

STATE OF FLORIDA
DEPARTMENT OF BANKING AND FINANCE
DIVISION OF BANKING



DEPARTMENT OF BANKING
AND FINANCE,

Petitioner,

vs.

DOAH Case No. 92-2455

BAY BANK & TRUST COMPANY,

Respondent.

_____ /

Administrative Proceeding
No. 3042-B

DEPARTMENT OF BANKING AND
FINANCE, STATE OF FLORIDA,

Complainant,

vs.

DOAH Case No. 92-3744

BAY BANK AND TRUST COMPANY,
JOHN CHRISTO, JR., and
JOHN CHRISTO, III,

Respondents.

_____ /

FINAL ORDER

THIS CAUSE came before the undersigned as Head of the Department of Banking and Finance, Division of Banking, (hereinafter "Department" or "Agency Head") for the purpose of issuing a final agency order. The hearing officer, Charles C. Adams, assigned by the Division of Administrative Hearings (DOAH) in the above-styled consolidated cases submitted on February 1, 1994 a Recommended Order ("Recommended Order") to the Department of Banking and Finance ("DBF" or "Petitioners"), a copy of which is attached hereto as attachment "A". After the parties filed three separate joint motions to extend filing dates of exceptions, responses, and proposed final orders, which motions were granted,

certain of the parties to this case have filed exceptions to the Recommended Order.¹ DBF timely filed its exceptions to the Recommended Order on May 16, 1994, a copy of which is attached hereto as attachment "B". John Christo, Jr. and John Christo, III ("Christos" or "Respondents") also filed their exceptions to the Recommended Order on that date, a copy of which is attached hereto as attachment "C". DBF and Bay Bank have, by previous Agreement and Final Order to Cease and Desist docketed April 19, 1994, resolved their respective differences.

The following findings and conclusions are made upon review of the Recommended Order, the argument of parties, and after a review of the complete record in this case.

RULINGS ON EXCEPTIONS

RULING ON EXCEPTIONS FILED BY THE CHRISTOS

Respondents, Christos, on May 16, 1994 filed consecutively numbered exceptions to findings of fact and conclusions of law contained in the Hearing Officer's Recommended Order. The

¹ The parties filed three joint motions to enlarge time to file extensions, responses to exceptions and proposed final orders and the deadlines for filing same were, by separate orders, extended accordingly. The third and last Order extended the time for filing exceptions to May 16, 1994; Responses to exceptions to May 26, 1994 and proposed final orders to June 9, 1994. While normally final orders pursuant to §120.59(1), F.S. are to issue within 90 days after submission of the Recommended Order, the stay order imposed by the First District Court of Appeals in Case 93-2669 as well as the several extensions requested by the parties served to extend the statutory and Rule 3-7.012, F.A.C. time periods accordingly. Issuance of a final order outside the 90 day period is considered, in an enforcement case such as this one, harmless error. Department of Business Regulation, Division of Para-Mutual Wagering v. Hymen, 417 So.2d 671 (Fla. 1982) on remand 431 So. 2d 603 (3rd DCA 1983).

Department's rulings follow:²

Exceptions as to Findings of Fact

1. The Respondents, in paragraph numbered 1 of their exceptions, make a generalized statement regarding an alleged use of unpromulgated rules to establish violations. Respondent's have not linked this exception to a specific finding of fact or legal conclusion in the Recommended Order and it is therefore rejected as unintelligible, immaterial, and irrelevant.

2. The Respondents except to paragraph 105 of the Recommended Order. Respondents, in their exception, inaccurately state the finding of the hearing officer. This forms the first basis for its rejection. In addition, in their exception, the respondents also reargue the evidence. In Heifetz v. Department of Business Regulation, 475 So. 2nd 1277 (Fla. 1st DCA 1985), the First District Court of Appeals explained the respective roles of hearing officers and state agencies in deciding factual issues, as follows:

Factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finder of fact. McDonald v. Department of Banking and Finance 346 So. 2nd 569 (Fla. 1st DCA 1977). It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence. State Beverage Department v. Renal, Inc. 115 So. 2nd 566 (Fla 3rd DCA 1959) If, as if often the case,

² The references to the Final hearing transcript, as utilized herein, shall be "T." followed by a page or line number; references to exhibits shall be as previously designated numerically by the parties prefaced by a P or R. Multipaged exhibits shall be prefaced by "Pg." and a number.

the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other. The agency may not reject the hearing officer's finding unless there is no competent substantial evidence from which the finding could reasonably be inferred. The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion....

Id. at 1281.

Having reviewed the transcript of the hearing, the exhibits and pleadings in this matter, it cannot be determined that there is no competent substantial evidence to support the Hearing Officer's finding as it is set forth in paragraph 105 of the Recommended Order. For these additional reasons, the Respondents' exception is rejected.

3. The Respondents' third exception fails to cite to a specific paragraph in the Recommended Order. Assumedly, this exception refers to paragraph 105, which, as previously noted, does not find what the Respondents argue in their second exception. In addition, the Respondent's mix questions of law and fact in their exception to a finding of fact. For the same reasons set forth in the ruling on exception number 2, supra, the Respondents' third exception is rejected.

4. The Respondents' fourth exception is an unconnected generalized statement of law regarding the burden of proof. No specific factual finding is challenged. This exception, with no linkage to a specific Finding(s) of Fact, is unintelligible and therefore rejected as immaterial and irrelevant.

5. The Respondents' fifth exception does not cite to a

specific factual finding in the Recommended Order; instead, it contains a generalized statement arguing that the Hearing Officer refused to consider alleged evidence that the bank incurred no losses as a result of the alleged violations. The Respondents' interpretation of Section 655.037, Florida Statutes, does not comport with the language of that statute which provides that such violative conduct created a likelihood of loss, or other substantial damage or that the interests of depositors, members or shareholders could be seriously prejudiced by reason of such violation. Competent, substantial evidence exists in the record that the unsafe and unsound practices and other cited violations created a sufficient likelihood of loss or substantial damage or could seriously prejudice the interests of depositors or shareholders. (see T. 321, 556-58, 559-62, 892-96, 905-08, 922, 927). For the foregoing reasons, this exception is rejected. See also Heifetz, supra.

6. The Respondents' sixth exception contains a generalized statement of law, without any specific reference to a particular finding of fact. This exception is rejected to the extent it fails to specify what finding it is excepting to. In addition, contrary to Respondents' assertions, the matter was alleged in the Department's Administrative Complaint (See Paragraphs 34 - 35, Exhibit R1B)

7. The Respondents' seventh exception contains a generalized statement of law without referencing a specific finding of fact. To the extent such a reference is lacking, this exception is

rejected as unintelligible and therefore immaterial and irrelevant. To the extent Respondents argue the matter therein was not alleged in the complaint, the exception is rejected as contrary to the facts (See Administrative Complaint, Exhibit R1B, Paragraphs 17 - 32 and 35)

8. The Respondents' exception number eight fails to specifically cite to a numbered paragraph in the Recommended Order. The exception instead contains a generalized statement mixing legal argument and factual dispute. To the extent this exception attempts to reargue the evidence, it is rejected. See Heifetz, supra. To the extent this exception misquotes section 655.037, Florida Statutes, it is likewise rejected for the same reasons as articulated in ruling on exception number 5, above.

9. The Respondents' ninth exception attacks the constitutionality of Section 655.045, Florida Statutes. This exception is rejected insofar as administrative agencies are not the appropriate forum to determine questions of constitutional import. See, e.g. Myers v. Hawkins, 362 So. 2nd 926, 928 (Fla. 1978).

10. The Respondents' tenth exception paraphrases the finding in paragraph 43 of the Recommended Order that it was appropriate on March 31, 1991 for the Department to direct Bay Bank not to pay dividends. The exception contends that the bank was not prohibited from paying dividends in the March, 1991 exam report. Respondents' exception inaccurately paraphrases the hearing officer's specific finding in paragraph 43. In addition, Respondents fail to link the

relevancy of its exception to the overall case. For these reasons, this exception is rejected.

11. The Respondents' eleventh exception fails to cite to a specific numbered paragraph of the Recommended Order. In their exception, respondents argue that "a finding of Bay Bank policy requiring collateral for letters of credit exceeding \$100,000.00 is not supported by any evidence in the record." The Respondents apparently have inaccurately stated the hearing officer's finding, which assumedly is found in paragraph 102 of the Recommended Order. The hearing officer concluded that a "custom and practice" existed at the bank requiring such security. There is competent substantial evidence in the record to support this finding. (See e.g., Plaintiffs Exhibit 32; T. 1480-81). For these reasons, this exception is rejected. See Heifetz, supra.

12. Respondents' twelfth exception fails to cite to a specific section, paragraph, or sentence of the Recommended Order; instead, it contains a generalized statement regarding violations being resolved through a "written agreement." Reviewing the Recommended Order, in toto, the hearing officer clearly evaluated and weighed the evidence surrounding the stipulation and the written agreement between the Bank and DBF (see paragraphs 54 through 78 of the Recommended Order). The contention that the written agreement operated to waive (or merge, for that matter) any claims the Department has against the Christos is rejected. It is noteworthy that the stipulation entered into in connection with the written agreement had a proviso (section 7) wherein the Department

retained its rights to "take such further action... against Bay Bank and the directors as the Department deems necessary and appropriate... to prevent any violation of law relating to financial institutions." In addition, the Respondents assert that the written agreement never became enforceable due to lack of proper execution by the agency head. This issue does not appear to have been raised by the Respondents before the hearing officer. The Respondents twelfth exception is therefore rejected as contrary to the law and the evidence.

13. The Respondents' thirteenth exception argues with an evidentiary matter, contending the hearing officer failed to consider certain "evidence". The alleged "failure" on the hearing officer's part is apparently a supposition of the respondents. This exception, as others before it, attempts to have the agency reweigh evidence which the Hearing Officer has previously evaluated in reaching his ultimate findings of fact. This is the Hearing Officer's function. See Heifetz, supra. The hearing officer's evaluation regarding the letters of credit is accepted. For these reasons, this exception is rejected.

14. The Respondents' fourteenth exception, as in their thirteenth exception, argues that the Hearing officer failed to consider certain evidence. This appears to be additional supposition by the Respondents. It is the hearing officer's function to weigh the evidence for the purpose of rendering ultimate findings of fact. See Heifetz, supra. Upon reviewing the record and the hearing officer's analysis and findings as to the

letters of credit in paragraphs 79 through 114 of the Recommended Order and concurring with his reasoning and findings and adopting same, this exception is therefore rejected.

15. In their fifteenth exception, the Respondents oversimplify the hearing officer's findings in paragraph 106 of the Recommended Order. The hearing officer, in that paragraph, did not merely focus on the unsecured nature of the February 26, 1991 extension of the line of credit; in addition, the hearing officer noted that the financial condition of Christo, Jr. did not justify the unsecured loan and that the loan was contrary to the policies of Bay Bank in that the unsecured loan was not "supported by satisfactory balance sheet and income statement information with repayment from demonstrated cash flow or reasonably certain conversion of its assets." In addition to inaccurately characterizing the hearing officer's findings, the respondents argue with the evidence and argue factors which they deem mitigating. As noted previously, it is the hearing officer's function to weigh the relevant evidence for the purpose of reaching ultimate findings of fact. Competent, substantial evidence exists in the record to support the hearing officer's findings (see T. 564-85; in particular, 568, lines 16-25; 569, lines 1-2; 573, lines 8-25; 574, lines 1-3; 579; exhibit P42, pg. 20.). See also Heifetz, supra. Lastly, contrary to the Respondents' assertions in their exception, the hearing officer noted in paragraph 137 of the Recommended Order that the Christos' conduct created an abnormal risk of loss that would seriously prejudice the interests of the

bank and its depositors. For the foregoing reasons, Respondents fifteenth exception is rejected.

16. Respondents, in their sixteenth exception, incorporates exception number 15 and additionally argues that the enforcement actions on the alleged violations were barred because they predated the written agreement, and thus were allegedly waived or merged into the written agreement. This argument is rejected as an erroneous legal conclusion. Competent, substantial evidence supports the hearing officer's finding. See Heifetz, supra. In further ruling on the latter issue raised by the Respondents as to "merger", the ruling on exception number 12, above, is incorporated herein by reference. Based upon the foregoing, this exception is rejected.

17. The Respondents' seventeenth exception is an inaccurate statement of the hearing officer's finding in paragraph 110 of the Recommended Order which primarily dealt with the value or lack thereof associated with Bay Savings Bank stock. The Hearing Officer did not specifically "find" that the written agreement was violated in paragraph 110. The Respondents' exception is therefore rejected as immaterial and irrelevant to the overall analysis and findings of the Hearing officer in paragraph 110.

18. In exception number eighteen, Respondents' make a generalized statement that the hearing officer allegedly rejected "undisputed" testimony in favor of the Christos and instead relied upon "inferences" in finding negligence or intent to commit violations by the Christos. As the finder of fact, with the

opportunity to observe the demeanor of a witness and place that witnesses testimony in the context of all the other evidence, the hearing officer is the sole judge of the credibility of a witness. Contrary to Respondents' assertion, intent not only can, but in the absence of a direct admission, must be proven by circumstantial evidence. See Tew v. Chase Manhattan Bank, 728 F. Supp. 1551, 1555 (S.D. Fla.), modified in part on other grounds, 741 F. Supp. 220 (S.D. Fla.). The Bowling case, cited by Respondents is factually and legally distinct from this case and therefore distinguishable. For these reasons, Respondents eighteenth exception is rejected.

19. Respondents except to paragraph 115 of the Recommended Order and contest the evidentiary findings of the hearing officer. Having reviewed paragraph 115, there is nothing within the context of that statement which specifically "finds" what the respondents allege to have been found in their exception. This exception is therefore rejected as an incorrect characterization of the hearing officer's finding, and therefore immaterial and irrelevant.

20. Respondents except to paragraph 116 of the Recommended Order and argue the relevancy of the hearing officer's finding therein which is, in essence, a reiteration of certain findings by the FDIC in a November 18, 1991 report of examination of Bay Bank which was introduced and accepted into evidence as Petitioner's exhibit 6. The Hearing Officer is in the best position to determine the initial relevancy of evidence in the presentation of the case and in the drafting of the Recommended Order. The finding appears relevant to the extent it is corroborative of the overall

findings of regulatory problems at the bank. The Department therefore concurs with the hearing officer, and rejects Respondents' exception.

21. Respondents except to paragraph 128 and 129 of the Recommended Order. Those paragraphs of the Recommended Order are essentially findings which speak to the high level corporate positions held by the Christos in Bay Bank and hence, the extent to which they should legally be charged with knowledge of its business and affairs. Again, competent substantial evidence in the record supports the hearing officer's findings. (See e.g. prehearing stipulations of fact, 1B, C, and D). In addition, this exception contains much irrelevant argument. For these reasons, the twenty first exception is rejected. See also Heifetz, supra.

22. Respondents except to paragraph 130 of the Recommended Order. Paragraph 130 is similar to paragraphs 128 and 129 to the extent it finds that the Christos knew or should have known that certain loans which were made were done so pursuant to terms dissimilar to those afforded the ordinary bank customer receiving a letter of credit. They appear to argue with the hearing officer's findings involving the weight he, the hearing officer, accorded the evidence introduced during the final hearing. The hearing officer is in the best position to evaluate the evidence and render ultimate findings of fact. Based upon the evidence introduced at the final hearing regarding the positions held by the Christos at Bay Bank, the hearing officers finding is supported by competent substantial evidence in the record. For these reasons, this

exception is rejected. See Heifetz, supra.

23. Respondents' twenty third exception simply references paragraphs 132 through 135 of the Recommended Order with a reference to " see 15,16,17,18,19,21 and 22 above". The undersigned is unable to ascertain as to precisely what point Respondents except; therefore, this exception is rejected as unintelligible and therefore immaterial and irrelevant.

24. Respondents, in the twenty fourth exception, except to paragraph 140 of the Recommended Order. The respondents cite no evidence or law in support of their generalized assertions of alleged inconsistent agency action. The Department concurs with the hearing officer's finding and reasoning, which is supported by competent, substantial evidence, and therefore rejects this exception. See Heifetz, supra.

Exceptions as to Conclusions of Law:

25. Respondents except to paragraph 143 of the conclusions of law of the Recommended Order which paragraph contains mixed statements of law and fact. To the extent such statements are fact related, they are supported by competent, substantial evidence. To the extent such statements are conclusions of law, the Department nevertheless concurs with the hearing officer's reasoning, adopts same, and rejects Respondents' exception. The cases cited by Respondents are both legally and factually distinguishable from this case.

26. Respondents except to paragraphs 144 and 145 of the Recommended Order. The Department rejects this exception based

upon its ruling to Respondents' exception number 25.

27. Respondents, in their twenty seventh exception, except to paragraph 148 of the Recommended Order. In paragraph 148, the hearing officer found that the department had proven that the cost of examination and supervision was \$67,494.20 and, in essence, was entitled to collect those costs. Respondents attempt to reargue the evidence which the hearing officer has already weighed and evaluated as is his function in reaching ultimate findings. Nevertheless, as will be discussed hereafter in ruling upon DBF's exceptions to certain conclusions of law, the subject matter of this conclusion has been rendered moot by agreement of both DBF and Bay Bank. This exception is therefore rejected.

28. The Respondents except to paragraph 149 of the Recommended Order which conclusion concerns the Department's administrative complaint filed against Bay Bank for cease and desist order, examination fees and costs. As will be discussed hereafter in ruling on DBF's exceptions to certain conclusions of law, the subject matter of this conclusion has been rendered moot by agreement of DBF and Bay Bank. For that reason, Respondent's exception is rejected.

29. The Respondents argue, in their twenty ninth exception, with the conclusion of the hearing officer in paragraph 167 of the Recommended Order which merely cites section 655.037(3), Florida Statutes, and then indicates that "decisions recommended in disciplining the Christos have taken these requirements into account." Respondents' exception is tantamount to argument and

speculation on behalf of the respondents. It is therefore rejected as immaterial and irrelevant. In addition, this exception is contrary to the law. Section 655.037(3), Florida Statutes, does not limit itself to evidence of actual loss as Respondents contend. That section also concerns itself with whether the institution will "likely" suffer substantial loss or other substantial damage or whether the interests of the depositors "could be" seriously prejudiced by reason of misconduct, or whether the conduct involves a willful disregard for the safety and soundness of the institution. To the extent of Respondents' argument, this exception is thus likewise rejected as contrary to the law.

30. The Respondents except to paragraph 168 of the Recommended Order. In their exception, they argue with the weight of the evidence which the hearing officer has already weighed and evaluated in reaching his ultimate conclusion. This is particularly within the province of the hearing officer. See Heifetz, supra. The Department concurs with the hearing officer's findings, adopts same, and rejects this exception for the foregoing reasons.

31. In their exception to paragraphs 169 and 170, the Respondents merely reference their exception to number 23 which previous exception further incorporates, merely by numerical reference, seven other previous exceptions. The Department is unable to discern what point the respondents are excepting to insofar as it is unintelligible. For this reason, this exception is therefore rejected as immaterial and irrelevant.

32. In their thirty second exception, the Respondents object to paragraphs 172 through 174 of the Recommended Order. Again, the respondents argue with the weight of the evidence. Deference must be accorded to the hearing officer's findings in this regard. See Heifetz, supra. There exists competent, substantial evidence in the record in support of the hearing officers findings of intentional violations by the Christos, based in part upon, to wit: 1) The substantial banking experience and background of the Christos (Prehearing stipulation, p. 15, para. 2, p. 4, para 15; see also T. 1561; 1308-09) 2) The familiarity of the Christos with their financial statements and those of their related interests (see, e.g., T. 1339; 1370-1371; 3) their familiarity with Bay Banks' loan policies and procedures (see, e.g., testimony of Christo, Jr., (T. 1459-1460; exhibit P26A-Pg. 111); and knowledge relative to the issuance of letters of credit at Bay Bank (T. 1480-1481; see also exhibit P32). In light of the above, and the other competent, substantial evidence of record, the Department concurs with the hearing officer's reasoning and adopts same. For these reasons, this exception is rejected.

33. The Respondents except to paragraph 175 of the Recommended Order. For the reasons set forth in ruling on respondent's similar exception number 20, this exception is rejected.

34. In their thirty fourth exception, the Respondents argue with the hearing officer's choice of the adjective "grave" in characterizing the evidence and violations concerning the Christos

in paragraph 178 of the Recommended Order. In their exception, respondents again attempt to argue as to the weight of the evidence. Since the preparation of the Recommended Order is within the hearing officer's province, it is believed it is likewise within his discretion to choose the adjectives he believes apply in evaluating the factual findings. After a review of the entire record, the Department concurs with the hearing officer's characterization and evaluation of the evidence regarding the violations, adopts same, and this exception is rejected. See also Heifetz, supra.

35. In their thirty fifth exception, the Respondents argue that the Christos cannot be held responsible for compliance with the 1989 Bay Bank Board resolution. In light of the positions held by the Christos at Bay Bank, this exception is rejected as contrary to the law and the facts.

36. In their thirty sixth and final exception, the Respondents simply make a statement. After a review of the entire record, and in response to their statement, it is apparent that substantial discovery was undertaken by both parties. The Department concurs with the hearing officer's reasoning in paragraph 181 of the Recommended Order, adopts same, and this exception is rejected.

RULING ON EXCEPTIONS FILED BY DBF

On May 16, 1994, DBF filed its exceptions to the Recommended Order. The Agency Head's rulings on those numbered exceptions follow:

fact number 46 through 51 of the Recommended Order wherein the hearing officer characterized certain correspondence and communications between DBF and Bay Bank concerning invoices for costs, extensions of time and further advising the bank of potential late fees and fines as "free form". The term "free form" is necessarily a legal conclusion by the hearing officer. It is therefore rejected as contrary to the law. To the extent one may consider it a finding of fact, it is rejected as not supported by competent, substantial evidence. See Heifetz, supra. This exception is thus granted and the term "free form" shall be considered stricken in the findings of fact in paragraphs 46 and 49. The second sentence of paragraph 50 shall be considered deleted. The reference to free form in paragraph 51, first sentence, shall be deleted. The phrase "was free form and" shall be considered deleted from the second sentence, paragraph 51.

4. DBF's exception number 4 is to Finding of Fact number 64, which finding states that certain correspondence between DBF and the Bank "stated that the written agreement had an effective date of November 29, 1991." DBF asserts the date is incorrect. Respondents agree (see "Response") that the date is incorrect and the record so reflects. The exception is therefore accepted and finding of fact number 64 shall be corrected by deleting the word "November" and substituting the word "September" in paragraph 64 (see exhibit P34).

Exceptions to Conclusions of Law

1. DBF has filed an exception to conclusions of law numbered

150 through 154 of the Recommended Order which relate to DBF's administrative complaint for examination fees against Bay Bank. The Agency Head, in his final order, may, of course, "reject or modify the conclusions of law and interpretation of administrative rules in the recommended order." Section 120.57(1)(b)(10), Florida Statutes (1993) University Community Hospital v. Department of Health and Rehabilitative Services, 610 So. 2nd 1342, 1346-47 (Fla. 1st DCA 1992). The hearing officer in the aforementioned paragraphs sets forth his legal interpretation as to the assessment of examination fees, late fees and fines for intentional late payment pursuant to section 655.045(1)(b) and (d), Florida Statutes. He concluded that no such fees could be assessed until a final order issued from a 120.57, F.S. hearing wherein it was found that unsafe and unsound practices had occurred thus warranting imposition of the examination fee. If such a fee was imposed by final order and the institution then failed to pay the fee within thirty days from the date of the final order, assumably then, according to the hearing officer's interpretation, another 120.57, F.S. hearing would be necessitated to address late charges or fines for intentional late payment. DBF's exception sets forth a compelling and persuasive argument that the accrual of such fees and fines can and should occur following the 31st day after a financial institution's receipt of a DBF notice (such as an invoice) that examination fees are due and that a hearing officer, in a single 120.57, F.S. hearing can and should determine the appropriateness of the fees for the exam based upon findings of

unsafe and unsound practices as well as determine late payment penalties and fines calculated from that previous 31st day foreward until payment in full. While recognizing the persuasiveness of DBF's argument, both DBF and Bay Bank previously filed on May 4, 1994, before the Agency Head, a "Notice of Stipulation and Settlement" which, by its terms "renders moot all aspects of the Recommended Order relating to the relief sought by DBF against the Bank except for the Cease and Desist Order sought by DBF." The notice further provided for entry of a stipulated cease and desist order which was in fact docketed on April 19, 1994. In light of the foregoing agreement, it is unnecessary to accept or reject DBF's exception insofar as it is now moot. In a similar manner, the agency head will neither accept or reject the conclusions of law number 147 through 154 of the Recommended Order as they relate to Bay Bank insofar as such conclusions are now moot.

2. DBF has further excepted to conclusions of law 155 through 158, contending that there is no legal basis for the legal conclusion that, by entering into the written agreement with Bay Bank (Exhibit P19), DBF's ability to enter a cease and desist order is circumscribed as the hearing officer reasoned therein. Upon a review of the stipulation and consent agreement, particularly section 7 thereof (P18), which was entered into in connection with the written agreement, there was a provision reserving DBF's right to "take such further action. . . against Bay Bank and the directors as the Department deems necessary and appropriate . . .

to prevent any violation of laws relating to financial institutions." This provision was incorporated by reference into the Written Agreement. DBF, in its exception, presents a compelling argument in light of the above-quoted language that DBF's rights to pursue a cease and desist order were not as limited as the hearing officer found. This exception is accepted to the extent it is relevant and applicable to the Administrative Complaint for Removal and Prohibition and Cease and Desist Order filed in part against the Christos. Conclusions of law numbered 155 through 157 shall therefore be stricken and conclusion of law number 158 shall be modified as set forth hereafter.

3. DBF's third exception, though unnumbered, relates to an evidentiary ruling contained on page 4 of the Recommended Order, wherein the Hearing Officer held that Exhibit 300 is admitted. A review of the record, particularly T. 2067, reveals that the Hearing Officer limited the admission of the curriculum vitae of Mr. Huggins to the statement of education. For that reason, this exception is granted to the extent the Hearing Officer's written ruling appears to depart from his prior oral ruling.

FINDINGS OF FACT

1. Having reviewed the entire record of this proceeding and having ruled upon all of the filed exceptions, the Department therefore incorporates by reference and adopts the Findings of Fact set forth in the Recommended Order, as such findings relate to the Christos, with the following modifications consistent with prior rulings on Exceptions:

Finding of Fact Number 2 shall read:

Consistent with long-standing practices in examining Bay Bank and other financial institutions over which the Department has had jurisdiction, it performed an examination to assess Bay Bank's financial condition and banking practices as of the close of business on March 31, 1991.

Finding of Fact Number 9 shall read:

Upon completion of the examination of the bank as of the close of business on March, 1991, as in its general experience with prior examinations, the Department equated the assigned aggregate score of 4 with unsafe and unsound practices by Bay Bank. This opinion was held when taking into account the specific conditions within the bank found at the time of the examination and as set forth in the post-examination written report.

Paragraphs 46 through 51 of the Recommended Order shall be modified as follows:

Paragraph 46. Strike the words "free form" from the third line of this paragraph.

Paragraph 49. The words "free form" should be stricken from the fifth line in the paragraph.

Paragraph 50. Strike the second sentence in this paragraph.

Paragraph 51. Strike the word "free form" from the first sentence; and strike the phrase "was free form and" from the second sentence.

Finding of Fact Number 64 is corrected by substituting the word September in place of the word November.

2. There is competent, substantial evidence to support the Findings of Fact, as amended.

CONCLUSIONS OF LAW

1. The Department incorporates by reference and adopts the conclusions of law set forth in the Recommended Order as such conclusions relate to the Christos, with the following modifications consistent with prior rulings on the exceptions:

Conclusions 147 through 154. These conclusions, to the extent they relate to Bay Bank, are neither accepted or rejected insofar as they are now moot by prior agreement.

Conclusions 155 through 157: These conclusions are rejected as contrary to the law.

Conclusion of law 158 is modified as follows:

Upon the facts found, the Department may enter an order requiring Bay Bank, its officers, directors, committee members, employees and other participating persons to cease and desist unsafe and unsound practices, and cease violating laws related to the operation of the financial institution which shall be discussed subsequently. This determination takes into account the opportunities for this choice considered in accordance with Section 655.021, Florida Statutes (1991), as reenacted through Section 655.031, Florida Statutes (1992 Supp.).

2. There is competent, substantial evidence to support the conclusions of law, as modified.

ORDER

BASED ON THE FOREGOING Findings of Fact and Conclusions of Law, it is therefore ORDERED that:

1. John Christo, Jr., is prohibited from participating in Bay Bank or any other financial institution regulated by the Department as an officer or in a similar position for Bay Bank or any other financial institution or becoming a director in any other financial institution and that restricts Christo, Jr., in his

directorship at Bay Bank from participating in any decision to select or dismiss Bay Bank officers or directors; and

2. John Christo, III, is prohibited from participating in Bay Bank or any other financial institution regulated by the Department as an officer or in a similar position for Bay Bank or any other financial institution or becoming a director in any other financial institution and that restricts Christo, III, in his directorship at Bay Bank from participating in any decision to select or dismiss Bay Bank officers or directors.

DONE and ORDERED this _____ day of _____, 1994, in Tallahassee, Florida.



GERALD A. LEWIS, as Comptroller
and Head of the Department of
Banking and Finance

NOTICE OF RIGHTS

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF BANKING AND FINANCE, SUITE 1302, THE CAPITOL, TALLAHASSEE, FLORIDA 32399-0350, AND A SECOND COPY ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THIS FINAL ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Final Order and Notice of Rights was served by U.S. Mail, postage prepaid upon Alan C. Sundberg, Esq., and Robert Pass, Attorneys, c/o Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., P.O. Box 3239, Tampa, Florida 33601, Attorneys for Petitioner; William Friedlander, Esq., 3045 Tower Court, Tallahassee, Florida 32303, S. Craig Kiser and Raymond Vickers, Esq., 424 East Call Street, Tallahassee, Florida 32301, Attorneys for Respondents John Christo, III and John

Christo, Jr.; and Jack G. Williams, Esq., 502 Harmon Avenue, P.O.
Box 2176, Panama City, Florida 32402, Attorney for Bay Bank, this
26 day of July, 1994.

H. RICHARD BISBEE
Deputy General Counsel
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Tallahassee, FL 32399-0350
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cc: Terrence Straub, Director
Division of Banking

William G. Reeves, General Counsel
Department of Banking and Finance

Albert T. Gimbel, Chief Banking Counsel
Department of Banking and Finance

Charles C. Adams, Hearing Officer
Division of Administrative Hearings

ATTACHMENT TO :

DEPARTMENT OF BANKING AND FINANCE VS.
BAY BANK AND TRUST COMPANY FINAL ORDER
OF 7/26/94

THE FOLLOWING ATTACHMENTS TO THE FINAL ORDER
MAY BE OBTAINED FROM THE CLERK OF THE DEPARTMENT
AS THEY WERE TOO LENGTHY TO ATTACH HERETO:

RECOMMENDED ORDER ISSUED BY THE DIVISION OF ADMINISTRATIVE
HEARINGS

RESPONDENT'S JOHN CHRISTO, JR. AND JOHN CHRISTO III
EXCEPTIONS TO RECOMMENDED ORDER

EXCEPTIONS TO RECOMMENDED ORDER BY PETITIONER