

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

IN THE MATTER OF:)
)
Donald McKinney,)
) OCC-AA-EC-04-70
 Former Vice President,)
)
 American National Bank,)
 Wichita Falls, Texas.)

DECISION AND ORDER

This matter is before the Comptroller of the Currency (“Comptroller”) on the recommendation of the Administrative Law Judge (“ALJ”) for entry of default against Donald McKinney (“Respondent”), former vice president of ANLC, a wholly-owned subsidiary of American National Bank, Wichita Falls, Texas (“the Bank”) in civil money penalty (“CMP”) and removal proceedings. The prohibition proceeding has been referred to the Board of Governors of the Federal Reserve System for final decision. Regarding the CMP proceeding, the Comptroller, after considering the pleadings, the ALJ’s Recommended Decision and the entire record, concludes that that Respondent is in default and assesses a civil money penalty of \$75,000. As noted below, this Order is final and unappealable.

I. DISCUSSION

A. Factual Background

The facts giving rise to this matter are described in detail in the ALJ’s Recommended Decision, and are briefly summarized here. On September 28, 2004, the OCC filed a Notice seeking an order of prohibition and assessing civil money penalties against Respondent based on

his misconduct while employed at the Bank from 1998 until his termination in April 2003. The Notice states that Respondent was hired by ANLC based upon, in part, false information contained in his 1998 employment application. Specifically, Respondent concealed that he had previously been convicted for making false entries in bank records in violation of 18 U.S.C. § 1005 and for embezzlement of bank funds in violation of 18 U.S.C. § 656. He falsified his employment history by stating he worked at a particular bank between certain dates when, in fact, he was imprisoned for his federal felony convictions during part of the time. During his employment with the Bank, he falsified bank records to make it appear that he was making lease payments to the Bank. Respondent sold a motorcycle that belonged to the Bank and kept proceeds of the sale. And, on a number of occasions, Respondent embezzled or misapplied funds by depositing Bank funds and third-party checks into his personal account at the Bank.

According to the Notice, Respondent's misconduct caused a gain to himself, as well as a total loss of \$129,046.45 to the Bank. (Respondent's mother has made complete restitution of this amount.) The Notice states that Respondent's acts involved a disregard for the safety and soundness of the Bank and a breach of his fiduciary duty to the Bank.

B. Procedural History

On September 27, 2004, the OCC served the Notice by certified mail and overnight delivery to the last known address for Respondent. However, Respondent failed to file an answer within the 20-day period specified in the Notice. Having received no answer from Respondent, on November 16, 2004 Enforcement Counsel moved for entry of a default pursuant to 12 U.S.C. § 19.19(c) based on Respondent's failure to appear and file an answer. On December 3, 2004, the ALJ issued an Order to Show Cause directing Respondent to appear and demonstrate why the ALJ should not grant the default motion. The record reflects that the ALJ

effected service of the Order to Show Cause by overnight mail on December 6, 2004.

Respondent did not respond to the Order and has never filed an answer to the Notice. The ALJ has now issued a Recommended Decision finding Respondent in default. To date, Respondent has not filed exceptions to the Recommended Decision, which was served on Respondent by overnight mail on January 31, 2005.

II. DECISION

The Comptroller agrees with the ALJ that Respondent is in default. Under the civil money penalty statute and implementing regulations, the failure to request a hearing converts the notice of assessment into a “final and unappealable order.” 12 U.S.C. § 1818(i)(2)(E)(ii); *see also* 12 C.F.R. § 19.19(c)(2). Moreover, failure to file a timely answer “constitutes a waiver of [a respondent’s] right to appear and contest the allegations in the notice.” 12 C.F.R. § 19.19(c)(1); *see also* 12 C.F.R. § 19.23(d)(2) (failure of a party to oppose a written motion is deemed consent by that party to entry of an order substantially in the form of the order accompanying the motion); and 12 U.S.C. § 19.39(b) (failure of a party to file exceptions to findings of law and fact in the ALJ’s recommended decision is deemed a waiver of objection thereto).

The record indicates that proper service of the Notice was effected pursuant to 12 U.S.C. § 19.11. Based on the above, the Comptroller finds that an order entering default against Respondent is warranted in this case.

Respondent’s acts involved a willful disregard for the safety and soundness of the Bank, a breach of his fiduciary duty to the Bank and personal dishonesty. The amount of penalty imposed in the Notice is appropriate. A review of the CMP matrix indicates that a \$75,000 penalty for the conduct alleged in the Notice is within the bounds of reasonableness. Moreover,

the Notice states that the appropriate statutory factors were taken into account when assessing the penalty against the Respondent. *See* 12 U.S.C. § 1818(i)(2)(G). Considering Respondent's history and pattern of misconduct, including a past criminal history of misapplying and embezzling bank funds, and the length of time over which the misconduct occurred, the Comptroller finds that \$75,000 is a fair and appropriate penalty.

III. ORDER

Based on the entire record of the proceeding and the Recommended Decision of the ALJ, the Comptroller hereby finds that Respondent is in default and hereby orders Respondent to pay a civil money penalty in the amount of \$75,000. As provided by statute, 12 U.S.C. § 1818(i)(2)(E)(ii), this assessment constitutes a final and unappealable order. Remittance of the penalty shall be payable to the Treasurer of the United States and be delivered to:

Hearing Clerk
Chief Counsel's Office
Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219

SO ORDERED this 17th day of May, 2005.

/s/ Julie L. Williams
JULIE L. WILLIAMS
Acting Comptroller of the Currency