

1 State of New Hampshire Banking Department

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3 In re the Matter of:) Case No.: 08-BD-001
))
4 State of New Hampshire Banking) Recommended Decision by the Presiding
) Officer
5 Department,)
))
6 and)
))
7 David A. Maloof)
))
8 Complainant,)
))
9 and)
))
10 Franklin Savings Bank,)
))
11 Respondent)
))

12
13 Recommended Decision

14 The Complainant had the burden of establishing a prima facie case that
15 a violation of the Chapter or an unfair and deceptive trade practice had
16 occurred. For the reasons set forth below I find that he met that burden.
17 For the reasons further set forth below I find the proper amount of
18 restitution to be \$416.00.

19 Procedural Background and Authority

20 Pursuant to RSA 383:10-d the commissioner shall have exclusive authority
21 and jurisdiction to investigate conduct that is or may be an unfair or
22 deceptive act or practice under RSA 358-A and exempt under RSA 358-A:3, I or
23 that may violate any of the provisions of Titles XXXV and XXXVI and
24 administrative rules adopted thereunder. The Commissioner may hold hearings
25 relative to such conduct and may order restitution for a person or persons
26 adversely affected by such conduct.
27

1 On February 13, 2008, the New Hampshire Banking Department
2 ("Department") received a complaint from David A. Maloof (Complainant)
3 regarding Franklin Savings Bank (Respondent). On review, the Commissioner
4 determined that the initial documents submitted contained a factual
5 discrepancy between the parties, and that a proper determination of what
6 restitution is due, if any, would best be determined by an administrative
7 hearing wherein each party would have an opportunity to present their
8 evidence to an appointed Presiding Officer.

9 The Respondent submitted a list of exhibits, identified as Exhibits A-
10 K, and Complainant likewise submitted a list of exhibits identified as
11 Exhibits 1-17. Neither party having objected to any of the submitted exhibits
12 they are all hereby admitted to the Record.

13 The hearing was convened on April 21, 2008. As stated in the Notice of
14 Hearing and reiterated at the hearing, the Respondent was charged with
15 answering the question of whether it had violated a provision of the New
16 Hampshire Banking Laws or committed an unfair or deceptive trade practice.
17 If the Presiding Officer determined that such a violation had occurred, then
18 he must then determine what restitution may be due to the Complainant for the
19 violation.

20 Findings of Fact, Rulings of Law

21 On the date of hearing there was testimony from the Complainant,
22 Richard Wyckoff (a lay witness on behalf of Complainant), and several of
23 Respondent's employees. All of the said witnesses were called by Complainant
24 in the presentation of his case and the Respondent called no witnesses and
25 presented no additional evidence.

26 The Respondent submitted a Request for Findings and Rulings
27 (Respondent's Request) within the time period set forth in the notice of
hearing and reiterated at the hearing. Respondent's Request 8, 11, and 12

1 are statements of law and therefore require no finding or ruling by this
2 Officer but I take judicial notice of the statutes indicated.

3 Mr. Maloof's principal complaint concerned the alleged failure of the
4 bank to follow their own policy on cashing out of state cashier's checks. In
5 addition he alleged that as a result of the bank's failure to follow their
6 policy he was adversely impacted because his business reputation was
7 diminished since checks were being dishonored and he was being charged
8 service charges.

9 It appears undisputed that the Complainant presented a cashier's check
10 which appeared to have been a product of Fifth Third Bank in the amount of
11 \$3,900.00 to a teller at Respondent's branch location and for which
12 Respondent never received payment. It further appears undisputed that the
13 Respondent paid the face value of the check to Complainant on the day of
14 presentment. I therefore find in favor of Respondent's Requests 1, 2, and 5.

15 Complainant testified that his intention was to deposit said check in
16 his banking account as he understood the Respondent's policy to be such that
17 he was unable to cash it. Complainant's lay witness also testified that he
18 has a business account at Franklin Savings Bank. He testified that he
19 regularly has to deposit out of state checks and that his understanding of
20 the bank policy was that they had to be held for one day before they would
21 post to his account, though on further examination by this officer he
22 couldn't specifically recall whether any of those deposits had been cashier's
23 checks.

24 Bank Teller Beverlie Byron and Senior Bank Teller Susan Pelletier
25 testified about the processing of the check. Each of them, along with Mr.
26 Maloof, testified to the longstanding relationship between the Bank and Mr.
27 Maloof. I therefore grant Respondent's Request 3. Each of those three also
testified that there was nothing on the face of the cashier's check that
indicated that it was fraudulent in anyway and I therefore similarly grant
Respondent's Request 4.

1 Each of the tellers further testified upon questioning by this Officer
2 that it is normally part of the process of cashing a check that the
3 customer's account balance is verified and that neither of them did that in
4 this instance. Connie Deuso, another senior bank employee, testified that
5 checking the account balance was part of the consideration of whether to cash
6 any given check or require it to be deposited but that whether or not the
7 customer was a long-term customer was a competing consideration.

8 Respondent's Request 6 is immaterial to the issues at hand and I
9 therefore decline to rule on it.

10 Remarkably none of the bank employees testified when they were notified
11 that the subject check was counterfeit, nor did they actually testify that it
12 was, in fact, counterfeit. I therefore deny Respondent's Request 7.

13 In fact neither party has submitted any evidence either through
14 testimony or exhibits to show that the check was in fact counterfeit.
15 However, it is undisputed that the check's alleged counterfeit nature was
16 what initiated the chain of events which lead to the complaint and the fact
17 or non-fact of its counterfeit nature is not essential to a determination on
18 this matter. Therefore for the purposes of this recommendation I have
19 assumed without deciding that the check was counterfeit. Having assumed this
20 I hereby grant Respondent's Request 9.

21 Respondent's Request 10 is granted. Respondent's Request 12 accurately
22 reports a portion of RSA 382-A:4-214(d) and to the extent that it does so I
23 take judicial notice of that provision of New Hampshire law. I note that the
24 unquoted portion of the statute accords liability to the Bank (Respondent)
25 for any failure to exercise ordinary care with respect to the item.

26 I hereby make a ruling of law in favor of Respondent's Request 13 and
27 15. The Respondent was entitled to revoke the settlement made to Mr. Maloof
and entitled to exercise its right to setoff on the account (again, assuming
the check was in fact dishonored by Fifth Third Bank). The date of

1 notification to Complainant that they had done so appears undisputed and I
2 therefore find in favor of Respondent's Request 14.

3 Respondent's Request 16 and 19 are granted. Respondent's Request 17
4 and 18 are immaterial to the issue at hand and I therefore decline to rule on
5 them. Respondent's Requests 21 through 34 are all generally true statements
6 of fact, law, or accurate commentary on federal or state law and to the
7 extent necessary I find in favor of them. I principally do so to illustrate
8 the point I believe the Respondent has missed. The parties here had an
9 agreement reproduced at Respondent's Exhibit B which sets forth the right of
10 setoff and also disclaims liability for dishonored checks as a result of said
11 setoff. As ruled above the Bank was in no way prohibited from exercising its
12 rights under the policy or the statute. It is unquestionable that Respondent
13 acted within their authority under the Chapter in granting "early" access to
14 the funds for the alleged counterfeit check. However, as previously noted,
15 the right of setoff is not strictly the issue in this case. Mr. Maloof's
16 complaint revolves around the Respondent's actions when cast against a
17 backdrop of the Respondent allegedly violating their own policy regarding
18 deposits and funds availability, not just for the face value of the check but
19 every action taken subsequent to its alleged dishonor by the bank it was
20 allegedly drawn against. It is not the subject matter of this hearing to
21 determine which of the parties are properly held accountable for the loss of
22 the \$3900.00 in this circumstance.¹

23 Respondent's Request 20 and 35 are denied. That the Complainant was
24 charged \$26 for each returned item is undisputed. According to Respondent's

25 ¹ The Respondent has already demonstrated its knowledge of the proper tribunal
26 for that matter when it sued its long-standing customer less than thirty days
27 after the Respondent chose to cash a check the customer had no way of knowing
was allegedly counterfeit instead of requiring him to deposit the funds.

1 Exhibit C there are two items for which a customer can be charged \$26;
2 namely, Overdrafts and Stop Payments. Mr. Maloof testified and his exhibits
3 10, 13, and 15 show there were sufficient funds to cover the checks which
4 were denied at the time the checks were written. It appears undisputed that
5 none of the dishonored checks were written after Respondent notified
6 Complainant that they were exercising their set-off right. There appears to
7 be nothing in the agreement between the bank and their customers that allows
8 the Bank to charge a fee to a customer for the bank choosing to dishonor
9 checks after choosing to exercise their set-off right.

9 I therefore rule that the charges by the Respondent were unlawful and
10 recommend that the Commissioner order them credited against Complainant's
11 account. The exhibits submitted show that the Respondent charged the
12 Complainant an "overdraft fee" of \$26.00 on sixteen occasions when, but for
13 the Respondent's exercise of its set-off right, there would have been funds
14 available. This resulted in \$416.00 of charges against the Complainant's
15 account that have no basis in the contracts between the Respondent and the
16 Complainant.

16 Because I have found that the Respondent has violated its own agreement
17 with the Complainant I deny Respondent's Requests 36 through 39.

18 I therefore submit the attached proposed order for the Commissioner's
19 approval, disapproval or modification.

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21
22 Respectfully submitted,

23 /S/
24 James Shepard, Esq.
25 Presiding Officer
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1 State of New Hampshire Banking Department

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3 In re the Matter of:) Case No.: 08-BD-001
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 4 State of New Hampshire Banking)
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 5 Department,) ORDER of the Commissioner
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 6 and)
)
 7 David A. Maloof)
)
 8 Complainant,)
)
 9 and)
)
 10 Franklin Savings Bank,
 11 Respondent

12
13
14 ORDER

15 The Recommended Decision by the Presiding Officer is hereby adopted and I
16 hereby

- 17 1. ADOPT the recommendation of the Presiding Officer and therefore
 18 2. FIND that the Respondent committed a violation of the Chapter and/or
 19 an unfair or deceptive act or practice and therefore
 20 3. ORDER Respondent to credit \$416.00 to Complainant's account
 21 immediately upon receipt of this order and to furnish evidence of
 22 such credit to the Department.

23
 24 /s/ _____
 Peter C. Hildreth
 Commissioner
 25 State of New Hampshire
 Banking Department

6/3/08

 Date