the 10-day deadline specified in the demand letter. (Wan testimony.)

9. On June 8, 2016, Specialist Wan called respondent's office asking to speak with Ms. Dao. Specialist Wan spoke with Kelly Nguyen, Ms. Dao's escrow assistant; she told Ms. Nguyen the purpose of her call was to find out whether the company's annual audit had been performed and when the audit report would be submitted to the Commissioner. Ms. Nguyen advised Specialist Wan that Ms. Dao was on vacation, that she was unable to answer those questions, but said she would ask Ms. Dao to call Specialist Wan upon her return to the office. (Ex. E; Wan testimony.)

10. After not hearing from Ms. Dao for several days, Specialist Wan called respondent's office on June 13, 2016. She was told by Ms. Nguyen that Ms. Dao "had just left the office." Ms. Nguyen advised that she would ask Ms. Dao to call her back. Several more days passed and Specialist Wan had not heard from Ms. Dao. (Ex. E; Wan testimony.)

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11. On June 20, 2016, Specialist Wan received a call from Mr. Hung Ngo, who identified himself as respondent's "CPA." Mr. Ngo stated that respondent's 2015 audit report was filed on April 15, 2016, and that he would provide her with proof of delivery and a copy of the audit report. (Ex. E; Wan testimony.)

12. After one week passed without receiving any information from Mr. Ngo, Specialist Wan called him on June 28, 2016. She was told he was not in the office. On the same day, Specialist Wan sent Mr. Ngo an email reminding him that she was waiting for a copy of the 2015 audit report and proof of prior delivery. No response was received from Mr. Ngo. (Ex. E; Wan testimony.)

13. On July 12 and July 19, 2016, Specialist Wan called Mr. Ngo's office and left messages with his assistant, requesting Mr. Ngo return her call. Specialist Wan received no response from Mr. Ngo. (Ex. E; Wan testimony.)

14. The Order was filed on July 18, 2016, and served on respondent on July 21, 2016. (Ex. A.) Specialist Wan calculated the monetary penalty pursuant to Financial Code section 17408 and arrived at a total of \$30,000, which was the amount stated in the Order. (Ex. E; Wan testimony.)

15. On July 25, 2016, after the Order had been served on respondent, Mr. Ngo called Specialist Wan. She again requested Mr. Ngo provide her with a copy of respondent's 2015 audit report and proof it had been timely delivered to the Commissioner. Later that day, Mr. Ngo sent Specialist Wan an email with attachments. One attachment was an incomplete copy of a 2015 audit report; it was missing the required trust account reconciliation. The other attachment was a copy of a mailing receipt which simply showed that a package had been sent to the Los Angeles area on April 15, 2015; the receipt did not show the contents of the package, the address of the recipient, or any indication that the package had been sent to, or received by, the Commissioner. (Ex. E; Wan testimony.)

16. At Specialist Wan's request, Mr. Ngo sent a hard copy of the audit report by mail, which was received by the Commissioner on July 27, 2016. Mr. Ngo also sent another copy of the same receipt of delivery he attached to his prior email. Ms. Wan testified that she reviewed the audit report and found it to be in compliance with all the requirements of Financial Code section 17406. (Ex. E; Wan testimony.)

17. A. During the hearing, Specialist Wan testified that she had recalculated the monetary penalty since the audit report had been received after the Order was issued.

B. In the letter sent to respondent on April 27, 2016, respondent was advised it had 10 days from the date of that letter to submit the audit report without being subject to a fine, i.e., May 7, 2016. In a memo she previously wrote, Specialist Wan indicated she would consider the next business day after a deadline to be the beginning of the lateness period. (Ex. D, p. 19.) Since May 7th was a Saturday, Specialist Wan used May 9, 2016, as the first late day. By her calculation, Specialist Wan testified the audit report was filed 79 days late.

C. Pursuant to Financial Code section 17408, Specialist Wan calculated \$100 per day for the first five days the audit report was late, for a sub-total of \$500; and \$500 per day for the remaining 74 days, for a sub-total of \$37,000. She testified the grand total was \$37,500.

18. Ms. Dao testified as follows. She remembered receiving the Department's reminder about filing her company's 2015 audit report, and she delegated that duty to her company's certified public account, Mr. Ngo. In her words, "it is not my job to do the report." Ms. Dao pointed to several attachments to the audit report that she completed and signed in February 2016 as support that she timely delegated that duty to Mr. Ngo. (Ex. F, pp. 70-77.) Mr. Ngo advised her that the audit report had been completed and sent to the Commissioner by the due date. When Ms. Dao received the Order, she again contacted Mr. Ngo, who advised her that he had filed the audit report on time. Ms. Dao surmised that the audit report may have been lost in the mail, and assuming so, she described this as "a technical violation." She concluded that "it is not fair to blame my company; it was the CPA's problem." In the future, she plans to file audit reports with the Commissioner either by messenger or certified mail with return receipt, so she can prove timely submission.

19. Respondent failed to establish that the report had been timely filed with the Commissioner. The delivery receipt submitted by Mr. Ngo is vague and does not show the audit report was delivered to or received by the Commissioner on or before April 15, 2016. Moreover, it is suspicious that Mr. Ngo failed to present a copy of the delivery receipt to Specialist Wan until more than one month and several telephone calls after she first contacted him. In addition, the first version of the audit report Mr. Ngo sent Specialist Wan was incomplete. Therefore, Ms. Dao's testimony that the audit report must have been lost in the mail was speculative and inconsistent with the above facts. Under these circumstances, it is more likely than not that the audit report had not been completed until just before the time it was finally submitted to the Commissioner, i.e., July 27, 2016.

20. In mitigation, Ms. Dao testified that her company has been licensed for 10 years and has not had prior problems timely filing audit reports. She also points out that the 2015 audit report filed with the Commissioner met all statutory requirements, as was confirmed by Specialist Wan. Complainant presented no evidence indicating respondent has any prior disciplinary history with the Commissioner.

LEGAL CONCLUSIONS

1. In this administrative matter not involving discipline of a professional license, but rather the imposition of a monetary penalty, the burden is on complainant to establish cause to support the monetary penalty by a preponderance of the evidence. (*Owen v. Sands* (2009) 176 Cal.App.4th 985, 992.)

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2. Financial Code section 17406, subdivision (a), provides:

Each licensee shall submit to the commissioner, at the licensee's own expense, an audit report containing audited financial statements covering the calendar year or, if the licensee has an established fiscal year, then for that fiscal year, within 105 days after the close of the calendar or fiscal year, as applicable. At that time, each licensee shall also file additional relevant information as the commissioner may require.

3. Financial Code section 17408 provides as follows:

(a) If any person subject to this division fails to make any report required by law or by the commissioner, the commissioner may immediately cause the books, records, papers, and affairs of said person to be thoroughly examined.

(b) The commissioner may impose, by order, a penalty on any person who fails, within the time specified in any written demand of the commissioner, (1) to make and file with the commissioner any report required by law or requested by the commissioner, or (2) to furnish any material information required by the commissioner to be included in the report. The amount of the penalty may not exceed one hundred dollars (\$100) for each day for the first five days the report or information is overdue, and thereafter may not exceed five hundred dollars (\$500) for each day the report or information is overdue.

[¶] . . . [¶]

(c) If a hearing is requested, the penalty shall be paid within five business days after the effective date of any decision in the case ordering payment to be made.

4. In this case, complainant established by a preponderance of the evidence that respondent failed to timely file its 2015 annual audit report, as required by Financial Code section 17406. Respondent's argument that it had completed the report and timely submitted it to the Commissioner, but that the report must have been lost in the mail, was not convincing. Pursuant to Financial Code section 17408, respondent is subject to a monetary penalty for filing its 2015 audit report late. (Factual Findings 1-20; Legal Conclusions 1-3.)

5. A. The Order requests a monetary penalty of \$30,000. During the hearing, complainant offered evidence supporting the argument that the penalty should be increased to \$37,500, since the audit report was submitted after the Order had been served.

B. Financial Code section 17408 specifies penalty amounts “may not exceed” \$100 for the first five days a report is late, and “may not exceed” \$500 per day thereafter. The quoted language from the statute suggests those amounts are the maximums but not the only amount that can be imposed, meaning there is discretion to impose lower daily penalty amounts.

C. In this case, a number of mitigating facts indicate reducing the daily penalty amount is warranted. For example, Ms. Dao delegated to and relied on her CPA to create and timely submit the audit report. To be clear, the Financial Code imposes the duty to file an annual report on the licensee. While a licensee may delegate that duty to others, it is ultimately the licensee’s responsibility to ensure that a delegated task has been accomplished. In this case, Ms. Dao was not diligent in ensuring the audit report had been timely filed. Her office ignored several contacts by Specialist Wan after the report was initially late. It is also presumed Mr. Ngo would have sent a courtesy copy of any audit report filed with the Commissioner to his client. It is curious that Ms. Dao, when first contacted by Specialist Wan, would have not simply sent to her a copy of the audit report in her file. In any event, the evidence here tends to show Mr. Ngo was more responsible for the audit report being file late than Ms. Dao.

D. The following other mitigating facts must also be considered. Respondent has had no prior problems submitting timely audit reports. Respondent’s 2015 audit report otherwise complied with the Financial Code. No evidence was presented showing respondent has had any disciplinary history with the Commissioner. (Factual Findings 1-20; Legal Conclusions 1-4.)

E. The fact that section 17408 provides a much lower penalty amount for the first five days a report is late is a concession that sometimes a licensee can fail to uphold a statutory duty for reasons not entirely within her control. Here, Ms. Dao established mitigating facts indicating the lateness of the 2015 audit report can be blamed, in part, on the professional to whom she delegated responsibility for the report. Other mitigating facts show respondent has a track record of timely complying with section 17406. While respondent was ultimately responsible for timely filing the 2015 audit report, a reduction in the daily penalty amount to \$100 per day for the entire late period properly apportions responsibility for, and puts in context, respondent’s violation of the Financial Code established in this case. Since the audit report was 79 days late, a total monetary penalty of \$7,900 is warranted.

6. Pursuant to Financial Code sections 17406 and 17408, cause was established by a preponderance of the evidence to uphold the Order against respondent imposing a monetary penalty. However, a reduction of the total monetary penalty to \$7,900 is warranted. Pursuant to Financial Code section 17408, subdivision (e), respondent has five business days after the effective date of the decision to make payment to the Commissioner. (Factual Findings 1-20; Legal Conclusions 1-5.)

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Pursuant to Financial Code section 17408, subdivision (e), respondent shall pay to the Commissioner of Business Oversight the sum of \$7,900 within five business days after the effective date of this decision.