

COMMONWEALTH OF KENTUCKY
PUBLIC PROTECTION CABINET
DEPARTMENT OF FINANCIAL INSTITUTIONS
AGENCY CASE NO. 2018-AH-0031



DEPARTMENT OF FINANCIAL INSTITUTIONS

COMPLAINANT

v.

GARY K. ROBERTS d/b/a LEVI PAWN AND GUN

RESPONDENT

**COMMISSIONER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND FINAL ORDER**

* * * * *

An Administrative Hearing was held in this matter on September 12, 2019, at the Department of Financial Institutions, 1025 Capital Center Drive, Frankfort, Kentucky. The Complainant, Department of Financial Institutions ("DFI" or "Department"), was represented by Catherine Falconer. Respondent was represented by Brian N. Thomas, Attorney at Law. Jim Howard, Hearing Officer, Public Protection Cabinet, presided.

The subject of the hearing was DFI's June 29, 2018 Administrative Complaint against Respondent seeking a Cease and Desist Order, restitution, and fines for various violations of KRS Chapter 286.9. The Hearing Officer, having reviewed the record, including all exhibits and written submissions by the parties, issued a Recommended Findings of Fact, Conclusions of Law, and Recommended Order ("Recommended Order").

For the reasons set forth herein, the Commissioner hereby enters this **Findings of Fact, Conclusions of Law, and Final Order** adopting, in part and as modified herein, the Findings of Fact, Conclusions of Law, and Recommended Order issued by the Hearing Officer.

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BOONEVILLE OFFICE

FINDINGS OF FACTS

Respondent owned and operated a pawn shop in Booneville, Kentucky called Levi Pawn and Gun. Respondent testified that he had been in business for approximately 10 years and he accepted various objects in pawn transactions, including automobiles and guns. Respondent was licensed as a pawnbroker in Owsley County, Kentucky.

As part of Respondent's business, he made loans against debit cards loaded with government benefits. The cards were designed for individuals who receive government benefits but do not have bank accounts or have access to direct deposit. From December 2016 to August 2018, when he received a Cease and Desist Order from DFI, Respondent engaged in approximately 400-500 loan transactions with customers involving the government benefit debit cards.

Respondent testified that he believed the cards to be personal property and subject to the pawnbroker statutes. He also claimed to have spoken to two different attorneys who informed him that the transactions were legal. An example of a pawn ticket involving one of the debit card transactions was entered into the evidence at the hearing. The ticket purportedly showed a 30-day pawn transaction, in which Respondent would take possession of the customer's card along with the customer's PIN number until the customer returned to pay off the loan. At that point, Respondent would either enter the PIN and debit the account, including a fee, or would give the card back if the customer paid the balance in cash, along with a fee. Respondent would call the 800 number on the back of the card to determine when the benefit payments were scheduled to be made on the cards. Respondent acknowledged that the cards themselves were worthless and the only value was the funds loaded on the card.

Based on a review of the record, the Commissioner adopts the Hearing Officer's finding that Respondent made loans against debit cards from 2016 until August 2018, when the Department issued a Cease and Desist Order against Respondent. Also adopted is the finding that the debit cards had no value by themselves, but were rather the means to obtain the funds deposited on the cards, which represented government benefit payments. Finally, the Commissioner adopts the finding that Respondent was not licensed to conduct deferred deposit activity in Kentucky.

CONCLUSIONS OF LAW

The Hearing Officer found that Respondent was conducting deferred deposit activity in Kentucky without being licensed. This finding is adopted, along with the Hearing Officer's finding that the debit cards held by Respondent were payment instruments under KRS 286.9. The Commissioner agrees that, based on multiple instances in KRS 286.9, the definition of "payment instrument" includes "debit authorization, electronic funds transfer, and any other form of electronic transmission of money." This definition of payment instrument would include the debit cards described in this case.

The Commissioner does not accept the Hearing Officer's finding that a penalty is not appropriate in the case. The Hearing Officer stated that there was no evidence Respondent acted in bad faith, as evidenced by the fact that he sought legal counsel to make sure he was compliant with the law. The Hearing Officer further opined, "there was no evidence that any customer was harmed- it appears that each got exactly what he bargained for." The Commissioner rejects this finding and its use to avoid recommending a penalty and order of restitution.

The Hearing Officer has seemingly added an "intent" element to the statute and has excused any monetary penalty or restitution based on this added element. Violation of the statute is not dependent on the mental state of the violator. Additionally, it is established Kentucky law that

reliance on the advice of counsel will not excuse violations of agency statutes or regulations. *See Executive Branch Ethics Comm'n v. Stephens*, 92 S.W.3d 69 (Ky. 2002). Based on the evidence at the hearing and as explained in the Recommended Order, Respondent engaged in deferred deposit activity without being licensed, which is a violation of KRS 286.9-020.

The Recommended Order also attempted to add an extra element of “harm” to customers before a fine or restitution is ordered. It should first be noted that violation of regulatory statutes is harm in and of itself. The Kentucky Supreme Court, in ruling on the “harm” element for the issuance of a temporary injunction requested by a state agency, held that “[w]here the government is enforcing a statute designed to protect the public interest, it is not required to show irreparable harm to obtain injunctive relief; the statute’s enactment constitutes Congress’s implied finding that violations will harm the public and ought, if necessary, be restrained.” *Boone Creek Properties, LLC v. Lexington-Fayette Urban County Board of Adjustment*, 442 S.W.3d 36, 40 (Ky. 2014).

Besides being contrary to statutory law enacted by the state legislature, the Department concludes consumers were harmed by the Respondent’s actions, as the customers were charged an exorbitant rate to borrow money from Respondent. Evidence at the hearing revealed that Respondent charged approximately 20% per transaction and also charged a \$7.50 swipe fee when the card was redeemed. While the customers may have technically consented to these transactions, this activity is covered by KRS 286.9, and the Respondent is required to obtain a license prior to engaging in such activity.

While the Hearing Officer correctly found the debit cards to be payment instruments and that Respondent engaged in unlicensed deferred deposit activity, the Hearing Officer declined to enter an order of restitution for the illegal transactions. The Commissioner rejects this finding based on the plain language of the statute.

Pursuant to KRS 286.9-035(1), “[a]ny deferred deposit transaction agreement made with a person who is not licensed under this subtitle shall be void, and the person shall not collect any principal, fee, interest, charges, or recompense whatsoever.” (Emphasis added). The Hearing Officer determined that the transactions entered into between Respondent and the customers were deferred deposit transactions. Based on the explicit language in the statute, Respondent is not entitled to any principal, fee, interest, charges, or any other type of recompense. By using the word “shall”, the legislature has not left any discretion to the Commissioner as to whether the transactions are void. This is especially apparent when compared to KRS 286.9-035(2), which states that “[t]he commissioner may void a deferred deposit transaction agreement when it is determined by the commissioner that the licensee has violated any provision of this subtitle. The licensee shall be allowed to recover from the customer any principal paid by the licensee to the customer, but the licensee shall not recover any service fee or other charge related to the deferred deposit transaction.” (Emphasis added). When a *licensee* violates KRS 286.9, there is discretion as to whether the transactions may be voided. That is not the case when dealing with unlicensed persons, such as Respondent.

Based on the literal reading of the statute, Respondent may not collect any type of payment from the transactions, and the transactions are void. Therefore, the payments collected by Respondent should be refunded to the customers. In the hearing, Respondent admitted he took the debit cards from December 2016 through August 2018. (Hearing Transcript, p. 171). According to the Department’s witness, Jennifer Doom, Respondent entered into 400-500 unlicensed transactions during that time period. (Recommended Order, p. 3). Based on the Hearing Officer’s opinion that Respondent engaged in unlicensed deferred deposit activity, which is adopted in this Final Order, Respondent is not permitted to collect any kind of

recompense for the transactions. Therefore, Respondent shall be required to make restitution to all effected customers from December 2016 through August 2018.

The Hearing Officer recommended there be no civil penalty assessed against Respondent for the violations of KRS 286.9-035. The Commissioner's authority related to civil penalties is found at KRS 286.9-991. According to the statute, the Commissioner may issue a civil penalty of \$1,000-\$5,000 per violation for each day the violation is outstanding. In order to deter any similar future conduct by Respondent or others, the Commissioner believes a civil penalty is warranted. Based on the mitigating circumstances mentioned in the Recommended Order, including Respondent's seeking the advice of counsel, the Commissioner levies a civil penalty of \$2,000 for the unlicensed deferred deposit activity.

FINAL ORDER

THEREFORE, based upon the foregoing findings of fact and conclusions of law and pursuant to KRS 286.9 and KRS 13B.120, IT IS HEREBY **ORDERED** AS FOLLOWS:

1. Except as modified herein, the Findings of Fact, Conclusions of Law, and Recommended Order issued by the Hearing Officer on July 24, 2020, and attached hereto, are adopted in full and incorporated by reference into this Final Order;

2. Respondent, Gary K. Roberts a/k/a Levi Pawn, shall CEASE AND DESIST from engaging in unlicensed deferred deposit activity in Kentucky;

3. Respondent, Gary K. Roberts a/k/a Levi Pawn, shall refund all principal collected and fees, interest, or charges paid by customers in the unlicensed deferred deposit transactions between December 2016 and August 2018. Respondent shall provide written proof by January 10, 2021 (90 days from the effective date of this Order) that the restitution has been made; and

4. Respondent, Gary K. Roberts a/k/a Levi Pawn, shall pay a fine of \$2,000 for violations of the statutes as described herein. Payment of the fine shall be due on or before February 9, 2021 (120 days from the effective date of this Order).

This is a **FINAL AND APPEALABLE ORDER**. The **EFFECTIVE DATE** of this order shall be the date reflected on the certificate of service attached to this order.

NOTICE OF APPEAL RIGHTS

Pursuant to KRS 13B.140, you are hereby notified that any person aggrieved by this Final Order of the Commissioner may obtain a review of the Order in the Circuit Court of proper venue pursuant to KRS 13B.140. If you choose to appeal, you must file a written petition asking that the order be modified or set aside in whole or in part within thirty (30) days after the date reflected on the certificate of service attached to this Final Order. A copy of the petition must be served upon the Commissioner.

SO ORDERED this 12th day of October , 2020.

Charles A. Vice

Digitally signed by: Charles A. Vice
DN: CN = Charles A. Vice email = charles.vice@ky.gov C = AD O = KY
DFI OU = KY Public Protection Cabinet
Date: 2020.10.12 12:00:04 -04'00'

CHARLES A. VICE
COMMISSIONER

Certificate of Service

I hereby certify that a true and correct copy of the foregoing **Final Order** was entered by the Commissioner and sent by certified mail, return receipt requested, on this the 13th day of October, 2020, to:

Hon. Brian Thomas
Grant, Rose & Pumphrey
41 South Main Street
Winchester, KY 40391

Counsel of Record for Respondent

Gary K. Roberts
d/b/a Levi Pawn and Gun
2000 KY 11 North
Booneville, KY 41314
Respondent

And by hand-delivery to:

Hon. Catherine Falconer
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And by messenger mail to:

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Kentucky Department of Financial Institutions

Name: Allyson Reed

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