

{{1-31-93 p.I-67}}

[¶8021] **In the Matter of Ronald J. Grubb, Bank of Hydro, Hydro, Oklahoma, Docket Nos. FDIC-88-282k and 89-111e (11-5-92).**

FDIC Board denies application for stay of a removal order pending appellate review by the Tenth Circuit because petition does not show that respondent has met the first test for a stay—likelihood that he will prevail on the merits before the appeals court. "Harshness" of removal from six banks for actions at one bank is not grounds for a court to reverse the removal decision, but may be the basis for an application to FDIC for partial exception to the removal order.

**[.1] Practice and Procedure—Stay of Enforcement Pending Judicial Review—Standards**

Board requires applicant to meet four tests for stay of enforcement pending judicial review: (1) likelihood of success on the merits in appellate court, (2) irreparable injury if stay is denied, (3) no substantial harm to other interested persons, and (4) no harm to the public interest.

**[.2] Removal—Exception to Order of Removal**

A party subject to an order of removal and prohibition may petition the FDIC to mitigate the harsh effect of the order, so an appeal on the basis of the harshness of the order is not likely to be successful.

**In the Matter of  
RONALD J. GRUBB, individually and  
as a director and/or person  
participating in the conduct  
of the affairs of  
BANK OF HYDRO  
HYDRO, OKLAHOMA  
(Insured State Nonmember Bank)  
DECISION AND ORDER  
DENYING APPLICATION FOR  
STAY PENDING APPEAL  
FDIC-88-282k and FDIC-89-111e**

On October 21, 1992, Respondent Ronald J. Grubb filed an Application to Stay the Decision and Orders of the Board of Directors of the Federal Deposit Insurance Corporation ("Application"), pursuant to section 308.41 of the Rules of Practice and Procedure of the Federal Deposit Insurance Corporation ("FDIC"), 12 C.F.R. § 308.41.<sup>1</sup>

The Application requests the stay pending appellate review by the Court of Appeals for the Tenth Circuit.

On August 25, 1992, the Board of Directors ("Board") of the FDIC issued (1) an Order assessing a civil money penalty in the amount of \$50,000 against Respondent pursuant to former sections 8(i)(2) and 18(j)(4) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. §§ 1818(i)(2) and 1828(j)(4); and (2) an Order pursuant to section 8(e) of the FDI Act, 12 U.S.C. § 1818(e).<sup>2</sup>

in part removing Respondent as a director and officer of Bank of Hydro, Hydro, Oklahoma ("Bank"); prohibiting Respondent from serving or acting as an institution-affiliated party and/or from participating in any manner in the conduct of the affairs of, *inter alia*, any insured depository institution, without the prior written consent of the FDIC and of the appropriate Federal financial institutions regulatory agency; and prohibiting Respondent from exercising or transferring in any manner voting rights in,

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<sup>1</sup> Section 308.41, entitled "Stays pending judicial review," provides as follows:

The commencement of proceedings for judicial review of a final decision and order of the FDIC may not, unless specifically ordered by the Board of Directors or a reviewing court, operate as a stay of any order issued by the FDIC. The Board of Directors may, in its discretion, and on such terms as it finds just, stay the effectiveness of all or any part of its order pending a final decision on a petition for review of that order.

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<sup>2</sup> Because the charges specified in the Notice of Assessment of Civil Money Penalties, Findings of Fact and Conclusions of Law. Order to Pay, and Notice of Hearing and the Notice of Intention to Remove and/or Prohibit from Further Participation occurred prior to the enactment of the Financial Institutions

Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 101 Stat. 183 (August 9, 1989) ("FIRREA"), Respondent's conduct was measured by the substantive provisions of sections 8(e)(1), 8(i)(2)(i), and 18(j)(4) of the FDI Act, 12 U.S.C. §§ 1818(e)(1), 1818(i)(2)(i), and 1828(j)(4), as they existed prior to amendment. The scope and effect of the Order of Removal and Prohibition, however, was determined by post-FIRREA section 8(e)(7) (1988 & Supp. II 1990).

[§1-31-93 p.I-68](#) *inter alia*, any insured depository institution, without the prior written approval of the FDIC and the appropriate federal banking agency. The Order is to remain effective and enforceable except to the extent that and until such time as, any of its provisions shall have been modified, terminated, suspended or set aside by the FDIC ("Order of Removal and Prohibition").

[.1] The Board has previously held that petitions for a stay pending judicial review must demonstrate that four conditions are met before a stay will be entered: (1) a likelihood that the petitioner will prevail on the merits of the appeal; (2) irreparable injury to the petitioner unless the stay is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest. *In the Matter of \*\*\* Bank, \*\*\* \*\*\*, \*\*\**, Docket No. FDIC-87-203b, 2 P-H FDIC Enf. Dec. ¶5123 (1988); *In the Matter of Harold A. Hoffman, Joseph L. Hayes and Alaska Continental Bank, Anchorage, Alaska*, Docket No. FDIC-88-156c&b, 2 P-H FDIC Enf. Dec. ¶5141 (1989); 7 (Pt.2) J. Moore, J. Lucas & K. Sinclair, Jr., *Moore's Federal Practice* ¶65.04[1] at 39-40 (2d ed. 1989) and the cases cited therein; *Associated Securities Corp. v. S.E.C.*, 283 F. 2d 773, 774-75 (10th Cir. 1960); *Virginia Petroleum Jobbers Assn. v. F.P.C.*, 259 F.2d 921, 925 (D.C. Cir. 1958). Respondent does not meet any of these conditions.

First, the Application presents no factual or legal basis that persuades us that Respondent is likely to prevail on the merits before the Court of Appeals. As to the Order imposing a civil money penalty of \$50,000, Respondent in his Exceptions to the Recommended Decision ("R.D.") of the Administrative Law Judge ("ALJ") in this proceeding stated:

...Respondent requests that the ALJ's recommended decision be adopted insofar as it is consistent with the issuance of a \$50,000.00 civil money penalty. However, in the event the Board does not adopt the ALJ's Recommended Decision, but instead orders removal, Respondent will have no adequate financial resources from which to pay a civil money penalty.

Resp. Excep. at 41. Hence, Respondent's only basis for contesting the civil money penalty is his inability to pay if removed. Yet his Application does not address this issue.<sup>3</sup>

Indeed, the proposed sale of Respondent's ownership interest in several of his banks would seem to belie any such claim.

As to the Order of Removal and Prohibition, the Application merely recites that the appeal "will present many novel issues... and will address particularly the overall harshness of a removal from six banks due to actions at a single bank..." The statutory penalty is a function of the amendment of the FDI Act by FIRREA, in an effort to curb insider abuses of the sort involved in this case. Section 8(e)(6) of the FDI Act provides that, if the appropriate Federal banking agency determines that section 8(e)(1) has been violated and issues an order of removal and suspension:

- Any person subject to an order issued under this subsection shall not—
- (A) participate in any manner in the conduct of the affairs of *any* institution ... specified in paragraph (7)(A);
  - (B) [exercise in any manner] voting rights in *any* institution described in subparagraph (A);... or
  - (D) vote for a director, *or serve or act as an institution-affiliated party.*

12 U.S.C. § 1818(e)(6) (emphasis added). Moreover, section 8(e)(7)(A) of the FDI Act provides that any person who has been removed or suspended from officer in *an* insured depository institution may not, while such order is in effect, continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of *any* insured depository institution.

These statutory terms are severe, "intended not only to punish a person for serious transgressions, but also to protect the insured institution ... and the banking system as a whole." *In the Matter of William Marvin Clark, Sr.*, Docket No. FDIC-89-199e, 2 P-H FDIC Enf. Dec. ¶5162 at A-1618 (1991).

[.2] However, section 8(e)(7)(B) of the FDI Act, also added by FIRREA, "provides the Board with additional flexibility in circumstances it deems appropriate to mitigate

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<sup>3</sup> It is unclear whether Respondent is requesting a stay of the Order assessing a civil money penalty. While the Application refers to the "Orders," it also states that:

Respondent respectfully requests that the Board stay the effectiveness of its Decision and Orders ... pertaining to the removal of Respondent from all of his banks.

Application, paragraph 17. This Decision assumes that the requested stay applies to both Orders. [{{1-31-93 p.I-69}}](#)the harsh effect of a removal order." *Id.* It provides that a party subject to an order of removal and prohibition may apply for an exception to the order by written consent of the agency that issued such order and the appropriate Federal financial institutions regulatory agency. The Order of Removal and Prohibition specifically incorporates this provision.<sup>4</sup>

Respondent has made no effort to apply for one or more exceptions to the Order of Removal and Prohibition by written consent, and hence cannot reasonably argue that the penalty imposed is too harsh. Therefore, it must be concluded that Respondent has not carried his burden of demonstrating a likelihood of success on appeal concerning his primary argument of harshness of the penalty.

The Board has previously considered, and rejected in its Decision as not supported by substantial evidence, the factual issues to be argued on appeal as set forth in the Application.<sup>5</sup>

Accordingly, it cannot be found that Respondent has carried his burden of demonstrating a likelihood of success on the merits of the appeal with respect to these issues.

Second, with respect to irreparable injury, Respondent alleges that he will suffer irreparable harm:

if removed from all six banks prior to appellate review ... because Respondent's reputation, career and value associated with the sale and liquidation of three banks will have already been destroyed by the time any order could be rendered.

Application, paragraphs 14 and 15. If Respondent is referring to the three banks currently subject to disposition activity, see page 10 below, Respondent's failure to apply for a suspension from or exception to the provisions of the Order of Removal and Prohibition, as provided by the terms of that Order, is inconsistent with his irreparable injury argument. The provision for exception by written consent provided in section 8(e)(7)(B) of the FDI Act allows the FDIC and the appropriate Federal financial institutions regulatory agency to fashion a specific suspension or exception to the removal order, subject to a written consent agreement with the party with appropriate safeguards and other terms and conditions to protect the institution involved, the Bank Insurance Fund, and the public negotiations for sale, respectively.<sup>6</sup>

The FDIC has no wish to interfere with or delay arrangements for the orderly disposition of Respondents' ownership interests in these banks. Indeed, under the circumstances, it appears that orderly disposition of ownership interests in such banks is in the public interest, as well as in the interest of the FDIC. Exceptions from the Order of Removal and Prohibition for these purposes, to the extent that Respondent's participation is required, for specific periods of time and subject to specific terms and conditions as appropriate, are contemplated by section 8(e)(7)(B) of the FDI Act, 12 U.S.C. § 1818(e)(7)(B).

The FDIC is of the view that, upon written application setting forth the specific facts concerning each of the three institutions, limited written exceptions to or suspensions of the Order of Removal and Prohibition may well be appropriate. In view of the fact that Respondent has not yet applied for such written consent, it is suggested that Respondent avail himself of section 8(e)(7)(B) of the FDI Act by making written application to the Board of Directors of the FDIC for approval to engage in necessary activities with respect to each of the three institutions controlled by Respondent which are currently subject to efforts to sell Respondent's ownership interest or to liquidation.

Based upon a careful review of the

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<sup>4</sup> For example, paragraph 2 of the Order of Removal and Prohibition provides in part:

2. Ronald J. Grubb is hereby prohibited from serving or acting as an institution-affiliated party and/or from participating in any manner in the conduct of the affairs of any of the institutions or agencies listed herein, without the prior written consent of the FDIC and of the appropriate Federal financial institutions regulatory agency pursuant to the provisions of section 904(a) of FIRREA, Pub. L. No. 101-73, § 904, 103 Stat. 183, 457 (1989) (codified at 12 U.S.C. § 1818(e)(7))  
*In the Matter of Ronald J. Grubb*, Docket Nos. FDIC-88-282k & FDIC-89-111e (8-25-92) at 90.

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<sup>5</sup> Respondent asserts that he was removed:

... due to actions at a single bank which (a) primarily occurred more than three years before the removal action was filed; (b) were the subject initially, and more appropriately, of a civil money penalty action; (c) did not cause any material loss to the subject bank; and (d) did not even warrant removal from the subject bank from the view-point of the Administrative Law Judge.

Application, paragraph 13.

<sup>6</sup> Application, paragraphs 6-8.

[{{1-31-93 p.I-70}}](#) Application, the FDIC finds and concludes that Respondent has presented no factual or legal basis upon which the Application for a Stay pending appellate review could be granted.

Accordingly, it is hereby ORDERED that Respondent's Application to Stay the Decision and Orders of the Board is DENIED.

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 FDIC.

Dated at Washington, D.C., this 5th day of November, 1992.

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

/s/ Hoyle L. Robinson

Executive Secretary