

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

IN THE MATTER OF:)	
)	
PETER G. WEINSTOCK, ESQ., AND)	
JEANNE BRECKINRIDGE, ESQ.,)	OCC-AA-EC-99-01
FORMER COUNSEL TO THE CASEY)	
NATIONAL BANK, CASEY, ILLINOIS,)	
Petitioners.)	

**DECISION AND ORDER ON
MOTION FOR INTERLOCUTORY REVIEW**

On March 30, 1999, Petitioners Peter G. Weinstock, Esq., and Jeanne Breckinridge, Esq. ("Petitioners") filed a Motion for Interlocutory Review of the March 16, 1999, decision of Administrative Law Judge Arthur L. Shipe ("ALJ"), denying their Motion to Dismiss. For the following reasons, the Comptroller of the Currency ("Comptroller") grants Petitioners' Motion for Interlocutory Review and affirms the ALJ's decision that the Office of the Comptroller of the Currency ("OCC" or "agency") has the authority to promulgate and enforce 12 C.F.R. Part 19, Subpart K ("Subpart K"); the procedures followed in this proceeding were in compliance with Subpart K; and Subpart K provides sufficient notice of the requisite standards of conduct for attorneys appearing before the agency.

Procedural Background

On February 5, 1999, Senior Deputy Comptroller Leann Britton issued a Notice of Formal Disciplinary Proceeding and Intention to Suspend From Practice Before the Office of the Comptroller of the Currency ("Notice of Charges") to Petitioners, who are

former counsel to Casey National Bank, Casey, Illinois. The Notice of Charges alleges that Petitioners, when appearing before the OCC to urge that a prohibition on a banker be lifted, had "knowingly giv[en] or participat[ed] in giving materially false or misleading information and/or ma[de] statements in reckless disregard for whether they were false or misleading." Notice of Charges at 10-11. Under the authority of Subpart K, the Notice of Charges proposed to prohibit the Petitioners from conducting all administrative law practice before the agency.

On February 26, 1999, the Petitioners filed a Motion to Dismiss contending that the OCC lacked authority to promulgate and enforce Subpart K; prosecuted the proceeding in contravention of the rules of Subpart K; and failed to provide adequate pre-enforcement notice of Subpart K's standards of practice. OCC Enforcement Counsel filed a Reply on March 12, 1999. On March 16, 1999, the ALJ denied the Petitioners' motion, finding that the OCC has the authority to promulgate and enforce Subpart K; the procedures followed in this proceeding were in compliance with Subpart K; and Subpart K provided sufficient notice of the requisite standards.

Petitioners now ask the Comptroller to grant interlocutory review of the ALJ's denial of their Motion to Dismiss. Petitioners argue that the seriousness of the questions raised about OCC's authority satisfy the standards for interlocutory review in 12 C.F.R. § 19.28(b). On the merits, Petitioners assert that Subpart K itself cites no statutory authority for OCC's promulgation of the rule and that removal under 12 U.S.C. § 1818(e) is the only lawful means by which Petitioners may be barred from agency practice. They also argue that even if authority for Subpart K exists, the OCC failed to comply with the

procedures required by that rule. Finally, the Petitioners argue that the agency did not provide adequate pre-enforcement notice of Subpart K's standards and requirements.

On April 13, 1999, OCC Enforcement Counsel filed a Response. The Comptroller has recused himself from this proceeding and delegated the matter to Chief Counsel Julie L. Williams, for decision pursuant to 12 U.S.C. § 4.¹

Interlocutory Review

The Petitioners argue that the Comptroller should grant interlocutory review of the ALJ's ruling. The OCC's rules contemplate that interlocutory review should be exercised rarely and only under specific circumstances. Under 12 C.F.R. § 19.28(b), the Comptroller may, in his discretion, review an interlocutory order if: "[t]he ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion; . . . [s]ubsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or [s]ubsequent modification of the ruling would cause unusual delay or expense."

The OCC, along with the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation, has had disciplinary rules in place for some time. However, the issue of an agency's authority to conduct the disciplinary proceeding provided for in the agency's rules of practice and procedure has never been decided. The Comptroller agrees with Petitioners' assertion that the OCC's ability to promulgate and enforce its rules of practice and procedure is an administrative law question of some magnitude, about which a difference of opinion exists. The Comptroller believes that

¹ Throughout this decision, unless the context indicates otherwise, references to the Comptroller refer to the Chief Counsel as the Comptroller's designate to decide this matter.

further guidance on this issue is appropriate and that the requirements for interlocutory review in 12 C.F.R. § 19.28(b) have been met. Therefore, the Comptroller grants interlocutory review of the ALJ's ruling.

Authority to Promulgate and Enforce Subpart K

Petitioners' primary argument is that Subpart K is invalid because the OCC did not cite appropriate statutory authority for issuing the rule. In addition, they argue that the OCC could not promulgate or enforce Subpart K because 12 U.S.C. § 1818(e), which authorizes the Comptroller to discipline "institution-affiliated parties" by prohibiting them from participating in banking, is the only authority for the Comptroller to prohibit an individual from appearing in a representative capacity before the OCC. I disagree and affirm the ALJ's order on this issue.

Subpart K Was Properly Promulgated

The Administrative Procedure Act requires a rulemaking notice to include "reference to the legal authority under which the rule is proposed." 5 U.S.C. § 553(b)(2); see also Global Van Lines, Inc. v. ICC, 714 F.2d 1290, 1298 (5th Cir. 1983). In order for a regulation to be validly promulgated, the agency must identify adequate authority for the rule at the time the rule is proposed, not afterwards, because to do otherwise would make useful public comment impossible. Id.

In the proposed and final rules on standards of practice before the agency, OCC cited 12 U.S.C. § 1818 as one of several statutes supporting the rulemaking. See 54 Fed. Reg. 22,768 (1989) (Subpart O, proposed rule); 55 Fed. Reg. 13,015 (1990) (Subpart O, final rule); 56 Fed. Reg. 27,816 (1991) (Subpart K, proposed rule); 56 Fed. Reg. 38,029 (1991) (Subpart K, final rule). Section 1818 specifically empowers the OCC "to make

rules and regulations with respect to any such proceedings, claims, examinations or investigations" taken under authority of that statute. 12 U.S.C. § 1818(n). See Independent Bankers Ass'n v. Heimann, 613 F.2d 1164, 1169 (D.C. Cir. 1979).

Subpart K was promulgated to establish a framework for disciplining attorneys who act in an incompetent or disreputable manner in OCC proceedings. Such conduct threatens the stability and effectiveness of the national banking system because it undermines the integrity of agency proceedings under § 1818. For this reason, § 1818(n) is an appropriate source of authority for a rule that establishes standards of practice for attorneys appearing before the OCC in a proceeding under § 1818.

The proceeding that gave rise to the Notice of Charges in this case was an application under 12 U.S.C. § 1818(e)(7) urging the OCC to lift the prohibition on participation in banking imposed on a former bank officer. The current disciplinary proceeding under Subpart K was brought to protect the integrity of the § 1818(e)(7) action.

For these reasons, 12 U.S.C. § 1818 is a valid source of authority for issuing disciplinary rules concerning conduct in proceedings carried out under authority of that statute.²

Subpart K Does Not Contravene OCC's Prohibition Authority Under § 1818(e)

Petitioners also argue that the OCC may not prohibit an attorney from appearing before the agency except in a proceeding initiated under 12 U.S.C. § 1818(e), and

² The OCC need not consider at this point whether Subpart K may be used to discipline persons appearing in a representative capacity in proceedings other than those under 12 U.S.C. § 1818.

therefore, the OCC may not promulgate or enforce Subpart K. Petitioners' argument fails in two respects.

First, the argument that the promulgation or enforcement of agency disciplinary rules conflicts with statutory prohibitions under § 1818(e) is inconsistent with established law. The seminal case in this area, Touche Ross & Co. v. SEC, 609 F.2d 570 (2d Cir. 1979), held that agencies may create regulations imposing disciplinary measures, so long as they are "reasonably related" to the agency's purpose and the purpose of existing law. Id., at 582. Like the OCC, the Securities and Exchange Commission enforces a series of statutes that authorize disciplinary and enforcement actions. Courts have recognized that the SEC can promulgate separate administrative rules governing practice before the agency, and that these rules can coexist with statutorily provided enforcement tools. Id., at 579; Checkovsky v. SEC, 23 F.3d 452, 455 (D.C. Cir. 1994); Davy v. SEC, 792 F.2d 1418, 1421 (9th Cir. 1986).

The OCC's situation is analogous to that presented in Touche Ross and the other SEC cases. The OCC necessarily must place considerable reliance on the individuals who practice before it. As the Second Circuit explained, without professionals "perform[ing] their tasks diligently and responsibly," the securities laws would be "jeopardize[d]" and the public "damaged." Touche Ross, 609 F.2d at 581. In like fashion, the safety of the national banking system would suffer if individuals representing institution-affiliated parties in § 1818 proceedings could not be held accountable for failing to act with professionalism and competence. The Second Circuit's determination that rules adopted to preserve the integrity of internal processes are "reasonably related" to the agency's purpose and can coexist with other prosecutorial authority is directly

applicable here. Touche Ross, 609 F.2d at 579 (“[I]t is clear that the SEC is not attempting to usurp the jurisdiction of the federal courts to deal with ‘violations’ of the securities laws. The Commission, through its Rule 2(e) proceeding, is merely attempting to preserve the integrity of its own procedures, by assuring the fitness of those professionals who represent others before the Commission.”)

The second flaw in Petitioners’ argument is that it confuses the different injuries for which Subpart K and § 1818(e) provide remedies. In this case, the proceeding is intended to address only alleged misconduct before the OCC, which need not involve actions calling for “removal” or “prohibition” from banking under § 1818(e). In addition, in a Subpart K proceeding, the agency does not purport to “remove” or “prohibit” the individual from holding the broad range of banking positions covered by § 1818(e) enforcement authority. Rather, the action under Subpart K only regulates who may appear before the agency in a representational capacity by barring individuals who have engaged in misconduct before the agency. The conduct giving rise to, and the discipline that can be imposed in, Subpart K disciplinary actions are not the same conduct and penalties addressed by § 1818(e). Therefore, contrary to Petitioners’ assertions, OCC’s enforcement of Subpart K is fully consistent with the OCC’s separate statutory authority to prohibit individuals from the business of banking under § 1818(e). Consequently, the Comptroller agrees with the ALJ’s ruling on this point.

The OCC’s Compliance With Subpart K’s Procedural Requirements

Petitioners argue that even if Subpart K was properly adopted, OCC did not comply with the regulation’s requirements in bringing this disciplinary action. They contend that the Comptroller did not personally find Petitioners’ conduct to be

“sufficiently egregious” as required by 12 C.F.R. § 19.193; the OCC did not specifically determine that the matter in which Petitioners made misrepresentations was a “significant matter” before the agency; and the OCC did not provide Petitioners with an opportunity to remedy the errors. For the reasons below, I disagree with Petitioners’ claims and affirm the ALJ’s decision on these points.

The Notice of Charges Was Properly Issued

The OCC’s rules of practice state that a proceeding for suspension or debarment under Subpart K may only be initiated “upon a finding by the Comptroller that the basis for the disciplinary action is sufficiently egregious.” 12 C.F.R. § 19.193. Petitioners argue that this language means that the Comptroller cannot delegate the duty of determining that an individual’s behavior is “sufficiently egregious.”

Petitioners’ argument is not supported by Part 19, which provides that “*Comptroller* means the Comptroller of the Currency or a person delegated to perform the functions of the Comptroller of the Currency under this part.” 12 C.F.R. § 19.3(c). Therefore, any reference to the Comptroller in 12 C.F.R. Part 19 necessarily incorporates a proper Comptroller delegate. Indeed, Subpart K itself provides that the proceeding can be initiated by a complaint “signed by the Comptroller or the Comptroller’s delegate.” 12 C.F.R. 19.197(c). Senior Deputy Comptroller Leann Britton has been delegated the authority to initiate a proceeding of this type,³ and her statement that “a sufficiently

³ See Delegation of Authority from Comptroller of the Currency Eugene A. Ludwig to the Senior Deputy Comptroller for Bank Supervision Operations dated April 3, 1998. Although the delegation order does not expressly mention proceedings under Subpart K, it does delegate authority for the initiation of proceedings under 12 U.S.C. § 1818(e). See paragraph 1.d. Since this debarment proceeding was initiated to protect the integrity of the earlier action under 12 U.S.C. § 1818(e)(7), the delegation order provides sufficient authority to the Senior Deputy Comptroller to issue the Notice of Charges.

egregious basis exists for the initiation of formal disciplinary proceedings” satisfies § 19.193. Notice of Charges at 33.

The Notice of Charges Satisfied Subpart K’s “Significant Matter” Requirement

The OCC may suspend or debar an attorney who acts with “incompetence in the representation of a client’s rights and interests in a significant matter before the OCC.” 12 C.F.R. § 19.195. Petitioners allege that this regulation cannot be used to discipline them because their participation in the § 1818(e)(7) reinstatement process did not constitute a “significant matter” before the OCC.

This argument is unpersuasive. Although the agency does not define “significant matter” in its regulations, the OCC has alleged that Petitioners’ participation in the reinstatement proceedings “potentially affected the operation, management, direction, and future of the Bank, an institution chartered and examined by the OCC, thus constituting a significant matter before the OCC.” Notice of Charges at 2. The stability of a bank is highly dependent on the character and competence of its executives, and those persons who represent an individual seeking reinstatement in the banking business are obliged to be candid and forthright with the OCC. Thus, I conclude that a request for reinstatement of an individual prohibited from banking is serious and weighty enough to be deemed significant on its face.

OCC Properly Denied Petitioners an Opportunity to Remedy

Petitioners argue that the agency failed to allow them an opportunity to remedy as required in 12 C.F.R. § 19.197(c). The regulation requires that a respondent first be allowed “the opportunity to . . . take whatever action may be necessary to remedy the conduct that is the basis for the commencement of the proceeding.” Id. However, this

requirement is limited by the preceding phrase which makes an exception for “cases of willfulness, or when time, the nature of the proceeding, or the public interest do not permit.” Id.

I conclude that “the nature of the proceeding” nullified the effectiveness of any remedy in this case. The proceeding called for Petitioners to conduct due diligence and present the OCC with accurate information on the proposed reinstatement of a prohibited individual. Petitioners are alleged to have presented affidavits and other documentary testimony that contained misrepresentations and falsities, both from the affiants and Petitioners themselves. Because many of these statements were presented in the form of sworn affidavits, the agency would not be independently aware of their falsity without conducting its own investigation. However, for the OCC to undertake an investigation invalidates the purpose of submitting the affidavits: to have counsel conduct the due diligence rather than the agency. After the OCC has discovered the statements were false, Petitioners’ only option would be to concur with agency findings of misrepresentation after the fact, an action that would not remedy the misconduct. Thus, the “nature of the proceeding” eliminates the opportunity for the OCC to offer Petitioners an opportunity to remedy the misconduct.

The Sufficiency of Subpart K’s Standards

Petitioners assert that they and other potential targets of OCC disciplinary actions are not on notice as to the standards of conduct that could result in the issuance of a suspension or debarment order. Specifically, they argue that several important terms, including “incompetence,” “disreputable conduct,” and “significant matter,” are inconsistent and poorly defined, leaving practitioners at a loss for certainty when

practicing before the agency. In addition, they claim that the agency has given attorneys no guidance on when a duty exists to make an independent inquiry as to the veracity of a client's statement. I agree that basic principles of fairness dictate that a party "be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform." General Electric Co. v. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (quoting Diamond Roofing Co. v. Occupational Safety and Health Comm'n, 528 F.2d 645, 649 (5th Cir. 1976)). Nevertheless, I believe that Subpart K provides meaningful standards.

The OCC has defined "incompetence" and "disreputable conduct" in 12 C.F.R. §§ 19.195 and 19.196, respectively. While the definitions require different levels of mental culpability, they are detailed and more than adequate to inform attorneys of their responsibilities. The agency, as any other body before which Petitioners might practice, reasonably expects that attorneys will familiarize themselves with, and endeavor to comply with, all of its requirements of professional conduct.

We have previously discussed Petitioners' argument that "significant matter" is not adequately defined and concluded that a request for reinstatement of an individual prohibited from banking is such a matter.

Finally, Petitioners assert that the OCC has given attorneys no guidance on when a duty exists to make an independent inquiry into the veracity of a client's statement. Contrary to Petitioners' assertions, the notion that attorneys must make an independent inquiry before submitting a matter to a tribunal is not "novel." As one court explained in a case in which an attorney knowingly prepared a written proffer of false testimony for a witness, an attorney is required to "conclude[] that there were logical and factual reasons

for arriving at his expectation [of client testimony].” In re Phelps, 637 F.2d 171, 175 (10th Cir. 1981).

In this case, the agency alleges, among other things, that Petitioners prepared sworn affidavits from the Bank’s directors falsely stating, in effect, that each director had knowledge of certain transactions and approved them at the time they occurred. Petitioners allegedly submitted these sworn statements to the OCC despite the fact that three of the six directors were not on the board at the time the transactions took place. In my view, these allegations, if proved, raise questions about the adequacy of Petitioners’ investigation of the facts contained in the affidavits.

I therefore conclude that the standards in Subpart K provide adequate notice to Petitioners of their responsibilities when appearing before the OCC.

Conclusion and Order

Based on the foregoing, the Comptroller grants Petitioners’ motion for interlocutory review, and affirms the ALJ’s order dated March 16, 1999.

So ordered this 9th day of July, 1999.

JULIE L. WILLIAMS
Chief Counsel