

{{9-30-93 p.A-2258}}

[¶5197] **In the Matter of Dell L. Pooler, Bellevue State Bank, Bellevue, Iowa, Docket No. FDIC-91-404k (7-6-93).**

FDIC Board exercises its discretion and dismisses a civil money penalty proceeding against respondent charged with violating an order of prohibition. The Board agrees with the ALJ that respondent violated the order but that he acted in good faith reliance on confusing language in written advice from the FDIC Regional Director when he executed proxies for the voting of his personal stock at two annual meetings.

[.1] Civil Money Penalties — Defenses — Reliance on FDIC Advice

Where the record shows correspondence from the FDIC which reasonably could have misled respondent about the meaning and import of a prohibition order (and respondent acted at the request of the bank, made reasonable efforts to comply with the order, and caused no harm to the bank or benefit to himself) the Board exercises discretion to dismiss proceedings charging respondent with violating that order.

[.2] Prohibition — Voting Rights — Proxies

Where prohibition order's definition of proxy is ambiguous, and respondent sought FDIC's advice about giving proxy to ensure a quorum at bank's annual meeting, Board dismisses civil money penalty proceeding though it finds giving a proxy in such circumstances does violate the order.

{{9-30-93 p.A-2259}}

**In the Matter of
DELL L. POOLER,
individually and as an institution-affiliated party of
BELLEVUE STATE BANK
BELLEVUE, IOWA
(Insured State Nonmember Bank)
DECISION AND ORDER
FDIC-91-404k**

DECISION

This proceeding arises out of a Notice of Assessment of Civil Money Penalty, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing, dated January 24, 1992 ("Notice"), against Dell L. Pooler ("Respondent") for \$25,000.

The notice was issued pursuant to section 8(i)(2) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. §1818(i)(2) (1989)¹ and Part 308 of the Federal Deposit Insurance Corporation ("FDIC") Rules of Practice and procedure, 12 C.F.R. §308.1, et seq. The Notice alleges violations of an Order of removal from Office and Prohibition from Further Participation, dated April 25, 1989, issued against the Respondent pursuant to section 8(e) of the FDI Act, 12 U.S.C. §1818(e) (1988) ("Order"), and of section 8(e)(6) of the FDI Act, 12 U.S.C. §1818(e)(6) (1989). Specifically, the Notice alleges that Respondent violated paragraph 1 of the Order² and section 8(e)(6)(B)¹³ of the FDI Act by transferring, by means of a proxy, his voting rights in shares of Bellevue State Bank, Bellevue, Iowa ("Bank"), in connection with the Bank's 1990 and 1991 annual shareholders meetings.

After an administrative hearing, Administrative Law Judge Arthur L. Shipe ("ALJ") issued his Recommended Decision finding that the Respondent violated the Order and section 8(e)(6) of the FDI Act. He also concluded that no civil money penalty should be imposed because of mitigating factors.

After a review of the entire record of this proceeding, the Board of Directors ("Board") of the FDIC has determined that the Notice should be dismissed as a matter of agency discretion.

[.1] The Board is electing to exercise its discretion in this proceeding to dismiss the notice because the record contains, among other evidence, correspondence from the FDIC which the Board concludes reasonably could have misled the Respondent about the meaning and import of the Order and section 8(e)(6) of the FDI Act.

The record also makes clear that the Respondent undertook what the Board concludes were reasonable efforts to seek clarification from the FDIC concerning the relevant prohibitions contained in

the Order and section 8(e), which he received. Respondent relied on such clarifications in executing, at the Bank's request for purposes of establishing a quorum, a proxy to vote his Bank shares at the 1990 annual shareholders meeting. Respondent did not, as he should have, seek similar clarification with respect to the 1991 annual meeting. But in view of the confusing nature of the FDIC advice he previously received, the Board does not view this lapse as significant.

The Board does not excuse ignorance of the law. However, in this case, the cause for the Respondent's confusion about the law rests in principal part with the FDIC, which issued the Order in the first instance, and which is responsible for enforcing the law. The board considers that to be a mitigating factor, and elects to take that factor into account in the exercise of its discretion and judgment.

Considering that mitigating factor together with the other relevant circumstances contained in this record—that Respondent acted at the request of the Bank, made reasonable efforts to comply with the Order, and caused no risk or harm to the Bank nor

¹ Section 8(i)(2)(A) of the FDI Act, 12 U.S.C. §1818(i)(2)(A) (1989), provides, among other things, that any institution-affiliated party who (i) violates any law or regulation; or (ii) violates any final order issued pursuant to subsection 8(e), shall forfeit and pay a civil penalty of not more than \$5,000 for each day during which such violation continues.

² Paragraph 1 of the Order, among other things, prohibited the Respondent from "...directly or indirectly soliciting or procuring, or transferring or attempting to transfer, or voting or attempting to vote, any proxies, consents or authorizations in respect of any voting rights in the Bank."

³ Section 8(e)(6)(B) of the FDI Act, 12 U.S.C. §1818(e)(6)(B), as amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), among other things, provides that a person subject to an order issued under section 8(e) shall not "solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights" in any insured depository institution. Prior to FIRREA, the quoted language was contained in section 8(j) of the FDI Act. [{{9-30-93 p.A-2260}}](#)any apparent benefit to himself—the Board concludes that it is appropriate to dismiss the Notice.

[.2] The Board does not wish to be misunderstood. It is plain that section 8(e)(6)(B) of the FDI Act represents a broad restriction on the exercise of bank stock voting rights by anyone subject to an order issued pursuant to section 8(e).⁴ The statute clearly prohibits, among other actions, any exercise of any bank stock voting rights, by proxy or otherwise, by any such person, absent the prior consent of the FDIC. The FDIC has reached that conclusion before, and the Board elects to restate it here. See, *In the Matter of Ronald J. Grubb*, FDIC-88-282k and FDIC-89-111e, 2 P-H Enf. Dec. ¶8021 (1992).

The Board adopts certain of the Findings of Fact and Conclusions of Law in the ALJ's Recommended Decision, and modifies or rejects others, as set forth in the Appendix to this Decision.

ORDER

For the reasons set forth in the above Decision, the Board of the FDIC hereby ORDERS that the Notice be dismissed.

IT IS FURTHER ORDERED, that the Executive Secretary, or his designee, is instructed to execute and serve copies of the Decision and Order on counsel for both parties, the Administrative Law Judge, the Bank, and the Superintendent of Banking for the State of Iowa.

By direction of the Board of Directors.

Dated at Washington, D.C., this 6th day of July, 1993.

/s/ Robert E. Feldman
Deputy Executive Secretary

APPENDIX

Findings of Fact and Conclusions of Law

Based upon its review of the entire record in this case, the Board adopts all of the ALJ's Findings of Fact except Nos. 15 and 22 through 24. The Board adopts all of the ALJ's Conclusions of Law except Nos. 14, 17, 19, and 20, which are moot in view of the Board's decision to dismiss the Notice, and Conclusions of Law Nos. 12 and 15, which are modified to read as follows: "By appointing Director Steven M. Gibbs to act and serve as his proxy at the 1990 [1991, as to No. 15] annual meeting of

stockholders, the Respondent violated the clear provisions of paragraph 1 of the Order and section 8(e)(6) of the FDI Act."

RECOMMENDED DECISION

**In the Matter of
Dell L. Pooler,
individually, and as an institution-affiliated party of
BELLEVUE STATE BANK,
BELLEVUE, IOWA
(Insured State Nonmember Bank)
ARTHUR L. SHIPE, Administrative Law
Judge**

This matter was instituted by the Federal Deposit Insurance Corporation on January 24, 1992, by the issuance of a Notice of Assessment of Civil Money Penalties, pursuant to Section 8(i) of the Federal Deposit Insurance Act, 12 U.S.C. §1818(i). Jurisdiction of the proceeding is not contested.

Exactly 21 days before the scheduled commencement of the Oral Hearing, counsel for the Federal Deposit Insurance Corporation moved for summary disposition of the proceeding, contending that there existed no genuine issue of material fact, such that the FDIC was entitled to a decision as a matter of law.

Under the applicable rules of practice, opposing counsel had 20 days in which to respond, but given the imminence of the Oral Hearing, it would have been burdensome to simultaneously prepare for the hearing and to reply to the motion. This difficulty could not be effectively solved by shortening the time for responses.

Moreover, there would have been no realistic opportunity for a thorough consideration of the motion before commencement of the proceeding, which had been scheduled some six months before. Following a

⁴ The Board rejects the ALJ's conclusion that the statute is ambiguous. The ALJ focused on the words "transfer" and "proxy" ("The pertinent provisions prohibit the Respondent from `transferring a proxy,' the exact meaning of which is simply unclear," R.D. at 11 [emphasis in original]). This focus is too narrow. When the focus is on the entire provision of section 8(e)(6)(B), the intent is clear and there is no ambiguity. Even if a reader were confused, as the ALJ concluded, by the fact that the term "proxy" has more than one meaning in the law, the additional terms "consent" and "authorization," and the phrase, "in respect of any voting rights," can leave no doubt that section 8(e)(6)(B) was intended to be a broad restriction on exercising voting rights and prohibits, among other things, the transfer of any voting rights by proxy.

{[9-30-93 p.A-2261]} telephonic conference with the parties on the matter, I delayed any replies and rulings upon the motion, and convened the Oral Hearing in Des Moines, Iowa, on September 15, 1992, as scheduled.

After the conclusion of the hearing, replies were filed in response to the summary disposition motion as well as a cross-motion filed on behalf of Respondent Pooler. Both motions were denied by Order entered November 30, 1992, which established a schedule for briefs and this Recommended Decision.

Based upon the evidence presented, and the totality of the circumstances established by the record¹ the following Discussion, Findings of Fact, Conclusions of Law, and proposed Order are entered.

DISCUSSION OF FACT

The facts of this matter are largely undisputed. On April 25, 1989, Respondent Dell L. Pooler, then an officer, director, and principal shareholder of the Bellevue State Bank, Bellevue, Iowa, entered into a written Stipulation and Consent with the Federal Deposit Insurance Corporation, resulting in the simultaneous issuance of a Final Order of Removal from Office and Prohibition from Further Participation (hereinafter "the Removal Order" or "the Order"), issued under the provisions of Section 8(e) of the Federal Deposit Insurance Act, 12 U.S.C. §1818(e)².

The Order provided in pertinent part as follows:

1. Dell L. Pooler is hereby prohibited from participating in any manner in the conduct of the affairs of the Bank, or directly or indirectly soliciting or procuring, or transferring or attempting to transfer, or voting or attempting to vote, any proxies, consents, or authorizations in respect of any voting rights in the Bank.
2. Dell L. Pooler is hereby prohibited from serving or acting as a director, officer, or employee of,

or participating in any manner in the conduct of the affairs of, any bank insured by the FDIC without the prior written approval of the appropriate Federal banking agency as that term is defined in section 3(q) of the Act, 12 U.S.C. §1813(q).

3. Dell L. Pooler is hereby prohibited from voting for a director of any bank insured by the FDIC without the prior written approval of the appropriate Federal banking agency as that term is defined in section 3(q) of the Act, 12 U.S.C. §1813(q).

This ORDER shall become effective ten (10) days after the date of its issuance.

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.

Prior to the execution and entry of the Stipulation and Removal Order, the record reflects that Respondent Pooler, through his Counsel, had previously corresponded with the FDIC Regional Director for the purpose of negotiating certain agreements and understandings with respect to the terms of the Order.

On April 25, 1989, the same date on which both the Stipulation and Removal Order were executed, the Regional Director replied to Respondent's inquiry, by letter, the expressed purpose of which was to "enumerate those understandings to which the FDIC will agree, provided Mr. Pooler fulfills his stated intent to Stipulate to an FDIC Order of Removal..."

The letter of the Regional Director addressed various and sundry issues, and then turned to the subject of Mr. Pooler's voting rights with respect to the shares of bank stock which he held individually, and through ownership of the bank's holding company, the Bellevue Service Company. In relevant part, the letter read as follows:

It is the position of the FDIC that the Order would not prohibit Mr. Pooler from voting shares of the bank stock owned by him or the bank's holding company provided that Mr. Pooler: (1) does not directly or indirectly solicit, procure, transfer, attempt to transfer, vote, or attempt to vote, any proxies, consents or authori-

¹ The FDIC post-hearing motion to correct the transcript is hereby granted.

² Effective August 9, 1989, Section 8(e) of the Act, was amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). Though the Prohibition and Removal Order at issue in this proceeding was entered prior to the amendment, for reasons that will become more obvious below, the statutory amendment actually had the effect of incorporating into the section the identical language set forth in the Removal Order.

[\[9-30-93 p.A-2262\]](#)zations *from other shareholders* of the bank or its holding company, and (2) Mr. Pooler receives prior written approval from the FDIC to vote the stock of the bank held either directly or indirectly by Mr. Pooler or its holding company for directors of the Bank. Additionally it is understood that Mr. Pooler may vote the bank stock held personally by Mr. Pooler or the bank's holding company without the prior written approval of the FDIC if the matter to be voted upon is something other than the election of directors of the bank.
Emphasis Added.

This letter was directed personally to Mr. Pooler and his counsel, a copy of which was likewise provided to the Board of Directors of the Bellevue State Bank.

The evidence establishes that Respondent Pooler completely removed himself from any participation in the conduct of the bank. Though he had regularly attended the annual stockholder's meetings, the Respondent decided to discontinue his attendance therein, notwithstanding that under the terms of the Order, neither his attendance, nor his ability to vote his shares on matters not involving the election of directors were prohibited.

As bank management began preparations for the annual 1990 stockholder's meeting, they grew concerned to learn that Mr. Pooler's shares would not be represented. This concern was principally motivated by the fact that without representation of Mr. Pooler's personal and service company stock, a requisite quorum might not be achieved, and hence, a valid annual meeting could not be convened.³

Accordingly, two bank officers approach Respondent Pooler with a request that he permit his shares to be represented at the meeting by proxy. Both officers knew of the existence of the outstanding Order, though neither had actually seen the final version. The evidence establishes that both officers were repeatedly reminded of the importance of insuring FDIC approval of any action with respect to Respondent Pooler's shares.

On December 5, 1989, Respondent Pooler, at the request of the two bank officers, executed a written appointment of proxy, in which he delegated to another director of the bank, one Mr. Steven M. Gibbs, the power to vote the respondent's personal shares of bank stock as "if there personally present with power of substitution." The intent of the proxy was for no other apparent reason than to insure presence of a required quorum.

The following day, December 6, 1989, the bank president, Mr. Thomas J. Daugherty, wrote the FDIC Regional Office, informing them of Mr. Pooler's intent to vote his personal shares by proxy. The principal purpose of Mr. Daugherty's letter was to inquire whether the arrangement would comply with the terms of the outstanding Order.

Deputy FDIC Regional Counsel Edward Lanning replied to the letter on December 29, 1989. Mr. Lanning reiterated the terms of the order and Statute,⁴ repeated the prohibition on Mr. Pooler's transferring or voting of proxies, and concluded that Mr. Pooler may otherwise vote his own bank stock on matters not involving the election of directors.

The officers and directors of the Bank were very conscious of the existence of the outstanding Removal Order. They very genuinely and sincerely wanted to insure that the terms of the Order were scrupulously complied with, largely because it was at their request that Respondent Pooler even executed the written proxy.

The officers consulted with bank counsel who opined that the terms of the Order, when read in conjunction with the Regional Director's letter of April 25, 1989, and the Deputy Regional Counsel's letter of December 29, 1989, permitted Mr. Gibbs to attend the 1990 stockholder's meeting, and to represent and vote therein the shares of Mr. Pooler. The bank counsel further concluded that the proxy could only vote for those matters not involving the election of directors.

The record reflects that the bank's cashier, Mr. Timothy P. Daugherty, advised Respondent Pooler, as well as his appointed proxy, Director Gibbs, of the above conclusion.

³ This concern about quorum appears to have been genuinely held, for an Iowa State Bank Examination conducted in January of 1992 cited the bank for a violation of Section 524.512 of the Code of Iowa, as it was deemed that the requisite quorum of shares entitled to vote at the 1990 and 1991 stockholder's meeting was not present. After further consideration and discussion, however, the violation was subsequently withdrawn by the Iowa Division of Banking.

⁴ The State, 12 U.S.C. §1818(e)(6), had since been amended to incorporate the exact limitations imposed by the Order.
[{{9-30-93 p.A-2263}}](#)

Accordingly, Director Gibbs did attend the 1990 stockholder's meeting, registering with the corporate secretary the Respondent's written proxy. The records clearly reflect that Mr. Gibbs abstained from voting the respondent's 409 shares for the election of directors.

The following year, December of 1990, this entire process was again repeated, in virtually identical fashion. Respondent Pooler, again at the request of representatives of the bank, executed a written appointment of proxy, empowering Director Gibbs to vote and represent his personal shares at the 1991 annual stockholder's meeting, which Mr. Gibbs did, again abstaining from any vote for the election of directors.

Thereafter this action was instituted, alleging that respondent Pooler, by granting the two proxies in question, violated the outstanding Order as well as Section 8(e)(6) of the Act, 12 U.S.C. §1818(e)(6).

DISCUSSION OF LAW

It is undisputed that Respondent Pooler may have legally and permissibly attended the annual stockholder's meetings, and may have voted his personal shares on all corporate matters not involving the election of directors.

The very limited issue in this proceeding, therefore, is whether the Respondent, by granting a proxy to another shareholder, for the principal purpose of insuring a quorum at the annual stockholder's meeting, necessarily violated the written Order and Statute which prohibit the "transfer of proxies."

By way of background, a brief review of some general principles of corporate law may be helpful.

The term "proxy" is properly defined as the grant of authority, given by a shareholder to another, for the purpose of insuring representation at a meeting of the corporate stockholders. 5 W. Fletcher, *Cyclopedia of Corporations*, §2050, (perm. ed. 1987). The right to be represented and to vote by proxy is recognized as a legal incident of stock ownership. *Id.* The appointment of a proxy involves the creation of an agency relationship, in which the grantor delegates to the proxy, the authority to represent and bind the principal, to the same extent as if the grantor has acted personally. 18 C.J.S. *Corporations* §387 (1990).

The term "proxy" is often used ambiguously in the law, sometimes referring to the grant of authority to

vote, sometimes to the actual document granting the authority, while at other times referring to the person to whom the authority is granted. 1 Model Business Corp. Act Annot. §7.22 (1985).

To alleviate this ambiguity, the drafters of the Revised Model Business Corporation Act adopted very specific nomenclature with respect to this subject, such that the term "proxy" specifically refers to the person delegated the power, the term "appointment" is used to describe the grant of authority to vote, and the word "form" is used to describe the written document which appoints the proxy. *Id.* at 603.

With this general background in mind, we now turn to the language which is at issue in this matter. Unfortunately, the language contained in the Order imposed upon Respondent Pooler, and subsequently adopted at Section 8(e) of the Act, deviates from the specificity achieved in the Model Act, and quite frankly, is ambiguous. The pertinent provisions prohibit the Respondent from "*transferring a proxy*," the exact meaning of which is simply unclear.

The Respondent contends that the term "proxy" in this instance, when used with the verb "transfer," must be intended to signify the conveyance or consignment of a written proxy granted by another, for example, in connection with an accumulated proxy pool or other representative combination or agreement.

The respondent's reasoning is that a person would not "transfer" their own "proxy," but rather, would "grant" or "appoint" one.

The Enforcement Counsel, on the other hand, argues that the respondent's appointment of Director Gibbs as his proxy constitutes an improper "transfer" within the meaning of the Order, obviously attaching slightly different meaning to the term "proxy."

After carefully considering all of the evidence of record, I can only conclude that the language employed in both the Order and the statute is unclear.

Analyzing the entire context in which the contested phrase appears, it would seem as though the meaning ascribed by the Respondent is certainly well-reasoned. Clearly one could only "solicit" or "procure" or "vote" the proxy of *another*, and it is quite clear that none of those limitations could possibly [\[9-30-93 p.A-2264\]](#) apply to the Respondent's granting a proxy for his own stock. The question then becomes why should the term "transfer," which is comfortably couched within these other terms, be given some meaning inconsistent with the natural reading of the others. To this end, the Respondent's interpretation of the disputed clause is further bolstered by the following additional circumstances. First, there is the letter of the FDIC Regional Director, which unequivocally states that Respondent may not "...solicit, procure, transfer...or vote...proxies ...*from other shareholders*." (Emphasis Supplied).

This language can only be read as being completely consistent with the interpretation advanced by the Respondent.

Second, there is the legislative and agency intent associated with this provision. Though the history concerning this language is particularly scant,⁵ the testimony of Assistant Regional Director Daughenbaugh establishes that the intent of the language is to prevent a prohibited individual from exercising control over an institution and its board, by the direct or indirect manipulation and voting of bank stock.

Clearly it would be incongruous for a prohibited individual to be permitted to solicit, procure, and then vote the shares of other stockholders. That practice could allow a prohibited individual to amass a controlling block of shares and thereby nullify the effect of his prohibition.

Nor should a prohibited individual be permitted in any way to transfer to another, the collected stock of other shareholders, for the purpose of carrying out some voting scheme designed to effect composition of the board. Though the prohibited individual clearly cannot vote for the election of a director, he or she might seek the complicity of some confederate shareholder, such that the transfer of proxied shares to this accomplice would have the effect influencing the election, in clear circumvention of the Order and the Law.

If the conceded intent of this provision is to prevent a prohibited person from conspiring with others to exercise control over an institution, I find it difficult to understand how the appointment of a proxy, whose authority to vote is limited to that which the grantor possesses, could in any way present more threat to the control of the institution than if that person were present at the meeting, voting the shares in person.

If anything, it would seem to me that the personal attendance at the meeting, by a person prohibited from participating in the affairs of the bank, could only increase the threat of such conspiracy. Furthermore it would seem that the relinquishment and conveyance of the voting right to a proxy would have the effect, if any, of actually diluting such threat, as the proxy may or may not vote the shares as desired by the grantor, and for that matter, may or may not even attend the meeting.

All of the above discussion notwithstanding, there is the decision set forth *In the Matter of Peder B. Sletteland*, FDIC-89-40j, 2 P-H FDIC Enf. Dec. ¶1512 (March 27, 1990), which involved the identical language at issue in this proceeding, as those terms were once part of another provision of the Act.⁶

In *Sletteland*, a removed individual and controlling shareholder, who was similarly restrained from

voting his stock for the election of board directors, established an irrevocable and renewable voting trust agreement, to which he transferred a controlling portion of his bank stock, designating his 26 year old son as trustee. The matter came before the Board upon the son's application for change of control of the bank.

That transaction, unlike the one at bar, actually had the effect of transferring ownership of the stock from the removed director to his trustee son. Thus, that transfer would have had the effect of circumventing the limitation on director elections, if the pending application for change of control were approved.

Though ultimately concluding that the application should be disapproved on other grounds, Administrative Law Judge James L. Rose reasoned that the thrust of the statutory limitation on soliciting, procuring, or transferring voting rights, was designed to prevent a removed director from gathering or accumulating the rights of others, and was not intended to prohibit the relinquishing or alienating of personal voting rights.

⁵ See S. Rep. No. 1482, *Financial Institutions Supervisory Act of 1966*, 89th Cong., 2nd Sess., reprinted in Vol. 3 U.S. Code Cong. and Ad. News, 3532.

⁶ FIRREA had the effect of moving the language once contained at Section 8(j)(i) to the current Section 8(e)(6).

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In the Final Decision, however, the FDIC Board of Directors expressly rejected the ALJ's "gathering of rights" analysis, and concluded that the identical statutory language at issue in this proceeding makes no distinction between transfers *from* a removed director or *to* a director. (Emphasis is Original).

Though this ruling may, in part, have been motivated by the Board's concern for an obvious attempt to circumvent an outstanding Removal Order, it nonetheless sets precedent for this case, which precedent I am constrained to follow.

Accordingly, I must conclude that the actions of Respondent Pooler, by the grant and appointment of a proxy on two occasions, while the subject of an outstanding and effective Removal Order, were in fact violations of the terms of a Final Order within the meaning of Section 8(i)(2)(A)(ii) of the Act. For each of these violations a First Tier Civil Money Penalty may be assessed pursuant to Section 8(i)(2)(A).

In determining the amount of penalty to be assessed, the FDIC is required to take into consideration the factors set forth in Section 8(i)(2)(G), which include the size of the Respondent's financial resources; the Respondent's good faith; the gravity of his violations; the history of previous violations; and such other matters as justice may require.

In my opinion the record in this matter is devoid of any evidence that would suggest that the Respondent has acted in anything but good faith. I have considered that with respect to both violations, the Respondent acted at the request of bank officers, for the purpose of enabling a requisite quorum of stockholders to convene, and for no other purpose personal or sinister to himself. I am convinced that Respondent fully intended to comply with the law in this regard.

I have also considered the gravity of the offense. By his actions the respondent did not cause any loss or harm to the bank, nor did he circumvent, or even attempt to circumvent, the prohibition concerning the election of directors. There is no showing that his conduct resulted in the receipt of anything of personal benefit to himself. By this measurement I must consider the gravity of this offense minimal.

I have considered the Respondent's previous violations, which are indeed serious, and his financial resources, which are sufficient to sustain a civil penalty. Most importantly, however, I have considered other matters which justice clearly requires in this case, including the extremely confusing and misleading letter of the Regional Director dated April 25, 1989, the ambiguity of the language contained within the Removal Order and statute, and the lack of any clarity in the reply letters returned in response to the Bank's inquiries. I am at a loss to understand why Mr. Lanning's letter of December 29, 1989, did not unequivocally notify the bank president that Mr. Pooler's stated intention of appointing a proxy to attend the 1990 meeting would violate the terms of his Removal Order. Perhaps Mr. Lanning himself was confused about, and uncertain of, the interpretation to be subsequently given by the FDIC Board, as were the former Regional Director, and Judge Rose.

For all of the above reasons, I find that the violations in this proceeding have been completely mitigated, and that no penalty should be imposed.

In support thereof, I enter the following Findings of Fact, Conclusions of Law, and Proposed Order.

FINDINGS OF FACT

1. At all times pertinent to the charges herein, the Bellevue State Bank was a corporation existing and

doing business under the laws of the State of Iowa, with its principal place of business in Bellevue, Iowa.

2. At all times pertinent to the charges herein, the Bank has been, and is, an insured State nonmember bank subject to the Act, 12 U.S.C. §§1811 *et. seq.*, the Rules and Regulations of the FDIC, 12 C.F.R. Chapter III, and the laws, rules and regulations of the State of Iowa.

3. Prior to April 25, 1989, the Respondent was president, director, and a principal shareholder of the Bank.

4. On April 25, 1989, Respondent Pooler entered into a STIPULATION AND CONSENT AGREEMENT with the FDIC, as part of a Prohibition and Removal Proceeding instituted under Docket Number FDIC-89-68e.

5. On April 25, 1989, in accordance with the STIPULATION AND CONSENT AGREEMENT, and as authorized by section 8(e) of the Act, 12 U.S.C. §1818(e), the FDIC issued a final ORDER OF RE- ~~{9-30-93 p.A-2266}~~ MOVAL FROM OFFICE AND PROHIBITION FROM FURTHER PARTICIPATION against Respondent Pooler.

6. A copy of the ORDER was personally served upon the Respondent, became effective ten days after the date of its issuance, and remains in effect without change or modification.

7. The same date on which the STIPULATION WAS EXECUTED and the ORDER was issued, the FDIC Regional Director, by letter, enumerated those understandings to which the FDIC would agree, provided that Respondent Pooler fulfilled his stated intention of stipulating to an Order of Removal.

8. The LETTER, which was served upon the Respondent, his counsel, and the Board of Directors of the Bank, expounded upon certain terms contained within the ORDER.

9. In particular, the LETTER addressed Respondent Pooler's ability to vote his shares of Bank stock, held at the time the ORDER was issued.

10. The LETTER specifically represented that Respondent Pooler would be prohibited from voting his shares of the Bank stock for the election of any director.

11. The LETTER further represented that the ORDER would not prohibit Respondent Pooler from voting his shares of bank stock in other matters, provided that he did not "directly or indirectly solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxies, consents or other authorizations from other shareholders of the bank or its holding company."

12. The terms of the ORDER, when read in conjunction with the LETTER, could reasonably be interpreted to prohibit the soliciting, procuring, transferring, or voting of proxies from other shareholders only.

13. The terms of the ORDER, when read in conjunction with the LETTER, could reasonably be interpreted to permit the grant or appointment of a proxy, for the voting and representing of the Respondent's shares, provided, however, that the vote cast on behalf such shares was for matters not involving the election of bank directors.

14. The phrase "transferring or attempting to transfer any proxies" is an ambiguous phrase, which may or may not be interpreted as embracing the concept of granting or appointing a proxy.

15. After entry of the ORDER, Respondent Pooler discontinued all participation in the affairs of the Bank, and further elected to discontinue his attendance at the annual stockholder's meetings.

16. Certain officers and directors of the Bank grew concerned that the Respondent's absence from the stockholder's meeting would result in the failure to achieve a required quorum, such that a legally constituted meeting could not be convened.

17. The Bank's President and the Bank's Cashier initiated contact with Respondent Pooler, to ascertain his ability and willingness to execute and grant a proxy, for the purpose of having his shares represented at the 1990 annual stockholder's meeting.

18. On December 5, 1989, at the request of the Bank's President, Mr. Thomas J. Daugherty, corresponded by letter with the FDIC Regional Director, inquiring whether the measures planned to be taken by bank management, to insure representation of Respondent Pooler's shares by proxy, would comply with the terms of the outstanding ORDER.

19. The following day, December 6, 1989, the Bank's President, Mr. Thomas J. Daugherty, corresponded by letter with the FDIC Regional Director, inquiring whether the measures planned to be taken by the bank management, to insure representation of Respondent Pooler's shares by proxy, would comply with the terms of the outstanding ORDER.

20. On December 29, 1989, FDIC Deputy Regional Counsel Edward Lanning replied to the president's inquiry. Mr. Lanning's letter simply repeated the literal language of the ORDER, again employing the ambiguous phrase "transferring of proxies."

21. Mr. Lanning's letter did not clarify the confusion or ambiguity that surrounds the use of the above phrase.

22. Upon receipt of Mr. Lanning's letter, the bank's officers consulted with counsel, to insure that their planned actions did not in any way violate the terms of the ORDER.

23. The bank's officers acted very conscientiously in this regard, and took genuine and reasonable efforts to insure compliance with the law.

24. The bank's counsel concluded that the terms of the Order and Statute, when read in conjunction with the LETTER, and when further read in conjunction with Mr. Lanning's letter of December 29, 1989, did not prohibit the grant of a proxy, provided, how- [{{9-30-93 p.A-2267}}](#)ever, that the shares were not voted in any matter involving the election of directors.

25. The Bank's Cashier, Mr. Timothy P. Daugherty, advised Respondent Pooler, as well as the appointed proxy, Director Gibbs, of the above conclusion.

26. The Bank's 1990 annual meeting of shareholders was convened on January 11, 1990.

27. The Respondent was not present at the Bank's 1990 annual shareholders meeting, but was represented by his appointed proxy, as registered with the recording secretary at the meeting.

28. Director Gibbs abstained from voting the Respondent's shares at the election of directors, and the corporate records properly reflect this abstention.

29. The following year, the above process was repeated in virtually identical fashion.

30. On December 15, 1990, at the request of the Bank's officers, Respondent Pooler, in his individual capacity, again appointed Director Steven M. Gibbs as proxy, to vote his personal shares in connection with the Bank's 1991 annual shareholder's meeting ("second proxy").

31. The Bank's 1991 annual meeting of shareholders was convened on January 10, 1991.

32. The Respondent was not present at the Bank's 1991 annual shareholders meeting, but was represented by his appointed proxy, as registered with the recording secretary at the meeting.

33. Director Gibbs again abstained from voting the Respondent's shares at the election of directors, and the corporate records properly reflect this abstention.

34. The Bank did not suffer any form of financial loss as a result of the Respondent's appointment of the first or second proxy.

35. The Respondent's proxy appointments were for the limited purpose of insuring that the requisite quorum of shares were represented at the above stockholder's meetings.

36. The Respondent's shares were not voted at either meeting for the election of any bank director, not was there any apparent attempt to circumvent the limitation set forth in the ORDER.

CONCLUSIONS OF LAW

1. At all times pertinent to this proceeding, the Bank was an insured depository institution within the meaning of Section 3(c)(2) of the Act, 12 U.S.C. §1813(c)(2).

2. On January 11, 1990, the Respondent was a controlling shareholder of the Bank in that he personally owned 409 of the Bank's 3,000 outstanding shares, and indirectly controlled, through his ownership of the Bellevue Service Company, an additional 1,492 shares of the Bank's stock.

3. On January 10, 1991, the Respondent was a controlling shareholder of the Bank in that he personally owned 445 of the Bank's 3,000 outstanding shares, and indirectly controlled, through his ownership of the Bellevue Service Company, an additional 1,492 shares of the Bank's stock.

4. As a controlling shareholder of the Bank, the Respondent was an institution-affiliated party of the Bank within the meaning of section 3(u) of the Act, 12 U.S.C. §1813(u).

5. The term "violates" as used in Section 8(i) of the Act, 12 U.S.C. §1818(i), includes, without limitation, any action, alone or with another or others, for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

6. The FDIC has been and is the "appropriate Federal Banking agency," as that term is defined by section 3(q) of the Act, 12 U.S.C. §1813(q), to assess and collect civil money penalties against the Bank and any of its institution-affiliated parties.

7. The FDIC has jurisdiction over the Bank, the Respondent, and the subject matter of this proceeding.

8. Under section 8(i) of the Act, 12 U.S.C. §1818(i), the FDIC has authority to impose civil money penalties against any institution-affiliated party who, among other things, violates any final order issued pursuant to section 8(e) of the Act.

9. Since April 25, 1989, the Respondent is and has been a person subject to a final order issued under section 8(e) of the Act, 12 U.S.C. §1818(e).

10. Effective August 9, 1989, section 8(e) of the Act, 12 U.S.C. §1818(e), was amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989).

11. Since August 9, 1989, the Respondent is and has been a person subject to sec- [{{9-30-93 p.A-2268}}](#)tion 8(e)(6) of the Act, 12 U.S.C. §1818(e)(6).

12. On December 5, 1989, by appointing Director Steven M. Gibbs to act and serve as his proxy at the 1990 annual stockholder's meeting, Respondent Pooler violated that portion of his Prohibition and Removal Order, as well as that portion of Section 8(e)(6) of the Act, which proscribe the "transfer" of any

proxy, as that term was subsequently interpreted by the Board of Directors of the Federal Deposit Insurance Corporation in *The Matter of Peder B. Sletteland*, 2 FDIC Enf. Dec. ¶5152 (March 27, 1990).

13. By executing and/or delivering the first proxy, the Respondent caused, brought about, participated in, counseled or aided or abetted violations of section 8(e)(6) of the Act, 12 U.S.C. §1818(e)(6).

14. The violation regarding the first proxy continued for a period of 37 days from the date of its execution on December 5, 1989, to the conclusion of the 1990 annual meeting on January 11, 1990, when the appointment expired.

15. On December 15, 1990, by appointing Director Steven M. Gibbs to act and serve as his proxy at the 1991 annual stockholder's meeting, Respondent Pooler violated that portion of his Prohibition and Removal Order, as well as that portion of Section 8(e)(6) of the Act, which proscribes the "transfer" of any proxy, as that term has been interpreted by the Board of Directors of the Federal Deposit Insurance Corporation in *The Matter of Peder B. Sletteland*, 2 FDIC Enf. Dec. ¶5152 (March 27, 1990).

16. By executing and/or delivering the second proxy, the Respondent caused, brought about, participated in, counseled or aided or abetted violations of section 8(e)(6) of the Act, 12 U.S.C. §1818(e)(6).

17. The violation regarding the second proxy continued for a period of 26 days from the date of its execution on December 15, 1990, to the conclusion of the 1991 annual meeting on January 10, 1991, when the appointment expired.

18. Respondent Pooler may be properly assessed a First Tier Civil Money Penalty pursuant to 12 U.S.C. §1818(i)(2)(A), for the above violations of the Removal Order and the Act.

19. There are mitigating factors that must be considered in this case, including the good faith of the Respondent and the others involved, the relatively technical and insignificant nature of the violations which in no way threatened the Bank or the composition of the Bank's Board, and finally, the other matters which justice requires to be considered in this case, including the ambiguity and confusion surrounding the language employed in the ORDER, about which reasonable legal minds obviously differ.

20. Justice requires the imposition of no penalty.

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.

The Board finds, based upon the mitigating factors unique to this proceeding, that no Civil Money Penalties should be assessed for the violations of the outstanding Removal Order and Section 8(e)(6) of the Act, as established herein.

IT IS HEREBY ORDERED that the Recommended Decision of the ALJ, including the Findings of Fact and Conclusions of Law, are adopted in full.

IT IS FURTHER ORDERED, upon consideration of the mitigating factors presented herein, as required by Section 8(i)(2)(G) of the Act, that no civil money penalties be assessed.

Dated this 2nd day of March, 1993.

/s/ Arthur L. Shipe
Administrative Law Judge
Date: March 2, 1993