

UNITED STATES OF AMERICA
Before the
OFFICE OF THRIFT SUPERVISION

In the Matter of)	
)	Office of Thrift Supervision
ROBERT L. HODGES,)	(Successor to the Federal
A Former Senior Vice President)	Home Loan Bank Board)
of First Federal Savings and)	No. 88-132
Loan Association,)	
Panama City, Florida)	OTS Order No.: 89-519
)	Date: December 19, 1989

ORDER OF PROHIBITION

WHEREAS, Robert L. Hodges was served with a Notice of Intention to Prohibit and Notice of Hearing, FHLBB Resolution No. 88-132, dated February 29, 1988 ("Notice"); and

WHEREAS, Robert L. Hodges, by motion dated June 22, 1989 and amended on June 30, 1989, withdrew his Answer to the Notice and waived his right to an administrative hearing; and

WHEREAS the Administrative Law Judge issued a recommended decision on August 3, 1989; and

WHEREAS the time for filing exceptions thereto has expired and none has been filed;

NOW THEREFORE, IT IS ORDERED that:

1. Robert L. Hodges is prohibited from further participation, in any manner, in the conduct of the affairs of First Federal Savings and Loan Association, Panama City, Florida ("First Federal") or any service corporation(s) thereof, including the solicitation or exercise of any voting rights in those entities.

2. Without the prior written approval of the Office of Thrift Supervision, Robert L. Hodges may not vote for any director or serve or act as a director, officer or employee of any institution the accounts of which are insured by the Savings Association Insurance Fund or any holding company(ies), subsidiary(ies) or service corporation(s) of such institutions.

3. Pursuant to 1 U.S.C. § 109, this Order is subject to the provisions of Section 5(d)(12) of the Home Owners Loan Act of 1933, as amended, 12 § 1464(d)(12) (1982) as the section existed prior to the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, and shall become effective on the date it is issued.

FOR THE OFFICE OF THRIFT SUPERVISION

151

M. Danny Wall
Director

Date: December 19, 1989

UNITED STATES OF AMERICA
Before the
OFFICE OF THRIFT SUPERVISION

In the Matter of)

ROBERT L. HODGES,
A Former Senior Vice President
of First Federal Savings and
Loan Association,
Panama City, Florida

) Office of Thrift Supervision
) (Successor to the Federal
) Home Loan Bank Board)
) No. 88-132
)
) OTS Order No.: 89-520
) Date: December 19, 1989

ORDER ADOPTING ADMINISTRATIVE LAW JUDGE'S
RECOMMENDED DECISION

WHEREAS, Robert L. Hodges was served with a Notice of Intention to Prohibit and Notice of Hearing, FHLBB Resolution No. 88-132, dated February 29, 1988 ("Notice"); and

WHEREAS, Robert L. Hodges, by motion dated June 22, 1989 and amended on June 30, 1989, withdrew his Answer to the Notice and waived his right to an administrative hearing; and

WHEREAS the Administrative Law Judge issued a recommended decision on August 3, 1989; and

WHEREAS the time for filing exceptions thereto has expired and none has been filed;

NOW THEREFORE, IT IS ORDERED that:

The recommended decision of the Administrative Law Judge dated August 3, 1989 is hereby adopted.

FOR THE OFFICE OF THRIFT SUPERVISION

181
M. Danny Wall
Director

Date: December 19, 1989

UNITED STATES OF AMERICA
Before the
OFFICE OF THRIFT SUPERVISION

In the Matter of)
)
ROBERT L. HODGES,) Office of Thrift Supervision
A Former Senior Vice President) (Successor to the Federal
of First Federal Savings and) Home Loan Bank Board)
Loan Association,) No. 88-132
Panama City, Florida)
) OTS Order No.: 89-521
) Date: December 19, 1989

ORDER EXTENDING TIME

As a result of the recent transition experienced by this Office pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 83, which included the transfer of personnel formerly employed by the Federal Home Loan Bank Board to the Federal Deposit Insurance Corporation and the Federal Housing Finance Board, the Office has been required to reassign certain work. Preparation of final orders in this matter is included in the work that has been reassigned. In view of the realignment of staff responsibilities caused by the agency restructuring mandated by FIRREA, and in order to allow adequate time for review of this matter, the time for issuance of a final decision and orders in this prohibition proceeding is extended until December 19, 1989.

151

M. Danny Wall
Director

Date: December 19, 1989

UNITED STATES OF AMERICA
Before The
FEDERAL HOME LOAN BANK BOARD

In the Matter of)

ROBERT L. HODGES,)

A Former Senior Vice President)
of First Federal Savings and)
Loan Association,)
Panama City, Florida)

) Federal Home Loan Bank Board
) Resolution No. 88-132
) Dated: February 3, 1989

DECISION RECOMMENDING THAT AN UNLIMITED
PERMANENT ORDER OF PROHIBITION BE ISSUED
AGAINST RESPONDENT

Decided: August 3, 1989

Introduction - The Federal Home Loan Bank Board (FHLBB, Bank Board or Agency) in its Resolution No. 88-132 stated that it is of the opinion that:

Robert L. Hodges (Hodges) has violated laws, rules, regulations, has engaged in unsafe or unsound practices and has breached his fiduciary duties in connection with the affairs of First Federal Savings and Loan Association, Panama City, Florida, (First Federal or Association);¹ Hodges has received financial gain and First Federal has suffered or probably will suffer

¹ First Federal now is known as Florida First Federal Savings Bank.

substantial financial loss or other damage, by reason of such violations, practices and breaches of duty; and such violations, practices and breaches of duty involve personal dishonesty on the part of Hodges and demonstrate his willful or continuing disregard for the Association's safety or soundness. In accordance with the provisions of Section 5(d)(4) of the Home Owners' Loan Act of 1933, as amended, (HOLA), 12 U.S.C. §1464(d)(4) (1982), the FHLBB issued a Notice of Intention to Prohibit, and accompanying Notice of Hearing, against Hodges.

JURISDICTION

First Federal is a stock savings and loan association chartered by the FHLBB pursuant to Section 5(a) of the HOLA, 12 U.S.C. §1464(a) (1982), that maintains its principal place of business in Panama City, Florida. It is an institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation (FSLIC) pursuant to Section 403(b) of the National Housing Act, (NHA), 12 U.S.C. §1726(b) (1982). As a federally chartered, FSLIC-insured institution, First Federal, as well as its officers, directors, employees and agents, are subject to the FHLBB's Federal Regulations at 12 C.F.R. § 541.1 et seq. and Insurance Regulations at 12 C.F.R. § 561.1 et seq. Hodges, at the time of the acts, omissions and practices referred to herein, served as Executive Vice President and advisory member of the board of directors of First Federal. As an officer and a person

participating in the affairs of First Federal at all pertinent times, Hodges is subject to the FHLBB's authority to maintain a proceeding to determine whether an order of prohibition should be issued against Hodges pursuant to Section 5(d)(4) of the HOLA, 12 U.S.C. §1464(d)(4) (1982). See Anava v. Federal Home Loan Bank Bd., 839 F.2d 1349 (9th Cir. 1988).

Respondent filed an answer and denied the facts alleged in the Notice. An administrative oral hearing was scheduled, infra. The parties engaged in extensive discovery. Numerous motions were filed and ruled on and several pre-hearing conferences were held.

BACKGROUND

Respondent was employed by First Federal for about 20 years until he resigned on January 8, 1987. For approximately six months in 1987, respondent was employed by Bay Bank in Panama City, FL which owned Bay Savings & Loan, an institution governed by the Agency. When bank examiners for FHLBB learned of Hodges employment at Bay Bank they made known their concern to its management, and Hodges' employment there was terminated. During the pendency of this administrative proceeding Mr. Hodges was indicted by a Federal Grand Jury for the Northern District of Florida. The allegations of that Indictment covered the allegations contained here as they relate to the Sunbird Condominium project, (Sunbird) infra. As a result of that

Indictment, this proceeding was held in abeyance until the criminal proceeding had been concluded. During this period respondent acquiesced in an order that he shall (i) not, directly or indirectly, participate in any manner in the conduct of the affairs of First Federal, and (ii) not, directly or indirectly, vote for a director of, or serve or act as a director, officer, or employee of any insured institution the deposit accounts of which are insured by the FSLIC (or any successor thereto) or of any subsidiary or holding company of any Insured Institution, without the prior written permission of the FHLBB (or any successor thereto). In April 1989, the criminal proceeding was concluded, and all charges dismissed against Mr. Hodges as a result of a jury's finding of Not Guilty on each Count of the Indictment.

The Administrative hearing was scheduled to begin July 6, 1989 in Panama City, FL. On June 26, 1989 explaining that Mr. Hodges could not afford further legal fees his counsel withdrew his denial of the facts described in the Notice. He did file several letters from interested citizens and a multi-page document which will be termed "Respondent's Statement of Position" discussed later, and he seeks an order of prohibition automatically terminating on June 30, 1990. OE recommends a permanent order of prohibition.

STATEMENT OF FACTS

As noted, Hodges was employed by First Federal for about 20 years. From 1982 until he resigned on January 8, 1987, Hodges served as a Senior Vice President, Executive Vice President and as a member of the Board of Directors of First Federal. In this capacity, among other things, he was responsible for supervising the loan origination activities of First Federal. During part of that time, he also served as the president of Service First, Inc. (Service First) ² a wholly owned subsidiary service corporation of First Federal. Among other things, First Federal utilized Service First to enter into joint ventures with real estate developers.

The transactions at issue may be grouped into two categories; (A) the alleged conflict-of-interest transaction, and (B) allegedly fraudulent loans to finance the sale of units at the Sunbird Condominium project.

A. The alleged Conflict-of-Interest Transactions

² The FHLBB and the FSLIC regulate the activities of service corporations. See 12 C.F.R. §§ 545.74, 561.26.

Dockside North Condominium

In 1984, while Hodges served as president Service First was involved as a joint venture partner for the development and sale of the real estate project called Dockside North Condominium (Dockside). Hodges, along with a partner who was also an officer at First Federal, purchased a condominium unit at Dockside from the joint venture. Hodges and his partner, however, failed to disclose this transaction to the boards of directors of either Service First or First Federal in breach of their fiduciary duty, and failed to obtain the required regulatory approval prior to purchasing this property in violation of Section 563.41 of the Insurance Regulations (12 C.F.R. § 563.41). Later, Hodges and his partner sold this property and received a profit of approximately \$9,000 from this improper transaction. (Notice paragraphs 31-36).

Bayou Pointe Villas Condominium

In December 1985, Service First was involved in a joint venture for the development and sale of the Bayou Pointe Villas Condominium (Bayou Pointe). Hodges, who still the president of Service First at this time, arranged for a friend to buy a unit at Bayou Point with financing from First Federal. Hodges, who was also loan officer for First Federal, approved this loan. About five months later, Hodges and a partner acquired the condominium unit from the borrower and improperly assumed his loan at First

Federal. Hodges failed to disclose his involvement in this transaction to the board of directors of First Federal in breach of his fiduciary duty and failed to obtain the required supervisory approval prior to engaging in this transaction in violation of Section 563.43 of the Insurance Regulations (12 C.F.R. § 563.43). Moreover, Hodges obtained personal benefit from this transaction. (Notice paragraphs 47-50).

Kings Point Harbour

In August 1985, Service First was a partner in a joint venture for the development and sale of residential and townhouse sites at Kings Point Harbour (Kings Point). Hodges requested and received approval from the board of directors at First Federal to purchase a lot there for \$50,000 to build a home which would become his primary residence. He however, failed to build a house and utilize the property as his primary residence. Instead Hodges sold the lot eight months after he purchased it for \$100,000. First Federal also provided the financing for the purchase of this lot from Hodges. In fact, Hodges approved the loan to the purchasers. Hodges failed to request and receive approval from the board of directors at First Federal for either the sale of this lot or First Federal's financing of this transaction to facilitate the sale in breach of his fiduciary duty and failed to obtain the requisite supervisory approval prior to engaging in this transaction in violation of Sections 563.41 and 563.43 of the

Sections 563.41 and 563.43 of the Insurance Regulations (12 C.F.R. §§ 563.41 and 563.43. Hodges improperly benefited from this transaction by approximately \$50,000. (Notice paragraphs 37-41).

College Village Property

In May 1985, Hodges arranged for a friend to purchase a condominium unit at College Village with financing provided by First Federal. Neither Hodges nor his friend told First Federal that they had agreed to enter into a partnership to purchase property and resell it at a profit. Hodges, on behalf of First Federal, approved a loan in the amount of \$35,000 to his friend, which provided 100 percent financing for the purchase of the College Village Unit. In addition, the loan was a one-year balloon loan so that Hodges and his friend would not have to make monthly payments. However, one year later they had not sold the property and did not repay the loan. Hodges, in his personal capacity, took title to the property by accepting a tender of the deed from this friend. Although the loan remained in default, Hodges prevented First Federal from instituting foreclosure proceedings. Hodges subsequently sold the property for \$48,000. He used part of the net sales proceeds to pay off the First Federal loan to his friend and Hodges retained the remainder of the proceeds for his own use. Thus, Hodges breached his fiduciary duty by taking profits for himself that should have been First Federal's, and he was the beneficiary of a loan for which he did

not receive approval of either the First Federal board or the supervisory agent in violation of Sections 563.41 and 563.43 of the Insurance Regulations (12 C.F.R. §§ 563.41 and 563.43). (Notice paragraphs 42-46).

Gulf American Holding Company

In December 1984, Hodges caused First Federal and Service First to enter into an agreement with others to form Gulf American Holding Company (GAHC) by purchasing a controlling interest in Gulf American Financial Corporation (GAFC). First Federal provided approximately \$1.4 million for the financing of this transaction and Service First contributed \$50,000. Hodges, while representing First Federal and Service First in negotiations with representatives of GAFC accepted an undisclosed kickback in the form of stock options in violation of his fiduciary duty and Section 563.40 of the Insurance Regulations (12 C.F.R. § 563.40). Hodges' involvement in these transactions constitutes an unsafe and unsound practice. Hodges later received \$12,548.47 in exchange for the stock options. (Notice paragraphs 61-69).

Seachase of Panama City Inc.

In May 1985, Hodges, while representing First Federal in negotiating the Sunbird Condominium loan purchased a condominium unit at Seachase of Panama City Inc. (Seachase) at a below market

price. The developer and president of Seachase was also one of the developers of the Sunbird Condominium project. Hodges finalized his own purchase of this unit two days prior to First Federal's financing of the Sunbird Condominium loan. Thus, in violation of Section 563.40 of the Insurance Regulations (12 C.F.R. § 563.40) Hodges received an undisclosed kickback in the form of a below market price from the developer in exchange for recommending that First Federal grant the Sunbird Condominium loan to the developer. Hodges' failure to disclose his purchase of this property or involvement in this transaction to the board of directors at First Federal was an unsafe and unsound practice and a breach of his fiduciary duty. (Notice paragraphs 55-60).

Conclusion

Hodges' involvement in the transactions discussed above demonstrates how he engaged in a pattern or practice of improper self-dealing involving First Federal and Service First and used his position at First Federal to engage in unsafe and unsound practices and to obtain personal gain in violation of First Federal's internal policies and federal regulations.

B. The Allegedly Fraudulent Sunbird Condominium End Loans

In connection with the Sunbird Condominium Project, Hodges participated in a scheme to cause First Federal to make numerous

mortgage loans without regard for prudent and ordinary loan underwriting procedures and to finance the sale of units at Sunbird to persons who clearly lacked the financial capacity to repay the loans. He also instructed his staff at First Federal to make the loan files look like First Federal was providing 90 percent financing with the borrowers providing 10 percent down payments when in fact no down payments were being made. Hodges did this in an attempt to avoid the scrutiny of bank examiners. In addition, Hodges caused First Federal to rely on appraisal reports of the security property that he knew, or should have known, (1) overstated the value of the property, and (2) were prepared by an appraiser not approved by the board of directors of First Federal. Hodges' conduct in this transaction was an unsafe and unsound practice. As a result of this fraudulent transaction, First Federal has suffered numerous defaults on loans granted on the Sunbird units as well as financial loss in excess of \$500,000. (Notice paragraphs 16-30).

Conclusion

The foregoing uncontested facts show that respondent engaged in numerous lending improprieties in violation of Federal Regulations and caused First Federal to suffer substantial financial loss.

Respondent's Statement of Position and Plea

Respondent admits that he approved the underwriting process of Sunbird Condominium units which violated FHLBB rules and regulations. However, he urges that there is no allegation that he approved the poor underwriting process for any personal gain, nor that he knew that the underwriting process was in violation of FHLBB rules and regulations, nor that there was any wilful intent on his part in approving this underwriting process. Respondent argues that the institution did not suffer a substantial loss as a result of the poor underwriting, and that there was no evidence of either personal dishonesty or that Hodge's actions demonstrated a wilful, or continuing, disregard for the institution's safety and soundness.

Respondent admits the allegations relative to the Dockside, Kings Point, Bayou Pointe, and GAHC transactions each involving affiliated persons without obtaining prior approval. Respondent urges that it was the intent of Congress to restrict only those transactions with affiliated persons which were unfair to the institution. He notes that each of the transactions set forth above involved documents duly recorded among the Public Records in the County in which First Federal was located. Respondent contends that there is no allegation that the transactions resulted in any unfairness to the institution and no allegation that respondent attempted to hide these transactions, but rather

that the transactions took place without obtaining prior approval. Respondent believes that the failure to obtain prior approval is a technical violation that does not involve wilful intent.

College Village, Seachase, and GAHC each involve violations of 12 CFR 571.7 in which the acquisition by Hodges was admittedly either a conflict of interest, or gave the appearance of a conflict of interest. Respondent argues that each of the transactions involved was a publicly recorded transaction, was done openly and notoriously, and without any intent to deceive, or to withhold information from First Federal. Respondent contends that it was not shown how the institution was endangered as a result of the conflict of interest and that there is no proof that Hodges entered into a conflict of interest knowingly and intentionally for the purposes of endangering the institution for which he was working at the time.

Respondent points out that the Letters of Recommendation submitted on his behalf come not from personal friends, relatives, or social acquaintances, but come from business leaders within the community. Three of them are from Presidents of Savings & Loan Associations with whom respondent dealt over the years. The other two are from the owner of an insurance agency and immediate Past President of a Chamber of Commerce and a president of a real estate company. Respondent urges that the record, including these Letters of Recommendation fail to demonstrate that he is unfit to

serve as an officer or Director of a savings and loan association or other institution governed by the FHLBB or the FSLIC; and that the time that he has been out of the savings and loan association industry since leaving Bay Bank in 1987 constitutes a sufficient period of probation and that an extended period of prohibition is not warranted under the facts and circumstances of this proceeding.

Respondent is willing to have the prohibition and restrictions placed upon him remain in force and effect until June 30, 1990, when, he urges they should be vacated so that he would have the unrestricted right to secure employment in the banking industry.

Discussions and Conclusions

The "prohibition" statute, section 5(d)(4) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. § 1464(d)(4) (1982), provides in pertinent part:

Whenever, in the opinion of the Board, any director or officer of an association has committed any violation of law, rule, or regulation *** or has engaged or participated in any unsafe or unsound practice in connection with the association, or has committed or engaged in any act, omission, or practice which constitutes a breach of his fiduciary duty as such director and the Board determines that the association has suffered or will probably suffer substantial financial loss or other damage or that the interests of its savings account holders could be seriously prejudiced by reason of such violation or practice or

breach of fiduciary duty, or that the director or officer has received financial gain by reason of such violation or practice or breach of fiduciary duty, and that such violation or practice or breach of fiduciary duty is one involving personal dishonesty on the part of such director or officer, or a willful or continuing disregard for the safety or soundness of the association, the Board may serve upon such director or officer a written notice of its intention to remove him from office or to prohibit his further participation in any manner in the conduct of the affairs of the association.

The question is whether the misconduct of Hodges is of the type that satisfies the three elements of section 5(d)(4) of the HOLA. The inquiry posed by the three parts of section 5(d)(4) are whether:

(1) the respondent, while a director or officer of a federally chartered savings association (A) committed any violation of law, rule, or regulation or of a cease-and-desist order which has become final, OR (B) engaged or participated in any unsafe or unsound practice in connection with the association, OR (C) committed or engaged in any act, omission, or practice which constitutes a breach of his fiduciary duty as such director or officer, AND

(2) either (A) the association has suffered or will probably suffer substantial financial loss or other damage, OR (B) the interests of its savings account holders (depositors) could be seriously prejudiced by reason of such violation or practice or breach of duty, OR (C) the respondent has received financial gain by reason of such violation or practice or breach of fiduciary duty, AND

(3) such violation or practice or breach of fiduciary duty is one involving either (A) personal dishonesty on the part of the respondent, OR (B) a willful or continuing disregard for the safety or soundness of the association.

A. The First Element: Violation, Unsafe or Unsound Practice, or Breach of Fiduciary Duty

Violations of Regulations

Hodges' misconduct is of the type that satisfies the first element of section 5(d)(4) of the HOLA. The violation-of-regulation sub-element is established because the evidence shows and this decision establishes that Hodges caused or participated in causing violations of various FSLIC regulations, including sections 563.41 and 563.43 of the FSLIC's regulations.³ The first regulation provides that it is improper for an officer of an Insured Institution (or subsidiary thereof), directly or indirectly, to acquire any interest in real or personal property from the Insured Institution (or a joint venture involving a subsidiary thereof) unless the Agency's Supervisory Agent provides prior approval of the transaction, having found the transaction to be fair to, and in the best interests of, the Insured Institution. 12 C.F.R. § 563.41. Hodges violated that regulation with respect to his purchasing, directly or indirectly, condominium units from joint ventures involving Service First, e.g., the Dockside North and Bayou Point transactions because he (1) failed to inform the boards directors of Service First and First Federal, and (2) he thereby prevented First Federal from attempting to obtain the regulatorily required prior approval from the Supervisory Agent.

³ For the purposes of 12 C.F.R. §§ 563.41 and 563.43 Hodges was an "affiliated person" as that term is defined in 12 C.F.R. § 561.29(a).

Section 563.43(b) of the FSLIC's conflict-of-interest regulations generally prohibits an officer of an Insured Institution from obtaining real estate investment loans, directly or indirectly, from the institution. In addition, an officer of an Insured Institution owes a fiduciary duty of loyalty to the institution, and it is a breach of his fiduciary duty to engage in self-dealing transactions or to usurp corporate opportunities of the institution. See e.g., 12 C.F.R. §§ 571.71, 571.9. Hodges caused a violation of section 563.43 by improperly assuming a loan made by First Federal, secured by a condominium unit at Bayou Point Villas, because (1) he failed to disclose this surreptitious transaction to the Board of Directors of First Federal, and (2) he did not attempt to obtain from the Supervisory Agent a waiver of the restrictions of section 563.43(b). Contrary to respondent's argument these are not mere "technical" violations without willful intent. The Bank Board's policy statement provides that conflict-of-interest transactions have demonstrably resulted in adverse effects upon FSLIC-insured institutions and "are considered by the Board to be inherently unsafe or unsound practices and conditions." 12 C.F.R. § 571.7(b) (1988); see 47 Fed. Reg. 44335 (Oct. 7, 1982) ("insider self-dealing is highly detrimental to the safety and soundness of an institution . . ."). The practice of Hodges of engaging in the conflict-of-interest transactions delineated in this decision constituted an unsafe or unsound practice with respect to First Federal.

Unsafe or Unsound Practices

An "unsafe or unsound practice" is a practice or conduct that exposes a government-insured depository institution to an unacceptable degree of financial risk. See Gulf Federal Savings and Loan Association v. Federal Home Loan Bank Board, 651 F.2d 259, 263-265, (5th Cir. 1981), cert. denied, 458 U.S. 1121 (1982). Moreover, it has been the longstanding position of the FHLBB that the phrase "unsafe or unsound practice" means as follows:

Generally speaking, an unsafe or unsound practice, embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds.

Financial Institutions Supervisory Act of 1966, Hearings on S. 3158 Before the House Comm. on Banking and Currency, 89th Cong., 2d Sess. 49 (1966) (memorandum supplied by John E. Horne, Chairman, Federal Home Loan Bank Board) and also discussed in Gulf Federal supra. Also, See, e.g., 12 C.F.R. § 563.17(a).

The manner in which the Sunbird End Loans were made constituted an unsafe or unsound practice. The loans were made to persons who clearly lacked the financial capacity to repay them, and Hodges was a central figure in the making of the loans. The loans were made in a manner contrary to generally accepted standards of prudent operation, and the consequences of the

practice, if continued, would be abnormal risk or loss or damage to First Federal, its depositors, and the FSLIC. Accordingly, in connection with the Sunbird End Loans, Hodges participated in an unsafe or unsound practice with respect to First Federal. A similar conclusion is warranted as to respondent's dealing with GAHC and Seachase as discussed earlier in this decision.

Breaches of Fiduciary Duty

It is settled law and policy that directors and officers of Federally insured depository institutions (including Federal savings associations) owe a fiduciary duty of loyalty to the institutions with which they are associated. See, e.g., 12 C.F.R. § 571.7; Lane v. Chowning, 610 F.2d 1385 (8th Cir. 1979) (national bank director duties); Goodman v. Perpetual Building Association, 320 F.Supp. 20 (D.D.C. 1970); Atherton v. Anderson, 99 F.2d 883 (6th Cir. 1938). See generally, W. Fletcher, Cyclopedia of the Law of Private Corporations §§ 838, 845 (rev. perm. ed. 1975).

The Bank Board's policy statement on conflicts of interest provides in pertinent part that "The [B]oard accordingly holds that each director, officer, or other affiliated person has a fundamental duty to avoid placing himself in a position which creates . . . a conflict of interest 12 C.F.R. § 571.7(b) (1988). Hodges, by engaging in the self-dealing transactions breached the fundamental fiduciary duty of loyalty

and integrity in regard to the institution employing him and paying for his services.

The Bank Board has promulgated sections 563.41 and 563.43 of the FSLIC's regulations to codify its position that certain transactions between an FSLIC-insured institution (or subsidiary) and its officers (and other affiliated persons) constitute improper conflicts of interest. Accordingly, Hodges engaged in a breach of his fiduciary duty of loyalty to First Federal (and Service First) with respect to each of the self-dealing transactions, including (but not limited to) those involving violations of 12 C.F.R. §§ 563.41 and 563.43.

The Second Element: Loss or damage to the association or financial gain to the respondent.

The second element is satisfied because Hodges caused First Federal to make the Sunbird loans which involved unsafe or unsound underwriting practices and significantly increased the losses suffered by First Federal on the project.

With respect to certain of the transactions Hodges usurped corporate opportunities belonging to First Federal (or Service First) which deprivations diminished profits they could have realized. Accordingly, Hodges caused those institutions to suffer other substantial financial damage.

Finally, Hodges received personal gain in connection with the conflict-of-interest transactions. For instance, in connection with the GAHC transaction Hodges accepted stock options as a kickback for causing First Federal to make the \$1.4 million loan to GAHC, and Hodges was later paid \$12,584.47 in exchange for the stock options.

The Third Element: Personal dishonesty or willful or continuing disregard for safety or soundness

Personal dishonesty.

The conduct of a director or officer will be found to evidence personal dishonesty where the conduct involves surreptitious, self-dealing transactions. The conflict-of-interest transactions involve self-dealing by Hodges without disclosure to the boards of directors of Service First and First Federal. Accordingly, Hodges' misconduct with respect to Dockside, Bayou Pointe, Kings Point, GAHC, Seachase and College Village - the conflict-of-interest transactions involved personal dishonesty. Hodges structured the Sunbird loans to affirmatively mislead First Federal, the participants in the Sunbird loans, and the examiners of the FSLIC. Accordingly, the activities of Hodges with respect to the Sunbird loans involved personal dishonesty.

Willful or continuing disregard for safety or soundness.

Hodges caused First Federal and Service First to violate sections 563.41 and 563.43 of the FSLIC's conflict-of-interest

regulations on numerous occasions. Accordingly, this repeated exposure of First Federal to the risks inherent in self-dealing constitutes continuing disregard for the safety or soundness of First Federal. Hodges' conduct also evidenced "willful disregard" for safety or soundness, within the meaning of these civil, remedial proceedings. See United States v. Illinois Central Railroad Company, 303 U.S. 239, 242-43 (1938); and Steadman v. SEC, 603 F.2d 1126, 1135 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). The participation of Hodges in the fraudulent scheme regarding the Sunbird loans also involved a willful or continuing disregard for the safety or soundness of the Association.

Hodges engaged in the type of misconduct that makes it appropriate to issue an order of prohibition which will protect First Federal and other Insured Institutions from further misconduct by Hodges.

Hodges has waived his right to a hearing, withdrawn his answer denying the facts, and therefore, OE's proposed findings are uncontested, except for Hodges' one reservation about

jurisdiction, which has already been denied.⁴ OE has demonstrated each element necessary to support an order of prohibition. The question is whether the record warrants imposition of a permanent order of prohibition as sought by OE or one of a limited duration of time as advocated by respondent.

The governing statute does not contemplate the FHLBB issuing limited orders of Prohibition. Instead, it provides a clearly defined process through which an individual, such as Hodges, can petition to have the order stayed, modified, terminated, or set aside, after it is issued. Such a petition may be made at any time and one's subsequent behavior as well as any other pertinent facts and circumstances would be relevant to such a petition.

Having shown that Hodges' actions clearly meet the statutory standard, there is only one remedy provided in the statute -- an unconditional order "*** to prohibit his further participation in any manner in the conduct of the affairs of the association." The statute does not provide a "sliding scale" or a time limited

⁴ Hodges argued that the Bank Board may not prohibit someone who has resigned, citing Stoddard v. Federal Reserve System, No. 88-1148, U.S. Court of Appeals D.C. Circuit, decided March 3, 1989. However, it is clear from the language of Section 5(d)(4) of HOLA that the statute grants authority to the FHLBB to prohibit a former bank officer, such as Hodges, for misconduct related to his tenure as an official of a federally-insured savings and loan. See Anaya v. Federal Home Loan Bank Board, 839 F. 2d 1349 (9th Cir. 1988). The two cases dealt with two differently worded statutes accounting for the different holdings.

prohibition. It does not permit the issuance of an order of prohibition for a limited term or specified number of months or years. Respondent does not point to any decided cases holding to the contrary or otherwise argue the point. When Congress wanted to provide for a time limited order it used the term "suspension". For example, in other sections of the same statute Congress provided for a possible suspension. See Subsection 5(d)(4)(D),(E) and (F), (12 U.S.C. § 1464(d)(4)(D),(E) and (F)) and Section 5(d)(5), (12 U.S.C. § 1464(d)(5)).

A review of pertinent case law demonstrates that banking agencies, in exercising their regulatory powers, issued permanent removal and prohibition orders as an appropriate remedy against individual bank officers and directors whose actions were, arguably, less egregious than Hodges. Two examples follow:

In Brickner v. Federal Deposit Ins. Corp. 747 F.2d 1198 (1984) the court upheld the Federal Deposit Insurance Corporation's permanent removal and prohibition order against two banking officials for breach of their fiduciary duty for failing to take affirmative action to curtail the improper lending activities of the bank head cashier's improper lending activities authorizing overdrafts and excessive extensions of credit. The officials' had argued that their failure to do more amounted to an honest error of judgment rather than to a breach of a fiduciary duty and that their conduct did not fall below that which could be

expected of reasonably prudent business persons in the same circumstances. These contentions were not accepted.

In Van Dyke v. Board of Governors of the Federal Reserve System, No. 88-5280, U.S. Court of Appeals for the Eighth Circuit, filed June 8, 1989, the office of the Comptroller of the Currency (Comptroller) initiated an administrative action to remove Van Dyke from his positions as a bank president and director. The Comptroller charged Van Dyke with engaging in a "check-kiting scheme." Following an evidentiary hearing, the recommended decision suggested that the Board of Governors of the Federal Reserve System (FRB) dismiss the removal action because Van Dyke's actions did not "demonstrate personal dishonesty nor [did] they seem to be of such a nature as to involve a disregard for the safety or soundness of the bank." The FRB, however, found that the check-kiting scheme satisfied its removal requirements and issued a permanent removal and prohibition order. The Court of Appeals upheld the FRB's permanent order.

In the present case, Hodges, a former savings and loan official abused his position by accepting kickbacks to make loans with poor underwriting, created false documents to deceive examiners and usurped the profits rightly belonging to his employer - First Federal. As in Brickner and Van Dyke, Hodges has demonstrated behavior which makes him unfit to serve as an officer or director of a federally-insured institution. Therefore, the

appropriate remedy is to bar Hodges permanently from participating in the affairs of First Federal or any institution insured by the FSLIC.

The Congress has charged the FHLBB with the responsibility to protect the public and the insurance fund. In doing so, Congress provided the agency with the authority to remove and prohibit individuals who have proven themselves unworthy of the public's trust. In light of the facts demonstrated on this record the appropriate remedy for the FHLBB is to issue an unlimited permanent Order of Prohibition against Hodges.

For the foregoing reasons, the request of OE is granted that I recommend an unlimited Order of Prohibition against Hodges in the form attached.

Dated at Washington, D.C., August 3, 1989.

Frederick M. Dolan, Jr.
Administrative Law Judge