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{{10-31-94 p.A-2478}}

[¶5218] In the Matter of Joseph D. McKean Jr., Frontier State Bank, Oklahoma City, Oklahoma, Docket No. FDIC-93-135k (8-2-94).

FDIC Board adopts ALJ's recommendation and orders respondent to pay substantial civil money penalty.

[.1] Practice and Procedure—Hearings—Cameras and Recordings

ALJ's authority to "regulate the course of the hearing and the conduct of parties and their counsel" includes authority to bar video recording equipment from the hearing.

In the Matter of
JOSEPH D. MCKEAN, Jr., individually,
and as an institution-affiliated
party of
FRONTIER STATE BANK
OKLAHOMA CITY, OKLAHOMA
(Insured State Nonmember Bank)
DECISION AND ORDER ON
CIVIL MONEY PENALTY
FDIC-93-135k

PROCEDURAL HISTORY

This is a civil money penalties proceeding brought by the Federal Deposit Insurance Corporation ("FDIC") against Joseph D. McKean, Jr. ("Respondent")[1], the chairman of the board of directors of Frontier State Bank, Oklahoma City, Oklahoma ("Bank"), pursuant to its authority under section 8(i) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1818(i), for alleged violations of Regulation O of the Board of Governors of the Federal Reserve System ("Regulation O").

The alleged misconduct includes two types of improper payments,[2] in violation of Regulation O,[3] as discussed by the Administrative Law Judge. See Recommended Decision[4] at 2–9.

A hearing was held before Administrative Law Judge Arthur L. Shipe ("ALJ") on January 20, 1994. Before entering the courtroom to commence the proceeding, Respondent requested permission to make a video recording of the proceeding.[5] The ALJ refused, but encouraged Respondent to raise the issue as a preliminary matter. Instead, Respondent evaded security, brought his camera into the courtroom, and commenced making a video recording of the proceeding. During the FDIC Enforcement Counsel's opening statement, the ALJ noticed the operation of the video equipment and requested its removal. Respondent asked for a federal court to rule on the matter, which the ALJ interpreted as a request for a continuance and denied. Tr. at 9. After stating, "If the equipment goes, I go," Respondent walked out of the courtroom. Tr. at 9. The hearing proceeded without the Respondent.

The ALJ issued a Recommended Decision on May 9, 1994, proposing that a $100,000 penalty be assessed against the Respondent. No exceptions were filed to the ALJ's Recommended Decision.

DISCUSSION

After a thorough review of the record in this proceeding, the Board of Directors

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[1] This proceeding initially sought to impose $15,000 civil money penalties against additional Respondents: Raymond O. Grant, Donald Correll, Kenneth R. Goodin, Thomas L. Herron, and Richard Morris ("Additional Respondents"). On May 17, 1994, Amended Orders were issued reflecting settlement of the civil money penalty proceeding against the Additional Respondents. Respondent Grant's Amended Order provides for the payment of $15,000; the remaining Additional Respondents have paid the amended penalty of $5,000.

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[2] Respondent was paid excessive fees of $10,000 per month in 1991 and $2,500 per month in 1992, which were not earned, documented or justified; and retroactive interest was paid on Respondent's

corporate demand deposit accounts totaling $334,655, in violation of 12 C.F.R. § 329.2. R.D. at 8.

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[3] Regulation O violations occurred because each of the above improper payments amounted to an extension of credit, and Respondent's total extensions of credit regularly exceeded 15 percent of the Bank's unimpaired capital and unimpaired surplus during this period. See ALJ's Recommended Decision at 12–13 and 24–27.

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[4] Citations to the record of this proceeding shall be as follows:
Recommended Decision "R.D. at ____."
Hearing transcripts "Tr. at ____."
Exhibits "FDIC Ex. ____."
FDIC Brief "FDIC Br. ____."

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[5] The U.S. Marshal's Office would not allow Respondent to enter the courtroom with the equipment without express permission from the ALJ. The policy excluding recording devices in courtrooms was conspicuously posted at the security check point. R.D. at 2–3.

{{10-31-94 p.A-2479}}("Board") of the FDIC agrees with the ALJ's analysis and conclusions concerning the violations of Regulation O and application of the statutory standards under sections 8(i) and 18(j)(4) of the FDI Act.[6] The Board also agrees that the facts support the recommended civil money penalty assessment and, thus, adopts the ALJ's carefully reasoned and well-documented Recommended Decision, with technical corrections.[7]

[.1**]** One issue merits further discussion since this is the first time the use of video recording equipment by a Respondent has come before the Board. It is the Board's view that the ALJ was within his authority to require removal of the video recording equipment. Under section 5(a) of the Uniform Rules of Practice and Procedure, 12 C.F.R. § 308.5(a), the ALJ has all the powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay. Further, section 308.5(b) provides: "The administrative law judge shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:...(5) *To regulate the course of the hearing and the conduct of the parties and their counsel*." (emphasis added)

Although FDIC Rules and Regulations do not explicitly address the use of cameras in the courtroom,[8] the FDIC's vest in the ALJ the discretion to disallow recording devices. This is consistent with the practice in the federal courts. The federal appellate courts have upheld judges' refusals to allow cameras in their courtrooms. "The court has the right to forbid the use of cameras...in the courtroom during the progress of a trial... It is essential to the integrity and independence of judicial tribunals that they shall have the power to enforce their own judgment as to what conduct is incompatible with the proper and orderly course of the administration of their duties." *Tribune Review Pub. Co. v. Thomas*, 254 F.2d 883 (3d Cir. 1958). *See also, Westmoreland v. C.B.S.*, 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017, 105 S.Ct. 3478 (1985).[9] Accordingly, the Board concludes that the ALJ acted within his authority under the Uniform Rules in excluding the video recording equipment from the hearing.[10]

CONCLUSIONS AND ORDER

Accordingly, the Board, having considered the entire record in this proceeding, taking into account the appropriateness of the penalty with respect to the size of financial resources and good faith of Respondent, the gravity of the violations, and such other matters as justice may require,[11] it is hereby

ORDERED that by reason of his multiple and serious violations of regulations, as set forth above, the Respondent is assessed a civil money penalty of $100,000.

IT IS FURTHER ORDERED, that the Order shall be effective and the penalty shall be final and payable twenty (20) days from the date of this Order. The provisions of this Order shall remain effective and enforceable except to the extent that, and until such time as, any provision of this Order shall have been modified, terminated, suspended or set aside by the Board.

IT IS FURTHER ORDERED, that the Executive Secretary, or his designee, is instructed to execute and serve copies of this Decision and Order on Civil Money Penalty on Mr. McKean, counsel for the FDIC, the ALJ, and the Bank Commissioner for the State of Oklahoma.

By direction of the Board of Directors.

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[6] See R.D. at 11 through 15 and 24 through 28.

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[7] The Board has prepared a separate errata page to make certain technical corrections to the Recommended Decision. See Appendix A.

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[8] The Office of Thrift Supervision ("OTS") has a regulation specifically prohibiting the use of cameras or other recording devices, other than by a court reporter, 12 C.F.R. § 509.104(g). Further, the policy of excluding video cameras in the courtroom is consistent with the recommendation of the Administrative Conference of the United States concerning administrative adjudicatory proceedings. R.D. at 10; *See* 1 C.F.R. § 305.72-1.

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[9] The United States Court of Appeals for the Second Circuit upheld the District Court's adherence to a local rule which prohibited taking photographs and the use of recording devices in the courtroom except by court officials. "[R]egulation of the courtroom lies within the inherent power of the courts." 752 F.2d at 20.

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[10] The Board also agrees with the ALJ's conclusion that these types of proceedings are not ones that ought to be recorded by Respondents or the public. R.D. at 10.

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[11] The Board notes that the record contains very limited evidence of "other matters as justice may require." This is largely the result of Respondents election not to participate in the proceeding after departing from the court room.

{{10-31-94 p.A-2480}}Dated at Washington, D.C., this 2nd day of August, 1994.
/s/ Lenata G. Gregorie
Acting Assistant Executive
Secretary

APPENDIX A

Correcting Technical and
Typographical Errors
in the Administrative Law Judge's
Recommended Decision
In the Matter of Joseph D. McKean, Jr.
Frontier State Bank, Oklahoma City,
Oklahoma
FDIC-93-135k

Page 12, fifth line, "12 U.S.C. § 1818(i)(B)" should read 12 U.S.C. § 1818(i)(2)(B)."
Page 12, second full paragraph, first sentence, the citations to Section 329.2 and 12 C.F.R. § 329.2 should be to Section 329.1 and 12 C.F.R. § 329.1, respectively, and at the end of the sentence the citation 12 C.F.R. § 329.2 should appear.
Page 25, paragraph number 40, third line, "May 19, 1992" should read "May 29, 1992."
Page 29, paragraph number 53, fourth line, "$205,000" should read "$206,000."
Page 31, paragraph number 9, fifth line, "Admitted pursuant of" should read "admitted pursuant to."
Page 32, paragraph number 13, fourth line, "breached his fiduciary duty of" should read "breached his fiduciary duty to."

RECOMMENDED DECISION

In the Matter of
Joseph D. McKean, Jr.
Raymond O. Grant,
Donald Correll,
Kenneth R. Goodin,
Thomas L. Herron,

Richard Morris,
individually, and as institution-
affiliated parties of
Frontier State Bank
Oklahoma City, Oklahoma
(Insured State Nonmember Bank)
FDIC 93-135k
Arthur L. Shipe, Administrative Law Judge:

Summary of Proceedings

This proceeding arises from a Notice of Assessment of Civil Money Penalties, Findings of Fact, Conclusions of Law, Order to Pay, and Notice of Hearing ("the Notice"), issued by the Federal Deposit Insurance Corporation on August 3, 1993.

The Notice is issued pursuant to Section 8(i) and Section 18(j)(4) of the Federal Deposit Insurance Act, 12 U.S.C. § 1818(i) and 12 U.S.C. § 1828(j)(4)(1989). The Notice alleges that the above Respondents violated Part 329 of the FDIC Rules and Regulations, 12 C.F.R. § 329; Section 22(h) of the Federal Reserve Act, 12 U.S.C. § 375b; Regulation O of the Board of Governors of the Federal Reserve System, 12 C.F.R. § 215; and Part 337.3 of the FDIC Rules and Regulations, 12 C.F.R. § 337.3. For these alleged violations, the Notice seeks assessment of second tier civil money penalties in the amount of $100,000 against Respondent McKean, and $15,000 against the other Respondents.

Prior to hearing, Enforcement Counsel for the Federal Deposit Insurance Corporation ("FDIC") negotiated consent and settlement agreements with each of the above parties except Respondent McKean. Accordingly, the matter concerning this Respondent was heard on January 20, 1994, in Oklahoma City, Oklahoma, wherein the FDIC appeared through the above counsel, and Respondent McKean appeared pro se.

Immediately before commencement of the hearing, Respondent McKean approached me in chambers. He requested that I permit him to bring certain video equipment into the courtroom, for the purpose of recording the proceeding. The Respondent indicated that the U.S. Marshal's Office would not permit entry of this equipment into the courtroom without the express permission of the presiding judge.[1]

I made it imminently clear to Respondent McKean that I would not permit any recording devices in the courtroom. Though he was somewhat persistent, I explained that the court reporter would transcribe the proceeding verbatim, that this transcription would be fully adequate for any future ap-

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[1] As with most federal court facilities, the policy excluding recording devices in courtrooms was conspicuously posted at the court security point.

{{10-31-94 p.A-2481}}pellate purposes, and hence, the hearing transcript would serve as the only official record of this matter.

Respondent McKean was obviously upset with my decision and asked that he be allowed to raise this issue on the record. I invited and encouraged that he present his request as a preliminary matter to the proceeding.

For reasons that are not completely clear, Respondent McKean succeeded in passing this video equipment through court security, where he then caused it to be set up in the courtroom. After opening the hearing, I noticed certain distracting motions by the camera operator, and I interrupted the proceeding to inquire about the presence of this unexplained equipment.

I then discovered that Respondent McKean had brought this recording equipment into the courtroom in defiance of both the posted policy of the court and my previous instructions. When questioned about his actions, Respondent McKean commented that it was his belief that he should be entitled to tape the hearing, and that if he were not so entitled, the hearing would have to continue in his absence.

After repeating my decision not to permit the video camera, the Respondent then proceed to remove his equipment and depart the hearing room. He inquired about the availability of the transcript, requesting that a copy be provided him at the conclusion of the proceeding. He then stalked from the courtroom, refusing to reply to my further questions.

The hearing continued in his absence, and the FDIC presented the agency's direct case-in-chief and then rested. The hearing Transcript was filed two weeks later, a copy of which was served upon Respondent McKean on February 4, 1994.

Pursuant to my post-hearing briefing schedule, the FDIC Enforcement Counsel filed initial briefs on March 7, 1994, whereas Respondent McKean filed no post-hearing briefs or exceptions.

Considering the totality of the circumstances established by the record, I enter the following Discussion,

Findings of Fact, Conclusions of Law, and Proposed Order, in which I recommend the assessment of second tier civil money penalties against Respondent Joseph D. McKean Jr. in the amount of $100,000.

Discussion of Fact

Respondent McKean personally, and through his family trust, owns 98.17 percent of the Frontier State Bank of Oklahoma City, Oklahoma. The Respondent is a practicing medical doctor, an accomplished businessman, and Chairman of the bank's Board of Directors, which he joined in the year 1975.

The Respondent owns numerous business entities, both personally and in trust. His various holdings include an incorporated medical practice, five independent medical service corporations, and one personal investment company, all of which contribute substantial business to the Frontier State Bank.

For the most part the Frontier State Bank is a sound and well-capitalized institution. The most recent examination report in evidence does show for the third consecutive year, however, a steadily declining trend in the bank's Adjusted Tier 1 Leverage Capital Ratio, caused in part by a declining net interest margin and a reduced return on assets. Historically the bank has experienced nothing but positive earnings. The recent below-average yields, however, have prevented earnings from keeping pace with the rapid growth of assets, attributable to the substantial demand deposits of Respondent McKean and his various interests.

In June of 1991, the board of directors of the Bank voted to pay Respondent McKean a consulting fee in the amount of $10,000 per month.[2] This fee, which was paid retrospectively to January 1, 1991, clearly exceeded any fees paid to other directors, who received $500 a month, and exceeded the salary of bank's own full-time officers, each of whom worked at the Bank on a daily basis.

The following month, representatives of the Oklahoma State Banking Department and the Federal Deposit Insurance Corporation sharply criticized the consulting fee arrangement. The regulators demanded a full explanation of and justification for the payment of the fee, which they characterized as un-

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[2] In his Answer, the Respondent disputes the characterization of this as a consulting fee, insisting that the reimbursement was intended to be a "Chairman of the Board" fee.

{{10-31-94 p.A-2482}}reasonably high and excessive, given that Respondent McKean provided the Bank no services beyond those provided by other directors.

After the exchange of several letters concerning the consulting fee arrangement, the bank's board elected to rescind the disputed practice, consistent with the demands of the regulators. Accordingly, the board resolved to discontinue the future payment of the fee, and directed that Respondent McKean credit the bank's expense account in the amount of $90,000 for the fees previously paid.

The decision to rescind payment of the fee was recorded in the Board of Directors minutes dated October 29, 1991. The bank's board transmitted a copy of these minutes to representatives of the FDIC as evidence of their corrective action on this issue.

At this same board meeting, however, the various directors voted and approved the retroactive payment of interest on certain noninterest bearing demand deposit accounts maintained by one of Respondent McKean's corporate entities. This decision, which resulted in an immediate retroactive "interest" payment of $110,150 into one of the accounts, was not recorded in the regular minutes of the board's meeting. Rather, the decision to begin making these unprecedented interest payments was recorded in something captioned "special minutes," which minutes were not transmitted to the FDIC, but were kept within the internal records of the bank.

The practical effect of these various actions was to simply substitute the payment of "interest" for the payment of the improper and discontinued consulting fee.

The FDIC commenced a full-scope examination of the bank as of November 30, 1992. During this examination representatives of the FDIC discovered, for the first time, that the bank's board had authorized and paid money market rates of interest on six different demand deposit accounts maintained and controlled by Respondent McKean. The examiner-in-charge, who recounted his findings at the Oral Hearing, carefully calculated and concluded that improper interest payments in the amount of $334,655 had been paid on the Respondent's various accounts.[3]

During the examination the FDIC also discovered Respondent McKean received during the year 1992 a monthly director's fee in the amount of $2,500. Though the fee was obviously reduced from the $10,000 fee paid the previous year, it nonetheless exceeded by five times the fees paid to the other directors, and was not adequately documented or justified.

The findings of the above examination resulted in the institution being assigned a CAMEL rating of 3, indicating moderately severe to unsatisfactory weakness in the bank's financial, operational, or

compliance functions. This particular rating was uncharacteristically low for the Frontier State Bank, and was influenced in large part by the low rating assigned to the bank's management. Of particular concern was the board of directors, and its perceived inability to prevent continued violations resulting from the insider transactions which give rise to this proceeding.

Discussion of Law

FDIC Practice Rule 308.21 (12 C.F.R. § 308.21), provides as follows:

> *Failure to Appear*. Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of the respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice the Administrative Law Judge shall file with the Board of Directors a recommended decision containing the findings and the relief sought in the notice.

Though Respondent McKean initially appeared at the hearing, he elected to leave the proceeding, fully aware that it would continue in his absence. The Respondent's departure from the courtroom was motivated, in large part, by my decision not to permit the presence of his video recording equipment, an issue to which I will briefly turn.

It is basic law that the decision whether to allow cameras in the courtroom in a particular case is submitted to the sound discretion of the presiding judge. *See* 75 Am. Jur. 2d, Trial, § 198, and cases cited therein. In certain instances involving administrative enforcement proceedings, such discretion is even withheld from the ALJ, and the pres-

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[3] The exact amount recorded in the Report of Examination is slightly higher, at $336,524. FDIC Exhibit No. 3. The record does not reflect the reason for this downward adjustment, and the lower figure, which was alleged in the Notice, is presumed accurate.

{{10-31-94 p.A-2483}}ence of cameras and other recording devices is strictly prohibited. *See* Office of Thrift Supervision Rule 509.104(g), 12 C.F.R. § 509.104(g) (The use of cameras and other recording devices, other than those by the court reporter, shall be prohibited and excluded from the proceedings.) *See Also In the Matter of Neil M. Bush*, Decision and Order No. 90–1714, slip op. at 1 (September 18, 1990.) (Consistent with the recommendation of the Administrative Conference of the United States, and the practice of other administrative agencies, video and audio recording equipment will not be permitted in OTS enforcement proceedings.)

In my opinion, administrative enforcement actions brought pursuant to Section 8 of the Act, and more particularly, those enforcement matters involving confidential bank examination reports, personal financial information, and confidential data concerning bank customers, are not normally the types of proceedings which should be recorded, whether by a respondent or general member of the public. Accordingly, for all of the above reasons, and other reasons of record, I elected to deny the Respondent's request to record this proceeding.

Given these circumstances, the Respondent's absence from the proceeding cannot be excused, and the provisions of FDIC Practice Rule 308.21 must apply. Respondent McKean is deemed to have admitted the facts alleged in the notice, and is further deemed to have consented to the $100,000 civil money penalty.

Moreover, the unrefuted evidence presented by the FDIC establishes those facts independently of the effect of Respondent's default, and warrants the assessment of the stated penalty.

The FDIC Board of Directors has statutory authority to assess civil money penalties upon institution-affiliated parties pursuant to Section 8(i) and Section 18(j)(4) of the Act, 12 U.S.C. §§ 1818(i) and 1828(j)(4). These sections establish a three tiered penalty structure, tailored to succeeding levels of culpable conduct.

The second tier authorizes assessment of civil money penalties against officers or directors who, inter alia:

> 1. Violate any law or regulation; or
> 2. Recklessly engage in an unsafe or unsound practice in conducting the affairs of such association; or
> 3. Breach any fiduciary duty;
>
> which violation, practice, or breach: (i) is part of a pattern of misconduct; (ii) causes or is likely to cause more than a minimal loss to such association; or (iii) results in pecuniary gain or other benefit to such party. The second tier authorizes a maximum $25,000 assessment for each day

during which such violation, practice, or breach continued.

12 U.S.C. § 1818(i)(B); 12 U.S.C. § 1828(j)(4)(B).

Turning now to the undisputed facts of record, it is not contested that payment of consulting fees to Respondent McKean in the amount of $10,000 per month during the year 1991, and $2,000 per month in excess of fees paid to other directors during the year 1992, constituted unearned compensation for a period in excess of 30 days. 12 C.F.R. § 215.3(a)(7) (1992 and 1993). Thus these fees must be deemed extensions of credit to Respondent McKean pursuant to Section 215.3(a)(7) of Regulation O.

Nor is it disputed that the six accounts maintained by the Respondent and his various entities were "demand deposit accounts" within the meaning of Section 329.2 of the FDIC Rules and Regulations, 12 C.F.R. § 329.2, upon which the payment of interest is prohibited by regulation. Thus the illegal interest payments made on the above accounts constitute extensions of credit to the Respondent and his related interests, pursuant to section 215.3(a)(8) of Regulation O, 12 C.F.R. 215.3(a)(8) (1992 and 1993).

As of October 30, 1991, extensions of credit to or attributable to Respondent McKean and his related interests totaled $389,770. This amount exceeded 15 percent of the Bank's unimpaired capital and surplus, such that each and every payment of interest on the above-referenced accounts, and each and every payment of the consulting fees discussed above, constituted separate violations of section 215.4(c) of Regulation O, 12 C.F.R. § 215.4(c) (1992 and 1993), because when added to the existing extensions of credit to or attributable to Respondent McKean, the total outstanding credit exceeded 15 percent of the Bank's unimpaired capital and surplus.

In the alternative, the transactions described {{10-31-94 p.A-2484}}above sufficiently demonstrate Respondent McKean's reckless engagement in unsafe and unsound banking practices, and a consequent breach of his fiduciary duty to the Frontier State Bank. By accepting and receiving the unearned fees and improper interest payments, Respondent McKean directly realized significant pecuniary gain, which personal gain resulted in more than a minimal loss to the Bank. For these reasons, this Respondent is, in the alternative, subject to the penalties set forth in section 8(i)(2)(B) of the Act, 12 U.S.C. § 1818(i)(2)(B).

Though by operation of law the Respondent is deemed to have consented to the assessment set forth in the Notice, I have, nevertheless, considered the statutory factors which determine the appropriate amount of a CMP assessment. These additional factors which I have considered include (1) the gravity of the violations; (2) the history of previous violations; (3) the good faith of the person charged; (4) the financial resources of the Respondent; and (5) other such matters as justice may require. 12 U.S.C. § 1818(i)(2)(G) (1989).

In my opinion the violations at issue in this proceeding are significantly grave, in that they demonstrate this Respondent's greater concern for self-interest than for the interest of the institution which he serves. Being more concerned about the fees he receives or the interest income he is awarded, Respondent McKean demonstrates an alarming ability to lose sight of his fiduciary duty to this insured institution.

No activity is more critical to the survival and success of an insured financial institution than the faithful performance by its officers and directors. Through their diligence, loyalty, care, and candor, the institution will prosper. Through their neglect, it will suffer.

In this particular case, Respondent McKean has failed to meet these standards, and the effect of his failure is reflected in the bank's performance.

I have considered the history of previous violations charged in the other examination reports in evidence, and have considered the Respondent's good faith in achieving compliance with these matters. I regretfully conclude that Respondent McKean shows little regard for the role of the banking regulators, and I find especially egregious his attempted deception of the FDIC in order to continue receiving consulting fees in the form of interest payments.

I have considered the financial resources of the Respondent, which are substantial, and the other matters required by justice. Considering the totality of the circumstances, I conclude that the assessment of civil money penalties in the amount of $100,000 is appropriate.

Accordingly, I enter the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

A. General

1. At all times pertinent to this proceeding, the Bank was a corporation existing and doing business under the laws of the State of Oklahoma, having its principal place of business in Oklahoma City, Oklahoma. The Bank is, and has been at all times pertinent to this proceeding, an insured State nonmember bank subject to the Federal Deposit Insurance Act ("Act"), 12 U.S.C. §§ 1811-1831t, the Rules and Regulations of the FDIC, C.F.R. Chapter III, and the laws of the State of Oklahoma. Admitted in McKean Answer.

2. The Bank is subject to section 22(h) of the Federal Reserve Act, 12 U.S.C. § 375b, Regulation O of the Board of Governors of the Federal Reserve System ("Regulation O"), 12 C.F.R. Part 215[4], promulgated thereunder and made applicable to insured State nonmember banks by section 18(j)(2) of the Act, 12 U.S.C. § 1828(j)(2), and section 337.3 of the FDIC Rules and Regulations, 12 C.F.R. § 337.3[5]. Admitted in McKean Answer.

3. At all times pertinent to the charges

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[4] Regulation O was amended effective May 18, 1992, 57 Fed. Reg. 22,417-26 (1992) (to be codified at 12 C.F.R. Part 215). The amendments to this part are, for the most part, (continued...) prospective. Therefore, all citations pertinent to violations of Regulation O occurring prior to May 18, 1992, are to be found in the 1992 edition of C.F.R. For violations occurring on or after this date, citations pertinent to the violations are to be found in the 1993 edition of C.F.R.

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[5] Section 337.3 of the FDIC Rules and Regulations as amended by 57 Fed. Reg. 7,647-49 (1992) (to be codified at 12 C.F.R. § 337.3(a)) (subsequently this amendment was corrected at 57 Fed. Reg. 28,457 (1992)), and also amended by 57 Fed. Reg. 17,847-51 (1992) (to be codified at 12 C.F.R. § 337.3(c)). The amendments to this part are effective May 18, 1992, and May 28, 1992, respectively; however, they are, for the most part, prospective. Therefore, all citations pertinent to conduct occurring prior to May 18, 1992, are to be found in the 1992 edition of C.F.R. For conduct occurring on or after this date (or, if appropriate, after May 28, 1992) citations pertinent to the violations are to be found in the 1993 edition of C.F.R.

{{10-31-94 p.A-2485}}herein, in excess of 98 percent of the outstanding common stock of the Bank was owned by (1) Respondent McKean and/or (2) the Joseph D. McKean, Jr. M.D. 1989 Family Trust which was owned or controlled by Respondent McKean. Admitted in McKean Answer.

4. At all times pertinent to the charges herein, Respondent McKean was chairman of the board of directors of the Bank. Admitted in McKean Answer.

5. At all times pertinent to this proceeding, Respondent McKean was an "executive officer" and a "principal shareholder" of the Bank as those terms are defined in section 215.2(d) and (j) of Regulation O, 12 C.F.R. § 215.2(d) and (j) (1992) and section 215.2(d) and (1) of Regulation O, 12 C.F.R. § 215.2(d) and (1) (1993). Admitted in McKean Answer.

6. At all times pertinent to the charges herein, Respondent McKean was an "institution-affiliated party" of the Bank as that term is defined in section 3(u) of the Act, 12 U.S.C. § 1813(u), and for purposes of section 8(i) of the Act, 12 U.S.C. § 1818(i). Admitted in McKean Answer.

7. At all times pertinent to the charges herein, Respondent McKean owned, controlled or had the power to vote 25 percent or more of the voting securities of Medical Consultants, Inc. ("MCI"), Emergency Physicians Billing Service, Inc. ("EPBSI") and Emergency Physicians of Oklahoma, Inc. ("EPOI"), and or/or controlled the election of a majority of the directors of MCI, EPBSI and EPOI. Admitted in McKean Answer.

8. At all times pertinent to the charges herein, Respondent McKean "controlled" MCI, EPBSI and EPOI as that term is defined in section 215.2(b) of Regulation O, 12 C.F.R. § 215.2(b) (1992 and 1993). Admitted in McKean Answer.

9. At all times pertinent to the charges herein MCI, EPBSI and EPOI were "related interests" of Respondent McKean as that term is defined in section 215.2(m) of Regulation O, 12 C.F.R. § 215.2(m) (1992 and 1993). Admitted in McKean Answer.

10. At all times pertinent to the charges herein, Respondent McKean and the other respondents exercised a controlling influence over the management, policies and practices of the Bank. Admitted in McKean Answer.

11. The FDIC has jurisdiction over the Bank, Respondent McKean, and the subject matter of this proceeding. Admitted in McKean Answer.

B. Loans to or Attributable to Respondent McKean

12. On or about October 26, 1988, the Bank loaned $34,463 to an individual and Respondent McKean co-signed or guaranteed the loan. FDIC Ex. 35. Admitted pursuant to 12 C.F.R. § 308.21.

13. On or about December 31, 1990, the Bank loaned $144,011.97 to an individual and Respondent McKean co-signed or guaranteed the loan. FDIC Ex. 32. Admitted pursuant to 12 C.F.R. § 308.21.

14. On or about January 10, 1991, the Bank loaned $234,000 to the Joseph D. McKean, Jr. MD 1989 Revocable Family Trust and to Respondent McKean individually. FDIC Ex. 61. Admitted pursuant to 12 C.F.R. § 308.21.

15. On or about December 17, 1991, the Bank renewed the loan to Joseph D. McKean, Jr. MD 1989 Revocable Family Trust and to Respondent McKean individually in the amount of $270,023. FDIC Ex. 33. Admitted pursuant to 12 C.F.R. § 308.21.

16. On or about September 25, 1992, the Bank loaned $2,010 to Respondent McKean's son, and Respondent McKean co-signed or guaranteed the loan. FDIC Ex. 34. Admitted pursuant to 12 C.F.R. § 308.21.

17. On or about November 12, 1992, the loan to the individual referenced in paragraph 12 was renewed by the Bank in the amount of $42,653.04, and Respondent McKean cosigned or guaranteed the loan. FDIC Ex. 35. Admitted pursuant to 12 C.F.R. § 308.21.

C. Fees Paid Respondent McKean

18. On or about June 25, 1991, the board of directors of the Bank voted to pay a fee in the amount of $10,000 per month to Respondent McKean retroactive to January 1, 1991. Admitted in McKean Answer.

19. The Bank subsequently paid $90,000 in consulting fees to Respondent McKean from January 1, 1991, through September 30, 1991. FDIC Ex. FDIC Ex. 31; Tr. 37. Admitted pursuant to 12 C.F.R. § 308.21.

20. After criticism by the FDIC of the consulting fees paid to Respondent McKean, the board of directors of the Bank, on or about October 29, 1991, voted to rescind the consulting fees paid to Respondent McKean in {{10-31-94 p.A-2486}} the amount of $90,000. This decision was recorded in the Regular Minutes. FDIC Exs. 26, 43, 45, 50, 54; Tr. 17-8, 47. Admitted pursuant to 12 C.F.R. § 308.21.

21. At the meeting of the board of directors of the Bank on or about October 29, 1991, the board agreed to pay interest on the accounts of EPBSI, an entity controlled by Respondent McKean, retroactive to January 1, 1991. This decision was not recorded in the Regular Minutes, but was recorded in the Special Minutes. FDIC Exs. 26, 30; Tr. 19. Admitted pursuant to 12 C.F.R. § 308.21.

22. On or about October 30, 1991, the Bank paid retroactive interest on EPBSI account number 094-878-7 in the amount of $110,149.75. FDIC Ex. 40, p. 45; Tr. 27. Admitted pursuant to 12 C.F.R. § 308.21.

23. By letter dated November 18, 1991, the Bank notified the FDIC that the consulting fees paid to Respondent McKean in the amount of $90,000 had been rescinded, and a copy of the Regular Minutes was enclosed. FDIC Ex. 54. Admitted pursuant to 12 C.F.R. § 308.21.

24. The Bank did not inform the FDIC that the Bank paid interest on the accounts of EPBSI, backdated to January 1, 1991, and a copy of the Special Minutes was not sent to the FDIC. Tr. 48-9. Admitted pursuant to 12 C.F.R. § 308.21.

25. In 1992, Respondent McKean was paid a director's fee in the amount of $2,500 a month while all other directors were paid a director's fee in the amount of $500 a month. FDIC Ex. 3, p. 6-a; Tr. 16. Admitted pursuant to 12 C.F.R. § 308.21.

26. The Bank paid $30,000 in director's fees to Respondent McKean from January 1, 1992, through December 15, 1992, said fee being paid on December 15, 1992. FDIC Ex. 31. Admitted pursuant to 12 C.F.R. § 308.21.

D. Payment of Interest on Accounts of EPBSI, MCI AND EPOI

27. On or about October 29, 1991, the board of directors of the Bank agreed to pay interest on the accounts of MCI, EPBSI and EPOI. FDIC Ex. 30. Admitted pursuant to 12 C.F.R. § 308.21.

28. Each of the accounts of MCI, EPBSI and EPOI referenced in paragraphs number 29 through 34 had in excess of three transfers a month (with the exception of one account of MCI one month) from October 1991 through December 1992. Two accounts of EPBSI and one account of MCI had in excess of 100 transfers each month from October 1991 through December 1992. FDIC Exs. 37–42. Admitted pursuant to 12 C.F.R. § 308.21.

29. Interest was paid on EPBSI account number 094-878-7 a follows:

October 30, 1991	$110,149.75
November 1, 1991	13,580.32
November 29, 1991	13,857.23
December 31, 1991	15,617.20
January 31, 1992	14,745.43
February 28, 1992	11,590.82
March 31, 1992	13,137.03
April 30, 1992	14,095.58
May 29, 1992	15,050.49
June 30, 1992	11,693.29
July 31, 1992	12,678.94
August 31, 1992	11,820.90

September 30, 1992	10,910.71
October 30, 1992	11,474.49
November 30, 1992	10,600.39
Total	$291,002.57

FDIC Ex. 40; Tr. 27-8. Admitted pursuant to 12 C.F.R. § 308.21.

30. Interest was paid on EPBSI account number 094-923-8 as follows:

January 31, 1992	$285.01
February 28, 1992	405.97
March 31, 1992	449.29
April 30, 1992	362.58
May 29, 1992	491.14
June 30, 1992	485.68
July 31, 1992	274.92
August 31, 1992	239.23
September 30, 1992	230.52
October 30, 1992	108.97
November 30, 1992	191.61
December 31, 1992	138.52
Total	$3,663.44

FDIC Ex. 41. Admitted pursuant to 12 C.F.R. § 308.21.

31. Interest was paid on EPOI account number 094-924-9 as follows:

January 31, 1992	$299.13
February 28, 1992	564.22
March 31, 1992	541.93
April 30, 1992	575.77
May 29, 1992	997.13
June 30, 1992	1,412.20
July 31, 1992	1,562.24
August 31, 1992	445.33
September 30, 1992	367.07
October 30, 1992	569.90

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November 30, 1992	897.20
December 31, 1992	541.80
Total	$8,773.92

FDIC Ex. 42. Admitted pursuant to 12 C.F.R. § 308.21.

32. Interest was paid on MCI account num-ber 102-541-3 as follows:

December 31, 1991	$69.92
January 30, 1992	827.79
February 28, 1992	335.48
March 31, 1992	472.50
April 30, 1992	900.51
May 29, 1992	533.12
June 30, 1992	374.38
July 31, 1992	442.97
August 31, 1992	442.99
September 30, 1992	413.23
October 30, 1992	450.23
November 30, 1992	391.59
December 31, 1992	272.29
Total	$5,927.09

FDIC Ex. 37. Admitted pursuant to 12 C.F.R. § 308.21.

33. Interest was paid on MCI account num-ber 094-862-2 as follows:

October 31, 1991	$229.76
November 29, 1991	352.65
December 31, 1991	716.35
January 31, 1991	441.67
February 28, 1992	456.48
March 31, 1992	554.22
April 30, 1992	622.36
May 29, 1992	3,038.80
June 30, 1992	3,650.73
July 31, 1992	2,652.56
August 31, 1992	3,167.72
September 30, 1992	3,340.16
October 30, 1992	2,661.12
November 30, 1992	2,124.52
December 31, 1992	638.49
Total	$24,647.59

FDIC Ex. 38. Admitted pursuant to 12 C.F.R. § 308.21.

34. Interest was paid on MCI account num-ber 094-937-0 as follows:

June 30, 1992	$37.85
July 31, 1992	68.10
August 31, 1992	111.88
September 30, 1992	96.23
October 30, 1992	127.60
November 30, 1992	110.86
December 31, 1992	87.42
Total	$639.94

FDIC Ex. 39. Admitted pursuant to 12 C.F.R. § 308.21.

35. Interest paid on the accounts of MCI, EPBSI and EPOI referenced in paragraphs 29 through 34 totaled $334,654.55 from October 30, 1991, through December 31, 1992. Admitted pursuant to 12 C.F.R. § 308.21.

E. Aggregate Amount of Extensions of Credit

36. As of October 30, 1991, extensions of credit to or attributable to Respondent McKean and his related interests were as follows:

Loan to Respondent McKean	$224,919
Loans co-signed/guaranteed by Respondent McKean	164,851
Interest paid on EPBSI demand deposit accounts	110,150
Total	$499,920

FDIC Exs. 32–36, 40; Tr. 27. Admitted pursuant to 12 C.F.R. § 308.21.

37. The payment of $110,150 in interest on October 30, 1991, on the DDA account of EPBSI, when added to $389,770 in extensions of credit to or attributable to Respondent McKean and his related interests, exceeded 15 percent of the Bank's unimpaired capital and unimpaired surplus which equalled $272,835 as of October 30, 1991. FDIC Exs. 4, 15, 32–36; Tr. 28-9. Admitted pursuant to 12 C.F.R. § 308.21.

38. Each payment of interest on the accounts of MCI, EPBSI and EPOI, referenced in paragraphs 29 through 34 above, from October 30, 1991, through April 30, 1992, when added to existing extensions of credit to or attributable to Respondent McKean and his related interests, exceeded 15 percent of the Bank's unimpaired capital and unimpaired surplus. FDIC Exs. 3–6, 15, 18, 19, 32–42. Admitted pursuant

to 12 C.F.R. § 308.21.

39. As of May 29, 1992, extensions of credit to or attributable to Respondent McKean and his related interests, prior to the payments of interest that day, were as follows:

Loan to Respondent McKean	$238,889
Loans co-signed/guaranteed by Respondent McKean	144,457
Interest paid on MCI demand deposit accounts prior to May 29, 1992	5,980
Interest paid on EPBSI demand deposit accounts prior to May 29, 1992	208,276
{{10-31-94 p.A-2488}} Interest paid on EPOI demand deposit account prior to May 29, 1992	1,981
Total	$599,619

FDIC Exs. 6, 32–42; Tr. 29–32.

40. The payments of interest on the DDA accounts of MCI, EPBSI and EPOI referenced in Findings of Fact 29 through 34, on May 19, 1992, in the amounts of $3,572, $15,542 and $997 respectively, when added to $599,619 in extensions of credit to or attributable to Respondent McKean and his related interests, exceeded 15 percent of the Bank's unimpaired capital and unimpaired surplus which equalled $287,850 as of May 29, 1992. FDIC Exs. 6, 32–42; Tr. 33.

41. Each payment of interest on the accounts of MCI, EPBSI and EPOI, referenced in paragraphs 29 through 34 above, after May 29, 1992, when added to existing extensions of credit to or attributable to Respondent McKean and his related interests, exceeded 15 percent of the Bank's unimpaired capital and unimpaired surplus. FDIC Exs. 3, 6–9, 19, 32–42. Admitted pursuant to 12 C.F.R. § 308.21.

42. As of December 15, 1992, extensions of credit to or attributable to Respondent McKean and his related interests were as follows:

Loan to Respondent McKean	$89,914
Loans co-signed/guaranteed by Respondent McKean	135,689[6]
Interest paid on MCI demand deposit accounts	29,664
Interest paid on EPBSI demand deposit accounts	294,527
Interest paid on EPOI demand deposit account	8,232
Total	$558,026

FDIC Exs. 32–42; Tr. 33-6.

43. The payment, on or about December 15, 1992, of $24,000 in director's fees to Respondent McKean in excess of the director's fees paid the other directors of the bank, when added to $558,026 in existing extensions of credit to or attributable to Respondent McKean and his related interests, exceeded 15 percent of the Bank's unimpaired capital and unimpaired surplus which equalled $306,450 as of December 15, 1992. FDIC Exs. 8, 32–42; Tr. 36.

44. The payment, on or about December 15, 1992, of $24,000 in director's fees to Respondent McKean in excess of the director's fees paid the other directors of the bank, when added to existing extensions of credit to or attributable to Respondent McKean and his related interests, exceeded $100,000 when added to existing extensions of credit to or attributable to Respondent McKean and his related interests. Tr. 33-6. Admitted pursuant to 12 C.F.R. § 308.21.

F. Prior Violations

45. At the FDIC examination of the Bank as of December 31, 1990, the Bank was cited for a violation of section 215.4(c) of Regulation O, 12 C.F.R. § 215.4(c)(1992), because a line of credit to Respondent

McKean in the amount of $300,000 exceeded 15 percent of the Bank's unimpaired capital and unimpaired surplus. FDIC Ex. 1; Tr. 51-2. Admitted pursuant to 12 C.F.R. § 308.21.

46. At the FDIC examination of the Bank as of September 9, 1991, the $10,000 per month consulting fee being paid Respondent McKean was deemed an extension of credit under section 215.3(a)(7) of Regulation O, 12 C.F.R. § 215.3(a)(7) (1992), because there was no consulting agreement, and the services actually performed were normal duties expected of a director. FDIC Ex. 45; Tr. 16-7. Admitted pursuant to 12 C.F.R. § 308.21.

47. At the State of Oklahoma Banking Commission Examination of the Bank as of December 31, 1991, the Bank was cited for a violation of section 215.4(c) of Regulation O, 12 C.F.R. § 215.4(c)(1992), because loans to Respondent McKean in the amount of $307,690 exceeded 15 percent of the Bank's unimpaired capital and unimpaired surplus. FDIC Ex. 2; Tr. 52-3. Admitted pursuant to 12 C.F.R. § 308.21.

48. At the State of Oklahoma Banking Commission Examination of the Bank as of December 31, 1991, the Bank was cited for a violation of section 215.4(d) of Regulation O, 12 C.F.R. § 215.4(d)(1992), because Respondent Goodin's account was overdrawn in excess of five business days. FDIC Ex. 2. Admitted pursuant to 12 C.F.R. § 308.21.

G. Reports of Condition and Income

49. The Bank's September 30, 1991 Reports of Condition and Income stated that the Bank's total equity capital equalled $1,606,000, and the Bank's allowance for

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[6] Net of certificate of deposit securing one of the loans.

{{3-31-95 p.A-2489}}loan and lease losses equalled $213,000. FDIC Ex. 4; Tr. 28.

50. The Bank's December 31, 1991 Reports of Condition and Income stated that the Bank's total equity capital equalled $1,672,000, and the Bank's allowance for loan and lease losses equalled $200,000. FDIC Ex. 5.

51. The Bank's December 31, 1991 Reports of Condition and Income stated that the Bank's total equity capital equalled $1,719,000, and the Bank's allowance for loan and lease losses equalled $200,000. FDIC Ex. 6; Tr. 32.

52. The Bank's June 30, 1992 Reports of Condition and Income stated that the Bank's total equity capital equalled $1,774,000 and the Bank's allowance for loan and lease losses equalled $201,000. FDIC Ex. 7.

53. The Bank's September 30, 1992 Reports of Condition and Income stated that the Bank's total equity capital equalled $1,837,000, and the Bank's allowance for loan and lease losses equalled $205,000. FDIC Ex. 8.

54. The Bank's December 31, 1992 Reports of Condition and Income stated that the Bank's total equity capital equalled $1,912,000, and the Bank's allowance for loan and lease losses equalled $206,000. FDIC Ex. 9.

55. The Bank's October 30, 1991 Daily Statement stated that the Bank's allowance for loan and lease losses equalled $212,903. FDIC Ex. 15.

56. Joseph D. McKean, Jr. has the ability to pay a civil money penalty in the amount of $100,000. FDIC Ex. 3.

57. The Board of Directors of the Bank did correct all violations of law, including the repayment of any and all interest paid to Respondent McKean. Tr. 50-1.

CONCLUSIONS OF LAW

1. Respondent McKean has waived his right to a hearing and is deemed to have admitted the facts as alleged and consented to the relief sought in the Notice. 12 C.F.R. § 308.21.

2. The accounts of MCI, EPBSI and EPOI referenced in Proposed Findings of Fact 29 through 34 are demand deposit accounts as defined in section 329.1(b) of the FDIC Rules and Regulations, 12 C.F.R. § 329.1(b). Admitted pursuant to 12 C.F.R. § 308.21.

3. The payment of interest on the DDA accounts of MCI, EPBSI and EPOI violated section 329.2 of the FDIC Rules and Regulations, 12 C.F.R. § 329.2. Admitted pursuant to 12 C.F.R. § 308.21.

4. The payment of interest on the accounts of MCI, EPBSI and EPOI are deemed to be extensions of credit to MCI, EPBSI, and EPOI pursuant to section 215.3(a)(8) of Regulation O, 12 C.F.R. § 215.3(a)(8) (1992 and 1993). Tr. 51. Admitted pursuant to 12 C.F.R. § 308.21.

5. The payment of a fee to Respondent McKean in 1991 in the amount of $10,000 per month is deemed to be an extension of credit to Respondent McKean pursuant to section 215.3(a)(7) of Regulation O, 12 C.F.R. § 215.3(a)(7)(1992), because the fees paid Respondent McKean constituted

unearned compensation for a period in excess of 30 days. Admitted pursuant to 12 C.F.R. § 308.21.

6. The payment to Respondent McKean of a director's fee in 1992 which exceeded by $2,000 each month the director's fee paid the other directors of the Bank is deemed to be an extension of credit to Respondent McKean pursuant to section 215.3(a)(7) of Regulation O, 12 C.F.R. § 215.3(a)(7)(1992 and 1993), because the director's fees paid Respondent McKean constituted unearned compensation for a period in excess of 30 days. Admitted pursuant to 12 C.F.R. § 308.21.

7. The payment of interest on account number 094-877-7 of EPBSI on October 30, 1991, violated the lending limit as set forth in section 215.4(c) of Regulation O, 12 C.F.R. § 215.4(c)(1992). Admitted pursuant to 12 C.F.R. § 308.21.

8. Each payment of interest on the accounts of MCI, EPBSI and EPOI, referenced in Findings of Fact 29 through 34, from October 30, 1991, through April 30, 1992, violated section 215.4(c) of Regulation O, 12 C.F.R. § 215.4(c)(1992). Admitted pursuant to 12 C.F.R. § 308.21.

9. The payments of interest on the accounts of MCI, EPBSI and EPOI, referenced in Findings of Fact 29 through 34, on May 29, 1992, $3,572, $15,542 and $997 respectively, violated section 215.4(c) of Regulation O, 12 C.F.R. § 215.4(c)(1993). Admitted pursuant to 12 C.F.R. § 308.21.

10. Each payment of interest on the accounts of MCI, EPBSI, and EPOI, referenced {{3-31-95 p.A-2490}}in Findings of Fact 29 through 34, after May 29, 1992, violated section 215.4(c) of Regulation O, 12 C.F.R. § 215.4(c)(1993). Admitted pursuant to 12 C.F.R. § 308.21.

11. The payment, on or about December 15, 1992, of $24,000 in director's fees to Respondent McKean in excess of the director's fees paid the other directors of the bank violated section 215.4(c) of Regulation O, 12 C.F.R. § 215.4(c)(1993). Admitted pursuant to 12 C.F.R. § 308.21.

12. The payment, on or about December 15, 1992, of $24,000 in director's fees to Respondent McKean in excess of the director's fees paid the other directors of the bank, violated section 337.3(c)(2) of the FDIC Rules and Regulations, 12 C.F.R. § 337.3(c)(2)(1993). Admitted pursuant to 12 C.F.R. § 308.21.

13. By reason of the foregoing findings of fact and conclusions of law, Respondent McKean recklessly engaged in an unsafe or unsound practice in conducting the affairs of the Bank, and/or Respondent McKean breached his fiduciary duty of the Bank, and the practices or breaches were part of a pattern of misconduct and/or have caused or are likely to cause more than minimal loss to the Bank and/or have resulted in a pecuniary gain or other benefit to Respondent McKean. Admitted pursuant to 12 C.F.R. § 308.21.

Proposed Order

The Board of Directors of the Federal Deposit Insurance Corporation, having considered the entire record in this proceeding, including the Recommended Decision of Administrative Law Judge Arthur L. Shipe, and the exceptions filed thereto, hereby adopts the recommendation of the ALJ.

By reason of the violations set forth in the Notice of Assessment, and after taking into account the appropriateness of the penalty with respect to the size and financial resources and good faith of the Respondent, the gravity of the violations, and such other matters as justice may require, the Board hereby assesses a civil money penalty in the amount of $100,000 against Respondent Joseph D. McKean, Jr.

So Ordered, this 9th day of May, 1994.

/s/ Arthur L. Shipe
Administrative Law Judge
Date: May 9, 1994