COMMONWEALTH OF KENTUCKY
PUBLIC PROTECTION CABINET
DEPARTMENT OF FINANCIAL INSTITUTIONS
ADMINISTRATIVE CASE NO. 2019-AH-0064

DEPARTMENT OF FINANCIAL INSTITUTIONS **COMPLAINANT**

V.

RUOFF MORTGAGE COMPANY **RESPONDENT**

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

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An Administrative Hearing was held in this case on August 9, 2021, pursuant to the provision of Kentucky Revised Statutes 13B.080 ("KRS") and KRS 13B.090, before Administrative Hearing Officer Jim Howard[1] and subsequently assigned to Administrative Hearing Officer Shawn Chapman ("Hearing Officer" or "Hearing Officer Chapman") for review and submission of a recommended order to the Commissioner of the Department of Financial Institutions, ("DFI" or "Department") pursuant to KRS 13B.110. The Department was represented by Gary Stephens. Ruoff Mortgage Company ("Ruoff" or "Respondent") was represented by Randall Strause.

In the Administrative Complaint, the Department alleged violations of the applicable law under KRS 286.8. Specifically, the Department alleges that Ruoff conducted business in Kentucky from its Columbus and New Albany, Indiana branches before obtaining licenses for those branches. In addition, one of Ruoff's employees originated loans in Kentucky without being

[1] Hearing Officer Jim Howard was no longer employed by the Administrative Hearing Office at the time of the review of the record. The case was subsequently assigned to Hearing Officer Shawn Chapman to provide the final Recommended Order.

registered in Kentucky, and finally, Ruoff failed to exercise control over its operations, employees, and company affairs.

On February 21, 2022, Hearing Officer Chapman, after having reviewed the record and all written submissions and evidence submitted by the parties, issued a Recommended Findings of Fact, Conclusions of Law and Recommended Order ("Recommended Order").

After review of the entire record, and for the reasons set forth herein, the Commissioner hereby enters this **Findings of Fact, Conclusions of Law and Final Order** adopting in total, the Findings of Fact, Conclusions of Law and Recommended Order issued by Hearing Officer Chapman.

Findings of Fact

In its original Administrative Complaint, and later Amended Administrative Complaint, and as stated in the Hearing Officer's Recommended Order, the Department alleged four Counts of statutory violations against Ruoff as follows:

1. That Ruoff established and maintained a mortgage branch at 1160 Washington Street, Columbus, Indiana 47201 and conducted business in the Kentucky mortgage loan process, including closing a Kentucky mortgage loan, prior to obtaining a license for the branch, in violation of KRS 286.8-032(5), KRS 286.8-036(3), and KRS 286.8- 100(1);

2. That Ruoff established and maintained a mortgage branch at 3125 Blackiston Mill Road, New Albany, Indiana 47150 and conducted business in the Kentucky mortgage loan process, including closing six Kentucky mortgage loans, prior to obtaining a license for the branch, in violation of KRS 286.8-032(5), KRS 286.8-036(3), and KRS 286.8-100(1);

3. That on five separate occasions, Jordan Plunkett, a mortgage loan originator employed by Ruoff, originated Kentucky mortgage loans without being registered as a mortgage loan originator in Kentucky, in violation of KRS 286.8-030(1)(d); and

4. That by repeatedly allowing a mortgage loan originator to conduct unlicensed activity and by engaging in the Kentucky mortgage lending process from unlicensed branches, Ruoff failed to exercise control over its operations, employees, and company affairs, in violation of KRS 286.8-295. (See Recommended Order of Hearing Officer Chapman, Findings of Fact, pg. 1-2). Additionally, in its request for relief, the Department requests a civil penalty in the amount of twenty thousand dollars ($20,000).

Hearing Officer Chapman states, referenced here in relevant part, the following Findings of Fact:

1. At all relevant times in this case, Ruoff had a branch office located at 1160 Washington Street, Columbus, Indiana 47201.

2. The Columbus branch transacted business in the Kentucky mortgage loan process before obtaining a license for the branch. Specifically, the branch closed a loan for a Kentucky property on August 22, 2016.

3. At all relevant times in this case, Ruoff had a branch office located at 3125 Blackiston Mill Road, New Albany, Indiana 47150.

4. The New Albany branch transacted business in the Kentucky mortgage loan process before obtaining a license for the branch. Specifically, the branch closed six Kentucky mortgage loans between April and July 2018.

5. Jordan Plunkett previously worked for Movement Mortgage LLC. When working for that company, he was registered as a mortgage loan originator in Kentucky. He left that

company's employment on May 28, 2019, when the branch at which he worked was closed. His registration expired on July 3, 2019, because Movement Mortgage LLC was no longer his sponsor.

6. Plunkett began employment with Ruoff on July 8, 2019. Ruoff failed to identify him as a sponsored employee until October 10, 2019. His registration as a licensee was approved on October 17, 2019. Thus, Plunkett's license was inactive from July 3, 2019 to October 17, 2019.

7. Plunkett originated five loans for properties located in Kentucky in August 2019. Plunkett was not licensed or registered in Kentucky when he originated those loans.

8. When Plunkett became employed by Ruoff, his registration was not immediately established with Ruoff as his sponsor due to a clerical error. Specifically, Ruoff's mortgage lending officer, Clint Morgan, failed to accomplish Plunkett's registration by failing to hit a "button," presumably referring to a computerized registration, that would have made Ruoff the sponsor of Plunkett."

Based on the review of the entire record, the Commissioner adopts the Hearing Officer's complete Findings of Fact in total and Finds the Respondent violated KRS 286.8 on all four counts as alleged in the Administrative Complaint.

Conclusions of Law

The Hearing Officer addressed the issues presented in Conclusions of Law under three separate sections, (A) the Statutory and Regulatory violations, (B) Ruoff's constitutional challenge to the statute under which the Department seeks the penalty and (C) a constitutional and statutory challenge to the Department's conduct in this matter. Those sections, as listed in the Recommended Order, are addressed by the Commissioner separately below.

(A) Statutory and Regulatory Violations.

The Hearing Officer addressed the statutory and regulatory violations under Conclusions of Law, Section A, Subsections 1-3. The Commissioner, after review of the record, adopts the Hearing Officer's Conclusions of Law, in relation to the statutory and regulatory violations, in their entirety. (See Recommended Order, Conclusions of Law, pg, 3-7).

(B) Constitutional and other challenges. As stated by the Hearing Officer, Respondent raises allegations that the Department exceeded its statutory and constitutional authority. The Hearing Officer concluded these claims were without merit.

(1) The Department's internal guidelines as to fines do not violate KRS 13A.130, and any harm was rendered harmless by the administrative hearing process.

After review of the record, The Commissioner concurs with the Hearing Officer's analysis and adopts the corresponding Conclusions of Law in this matter in its entirety.

(2) Ruoff's constitutional attacks.

(a) Professor Bauries should not have been allowed to testify, and his testimony has been disregarded by the hearing officer.

After review of the record, The Commissioner concurs with the Hearing Officer's analysis and adopts the corresponding Conclusions of Law in this matter in its entirety.

(b) Ruoff cannot mount a facial challenge to any statute in this forum.

After review of the record, The Commissioner concurs with the Hearing Officer's analysis and adopts the corresponding Conclusions of Law in this matter in its entirety.

(c) Ruoff's as-applied constitutional challenge fails.

After review of the record, The Commissioner concurs with the Hearing Officer's analysis and adopts the corresponding Conclusions of Law in this matter in its entirety.

(C) [Civil] Penalty.

After review of the record, The Commissioner concurs with the Hearing Officer's analysis and adopts the corresponding Conclusions of Law in this matter in its entirety with a few additional comments.

As the Hearing Officer correctly states, "the Department "*has the burden to show the propriety of a penalty imposed.*" KRS 13B.090(7)." The Department agrees with the Hearing Officer's conclusions that the Department has shown the propriety of a civil penalty, but will address the Hearing Officer's comment that "The Department also offered no proof of harm or fraud in this case" and the recommended amount of civil penalty to impose.

The Commissioner would emphasize, in conjunction with *Complainant's Exceptions to the February 21, 2022 Recommended Order pg. 3*, in relation to the issue of harm,

"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' implied findings 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). (Emphasis added). The Department's statutes and regulations are designed to protect the public. Therefore, violations of the statutes or regulations are inherently harmful to the public and industry as a whole. Providing additional evidence of harm is not be required for the statutory

and regulatory violation. Furthermore, Fraud was not alleged in this case, therefore, to impose a fraud analysis in the civil penalty application would not be appropriate.

In relation to the amount of the civil penalty, the hearing officer concludes that "a civil penalty of more than the minimum per count but less than the maximum is more appropriate. Specifically, the hearing officer concludes that Ruoff should be assessed a civil penalty of $2,000 per count, for a total of $8,000." (See Recommended Order, pg. 14) rather than the requested $20,000 penalty. The Commissioner agrees with the conclusion of the Hearing Officer and, in consideration of the Respondent's act of self-reporting the incidents, believes a civil penalty of two thousand dollars ($2,000) per Count is appropriate and warranted in this case. The Commissioner will forgo imposition of an order for expenses and attorney's fees as the monetary penalty is deemed sufficient.

FINAL ORDER

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, and pursuant to KRS 286.8 and KRS 13B.120, it is hereby **ORDERED** as follows:

1. The Findings of Fact, Conclusions of Law and Recommended Order issued by the Hearing Officer on February 21, 2022, and attached hereto, are adopted in total and incorporated by reference into this Final Order;
2. Respondent, Ruoff Mortgage Company, shall pay a fine of $2,000 per Count, for violations of the statutes as described herein, for a total civil penalty amount of $8,000. Respondent will not be required to pay expenses or attorney fees to the Department. Payment of the civil penalty shall be due on or before 30 days following the entry of the Final 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 a person aggrieved by a Final Order of the Commissioner may obtain a review of the order by in the Circuit Court of the proper venue pursuant to KRS 13B. 140. If you chose to appeal the decision of the Commissioner, you must file a written petition asking the court to modify or set aside, in whole or in part, within thirty (30) days of 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 19th day of May, 2022.

Charles A Vice, Commissioner
Department of Financial Institutions

Certificate of Service

I hereby certify that a copy of the foregoing Final Order, was sent electronically this the 19 day of May, 2022 to:

Gary A. Stephens, Esq.
Department of Financial Institutions
500 Mero Street, 2SW19
Frankfort, KY 40601
Gary.Stephens@ky.gov
Counsel for Complainant

Randall Struase, Esq.
Strause Law Group, PLLC
804 Stonecreek Parkway, Suite One
Louisville, KY 40223
rstrause@strauselawgroup.com
Counsel for Respondent

Shawn D. Chapman
Executive Director Office of Administrative Hearings
Kentucky Public Protection Cabinet
500 Mero Street, 218 NC Frankfort, KY 40601
ShawnD.Chapman@ky.gov
Hearing Officer

Allison Reed by Victoria Ward

Allison Reed, Record Custodian
Department of Financial Institutions

COMMONWEALTH OF KENTUCKY
PUBLIC PROTECTION CABINET
DEPARTMENT OF FINANCIAL INSTITUTIONS
ADMINISTRATIVE CASE NO. 2019-AH-0064

DEPARTMENT OF FINANCIAL INSTITUTIONS **COMPLAINANT**

V.

RUOFF MORTGAGE COMPANY **RESPONDENT**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER

Introduction

In this action, the Department of Financial Institutions seeks to fine the Respondent, Ruoff Mortgage Company, $20,000 for various violations of Kentucky's mortgage loan statutes. Specifically, the Department alleges that Ruoff conducted business in Kentucky from its Columbus and New Albany, Indiana branches before obtaining licenses for those branches, that one of Ruoff's employees originated loans in Kentucky without being registered in Kentucky, and that Ruoff failed to exercise control over its operations, employees, and company affairs.

An evidentiary hearing was held in this case on August 9, 2021, before Hearing Officer Jim Howard. The Department was represented by Gary Stephens. Ruoff was represented by Randall Strause.

The matter has now been reassigned to the undersigned hearing officer, who has reviewed the transcript of the hearing and the exhibits admitted during the hearing, and the post-hearing briefs submitted by the parties. The undersigned hearing officer submits the following findings of fact, conclusions of law, and recommended order.

Findings of Fact

Based on the proof in this case, the hearing officer finds the following facts:

1. At all relevant times in this case, Ruoff had a branch office located at 1160 Washington Street, Columbus, Indiana 47201. This branch became licensed on August 29, 2016.

2. The Columbus branch transacted business in the Kentucky mortgage loan process before obtaining a license for the branch. Specifically, the branch closed a loan for a Kentucky property on August 22, 2016.

3. At all relevant times in this case, Ruoff had a branch office located at 3125 Blackiston Mill Road, New Albany, Indiana 47150. This branch became licensed on December 12, 2018.

4. The New Albany branch transacted business in the Kentucky mortgage loan process before obtaining a license for the branch. Specifically, the branch closed six Kentucky mortgage loans between April and July 2018.

5. Jordan Plunkett previously worked for Movement Mortgage LLC. When working for that company, he was registered as a mortgage loan originator in Kentucky. He left that company's employment on May 28, 2019, when the branch at which he worked was closed. His registration expired on July 3, 2019, because Movement Mortgage was no longer his sponsor.

6. Plunkett began employment with Ruoff on July 8, 2019. Ruoff failed to identify him as a sponsored employee until October 10, 2019. His registration as a licensee was approved on October 17, 2019. Thus, Plunkett's license was inactive from July 3, 2019 to October 17, 2019.

7. Plunkett originated five loans for properties located in Kentucky in August 2019. Plunkett was not licensed or registered in Kentucky when he originated those loans. Plunkett was unaware that his Kentucky license/registration had lapsed when he left Movement Mortgage or that he originated loans in August 2019 without a valid license/registration.

8. When Plunkett became employed by Ruoff, his registration was not immediately established with Ruoff as his sponsor due to a clerical error. Specifically, Ruoff's mortgage lending officer, Clint Morgan, failed to accomplish Plunkett's registration by failing to hit a "button," presumably referring to a computerized registration, that would have made Ruoff the sponsor of Plunkett.

9. On April 13, 2017, Ruoff entered into an agreed order with the Department to resolve a case in which it was alleged that Ruoff had transacted business in Kentucky from three unlicensed branches, and employed ten unlicensed mortgage loan originators in 2016. Although Ruoff neither admitted nor denied the factual allegations, it agreed to pay a civil penalty of $17,500 to resolve the case. The branches and employee conduct covered by this agreed order are different from that in this case.

10. On November 30, 2018, Ruoff entered into an agreed order with the Department to resolve a case in which it was alleged that Ruoff had transacted business in Kentucky from two unlicensed branches in 2018. Although Ruoff neither admitted nor denied the factual allegations, it agreed to

pay a civil penalty of $9,500 to resolve the case. The branches covered by this agreed order are different from that in this case.

Conclusions of Law

As noted above, the Department seeks a $20,000 fine against Ruoff for the alleged statutory violations. Each of the four alleged counts is addressed in turn. Ruoff has also raised a constitutional challenge to the statute under which the Department seeks the penalty and a constitutional and statutory challenge to the Department's conduct in this matter. Those issues are addressed separately below, after the hearing officer determines whether a violation has been proven. Finally, the question of penalty is addressed.

(A) Statutory and Regulatory Violations.

The Department has alleged four general counts against Ruoff, as follows:

1. That Ruoff established and maintained a mortgage branch at 1160 Washington Street, Columbus, IN 47201 and conducted business in the Kentucky mortgage loan process, including closing a Kentucky mortgage loan, prior to obtaining a license for the branch, in violation of KRS 286.8-032(5), KRS 286.8-036(3), and KRS 286.8-100(1);
2. That Ruoff established and maintained a mortgage branch at 3125 Blackiston Mill Road, New Albany, IN 47150 and conducted business in the Kentucky mortgage loan process, including closing six Kentucky mortgage loans, prior to obtaining a license for the branch, in violation of KRS 286.8-032(5), KRS 286.8-036(3), and KRS 286.8-100(1);
3. That on five separate occasions, Jordan Plunkett, a mortgage loan originator employed by Ruoff, originated Kentucky mortgage loans without being registered as mortgage loan originator in Kentucky, in violation of KRS 286.8-030(1)(d); and
4. That by repeatedly allowing a mortgage loan originator to conduct unlicensed activity and by engaging in the Kentucky mortgage lending process from unlicensed branches, Ruoff failed to exercise control over its operations, employees, and company affairs, in violation of KRS 286.8-295.

(1) Counts I and II: Ruoff processed loans from its Columbus and New Albany, Indiana offices before obtaining a license, in violation of KRS 286.8-032(5), KRS 286.8-036(3), and KRS 286.8-100(1).

Counts I and II of the amended administrative complaint alleges violations of KRS 286.8-032(5), KRS 286.8-036(3), and KRS 286.8-100(1).

Under KRS 286.8-032(5), "If a licensee desires to establish a branch, the licensee shall file an application with the commissioner that includes the physical location and telephone number of the branch, the name of the prospective manager, the anticipated opening date, and any other information requested by the commissioner."

Under KRS 286.8-036(3), "No licensee shall transact the business provided for by this subtitle under any other name or maintain an office at any location other than that designated in the license."

And under KRS 286.8-100(1), "No licensee shall establish or maintain a branch transacting business in Kentucky, either directly or indirectly, without filing the application as described in KRS 286.8-032(5) and receiving prior written approval of the commissioner."

As used in these statutes, the phrase "'transact business in Kentucky' … means to participate in any meaningful way in the mortgage lending process, including the servicing of mortgage loans, with respect to any residential real property located in Kentucky." KRS 286.8-010(34).

Read together, these statutes require any branch location of a mortgage company to be licensed or otherwise approved before participating in the mortgage lending process in Kentucky.

Ruoff does not dispute that its Columbus and New Albany branches originated or otherwise participated in the mortgage lending process with respect to residential real property in Kentucky before those branches were separately licensed. As noted above, the proof established that at least one loan was processed at the Columbus branch before it was licensed, and six loans were processed at the New Albany branch before it was licensed. Instead, Ruoff argues that the Department's reading of KRS 286.8-100(1) and KRS 286.8-036(3)[1] is contradictory or otherwise inconsistent, in that the former allows transacting business in Kentucky only with permission, while the latter appears to permit transactions regardless of whether the branch location is in Kentucky.

[1] Ruoff's references to the subsection of this statute at issue are to "No. 4." Ruoff appears to be referring to subsection (4) of the statute, but the relevant provision is subsection (3). In fact, Ruoff's brief quotes subsection (3). By referring to subsection (4), Ruoff appears to be referring to the version of the statute that existed before a 2016 amendment resulted in the present subsection (3) being numbered as such.

These provisions simply are not in conflict, even as read by the Department. First, Ruoff misreads both provisions as granting permission of any kind; both provisions are limits on what a licensee may do, not grants of permission.

Second, in proposing this seeming contradiction, Ruoff runs together two concepts: the notion of transacting business in Kentucky and the notion of having a business location in Kentucky. This can be seen in Ruoff's questioning of Prof. Bauries, when counsel described the statutes as follows: "these two positions, one says in Kentucky and the other one says registered Kentucky branch." But one can transact business in Kentucky, as defined in KRS 286.8-010(34), without having a location in Kentucky. Engaging in a mortgage transaction concerning Kentucky real estate, regardless of where the transaction is consummated, constitutes transacting business in Kentucky. For a branch to engage in such business, KRS 286.8-100(1) requires it to have obtained approval from the Department. Similarly, KRS 286.8-036(3) bars a licensed mortgage broker from conducting business governed by KRS Chapter 286.8—that is transacting mortgage business in Kentucky—at any location not listed in the license. Instead of being contradictory, the provisions align with each other (and may even be somewhat redundant). Read together, the statutes require that any branch of a mortgage company, regardless of its location, that transacts business in Kentucky to be licensed.

The hearing officer therefore concludes that the Department proved by a preponderance of the evidence that Ruoff committed the statutory violations as alleged in Counts I and II of the amended complaint.

(2) Count III: Ruoff violated KRS 286.8-030(1)(d).

Count III of the amended complaint alleges that on five separate occasions, Jordan Plunkett, a mortgage loan originator employed by Ruoff, originated Kentucky mortgage loans without being registered as mortgage loan originator in Kentucky, in violation of KRS 286.8-030(1)(d). Under KRS 286.8-030(1)(d), "It is unlawful for any mortgage loan company or mortgage loan broker to employ or use a mortgage loan originator if the mortgage loan originator is not registered in accordance with KRS 286.8-255 or otherwise exempted."

Ruoff does not dispute that Plunkett originated loans during a period in which he was not registered as a mortgage loan originator. Indeed, Ruoff does not even address this count directly in

its post-hearing brief, having not even cited the relevant statute.[2] Instead, Ruoff appears to seek to minimize the conduct by stating in the background section of its brief that Plunkett was unregistered due to what amounts to a clerical error, where one of its employees simply failed to update Plunkett's registration when he began employment with Ruoff.

Ruoff's discussion in this respect may work in mitigation of any penalty, but it does not go to whether the violation occurred. There is no question from the proof that Ruoff employed or used a mortgage loan originator—Plunkett—who was not registered under KRS 286.8-255. Thus, the hearing officer concludes that the Department proved by a preponderance of the evidence that Ruoff violated KRS 286.8-030(1)(d) as alleged in Count III of the amended complaint.

(3) Count IV: Ruoff failed to properly control its operations, employees, and company affairs, in violation of KRS 286.8-295.

Count IV of the amended complaint alleges that "by repeatedly allowing a mortgage loan originator to conduct unlicensed activity and by engaging in the Kentucky mortgage lending process from unlicensed branches, Ruoff failed to exercise control over its operations, employees, and company affairs, in violation of KRS 286.8-295. That statute provides, in relevant part: "Every mortgage loan company and mortgage loan broker shall exercise proper supervision and control over the operations, employees, and affairs of its company."

With respect to this count, Ruoff complains only that the Department "fail[ed] to provide any source or definition of institutional control they allege Ruoff has failed to maintain," and that "[t]here is nothing in any of the statutes that defines lack of institutional control." To some extent, Ruoff's complaint appears to be based on the colloquial phrase "institutional control," which several witnesses used during their testimony. This ignores that statute under which Count IV was brought does not use that phrase. Instead, it refers only to "control." That term is expressly defined: "'Control' means the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise …." KRS 286.8-010(9). This is the controlling statutory authority on which the Department relies.

Ruoff also argues that the Department generally failed to offer any statutory authorization for Count IV and thus that the Department exceeded its statutory authority. But KRS 286.8-295,

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[2] The brief includes a single reference to KRS 286.8-030 (Br. at 16), with no subsections cited, but this appears to be a typographical error, as the discussion is of KRS 286.8-036's requirement that a mortgage company be licensed.

under which Count IV was brought, is the statutory authority for the count, especially when considered in conjunction with the definition of "control." A violation of that statute is grounds for disciplinary action by the Department, without further statutory authorization.

The simple fact is that, as discussed above, Ruoff allowed two of its Indiana branches to transact business in Kentucky without being licensed or otherwise approved by the Department, and it permitted an unregistered mortgage loan originator to originate loans in Kentucky (and it failed to update the employee's registration when he joined the company). KRS 286.8-295 requires a mortgage company to *properly supervise and control* the operations, employees, and affairs of its company. By allowing the violations covered by Counts I, II and III to occur, Ruoff failed to properly supervise and control its operations, employees, and affairs. Had it engaged in proper supervision and control, the violations would not have occurred. The hearing officer concludes that the Department proved by a preponderance of the evidence that Ruoff violated KRS 286.8-295 as alleged in Count IV of the amended complaint.

(B) Constitutional and other challenges.

Most of Ruoff's brief is dedicated to allegations that the Department exceeded its statutory and constitutional authority. Those challenges are addressed separately here.

(1) The Department's internal guidelines as to fines do not violate KRS 13A.130, and any harm was rendered harmless by the administrative hearing process.

Ruoff complains about the Department's use of a set of internal matrices or guidelines when setting the amount of fines that it initially assesses or proposes and later seeks during an administrative hearing. Specifically, Ruoff alleges that this practice violates KRS 13A.100's bar on regulation through "internal policy, memorandum, or other form of action" other than a properly promulgated administrative regulation. The hearing office shares Ruoff's concern to some extent, especially as it appears that these internal matrices are not publicly available.

That concern, however, is alleviated by the fact that before a fine or other sanction can be imposed, Ruoff had the right to seek an administrative hearing at which the Department would be required to prove both the statutory violations and "the propriety of a penalty imposed." KRS 13B.090(7). In this proceeding, no deference is afforded the matrices used by the Department or the penalty that it initially proposed. This proceeding is conducted *de novo*, with the Department bearing the burden of proof. Even if there were any impropriety in the Department's use of an

unpublished matrix or memorandum when it is processing cases before the administrative hearing stage, the administrative hearing renders it harmless.

But ultimately, the hearing office perceives no violation of KRS 13A.100. Ruoff is not bound by the matrices used by the Department. Thus, they are not an attempt to modify, limit, or extend a statute or regulation. Instead, they appear to have been used to direct the Department's internal processes in handling cases. In this proceeding, the controlling law is KRS 286.8-046(1), which permits a civil penalty of "not less than one thousand dollars ($1,000) nor more than twenty-five thousand dollars ($25,000) per violation, plus the state's costs and expenses for the examination, investigation, and prosecution of the matter, including reasonable attorney's fees and court costs." The Department has not alleged that its internal matrices or policies control over this statute or affect how it should be applied in this proceeding. Indeed, no evidence of the content of those matrices was ever admitted into evidence, other than that some witnesses noted vaguely factors that the Department considers internally.

(2) Ruoff's constitutional attacks.

Ruoff also raises a constitutional challenge, although the scope and nature of that challenge are not clear. In some respects, Ruoff appears to be challenging the constitutionality of the statutes themselves, such as where it states that the statutes' "enactment … constitute arbitrary action under the Kentucky Constitution" (Br. at 20), and alleges that the "penalty provision is arbitrary based on the lack of a discernible protective purpose for the particular provisions of the statute that require loans to be processed and closed in a particular location" (Br. at 21). This appears to be a facial challenge to the statutes at issue and is based, in large part, on the testimony of Scott Bauries, a law professor at the University of Kentucky College of Law. Ruoff also argues that the Department violated Section 2's prohibition on arbitrary state action by exceeding its statutory authority, by failing to afford due process, and by lacking substantial evidence. This appears to be an as-applied challenge.

(a) Professor Bauries should not have been allowed to testify, and his testimony has been disregarded by the hearing officer.

Professor Bauries was permitted to testify at length as to his opinion of whether the statutes at issue in this case and the Department's handling of the case are unconstitutional. He appears to have been allowed to testify without objection from the Department. Nevertheless, Professor

Bauries should not have been allowed to testify about whether constitutional violations occurred in this case.

Professor Bauries testified as to questions of law—that is, whether the Department's statutes and conduct violated various constitutional protections. But "testimony regarding a legal conclusion is improper, for witnesses—whether of a lay or expert variety, 'are not qualified to express opinions as to matters of law." *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 623–24 (Ky. App. 2003) (quoting Robert G. Lawson, *The Kentucky Evidence Handbook*, § 6.15 at 291 (3d Ed., 2002 supp.)); *see also Tamme v. Com.*, 973 S.W.2d 13, 32 (Ky. 1998) ("[A] witness generally cannot testify to conclusions of law."); *Griffith v. Blair*, 430 S.W.2d 337, 339 (Ky. 1968) (holding "expert may not usurp the function of the board by giving testimony which, in the form of a medical opinion, expresses a legal conclusion"); *Lambert v. Franklin Real Est. Co.*, 37 S.W.3d 770, 779 (Ky. App. 2000) (holding that expert "was not qualified to give a legal opinion as to the legal standards to establish the liability"); *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) ("Expert testimony is not proper for issues of law. Experts interpret and analyze factual evidence. They do not testify about the law...." (quoting *United States v. Brodie*, 858 F.2d 492, 496 (9th Cir.1988) (quotation marks omitted)). Thus, Professor Bauries was improperly allowed to provide expert testimony laying out his legal opinion and conclusions.

The proper place for expert assistance on matters of law is in briefing and making legal arguments to a court of other tribunal. *See RLJCS Enterprises, Inc. v. Pro. Ben. Tr. Multiple Emp. Welfare Ben. Plan & Tr.*, 487 F.3d 494, 498 (7th Cir. 2007) ("If specialized knowledge about tax or demutualization would assist the judge, the holders of that knowledge can help counsel write the briefs and present oral argument. In this court each side is represented by two law firms, and a professor of law also has signed plaintiffs' brief. Enough!"); *Roundy's Inc. v. N.L.R.B.*, 674 F.3d 638, 648 (7th Cir. 2012) (holding that expert's opinion in administrative action "as to Wisconsin property law amounts to legal arguments that should be presented to the court in counsel's analysis, not expert opinion testimony").

Because Professor Bauries testified as to legal conclusions, his testimony should not have been allowed, even without objection from the Department. That said, the evidence is already in the record. The only remedy is for the hearing officer to disregard the testimony, which he has done.[3]

[3] The hearing officer has cited an instance of Professor Bauries' testimony above, but did so only as an example of Ruoff's approach to this case, and not for the "truth" of the assertion.

(b) Ruoff cannot mount a facial challenge to any statute in this forum.

To the extent that Ruoff raises a facial challenge to the statutes at issue in this case, the hearing officer cannot consider it. The Supreme Court has held that "an administrative agency cannot decide constitutional issues. Thus, to raise the facial constitutional validity of a statute or regulation at the administrative level would be an exercise in futility." *Commonwealth v. DLX, Inc.*, 42 S.W.3d 624, 626 (Ky. 2001). The hearing officer has no authority to consider Ruoff's facial challenge and thus offers no opinion as to the merits of that challenge.

(c) Ruoff's as-applied constitutional challenge fails.

The rule identified in *DLX*, however, is limited to facial attacks on regulations and statutes. Where a party attacks the application of a statute or regulation as unconstitutional, the agency may consider the constitutional question. *Id.* Indeed, when a party alleges that an agency is acting beyond the scope of its statutory authority, which would be unconstitutional, the matter must be litigated before the agency, because "it is the administrative action which determines the extent, if any, of the constitutional injury." *Id.*

Essentially, Ruoff claims that the Department is acting arbitrarily, in violation of Section 2 of the Kentucky Connstitution. Specifically, Ruoff alleges that by incorrectly interpreting and applying its statutes, the Department is acting beyond its statutory authority and is not providing procedural due process. It also argues that the Department's actions are not supported by substantial evidence. Finally, it argues that the proposed fine violates the equal-protection aspects of Section 2 of the constitution.

As to the first claim, the hearing officer concludes that the Department has not incorrectly interpreted or applied it statutes. As discussed above, the Department's reading of the two licensing statutes at issue, KRS 286.8-100 and -036, are not incorrect or contradictory. In fact, the Department's approach to the statutes harmonizes them, which, if anything, would save them from a constitutional challenge.

The hearing officer also concludes that the Department has not failed to provide due process. This claim appears to be based on the allegation that the Department improperly uses internal guidelines. But as discussed above, the administrative hearing cures any defect in that respect. In this administrative hearing, Ruoff received notice of the allegations against it, was permitted to be heard and put on evidence, and received the benefit of the Department's bearing the burden of proof. That suffices to meet the demands of due process of law.

The claim that the Department's actions are not supported by substantial evidence is better reserved for judicial review of any final order in this case. Nevertheless, the hearing officer concluded as to each of the counts above that the Department carried its burden of proof by a preponderance of the evidence. That satisfies the requirement of substantial evidence.

Ruoff's final argument,[4] that the proposed fine violates the equal-protection aspects of Section 2 of the Kentucky Constitution, is equally unavailing. This argument is also better reserved for later judicial review, since the fine has not yet been established. Nevertheless, the hearing office concludes that the Department's decision to seek a $20,000 fine in this case does not violate the equal protection aspects of Section 2. The other fines that Ruoff has identified all appear to have been the result of settlement negotiations, rather than completed administrative hearings. The amounts were the result of compromise, and thus are not comparable to a case, like here, where the licensee proceeds to an administrative hearing. To establish an equal protection violation, a party must identify similarly situated parties who were treated differently. Ruoff has failed to do so.

(C) Penalty.

Having concluded that Ruoff violated the statutes as outlined above, the hearing officer must address the question of penalty. The Department seeks a civil penalty of $20,000. As noted above, the Department "may" impose a civil penalty for violations of KRS Chapter 286.8, and such penalties "shall be not less than one thousand dollars ($1,000) nor more than twenty-five thousand dollars ($25,000) per violation, plus the state's costs and expenses for the examination, investigation, and prosecution of the matter, including reasonable attorney's fees and court costs." KRS 286.8-046(1).

In support of its proposed penalty, the Department points to the number of separate violations—two instances of branches engaging in mortgage activity without a license, and the five instances of Plunkett originating loans without being registered—each of which is subject to a fine of up to $25,000. The Department also cites proof that Ruoff entered into agreed orders on two occasions to resolve past regulatory actions in Kentucky.

The number of violations is an appropriate consideration in most cases, but here, the Department charged only four counts, several of which included multiple alleged violations.

[4] Ruoff also argues that the statutes have no discernible protective purpose, but this is part of the facial challenge that the Board cannot entertain.

Specifically, Count II included six loans processed when the branch was unlicensed,[5] and Count III included five loans originated by a mortgage loan originator who was not registered. If each violation is counted separately, with a minimum fine of $1,000 per violation, the overall minimum penalty would be $13,000. The Department could have charged each violation separately, but it chose not to do so. Moreover, Count IV, which alleged lack of control, is largely redundant of and dependent on the other three charges. Thus, the hearing office concludes that the number of violations is a proper factor to consider, but it does not weigh heavily in favor of a high penalty in this case, nor does it require a per-violation fine when the Department has not charged each violation separately.

As for the agreed orders, the hearing officer sees no way to consider them in assessing a fine. In both orders, Ruoff neither admitted nor denied the allegations. Thus, the orders themselves are not proof that the former bad conduct occurred. Such agreements are not admissible evidence to prove the Ruoff committed the violations in those cases. *See* KRE 408 (barring evidence of acceptance of consideration "in compromising … a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount").

And the Department put on very little, if any, direct testimony of the conduct underlying those actions. Primarily, Jennifer Doom testified about the Department's prior investigation into Ruoff, which resulted in the agreed orders and the present case, but she did not give a detailed account of Ruoff's allegedly unlawful conduct that led to the agreed orders. She testified primarily about the counts at issue in this case. The Department notes that Ruoff has not contested the earlier violations, but that misses the point that the Department bears the burden in this case, not Ruoff. In fact, the Department specifically bears the burden of showing the propriety of any penalty. If it had wanted the prior conduct to be considered, it needed to put proof of that conduct before the hearing officer. (That Department staff may have considered the prior conduct, or evidence of it, in initially proposing the fine amount cannot carry the day in this respect, because the hearing officer, in issuing a recommended order is limited to the record established in this administrative hearing. See KRS 13B.090(1) ("In an administrative hearing, findings of fact shall be based exclusively on the evidence on the record.").)

The question remains, then, as to the proper penalty. The parties have approached the question of penalty as though it had already been determined and was now on appeal. But that is not the

[5] In its brief, the Department does not cite the fact that Count II encompassed six violations.

correct approach. Again, the Department "has the burden to show the propriety of a penalty imposed." KRS 13B.090(7).

The Department offered proof of how its staff determines the initially proposed penalties. For example, Jennifer Doom testified that the Department considers potential harm to the public, but she did not testify specifically to the danger of harm created here, other than to say there is always danger from unlicensed activity. She also testified that the Department considers the number of unlicensed loans at issue; the number of unlicensed loans is probative of the appropriate penalty, but how the Department considers that proof is less helpful.

Indeed, Ms. Doom's testimony in this regard was of limited helpfulness overall, because it goes to the Department's internal processes. As discussed above, in the context of the administrative hearing, the Department has the burden of establishing the propriety of the penalty to be imposed, not its internal processes for making an offer to settle the case. In essence, the Department's proof about the appropriate penalty was largely analogous to how a prosecutor's office might go about making plea-offers in an attempt to be consistent from case to case. But the better analogy would be to proof necessary to show the propriety of a sentence when an unsettled criminal case goes to a jury trial, which is similar to the evidentiary hearing in an administrative action. Determining the sentence in such a case requires different kind of proof. Indeed, the prosecutor's internal processes would be irrelevant to what the appropriate penalty would be. The hearing officer concludes that the proof touching on the Department's internal processes is of limited probativeness as to the appropriate penalty.

Of course, the Department's proof also included proof that is probative of the appropriate fine. The number of unlicensed loans is one appropriate factor, as discussed above. As noted above, the proof showed at least twelve unlicensed loans overall. But weighed against that is the fact that at least five of those loans—those originated by Plunkett—were unlicensed because of a clerical error through which Plunkett's registration was not renewed when he first started working for Ruoff. The Department does not allege that Plunkett was ineligible for registration. The other license violations, the processing of loans by the Columbus and New Albany branches before they were licensed, appear to be minor violations. In each instance, the loans in question were either processed very shortly before the branch was licensed (the Columbus branch) or before Ruoff became aware that Kentucky requires separate licensure of each branch transacting business in Kentucky (the New Albany Branch). As to the latter, ignorance of the law is no excuse with respect to whether the law

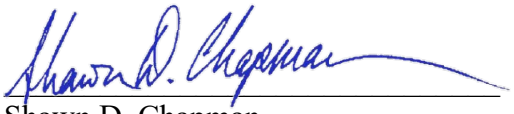
was violated, but it is relevant to the extent that it can reasonably mitigate the punishment that is due. The Department also offered no proof of harm or fraud in this case.

Considering all the circumstances, the hearing officer concludes that although the Department has established the propriety of a civil penalty, it has not established the propriety of the $20,000 penalty that it seeks. Instead, considering all the circumstances, as discussed above, the hearing officer concludes that a civil penalty of more than the minimum per count but less than the maximum is more appropriate. Specifically, the hearing officer concludes that Ruoff should be assessed a civil penalty of $2,000 per count, for a total of $8,000. By statute, in addition to the civil penalty, Ruoff must also be assessed "the state's costs and expenses for the examination, investigation, and prosecution of the matter, including reasonable attorney's fees and court costs." KRS 286.8-046(1).

Recommended Order

Based on the foregoing Findings of Fact and Conclusions of Law, the hearing officer recommends that the Commissioner of the Department of Financial Institutions find that Ruoff Mortgage Company violated the statutes as alleged in the Amended Complaint and as described above, and that Ruoff receive a civil penalty of $8,000, plus the Department's costs and expenses for the examination, investigation, and prosecution of the matter, including reasonable attorney's fees and court costs, as required by KRS 286.8-046(1).

So recommended, this the 21st day of February, 2022.



Shawn D. Chapman
Executive Director
Public Protection Cabinet
Office of Administrative Hearings
500 Mero Street, 218 NC
Frankfort, KY 40601
ShawnD.Chapman@ky.gov

NOTICE OF APPEAL RIGHTS

Administrative Appeal Rights

Under KRS 13B.110(4), any aggrieved party has a right to file Exceptions to this Recommended Order. Such exceptions must be in writing and submitted to the Kentucky Department of Financial Institutions within **fifteen** calendar days from the date that this Recommended Order is mailed to the parties. Specific reasons for disagreement with the Recommended Order must be stated in the Exceptions, along with citations to any documentation, testimony, or other evidence presented at the Hearing, if one was held. A failure to file exceptions is considered to be a failure to exhaust all administrative remedies, and may bar any appellate review by the courts. *Swatzell v Natural Resources and Environmental Protection Cabinet*, 962 S.W.2d 866 (Ky. 1998).

This Recommended Order is not a final decision by the Department. A Final Order will be rendered only after all Parties have had an opportunity to file Exceptions, after which the Department will consider the Recommended Order, along with any Exceptions that have been filed, and render a final decision.

Appeal to Circuit Court

Under KRS 13B.140(1), a final order of the Kentucky Department of Financial Institutions may be appealed by filing a Petition for Judicial Review in the Circuit Court with proper venue, in accordance with KRS 13B.140, within 30 days from the final order. Therefore, only after the Department renders a final order in this matter may an aggrieved Party appeal to the Circuit Court with proper appellate jurisdiction.

CERTIFICATE OF SERVICE

I hereby certify that copies of this Order were, this the 21st day of February, 2022, sent by electronic mail to:

Randall Strause
rstrause@strauselawgroup.com
Counsel for Respondent

Gary A. Stephens
Gary.Stephens@ky.gov
Counsel for Complainant

kfi@ky.gov
Department of Financial Institutions

Shawn D. Chapman