Serpe
+Ryan

November 27, 2017

East London Employment Tribunal
Anchorage House, 2nd Floor
2 Clove Crescent
London E14 2BE

Re: *David Keir Fotheringhame v. Barclays Services Limited (Case Number 3200194/2017)*

Dear Sir/Madam:

We have been retained by David Fotheringhame to provide this opinion letter. Specifically, we write to opine on the propriety of the New York State Department of Financial Services ("DFS")'s November 17, 2015 directive that Barclays Bank PLC (UK) and its New York Branch (hereinafter, collectively referred to as "Barclays") "take all steps necessary to terminate" Mr. Fotheringhame's employment (the "Termination Order"). It is our opinion that the Termination Order—contained in paragraph 31 of a Consent Order nominally issued by DFS pursuant to Section 44 of the New York Banking Law and which apparently settled DFS's investigation into the electronic foreign exchange trading ("e-FX trading") activities of Barclays—exceeded DFS's statutory authority and was unlawful.

In short, DFS does not have plenary power to remove a company's employee. Nor may DFS violate an individual's due process rights when removing a person. Instead, DFS's authority to remove employees is narrowly tailored by statute to provide procedural protections for persons whom DFS attempts to remove. In Mr. Fotheringhame's case, DFS made an unlawful end run around these statutory limitations and procedural protections by ordering Barclays to terminate him.

Background

We base this opinion letter on the following facts, which have been provided to the firm by Mr. Fotheringhame. Sometime in 2014, DFS initiated an investigation into e-FX trading at Barclays. In early 2015, DFS indicated a desire to interview Mr. Fotheringhame, an English citizen who resides in London and who was then employed by Barclays as the "Managing Director and Global Head of Electronic Fixed Income, Currencies, and Commodities Automated Flow Trading."

On April 16, 2015, in response to DFS's request that he assist in its investigation, Mr. Fotheringhame traveled to New York so that he could voluntarily attend an interview conducted by DFS at its offices in lower Manhattan. The interview, at which Mr. Fotheringhame was represented by Daniel Gitner of Lankler Siffert Wohl LLP, lasted an entire business day. At its conclusion, the DFS examiner noted that DFS might have additional questions for Mr. Fotheringhame after

receiving additional documents from Barclays. Counsel for Mr. Fotheringhame indicated that he was happy to continue to cooperate and answer questions, but DFS never reached out. Nor did DFS indicate at any point during or subsequent to the interview that it was planning to take any action against Mr. Fotheringhame.

Mr. Fotheringhame heard nothing from DFS for more than seven months until November 17, 2015, when DFS unexpectedly issued the Consent Order apparently settling its investigation into e-FX trading at Barclays (attached hereto as Exhibit A). The Consent Order contains the Termination Order in paragraph 31, which orders Barclays to "take all steps necessary" to terminate Mr. Fotheringhame. (*See* Ex. A, ¶ 31.)

DFS Both Evaded its Statutory Obligations and Exceeded its Statutory Powers

DFS's Termination Order to Barclays "to take all steps necessary to terminate" Mr. Fotheringhame was unlawful and issued without authority. Although the Consent Order purports to be a "Consent Order Under New York Banking Law § 44," that section of the New York Banking Law does not provide DFS with the power to order regulated entities to remove employees, nor does it allow DFS to directly remove employees from those entities. Rather, Section 44 merely authorizes DFS to levy an escalating set of financial penalties on certain entities within its scope of jurisdiction, depending upon the severity of the regulated entity's violation and the state of mind accompanying it. *See, e.g.*, N.Y. Banking Law § 44(4) (setting forth DFS's maximum authority to financially sanction "knowing[] and willful[]" violations that also "threaten the safety and soundness" of the regulated institution).[1]

In fact, there is a specific provision of the New York Banking Law that makes clear when and how DFS can remove an employee: Section 41, which grants DFS the power to "remove" "any director, trustee or officer of any corporate banking organization or bank holding company" or any "officer of[] a branch of a foreign banking corporation." N.Y. Banking Law § 41(1).[2] However, Section 41 strictly limits this power. For example, "[w]henever" DFS wishes to remove an employee it must afford the individual the opportunity to "show cause why he should not be removed from office" and provide procedural safeguards including "a reasonable opportunity to be heard" at a hearing regarding whether removal is appropriate. *Id.*

Notably, DFS regulations provide accused individuals considerable due process protections. Notice for the hearing referenced above must be given at least 30 days from the date of service. *See* 3 NYCRR § 2.2(b). "Parties to removal proceedings . . . shall at all stages thereof have all fundamental

[1] Attached hereto as Exhibit B are copies of the New York statute sections cited in this letter.

[2] According to the case law, New York's banking regulator may only remove employees under either the Section 41 power (and its predecessor, New York Banking Law § 10-d) or the power relating to receiverships codified in Section 606. *See Peterson v. State*, 67 A.D.2d 1054 (3d Dep't 1979) (noting that the banking regulator was removing an employee pursuant to Section 606, and not Section 41).

rights, including the rights of counsel, cross-examination, presentation of evidence, objection and motion." *Id.* § 2.1. A transcript must be taken. *Id.* § 2.6. A hearing officer may be designated to regulate the hearings, allow for the taking of evidence, to rule on objections and motions, and to receive offers of proof. *Id.* § 2.5. At the close of evidence, both parties may submit briefs and proposed findings, and "shall be allowed oral argument." *Id.* § 2.7. Ultimately, after considering the evidence, briefs, and proposed findings, the hearing officer "shall" make a written report containing proposed findings of fact, conclusions of law, and citations to the records showing support. *Id.* § 2.8. If a party disagrees with the written report, he may file objections, briefs, and citations to the record. *Id.* § 2.9. A determination by DFS to remove a person must be supported by "substantial evidence" in the record. N.Y. C.P.L.R. § 7803(4).

Mr. Fotheringhame was afforded none of the statutorily-required process. First, DFS did not send him a copy of the Consent Order purportedly containing the Termination Order. Second, DFS evaded the statutory notice and hearing provisions of Section 41 by ordering Barclays to "take all steps" to terminate him. *Cf. Requa v. White*, 9 N.Y.S.2d 863, 865 (Sup. Ct. 1939) (finding that DFS's predecessor regulatory entity had exceeded its power by trying to remove an officer for a reason not specified in the statutory predecessor to Section 41).[3] Accordingly, this DFS end run around the procedural protections embodied in the New York Banking Law was unlawful.

In sum, DFS's Termination Order was *ultra vires*, and deprived Mr. Fotheringhame of his rights to notice and a hearing pursuant to Section 41. As a result, the Termination Order was unlawful under New York law and should not have been enforced.

Sincerely,

Silvia L. Serpe

[3] Attached hereto as Exhibit C are copies of the cases cited in this letter.

EXHIBIT A

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES

In the Matter of

BARCLAYS BANK PLC,
BARCLAYS BANK PLC, NEW YORK BRANCH

CONSENT ORDER UNDER
NEW YORK BANKING LAW § 44

The New York State Department of Financial Services (the "Department"), Barclays Bank PLC, and Barclays Bank PLC, New York Branch (collectively, "the Parties") stipulate that:

WHEREAS Barclays Bank PLC is a major international banking institution with more than 132,000 employees and total assets exceeding $2 trillion;

WHEREAS Barclays Bank PLC has operated a foreign bank branch in New York State ("the New York Branch"), licensed, supervised and regulated by the Department since 1963;

WHEREAS the New York Branch has more than 500 employees and total assets exceeding $36 billion;

WHEREAS the Department and Barclays Bank PLC and its New York Branch (collectively, "Barclays" or the "Bank") entered into a May 20, 2015 Consent Order pursuant to which Barclays admitted it had engaged in certain misconduct regarding the trading of benchmark foreign exchange ("FX") rates from at least 2008 through 2012 in violation of the New York Banking Law and other laws (the "May 2015 Order");

WHEREAS the May 2015 Order did not release Barclays from any claims concerning FX trading electronic systems, electronic trading of FX and FX-related products, or any related activities;

WHEREAS the Bank operates an electronic trading platform for the foreign exchange market, called BARX, which allows traders to execute FX trades with Barclays;

WHEREAS some trades on BARX are subject to Last Look, an automated function that delays the Bank's response to a counterparty's incoming client orders for a set period of time — called the "hold time" — and rejects the order if the market price moves beyond a certain threshold during the hold time;

WHEREAS from at least 2009 through 2014, Barclays engaged in certain practices involving the imposition of "Last Look" on client orders, which Barclays states was intended to be used as a defense to protect the Bank against trading on stale prices, as well as from "latency arbitrage" and other toxic trading practices in FX trading;

WHEREAS Barclays failed to properly use Last Look due to the failure of systems and controls, including management oversight;

WHEREAS Barclays employed its Last Look order holding and rejection protocols broadly and indiscriminately, without first verifying if latency or arbitrage was involved;

WHEREAS there was a lack of transparency both internally and with customers regarding Last Look; and

WHEREAS in certain instances, information provided to customers and/or the Barclays sales team concerning Last Look was insufficient and/or incomplete;

NOW THEREFORE, to resolve this matter without further proceedings pursuant to the Superintendent's authority under Section 44 of the Banking Law, the Department and Barclays agree to the following:

FACTUAL BACKGROUND

FX Electronic Trading; Latency Arbitrage and Defensive Last Look

1. Barclays is a "market maker" in the foreign currency markets. It provides liquidity in these markets by selling currencies to those who wish to buy them and buying currencies from those who wish to sell.

2. Because Barclays will generally agree to one side of a foreign currency exchange without identifying a perfectly simultaneous, offsetting order on the other side, the Bank assumes risk in its role as a market maker.

3. As a market maker, and to compensate for this assumption of risk, Barclays establishes a "bid-ask" spread on its activity; it adds a small percentage to the prices it offers so that it may buy for less than it sells and sell for more than it buys with a profit margin commensurate with the risk it assumes.

4. While FX trading, like other trading activity, was historically conducted and/or confirmed via human-to-human communications, including by "voice" trading over telephone, some 80% of Barclays's FX trading volume is now conducted solely electronically, on Barclays's electronic trading platform, known as BARX.

5. Barclays's FX electronic trading clients fall into two broad categories: (1) clients that trade using a Barclays graphical user interface ("GUI"); and (2) clients that trade using a Barclays financial information exchange application program interface ("FIX/API").

6. The ever-increasing power of sophisticated automated electronic trading systems and technologies creates opportunities for investment entities, which might be able to exploit latencies in the flow of information by requesting trades at prices informed by information that Barclays and other market makers might not yet have. Orders of this kind, which seek to

outflank and exploit a market maker's less nimble trading systems, are known as "toxic order flow" or "toxic flow."

7. For example, a sophisticated electronic trading business might detect market movement some milliseconds (1/1,000sth of a second) before Barclays's systems have, and therefore benefit by trading with Barclays before Barclays's systems have properly adjusted their prices. Similarly, a sophisticated client could obtain a better price by breaking up and spreading fractions of its total order volume across a number of market makers. A market maker would then execute this apparently low volume trade at a lower price than it would have had it been aware of the total size of the customer's order in the market place, because lower volume orders have a lesser impact upon the market and require market makers to assume less risk. This practice, known as "spraying the market" is another example of the kind of "toxic flow" that concerned Barclays.

8. In order to protect Barclays from toxic flow, Barclays designed Last Look, which imposed a hold period between its receipt of a customer order and its acceptance and execution of the same. During this interval, Barclays would compare the BARX price of the customer's order at the start of the hold time against the BARX price at the end of the hold time; where the price at the end of the hold time had moved against Barclays (and in favor of the client) beyond the threshold set by Barclays in the tens and hundreds of milliseconds following the order, Barclays would reject the trade.

Barclays's Use of Last Look Was Overbroad

9. Barclays did not seek to distinguish toxic order flow from instances in which prices merely happened to move in favor of the customer and against Barclays after the customer's order was entered on Barclays's systems.

10. Barclays instead applied Last Look to *all* API/FIX trades, as well as a handful of GUI customers.

11. From 2009 to 2014, a large number of the trades Barclays rejected were not truly examples of latency arbitrage or other toxic order flow.

12. Barclays's systems assumed the use of the API/FIX system was itself a clear indication of customers' ability to engage in latency arbitrage and create toxic flow. Thus, all customers routing orders through such platforms were assigned an undisclosed latency or "hold" time before their trades were executed.

13. Whenever prices within this holding period moved against Barclays and in favor of the customer beyond a certain undisclosed loss threshold, Barclays treated the trade as toxic flow.

14. Barclays thereby evaluated and applied its Last Look rejection protocols almost entirely in reference to the profit or loss the trade would bring to the Bank.

15. Barclays did not perform an analysis to ensure Last Look was limiting its rejections to trades that in fact reflected "latency arbitrage" or other truly "toxic" flow.

16. Thus, instead of employing Last Look as a purely defensive measure, Barclays instead used it as a general filter to reject customer orders that Barclays predicted, based on price movements during the hold period, would be unprofitable to the Bank.

17. After the commencement of the Department's FX trading investigation, Barclays revised Last Look, in September and October 2014, so that its rejection filters would operate symmetrically. That is, rather than reject only those orders that became sufficiently unprofitable to the *Bank*, trade requests sufficiently unprofitable to *customers* (but profitable to the Bank) would also be rejected.

18. In executing these revisions to make Last Look symmetrical, Barclays neglected to update one of its trading platforms, causing 7% of its trading volume to continue under the asymmetrical paradigm until August 2015. Barclays has since updated all trading platforms.

Application of Last Look to Stop Orders

19. Barclays also applied protocols similar to Last Look to hold customer orders that had been entered as "stop loss" or "stop limit" orders.

20. Stop orders are designed and understood across financial markets as a type of predetermined, risk-reducing trade. A customer determines in advance that a trade should be made once a market price reaches the predefined "trigger," and enters an order triggered at that price, which remains on the market maker's order book until such time as that price is reached. At that time, and depending on the type of order entered, the market maker will either attempt to execute a trade either at the specific pre-set stop limit (taking the risk no trade will occur if the market price quickly moves away from that pre-set price) or else execute a trade at whatever price it can achieve the instant after the stop loss trigger price was reached.

21. Barclays applied protocols similar to Last Look to standing stop loss orders, delaying the execution of these preexisting customer orders.

22. In addition, stop loss orders could be subject to multiple Last Look holds, if price movements during each hold period exceeded the threshold in place by the end of each hold period.

Barclays Exhibited a Lack of Transparency about Last Look with Customers and Its Own Sales Team

23. On certain occasions, from at least 2009 to 2014, certain Barclays employees provided insufficient and/or incomplete information to its customers about its use of Last Look.

24. Barclays did not disclose the reasons for not accepting trades in its post-trade reporting to clients. Instead, the client would receive a simple rejection message: "NACK," which stood for "Not Acknowledged."

25. In certain instances, when clients received a NACK message and questioned Barclays about it, Barclays failed to disclose the reason that trades were rejected, instead citing technical issues or providing vague responses:

a. On October 10, 2008, a New York Barclays Client Services employee announced the release of Last Look, emphasizing that it "gives traders the ability to configure a profit check." The employee continued, "GUI clients will get a pop up for any of the[] rejects stating 'trade rejected due to latency.' FIX clients will get a FIX reject message. IF any client does call up about a rejected trade . . . it is important that you state in any communication 'THE TRADE WAS REJECTED BECAUSE OF LATENCY.' . . . DO NOT talk about P&L on trades."

b. On December 15, 2010, a Barclays client wrote, "[w]e have noticed that there were over 300 rejected orders with you today and the reason is 'NACK', could you pls have a look at them and advise what's causing it?" After failing to receive a substantive response, the client followed up two days later, writing, "[w]e have not heard anything back with regards to the rejections. And this has become quite a serious matter. . . . We kept receiving top of the book rates from you and hitting your rate, but we got rejected by you 9 times out of 10 where we could have been well filled by other liquidity providers who have been providing competitive rates. . . . Could someone from your side shed some lights on the rejections? Whether they are due to technical difficulties or business decisions?" There is no evidence that Barclays ever responded to these queries.

c. On September 28, 2011, after several days had passed since a Barclays client had asked whether a trade rejection was due to Barclays's "price engine experienc[ing] delays or is it the result of an extreme market event/movement," Barclays staff directed a Sales employee, "because the client didn't chase us for an answer on the below last look rejection since Monday we have decided to park it for now and in case the client comes back, [another Barclays employee] will explain that the rejection was due to the market [sic] large volatility."

d. On February 25, 2013, after inadvertently providing a Barclays client with the rejection message "AntEconomic failed by failing check," a Barclays Sales employee directed that "We should revert to naming ALL REJECTS the same NACK urgently . . . Clients are gonna come asking."

e. On August 27, 2013, a support employee of an ECN noted "Barclays is frequently rejecting executions on the last available quote or sending rejection messages without a clear reason." In the same email chain, Barclays employees suggested explaining to the ECN "what last look is."

f. On October 10, 2013, after a Barclays client questioned the reason for an "unusual amount of rejected orders" caused by Last Look, a BARX support employee familiar with Last Look wrote to the relevant Sales employee, "Would you like to go back to [the client] and tactfully explain? [BARX Support] cannot confirm or deny the existence of last look."

g. On September 4, 2014, when a Barclays Sales employee emailed a BARX Support employee, the employee responded by describing Last Look as a "pricing check setup against BARX clients" to "ensure profitability of a trade for Barclays," but emphasized that "Our Team generally does not share this info with the client, and just say it was a business reject."

26. Some sophisticated customers monitored their rejection rates and turnaround times at Barclays and other banks. On certain occasions, some of these sophisticated customers raised concerns about their high rejection rates at Barclays. Upon such complaints, Barclays engaged in discussions with customers concerning their rejection rates, and sometimes adjusted hold times and thresholds to decrease rejection rates.

27. In a marketing presentation for the BARX GUI circulated to a variety of clients, Barclays stated: "No last look — what you see is what you get." This presentation did not explicitly distinguish GUI from the FIX/API platform, nor did it explain that Last Look did apply to FIX/API client orders.

28. Certain senior Barclays employees instructed traders and IT employees not to inform the Barclays Sales team about the existence of Last Look:

a. On June 6, 2011, in an email discussion about Last Look, a Barclays Managing Director and Head of Automated Electronic FX Trading wrote: "Do not involve Sales in anyway [sic] whatsoever. In fact avoid mentioning the existence of the whole BATS Last Look functionality. If you get enquiries just obfuscate and stonewall."

b. On August 4, 2011, a Barclays employee wrote to a trader: "for the future, sales absolutely 100% do not know about the existence of last look and it shouldn't be a concern for them."

c. On November 7, 2011, the Barclays Managing Director and Head of Automated Electronic FX Trading wrote: "Do not discuss Last Look with Sales. If there has been a spurt [in rejected trades] just blame it on the weekend IT release and say it's being fixed."

VIOLATIONS OF LAW AND REGULATIONS

29. With regards to the aforementioned conduct, the Bank has conducted banking business in an unsafe and unsound manner.

SETTLEMENT PROVISIONS

Monetary Penalty

30. Barclays shall pay a civil monetary penalty, pursuant to Banking Law § 44, to the Department in the amount of $150,000,000. Barclays shall pay the entire amount within ten days of executing this Consent Order. Barclays agrees that it will not claim, assert, or apply for a tax deduction or tax credit with regard to any U.S. federal, state, or local tax, directly or indirectly, for any portion of the civil monetary penalty paid pursuant to this Consent Order.

Employee Discipline

31. A Barclays Managing Director and Global Head of Electronic Fixed Income, Currencies, and Commodities ("eFICC") Automated Flow Trading has been suspended but remains employed by the Bank. The Department orders the Bank to take all steps necessary to terminate this individual, who played a role in the misconduct discussed in this Consent Order.

32. After the commencement of the Department's FX trading investigation, the Global Head of eFICC Trading was terminated.

33. If a judicial or regulatory determination or order is issued finding that the termination of any of the above employees is not permissible under local law, then such employees nevertheless shall not be allowed to hold or assume any duties, responsibilities, or activities involving compliance, FX benchmarks, or any matter relating to U.S. or U.S. Dollar operations.

Independent Monitor

34. Pursuant to a July 25, 2014 Memorandum of Understanding, the Department installed a Monitor at Barclays. Following the execution of this Consent Order, the Monitor will work with Barclays solely on remediation plans concerning the conduct referenced both in this Consent Order and in the May 2015 Order, and will terminate its engagement on February 19, 2016.

35. By December 15, 2015, Barclays will provide the Monitor with a proposed remediation plan concerning the conduct referenced both in this Consent Order and in the May 2015 Order. The plan shall include an overview on:

a. Barclays's review of the effectiveness of the Bank's policies and procedures pertaining to FX trading, including FX trading electronic systems and electronic trading of FX (including FX derivatives), and implementation of improved policies, procedures, and oversight;

b. Barclays's plan for designing and implementing change management procedures for FX trading electronic systems, which include a Compliance approval process and a formalized set of criteria for making changes, and improving testing and oversight; and

c. Implementing supervisory procedures requiring periodic review of FX trading electronic systems settings, and changes thereto, to ensure compliance with documented procedures and principles.

Breach of Consent Order

36. In the event that the Department believes Barclays to be in material breach of the Consent Order, the Department will provide written notice to Barclays and Barclays must, within ten business days of receiving such notice, or on a later date if so determined in the Department's sole discretion, appear before the Department to demonstrate that no material breach has occurred or, to the extent pertinent, that the breach is not material or has been cured.

37. The parties understand and agree that Barclays's failure to make the required showing within the designated time period shall be presumptive evidence of Barclays's breach. Upon a finding that Barclays has breached this Consent Order, the Department has all the remedies available to it under New York Banking and Financial Services Law and may use any evidence available to the Department in any ensuing hearings, notices or orders.

Waiver of Rights

38. The Parties understand and agree that no provision of this Consent Order is subject to review in any court or tribunal outside the Department.

Parties Bound by the Consent Order

39. This Consent Order is binding on the Department and Barclays, as well as any successors and assigns that are under the Department's supervisory authority. But this Consent Order does not bind any federal or other state agency or any law enforcement authority.

40. No further action will be taken by the Department against Barclays for the conduct set forth in the Consent Order or claims concerning FX trading electronic systems and

electronic trading of FX (including FX derivatives), provided that Barclays complies with the terms of the Consent Order.

41. Notwithstanding any other provision in this Consent Order, however, the Department may undertake additional action against Barclays for transactions or conduct that Barclays did not disclose to the Department in the written materials Barclays submitted to the Department or the Monitor in connection with this matter.

Notices

42. All notices or communications regarding this Consent Order shall be sent to:

For the Department:

Daniel Sangeap
Director and Deputy Counsel
Capital Markets Division
One State Street
New York, NY 10004

For Barclays Bank PLC:

Lawrence Dickinson
Company Secretary
1 Churchill Place
London, E14 5HP
United Kingdom

Miscellaneous

43. Each provision of this Consent Order shall remain effective and enforceable until stayed, modified, suspended or terminated by the Department.

44. No promise, assurance, representation or understanding other than those contained in this Consent Order has been made to induce any party to agree to the provisions of the Consent Order.

45. The Department has agreed to the terms of this Consent Order based on, among other things, the representations made to the Department by Barclays either directly or through its counsel and the Department's own factual investigation. To the extent that representations made by Barclays either directly or through their counsel are later found to be materially incomplete or inaccurate, this Consent Order is voidable by the Department in its sole discretion.

IN WITNESS WHEREOF, the parties have caused this Consent Order to be signed this 17 day of November, 2015.

BARCLAYS BANK PLC

By: _____

ROBERT F. HOYT
Group General Counsel

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES

By: _____

ANTHONY J. ALBANESE
Acting Superintendent of Financial Services

EXHIBIT B

NY CLS Bank § 41

Current through 2017 released chapters 1-407

New York Consolidated Laws Service > Banking Law > Article II Department of Financial Services; Superintendent of Financial Services; Supervisory and Regulatory Powers

§ 41. Removal of director, trustee or officer

1. Whenever the superintendent shall find that any director, trustee or officer of any corporate banking organization or bank holding company (as such term "bank holding company" is defined in article three-A of this chapter) has violated any law or duly enacted regulation of the superintendent of financial services relating to such corporation, or has continued unauthorized or unsafe practices in conducting the business of such corporation after having been ordered or warned by the superintendent to discontinue such practices, the superintendent may, in his discretion, certify the facts to the board. The board shall cause notice to be served upon such director, trustee or officer either personally or, upon a finding that he cannot be served personally within the state, by registered mail, at his address last known to the superintendent, to appear before such board to show cause why he should not be removed from office. A copy of such notice shall be sent by registered mail to each director or trustee of the corporation affected. If, after granting the accused director, trustee or officer a reasonable opportunity to be heard, the board by a three-fifths vote of all its members finds that he has violated any law or duly enacted regulation of the board relating to such corporation, or has continued unauthorized or unsafe practices in conducting the business of such corporation after having been ordered or warned by the superintendent to discontinue such practices, the board, in its discretion, by a three-fifths vote of all its members, may order that such director, trustee or officer be removed from office.

2. Upon service either personally or by registered mail at his address last known to the superintendent upon such director, trustee, officer or person in charge of, or officer of, a branch of a foreign banking corporation and upon the corporation of which he is a director, trustee, officer or, in case he is a person in charge of, or officer of, a branch of a foreign banking corporation upon such foreign banking corporation, of a copy of such order, he shall cease to be a director, trustee or officer of such banking organization or person in charge of, or officer of, a branch of a foreign banking corporation. Such order and the findings of fact upon which it is based shall not be made public or disclosed to anyone except the director, trustee or officer or person in charge of, or officer of, a branch of a foreign banking corporation involved and the directors or trustees of the corporation involved, except in connection with proceedings for a violation of this section. Any director, trustee or officer or any person or persons in charge of, or any officer of, a branch of a foreign banking corporation so removed from office who thereafter without permission of the board participates in any manner in the management of such banking organization or of a branch of such foreign banking corporation shall be guilty of a misdemeanor.

History

Formerly § 10–d, add, L 1935, ch 57; renumbered § 41 and amd, L 1938, ch 684; L 1944, ch 52; L 1957, ch 284, eff April 9, 1957; L 1960, ch 237 § 17; L 1960, ch 553, § 10, eff Jan 1, 1961; L 1961, ch 146, § 15, eff March 17, 1961; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011.

Annotations

Notes

Prior Law:

Former § 41, add, L 1914, ch 369, amd, L 1930, ch 678, L 1932, ch 399, repealed, L 1938, ch 684. Substance transferred to § 36 sub 10.

Editor's Notes:

See note under Art. III-A as to invalidity of L 1960, ch 237, and validation of proceedings taken thereunder. And see also note as to L 1960, ch 553, below.

Laws 1961, ch 146, § 15, amended sub (1) of this section as amended by chapter 284 of the Laws of 1957, thus omitting any reference to either of the two 1960 amendments, i.e., L 1960, ch 237 and L 1960, ch 553, § 10. The 1961 amendment is the same as the first 1960 amendment, and the later act contains provisions validating proceedings taken under L 1960, ch 237, which had been declared invalid. As amended by L 1960, ch 553, § 10, subdivision 1 reads as follows:

1. Whenever the superintendent shall find that any director, trustee or officer of any corporate banking organization or any person or persons in charge of, or any officer of, a branch of a foreign banking corporation has violated any law or duly enacted regulation of the banking board relating to such corporation, or has continued unauthorized or unsafe practices in conducting the business of such corporation after having been ordered or warned by the superintendent to discontinue such practices, the superintendent may, in his discretion, certify the facts to the board. The board shall cause notice to be served upon such director, trustee, officer or person in charge of, or officer of, a branch of a foreign banking corporation either personally or, upon a finding that he cannot be served personally within the state, by registered mail, at his address last known to the superintendent, to appear before such board to show cause why he should not be removed from office. A copy of such notice shall be sent by registered mail to each director or trustee of the banking organization and to each person in charge of and each officer of a branch of the foreign banking corporation affected. If, after granting the accused director, trustee, officer or person in charge of, or officer of, a branch of a foreign banking corporation a reasonable opportunity to be heard, the board by a three-fifths vote of all its members finds that he has violated any law or duly enacted regulation of the board relating to such corporation, or has continued unauthorized or unsafe practices in conducting the business of such corporation after having been ordered or warned by the superintendent to discontinue such practices, the board, in its discretion, by a three-fifths vote of all its members, may order that such director, trustee, officer or person in charge of, or officer of, a branch of a foreign banking corporation be removed from office.

Amendment Notes:

2011. Chapter 62, § 104 (Part A) amended:

Sub 1 by substituting at fig 1 "superintendent of financial services" for "banking board".

Notes to Decisions

Section 41 does not authorize a proceeding before state banking board for removal of an officer of a bank for violations of law committed prior to effective date of the statute, where no charge is made by superintendent of banks that any such violations occurred after warning by superintendent based on a previous violation, in accordance with former § 10-d in force at time of alleged violations. Requa v White, 9 N.Y.S.2d 863, 170 Misc. 29, 1939 N.Y. Misc. LEXIS 1501 (N.Y. Sup. Ct. 1939).

The Legislature has not contemplated that members of a savings and loan association will exercise control over management in like manner as the stockholders of a stock corporation. Stuberfield v Long Island City Sav. & Loan Asso., 37 Misc. 2d 811, 235 N.Y.S.2d 908, 1962 N.Y. Misc. LEXIS 2246 (N.Y. Sup. Ct. 1962).

Opinion Notes

Agency Opinions

By virtue of 1938 amendment to § 41, it is no longer necessary that bank officer be warned of violation of law and continue such violation before he may be removed, even though violation occurred before amendment took effect. 1938 N.Y. Op. Att'y Gen. No. 310.

For violation of §§ 108, 173, 293-a and 510-a, provisions of §§ 40, 41 and 606 may be invoked by superintendent of banks. 1946 NY Ops Atty Gen Dec 31.

Research References & Practice Aids

Cross References:

This section referred to in §§ 251, 397, 7006, 7014.

CODES, RULES AND REGULATIONS:

Procedure in removal proceedings, 3 NYCRR §§ 2.1 et seq.

False reporting as ground for removal proceeding, 3 NYCRR § 3.3.

Jurisprudences:

10 Am Jur 2d, Banks § 80.

FORMS:

LexisNexis Forms FORM 70-BK41:1.—Certification to Banking Board by Superintendent of Banks as to Facts Supporting Removal of Director, Trustee or Officer.

Hierarchy Notes:

NY CLS Bank

NY CLS Bank, Art. II

NY CLS Bank § 44

Current through 2017 released chapters 1-407

New York Consolidated Laws Service > Banking Law > Article II Department of Financial Services; Superintendent of Financial Services; Supervisory and Regulatory Powers

§ 44. Violations; penalties

1.

(a) Without limiting any power granted to the superintendent under any other provision of this chapter, the superintendent may, in a proceeding after notice and a hearing, require any safe deposit company, licensed lender, licensed casher of checks, licensed sales finance company, licensed insurance premium finance agency, licensed transmitter of money, licensed mortgage banker, registered mortgage broker, licensed mortgage loan originator, registered mortgage loan servicer or licensed budget planner to pay to the people of this state a penalty for any violation of this chapter, any regulation promulgated thereunder, any final or temporary order issued pursuant to section thirty-nine of this article, any condition imposed in writing by the superintendent in connection with the grant of any application or request, or any written agreement entered into with the superintendent.

(b) The penalty for each violation prescribed in paragraph (a) of this subdivision shall not exceed two thousand five hundred dollars for each day during which such violation continues.

(c) Notwithstanding paragraph (b) of this subdivision, if the superintendent determines (i) that any such licensee, registrant or safe deposit company has committed a violation as described in paragraph (a) of this subdivision, or has recklessly engaged in any unsafe and unsound practice and (ii) that such violation or practice is part of a pattern of misconduct, results or is likely to result in more than minimal loss to such licensee, registrant or safe deposit company, or results in pecuniary gain or other benefit to such licensee, registrant or safe deposit company, then the penalty shall not exceed fifteen thousand dollars for each day during which such violation or practice continues.

(d) Notwithstanding paragraphs (b) or (c) of this subdivision, if the superintendent determines (i) that any such licensee, registrant or safe deposit company has knowingly and willfully committed any violation as described in paragraph (a) of this subdivision, or has knowingly and willfully engaged in any unsafe and unsound practice, or (ii) that any licensee, registrant or safe deposit company has knowingly committed any violation described in paragraph (a) of this subdivision which substantially undermines public confidence in any such licensee, registrant or safe deposit company or in such licensees, registrants or safe deposit companies generally, and, in either case, (iii) that such licensee, registrant or safe deposit company has knowingly or recklessly incurred so substantial a loss as a result of such violation or practice as to threaten the safety and soundness of such licensee, registrant or safe deposit company, then the penalty shall not exceed seventy-five thousand dollars for each day during which such violation continues.

(e) The superintendent, in determining the amount of any penalty assessed pursuant to this subdivision, shall take into consideration the net worth and annual business volume of such licensees, registrants or safe deposit companies.

2.

(a) Without limiting any power granted to the superintendent under any other provision of this chapter, the superintendent may, in a proceeding after notice and hearing, require any banking organization, bank holding company out-of-state state bank that maintains a branch or branches or representative or other

offices in this state, or foreign banking corporation licensed by the superintendent to maintain a branch, agency or representative office in this state to pay to the people of this state a penalty for any violation of this chapter, any regulation promulgated thereunder, any final or temporary order issued pursuant to section thirty-nine of this article, any condition imposed in writing by the superintendent in connection with the grant of any application or request, or any written agreement entered into with the superintendent. For purposes of this section, any reference to a “banking organization” shall be deemed to exclude a safe deposit company and any reference to a “foreign bank licensee” shall be deemed to include an out-of-state state bank that maintains a branch or branches or representative or other offices in this state and a foreign banking corporation licensed to maintain a branch, agency or representative office in this state.

(b) The penalty for each violation prescribed in paragraph (a) of this subdivision shall not exceed five thousand dollars for each day during which such violation continues.

3. Notwithstanding paragraph (b) of subdivision two of this section, if the superintendent determines:

(a) that any banking organization, bank holding company, or foreign bank licensee has committed any violation described in subdivision two of this section or has recklessly engaged in any unsafe and unsound practice, and

(b) that such violation or practice is part of a pattern of misconduct, results or is likely to result in more than minimal loss to the banking organization, bank holding company, or foreign bank licensee, or results in pecuniary gain or other benefit to the banking organization, bank holding company, or foreign bank licensee, then the penalty shallnot exceed twenty-five thousand dollars for each day during which such violation or practice continues.

4. Notwithstanding paragraph (b) of subdivision two and subdivision three of this section, if the superintendent determines: (a)(i) that any banking organization, bank holding company, or foreign bank licensee has knowingly and willfully committed any violation described in subdivision two of this section or has knowingly and willfully engaged in any unsafe and unsound practice, or (ii)that any banking organization, bank holding company, or foreign bank licensee has knowingly committed any violation described in subdivision two of this section which substantially undermines public confidence in any such banking organization, bank holding company, or foreign bank licensee or in banking organizations, bank holding companies, or foreign bank licensees generally, and, in either case, (b) that the banking organization, bank holding company, or foreign bank licensee has knowingly or recklessly incurred so substantial a loss as a result of such violation or practice as to threaten the safety and soundness of such banking organization, bank holding company, or foreign bank licensee, then the penalty shall not exceed the lesser of (i) two hundred fifty thousand dollars or (ii) one percent of the total assets of such banking organization, or one percent of the total assets of the banking subsidiaries, as such term is defined pursuant to section one hundred forty-one of this chapter, of such bank holding company, or one percent of the total assets in this state of such foreign bank licensee, as applicable, for each day during which such violation or practice continues.

5. In assessing any penalty against any entity listed in paragraph (a) of subdivision one or paragraph (a) of subdivision two of this section, the superintendent shall take into account, without limitation, factors including: (a) the extent, if any, to which senior management or board directors or trustees participated therein, (b) the extent to which the entity has cooperated with the superintendent in the investigation of such conduct, (c) any sanction imposed by any other regulatory agency, (d) the financial resources and good faith of the entity, (e) the gravity of the violation, (f) any history of prior violations, and (g) such other matters as justice and the public interest may require.

6. Whenever the superintendent shall require the payment of such penalty by any such entity, he shall forthwith execute in duplicate a written order to that effect. On the date such order is executed, the superintendent shall file one copy of such order in the office of the department and serve the second copy upon such entity either personally or by registered or certified mail, return receipt requested, directed to the entity’s principal place of business or, in the case of a licensee or registrant, its last known address of record. Such order may be reviewed in the manner provided by article seventy-eight of the civil practice law and rules. Such

special proceeding for review as authorized by this section must be commenced within thirty days from the service of such order.

7. The superintendent may compromise, modify, or remit any penalty which he or she may assess or had already assessed under this section.

8. The superintendent may prescribe regulations to carry out the provisions and purposes of this section.

9. As used in this section, “bank holding company” shall have the same meaning as that term is defined in subdivision six of section thirty-nine of this article.

History

Add, L 1972, ch 97, eff April 5, 1972; amd, L 1975, ch 448; L 1976, ch 536; L 1979, ch 493, § 2, eff July 5, 1979; L 1981, ch 864, § 2, eff Sept 29, 1981; L 1997, ch 3, § 2, eff Oct 10, 1997 (see 1997 note below); L 2004, ch 356, § 2, eff Aug 10, 2004; L 2006, ch 59, § 9 (Part O), eff April 11, 2006; L 2006, ch 702, § 2, eff Sept 13, 2006; L 2006, ch 744, § 4, eff Jan 1, 2008 (see 2006 note below); L 2007, ch 553, § 4, eff Jan 1, 2008; L 2008, ch 472, § 16, eff July 1, 2009 (see 2008 note below); L 2009, ch 123, § 3, eff July 1, 2009 (see 2009 note below); L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011; L 2012, ch 155, § 9, eff July 18, 2012.

Annotations

Notes

Prior Law:

Former § 44, add, L 1914, ch 369; amd, L 1930, ch 678, L 1932, ch 399, L 1937, ch 619; repealed, L 1938, ch 684.

Editor’s Notes:

Laws 1997, ch 3, § 7 eff Sept 10, 1997, provides as follows:

§ 7. This act shall take effect immediately provided that section two of this act shall take effect on the thirtieth day after it shall have become a law and shall apply to violations prescribed in section 44 of the banking law that occur on or after such date; and provided further that sections one, three, four and five shall expire and be deemed repealed September 10, 2014; and provided further that any rules and regulations promulgated pursuant to sections one, three, four and five shall remain in full force and effect on and after such expiration date and shall not be affected by such expiration date. (Amd, L 1998, ch 392, § 1, eff July 20, 1998, L 2000, ch 418, § 11, eff Sept 8, 2000, L 2003, ch 241, § 1, eff July 29, 2003, L 2007, ch 322, § 5, eff July 18, 2007, L 2009, ch 122, § 2, eff July 11, 2009, L 2011, ch 62, § 95 (Part A), eff April 1, 2011, L 2014, ch 113, § 2, eff July 22, 2014.).

Laws 2006, ch 744, § 5 eff Jan 1, 2008, provides as follows:

§ 5. This act shall take effect January 1, 2008; provided, however, that prior to such date, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act shall be promulgated by the superintendent of banks; provided further, however, that the superintendent of banks in his or her sole discretion, may postpone any date prescribed by this act by which any person or entity subject to any requirements of this act must be in compliance with such requirements until such date or dates as the superintendent of banks determines shall achieve the effective implementation of such requirements.

Laws 2008, ch 472, § 28 eff Aug 5, 2008, provides as follows:

§ 28. This act shall take effect immediately; provided, however, that:

g. provided however, effective immediately the promulgation of any rules, regulations or actions necessary for timely implementation of the provisions of this act are hereby authorized.

Laws 2009, ch 123, § 5 eff July 11, 2009, provides as follows:

§ 5. This act shall take effect immediately; provided, however, that sections two and three of this act shall take effect on the same date and in the same manner as sections 15 and 16 of chapter 472 of the laws of 2008 take effect, respectively, and provided, further, that the superintendent of banks may delay the implementation of any provision of this act if consistent with title V of The Housing and Economic Recovery Act of 2008, Pub. L. No. 110-287.

Amendment Notes:

2012. Chapter 155, § 9 amended:

Sub 1, par (a) by deleting at fig 1 “or superintendent of financial services”.

Sub 2, par (a) by deleting at fig 1 “or superintendent of financial services”.

2006. Chapter 59, § 9 (Part O) amended:

Sub 1, par (b) by deleting at fig 1 “be”, at fig 2 “more than”, at fig 3 “thousand” and adding the matter in italics.

By adding sub 1, pars (c), (d) and (e).

Sub 2, par (b) by deleting at fig 1 “or” and adding the matter in italics.

Sub 3, par (a) by deleting at fig 1 “or” and adding the matter in italics.

Sub 3, par (b) by deleting at fig 1 “be”, at fig 2 “more than” and adding the matter in italics.

Sub 4 by deleting at fig 1 “or”, at fig 2 “be”, at fig 3 “more than” and adding the matter in italics.

2006. Chapter 702, § 2 amended:

Sub 9 by deleting at fig 1 “means any company which (a) directly or indirectly, or through a subsidiary or subsidiaries, owns, controls, or holds with power to vote (i) more than ten per centum of the voting stock of a company which is or becomes a bank holding company by virtue of article three-a of this chapter, or (ii) ten per centum or more of the voting stock of a banking institution, or (iii) if such company is a banking institution, more than ten per centum of the voting stock of any one banking institution, or (b) controls in any manner the election of a majority of the directors of (i) a banking institution, (ii) a company which is or becomes a bank holding company by virtue of article three-a of this chapter, or (iii) if such company is a banking institution, another banking institution, or (c) is a company, if such company is not a banking institution, for the benefit of whose stockholders or members ten per centum or more of the voting stock of a banking institution or of a company which is or becomes a bank holding company by virtue of article three-a of this chapter is held, directly or indirectly, by a trustee or trustees, or (d) is a company for the benefit of whose stockholders or members, if such company is a banking institution, ten per centum or more of the voting stock of any other banking institution, or ten per centum or more of the voting stock of any company which is or becomes a bank holding company by virtue of article three-a of this chapter, is hereafter acquired and held by a trustee or trustees, or (e) through a combination of (i) ownership, control or holding, directly or indirectly, of voting stock and (ii) voting stock hereinafter acquired and held, directly or indirectly, by a trustee or trustees for the benefit of the members or stockholders of such company, if such voting stock is voting stock of one or more banking institutions or of one of more companies which are or become bank holding companies by virtue of article three-a of this chapter, as the case may be, is a company which would be a bank holding company if the aggregate of such voting stock were either entirely owned, controlled or held, directly or indirectly, by such company or entirely held, directly or indirectly, by a trustee or trustees for the benefit of the members or stockholders of such company. Notwithstanding the foregoing, no company shall be a bank holding company by virtue of its ownership or

control of stock in a fiduciary capacity, except where such stock is held for the benefit of the stockholders or members of such company, nor shall any company formed and operated for the sole purpose of participating in a proxy solicitation be a bank holding company by virtue of its control of voting rights of stock in any banking institution or bank holding company acquired in the course of such solicitation" and adding the matter in italics.

1997. Chapter 3, § 2 amended:

By adding subs 5, 7 and 8.

Sub 6 by deleting at figs 1 and 2 "banking organization or licensee", at fig 3 "banking organization's" and at fig 4 "licensee's" and adding the matter in italics.

Notes to Decisions

N.Y. Banking Law art. 12-C did not prescribe any particular penalty for violation of the statute but did give the superintendent of banking the right to impose penalties pursuant to N.Y. Banking Law § 44; the penalties only may have been enforced against "licensees" found to be in violation of the Banking Law. N.Y. Gen. Bus. Law art. 28-B made it a misdemeanor to violate that article, N.Y. Gen. Bus. Law § 457, but that relief was not available in civil court. Pavlov v Debt Resolvers USA, Inc., 907 N.Y.S.2d 798, 2010 NY Slip Op 20252, 28 Misc. 3d 1061, 243 N.Y.L.J. 117, 2010 N.Y. Misc. LEXIS 2808 (N.Y. Civ. Ct. 2010).

Research References & Practice Aids

Cross References:

This section referred to in § 9-f.

Suspension or revocation of license and criminal penalties, §§ 358., 373., 495., 499., 563., 650 et seq.

Proceeding against body or officer, CLS CPLR Art 78., §§ 7801 et seq.

Codes, Rules and Regulations:

Maintenance of anti-money laundering compliance programs by banking organizations and foreign banking corporations licensed to maintain a branch or agency. 3 NYCRR §§ 116.1 et seq.

Anti-money laundering programs for applications for licenses, branches and acquisitions by licensed check cashers and licensed money transmitters. 3 NYCRR §§ 416.1 et seq.

Maintenance of anti-money laundering compliance programs by licensed cash checkers and licensed money transmitters. 3 NYCRR §§ 417.1 et seq.

FORMS:

LexisNexis Forms FORM 70-BK44:1.— Checklist Governing Assessment of Penalty Against Banking Organization for the Violation of a Law or Regulation, or the Violation of an Order, Condition or Agreement By or With the Superintendent of Banks.

Hierarchy Notes:

NY CLS Bank

NY CLS Bank, Art. II

End of Document

3 NYCRR § 2.1

This document reflects those changes received from the NY Bill Drafting Commission through November 17, 2017

New York Codes, Rules, and Regulations > TITLE 3. BANKING DEPARTMENT > CHAPTER I. GENERAL REGULATIONS OF THE BANKING BOARD > PART 2. BANKING BOARD: PROCEDURE IN REMOVAL PROCEEDINGS

§ 2.1 Rights of parties

Parties to removal proceedings before the Superintendent shall at all stages thereof have all fundamental rights, including the rights of counsel, cross-examination, presentation of evidence, objection and motion.

History

Amended 2.1(effective 06, 01, 13) on 4/24/13.

NEW YORK CODES, RULES AND REGULATIONS

End of Document

3 NYCRR § 2.2

This document reflects those changes received from the NY Bill Drafting Commission through November 17, 2017

New York Codes, Rules, and Regulations > TITLE 3. BANKING DEPARTMENT > CHAPTER I. GENERAL REGULATIONS OF THE BANKING BOARD > PART 2. BANKING BOARD: PROCEDURE IN REMOVAL PROCEEDINGS

§ 2.2 Notice of hearing

(a) Upon receipt by the Superintendent of any certification of facts pursuant to Banking Law, section 41, the Superintendent shall cause notice to be served as provided in said section.

(b) Such notice shall specify when and where a hearing is to be held. Such hearing shall be held not less than 30 days from the date of service of such notice upon the director, trustee or officer sought to be removed (hereinafter referred to as the "respondent"), unless the respondent or the superintendent shall in writing, for good cause shown, request a hearing at an earlier date, in which event the Superintendent may, in its discretion, direct a hearing at such earlier date.

(c) A copy of the superintendent's certification and of this Part shall be annexed to the aforesaid notices served pursuant to the Banking Law, section 41.

Statutory Authority

Section statutory authority:

Banking Law, § 41

Banking Law, § A12

History

Amended 2.2(effective 06, 01, 13) on 4/24/13.

NEW YORK CODES, RULES AND REGULATIONS

End of Document

3 NYCRR § 2.5

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New York Codes, Rules, and Regulations > TITLE 3. BANKING DEPARTMENT > CHAPTER I. GENERAL REGULATIONS OF THE BANKING BOARD > PART 2. BANKING BOARD: PROCEDURE IN REMOVAL PROCEEDINGS

§ 2.5 Hearing officer

The Superintendent may designate a hearing officer to take any evidence for the Superintendent. The hearing officer shall have all powers necessary for the taking of evidence, including but not limited to the following powers:

(a) to fix the time or times when, and the place or places where, the evidence shall be taken;

(b) to regulate the course of the hearings and the conduct of the parties and their counsel;

(c) to consider and rule upon all objections to evidence and motions regarding the same, and to receive any offers of proof.

Statutory Authority

Banking Law, §§ 14(1), 41

History

Amended 2.5(effective 06, 01, 13) on 4/24/13.

3 NYCRR § 2.6

This document reflects those changes received from the NY Bill Drafting Commission through November 17, 2017

§ 2.6 Transcripts

All hearings, whether before the Banking Board or a hearing officer, shall be stenographically recorded and transcribed. Copies of such transcript may be purchased from the reporter by the respondent and the superintendent.

NEW YORK CODES, RULES AND REGULATIONS

3 NYCRR § 2.7

This document reflects those changes received from the NY Bill Drafting Commission through November 17, 2017

New York Codes, Rules, and Regulations > TITLE 3. BANKING DEPARTMENT > CHAPTER I. GENERAL REGULATIONS OF THE BANKING BOARD > PART 2. BANKING BOARD: PROCEDURE IN REMOVAL PROCEEDINGS

§ 2.7 Briefs and argument after taking evidence

After the evidence has been taken, whether before the Superintendent or a hearing officer, and within such time as may be fixed by the Superintendent or the hearing officer as the case may be, the respondent and the Superintendent shall be afforded an opportunity to file briefs and proposed findings with, and shall be allowed oral argument before the hearing officer as the case may be.

Statutory Authority

Statutory authority:

Banking Law, § A12

History

Added fb 2.7 on 9/07/94.

3 NYCRR § 2.8

This document reflects those changes received from the NY Bill Drafting Commission through November 17, 2017

New York Codes, Rules, and Regulations > TITLE 3. BANKING DEPARTMENT > CHAPTER I. GENERAL REGULATIONS OF THE BANKING BOARD > PART 2. BANKING BOARD: PROCEDURE IN REMOVAL PROCEEDINGS

§ 2.8 Hearing officer's report

(a) If the evidence has been taken before a hearing officer, he shall, after considering the briefs and proposed findings that may have been filed with him and any oral argument that may have been made before him, make and file a report with the Superintendent, and shall thereupon serve a copy of such report on the respondent. Such report shall contain:

(1) recommended findings of fact, together with the page numbers of the transcript supporting those findings;

(2) recommended conclusions of law;

(3) any statement as to the credibility of witnesses that the hearing officer may deem desirable.

(b) Together with his report, the hearing officer shall file with the Superintendent the entire record of the proceedings before him, including the transcript, any exhibits, and the briefs and proposed findings of the parties, if any were filed.

Statutory Authority

Statutory authority:

Banking Law, §§ 14(1), 41

History

Amended 2.8(effective 06, 01, 13) on 4/24/13.

3 NYCRR § 2.9

This document reflects those changes received from the NY Bill Drafting Commission through November 17, 2017

New York Codes, Rules, and Regulations > TITLE 3. BANKING DEPARTMENT > CHAPTER I. GENERAL REGULATIONS OF THE BANKING BOARD > PART 2. BANKING BOARD: PROCEDURE IN REMOVAL PROCEEDINGS

§ 2.9 Exceptions to hearing officer's report and argument thereon

(a) Within 15 days after service of the hearing officer's report, the respondent and the Superintendent may respectively serve upon each other, exceptions to the report and briefs in support of the exceptions. Answering briefs may be served and filed with the Superintendent within 15 days after service of the original brief. Argument in opposition to recommended findings of fact shall include specific page references to the transcript.

(b) If either the respondent or Superintendent desires oral argument before the hearing officer, written request therefore shall be made no later than the last date for filing briefs. Upon such request, or on its own motion, the Superintendent shall direct oral argument and shall serve notice upon the respondent of the time when and the place where such oral argument shall be heard.

Statutory Authority

Statutory authority:

Banking Law, §§ 14(1), 41

History

Amended 2.9(effective 06, 01, 13) on 4/24/13.

NEW YORK CODES, RULES AND REGULATIONS

End of Document

NY CLS CPLR § 7803, Part 1 of 6

Current through 2017 released chapters 1-407

New York Consolidated Laws Service > Civil Practice Law And Rules > Article 78 Proceeding Against Body or Officer

§ 7803. Questions raised

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

5. A proceeding to review the final determination or order of the state review officer pursuant to subdivision three of section forty-four hundred four of the education law shall be brought pursuant to article four of this chapter and such subdivision; provided, however, that the provisions of this article shall not apply to any proceeding commenced on or after the effective date of this subdivision.

History

Add, L 1962, ch 308, § 1, eff Sept 1, 1963; amd, L 1962, ch 318, § 26, eff Sept 1, 1963; L 2003, ch 492, § 2, eff Sept 1, 2003.

EXHIBIT C

Requa v. White

Supreme Court of New York, Special Term, New York County

February 11, 1939

No Number in Original

Reporter
170 Misc. 29 *; 9 N.Y.S.2d 863 **; 1939 N.Y. Misc. LEXIS 1501 ***

In the Matter of the Application of Isaac Requa for a Restraining Order under the Provisions of Article 78 of the Civil Practice Act, Petitioner, v. William R. White and Others, as the Banking Board of the State of New York, Respondents

Prior History: [*1]** Application for order restraining State Banking Board from removing petitioner, as president and trustee of savings bank, under section 41 of Banking Law.

Disposition: For the reasons indicated the motion is granted. Settle order.

Core Terms

removal, warning, violation of law, violations, taking effect, reasonable opportunity, removed from office, power to remove, discontinue, proceedings, depositors, provisions, certify

Case Summary

Procedural Posture
Petitioner bank president sought an order under N.Y. C.P.L.R. art. 78 to restrain and prohibit respondent Banking Board of the State of New York from proceedings it had instituted under N.Y. Banking Law § 41 for the removal of petitioner as the president of a bank.

Overview
The Board sought to remove petitioner as president of a bank under N.Y. Banking Law § 41 (1938) for violations of the law that occurred on or before April 1, 1938. N.Y. Banking Law § 41 (1938) did not become effective until June 30, 1938. The president sought an order to restrain the Board from the proceedings and the court granted the order. The court found that prior to June 30, 1938, the president could have been removed under N.Y. Banking Law § 10-d after having been warned to discontinue violations of the law. The president had not been given any warning. With the enactment of N.Y. Banking Law § 41 (1938), the law was changed so as to permit removals without warning. The only logical conclusion was that the legislature intended that for any violation of law committed after June 30, 1938, an officer, director or trustee of the bank could be removed without warning. The court held that N.Y. Banking Law § 41 (1938) did not authorize a proceeding before the Banking Board for the removal of an official for violations of law committed prior to June 30, 1938.

Outcome
The court granted the order.

LexisNexis® Headnotes

Banking Law > Commercial Banks > Directors & Officers > Duty of Care

Banking Law > Federal Acts > General Overview

HN1[] **Directors & Officers, Duty of Care**

See N.Y. Banking Law § 10-d.

Banking Law > Commercial Banks > Directors & Officers > Misfeasance & Nonfeasance

HN2[] **Directors & Officers, Misfeasance & Nonfeasance**

See N.Y. Banking Law § 41 (1938).

Banking Law > Commercial Banks > Directors & Officers > Misfeasance & Nonfeasance

HN3[] **Directors & Officers, Misfeasance & Nonfeasance**

N.Y. Banking Law § 41 (1938) does not authorize a proceeding before the Banking Board for the removal of an official for violations of law committed prior to June 30, 1938, where no charge is made by the Superintendent of Banks that any such violations occurred after warning by the Superintendent based upon a previous violation.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Governments > Legislation > Interpretation

HN4[] **Jury Trials, Province of Court & Jury**

It is not within the province of the court to substitute its wisdom for the expressed policy of the legislature.

Headnotes/Syllabus

Headnotes

Banks and banking -- removal of officer of bank -- Banking Law, § 41, effective June 30, 1938, does not authorize proceeding before State Banking Board for removal of officer of bank for violations of law committed prior to effective date of statute -- petitioner, president and trustee of savings bank, who sought order, under Civ. Prac. Act, art. 78, to prohibit Board from removing him, adopted proper procedure (Civ. Prac. Act, § 1296, subd. 2) -- motion granted.

Syllabus

Section 41 of the Banking Law (as thus renumbered from § 10-d and amd. by Laws of 1938, chap. 684, § 38), effective on June 30, 1938, does not authorize a proceeding before the State Banking Board for the removal of an officer of a bank for violations of law committed prior to the effective date of the statute, where no charge is made by the Superintendent of Banks that any such violations occurred after warning by the Superintendent based on a previous violation, in accordance **[***2]** with the statute in force at the time of the alleged violations (Banking Law, § 10-d, as it existed prior to Laws of 1938, chap. 684).

The petitioner, the president and trustee of a savings bank, who sought an order under article 78 of the Civil Practice Act to prohibit the State Banking Board from removing him, adopted the appropriate procedure under the provisions of subdivision 2 of section 1296 of the Civil Practice Act, which relates to the exercise of judicial or quasi-judicial functions without or in excess of jurisdiction.

The motion is granted.

Counsel: *O'Connor & Farber* [*Basil O'Connor* and *Henry K. Urion* of counsel], for the petitioner.

John J. Bennett, Jr., Attorney-General [*Henry Epstein, Solicitor-General*, of counsel], for the respondents.

Judges: Levy, J.

Opinion by: LEVY

Opinion

[*29] **[**864]** Petitioner seeks an order, under article 78 of the Civil Practice Act, in the nature of the former writ of prohibition to restrain and prohibit the Banking Board of the State of New York from proceedings it has instituted under section 41 of the Banking Law (as thus renumbered from § 10-d and amd. by Laws of 1938, chap. 684, § 38) for the removal of petitioner **[***3]** as the president and as a trustee of Westchester County Savings Bank. The violations of law charged against petitioner and for which his removal is sought, occurred on or before April 1, 1938, whereas section 41 became effective June 30, 1938. Consequently the **[*30]** proper determination of this application depends upon whether the provisions of that section permit the removal for offenses occurring prior to its effective date.

At the time of the alleged violations of law, the statute governing removals by the Board was section 10-d of the Banking Law and read in part as follows: ***HN1***[] "Whenever, in the opinion of the Superintendent, any director, trustee or officer * * * shall have continued to

violate any law * * * after having been warned by the Superintendent to discontinue such violations * * * the Superintendent may certify the facts to the Banking Board. * * * If, after granting the accused director, trustee or officer a reasonable opportunity to be heard the Banking Board * * * finds that he has continued to violate any law * * * after having been warned by the Superintendent to discontinue such violations * * * the Banking Board * * * may order that such director, trustee **[***4]** or officer be removed from office."

[865]** Thus it is plain that prior to June 30, 1938, petitioner could have been validly removed for continued violations of law in defiance of warning. Moreover, no claim is made that any warning was ever given to petitioner or that any violation was committed subsequent to such warning. The law governing removals was changed, however, by the enactment of section 41 of the Banking Law (Laws of 1938, chap. 684, § 38) so as to permit removals for a single offense without warning. That section provides as follows: ***HN2***[] "Whenever the Superintendent shall find that any director, trustee or officer * * * has violated any law * * * the Superintendent may, in his discretion, certify the facts to the Board. * * * If, after granting the accused director, trustee or officer reasonable opportunity to be heard, the Board * * * finds that he has violated any law * * * the Board * * * may order that such director, trustee or officer be removed from office." Moreover, the Legislature expressly declared, "This act shall take effect on June thirtieth, nineteen hundred and thirty-eight." That declaration must be given effect in accordance with the intent of the **[***5]** Legislature and may not be disregarded. (*Matter of Miller*, 110 N. Y. 216, 223; *Matter of Kaufman Estate*, 158 Misc. 102.)

What, then, did the Legislature intend when it provided that section 41 was to take effect on June 30, 1938? Only two interpretations are possible. Its intent was either as claimed by the petitioner, that an officer, director or trustee of a bank could be removed for any violation of law committed after June 30, 1938, or, as urged by the respondents, that after June 30, 1938, such removal could be based upon any violation of law whenever committed. If the latter interpretation be the correct one, its only effect was to **[*31]** compel the Superintendent of Banks if he wished to cause the removal of an officer, director or trustee who had been guilty of a violation of law but had not committed another violation after warning, to defer action until after June 30, 1938. Thus the Legislature intended to make the power of removal depend not upon the time when the violations of law were committed, but rather upon whether the Superintendent chose to institute proceedings for removal before or after June 30, 1938. It is difficult, if not impossible, to ascribe **[***6]** to the Legislature an intent to achieve a result so absurd and meaningless. It is much more likely and probable that it intended that for any violation of law committed after June 30, 1938, an officer, director or trustee of the bank could be removed without warning.

I am, accordingly, constrained to hold that section 41 of the Banking Law ***HN3***[] does not authorize a proceeding before the Banking Board for the removal of an official for violations of law committed prior to June 30, 1938, where no charge is made by the Superintendent of Banks that any such violations occurred after warning by the Superintendent based upon a previous violation. I reach this conclusion despite the fact that I am in full accord with the view expressed by the Solicitor-General and the Attorney-General of this State that public policy demands that such officials should be subject to removal for a single violation of law, whenever committed and that a proper protection of depositors and **[**866]** others requires that such recalcitrant officials should not be afforded a second opportunity to violate the law and injure the depositors and the public generally before the Banking Board acquires the power to remove **[***7]** them. It is unfortunate indeed that the Legislature saw fit to provide that section 41 shall not take effect until June 30, 1938. However, ***HN4***[] it is not within the province of the court to substitute its wisdom for the expressed policy of the Legislature.

In the circumstances petitioner adopted the appropriate procedure under the provisions of subdivision 2 of section 1296 of the Civil Practice Act, relating to the exercise of judicial or quasi-judicial functions without or in excess of jurisdiction.

For the reasons indicated the motion is granted. Settle order.

Peterson v. State

Supreme Court of New York, Appellate Division, Third Department

February 15, 1979

Claim No. 61813

Reporter
67 A.D.2d 1054 *; 413 N.Y.S.2d 518 **; 1979 N.Y. App. Div. LEXIS 10867 ***

Lloyd Peterson, Appellant, v. State of New York, Respondent

Core Terms

banking law, taking possession, terminate, claimant, banking, employment contract, credit union, Receivers, vested

Case Summary

Procedural Posture
Appellant general manager sought review of a decision of the Court of Claims (New York), which granted respondent Superintendent of Banks' motion to dismiss the claim against it. The bank had terminated the employment of the general manager pursuant to its discretion of N.Y. Banking Law §§ 10, 12(3), and 606.

Overview
The Superintendent took possession of a credit union under provisions of § 606, and terminated the employment of the general manager. The manager filed an action against the State for wrongful breach of contract of employment, and he demanded damages. The Superintendent filed a motion to dismiss the claim, and it was granted. The manager appealed, arguing that the Superintendent could not terminate the employment contract. The court affirmed, holding that the Superintendent was acting lawfully in taking possession of the credit union, and actions under § 606 were clearly within her discretionary power. In taking possession of a banking organization, the Superintendent of Banks acquired the powers of a statutory receiver, and had the power to reject the obligation created under the employment contract.

Outcome
The court affirmed the dismissal of the manager's action against the Superintendent.

LexisNexis® Headnotes

Banking Law > ... > National Banks > Insolvencies, Liquidations & Rehabilitations > General Overview

HN1[] **National Banks, Insolvencies, Liquidations & Rehabilitations**

By virtue of N.Y. Banking Law § 606, the Superintendent of Banks has the duty of instant decision and quick action to protect the moneys of the depositors.

Judges: [*1]** Mahoney, P. J., Greenblott, Sweeney and Staley, Jr., JJ., concur; Mikoll, J., not taking part.

Opinion

[*1054] [519]** Appeal from an order of the Court of Claims, entered June 6, 1978, which granted a motion to dismiss the claim. The Superintendent of Banks took possession of the Municipal Credit Union of New York City under the provisions of section 606 of the Banking Law on November 2, 1977, finding one or more of the grounds specified in the statute present. The Superintendent in the exercise of the discretion vested in her pursuant to section 10, subdivision 3 of section 12 and section 606 of the Banking Law terminated the employment of claimant as general manager of the bank. Claimant filed a claim against the State for wrongful breach of contract of employment and demanded $ 335,000 in damages. The Court of Claims granted respondent's motion to dismiss. The order

should be affirmed. There is no dispute that the Superintendent was acting lawfully in taking possession of the credit union, a banking organization (Banking Law, § 2, subd 11). The issue raised is whether in doing so she may terminate the employment contract in question. Actions under section 606 clearly **[***2]** fall within the discretionary power of the Superintendent. In taking possession of a banking organization she acquired the powers of a statutory receiver *(Leal v Westchester Trust Co*., 279 NY 25; *Lafayette Trust Co. v Beggs*, 213 NY 280). Thus, the Superintendent had the power to reject the obligation created under the employment contract (49 NY Jur, Receivers, § 60). ***HN1***[] By virtue of section 606 of the Banking Law, the Superintendent has the duty **[*1055]** of instant decision and quick action to protect the moneys of the depositors *(Lunghino v Rand*, 247 App Div 481, mot for lv to app den 272 NY 675). We, therefore, find that the Superintendent did not abuse the discretion vested in her by the banking laws in terminating the employment and salary of claimant (Banking Law, §§ 10, 12, subd 3; § 606). Section 41 of the Banking Law was properly ruled inapplicable by the Court of Claims since the Superintendent had taken possession of the organization pursuant to section 606 of the Banking Law. Moreover, the Superintendent here was exercising her statutory discretion in performance of a governmental function. Thus, the State is immune from liability for her action *(Weiss* **[***3]** *v Fote*, 7 NY2d 579; *Burgundy Basin Inn v State of New York*, 47 AD2d 692, mot for lv to app den 37 NY2d 706; *Gross v State of New York*, 33 AD2d 868). Order affirmed, without costs.

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