{{11-30-94 p.I-98}}

[¶8028B**] In the Matter of Doolin Security Savings Bank, FSB, New Martinsville, West Virginia, Docket No. FDIC-93-178a (5-25-94).**

FDIC Board denies request for interlocutory review of an ALJ's order disallowing certain discovery sought by the bank.

[.1] Practice and Procedure—Interlocutory Review—Standards

In order for Board to grant interlocutory review of an ALJ ruling, one of the statutory criteria must be met: the request involves a controlling question of law; or immediate review may advance ultimate termination of the proceeding; or subsequent modification of the ruling at the end of the proceeding would be an inadequate remedy or would cause unusual delay or expense.

[.2] Practice and Procedure—Discovery

Where the issue is limited to whether bank paid its assessment in full as required by statute and regulation, documents regarding its risk classification are not essential to the determination and would not materially advance the termination of the proceeding.

In the Matter of

DOOLIN SECURITY SAVINGS BANK,
FSB NEW MARTINSVILLE,WEST VIRGINIA
(Insured Federal Savings Association)
DECISION AND ORDER
ON REQUEST FOR
INTERLOCUTORY REVIEW
FDIC-93-178a

INTRODUCTION

This matter is before the Executive Secretary of the Federal Deposit Insurance Corporation ("FDIC"), acting pursuant to authority delegated by the Board of Directors ("Board") of the FDIC and with the advice and recommendation of the General Counsel. Doolin Security Savings Bank, FSB, New Martinsville, West Virginia ("Respondent" or "Bank") filed a Request for Interlocutory Review of the Order of Discovery entered by Administrative Law Judge Arthur L. Shipe ("ALJ"), dated February 4, 1994 ("Request for Interlocutory Review"), which disallows certain discovery sought by Respondent from the Office of Thrift Supervision ("OTS").

BACKGROUND

Pursuant to section 8(a)(2)(B) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1818(a)(2)(B), on November 18, 1993, the FDIC initiated this proceeding by issuing a Notice of Intention to Terminate Insured Status, Findings, and Order Setting Hearing, against Respondent alleging violation of section 7 of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1817, and Part 327 of the FDIC's Rules and Regu- {{11-30-94 p.I-99}}lations, 12 C.F.R. Part 327, for failure to pay its full semiannual insurance assessment due and payable by January 31, 1993, and its full semiannual insurance assessment due and payable by July 31, 1993.

On November 29, 1993, through the issuance of subpoenas, Respondent sought document discovery from two non-parties, OTS and the General Accounting Office. On December 15, 1993, Enforcement Counsel for the FDIC moved to quash the two subpoenas on the grounds of relevance and reasonableness. Counsel for OTS appeared on December 23, 1993, and moved to quash the OTS subpoena for similar reasons.[1] The ALJ entered an Order quashing the OTS subpoena from which Respondent seeks this interlocutory review. Counsel for OTS filed a Brief in Opposition to the Request for Interlocutory Review ("OTS Brief in Opposition"). Respondent filed a Reply to the OTS Brief in Opposition.

DISCUSSION

[.1**]** Requests for Interlocutory Review are governed by Rule 28 of the Uniform Rules of Practice and Procedure, 12 C.F.R. § 308.28, and the standard established by the decisions of the Board of the FDIC.

See In the Matter of The Citizens Bank of Clovis, Clovis, New Mexico, FDIC-91-406b, 2 P-H FDIC Enf. Dec. ¶8012 (1992); *In the Matter of Gary A. Dorris, Bank of Arizona, Scottsdale, Arizona*, FDIC-92-128jj, 2 P-H FDIC Enf. Dec. ¶8023 (1992); and *In the Matter of Edward S. Buchanan, Massachusetts Bank and Trust Company, Brockton, Massachusetts*, FDIC-91-368e, 2 FDIC Enf. Dec. ¶8019 (1992). Upon a review of the record presented by the parties, including the ALJ's Order denying the discovery request and the briefs submitted by counsel, the FDIC concludes that the Respondent has failed to satisfy any of the criteria for interlocutory review, and therefore denies the Request.

Rule 28 provides that the Board may grant interlocutory review of an ALJ's ruling if:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling at the conclusion of the proceeding would cause unusual delay or expense.

12 C.F.R. § 308.28.

The documents sought by Respondent from OTS relate to its challenge to the manner in which it was supervised and examined by OTS. Because the FDIC's risk assessment classification of Respondent relied upon an OTS examination, Respondent argues that the documents are relevant to the Bank's assessment classification and thus to this proceeding, and must be discoverable. This argument is consistent with Respondent's attempt to transform this termination-of-insurance proceeding into a challenge of the risk-based insurance program. It is, however, inappropriate. The issues to be determined in this hearing pursuant to section 8(a) of the FDI Act essentially are limited to whether Respondent violated the pertinent statutory and regulatory provisions by failing to pay the full amount of its insurance assessment.[2]

[.2**]** Given the nature of this proceeding and the issue properly addressed (*i.e.*, whether the assessment was paid in full as required by statute and regulation), the issues raised by Respondent's Request do not raise a controlling question of law or policy as to which substantial grounds exist for a difference of opinion. Thus, discovery of the documents sought would not materially advance the termination of this proceeding. The Board has not identified anything to distinguish this from the usual discovery dispute for which a subsequent disclosure order would be an adequate remedy and would not cause unusual delay or expense.

Accordingly, the Request for Interlocutory Review is hereby denied.

---

[1]Counsel for the General Accounting Office subsequently appeared and indicated the agency's intent to comply with the subpoena. Thus, that subpoena is not in issue here.

---

[2]This is not to say that Respondent is precluded from challenging OTS's supervision or its examinations, or even the risk classification assigned by the FDIC. There are other, appropriate fora for such challenges. Respondent is currently litigating many of these issues with OTS. OTS No. AP 93-74. Having followed the review and appeal procedure for FDIC's assessment risk classifications set forth at 12 C.F.R. § 327.3(f), it may proceed to challenge its classification in U.S. District Court under the Administrative Procedure Act.

{{11-30-94 p.I-100}}

ORDER

For the reasons set forth above, it is hereby ORDERED that Respondent's Request for Interlocutory Review is DENIED.

Pursuant to delegated authority, upon the advice and recommendation of the General Counsel.

Dated at Washington, D.C., this 25th day of May, 1994.