

Order No. 2011-011

IN THE MATTER OF	§	BEFORE THE BANKING
DIVERSOS SERVICIOS HEIDI,	§	
HEIDI CASA DE CAMBIO,	§	COMMISSIONER OF TEXAS
AND JOSE FLORES PINALES, OWNER	§	
EL PASO, TEXAS	§	AUSTIN, TRAVIS COUNTY,
		TEXAS

FINAL ORDER

On this day, came on to be considered Docket No. BE-10-321, In the Matter of Diversos Servicios Heidi, Heidi Casa De Cambio, and Jose Flores Pinales, Owner.

After reviewing the administrative record and the Amended Proposal for Decision issued by the Administrative Law Judge on February 1, 2011, I have determined that the findings of fact and conclusions of law are supported by the evidence of record and applicable law.

I, therefore, ADOPT the Amended Proposal for Decision, including specifically the findings of fact and conclusions of law that are set forth in the Amended Proposal for Decision and incorporate in this order the findings of fact and conclusions of law therein as if set out in full in this Order.

Based on the record and the findings of fact and conclusions of law, I conclude that an administrative penalty in the amount of \$7,000.00 is justified and appropriate under the factors required by law.

It is, therefore, ORDERED that an administrative penalty in the amount of \$7,000.00 be and is hereby ASSESSED against respondents Jose Flores Pinales, Owner, and Diversos Servicios Heidi and Heidi Casa de Cambio.

It is further ORDERED that the costs of this proceeding in the amount of \$389.75 are assessed against the respondents.

Respondents are ORDERED to pay an administrative penalty of \$7,000.00 plus the costs of this hearing in the amount of \$389.72 to the Texas Department of Banking.

All relief that was requested but not granted or otherwise disposed of herein is denied.

SIGNED and ENTERED this 28th day of February, 2011.

/s/ Charles G. Cooper
Charles G. Cooper, Commissioner
Texas Department of Banking

Docket No. BE-10-321

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DIVERSOS SERVICIOS HEIDI,	§	
HEIDI CASA DE CAMBIO,	§	COMMISSIONER OF TEXAS
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AMENDED PROPOSAL FOR DECISION

This Amended Proposal for Decision is issued following consideration of the Exceptions of Texas Department of Banking to Proposal for Decision and Proposed Order. The ALJ's Rulings and Discussion on the department's exceptions, which are in a separate document are incorporated in this Amended Proposal for Decision as if it were set forth herein.

STATEMENT OF THE CASE

This is an enforcement action initiated by the Department of Banking. Department staff alleges the respondents, Diversos Servicios Heidi, Heidi Casa de Cambio and their owner, Jose Flores Pinales, violated the Texas Finance Code by conducting a currency exchange business without a license. The ALJ concludes the respondents committed violations of the law and recommends assessment of an administrative penalty.

DISCUSSION

THE PARTIES' STIPULATION

The parties stipulated to the two transactions of currency exchange that were set forth in the Notice of Hearing as the basis for the action. Respondents were represented by counsel and Hugo Pinales, Chief Financial Officer of Diversos Servicios Heidi and son of Jose Flores Pinales. There is no dispute that respondents do not have a license to conduct the business of currency exchange. As a result of the stipulation, proof of violations was accomplished. This leaves the amount of an administrative penalty, if any, as the only issue to be decided. Department staff argues for a \$20,000 penalty. Respondents argue for no more than a \$2,500 penalty, if a penalty is assessed.

APPLICABLE LAW

Statutory Law - Finance Code Section 151.707

Texas Finance Code, Section 151.707, provides the statutory parameters and factors for the commissioner to consider in assessing administrative penalties. Pursuant to Subsection (a), the commissioner has discretion to assess a penalty: "the commissioner may assess an

administrative penalty.” In general, the commissioner may assess an administrative penalty in four circumstances that are listed in Subsections (a)(1-4). One of those, (Subsection (a)(2)), applies only to license holders and, accordingly, does not apply to this case. The applicable provisions are:

(1) the person has violated the chapter and has failed to correct the violation not later than the 30th day after the date the department sends written notice of the violation to the person;

(3) the person has engaged in a pattern of violations; or,

(4) the person has demonstrated willful disregard for the law.

The penalty may not exceed \$5,000 for each violation or, in the case of a continuing violation, \$5,000 for each day the violation continues. Subsection (c). Factors to be considered in determining the amount of the penalty include [1] the seriousness of the violation, [2] the person’s compliance history, and [3] the person’s good faith in attempting to comply with the statute. Subsection (d).

If a person has demonstrated wilful disregard for the requirements of the statute, commission rules, or an order of the commissioner, the trier of fact shall recommend that the commissioner impose the maximum administrative penalty Subsection (d). Further, a violation corrected after a person receives written notice of the violation may be considered for purposes of determining whether the person has engaged in a pattern of violations or demonstrated willful disregard of the law. Subsection (b).

Agency Decision

A 1996 case involving unlicensed currency exchange was presented in briefing in this case, *In the Matter of Gilberto Rodriguez d/b/a/ El Galvan Service Station*, Docket No. B18-96-025 (Proposal for Decision issued June 3, 1996). Aspects of that case are addressed later in the proposal for decision. Generally in *Rodriguez*, the staff and respondent agreed to a penalty of \$5,000 for four instances of unlicensed currency exchange that occurred after the respondent received written notice of violation from the department. The ALJ recommended the commissioner accept the agreed penalty.

Exhibit 2 to department staff’s exceptions to the PFD shows data of penalty assessments for violations of the currency exchange laws. The exhibit is discussed in the ALJ’s rulings and discussion on the exceptions.

OVERVIEW OF THE FACTS

The testimony and exhibits presented by the parties did not raise issues of disputed facts. In other words, the evidence is essentially not controverted. There might be, of course, differing assessments or arguments of what the facts mean.

Diversos Servicios Heidi and Heidi Casa de Cambio (“DSH”) is owned by Jose Flores Pinales and opened for business on December 16, 2009. The business of DSH is primarily

check cashing and includes making copies, providing internet and fax service and bill paying. The business was making a profit of about \$500 per week from its check cashing activities.

DSH applied in January 2010 for a Money Services Business license limited to currency exchange. The application was returned as incomplete, including the absence of a bond, under cover of a department letter dated January 12, 2010. The DOB letter also advised Mr. Pinales that a person or business may not solicit or engage in a money services business in Texas unless the person or business holds a license issued under Chapter 151 of the Finance Code. Mr. Pinales testified the employees of DSH were instructed not to engage in currency exchange transactions.

By April 2010, DSH prepared an updated application, including the required bond, but did not submit it, because it lacked the funds to pay the \$2,500 application fee.

The first violation was an exchange of \$300 MX (pesos) for \$23.08 US (dollars) on September 3, 2010. A competitor brought the evidence of the currency exchange to the attention of the department. The second violation was the exchange of \$10 US for \$123.50 MX on September 13, 2010. This exchange was initiated by a financial examiner who was employed by the department.

Based on those two violations, the department issued an Emergency Order to Cease and Desist Activity on September 16, 2010. The order did not charge the respondents with a violation of the law based on advertising activity. Respondents were ordered to cease and desist from engaging in the unauthorized business of currency exchange, including advertising and the solicitation of funds from the public. After receiving the order to cease and desist, respondents stopped conducting at least the check cashing business at DHS and, at the time of hearing, continues not to conduct that business.

At the hearing, Mr. Hugo Pinales in response to questioning testified that, based on a review of the video from security cameras in the store, he found five other instances of currency exchange in September before the business was shut down. That makes 7 violations of unlicensed currency exchange during a period of about 17 days. (September 1 - 17, allowing one day for the September 15 cease and desist order, which was mailed on September 16, to be received.) After using the video to identify the individuals, DHS fired the two employees who conducted the currency exchange transactions. Mr. Pinales testified he did not know before receiving the cease and desist order that DSH employees were making currency exchange transactions.

PETITIONER'S ARGUMENT REGARDING AMOUNT OF PENALTY

By brief filed after the hearing, department added the assertion that respondents committed violations of advertising currency exchange services without a license. The

assertion is based on the sign “Casa de Cambio,” which appears painted on the storefront and has been there since the business opened nine months earlier. The term “casa de cambio” means house of change, literally, and is commonly understood in the community to include currency exchange but can have other meanings. Mr. Pinales testified the term also includes the meaning “check cashing.”

Department staff argues its advocacy for a \$20,000 penalty is supported by several approaches. First is that the two violations set forth in the notice of hearing were stipulated to by the respondents. Staff also argues the occurrence of those transactions on September 2 and 13 evidences 11 days of conducting a currency exchange business, which amounts to a continuing violation exposing respondents to a maximum penalty of \$55,000. Second, seven unlicensed exchange transactions (the noticed two transactions plus the five transactions that came to light during the hearing) exposes respondents to a maximum \$35,000 penalty. Third, respondent’s sign amounted to advertising a business of currency exchange that continued from the business’s opening on December through mid-September when respondents shut the business. Staff argues that using 270 days of violation of the advertising prohibition of the Code exposes respondents to a maximum penalty of \$1,350,000. In its exceptions to the PFD, department staff argues the circumstances constitute the basis for the ALJ to recommend the maximum administrative penalty, because the record shows a willful disregard for the licensing requirements in Chapter 151.

RESPONDENT’S ARGUMENT REGARDING AMOUNT OF PENALTY

Respondent argues for no more than a \$2,500 penalty, in part because there were only two violations, the transactions on September 2 and 13. Relying on the language of Subsection (a)(1), respondent argues a penalty would not be proper under that provision, because he corrected the violation within 30 days after receiving written notice of the violation. Respondent argues a pattern of violations was not established, because of consideration under Subsection (b) of his having corrected the violation after receiving written notice from the department. Respondent also argued he exhibited good faith by shutting down the business after receiving the order to cease activity.

Respondent references a prior department enforcement case concerning violations of the prohibition against engaging in the business of currency exchange without a license, *In the Matter of Gilberto Rodriguez d/b/a El Gavilan Service Station*, Docket No. B18-96-025. The parties in that case agreed to a \$5,000 penalty for four transactions of currency exchange without a license (\$20-\$40 US each) that occurred after the respondent received a cease and desist letter from the department. Contrasting the facts of this case with those of *Rodriguez*, respondent argues that a penalty of \$2,500 for two violations that occurred before written notice of violation would be more severe than the *Rodriguez* penalty of \$5,000 for 4 violations

that occurred after written notice of violation. Respondent also noted the hearing officer's analysis in *Rodriguez* that, while taking into account the fact that the four violations took place after two warnings from the department, a penalty of \$20,000, which department staff recommended, would possibly be excessive.

Respondent also referencing the small amount of money the business makes, such that a smaller penalty would be more in line with a modest business activity.

ANALYSIS BY THE ADMINISTRATIVE LAW JUDGE

Violations - Currency Exchange

In the notice of hearing and the conduct of the hearing, the focus of the prosecution was on the currency exchange transactions. The parties stipulated to two such transactions and five more violations came to light in testimony. These seven violations are not in contention.

Violations - Advertising

After the hearing, attention was given to a possible violation of the advertising law. The sign "casa de cambio" can be considered to be advertising currency exchange services and amount to a violation of the Finance Code. Department staff did not argue the sign constituted a violation at least until closing statements at the hearing and included possible advertising violations as a factor in determining the amount of penalty when it submitted its brief after the hearing. The evidence could support a finding that the sign advertised currency exchange services, which also would be a violation of the code, since it can refer to currency exchange and respondents were not licensed to exchange currency. But "casa de cambio" can also refer to the check cashing services, according to the testimony. Under the circumstances, including the fact the respondent directed DSH employees not to exchange currency, the ALJ decided not to propose a conclusion that the sign constituted a violation.

Assessment of An Administrative Penalty Is Authorized Under the Law Applied to the Facts

Violations of the prohibition of exchanging currency without a license have been established, so the amount of penalty is the next consideration.

Assessment of an administrative penalty is discretionary. Under Finance Code 151.707(a)(1), a penalty may be assessed against a person who violates the code and fails to correct the violation not later than the 30th day after the department sends written notice of the violation to the person. In this case, the respondent stopped doing business immediately after receiving the written notice. If a currency exchange violation can be corrected by not committing further violations, then respondent did correct the violations within the prescribed 30-day period. Under those circumstances, Section 151.707(a)(1) would not support assessment of a penalty. There might be an issue whether an illegal currency exchange

transaction can be corrected, however, but that issue has not been addressed and need not be resolved, here.

Section 151.707(a)(3) provides for the assessment of a penalty against a person who has engaged in a pattern of violations. Seven transactions during a 16-day period amounts to a something of a pattern, a recurrence of activity that was a violation of the Finance Code. The facts support a conclusion that respondents engaged in a pattern of violations concerning the business of currency exchange.

As noted before in the discussion, if several currency exchange violations can be corrected by not exchanging currency after receiving written notice of the violation, then consideration of the correction is due under Section 151.707(d). The language of Subsection (d) provides that, in general, “a violation corrected” after receipt of notice of violation “may be considered for purposes of determining whether a person has engaged in a pattern of violations” That language does not have much clarity in what it means. It applies to all violations of law under the jurisdiction of the Department of Banking. No precedent regarding correction of a violation of the prohibition against unlicensed currency exchange was presented. Perhaps the provision was meant to refer to other types of violation or to a respondent’s knowledge of the activity that constituted a violation. Even if stopping business as a “correction” of violation is considered, however, the ALJ concludes that seven currency exchange violations during a 16-day period show a pattern and too much recurrence of violation to remove the activities from any penalty at all. The evidence supports the assessment of an administrative penalty under Finance Code Section 151.707(a).

An Administrative Penalty in the Lower Range Is Supported by the Evidence

The parties’ arguments present a range of penalty between \$2,500 and \$20,000. A determination of an appropriate penalty includes the consideration of the three Finance Code factors: seriousness of the violations, respondent’s compliance history, and respondent’s good faith.

Seriousness of Violation

Regarding seriousness of the violations, the stipulation and evidence show seven transactions of currency exchange. The amount of currency exchanged was small for two transactions and not known for the other five transactions that Mr. Pinales noted. The small size of the transactions indicates less serious violations. Although not a direct comparison, Finance Code Section 151.502(d)(2) might help in defining a degree of seriousness. It provides an exemption from the licensing requirement for business transactions paid with foreign currency when the change given does not exceed \$100. The transactions in this case were well below \$100. Also and in contrast with the facts in the *Gilberto Rodriguez* case, these violations occurred before written notice of violation was given. There should be no doubt that Respondent was aware of the prohibition, however, because he had filed an

application for license and received a letter from the department, which included a reminder of the prohibition. And respondent did instruct his employees not to exchange currencies. These facts indicate the violations are less serious than others can be.

Good Faith of Respondent

The following evidence shows good faith of the respondent. Respondent had instructed the employees not to transact currency exchanges and testified he was not aware of the violations before receiving the order to cease activity. Respondent shut down his primary business of check cashing after receiving the department's notice of violation. After determining which employees conducted the currency exchanges, respondent fired them. In addition, during the hearing respondent admitted wrongdoing and revealed five other currency exchange violations.

Compliance History

There is no evidence of a compliance history regarding the respondent.

Based on the evidence of record and applicable law, the ALJ makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Proper notice of hearing was timely given to respondents.
2. Respondent, Jose Flores Pinales, d/b/a Diversos Servicios Heidi and Heidi Casa de Cambio ("DSH"), appeared at the hearing, represented by counsel and by Hugo Pinales, respondent's son and chief financial officer of DSH. Respondents stipulated to the two violations of the currency exchange laws, which were set forth in the notice of hearing..
3. DHS opened on December 16, 2009, to conduct the business primarily of cashing checks and also to provide services including faxing, copying, internet and paying bills.
4. DSH made about \$500 per week from its check cashing business.
5. DSH does not have a license to engage in the business of currency exchange.
6. Since the opening of business of DSH, a sign on its storefront included the phrase "Casa de Cambio," which means "house of change" and is understood in the community to include the meanings "a place for currency exchange" and "a place for cashing checks."
7. DHS applied in January to the Department of Banking for a license that would authorize it to engage in the business of currency exchange.
8. The Department returned DSH's application for license as incomplete, in part because of a lack of the required bond, by letter dated January 12, 2010. The letter included a

reminder that the conduct or solicitation of the business of currency exchange without a license is prohibited.

9. DSH obtained a bond and prepared what it thought was a complete application for license by April 30, 2010, but did not submit the application because it lacked the funds to pay the \$2,500 application fee.

10. DSH management instructed its employees not to engage in transactions of money exchange.

11. DSH conducted two transactions of currency exchange in September, 2010, one on September 2 and the other on September 14.

12. The September 2 transaction was an exchange of 300 MX pesos for 23.08 US dollars and the September 14 transaction was an exchange of 10 US dollars for 123.50 MX pesos.

13. The Department of Banking issued to respondents an Emergency Order To Cease And Desist Activity dated September 15, 2010, which ordered respondents to stop engaging in the business of currency exchange. The Emergency Order did not identify the sign "Casa de Cambio" to be a violation, but the order included direction to cease and desist from "advertising and the solicitation of funds from the public."

14. Respondent candidly presented testimony of five more transactions of currency exchange of unspecified amounts between September 1 and the time DSH received the order to cease and desist.

15. The other five money exchange transactions were discovered by respondent after a review of video from security cameras, following receipt of the department's order to cease and desist.

16. Respondent has admitted wrongdoing concerning unlicensed currency exchange.

17. Respondent fired the two employees who had conducted transactions of currency exchange during September 2010.

18. Respondent shut down the check cashing business activity of DSH after receiving the emergency order to cease and desist from the department, in order to prevent any more currency exchange transactions..

19. Respondent exhibited good faith when he investigated the currency exchange transactions, fired the offending employees, shut down the check cashing business after receiving the department's order to cease currency exchange activities, admitted wrongdoing and candidly presented testimony of five more violations of which the department staff had no other knowledge.

20. The currency exchange transactions were relatively minor in respect to the

small amounts of money involved.

21. The respondent does not have a compliance history with the department.
22. An administrative penalty between \$2,500 and \$20,000 is supported by the evidence.
23. A cost of \$389.75 was incurred by the department for a transcription of the hearing.

CONCLUSIONS OF LAW

1. The Commissioner of Banking has jurisdiction to enforce provisions of the Texas Finance Code concerning the business of currency exchange in general and, specifically, with respect to actions of Jose Flores Pinales d/b/a Diversos Servicios Heidi and Heidi Casa de Cambio.
2. Jose Flores Pinales d/b/a Diversos Servicios Heidi and Heidi Casa de Cambio violated the Texas Finance Code on seven occasions during the first 16 days of September 2010 by engaging in the business of currency exchange.
3. The seven transactions of currency exchange without a license constitute a pattern of violations.
4. The Commissioner of Banking has the authority to assess an administrative penalty against Jose Flores Pinales, Diversos Servicios Heidi and Heidi Casa de Cambio in an amount up to \$5,000 for each violation, in his discretion.
5. An administrative penalty of an amount between \$2,500 and \$20,000 is reasonable under the provisions of Texas Finance Code Section 151.707.
6. The administrative law judge may allocate costs incurred by the agency among the parties, including imposing costs that are solely or primarily attributable to a particular party against that party. Assessing the cost of transcription against the respondent is appropriate in this case.

RECOMMENDATION

Based on the evidence and the factors of Finance Code Section 151.707, a penalty on the lower end of the range advocated by the parties is justified. Based on consideration of the statutory criteria of Finance Code Section 151.707(a) and the record, including the evidence, the parties' arguments and briefs, and the department's exceptions to the Proposal for Decision, the ALJ recommends a penalty in the amount of \$7,000. The two specific violations involved small amounts of money and there is no reason to believe the other five were substantially different. This case appears to be less serious than the 1996 case of *Gilberto Rodriguez d/b/a El Gavilan Service Station*, which was settled for \$5,000 and

involved at least four violations that occurred after receipt of notice of violation by the department.

In addition, the respondent admitted wrongdoing and accepted responsibility for the violations at the hearing. It appears DSH is a modest operation. The record shows its management exhibited good faith and does not fit the description of a bad actor. While there is no question that the respondents knew from the beginning of starting DSH that exchanging currency without a license is a violation of the law, the evidence showed they took steps to avoid violations and moved quickly to stop more from occurring after receiving notice of violation. The facts that respondents accepted responsibility and showed good faith, and that the violations occurred in violation of management's directives, support some degree of leniency. Furthermore, the evidence shows that even a smaller penalty will be a substantial blow to the business and an effective deterrent against future violations. Any future violations could be dealt with severely.

Respectfully submitted,

/s/ Donald N. Walker
Donald N. Walker
Administrative Law Judge

SIGNED: February 1, 2011