#2003-169

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

IN THE MATTER OF GENE ULRICH FORMER SENIOR VICE PRESIDENT AND SENIOR LOAN OFFICER AND SUSAN DIEHL MCCARTHY FORMER VICE PRESIDENT AND LOAN OFFICER SIX RIVERS NATIONAL BANK EUREKA, CALIFORNIA	AA-EC-00-40

DECISION AND ORDER

I. Summary

Before the Comptroller is the recommended decision ("RD") of the Administrative Law Judge ("ALJ") in an enforcement proceeding that seeks to impose a civil money penalty ("CMP") and restitution on Respondents. Upon consideration of the entire record, the Comptroller orders Respondent Gene Ulrich to pay a CMP of $35,000, Respondent Susan Diehl McCarthy to pay a CMP of $20,000, and both Respondents to pay restitution totaling $232,000.

II. Procedural Background

On October 6, 2000, the Office of the Comptroller of the Currency ("OCC") issued a combined Notice of Intention to Prohibit Further Participation, Notice of Charges for Restitution, and Notice of Assessment of Civil Money Penalties against Gene Ulrich, former Senior Vice President and Senior Loan Officer, and Susan Diehl McCarthy, former Vice President and Loan

Officer, Six Rivers National Bank, Eureka, California ("the Bank").[1] To the extent relevant here, the Notices sought to require Respondents to make restitution to the Bank in the amount of $300,000, and to pay CMPs of $100,000 (Respondent Ulrich) and $50,000 (Respondent Diehl McCarthy).

Respondents filed Answers to the Notices, and a hearing was held before Administrative Law Judge Ann Z. Cook ("ALJ") on 18 days between May 14, 2001, and January 16, 2002. The OCC was represented by Enforcement Counsel. Respondents were represented by private counsel.

On January 31, 2003, the ALJ issued the RD, finding that Respondents should make restitution in the amount of $232,000, under the authority of 12 U.S.C. § 1818(b)(6), and that they should pay CMPs of $100,000 (Ulrich) and $50,000 (Diehl McCarthy), as authorized by 12 U.S.C. § 1818(i)(2)(B). After receiving an extension of time, Respondents filed joint exceptions on April 8, 2003. On July 2, 2003, the Comptroller extended the deadline for a final decision to September 12, 2003.

III. The ALJ's Recommended Decision

According to the ALJ's findings of fact, Respondent Ulrich was Senior Vice President and Senior Loan Officer at the Bank in 1996. At the same time, Respondent Diehl McCarthy was Vice President, Manager of the Government Guaranteed Loan Program, and a Loan Officer. By December 1996, Bank loans to Northcoast Hardwoods ("NCH") were near the Bank's lending limit. NCH was delinquent on several loans and had received extensions and renewals. RD at 2, 30.

[1] The Board of Governors of the Federal Reserve System will issue a final decision on the Notice of Intention to Prohibit Further Participation. 12 U.S.C. § 1818(e)(4). Nothing in this Decision and Order is intended to have any effect on the issues raised in that Notice.

During 1996, the Bank and NCH sought loan guarantees from the U. S. Department of Agriculture ("USDA"). With a government guarantee, the loans would not be subject to the Bank's lending limit. However, the USDA responded negatively because NCH lacked substantial equity. *Id.* at 3-4.

Following the USDA's action, Respondents approved five unsecured loans totaling $900,000 to friends and business associates of Matthew Galt, the principal shareholder of NCH. The five named borrowers immediately transferred the proceeds to NCH, ostensibly as an investment in exchange for NCH stock. In reality, none of the five borrowers intended to purchase NCH stock, and the stock was never issued. After NCH filed for bankruptcy, the Bank recouped a substantial amount but still incurred a $232,000 loss on the five loans. Combined with NCH's pre-existing debt, the five loans caused the Bank to exceed its legal lending limit by approximately $800,000. *Id.* at 4-5.

According to the ALJ, Respondents admitted violating the lending limit statute and the implementing regulation. RD at 6-8. The ALJ also found that the violations caused "more than a minimal loss" to the Bank, within the meaning of the civil money penalty statute, 12 U.S.C. § 1818(i)(2)(B). RD at 22. Moreover, the ALJ concluded that the Respondents' conduct satisfied the requirements in 12 U.S.C. § 1818(b)(6) for an order of restitution in the amount of $232,000. RD at 20-21.

IV. Analysis of Respondents' Exceptions

In their Joint Exceptions, Respondents raise several issues. Only one merits serious consideration.

A. Right to Counsel

During the hearing, the ALJ issued a sequestration order that, among other things, prohibited all witnesses from discussing their testimony (but not other matters) with counsel during breaks.[2] TR 1. The ALJ applied the sequestration order to both Respondents, with the result that while giving testimony, Respondents were barred during intra-day and overnight breaks from discussing their testimony with counsel but were free to discuss other matters. In their exceptions, Respondents argue that the sequestration order as applied improperly denied them the right to counsel "before, during and after" testimony, citing 12 C.F.R. § 19.183(b), the Administrative Procedure Act's right-to-counsel provision at 5 U.S.C. § 555(b), and the Sixth Amendment to the U.S. Constitution. Respondents' Joint Exceptions at 14-17.

The ALJ correctly rejected this argument. As she explained, 12 C.F.R. § 19.183(b) does not apply to this proceeding. That regulation is contained in Subpart J of Part 19, and applies only to sworn statements taken during formal investigations. In contrast, this proceeding is governed by Subpart A, which applies to restitution, civil money penalty, and certain other proceedings. 12 C.F.R. § 19.1. Subpart A does not provide a comparable "before, during and after" right to counsel during an administrative hearing. RD at 25. Moreover, there is no support for Respondents' contention that the right to counsel in section 19.183(b) should apply when, as here, a proceeding initiated under Subpart A was preceded by an investigation authorized by Subpart J.

The Administrative Procedure Act entitles a party "to be accompanied, represented, and advised by counsel" in an administrative procedure. Neither its language nor the case law addresses whether a party may discuss his or her testimony with counsel during breaks.

[2] The sequestration order was apparently initiated at the ALJ's motion. *See* Order and Report on Pre-Hearing Conference (May 7, 2001).

The Sixth Amendment to the U.S. Constitution provides a defendant with a right to counsel in criminal proceedings. As the ALJ explained, RD at 25, the Supreme Court has held that the Sixth Amendment allows a judge to prohibit defense counsel from discussing *any* matters with the defendant during brief intra-day breaks but not during overnight breaks that occur during the defendant's testimony. *Perry v. Leeke*, 488 U.S. 272, 283-84 (1989). Here, the ALJ's sequestration order was more limited; Respondents were not prevented from consulting with their attorneys during breaks or overnight, but instead were limited only as to discussing their ongoing testimony.[3] Thus, during both intra-day and overnight breaks, Respondents were free to confer with counsel on other matters, such as availability of other witnesses, trial tactics, etc., that the Supreme Court regards as important under the Sixth Amendment. 488 U.S. at 284.

The Comptroller concludes that the ALJ's sequestration order passes muster under the Sixth Amendment. Since Respondents' right to counsel under 5 U.S.C. § 555(b) is certainly not greater than the Sixth Amendment right to counsel, the ALJ correctly rejected Respondents' contention. RD at 26.

B. Other Exceptions

The Comptroller has considered the Respondents' other exceptions, including the criticism of the ALJ's factual findings and the frivolous contention that Enforcement Counsel failed to establish that the Bank was a federally insured depository institution. The ALJ addressed these contentions, RD at 27-28, and did so correctly.

V. Restitution and Civil Money Penalties

The ALJ, noting that Respondents have admitted participating in the Bank's lending limit violations, RD at 7-8, concluded that Respondents should make restitution to the Bank for its unreimbursed loss of $232,000. RD at 20-21. The ALJ also found that Respondents should be

[3] Each respondent had only one overnight break during testimony.

assessed second-tier CMPs under 12 U.S.C. § 1818(i)(2)(B). After reviewing the statutory factors, the ALJ recommended CMPs of $100,000 (Ulrich) and $50,000 (Diehl McCarthy). RD at 22-24. The Comptroller differs with the ALJ only on the amount of the CMPs.

In determining the appropriate amount of a CMP, the Comptroller must consider several factors, including the size of financial resources of the respondent. 12 U.S.C. § 1818(i)(2)(G)(i). The Comptroller notes that Respondent Diehl McCarthy commenced bankruptcy proceedings after the ALJ issued the RD. Notice of Bankruptcy Filing (June 5, 2003). This development, both Respondents' lack of financial resources, and the substantial restitution required in this matter persuade the Comptroller to reduce the CMPs to $35,000 (Respondent Ulrich) and $20,000 (Respondent Diehl McCarthy).

VI. Order

Based on the entire record of the proceedings and the reasons given in the foregoing, the Comptroller hereby ORDERS

1. Both Respondents to pay restitution totaling $232,000.

2. Respondent Gene Ulrich to pay a civil money penalty in the amount of $35,000.

3. Respondent Susan Diehl McCarthy to pay a civil money penalty in the amount of $20,000.

9/2/03
Date

/s/ John D. Hawke, Jr.
John D. Hawke, Jr.
Comptroller of the Currency