BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF COMMERCE, COMMUNITY & ECONOMIC DEVELOPMENT

IN THE MATTER OF	)	
	)	
Advance Alaska LLC dba Advance Til Payday and Loren C. Gill	)	Case No. OAH 08-0689-BFI
	)	
	)	

DECISION ON SUMMARY ADJUDICATION

I. Introduction

The Division of Banking and Securities ("the division") denied applications filed by Loren Clinton Gill individually and as managing partner for Advance Alaska, LLC ("respondents") to renew six Deferred Deposit Advance Licenses. The applicants filed a Notice of Defense. The division moved for summary adjudication. The respondents opposed the motion.

The division's motion for summary adjudication is granted. The division's decision to deny renewal of the licenses involved is affirmed.

II. Facts

The division began to license and regulate deferred deposit advance lenders, also known as "payday lenders", when AS 06.50 went into effect on January 1, 2005. The respondents' first licenses were effective on that day and valid for a two-year period.[1] On December 13, 2006, the division notified the respondents that it would not renew the licenses due to violations of AS 06.50. The parties negotiated a settled resolution of the matter that allowed the respondents to have their licenses renewed for another two years, with conditions that included refunds to consumers of certain fees. After the respondents met the conditions, the licenses were renewed until December 31, 2008.

On April 9, 2008, a consent order was entered against Mr. Gill and a related business entity in Arkansas, and on July 7, 2008, a similar order was entered in the State of Washington. On November 13, 2008, the respondents filed applications with the division to renew their Alaska licenses. On December 4, 2008, the Division gave notice to the respondents of its intent to not renew these licenses. On December 10, 2008, the Division received a notice of defense form submitted by Gill and on December 16, 2008, the Division referred the matter to OAH. The division's decision to deny the applications was based entirely on the entry of the consent orders in Arkansas and Washington.

[1] This case involves six licenses. Separate licenses are required for each place of business.

Arkansas Order

Mr. Gill was the managing member of Arkansas Payday Advance, LLC ("APA"), an Arkansas limited liability company doing business as Advance Til Payday. The Arkansas State Board of Collection Agencies ("Arkansas Board") regulated payday lenders in Arkansas under Arkansas Code Annotated, Title 23, Chapter 52, the Arkansas Check-cashers Act, during all relevant times. On October 27, 2007, the Arkansas Board issued a Notice of Violations to APA, indicating that the firm was in violation of the liquid asset requirement of the Arkansas Code. The Arkansas Board proposed a civil penalty of $41,000.[2] The Board then issued a Notice of Hearing on March 7, 2008, that listed numerous other past and pending claims of violations.[3] The Notice of Hearing alleges the following violations:

- Misdated checks;
- Late-filed application;
- Conviction by guilty plea in Washington to 2nd degree assault in 2006;
- Incomplete and therefore inaccurate disclosure of Colorado enforcement action;
- Incomplete and therefore inaccurate disclosure of Washington enforcement action;
- Alleged connections between Arkansas ATP, related entities and individuals, and criminal and payday lending enforcement actions (see paragraphs 9-12 of Notice of Hearing);
- Liquid asset requirement not met; and
- Incomplete disclosures as to the extent and nature of offenses in which Gill and his check-cashing entities in other states have been involved, justifying a preliminary determination that financial responsibility, financial condition, and business experience of APA and its owners and managers did not warrant the belief that its business would be conducted in accordance with law.

The Notice of Hearing states that the Board may suspend or revoke a permit if it finds that respondent's violations occurred either knowingly or through lack of due care. The notice indicates that the hearing will determine whether the respondent violated the authorities cited, whether administrative penalties should be imposed, and whether respondent's license should be renewed.

Rather than proceeding to a hearing, Mr. Gill and APA voluntarily agreed to enter in to the Arkansas consent order. The order provided that

[2] Exhibit B. pages 4-5.
[3] Exhibit B, pages 6-14.

> APA denies the allegations of fact and denies that it has violated Arkansas law. Pursuant to Ark. Code Ann. §23-52-116, this Consent Order does not constitute an admission by APA or Loren Gill that any provision of the Arkansas Check-cashers Act or any rule, regulation, or order promulgated or issued pursuant to the Arkansas check-cashers Act has been violated, nor does it constitute a finding by the Board that APA or Loren Gill has violated any provision of the Arkansas Check-cashers Act or any rule, regulation or order promulgated or issued thereunder.

The respondents acknowledge signing the Arkansas order. While they have not provided any evidence, by affidavit or otherwise, they assert in their brief that

> Specifically, the Arkansas matter arose from a clerical error. In November-December 2006, the state of Arkansas administered an exam of Advance Alaska's bank accounts. During the examination, Arkansas examined the wrong accounts, therefore accusing Advance Alaska of a breach of Arkansas law. Due to the "clerical oversight", to [put the] matter to rest, Advance Alaska agreed to a Consent Order. These agreements were not entered on the merits of the claims, but because they were an economically favorable and more efficient settlement option.

The order reflected an agreement that Mr. Gill and APA would close their check-cashing business no later than April 9, 2008, make a payment to the Board in the amount of $7,000, and that Mr. Gill and APA would not operate a check-cashing business in the State of Arkansas ever again, effective the date of the order. In return, the board would take no further action on the allegations in the Notice of Violations and Notice of Hearing.

For purposes of this summary adjudication motion, the Arkansas order will be viewed in the light most favorable to the respondents. It will be assumed that the respondents engaged in no wrongdoing or illegal activity in Arkansas, but nevertheless found it more efficient and economical to completely shut down their business and promise never to do business again in that state rather than to correct a clerical error on the part of the regulating authority.

Washington Order

The State of Washington, Department of Financial Institutions, Division of Consumer Services, regulates and licenses payday lenders under the Revised Code of Washington (RCW) Chapter 31.45, the Check Cashers and Sellers Act. Mr. Gill was the owner and president of WSC Loans, Inc. ("WSC"), doing business as "Advance Til Payday" during all times relevant to the Washington proceedings. Mr. Gill and WSC are the respondents described in the Washington Order and the Amended Statement of Charges. The Amended Statement of Charges[4] alleges numerous violations of RCW Chapter 31.45 by WSC and Mr. Gill, including

(1) Making loans in excess of the statutory maximum principal amount;

(2) Making loans with charges and fees in excess of the permissible statutory amount;

(3) Failing to respond completely to directive;

(4) Making false statements or omissions of material fact on application;

(5) Failing to preserve books, accounts, and records; and

(6) Failing to disclose significant developments.

The Amended Statement of Charges imposed an immediately-effective cease and desist order against WSC and Gill, enjoining them from making loans in excess of the statutory maximum amount, and required Mr. Gill and WSC to retain all records and make the records available for inspection by the Washington Department of Financial Institutions ("DFI"). The Amended Statement of Charges also provided notice to Mr. Gill and WSC of the Director's intent to

(1) revoke the license of WSC;

(2) impose a fine of $933,400 on WSC and Gill, jointly and severally;

(3) require restitution by WSC and Gill, jointly and severally, to all borrowers shown at hearing to have been charged excessive principal, interest, or fees;

(4) ban WSC from the business for which a license is required under RCW Chapter 31.45 for a period of five years;

(5) ban Gill from participation in any business for which a license is required under RCW Chapter 31.45 for a period of five years; and

(6) require WSC to pay an investigative fee of$27,604 to DFI.

Rather than undergo a hearing on the Amended Statement of Charges, Mr. Gill (individually and as WSC president) and WSC agreed to enter into the Washington consent order. The order provided that "The parties intend this Consent Order to fully resolve the Statement of Charges and agree that respondents do not admit any wrongdoing by its entry. Respondents further agree not to contest the Statement of Charges in consideration of the terms of this Consent Order."

The respondents have not offered an explanation for entering the Washington agreement, such as the clerical error explanation for the Arkansas case, other than to note that the order does not reflect any admission of wrongdoing. On the other hand, neither does the order reflect any challenge to the allegations. The order is essentially a no contest plea on the part of the respondents to all of the allegations in the Washington Amended Statement of Charges.

The specific terms of the consent order provide that:

(1) Respondents' license [to conduct payday lending in Washington] is revoked;

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[4] Exhibit A, page 13.

(2) WSC is banned for the remainder of its legal existence from participating in a business required to be licensed under RCW Chapter 31.45;

(3) Gill is banned for the remainder of his natural life from participating in a business required to be licensed under RCW Chapter 31.45;

(4) WSC and Gill are subject to a fine of $933,400, which will be stayed permanently pending full satisfaction of their restitution obligations under the order;

(5) WSC and Gill shall make restitution to borrowers of $22,840;

(6) WSC and Gill shall pay Washington DFI an investigative fee of $27,604; and

(7) WSC for the duration of its legal existence and Gill for his natural life are prohibited from applying for licensure under RCW Chapter 31.45 under any name.

III. Discussion

A. Summary Adjudication

Summary adjudication is authorized by 2 AAC 64.250. If a motion for summary adjudication is supported by an affidavit or other documents establishing that a genuine dispute does not exist on an issue of material fact, to defeat the motion a party may not rely on mere denial but must show, by affidavit or other evidence, that a genuine dispute exists on an issue of material fact for which an evidentiary hearing is required. The Alaska Supreme Court has recognized that in an administrative case there is no right to an evidentiary hearing when there are no material issues of fact. [5]

In their Opposition to Motion for Summary Judgment, the respondents admit that "the factual background to this proceeding is generally not in dispute," but in their conclusion they state that "genuine material issues of fact exist to necessitate further findings of law and fact regarding the denial of these licenses." Specifically, the respondents argue that denial of the renewal applications based on the consent orders violates due process guarantees, that in denying the renewal applications the division abused its discretion, and that the division has failed to recognize that respondents Gill and Advance Alaska are separate entities.

While the respondents assert that there are material issues of fact in dispute, the first two points they raise are issues of law, not fact. The division denied the renewal applications based entirely on the two consent orders. There is no dispute about the content of the orders or the circumstances surrounding their entry, which is viewed in the light most favorable to the respondents. There are no additional facts in dispute that would shed light on whether the division's decision to deny renewal based on the Arkansas and Washington orders would constitute a denial of

due process or an abuse of discretion. The respondents simply argue that the consent orders alone are not an adequate basis for denial of the license renewal applications. On the third point, that Mr. Gill and Advance Alaska LLC are two distinct entities, there is no dispute. The division concedes the point and argues that it is still entitled to summary adjudication in its favor.

In short, there have been no facts alleged that could be expected to affect the outcome of the case. The question is purely one of law that may be decided by summary adjudication.

B. Denial of the License Renewal Applications was Proper

AS 06.50.020 provides that in order to qualify for a deferred deposit advance license, in addition to other requirements "an applicant shall…demonstrate the financial responsibility, financial condition, business experience, character, and general fitness that reasonably warrant the department's belief that the applicant's business will be conducted lawfully and fairly." The issue in this case is whether the respondents have demonstrated a level of financial responsibility, financial condition, business experience, character, and general fitness that would reasonably warrant belief that their business will be conducted lawfully and fairly, when the applicants have:

1) closed a business in Arkansas and promised to never do business in that state again instead of resolving a clerical error made by the regulating agency; and

2) closed their businesses in Washington, promised to never do business in that state again, and failed to contest allegations of

(1) Making loans in excess of the statutory maximum principal amount;

(2) Making loans with charges and fees in excess of the permissible statutory amount;

(3) Failing to respond completely to directives;

(4) Making false statements or omissions of material fact on application;

(5) Failing to preserve books, accounts, and records; and

(6) Failing to disclose significant developments;

3) accumulated a history of violations in Alaska;

4) not offered additional evidence of financial responsibility, financial condition, business experience, character, and general fitness, other than an offer to change control, but not ownership, of Mr. Gill's LLC to a third person.

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[5] *Church v. State of Alaska, Department of Revenue*, 973 P.2d 1125 (Alaska 1999).

The licensing statute requires the applicant to demonstrate the required characteristics to qualify for a license. The division acknowledges that the consent orders do not establish any wrongdoing or violations of law in the other states, but the obvious question arising in this case is how the applicant can reasonably be considered to have the requisite business experience or financial responsibility to engage in a regulated financial institution business, when he has declined to contest serious allegations of misconduct in the regulated field in Washington, or when he has shut down his business in Arkansas and accepted the ultimate penalty, permanent prohibition from the regulated business, rather than sort out a clerical error made by a regulator.

Banking and financial businesses by their nature require careful keeping of books and records to protect their customers and themselves. Even if Mr. Gill and the businesses he has been involved in are completely innocent of any of the errors or wrongdoing alleged in the other states, a financial institution that cannot produce the necessary books and records to clear up such serious allegations, rather than agreeing to go out of business forever, does not have the degree of financial responsibility, financial condition, business experience, character, and general fitness that would reasonably warrant a belief that it is capable of conducting its business lawfully and fairly, despite the purest of intentions, at least not without an extraordinary degree of explanation. While the applicants have asserted that they have not had "their day in court" and that they are entitled to a hearing, they have not explained what evidence they might produce at a hearing to show that the department might reasonably find them fit to engage in this business under the circumstances, other than to state that the Arkansas order was merely a convenient solution to a regulator's clerical error.

The respondents argue that the division has failed to recognize that Advance Alaska, LLC, is a separate entity from Mr. Gill, who is the owner of the company. The respondents appear to propose that Advance Alaska, LLC, be permitted to hold licenses if Mr. Gill steps down from his position as manager of his company, letting somebody else manage it. In evaluating whether a belief is reasonably warranted that a business entity will fairly and lawfully run its business, the division may review the competence, experience, integrity, and financial ability of any person who is a member, partner, director, senior officer, or owner of more than ten percent of the entity's equity.[6] Mr. Gill, the sole owner of the company, has not demonstrated that he has the competence or ability to run a financial institution; to the contrary, he has demonstrated in other states that he is not capable of staying in business. While Mr. Gill is free to sell Advance Alaska, LLC to someone

[6] AS 06.50.020(a)(2)(B).

who is qualified to obtain a license and run the business, his interest in a license is not something that he may transfer or sell.[7] So long as Mr. Gill owns the business, merely appointing a third party to act as a manager would not constitute an effective transfer of control.

The respondents argue that they have been denied due process, relying on *Frontier Saloon v. Alcoholic Beverage Control Board*.[8] In Frontier Saloon, the ABC Board had suspended a liquor license after the licensee pled guilty to allowing a minor on the premises. The board did not provide the licensee a hearing. The court held:

> Because the Board employs discretion, the only way in which appellant can seek to invoke that discretion in its favor is through a hearing. A hearing would permit the owner of the business to present arguments in mitigation of the penalty to be assessed, and would assure that the Board's action was not taken solely on the basis of ex parte communications to it. Without such a hearing, the Board's discretion would be employed without the enlightenment that might be achieved through a consideration of the arguments of both parties to the issue.[9]

In this case, the licensees have been provided a hearing. They have had a full opportunity to brief the issues, and this decision is the result. They have also had an opportunity to identify any material issues of fact in dispute, and have not shown any. Relying on *Frontier Saloon*, respondents argue that "Advance Alaska was never convicted of any wrongdoing, and has never had its day in court. While a Statement of Charges was brought against Gill and Advance Til Payday (AKA Advance Alaska) in both Washington and Arkansas, the resulting consent orders do not constitute an admission of guilt."

The respondents have not explained what evidence they might be able to offer to mitigate the evidence that they lack the financial responsibility and general fitness to run a financial institution, other than an offer of Mr. Gill having somebody else as the manager of his LLC, at least on paper. Respondents do not appear interested in having the department look carefully at what actually happened in Washington and Arkansas. Respondents argue that "it is unreasonable to impute Mr. Gill's alleged bad-acts to Advance Alaska; and second, it is unreasonable to rely on the Washington and Arkansas orders in revoking the licenses – they plainly state that they are not an admission of guilt or wrongdoing." Yet, it is undisputed that Mr. Gill owns Advance Alaska. Absent significant evidence to the contrary, none of which has been offered, it would be unreasonable to consider Advance Alaska fit to do business fairly and lawfully when the LLC's sole

[7] AS 06.50.200.
[8] cite needed
[9] *Frontier Saloon* at 659.

owner has agreed with regulators in two other states to never do business there again rather than face serious allegations of misconduct, especially when the division is authorized to consider an owner with only a ten percent equity share in a company.

The respondents argue that the division has abused its discretion because "the weight of the evidence does not support the decision of the division." The respondents state that

> it is not disputed that this type of record [the consent orders] may be reviewed by the division. However, AS 06.50.020(a)(2) includes a reasonableness standard – it requires the applicant show financial responsibility, financial condition, business experience, character and general fitness that would *reasonably* warrant the department's belief that the applicant's business will be conducted lawfully and fairly." (emphasis in original, footnotes omitted.)

As the respondents concede, they are required to make a showing that the division can reasonably rely on. While they admit no wrongdoing, they have not explained how they intend to show that the division may reasonably believe they will conduct their business lawfully and fairly under the circumstances. The respondents' assertion that the division may consider the evidence but not reasonably rely on it does not make sense.

The respondents assert that the division was aware of pending proceedings in Washington and Arkansas when it renewed the licenses for 2007 through 2008. The division could not have been aware of the 2008 consent orders when it renewed the licenses in 2007. Even if the division had known that such consent orders were imminent, the fact merely suggests that perhaps the division should have been more diligent the first time around. It does not mean the division must continue renewing licenses for individuals and entities that have agreed to be permanently barred from doing business in other states as a means of settling serious allegations of misconduct.

Finally, the respondents argue that the division has "acted in excess of its jurisdiction by arbitrarily setting the renewal fee for Advance Alaska under new management at $15,000. In fact, AAC 03.11.020 states that the fee for an initial or renewed license to do business under AS 06.50 is $2,500." The correct manner for setting fees for license renewals is not an issue in this case, and the basis for this objection is not apparent.[10] The division's method of calculating renewal fees is not relevant to the applicant's financial responsibility, financial condition, business experience, character, or general fitness.

[10] The respondents appear to have overlooked that each place of business requires a separate license, AS 06.50.010, and they have six licenses. At $2,500 per license, the renewal fees for the respondents or the new license fees for a new owner would be six times $2,500, or $15,000.

IV. Conclusion

The respondents have not admitted to any wrongdoing or illegal activity in Washington or Arkansas, but rather than contest serious allegations lodged by the regulating authorities in those states they have voluntarily agreed to cease doing business and to never do business in those states again, in addition to other penalties. The respondents have not offered any significant evidence to demonstrate their ability to lawfully and fairly conduct a deferred deposit advance lending business. The respondents have not met their statutory burden under AS 06.50.020 demonstrate the financial responsibility, financial condition, business experience, character, and general fitness that reasonably warrant the department's belief that the respondents' business will be conducted lawfully and fairly. The division's decision to not renew the deferred deposit advance licenses of Advance Alaska LLC and Loren C. Gill is AFFIRMED.

DATED this 22nd day of July, 2009.

By: *Signed*
DALE WHITNEY
Administrative Law Judge

Adoption

The undersigned, on behalf of the Commissioner of Commerce, Community and Economic Development and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

DATED this 21st day of August, 2009.

By: *Signed*
Signature
Emil Notti
Name
Commissioner
Title

[This document has been modified to conform to technical standards for publication.]