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OF WASHINGTON

DEC 31 2008

GOVERNMENT COMPLIANCE  
& ENFORCEMENT



State of Washington

DEPARTMENT OF FINANCIAL INSTITUTIONS

IN THE MATTER OF INVESTIGATING  
The Loan Originator License Application  
under the Mortgage Broker Practices Act of  
Washington by:

OAH Docket No. 2007-DFI-0050  
No. C-07-521-07-FO01

DONALD EUGENE RAILSBACK,

Respondent.

FINAL DECISION AND ORDER  
GRANTING SUMMARY JUDGMENT  
AND MODIFYING INITIAL ORDER OF  
ADMINISTRATIVE LAW JUDGE

THIS MATTER has come before the Director ("hereinafter, "Director") of the Department of Financial Institutions (hereinafter, "Department") in the above-enumerated administrative action pursuant to Initial Order on DFI Motion for a Summary Judgment (hereinafter, collectively, "Initial Order") based upon a Statement of Charges and Notice of Intention to Enter an Order to Deny License Application and Prohibit from Industry (hereinafter, "Statement of Charges") issued by the Division of Consumer Services (hereinafter, "Division") on or about December 19, 2007, under the authority of the Mortgage Broker Practices Act, Ch. 19.146 RCW (hereinafter, "MBPA").

The Respondent, DONALD EUGENE RAILSBACK (hereinafter, "Respondent") timely requested an Administrative Hearing to contest the Statement of Charges, and this matter was assigned to the Office of Administrative Hearings (hereinafter, "OAH"), which designated Administrative Law Judge Laura Valente (hereinafter, "Administrative Law Judge") to hear the case. The Division made a Motion for Summary Judgment (hereinafter, "Summary Judgment Motion"), by and through its counsel, Assistant Attorney General, Chad C. Standifer (hereinafter, "Division Counsel"), which included a Memorandum in Support of Department's Motion for Summary Judgment (hereinafter, "Division's Memorandum") and a Declaration of

RE: Donald Eugene Railsback, OAH Docket No. 2007-DFI-0050, No. C-07-521-07-FO01

1 Deborah Pinsonneault on behalf of the Division with supporting Exhibits (hereinafter,  
2 "Pinsonneault Declaration" and "Pinsonneault Exhibits"). Respondent filed a Summary  
3 Judgment Answer and Declaration in Support of Granting Railsback Summary Judgment  
4 (hereinafter, "Summary Judgment Response"). Then, on March 20, 2008, the Administrative  
5 Law Judge issued an Initial Order granting the Summary Judgment Order, which was followed  
6 by a corrected Initial Order on April 30, 2008. The Initial Order contains Findings of Fact  
7 (hereinafter, "FOF") and Conclusions of Law (hereinafter, "COL").  
8

9 The Division, by and through Division Counsel, timely filed its own Petition for  
10 Review of Initial Order on May 19, 2008 (hereinafter, "Petition for Review"). Respondent  
11 never filed a response to the Petition for Review.

12 More than twenty (20) days has elapsed since the entry and service of the Initial Order.  
13 Respondent has not filed any petition for review of the Initial Order.

14 The Director subsequently ordered, received and has now considered the entire OAH  
15 Record. This Final Decision and Order are based upon a consideration of the entire OAH  
16 Record, including, without limitation, the following:

- 17 1. Uniform Individual Mortgage License/Registration & Consent Form, filed as of  
18 April 16, 2007 (hereinafter, "DFI Registration Form");
- 19 2. Online License application dated July 24, 2007 (hereinafter, "Application");
- 20 3. Statement of Charges;
- 21 4. Application for Adjudicative Hearing;
- 22 5. Summary Judgment Motion;
- 23 6. Declaration of Deborah Pinsonneault (hereinafter, "Pinsonneault Declaration");
- 24 7. Exhibits to Pinsonneault Declaration;
- 25 8. Summary Judgment Response;
- 26 9. Initial Order; and
- 27 10. Petition for Review.

28  
29 This record is hereinafter referred to collectively as "Record on Review."

30 **1.0 Summary of the Case.** This case comes before the Director on the ultimate issue of  
31 whether Respondent should be precluded from obtaining a loan originator license until on or  
32 about March 24, 2010, or whether Respondent should be prohibited from participating in the  
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34 RE: Donald Eugene Railsback, OAH Docket No. 2007-DFI-0050, No. C-07-521-07-FO01

1 conduct of the affairs of a mortgage broker or loan originator subject to licensure in  
2 Washington State, through and including July 14, 2014, or whether the Director, in the exercise  
3 of his plenary authority and discretion, may impose a prohibition for a period ending  
4 somewhere between these two dates. This issue revolves around the following undisputed facts  
5 and questions of law:

6       1.1 Prior Department Order. On March 1, 2005, the Division filed and served upon  
7 Respondent a statement of charges that resulted in a final order, dated March 24, 2005, in  
8 which (1) the Washington State mortgage broker license held by Clark County Carpet Cleaning  
9 & Damage Restoration, Inc. (in which Respondent was a principal and designated broker) was  
10 revoked. Respondent was prohibited from acting as a principal or designated broker for a  
11 licensed mortgage broker for a period of five (5) years.

12       1.2 Prior Bankruptcy Proceedings. In answer to Question 1 of the Financial  
13 Disclosure on his Application, the Respondent responded as to whether he had ever filed  
14 bankruptcy, as follows: "Related to litigation in a civil action. Long story, but I had it  
15 dismissed a few months after filing." Respondent failed to completely which was later  
16 dismissed on June 29, 1999. Respondent also failed to acknowledge or identify the  
17 commencement and subsequent dismissal, on apparent procedural grounds, of three other  
18 bankruptcy proceedings: (1) A case filed on July 17, 2001, which was dismissed February 15,  
19 2002; (2) a case filed June 5, 2002, which was dismissed July 12, 2002; and (3) a case filed  
20 February 18, 2003, which was dismissed March 20, 2003.

21       1.3 Automatic Five-Year Ban. One question of law is whether, pursuant to RCW  
22 19.146.310(1)(c), Respondent is subject to an automatic denial of a license, on account of  
23 having had another license under the MBPA revoked or suspended within 5 years of the  
24 Application.

25       1.4 Authority to Extend Prohibition. The other question of law is whether the  
26 Director has the authority, pursuant to RCW 19.146.220(5)(a) and WAC 208-660-008(9), to  
27 prohibit Respondent from participating in the conduct of affairs of a mortgage broker subject  
28 to licensure, or otherwise acting as an "independent contractor" loan originator for a mortgage  
29 broker exempt from licensure under RCW 19.146.020(1)(b), (c), (e) and (g), up through and  
30 including July 14, 2014, by reason of Respondent having negligently made false statements or  
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34 RE: Donald Eugene Railsback, OAH Docket No. 2007-DFI-0050, No. C-07-521-07-FO01

1 knowingly and willfully made omissions of material fact in connection with his Application in  
2 violation of RCW 19.146.0201(8).

3 2.0 Preliminary Considerations.

4       2.1 Standards for Summary Judgment in Administrative Actions. The Director takes  
5 note preliminarily of the following standards which are to be applied to motions for summary  
6 judgment in an administrative action under the Administrative Procedures Act, Chapter 34.05  
7 RCW (hereinafter, "APA"). The Department has adopted the Model Rules of Procedure,  
8 Chapter 10-08 WAC, except to the extent of any conflict with the Department's Rules of  
9 Procedure.<sup>1</sup> WAC 10-08-135 sets forth the standards to be followed by the Department and the  
10 Administrative Law Judge, as its agent, when considering the Summary Judgment Motion and  
11 the Summary Judgment Response, and declares that "[a] motion for summary judgment may be  
12 granted and an order issued [only] if the written record shows that there is no genuine issue as  
13 to any material fact and that the moving party is entitled to judgment as a matter of law." In  
14 evaluating the application of this standard, the Director may rely on applicable law from  
15 sources other than WAC 10-08-135 itself and must be respectful of the constitutional rights of  
16 respondents.<sup>2</sup> To that end, the Director is required to weigh on review all pleadings, evidence  
17 and argument in a light most favorable to the non-moving party.<sup>3</sup> If there is any inference of a  
18 triable issue of fact, then summary judgment is inappropriate.<sup>4</sup> Litigants are entitled to a  
19 dispositive hearing on all issues of fact and law.<sup>5</sup> Summary judgment may be granted if  
20 reasonable minds could reach only one conclusion based upon the facts in evidence, and  
21 neither the non-moving party, Administrative Law Judge or the Director may rely upon  
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26 <sup>1</sup> WAC 208-08-020(1) declares: "The department adopts the model rules of procedure as set forth in WAC 10-08-035 through 10-08-230. If  
27 there is a conflict between the model rules and this chapter, the rules in this chapter shall govern. Wherever the term 'agency' appears in the  
model rules it means the department of financial institutions."

28 <sup>2</sup> WAC 10-08-220 declares: "Nothing in chapter 10-08 WAC is intended to diminish the constitutional rights of any person or to limit or  
29 modify additional requirements imposed by statute, including the Administrative Procedure Act."

30 <sup>3</sup> *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998).

31 <sup>4</sup> *Davis v. W. One Auto. Group*, 140 Wn. App. 449, 456 (2007).

32 <sup>5</sup> *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002), citing *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124  
33 (2000).

34 RE: Donald Eugene Railsback, OAH Docket No. 2007-DFI-0050, No. C-07-521-07-FO01

1 speculation or argumentative assertions that unresolved factual issues remain to be tried.<sup>6</sup>  
2 These principles apply equally to the Administrative Law Judge and to the Director evaluating  
3 the Initial Order.<sup>7</sup>

4       2.2     Proper Consideration by Director Absent Petition for Review from  
5 Respondent. Respondent did not file a petition for review contesting the Initial Order.  
6 However, even when a party has *not* filed a petition for review, the Director still has the  
7 authority and duty, prior to entering a Final Decision and Order, to consider whether any part  
8 of the Initial Order is *not* supported by the record<sup>8</sup> and whether confirmation of the Initial  
9 Order, without modification, would be an error of law. Indeed, with regard to the COL as  
10 contained in the Initial Order, the Director is obliged, in the manner of a reviewing court, to  
11 consider the statutes and implementing regulations of the Division under the error of law  
12 standard, which permits the Director to substitute his judgment for that of the Division's  
13 Statement of Charges and the Administrative Law Judge's Initial Order.<sup>9</sup>

14       3.0     Director's Consideration of FOF and COL. After due consideration of the entire  
15 Record on Review and in a light most favorable to Respondent, the Director is of the decided  
16 view that, while summary judgment is appropriate as to all issues, certain conclusions of law  
17 contained in the Initial Order should be eliminated as error or otherwise modified.

18       3.1     Error in COL 9 of the Initial Order. The Director concurs with the Petition for  
19 Review that WAC 208-660-163 applies to the licensure of mortgage brokers. Since the  
20 Respondent applied for a *loan originator* license and not a mortgage broker license, WAC 208-  
21 660-163 is not applicable to this case.

22       3.2     Error in COL 10 of the Initial Order. The Director concurs with the Petition for  
23 Review that WAC 208-660-163(5) applies to mortgage broker applications. Since the  
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29 <sup>6</sup> White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

30 <sup>7</sup> Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

31 <sup>8</sup> See RCW 34.05.464(4); see also Northwest Steelhead v. Washington State Department of Fisheries, 78 Wn. App. 778, 896 P.2d 1292 (1995);  
32 see also Towle v. Department of Fish and Wildlife, 94 Wn.App. 196, 971 P.2d 591 (1999).

33 <sup>9</sup> See Aponte v. Dep't of Soc. & Health Servs., 92 Wn. App. 604, 616-17, 965 P.2d 626 (1998), *review denied*, 137 Wn.2d 1028 (1999).

1 Respondent applied for a *loan originator* license and not a mortgage broker license, WAC 208-  
2 660-163(5) is not applicable to this case.

3       3.3 Error in COL 16 of the Initial Order. The Director is of the view that the  
4 Administrative Law Judge committed error in COL 16 of the Initial Order in deciding that the  
5 issue of Respondent's culpability (negligence or willfulness) requires a hearing. On the  
6 contrary, the Record on Review is devoid of any inference of a triable issue of fact. Based  
7 upon the Record on Review, the Director is of the view that reasonable minds can reach only  
8 one conclusion. There is no contention in the Record on Review that Respondent was unaware  
9 that he had filed for bankruptcy four times. Respondent's act in filling out the Application was  
10 volitional. The statements in question were false. Respondent omitted material facts from his  
11 answer in question. The Record on Review is simply devoid of any inference that Respondent  
12 did not act willfully. The Director will, therefore, not entertain mere speculation that a triable  
13 issue of fact exists as to Respondent's state of mind in the absence of any help from  
14 Respondent or the remainder of the Record on Review.

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16       3.4 Error in COL 17 of the Initial Order. COL 17 of the Initial Order states that  
17 RCW 19.146.220(5) is not applicable to this matter because the Respondent is not licensed as a  
18 mortgage broker. This conclusion is a clear error of law, since RCW 19.146.220(5) is  
19 applicable to this matter. Any "loan originator of any licensed mortgage broker" or any  
20 "person subject to licensing under this chapter" may be prohibited from participation in the  
21 conduct of the affairs of any licensed mortgage broker.<sup>10</sup> Pursuant to RCW 19.146.220(5), it is  
22 within the discretion of the Department to prohibit *unlicensed* individuals from the mortgage  
23 broker industry if certain violations of the MBPA are committed. Respondent had established  
24 a working relationship as a loan originator with a licensed mortgage broker, Creekside  
25 Mortgage, at the time of Application.<sup>11</sup> He subsequently established a working relationship as  
26 a loan originator with Abacus Mortgage, a licensed mortgage broker.<sup>12</sup> In addition, as a loan  
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30 <sup>10</sup> RCW 19.146.220(5). One need not be licensed under the MBPA to meet the statutory definition of "loan originator." See RCW  
31 19.146.010(1); see also WAC 208-660-006.

32 <sup>11</sup> See Exhibit B to Pinsonneault Declaration at p. 2.

33 <sup>12</sup> See Exhibit B to Pinsonneault Declaration at p. 4.

34 RE: Donald Eugene Railsback, OAH Docket No. 2007-DFI-0050, No. C-07-521-07-FO01

1 originator license applicant, the Respondent was certainly "subject to licensing" under the Act.  
2 Moreover, it is conceivable that Respondent might seek to become an "independent contractor"  
3 loan originator for an exempt mortgage broker. It is squarely within the Department's statutory  
4 authority to order that Respondent be prohibited from the mortgage broker industry pursuant to  
5 RCW 19.146.220(5)(a) for his violation of the MBPA and that the prohibition extend to any  
6 attempt to act as an "independent contractor" loan originator for an exempt mortgage broker  
7 under RCW 19.146.020(1)(b), (c), (e) and (g).<sup>13</sup> Respondent violated RCW 19.146.020(8) by  
8 submitting false statements and omitting material information on the Application. It would  
9 therefore be a proper exercise of the Director's discretion to prohibit Respondent from the  
10 mortgage broker industry in Washington State through July 14, 2014.

11  
12 4.0 Findings of Fact. Now, therefore, the Director re-affirms FOF 1 through FOF 8,  
13 inclusive, at pages 1-3 of the Initial Order.

14 5.0 Conclusions of Law. Now, therefore, the Director disaffirms, re-affirms and otherwise  
15 modifies COL 1 through COL 17, at pages 3-8 of the Initial Order, as follows:

16 5.1 COL 1-5, 7-8, and 11-15 of the Initial Order. COL 1 through COL 5, COL 7  
17 through COL 8, and COL 11 through COL 15 of the Initial Order are hereby re-affirmed in  
18 their entirety and without modification.

19 5.2 COL 6 of the Initial Order. COL 6 of the Initial Order is modified to read as  
20 follows:

21 "WAC 208-660-163(9) states that the Administrative Procedures Act, RCW  
22 34.05, governs appeals or review of mortgage broker license denials, suspensions,  
23 revocations and appeals or reviews of those actions."

24 5.3 COL 9 of the Initial Order. COL 9 of the Initial Order is disaffirmed and is hereby  
25 stricken.

26 5.4 COL 10 of the Initial Order. COL 10 of the Initial Order is disaffirmed and is  
27 hereby stricken.

28 5.5 COL 16 of the Initial Order. COL 16, as contained in the Initial Order, is  
29 disaffirmed and is hereby stricken. In its place, the Director makes the following conclusion of  
30 law:  
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33 <sup>13</sup> See WAC 208-660-008(9).

1 "The Department seeks to resolve by Summary Judgment the issue of whether  
2 Respondent negligently made false statements or knowingly and willfully omitted  
3 material facts in the Application. This issue relates to the Exhibits to  
4 Pinsonneault Declaration, which are part of the Record on Review and are not  
5 contested by Respondent. When asked on his Application whether he had filed  
6 for bankruptcy within the last 10 years, Respondent gave an answer which was  
7 only partially true – and was altogether vague in the part which was "true."  
8 Respondent acknowledged one filing and failed to inform the Division of 3 other  
9 U.S. Bankruptcy Court filings. The Administrative Law Judge correctly made  
10 this finding in FOF 1. The Director concludes that all of the bankruptcy filings  
11 were material facts. Under the circumstances, Respondent's answer to the  
12 Application question regarding past bankruptcy filing(s) was not reasonable. In  
13 answer to Question 1 of the Financial Disclosure, the Respondent answered  
14 simply: "Related to litigation in a civil action. Long story, but I had it dismissed  
15 a few months after filing." This answer is direct, uncontested evidence of having  
16 failed to disclose 3 of the four bankruptcy filings and having misrepresented a  
17 fourth, since it also appears to the Director from the Record on Review that  
18 Respondent these bankruptcy proceedings were *involuntarily* dismissed (which  
19 would mean that in the one disclosed case that Respondent did not have "it"  
20 dismissed). This false statement and omission of material facts were a violation  
21 of RCW 19.146.0201(8), which is a legitimate basis for the Director prohibiting  
22 Respondent from prospective participation in the mortgage broker industry in  
23 Washington State pursuant to RCW 19.146.220(5)(a). The remaining question is  
24 whether the Director can conclude as a matter of law from the Record on Review  
25 whether Respondent's false statement was merely *negligent* or whether the  
26 material omissions of fact were *willful* – a distinction which would affect the  
27 Director's discretion with regard to the length of the prohibition to be imposed  
28 upon Respondent. In this regard, the Director has determined that reasonable  
29 minds can reach only one conclusion – that some *willful* omission of material  
30 facts took place. The Director can simply find no credible basis in the Record on  
31 Review for the proposition that Respondent's omission of material facts was an  
32 oversight and, therefore, *unintentional*. While the Director must consider even an  
33 *inference* of a triable issue of fact in a light most favorable to Respondent, the  
34 entire Record on Review, including Respondent's Summary Judgment Response,  
provides no such inference."

27 5.6 COL 17 of the Initial Order. COL 17 of the Initial Order is disaffirmed and is  
28 hereby stricken.

29 5.7 Director's Additional Considerations. The Director is all too familiar with other  
30 loan originator license applicants who have willfully omitted material facts about their past  
31 *criminal* history. However, this is the first case on review before the Director since the 2006  
32 MBPA Amendments in which a license applicant has appeared to willfully omit material facts  
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34 RE: Donald Eugene Railsback, OAH Docket No. 2007-DFI-0050, No. C-07-521-07-FO01

1 about matters so insignificant, in comparison to criminal felonies and other financial crimes, as  
2 bankruptcy filings which were dismissed on procedural grounds and in which there does not  
3 appear from the Record on Review to have been a single adjudication under Chapter, 7, 11 or  
4 13 resulting in a confirmed plan of reorganization or liquidation. In this regard, the Director  
5 concludes that this conduct is disturbing, because complete honesty would have been so easy  
6 for Respondent and the facts, if known by the Division from the face of the Application, may  
7 not have been viewed harshly. But Respondent – by his own volition and for reasons of his  
8 own which we need not explore in order to grant summary judgment – *lied* to the Division and  
9 did so in a manner which can only be viewed as *willful*. Accordingly, there appear to be no  
10 mitigating factors that would weigh in favor of leniency by the Director in regard to the length  
11 of prohibition from participation in the mortgage brokerage industry properly requested by the  
12 Division in its Statement of Charges.

14 **6.0 Final Order.** Having made Findings of Fact and Conclusions of Law as set forth in  
15 Sections 4.0 and 5.0 above, IT IS HEREBY ORDERED AS FOLLOWS:

16 **6.1 Denial of License.** The application of Respondent, DONALD EUGENE  
17 RAILSBACK, for a Loan Originator License is denied.

18 **6.2 Prohibition.** Respondent DONALD EUGENE RAILSBACK is further prohibited  
19 until July 14, 2014, from (1) participation in the conduct of the affairs of any mortgage broker  
20 subject to licensure by the Director, and (2) acting as a loan originator (or the equivalent) in  
21 Washington State for any mortgage broker claiming exemption from licensure under RCW  
22 19.146.020(1)(b), (c), (e) and (g).

24 **6.3 Reconsideration.** Pursuant to RCW 34.05.470, Respondent has the right to file a  
25 Petition for Reconsideration stating the specific grounds upon which relief is requested. The  
26 Petition must be filed in the Office of the Director of the Department of Financial Institutions  
27 by courier at 150 Israel Road SW, Tumwater, Washington 98501, or by U.S. Mail at P.O. Box  
28 41200, Olympia, Washington 98504-1200, within ten (10) days of service of this Final Order  
29 upon Respondent. The Petition for Reconsideration shall not stay the effectiveness of this  
30 order nor is a Petition for Reconsideration a prerequisite for seeking judicial review in this  
31 matter. A timely Petition for Reconsideration is deemed denied if, within twenty (20) days  
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34 RE: Donald Eugene Railsback, OAH Docket No. 2007-DFI-0050, No. C-07-521-07-FO01

1 from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the  
2 parties with a written notice specifying the date by which it will act on a petition.

3 6.4 Stay of Order. The Director has determined not to consider a petition to stay the  
4 effectiveness of this order. Any such requests should be made in connection with a Petition for  
5 Judicial Review made under chapter 34.05 RCW and RCW 34.05.550.

6 6.5 Judicial Review. Respondent has the right to petition the superior court for judicial  
7 review of this agency action under the provisions of chapter 34.05 RCW. For the requirements for  
8 filing a Petition for Judicial Review, see RCW 34.05.510 and sections following.

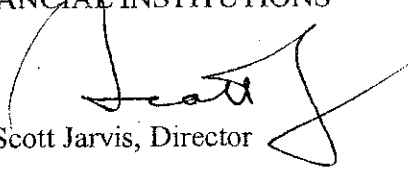
9 6.6 Service. For purposes of filing a Petition for Reconsideration or a Petition for  
10 Judicial Review, service is effective upon deposit of this order in the U.S. mail, declaration of  
11 service attached hereto.

12 6.7 Effectiveness and Enforcement of Final Order. Pursuant to the Administrative  
13 Procedures Act, at RCW 34.05.473, this Final Decision and Order shall be effective  
14 immediately upon deposit in the United States Mail.

15 Dated at Tumwater, Washington, on this 30<sup>th</sup> day of December 2008.

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18 WASHINGTON STATE DEPARTMENT  
19 OF FINANCIAL INSTITUTIONS

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21 By:

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23 Scott Jarvis, Director

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34 RE: Donald Eugene Railsback, OAH Docket No. 2007-DFI-0050, No. C-07-521-07-FO01

FINAL DECISION AND ORDER GRANTING SUMMARY JUDGMENT AND MODIFYING INITIAL ORDER OF ADMINISTRATIVE  
LAW JUDGE - 10

1 **NOTICE TO THE PARTIES**

2  
3 In accordance with RCW 34.05.470 and WAC 10-08-215, any Petition for  
4 Reconsideration of the FINAL DECISION AND ORDER must be filed with the Director  
5 within ten (10) days of service of the FINAL DECISION AND ORDER. It should be noted  
6 that Petitions for Reconsideration do not stay the effectiveness of the FINAL DECISION AND  
7 ORDER. Judicial Review of the FINAL DECISION AND ORDER is available to a party  
8 according to provisions set out in the Washington Administrative Procedure Act, RCW  
9 34.05.570.

10 This is to certify that the FINAL DECISION AND ORDER has been served upon the  
11 following parties on December 30, 2008, by depositing a copy of  
12 same in the United States mail, postage prepaid.

13 WASHINGTON STATE DEPARTMENT  
14 OF FINANCIAL INSTITUTIONS

15 By:



16 Susan Putzier  
17 Executive Assistant to the Director

18 **Mailed to the following:**

19 Donald Eugene Railsback  
20 5933 N.E. Garfield  
21 Portland, OR 97211

✓ Chad C. Standifer, Assistant Attorney General  
Office of the Attorney General  
PO Box 40100  
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22  
23 James R. Brusselback, Chief of Enforcement  
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25 Department of Financial Institutions  
26 P.O. Box 41200  
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34 RE: Donald Eugene Railsback, OAH Docket No. 2007-DFI-0050, No. C-07-521-07-FO01

FINAL DECISION AND ORDER GRANTING SUMMARY JUDGMENT AND MODIFYING INITIAL ORDER OF ADMINISTRATIVE  
LAW JUDGE - 11