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{{3-31-92 p.A-1542.14}}

[¶5154B] In the Matter of * * *, * * *, James C. Amberg, Robert Ray Carroll, Roscoe P. Steen, W. M. Causey, Billy Ray Whitehead, and Benny Zeagler, The Olla State Bank, Olla, Louisiana, Docket No. FDIC-89-144k(6-26-90).

On appeal of ALJ's denial of FDIC Enforcement Counsel's Motion for Entry of Default Orders against eight respondents, Board rejects ALJ's decisions concerning seven respondents and adopts the decision regarding one. Board (1) remands for the ALJ to consider evidence concerning the proof of service of an answer offered by one respondent; (2) denies default order against one respondent whose *pro se* response was timely and sufficient to constitute an answer; and (3) grants default orders against six named respondents whose answer was not timely. *(This decision was appealed to the Fifth Circuit, which ruled that the FDIC had abused its discretion in entering the default order against six Respondents whose answer was not within the time limit set by FDIC regulations. Amberg v. FDIC, 934 F.2d 681. The FDIC remanded the case to the ALJ for further proceedings, by order dated 1-7-92; see ¶5172.)*

[.1] Practice and Procedure—Answer—Failure to File

Where FDIC regulations require Respondent to serve an answer on all parties and to file the answer with the Executive Secretary of the FDIC, and neither the parties nor the Executive Secretary have received such an answer, the burden of proving proper service and/or filing rests on the Respondent.

[.2] Practice and Procedure—Answer—Pro Se Letter

A *pro se* letter of response, even though it is not the form prescribed by FDIC regulations, may constitute an answer if it apprises the FDIC that the Respondent contests the charges and of the nature of his defense.

[.3] Practice and Procedure—Answer—Time to Answer

Service of a Notice when mailed is accomplished only upon receipt by the Respondent, and there is no basis for expanding the period to file an answer beyond the 20 days prescribed in FDIC regulations.

[.4] Civil Money Penalty—Late Answer—ALJ Authority

ALJ does not have authority to permit late filing of answers, since civil money penalties assessed upon service of the notice had become final and unappealable.

[.5] Civil Money Penalty—Late Answer—Permission to File

The Board has authority to permit the filing of a late answer for good cause, but finds that negligent interpretation of FDIC notices or FDIC Rules does constitute good cause.

In the Matter of
*** * *, individually and**
as an executive officer of Olla
Bancshares, Inc., and as a director
and executive officer, and
*** * *, individually and as**
an executive officer, and
{{3-31-91 p.A-1542.15}}
JAMES C. AMBERG, ROBERT RAY
CARROLL, ROSCOE P. STEEN, W.M. CAUSEY, BILLY RAY
WHITEHEAD, and BENNY
ZEAGLER, individually and as
directors of
THE OLLA STATE BANK
OLLA, LOUISIANA
(Insured State Nonmember Bank)
DECISION AND ORDER

DECISION

This matter is before the Board of Directors (the "Board") of the Federal Deposit Insurance Corporation

(the "FDIC") to appeal the administrative law judge's ("ALJ") denial of the FDIC Enforcement Counsel's Motion for Entry of Default Orders against [Respondent A], [Respondent B], James C. Amberg, Robert Ray Carroll, Roscoe P. Steen, W.M. Causey, Billy Ray Whitehead, and Benny Zeagler ("Respondents").

The basis for the Enforcement Counsel's motion was the alleged failure of Respondents to file timely answers to the FDIC's Notice of Assessment of Civil Money Penalties, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing ("Notice"), as required by section 308.21(a) of the FDIC Rules of Practice and Procedures ("FDIC Rules").[1] On January 3, 1990, the ALJ issued two separate "Decisions and Orders" (referred to collectively herein as the "ALJ's Decision and Order" or the "ALJ's Decision") which denied the Enforcement Counsel's motion as to eight Respondents,[2] finding in each case either that the answer was in fact timely filed or that good cause existed for the failure to file in a timely fashion. On March 27, 1990, the Board granted FDIC Enforcement Counsel's request for interlocutory appeal and stayed the proceedings pending is decision as to the appeal. For the reasons set forth below, the Board (1) adopts that part of the ALJ's Decision and Order which denies the motion for entry of a default order against Respondent [B]; (2) remands for further consideration that part of the ALJ's Decision and Order which denies the motion for entry of a default order against Respondent [A]; (3) rejects the ALJ's Decision and Order denying the motion for entry of a default order against Respondents Amberg, Carroll, Steen, Causey, Whitehead, and Zeagler; and (4) grants FDIC Enforcement Counsel's motion for entry of a default order against Respondents Amberg, Carroll, Steen, Causey, Whitehead, and Zeagler, finding that no good cause for failure to file a timely answer has been shown by these Respondents.

I. *BACKGROUND*

The FDIC issued the Notice against the Respondents pursuant to section 18(j)(4) of the Federal Deposit Insurance Act (the "FDIC Act"), 12 U.S.C. §1828(j)(4), on September 28, 1989. Certified mail receipts indicate that the Notice was received on October 3, 1989, by Respondents Carroll, Steen, Whitehead, and Zeagler; on October 4, 1989, by Respondents [A], Amberg, and Causey; and on October 12, 1989, by Respondent [B]. Respondents Carroll, Steen, Whitehead, Amberg, and Causey each filed requests for hearing by letter of their counsel dated October 16, 1989. Respondent [A] filed his request for hearing on October 20, 1989. By letter to the Board dated October 25, 1989, and received in the Office of the Executive Secretary on October 31, 1989, Respondent [B] requested a hearing and submitted an explanation of why he should not be assessed civil money penalties. All of the requests for hearing were filed within the prescribed period under the Rules.

By letter dated October 27, 1989, counsel for Respondents Carroll, Steen, Whitehead, Zeagler, Amberg, and Causey filed an answer on behalf of these Respondents. This was four days after the answers of Carroll, Steen, Whitehead, and Zeagler were due and three days after the answers of Amberg and Causey were due. On November 2, 1989, FDIC Enforcement Counsel filed two motions seeking entry of recommended default orders pursuant to section 308.21(d) of the FDIC Rules, 12 C.F.R. §308.21(d), against all Respondents except [B]. Entry of a recommended default order was subsequently sought against Respondent [B] as well, by

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[1] The Notice alleged violations of section 22(h) of the Federal Reserve Act, 12 U.S.C. §375b, and Regulation O of the Board of Governors of the Federal Reserve System, 12 C.F.R. Part 215, which have been made applicable to insured state nonmember banks by section 18(j)(2) of the Federal Deposit Insurance Act, 12 U.S.C. §1828(j)(2) and section 337.3 of the FDIC Rules, 12 U.S.C. §337.3.

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[2] Respondent J.J. Silagy, is not involved in the motion for default proceedings; there is no dispute that his answer was timely filed. References to "Respondents" herein therefore refer only to the other eight Respondents.

{{3-31-91 p.A-1542.16}}motion dated November 13, 1989.[3] Counsel for Respondents Carroll, Steen, Whitehead, Zeagler, Amberg, and Causey filed memoranda contesting the request for entry of default orders and containing a request to be permitted by the ALJ to file the answer on behalf of her clients out of time.

Respondents [A] and [B] have submitted no formal opposition to the present motions for default orders, although Respondent [B] submitted a letter in opposition which was received by the Executive Secretary on January 9, 1990.[4]

On January 3, 1990, the ALJ issued a two-part Decision and Order, the first part concerning the motions for default as to Respondents [A] and [B], and the second concerning the remaining Respondents.

II. *THE ALJ'S DECISIONS*

A. *Respondent [A] Has Failed To Submit Sufficient Proof of Service*

The ALJ's Decision respecting Respondents [A] and [B] notes that [A] stated in a November 7, 1989, letter to the ALJ which enclosed an answer, that he had previously filed an answer to the Notice on October 18, 1989.

Neither the October 18th and the November 7th letters nor any answer on behalf of Respondent [A] are on file with the Executive Secretary, as required by the FDIC Rules.

FDIC Enforcement Counsel states that it has received no answer or correspondence from [A] since his October 20, 1989, letter requesting a hearing and has submitted an affidavit from the FDIC Compliance and Enforcement Section, Washington, D.C., to the same effect. Furthermore, there is no evidence that any of the other Respondents received a copy of any letter or answer since Respondent [A's] October 20, 1989, letter. It thus appears that [A] failed to serve copies of both his alleged October 18th letter and his November 7th letter upon any other party to the proceeding pursuant to section 308.13(b) of the FDIC Rules, 12 C.F.R. §308.13(b), which requires a party serving papers to serve them upon all other parties to the proceeding.

The ALJ did not address whether Respondent [A] indicated in any of his correspondence that he served any of the other parties as required by the FDIC Rules, and it does not appear that any evidence was submitted by [A] on this issue in these proceedings. Despite the lack of any evidence that FDIC Enforcement Counsel, the Compliance and Enforcement Section in Washington, the Executive Secretary, or any of the other parties to the proceeding had received a copy of the October 18th letter, the ALJ accepted as true the statement in the November 7th letter that Respondent had previously mailed a timely answer.

It should be noted that, in addition to the requirement of serving all parties set forth in section 308.13(b) of the FDIC Rules, the Notice itself expressly requires Enforcement Counsel in both the regional office and in Washington to be served. However, either [A] did not send copies of his letters, or the copies of his answer alleged to have been enclosed therewith, to these two parties or *any* of the other parties,[5] or there is an unexplained problem with the U.S. mails. Despite these serious inconsistencies, it does not appear from his Decision that the ALJ called for any evidence from Respondent [A] or otherwise addressed these inconsistencies.

Even more important than the requirements regarding service of papers upon other parties in FDIC proceedings is the requirement in the FDIC Rules that all papers be filed with the Executive Secretary. The Executive Secretary controls the official files of the FDIC for formal enforcement actions, functioning in a capacity similar to a clerk of court. Indeed, the requirement of section 308.12(a) of the FDIC Rules, 12 C.F.R. §308.12(a), that the original of all documents be filed with the Executive Secretary, implements the procedure whereby receipt

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[3] The motion papers indicate the FDIC Enforcement Counsel was apparently not aware that Respondent [B] had filed the October 25, 1989, letter with the Board until after the motion for default order was filed. On becoming aware of this fact, FDIC counsel filed an amended motion maintaining that the letter did not constitute an answer under section 308.21(b) (entitled *content of answer*) of the FDIC Rules, 12 C.F.R. §308.21(b), and that Respondent [B] was in default notwithstanding his filing of the letter within the time prescribed for responding to the notice.

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[4] Respondent [B's] January 3, 1990, letter repeated the assertions of his October 25, 1989, letter regarding his absence of liability for civil money penalties and his inability to afford counsel. Respondent [B] also stated in the letter that he wanted to "make abundantly clear" that he denied the charges.

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[5] FDIC Rule 308.13(b) requires a party filing any papers in the proceeding to serve a copy of them on *all* other parties to the proceeding.
{{3-31-91 p.A-1542.17}}by the Executive Secretary's Office would constitute the formal filing of any pleading in an enforcement proceeding.

As shown by the certified statement of Deputy Executive Secretary Robert E. Feldman, custodian of the official records of the FDIC, as of January 10, 1990, nothing had been filed with the Office of the Executive Secretary on behalf of Respondent [A] since his October 20th letter requesting a hearing. A review of the record in this case discloses that, as of the date of this Memorandum, no additional filings have been made by [A] since his October 20, 1989, letter. Notwithstanding the clear requirements of the FDIC Rules as set forth in the Notice itself, however, no factual questions concerning Respondent [A's]

filing and service of his answer or his attempts to file and serve were addressed by the ALJ, and no evidence was received as to this issue.

[.1**]** The ALJ's only analysis consists of a statement that "the FDIC has produced no evidence to the contrary, nor has any evidence been presented which would cast doubt on the credibility of [A], a practicing attorney in the State of Louisiana." However, in the Board's view, the ALJ has misplaced the burden of proof as to service and filing. The burden to proof proper service and/or filing of his answer is on [A], not on Enforcement Counsel. [A] has not submitted any affidavit or certification which is either under oath or in a form capable of supporting his assertion that he served or filed an answer to the Notice, even though his credibility has been brought directly into issue. Furthermore, [A's] status as an attorney bolsters his credibility no more than it heightens his responsibility to know and comply fully with the requirements of the FDIC Rules regarding service and filing of pleadings.

The FDIC Rules cannot be enforced unless parties serving or filing papers are required to prove by competent and reliable evidence their compliance with the Rules. Adoption of the ALJ's Decision with regard to [A] would encourage parties to flout the FDIC Rules governing service and filing. Furthermore, the only way to enforce the FDIC Rules is to require parties serving or filing papers to be prepared to prove their compliance with the FDIC Rules. This requirement is consistent with service and filing requirements in the federal courts, where pleadings must be filed with the clerk of the court and service supported by a certificate of service. If an answer to a compliant is not received by the clerk of court, it is not deemed to be filed. Fed.R.Civ.P. 5. Accordingly, the proceedings on the motion for entry of a default order as to Respondent [A] are hereby remanded and the ALJ is directed, on remand, to require competent evidence, such as copies of mail receipts, an affidavit, or other certification under oath carrying the penalty of perjury supporting service, testimony of other parties as to receipt, or other evidence on the issue of [A's] service and filing or his attempts to serve and file an answer in accordance with the FDIC Rules.[6]

B. *Respondent [B's] Letter Is Sufficient To Constitute An Answer*

[.2**]** The ALJ's Decision respecting Respondents [A] and [B] also addresses the question whether [B's] October 25, 1989, letter to the Board, which was received in the Office of the Executive Secretary within the prescribed period, constitutes an answer pursuant to section 308.21(b).[7]The ALJ found that it does, and the Board agrees.

The intent of section 308.21(b) is to ensure that answers filed with the Board are in a form similar to the format of answers filed in courts so as to provide notice of the position of the answering party. However, a *pro se* response to a notice which does not follow the literal requirements of section 308.21(b) may nevertheless be a sufficient answer. *See, e.g., Kinnear Corp. v. Crawford Door Sales Co.*, 49 F.R.D. 3, 7 (D.S.C. 1970) (layman's letter held to constitute answer to compliant so as to preclude entry of default judgement).

Respondent [B's] letter complies with the spirit of section 308.21(b) because it is suf-

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[6] This Decision does not address the question whether good cause exists for the acceptance of any untimely filing, since the ALJ must first determine, in a manner consistent with this Decision, whether Respondent [A's] answer was timely filed and served on all other parties.

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[7] Section 308.21(b) states, in relevant part:
Content of answer. An answer shall specifically respond to each paragraph or allegation of fact contained in the Notice and shall admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. . . .

{{3-31-91 p.A-1542.18}}ficient to apprise the FDIC of the nature of [B's] defenses as well as the fact that he contests the charges. However, it is noted that Respondent [B's] answer failed to indicate service upon all other parties to the proceeding as required by section 308.13(b). While this deficiency cannot be excused, in this instance, no serious prejudice to Enforcement Counsel has resulted. Since Respondent [B's] letter was received in the Office of the Executive Secretary, and there is thus no doubt as to its actual filing, contrary to the situation involving Respondent [A], the Board is inclined to show leniency to [B], who is not an attorney and is appearing *pro se*.

Accordingly, the Board adopts that part of the ALJ's January 3, 1990, Decision denying entry of a default order against Respondent [B]. However, Respondent [B] is reminded that in the future he must serve all papers in this proceeding on all parties to certify such service on the copies filed with the Executive Secretary and the ALJ.

C. *Respondents Amberg, Carroll, Steen, Causey, Whitehead, and Zeagler*

1. *The ALJ Incorrectly Applied Section 308.14(c) Of The FDIC Rules*

Based upon a review of the record to date in this proceeding, it is clear that adoption of the ALJ's interpretation and application of section 308.14(c) to the facts presented here significantly alters the regulatory timeframes established under the FDIC Rules, 12 C.F.R. §308.14(c), a power reserved exclusively to the Board. Accordingly, the ALJ's interpretation and application of section 308.14(c) must be set aside.

The ALJ, after considering section 308.21(a), providing that service of a Notice is deemed to be accomplished upon receipt by the Respondent where the Notice is mailed,[8] and section 308.14(c), providing that an additional three days shall be afforded a party to do an act or take proceedings when the time for doing so commences upon service and service is by mail, concluded that the Respondents in the present case had twenty-three (23) days rather than the twenty (20) days provided in section 308.21(a) in which to file their answers to the Notice.

[.3**]** While the Board believes that it is clear that section 308.14(c) does not apply to the time for an answer to the Notice, it notes that section 308.14(c) is nearly identical to Rule 6(e) of the Federal Rules of Civil Procedure. Generally, Rule 6(e) has no application when a statute or rule calls for a time period to commence only after actual receipt of the notice or paper.[9] The reason is that the rule is intended to put the recipient on equal footing with one who is personally served. Applying the rule in a case where the period commences upon receipt enlarges the prescribed period beyond that provided in the statute or rule when there is no valid purpose for doing so. The Board's intent in enacting section 308.14(c) and the literal language of the section is consistent with the general rule applicable to Rule 6(e) of the Federal Rules of Civil Procedure. Because service of the notice when mailed is accomplished only upon receipt by the Respondent, there is no basis for expanding the period to file an answer beyond 20 days.

Although the ALJ cites cases to the contrary, they are largely confined to cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, in which Congress has expressed an intent that claimants be accorded liberal treatment in bringing suit.[10] To the extent that authority exists supporting the ALJ's conclusion which does not involve Title VII, the Board finds such cases unpersuasive. The Board's dis-

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[8] Section 308.21(a)(1)(ii) provides, in relevant part:
For purposes of Part 308, service of a Notice is deemed to have been accomplished:
. . .
(ii) if the Notice is mailed, or served in any other manner authorized by §308.13(a), at the time the Notice is received by the Respondent.
Section 308.14(c) provides in full as follows:
Service and filing of papers. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or paper is served upon the party by first class, registered or certified mail, three (3) days shall be added to the prescribed period.

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[9] *See* 4A C. Wright and A. Miller, *Federal Practice and Procedure*, §1171 at 515 (1987) and class cited therein.

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[10] *See Tavernaris v. Beaver Area School District*, 545 F. Supp. 355 (W.D. Pa. 1978), cited by the ALJ. The court emphasized that its holding "should be narrowly construed. Rule 6(e) is analogously applied only because of the board remedial intent of Title VII." *Tavernaris* at 357, n.2.
{{3-31-91 p.A-1542.19}}cretionary powers provide sufficient flexibility to handle the rare case where special circumstances require modified application of the general rule.
The Board, therefore, holds that section 308.14(c) does not extend the time in which to file an answer to a Notice pursuant to section 308.21(a).

2. *The ALJ Lacked Authority To Allow A Late Answer*

[.4**]** The ALJ, after analyzing the reasons proffered by counsel for filing answers on behalf of her clients

several days after they were due under the FDIC Rules, concluded that counsel's explanation was essentially that the untimeliness of the filings was due to excusable neglect and amounted to good cause for allowing the answers to be filed out of time. As set forth below, this finding was erroneous and must be rejected.

As pointed out by Enforcement Counsel, the ALJ did not have the authority to allow the late filing of the answers, since the civil money penalties assessed upon service of the Notice had become final and unappealable.[11] Thus, even assuming that the ALJ's finding of good cause is correct, the ALJ's granting of permission to file the late answer exceeds the powers vested in him under the FDIC Rules. In an appropriate case, where good cause is shown but the answer to a Notice assessing money penalties is untimely, the ALJ is only empowered to issue a recommended decision and order denying a motion for entry of a default order, and indicate therein that the Respondent's remedy is to petition the Board under section 308.21(a)(2) to permit the filing of a late answer.

3. *No Good Cause Shown*

[.5**]** Nevertheless, since the Board has power to permit the filing of a late answer upon its own determination, it finds it appropriate to conduct an independent inquiry in this case as to whether good cause exists to warrant consideration of the answers of these Respondents even though the civil money penalties assessed have become final and unappealable under section 308.75.

The Board disagrees with the ALJ's finding that negligent interpretations of FDIC notices or of the FDIC Rules can excuse defaults. No matter how short the delay in answering or how slight the apparent prejudice to the Enforcement Counsel, excusable neglect does not constitute "good cause" under section 308.21(a)(2) for extending the time in which to file an answer. Excuse of oversights or inadvertent mistakes in matters involving the FDIC's procedural timeframes would create chaos in the administrative process and reduce the incentive of litigants in FDIC proceedings to follow the commands of the FDIC Rules. This would be contrary to the Board's intent to require strict compliance. The Board recognizes the possibility that a finding of good cause may be appropriate in certain circumstances. However, the determining factor in such cases would be Respondent's lack of actual or constructive knowledge, as a factual matter, that a response is required, or inability to file in a timely manner, not the character or seriousness of the oversight.

In the present case, the facts establish that counsel must not have read either the Notice or the FDIC Rules, with reasonable care, each of which disclosed the requirement of filing a timely response to the Notice. Counsel clearly had at least constructive knowledge that an answer was due. This is not a situation in which some factual circumstance prevented receipt by a Respondent of knowledge that a timely response was due. Counsel for Respondent should have known and certainly had ample opportunity to discover what was required. Counsel's error was simply a mistake of law. Such a legal mistake cannot serve as the basis for a finding of good cause in these circumstances.

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[11] Section 308.21(a)(2) of the FDIC Rules provides, in pertinent part:
Except as provided . . . only the Board may permit filing of a later answer *where a default order has been entered* . . . or a Notice of disapproval has become final . . . or an assessment of civil money penalties has become final under the provisions of §308.75. [Emphasis added.]
Section 308.75(a) provides that a civil money penalty

> . . . shall *automatically become final and unappealable* unless the Respondent both (1) requests a hearing pursuant to the provisions of §308.20 and (2) answers the Notice *pursuant to the provisions of §308.21* . . . [Emphasis added.]

It is clear that the phrase "pursuant to the provisions of §308.21 . . ." naturally includes the requirement that the answer be timely filed.

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IV. *CONCLUSION*

The Board finds that: (1) additional evidence is required as to whether Respondent [A] filed a timely answer to the Notice; (2) Respondent [B] filed a timely answer to the Notice; and (3) no good cause exists for accepting the untimely answer filed on behalf of Respondents Amberg, Carroll, Steen, Causey, Whitehead, and Zeagler. Therefore, an appropriate order shall be entered as set forth below.

ORDER

IT IS HEREBY ORDERED, that

1. The Decision and Order of the ALJ is REJECTED with respect to Respondents Amberg, Carroll, Steen, Causey, Whitehead, and Zeagler;

2. The Motion of Respondents Amberg, Carroll, Steen, Causey, Whitehead, and Zeagler for an Extension of Time to File Answer is DENIED;

3. The FDIC's Motion for Entry of Default Orders against Respondents Amberg, Carroll, Steen, Causey, Whitehead, and Zeagler is GRANTED;

4. The Decision and Order of the ALJ is REJECTED with respect to Respondent [A], and the proceedings relating to Respondent [A] are REMANDED to the ALJ for further consideration consistent with this Decision an Order; and

5. The Decision and Order of the ALJ is ADOPTED with respect to Respondent [B].

By direction of the Board of Directors.

Dated at Washington, D.C., this 26th day of June, 1990.

In the Matter of
JAMES C. AMBERG, ROBERT RAY CARROLL, ROSCOE P. STEEN, W.M. CAUSEY, BILLY RAY WHITEHEAD, and BENNY ZEAGLER, individually and as directors of THE OLLA STATE BANK OLLA, LOUISIANA (Insured State Nonmember Bank)
RECOMMENDED DECISION

By motion dated November 2, 1989, pursuant to 12 C.F.R. §308.21(d), the Federal Deposit Insurance Corporation (FDIC) requested the issuance of a default order against James C. Amberg, Robert Ray Carroll, Roscoe P. Steen, W.M. Causey, Billy Ray Whitehead, and Benny Zeagler (Respondents) for failure to file a timely answer to the FDIC's Notice of Charges. All Respondents have filed memoranda in opposition to the FDIC motion.

Interim Orders were issued on November 27, 1989, staying all discovery until the motions for default orders have been decided.

A. *BACKGROUND*

The FDIC issued a Notice of Assessment of Civil Money Penalties against Respondents on September 28, 1989. Certified mail receipts indicate that the Notices were received by Respondents Carroll, Steen, Whitehead, and Zeagler (or by others on their behalf) on October 3, 1989, and by Respondents Amberg and Causey (or by others on their behalf) on October 4, 1989.

In a letter dated October 16, 1989, Claudia Sue Dunn identified herself as the counsel for Respondents and filed a request for a hearing. In a letter dated October 27, 1989, Ms. Dunn filed an Answer with the Executive Secretary.

On these facts, the FDIC moved for a default order on grounds that Respondents failed to filed Answers within the twenty-day period prescribed by Section 308.21(a) of the FDIC Rules of Practice and Procedures. The FDIC contends that the period in which to file an answer extends for twenty days from the date Respondents receives the Notice (as evidenced by the certified mail receipt). Thus, Answers were due from Respondents Carroll, Steen, Whitehead, and Zeagler on October 23, and from Respondents Amberg and Causey on October 24. Although acknowledging that Respondents filed timely requests for hearing, the FDIC maintains that none filed an Answer within the prescribed period. Therefore, a default order should be entered, pursuant to 12 C.F.R. §308.21(d).

A conference call was conducted on December 4, 1989, with FDIC counsel and Ms. Dunn. In the course of that call, Ms. Dunn provided an explanation for her delay in filing an answer after her initial filing of a request for hearing on October 16. The undersigned administrative law judge (ALJ) requested Ms. Dunn to submit this explanation in writing for consideration as a possible basis for a finding of good cause for late filing. By letter dated December 5, 1989, Ms. Dunn submitted her statement. By let- {{3-31-91 p.A-1542.21}}ter dated December 12, 1989, the FDIC submitted a response in opposition to Ms. Dunn's statement.

B. *COMPLIANCE WITH LAWFUL REQUIREMENTS FOR TIMELINESS*

Timeliness is an essential element in the conduct of all judicial proceedings. Compliance with statutory

and regulatory timeframes promotes efficiency and furthers the orderly administration of the law. However, compliance with requirements for timeliness is not an end in itself. It is a means toward efficiency and certainty in the administration of justice. But fair and impartial adjudication is paramount. Thus time limits must be adhered to but they are not sacrosanct—particularly where the Government is the party moving to have a case decided on procedural grounds.

Thus I find the FDIC's motion in the present case troubling. If a default judgment is entered in this case, Respondents will suffer a substantial civil money penalty without the opportunity to present their defense. Statutory and regulatory requirements for timeliness should be construed reasonably to permit individuals charged in such cases to present their cases on the merits.

The Respondents complied with the statutory requirements of 12 U.S.C. §1818 by filing timely requests for hearing. Upon realizing that a timely answer was also required by FDIC regulations, the Respondents' counsel immediately filed answers.

In effect, Counsel for the Respondent's contends that her failure to file timely answers amounted to excusable neglect inasmuch as the Notice is not clear in requiring both an answer and a request for hearing. I believe her explanation is reasonable and amounts to good cause for granting an extension to the Respondents to file their answers late.

Counsel for the FDIC argues that the time limits set in the Rules of Practice and Procedures are absolute and cites several decisions of the Corporation Board granting defaults where there had been a request for hearing but no answer. In none of these cases, however, was an answer in fact filed (as here) nor was there a contention that good cause existed for failing to file the answer timely.

By any method of calculation, the answers were filed no more than three or four days late, *i.e*., October 27 instead of October 23 or 24. The timely conduct of the hearing (within 120 days of the date of receipt of the Notice) would not have been compromised by this delay, absent consideration of the FDIC's motion here. Since the Respondents filed requests for hearing, it is clear that they intended to contest the allegations against them. Further, I conclude that some of the Respondents in fact filed their answers within the prescribed time.

C. *TIMELINESS OF FILINGS*

1. *Respondents Amberg and Causey*

Counsel for Respondents Amberg and Causey filed a request for hearing on October 16 and filed an Answer on October 27, 1989. The FDIC maintains that a default order should be entered, pursuant to 12 C.F.R. §308.21(d), because these Answers were not filed by October 24, twenty days after the date when certified mail receipts were signed, indicating receipt of the Notice of Charges by Respondents Amberg and Causey or by others on their behalf.

Their counsel argues that the Answer of Amberg was timely filed because, pursuant to 12 C.F.R. §308.14(c), if service is made by certified mail but not upon the named party, three days are added to the prescribed period. In this case, the certified mail receipt indicates that service was not made upon Respondent Amberg. Therefore, Amberg's Answer was due on October 27 (twenty plus three days after receipt of service), which is the date on which the Answer was filed.

In its Reply Brief, the FDIC argues that the three-day provision in 12 C.F.R. §308.14(c) does not apply to the present situation because 12 C.F.R. §308.21(a) is controlling and requires the computation of the twenty-day period from the date of receipt of the document, without allowing an additional three days for mailing. The FDIC notes that the language concerning the three-day mailing period in 12 C.F.R. §308.14(c) is similar to language in Rule 6(e) of the Federal Rules of Civil Procedure. The FDIC contends that the courts have interpreted Rule 6(e) to be inapplicable in situations where the time period commences upon receipt and not upon mailing. *See Norris v. Florida Dept. of Health and Rehabilitative Services*, 730 F.2d 682 (11th Cir. 1984); *Suarez v. Little Havana Activities*, 721 F.2d 338 (11th {{3-31-91 p.A-1542.22}}Cir. 1983). Thus, the FDIC concludes, the Answer was not filed within the prescribed period, and a default order should be entered.

The FDIC recently adopted revised Rules of Practice and Procedures. 53 Fed. Reg. 51,656 (December 22, 1988). The rules concerning the filing of answers and the establishment of time limits for filings were changed in the revision. Section 308.21(a) imposes the following requirement for the timely filing of an Answer:

(a) *Timely answers are required*. (1) Every Respondent shall file an answer with the Executive Secretary within twenty days after service of the Notice. For purposes of Part 308, service of a Notice is deemed to have been accomplished:

> (i) At the time personal service or service on an agent is accomplished, or
> (ii) if the Notice is mailed, or served in any other manner authorized by §308.13(a), at the time

the Notice is received by the Respondent.

Section 308.14 sets forth various rules for the construction of time limits under the rules of practice and procedure. Section 308.14(c) provides as follows:

> (c) *Service and filing of papers*. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by first class, registered or certified mail, three (3) days shall be added to the prescribed period.

Considering these provisions in conjunction, the filing of an answer is required twenty days after service of the Notice, and this service (when the Notice is mailed) is deemed to be accomplished at the time the Notice is received. But when service is accomplished by mail (concerning an act which is required to be performed within a specified period after service), three more days are added to the prescribed period. Thus, in the present case, in which Respondents Amberg and Causey received the Notice by certified mail on October 4, three days must be added to the prescribed period. As a result, their Answer was due 23 days after the date when the Notice was received, *i.e.*, on October 27, which was the actual date when their Answers were filed.

This construction of the Rules of Practice and Procedures is consistent with the wording of the regulations which permits a three-day addition to the prescribed period *"whenevery"* a party is permitted or required to take some action within a specified period after service. Such a construction of the FDIC's rules is also consistent with judicial interpretations of the Federal Rules of Civil Procedure. Such rules are to be liberally construed in order to avoid substantial injustice. *Cf. 2 Moore's Federal Practice* §6.08.

Here, substantial penalties would be imposed on the Respondents for an apparently inadvertent and trivial filing error. They would be denied an opportunity to present their case on the merits, a result to be avoided where possible to do so within the general scheme of fair and expeditious adjudication of these matters.

Federal courts have permitted the three-day period described in Rule 6(e) to be added to the statutory period from the date of receipt, especially in cases in which the court considered such a result consistent with the purposes of the underlying statute. *See Tavernaris v. Beaver Area School District*, 454 F. Supp. 355 (W.D. Pa. 1978) (Action filed 23 days from the receipt of letter is considered timely in view of the three day period in Rule 6(e)); *Bell & Howell Acceptance Corp. v. Wolverine Mailing, Packaging, Warehouse, Inc.*, 3 Fed Rules Serv. 3d 108, 107 FRD 116 (E.D. Mi. 1985) (Defendant served by mail on July 5 is entitled to three days pursuant to Rule 6(e) in addition to the ten permitted by the rules and thus could file answer by July 18).

Accordingly, I conclude that Respondents Amberg and Causey filed timely Answers on October 27, 1989, the twenty-third day after receipt of the Notice of Charges.

2. *Respondent Amberg*

Section 308.21(a), cited above, requires an answer within twenty (20) days from the date when Notice is received by the Respondent. Since the certified mail receipts indicate that the Notice was received by a person other than Respondent Amberg, it is unknown when he received it.

Section 308.14(c), also quoted above, provides a rule of construction that three days shall be added to the prescribed period when service is made by certified mail. This rule would certainly seem applicable when it cannot be determined precisely when a respondent personally receives a notice. Thus, Am- {{3-31-91 p.A-1542.23}}berg's answer was due on October 27 and was timely filed.[1]

D. *GOOD CAUSE*

By letter dated December 5, 1989, respondents' counsel, explained why she initially filed only a request for hearing and not an answer. Ms. Dunn stated that the FDIC's letter of September 28, 1989, requiring a response to the Notice of Assessment, provides information concerning the filing of a request for hearing but makes no mention of the requirement that an answer be filed.

The FDIC's letter specifically states that the civil money penalty is to be paid "[i]f no hearing is requested. . . ." Furthermore, the FDIC counsel notes in the reply to Ms. Dunn, there is no reference in the statute, either before or after amendment by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, to a requirement that an answer be filed. The requirement that an answer be filed along with the request for hearing is based solely on the FDIC's regulations and is mentioned only on page eight of the Notice.

Counsel for the FDIC, by letter dated December 12, 1989, responded to Ms. Dunn's explanation. On

the issue of good cause, the FDIC made the following comment:

> The Statement submitted by counsel for Respondents basically contends that the untimely filing of an Answer in this matter was based upon "misinterpretation of FDIC communication". Counsel's misinterpretation is unwarranted. Counsel pointed out that the September 28, 1989 letter to Respondents enclosing the Notice of Assessment of Civil Money Penalties, Findings of Fact and Conclusions of Law, Order to Pay and Notice of Hearing ("Notice") specified only that a request for hearing must be filed within twenty (20) days of receipt of the Notice of Assessment. Counsel's filing of a timely Request for Hearing is clear evidence that Counsel was able to determine that the "Order to Pay" referenced in Paragraph 2 of the letter referred to that portion of the Notice entitled "Order to Pay". Therefore, it is difficult to understand Counsel's confusion concerning the reference to the Notice of Hearing contained in the same Notice.

The FDIC's argument is not entirely clear. The section of the Notice in which FDIC counsel referred, entitled "Order to Pay," reiterates the requirement that a request for hearing be filed to stay the effective date of the Order but again makes no mention of the requirement that an answer be filed. A reading of this section would, therefore, simply confirm the impression created by the cover letter that only a request for hearing is necessary to prevent the entry of an Order to Pay.

Section 308.21(a)(2) provides that: "The administrative law judge may grant an extension of the time to answer for good cause shown." A finding of good cause depends upon the circumstances of an individual case and lies largely in the discretion of the officer or court to which the decision is committed. *Wilson v. Morris*, 369 S.W.2d 402, 407 (Mi. 1963).

I conclude that the interpretation by Respondents' counsel of the FDIC's letter and Notice was not unreasonable. Although a careful reading of the entire letter and Notice could lead the reader to conclude that an answer was required at the same time as the request for hearing, a reasonably prudent reading of these documents could also persuade the reader that only a timely request for hearing was required to avoid the entry of a judgment.

I am persuaded that the Respondents, through Counsel, attempted to meet the required time limits and have their cases heard on the merits. The failure to file timely answers was inadvertent and trivial. There is no indication that the later filings were dilatory or were in the furtherance of any kind of scheme by which the Respondents sought an advantage. At worst, the late filings amounted to an excusable error. In any event, I believe that Counsel for the Respondents demonstrated good cause for the late filings.

The facts should be construed in a light most favorable to the Respondents in order to avoid the entry of a judgment without permitting Respondents to present their case on the merits.

Although default judgments can be appropriate—to protect the procedural integrity of the system—they are not required in every case where a party has erred in filing a plead-

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[1] The same argument applies to Respondents Steen and Whitehead, who also did not sign the certified mail receipts. In their case, however, since the receipts were signed on October 3 rather than October 4 as in the case of Amberg, the additional three days makes their answers due on October 26. Since the answers were actually filed on October 27, they were one day late.

{{3-31-91 p.A-1542.24}}ing. More important to the integrity of the process is insuring that parties have a fair opportunity to present their cases to an impartial adjudicator. In this case, the answers were late by only a few days. There is no contention that this small delay would adversely affect the scheduling of a hearing and the prompt resolution of the issues in the case. Those cases cited by counsel for the FDIC wherein the Board has entered defaults are factually inapposite in that they involved substantial delays and no effect to correct the untimely filing.

Consequently, a finding of good cause for an extension of time to answer is appropriate in this case. *See, e.g., In re Racorinno*, 37 F.Supp. 524, 526 (S.D.N.Y. 1941) (Good cause was shown for granting an extension of time to file a bankrupt's petition for review after the expiration of the statutory deadline because a delay of two or three days in filing was not prejudicial and was in part explainable by delays which were neither willful nor dilatory.).

Accordingly, I conclude that the Answers of Respondents Amberg, Carroll, Causey, Steen, Whitehead, and Zeagler were timely filed.

ORDER

Pursuant to 12 C.F.R. §308.07(7), IT IS HEREBY ORDERED that the motions of the FDIC for the issuance of default orders, pursuant to 12 C.F.R. §308.21(d), against Respondents James C. Amberg, Robert Ray Carroll, W.M. Causey, Roscoe P. Steen, Billy Ray Whitehead, and Benny Zeagler be denied.