

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

THE CALIFORNIA CORPORATIONS
COMMISSIONER,

Complainant,

v.

JOSEPH BARNETT HUBBARD dba
CASH TIL PAYDAY,

Respondent.

Case No. 100-3229

OAH No.: L2008030198

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated July 17, 2008, is hereby adopted by the Department of Corporations as its Decision in the above-entitled matter.

This Decision shall become effective on October 29, 2008.

IT IS SO ORDERED this 28th day of October 2008.

CALIFORNIA CORPORATIONS COMMISSIONER

Preston DuFauchard

**BEFORE THE DEPARTMENT OF CORPORATIONS
OF THE STATE OF CALIFORNIA**

**THE CALIFORNIA CORPORATIONS
COMMISSIONER,**

Complainant,

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**JOSEPH BARNETT HUBBARD dba
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Respondent.

Case No. 100-3229

OAH No. L2008030198

PROPOSED DECISION

This matter came on regularly for hearing on June 27, 2008, in Los Angeles, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Preston DuFauchard, the California Corporations Commissioner (Complainant or Commissioner), was represented by Marisa I. Urteaga-Watkins, Corporations Counsel.

Joseph Barnett Hubbard (Respondent) was present and represented himself.

Oral and documentary evidence was received. The record was held open to and including July 8, 2008, for Complainant's counsel to redact borrower names, signatures and other identifying information from her exhibits. The redacted exhibits were timely received. On July 8, 2008, the record was closed, and the matter was deemed submitted for decision.

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FACTUAL FINDINGS

The Administrative Law Judge makes the following factual findings:

1. On July 20, 2006, the Commissioner issued a deferred deposit transaction originator license (File No. 100-3229) pursuant to the California Deferred Deposit Transaction Law (CDDTL) set forth in Financial Code¹ section 23000 et seq. The license was issued in the name of Joseph Barnett Hubbard dba Cash Til Payday (Cash Til Payday or the business). The license was in full force and effect at all relevant times.

2. On February 7, 2007, a Senior Examiner for the Department of Corporations (Department) wrote to Respondent to notify him of an upcoming field examination of Cash Til Payday's books and records, and to request that Respondent provide the examiner with certain documents within the following 10 days. Respondent timely submitted the requested documents.

3. The noticed field examination took place on June 27, 2007, and was conducted by a Department Corporation Examiner. The examiner made the following findings:

a. Respondent included in his contract forms two telephone numbers which he represented to customers were the Department's toll-free telephone numbers for receiving consumer complaints. The two telephone numbers were 1-866-ASK-CORP and 1-866-275-3677. The second telephone number was intended to be the all-numeral version of 1-866-ASK-CORP. However, that number was incorrect. The correct number was 1-866-275-2677. The examiner determined the incorrect number to be a violation of section 23035, subdivision (c)(4).

b. Respondent failed to have posted in the customer lobby, business office, or any other conspicuous location, a sign, in letters at least .5 inch in height, stating that the licensee cannot use the criminal process against a consumer to collect any deferred deposit transaction. The examiner determined the failure to have such a sign conspicuously posted to be a violation of section 23035, subdivision (d)(1).

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¹All statutory references are to the Financial Code unless otherwise indicated.

c. The examiner discovered five checks written by customers on accounts that did not contain sufficient funds. The business had charged each of those customers a \$15 NSF charge (for a total of \$75) even though none of the checks had been deposited into or returned from a bank. A document attached to the business's standard contract form and signed by each customer at the time he/she entered into a deferred deposit transaction agreement with Cash Til Payday contained the following language:

I further understand that I would have to pay a \$15 NSF Fee if my check is not good on the agreed upon date, or if i [*sic*] have to make my check good with cash or certified funds for any reason after the date it was supposed to have been good. **This \$15 fee is due even if my check was never deposited because the holder's bank knew the check would not be honored by my bank or if the holder held the check at my request for me to come in and "Pick Up The Check". The \$15 fee will still be due and payable.** (Emphasis added.)

The examiner determined the collection of a \$15 NSF fee on a check that was neither received by nor returned from a bank to be a violation of section 23036, subdivision (f).

4. On December 28, 2007, the Department issued three citations and a Desist and Refrain Order against Respondent. Citation A alleged a violation of section 23035, subdivision (c)(4) and called for an administrative penalty of \$1,500. Citation B alleged a violation of section 23035, subdivision (d)(1) and called for an administrative penalty of \$1,500. Citation C alleged a violation of section 23036, subdivision (f) and called for an administrative penalty of \$2,500. The administrative penalties totaled \$5,500.

5. The Desist and Refrain Order contained the following language:

Pursuant to California Financial Code section 23050, Licensee is hereby ordered to desist and refrain from engaging in the business of deferred deposit transactions in the State of California in violation of the above referenced section.

These Citations and Desist and Refrain Order [*sic*] are necessary, in the public interest, for the protection of consumers and is [*sic*] consistent with the purposes, policies and provisions of the California Deferred Deposit Transaction Law. These Citations and Desist and Refrain Orders shall remain in full force and effect until further order of the Commissioner.

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6. The computer software Respondent uses in his business was in place when he purchased the business. That software generates his contract forms. Respondent has not changed the toll-free Department telephone numbers from those that were on the contract form at the time he purchased Cash Til Payday. Respondent complained that the administrative penalty of \$1,500 was excessive in light of the fact that 1-866-ASK-CORP is an accurate number by which consumers may register complaints, and the all-numeral number is only one digit off from complete accuracy.

7. Respondent is not physically present at the business every day. He claimed that a sign satisfying the requirements of section 23035, subdivision (d)(1) was posted the last time he was in the store before the examination took place. Whether that statement is accurate or not, the posted sign was required at all times.

8. The examiner erroneously associated three of the five checks he found to have been improperly assessed a \$15 NSF fee with incorrect files. Those three checks were from prior transactions involving the same customers, and the checks have been properly deposited and returned from the bank. As to the remaining two checks, Respondent explained that the company's computer software automatically assesses and incorporates the \$15 fee in the total when the account is paid, but that it does not assess the fee before the check is deposited in the bank. If a check is returned from the bank, the \$15 fee is entered manually. He further explained that no customer has ever been charged a \$15 fee without the customer's check being deposited into the bank. That testimony was not convincing for the following reasons: (1) If the testimony were accurate, one would expect the examiner to have found a great many \$15 fees incorporated into account totals for checks that cleared the bank. (2) If Respondent's testimony was accurate, some indication of deposit should appear on the two remaining checks. (3) Respondent's wife, who works at Cash Til Payday, informed the examiner that she or Respondent occasionally telephoned a bank to ascertain whether a borrower's account contained sufficient funds to cover a check they were ready to deposit. If the bank answered negatively, Cash Til Payday assessed the \$15 NSF fee without depositing the check. (4) The authorization Respondent required customers to sign, permitting the assessment of a \$15 fee even for checks not deposited, stands in stark contrast to Respondent's testimony.

LEGAL CONCLUSIONS

Pursuant to the foregoing Factual Findings, the Administrative Law Judge makes the following Legal Conclusions:

1. Cause exists to affirm the Desist and Refrain Order against Respondent, pursuant to Financial Code section 23050, for violations of Financial Code sections 23035, subdivisions (c)(4) and (d)(1), and 23036, subdivision (f), as set forth in Findings 2, 3, 4, 5, 6, 7 and 8.

2. Cause exists to affirm Citation Nos. 1 through 3 against Respondent, for violations of Financial Code sections 23035, subdivisions (c)(4) and (d)(1), and 23036, subdivision (f), as set forth in Findings 2, 3, 4, 5, 6, 7 and 8.

3. Financial Code section 23035, subdivision (c) states in pertinent part:

Before entering into a deferred deposit transaction, licensees shall distribute to customers a notice that shall include, but not be limited to, the following:

[¶] . . . [¶]

(4) The department's toll-free telephone number for receiving calls regarding customer complaints and concerns.

4. Financial Code section 23035, subdivision (d) states in pertinent part:

The following notices shall be clearly and conspicuously posted in the unobstructed view of the public by all licensees in each location of a business providing deferred deposit transactions in letters not less than one-half inch in height:

(1) The licensee cannot use the criminal process against a consumer to collect any deferred deposit transaction.

5. Financial Code section 23036 states in relevant part:

(e) A fee not to exceed fifteen dollars (\$15) may be charged for the return of a dishonored check by a depository institution in a deferred deposit transaction. A single fee charged pursuant to this subdivision is the exclusive charge for a dishonored check. No fee may be added for late payment.

(f) No amount in excess of the amounts authorized by this section shall be directly or indirectly charged by a licensee pursuant to a deferred deposit transaction.

6. Complainant proved each of the violations referenced in the three citations. However, as to Citation C, Complainant proved Respondent charged an excessive fee with respect to only two of the five checks referenced by the examiner,

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7. Financial Code section 23058, subdivision (a) states:

If, upon inspection, examination or investigation, based upon a complaint or otherwise, the department has cause to believe that a person is engaged in the business of deferred deposit transactions without a license, or a licensee or person is violating any provision of this division or any rule or order thereunder, the department may issue a citation to that person in writing, describing with particularity the basis of the citation. Each citation may contain an order to desist and refrain and an assessment of an administrative penalty not to exceed two thousand five hundred dollars (\$2,500). . . .

8. Respondent's point with respect to the Department's telephone numbers as listed on the contract form is well taken. 1-866-ASK-CORP is the correct number for a consumer to call if he/she wishes to report a complaint. The corresponding all-numeral number was incorrect by a single digit. This was an innocent error made without any intent to deceive the public. Although the erroneous number is misleading, no ignoble intent is associated with it. The error is correctly the subject of a citation and administrative penalty. However, the law does not set a minimum administrative fee for a citation. It sets only the maximum fee that may be imposed. Under the specific circumstances of this case, the administrative penalty for Citation A is excessive and should be reduced by \$500.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. The Desist and Refrain Order is affirmed.
2. Citation A is modified as follows: The administrative penalty is reduced to \$1,000.
3. Citations B and C are affirmed.
4. Respondent shall pay a total administrative penalty of \$5,000 within 30 days of the effective date of this Decision, unless the Department agrees in writing to payment by an installment plan because of financial hardship.

DATED: July 17, 2008

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings