

State of New Hampshire Banking Department

In re the Matter of:) Case No.: 08-BD-001
)
State of New Hampshire Banking)
)
Department,)
)
and)
)
David A. Maloof)
)
Complainant,)
)
and)
)
Franklin Savings Bank,)
)
Respondent)
_____)

Order on Motion for Rehearing

Background

This matter came before the Banking Department initially as a consumer complaint. The Commissioner determined that there was a factual discrepancy between the parties and assigned the undersigned presiding officer to conduct a hearing on the matter to determine if the Respondent had committed a violation of New Hampshire or federal banking laws or committed an unfair or deceptive trade practice.

The matter came for hearing on April 21, 2008. The Respondent submitted a detailed Request for Findings of Fact and Rulings of Law which were duly considered in composing the Recommended Decision. A Recommended Decision was offered to the Commissioner thereafter and adopted by him on June 3, 2008.

Respondent now moves for rehearing pursuant to BAN 205.1 arguing that it is unlawful or unreasonable.

STATUTORY AUTHORITY

The Commissioner has the power, as granted by RSA Chapter 541 and New Hampshire Administrative Rule BAN 205.02, to grant a motion for rehearing. A motion for re-hearing will be granted if good reason has been provided. Good reason includes:

1. New information not available at the time of hearing;
2. A change in law relied upon by the presiding officer in reaching a decision on the hearing; or
3. Other factors beyond the control of the moving party causing the decision to be unreasonable or unlawful, or to be based upon a mistake of law or fact.

DISCUSSION

Respondent appears to have submitted the request for rehearing on the sole basis of factor three of BAN 205.02. The Movant cites no new information or changes in law. Nor does the Movant set forth any mistake of the facts in their motion for rehearing.

The administrative rules set the burden of proof and persuasion as to the motion for rehearing squarely on the moving party's shoulders. I find then that a rehearing should only be held if the moving party can establish that not only was the decision unreasonable, unlawful, or based on a mistake of fact or law, but also that this was beyond the control of the moving party. In other words to the extent that Movant/Respondent has now cited provisions of law not previously cited in its briefs or request for findings but were previously available then it has failed to meet that burden.

The motion for rehearing assumes without basis that where the Commissioner finds that Respondent violated "the Chapter" he is finding them in violation of Chapter 358-A and goes on to comment that the Commissioner

has no authority to award restitution on the basis of a simple contract law violation. Such a presumption is unfounded and without setting forth all the statutes which a contract violation could trigger it is sufficient to say that such an act by a bank under the supervision and authority of the Bank Commissioner violates Chapter 384. It then follows that since RSA 383:10-d set forth the authority for the Commissioner to order restitution for any person adversely affected by conduct violating RSA 358-A (or that may violate any of the provisions of Title XXXV and XXXVI and administrative rules adopted thereunder) that the authority for the Commissioner's order of restitution was well founded.

ORDER

Having considered the Respondent's motion, it is this 11 day of August, 2008 ORDERED:

1. A rehearing for Case No. 08-BD-001 is hereby denied because Respondents did not carry their burden of proof that the Recommended Decision was based on a mistake of law or fact beyond the control of the moving party; and
2. The Order of the Commissioner dated June 3, 2008 stands.

/s/

Peter Hildreth,
Bank Commissioner