

{{5-31-93 p.A-2000.15}}

¶5180] **In the Matter of Paul E. Oberstar, Boundary Waters State Bank, Ely, Minnesota, Docket No. FDIC-91-354k (8-4-92).**

Board adopts ALJ's Recommended Decision finding that Respondent's answer to a notice of assessment of a civil money penalty was untimely filed, and that he did not establish good cause for his failure to file a timely answer. Respondent ordered to pay \$125,000 for violations of Change in Bank Control Act. [This order was reversed, along with the order at ¶5171, by the 8th Circuit Court of Appeals, 987 F.2d 494 (3-2-93).]

**[.1] Practice and Procedure — Civil Money Penalty — Answer — Time to File**

Where a timely request for a hearing has been made, Respondent's failure to file a timely answer does not trigger an automatic default judgment but requires {{5-31-93 p.A-2000.16}}the Board to consider whether Respondent had good cause for failing to file a timely answer. If good cause is not shown, a default order is appropriate.

**[.2] Civil Money Penalty — Notice of Assessment — Good Cause for Failure to Answer**

Expense of filing an answer, belief that enforcement counsel was aware of the nature of Respondent's defense, and similarity between defense to this notice and defense to another, pending FDIC enforcement action, do not constitute good cause for failure to file an answer.

**In the Matter of  
PAUL E. OBERSTAR,  
individually and as an  
institution-affiliated party of  
BOUNDARY WATERS STATE BANK  
ELY, MINNESOTA  
(Insured State Nonmember Bank—In  
Receivership)  
DECISION AND ORDER TO PAY  
FDIC-91-354k**

*DECISION*

*I. Introduction*

This matter is before the Board of Directors ("Board") of the Federal Deposit Insurance Corporation ("FDIC") following the issuance of a Recommended Decision by Administrative Law Judge Arthur L. Shipe ("ALJ").<sup>1</sup>The ALJ's Recommended Decision found that the answer of Respondent Paul E. Oberstar ("Respondent") was untimely filed and that Respondent failed to establish good cause for his failure to file a timely answer. The ALJ therefore recommended the issuance of an order to pay a civil money penalty in accordance with the Notice of Assessment of Civil Money Penalty, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing ("Notice") which had been issued to Respondent on December 31, 1991, pursuant to sections 7(j)(16) and 8(i)(2) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. §1817(j)(16) and 12 U.S.C. §1818(i)(2).

Following a thorough review of the Recommended Decision and the entire record in this proceeding, the Board concurs in the findings of the ALJ and adopts in full his Recommended Decision, Findings of Fact and Conclusions of Law.

*II. Procedural History*

The case before the Board is the second enforcement action against Respondent taken by the FDIC. Argument was held on June 8, 1992, in the Court of Appeals for the Eighth Circuit on Respondent's petition for review of the Order of the FDIC Board prohibiting Respondent from further participation in the conduct of the affairs of any insured depository institution ("*Oberstar I*").<sup>2</sup>In *Oberstar I* Respondent was represented by the same counsel representing him in this proceeding ("*Oberstar II*"). Respondent filed a timely request for a hearing and a timely answer in *Oberstar I*. Resp. Exceptions at 2.

Five days after Respondent filed his Notice of Appeal in the Eighth Circuit in *Oberstar I*, the Notice in

*Oberstar II* was issued. Respondent received the Notice on January 6, 1992, and counsel for Respondent filed a request for a hearing on January 8, 1992, within 20 days of service of the Notice. The answer was due on January 27, 1992; however, no answer was filed until February 19, 1992. Respondent requested neither nor leave to file late. FDIC Enforcement Counsel filed

---

<sup>1</sup>References to the record shall be as follows:

Recommended Dec. — "Rec. Dec. at \_\_\_\_."

Affidavit of John F. Bonner, III—"Bonner Affidavit at \_\_\_\_."

Affidavit of Edward G. Lanning—"Lanning Affidavit at \_\_\_\_."

Respondent's Exceptions—"Resp. Exceptions at \_\_\_\_."

---

<sup>2</sup>A separate action by the FDIC pursuant to section 8(e) of the FDI Act, 12 U.S.C. §1818(e), was commenced on March 6, 1991, to prohibit Respondent from further participation in the conduct of the affairs of any insured depository institution. On cross motions for summary disposition, the Board issued its Decision and order prohibiting Respondent from such further participation on November 26, 1991. See *In the Matter of Paul E. Oberstar, Boundary Waters State Bank, Ely, Minnesota*, Docket No. FDIC-91-19e, 2 FDIC Enforcement Decisions and Orders (P-H) 5171 (Nov. 26, 1991). Respondent appealed the Board's decision to the Court of Appeals for the Eighth Circuit, and the appeal is pending. The record before the Board contains no explanation of why two separate actions were initiated. As a matter of administrative efficiency, it would appear that whenever possible actions of this nature ordinarily should be consolidated.

[{{3-31-93 p.A-2000.17}}](#)his Motion for Entry of an Order of Default ("Default Motion") on February 27, 1992. Rec. Dec. at 1–2.

### III. Discussion

[.1] The Board and both parties recognize that under the Uniform Rules of Practice and Procedure governing this proceeding (12 C.F.R. §308.19), where a timely request for a hearing has been made, a Respondent's failure to file a timely answer does not trigger an automatic default judgment.<sup>3</sup>See Resp. Exceptions at 6. Rather, the Board must consider whether Respondent has made a showing of good cause for his failure to file a timely answer. Had Respondent not preserved his right to proceed by filing a timely request for a hearing, the Notice would have become a final and un-appealable order. 12 U.S.C. §1818(i)(2). It is only because a hearing request was timely filed that the issue of good cause for failing to file a timely answer is before the Board. In the absence of good cause, an entry of a default order is appropriate as the FDIC's Rules provide:

*(c) Default.—(1) Effect of failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice. if no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. *Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file with the Board of Directors a recommended decision containing the findings and the relief sought in the notice.* 12 C.F.R. §308.19(c) (emphasis added).

The Board has carefully reviewed each of Respondent's assertions and finds that Respondent's failure to file a timely answer was neither inadvertent nor trivial and that none of the excuses raised for his tardiness constitutes good cause.

[.2] First, Respondent's counsel claims that "since the assignment and hearing process in these matters is usually somewhat lengthy, and because [Respondent's counsel] deemed it likely that this matter would in all probability be continued to permit the Eighth Circuit to rule, an Answer seemed to be an unnecessary expense." Resp. Exceptions at 3–4; Bonner Affidavit at ¶5. The Board is at a loss to discern why or how Respondent's counsel "deemed it likely" that this matter would be continued to permit the Eighth Circuit to rule in *Oberstar I*. Only Respondent had an interest in such a continuance, and Respondent never requested a continuance or a stay of any kind. Obvi-  
(Next page is A-2001.)

---

<sup>3</sup>Hereinafter, the Uniform Rules of Practice and Procedure are referred to as the "FDIC's Rules." [{{10-31-92 p.A-2001}}](#)ously, without a request by a party for a stay or continuance the Board would have

no reason to consider a modification in the administrative process. The Eighth Circuit, of course, has no jurisdiction over *Oberstar II* and could not stay this proceeding. Thus, there is no factual basis for the assumption made by Respondent's counsel. As there was not even a possibility that his prediction would materialize it was completely unreasonable.

In addition, when Respondent's counsel asserts that filing an answer was an "unnecessary expense," presumably he was trying to economize for the benefit of his client. Resp. Exceptions at 4. Even if expense were relevant to the requirement of filing an answer, which it is not, his argument is significantly undercut by his admission that the answers "filed by Mr. Oberstar in both FDIC proceedings were nearly identical." *Id.* Thus, the expense of filing an answer was minimal and Respondent's primary assertion is patently without merit and does not establish good cause.

Second, Respondent's counsel concluded that FDIC Enforcement Counsel "was aware of his position as to the allegations in the Notice" because the Notice in *Oberstar I* and *Oberstar II* "were virtually identical." Respondent's Memorandum in Opposition to the FDIC's Motion for Default at 2. Respondent's Counsel evidently concluded that an answer in *Oberstar II* was therefore unnecessary. This was an erroneous conclusion that he reached at his peril. Respondent's counsel's "belief" (even if correct) that FDIC Enforcement Counsel was aware of Respondent's position does not excuse the procedural requirement that a timely answer be filed. Moreover, Respondent's position is again undercut by his admission that he "recognized that the Notice [in *Oberstar II*] has independent status. . . ." Resp. Exceptions at 6.<sup>4</sup> Thus, there is no legal or factual basis for Respondent simply to have ignored the regulatory requirement to file an answer in a timely manner.<sup>5</sup>

Finally, Respondent's counsel complains that "the FDIC also knew the phone number, fax number and address of Mr. Oberstar's counsel. The FDIC, however, failed to contact Mr. Oberstar's counsel and ask that the Answer be submitted." Resp. Exceptions at 4. To the contrary, the FDIC issued its Notice to Respondent clearly informing him of the requirement to file an answer within 20 days. Respondent contends that until after the answer was filed, there was no communication concerning the answer from the FDIC. Bonner Affidavit at ¶7. FDIC Enforcement Counsel contends, however, that in a telephone conversation between himself and Mr. Bonner on January 7, 1992, Mr. Bonner informed FDIC Enforcement Counsel that he was going to file a Request for Hearing the next day and [FDIC Enforcement Counsel] "advised him that an answer was also required." Lanning Affidavit at ¶1. To be sure, the responsibility for appropriately filing an answer rests with Respondent. FDIC Enforcement Counsel is not responsible for the conduct of Respondent or his counsel and is not obliged to remind Respondent's counsel of his responsibilities. Respondent's counsel's attempt to characterize his own failure to comply with the regulatory requirement as a failure on the part of FDIC Enforcement Counsel is totally disingenuous.<sup>6</sup>

The Board has reviewed Respondent's submissions in light of the holding in *Amberg v. Federal Deposit Ins. Corp.*, 934 F.2d 681 (5th Cir. 1991), the only appellate court decision to address the issue of good cause for failure to file a timely answer under the FDIC Rules. The factors which led to the decision in *Amberg* are not present in this case. Most

---

<sup>4</sup>Respondent also seems to suggest that administrative economy resulted in his failure to file a timely answer because he was "attempting to make the Second Notice proceeding as concise as possible by incorporating" the decision of the Eighth Circuit in *Oberstar I*, which might be relevant to the outcome of this proceeding. Resp. Exceptions at 6. This is a frivolous position as Respondent's answer was due in January 1992, and the June 8, 1992, argument before the Eighth Circuit in *Oberstar I* was not even scheduled until March 1992. A decision from the court of appeals may take several months to be issued, depending upon the court's docket.

---

<sup>5</sup>Respondent does not claim, nor could he, that he was unaware of the requirement. Respondent's counsel has represented clients in at least four other enforcement proceedings before the FDIC.

---

<sup>6</sup>Respondent's counsel also complains that the FDIC never indicated to him in advance that it intended to file a Default Motion. Respondent's Memorandum in Opposition to the FDIC's Motion for Default at 4. As a legal matter this is irrelevant. There is no obligation to provide advance notice of such a filing. Nonetheless, Respondent's counsel's statement is contradicted by the Lanning Affidavit at ¶4 which states that on February 21, 1992, Mr. Lanning called Respondent's counsel and spoke with his associate, Kathryn J. Carlson, and advised her that he intended to file a Default Motion. [\[10-31-92 p.A-2002\]](#) significant is the change in the FDIC's Rules following the *Amberg* decision. The period in which a request for a hearing and an answer must be filed is now identical. Failure to request a hearing in a timely manner will result in the Assessment Notice becoming a final and unappealable order

by statute, 12 U.S.C. §1818(i)(2)(E)(ii). Failure to file a timely answer, however, no longer results in an "automatic" default and there is no diminution of any of the rights Congress provided. See *Amberg*, 934 F.2d at 688. As noted above, the Board must determine whether good cause exists for failure to file a timely answer. Where it does not, entry of a default order is appropriate.

The Board distinguishes the facts in *Amberg* which led to the finding of good cause from those in this case. In *Amberg*, the answer was filed one day late. Here, it was filed 23 days late, and only after two telephone "reminders".<sup>7</sup>In *Amberg*, the respondent ultimately requested an extension of time to file his answer. No such request was made here.<sup>8</sup>Also, the *Amberg* court suggested that the notice and transmittal letter sent to respondent by the FDIC were unclear or misleading. That is not an issue here, and the FDIC's notice and transmittal letter have been revised to eliminate the problems noted in *Amberg*. In this case none of Respondent's assertions either justifies or explains his failure to file a timely answer.

Other decisions support the Board's conclusion that entry of a default order is appropriate in this case. The Court of Appeals for the Ninth Circuit upheld the entry of an administrative default for failure to file a timely answer in *Kirk v. U.S. Immigration and Naturalization Service*, 927 F.2d 1106 (9th Cir. 1991). That court recognized the authority of the administrative law judge to enter a judgment by default when a timely answer was not filed, and concluded that the administrative law judge did not err in finding that the respondent's reasons for not filing on time were insufficient to establish good cause. The Court of Appeals for the Seventh Circuit has also recently affirmed the entry of a default judgment. In *the Matter of State Exchange Finance Company*, 896 F.2d 1104 (7th Cir. 1990). There the default was upheld although the answer was filed only two weeks late. Notably, the court stated "but even if the answer is filed two minutes late, if a default is entered the defendant cannot get it set aside without showing that he had good cause for the default." *Id.* at 1106. Moreover, the court clearly announced that it "has moved away from the traditional position [disfavoring default judgments] and [it] is increasingly reluctant to reverse refusals to set [defaults] aside." *Id.*; see also *Dimmitt & Owens Financial, Inc. v. United States*, 787 F.2d 1186, 1192 (7th Cir. 1986); *Hal Commodity Cycles Management Col v. Kirsh*, 825 F.2d 1136 (7th Cir. 1987); *North Central Illinois Laborers' District Council v. S.J. Groves & Co.*, 842 F.2d 164 (7th Cir. 1988); *United States v. DiMucci*, 879 F.2d 1488, 1493-96 (7th Cir. 1989). The court further explained that the "entry of a default judgment is becoming—without interference from this court—a common sanction for late filings by defendants, especially in collection suits . . . against sophisticated obligors". 896 F.2d at 1106. While *In the Matter of State Exchange Finance Company* does not involve an administrative action, the point made by the court regarding sophisticated litigants is noteworthy. In the instant case, both Respondent and his counsel have previously participated in administrative litigation before the FDIC and are well aware of the procedural requirements.

The Board is cognizant of the significance of a default order and would hesitate to enter such an order in the face of any evidence justifying Respondent's failure to act, especially in a civil money penalty proceeding. The Board, however, cannot and will not condone the outright flaunting of its procedural rules by a respondent or his counsel experienced in FDIC procedural requirements.<sup>9</sup>The Board is mindful of the *Amberg* court's quotation of 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice*

---

<sup>7</sup>According to his sworn affidavit, FDIC Enforcement Counsel reminded Respondent's counsel of the requirement to file an answer on January 7, 1992. Subsequently, on February 18, 1992, the law clerk to Judge Shipe and FDIC Enforcement Counsel conferred and agreed that neither of them had received a copy of an answer from Respondent. They agreed the law clerk should call Respondent's counsel, which he did. Apparently, in response to this call Respondent filed his answer on February 19, 1992. See Resp. Exceptions at 4; FDIC's Response to Respondent's Memorandum in Opposition to Motion For Default at 5.

---

<sup>8</sup>The FDIC Rules provide that a respondent may receive an extension of time to file an answer for good cause shown. 12 C.F.R. §308.13.

---

<sup>9</sup>To the extent that the failure in this matter rests solely with counsel, the Respondent has legal remedies available.

{10-31-92 p.A-2003} ¶55,10[2] (2d ed. 1990) that the "requirement of 'good cause' and the specific criteria of Rule 60(b) [of the Federal Rules of Civil Procedure ("FRCP")] have generally been interpreted liberally." Of course, FDIC administrative proceedings are not governed by the FRCP and the FDIC's Rules no longer refer to the FRCP. However even under the FRCP, the Board is unaware of any administrative or court decision or analysis in a treatise which has eliminated the need to show good cause to set aside a default. Under even the most liberal reading, the record before the Board contains

nothing which establishes good cause for the untimely filing or any other basis for modifying the recommendation of the ALJ.

#### IV. Conclusion

For the reasons set forth above, the Board adopts and incorporates the Findings of Fact and Conclusions of Law of the ALJ and enters the following Order to Pay ("Order").

#### ORDER TO PAY

The Board of the FDIC, has considered the entire record in this proceeding, including the ALJ's Recommended Decision and Order and Exceptions to the Recommended Decision filed by Respondent. It hereby adopts the recommendation of the ALJ that based upon Respondent's failure to provide good cause for the untimely filing of his answer in this proceeding, the Default Motion of FDIC Enforcement Counsel should be granted and an order to pay civil money penalty should be issued against Respondent.

ACCORDINGLY, IT IS HEREBY ORDERED, that by reason of the violations set forth in the Notice, a penalty of \$125,000 be, and hereby is, assessed against the Respondent pursuant to section 7(j)(16) and 8(i)(2) of the FDI Act, 12 U.S.C. §§ 1817(j) (16) and 1818(i)(2).

IT IS FURTHER ORDERED, that this Order shall be effective and the civil money penalty ordered 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.

By direction of the Board of Directors.

Dated at Washington, D.C., this 4th day of August, 1992.

---

#### RECOMMENDED DECISION

**In the Matter of  
Paul E. Oberstar, individually and as an institution-affiliated party of  
Boundary Waters State Bank  
Ely, Minnesota  
(Insured State Nonmember Bank—In  
Receivership)  
FDIC-91-354k  
ARTHUR L. SHIPE, Administrative  
Judge:**

This matter comes before me on the FDIC's Motion for Entry of Order of Default ("Default Motion"), filed by its Enforcement Counsel. On December 31, 1991, the Federal Deposit Insurance Corporation ("FDIC") issued a Notice of Assessment of Civil Money Penalty, Findings of Fact and Conclusions of Law, Order to Pay and Notice of Hearing ("Notice") against Paul E. Oberstar ("Respondent") pursuant to sections 7(j)(16) and 8(i)(2) of the Federal Deposit Insurance Act ("Act"), 12 U.S.C. § 1817(j)(16) and 12 U.S.C. §1818(i)(2).

Respondent received the Notice on January 6, 1992, and filed a Request for Hearing on January 8, 1992. FDIC's procedural rules require Respondent to also file an answer within 20 days of service of the Notice. Respondent's answer was due January 27, 1992. Respondent filed his Answer on February 19, 1992. Respondent requested neither an extension of time to file his answer nor leave to file out of time. The FDIC filed its Default Motion on February 27, 1992.

Respondent, pursuant to the Prehearing Order issued in this matter on March 9, 1992, filed his Memorandum In Opposition To The FDIC's Motion For Default on March 13, 1992 ("Reply"). On March 24, 1992, the FDIC's Enforcement Counsel filed the FDIC's Response To Respondent's Memorandum In Opposition To Motion For Default ("Response"). Upon consideration of the Default Motion, Reply and Response, and the complete record in this matter, I find that Respondent's answer was filed out of [10-31-92 p.A-2004](#) time, that Respondent has failed to establish any good cause for his failure to file a timely answer in this proceeding, and is in default. Wherefore, in conformity with section 308.19(c) of the FDIC Rules of Practice and Procedure ("FDIC Rules"), 56 Fed. Reg. 37,968, 37,980 (1991) (to be codified at 12 C.F.R. §308.19(c)), I make the following Findings of Fact and Conclusions of Law and I hereby issue the following recommended Order to Pay.

#### FINDINGS OF FACT AND

## CONCLUSIONS OF LAW

### JURISDICTION

1. Prior to its closing on November 30, 1990, the Bank was a corporation existing and doing business under the laws of the State of Minnesota with its principal place of business at Ely, Minnesota. At all times pertinent to this proceeding, the Bank was and had been a State nonmember bank within the meaning of section 3(e)(2) of the Act, 12 U.S.C. §1813(e)(2), an insured depository institution within the meaning of section 3(c)(2) of the Act, 12 U.S.C. §1813(c)(2), and subject to the Act, 12 U.S.C. §1811-1831I, the Rules and Regulations of the FDIC, 12 C.F.R. Chapter III, and the laws of the State of Minnesota.

2. At all times pertinent to this proceeding, Respondent was an institution-affiliated party within the meaning of section 3(u) of the Act, 12 U.S.C. §1813(u), in that he: (a) was a controlling stockholder within the meaning of section 3(u)(1) of the Act, 12 U.S.C. §1813(u)(1); (b) is a person who has filed or was required to file a change-in-control notice with the appropriate Federal banking agency under section 7(j) of the Act, 12 U.S.C. §1817(j), within the meaning of section 3(u)(2) of the Act, 12 U.S.C. §1813(u)(2); and/or (c) is a person who participated and/or participates in the conduct of the affairs of the Bank within the meaning of section 3(u)(3) of the Act, 12 U.S.C. §1813(u)(3).

3. The FDIC is the appropriate Federal banking agency within the meaning of section 3(q)(3) of the Act, 12 U.S.C. §1813(q) (3), and has jurisdiction over the Bank, Respondent and the subject matter of this proceeding.

4. The term "violation" as used in these Findings of Fact and Conclusions of Law ("Findings"), as defined in section 3(v) of the Act, 12 U.S.C. §1813(v), includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

### DENIAL OF RESPONDENT'S PRIOR CHANGE IN CONTROL APPLICATION

5. On April 28, 1989, Respondent and James H. Peterson submitted to the FDIC a Notice of Acquisition of Control concerning the Bank, under section 7(j) of the Act, 12 U.S.C. §1817(j), which was accepted as complete on or about May 17, 1989.

6. On August 11, 1989, the FDIC issued a Notice of Disapproval of Acquisition of Control and Notice of Hearing, FDIC-89-161j, ("Change in Control Matter") disapproving Respondent's and James H. Peterson's Notice of Acquisition of Control based, in part, on the FDIC's determination that ". . . the competence, experience or integrity of the Acquiring Persons and proposed management, and in particular Paul E. Oberstar. . . , is such that the proposed acquisition is not in the interest of the Bank's depositors or in the interest of the public to permit such persons to control the Bank."

7. Pursuant to section 7(j)(4) of the Act, 12 U.S.C. §1817(j)(4), the Respondent and James H. Peterson filed a timely request for a hearing and on December 18-21, 1989, a hearing on the Change in Control Matter was held before an administrative law judge ("ALJ") in Minneapolis, Minnesota.

8. On April 20, 1990, the ALJ issued a Recommended Decision in the Change in Control Matter recommending that the Notice of Acquisition of Control by Respondent and James H. Peterson be denied based, in part, on a finding that the competence and integrity of Respondent was such that it would not be in the interest of the Bank's depositors or the public to permit the proposed acquisition of control.

9. On August 28, 1990, the Board of Directors of the FDIC issued its Decision and Order in the Change in Control Matter and adopted the ALJ's Recommended Decision with certain modifications that are not pertinent to this proceeding. In its decision, the Board specifically stated: "[T]he uncontested facts fully support the finding that Oberstar lacks the competence and integrity to acquire the Bank."

{{11-30-92 p.A-2005}}

### VIOLATION OF CHANGE IN BANK CONTROL ACT

10. At all times pertinent to this proceeding, the Bank had 65,000 shares of voting common stock outstanding.

11. On or about July 30, 1990, and August 1, 1990, Craig Kronholm and Marcia Kronholm, respectively, executed a proxy ("Proxy") for their 55,199 shares of common stock of the Bank, representing 84.9 percent of the voting common stock outstanding, appointing either Respondent or John Wavrin as their proxy to attend all meetings of the stockholders with full power to vote such shares and substitute another proxy. The Proxy was effective for one year from the date thereof unless sooner revoked by written notice to the secretary of the Bank.

12. On or before August 6, 1990, Respondent accepted the Proxy and at a meeting of the Bank's stockholders on August 6, 1990, voted the Proxy, including voting for the election of the Bank's directors.

13. Upon accepting the Proxy, Respondent acquired control of the Bank within the meaning of section 7(j) of the Act, 12 U.S.C. §1817(j), by gaining the power to vote 55,199 shares, or 84.9 percent, of the Bank's voting stock outstanding for one year from the date of the Proxy. In addition, Respondent in fact exercised control of the Bank by voting the said shares of stock pursuant to the Proxy.

14. At the time Respondent acquired control of the Bank in violation of section 7(j) of the Act, 12 U.S.C. §1817(j), Respondent well knew that: (a) with respect to his Notice of Acquisition of Control, as set forth in paragraphs 5 and 6 of these Findings, the FDIC had issued a Notice of Disapproval of Acquisition of Control based, in part, on the grounds that he lacked the requisite integrity and competence; (b) in the Change in Control Matter, as set forth in paragraphs 7 and 8 of these Findings, the ALJ affirmed the FDIC's initial disapproval holding that Respondent's "record as a banker suggests that he lacks competence and integrity to have a controlling voice in a troubled bank"; (c) Respondent did not file any exceptions or objections to the said ALJ's Recommended Decision pursuant to section 308.39 of the FDIC's Rules of Practice and Procedure, 56 Fed. Reg. 37,968, 37,985 (1991) (to be codified at 12 C.F.R. §308.39); and (d) section 7(j) of the Act, 12 U.S.C. § 1817(j), required that he give 60 days' prior notice to the FDIC of any new proposed acquisition of the Bank. Notwithstanding the foregoing, as set forth in paragraphs 11 through 13 of these Findings, Respondent acquired control of the Bank individually even though his prior Notice of Acquisition of Control for the same Bank had been denied and without any additional notice to the FDIC.

15. Respondent violated section 7(j)(1) of the Act, 12 U.S.C. §1817(j)(1), by:

- (a) acquiring control of the Bank, as set forth in paragraphs 11 through 13 of these Findings, without giving the FDIC 60 days' prior notice of his proposed acquisition of control of the Bank; and
- (b) acquiring control of the Bank in spite of the fact that Respondent knew, or should have known, when he acquired control of the Bank that Respondent's prior Notice of Acquisition of Control of the Bank (i) had been disapproved by FDIC, as set forth in paragraph 6 of these Findings, (ii) an ALJ had issued a Recommended Decision affirming the FDIC's disapproval of Respondent's Notice of Acquisition of Control of the Bank, as set forth in paragraphs 7 and 8 of these Findings, and (iii) the ALJ's Recommended Decision was pending before the FDIC's Board of Directors and Respondent filed no exception or other objection to the ALJ's Recommended Decision.

*VIOLATIONS OF ORDER OF  
PROHIBITION AND SECTION 8(e)*

16. On September 26, 1988, the FDIC issued a final Order of Prohibition, FDIC-88-100e, against Craig Kronholm, which became effective October 6, 1988, and, among other things, prohibited Mr. Kronholm 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.

17. At the time Respondent acquired and accepted the Proxy as set forth in paragraphs 11 and 12 of these Findings, Respondent knew or should have known that (i) an Order of Prohibition had been issued against Mr. Kronholm, and (ii) the Order of Prohibition and section 8(e)(6)(B) of the Act, 12 U.S.C. §1818(e)(6)(B), prohibited Mr. Kronholm from transferring any proxy with respect to any voting rights in the Bank.

[\[11-30-92 p.A-2006\]](#) 18. Respondent violated section 8(e)(6)(B) of the Act, 12 U.S.C. §1818(e)(6)(B), and the Order of Prohibition by causing, bringing about, participating in, or aiding or abetting the transfer by proxy of Mr. Kronholm's voting rights in the 55,199 shares of stock of the Bank as set forth in paragraphs 11 and 12 of these Findings.

19. The violations as set forth in paragraphs 15 and 18 of these Findings resulted in benefit to Respondent in that Respondent acquired control of the Bank, which as set forth in paragraphs 5 through 9 of these Findings, he had previously sought and been denied.

*ORDER TO PAY*

IT IS ORDERED that a default order is hereby entered against the Respondent in this proceeding.

After taking into account the appropriateness of the penalty with respect to the financial resources and good faith of the Respondent, the gravity of the violations of the Respondent, the history of previous violations of the Respondent, and such other matters as justice may require.

IT IS FURTHER ORDERED, that by reason of the violations set forth above, a penalty of \$125,000 be, and hereby is, assessed against the Respondent pursuant to sections 7(j)(16) and 8(i)(2) of the Act, 12 U.S.C. §§1817(j)(16) and 1818(i)(2).

IT IS FURTHER ORDERED, that this Order shall be effective and the Civil Money Penalty ordered 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.

Dated by Washington, D.C., this 27th day of April, 1992.

Last Updated 6/6/2003

[legal@fdic.gov](mailto:legal@fdic.gov)