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[¶8006A] **In the Matter of Ronald J. Grubb, Glenn Ray Randolph, Fred Shamburg and Richard Dibler, Bank of Hydro, Hydro, Oklahoma, Docket Nos. FDIC-88-282k, 89-111e (1-10-90).**

Board grants special permission to appeal and quashes a hearing subpoena for senior agency officials. The testimony sought—concerning the decision to initiate the enforcement action—is not relevant to the issues to be determined at the hearing and is covered by the mental processes privilege, and enforcement of the subpoena would disrupt agency functions.

[.1] Practice and Procedure—Interlocutory Appeals—Standard

Special permission to appeal is granted when the appeal involves an important unresolved issue of general application or clear error below which is likely to result in prejudice to a party if the Board does not resolve the matter immediately.

[.2] Evidence—Subpoena—Relevance

Testimony regarding the FDIC's deliberations prior to initiating an enforcement action have no relevance or probative value on the issues at hand: whether respondents' actions warrant their removal from banking and/or assessment of a civil money penalty, and the appropriate amount of a penalty.

[.3] Evidence—Subpoena—Disruption of Agency Functions

When the testimony sought of senior agency officials is of little or no relevance to the resolution of the matter before an ALJ, public policy requires that the officials should be protected from undue interference with their official duties.

[.4] Evidence—Subpoena—Mental Processes Privilege

Testimony regarding FDIC's deliberations before initiating enforcement action is privileged: tribunals cannot compel the testimony of senior government officials to probe their mental processes in reaching an official decision.

**In the Matter of
RONALD J. GRUBB and GLENN
RAY RANDOLPH, individually and as Directors
and
FRED SHAMBURG and RICHARD
DIBLER, individually and as Officers and/or Directors of
BANK OF HYDRO
HYDRO, OKLAHOMA
(Insured State Nonmember Bank)
FDIC-88-282k
FDIC-89-111e**

DECISION AND ORDER

This matter arises from a request by FDIC Enforcement Counsel ("Enforcement Counsel") for special permission to appeal an interlocutory order issued by the Administrative Law Judge ("ALJ"). Enforcement Counsel seeks permission from the FDIC's Board of Directors ("Board") to appeal the ALJ's refusal to quash two hearing subpoenas issued for FDIC Regional Director (Supervision) Kenneth L. Walker and John W. Stone, Associate Director of the FDIC's Division of Supervision.

As part of Respondent's Reply Brief, Respondent has filed a cross-appeal. Respondent requests permission to appeal an order limiting the scope of Associate Director Stone's testimony regarding the requested civil money penalty.¹

For the reasons set forth herein, the Board grants Enforcement Counsel's request for special permission to appeal and grants the

¹ In FDIC's Reply to Respondent's petition for a cross-appeal, Enforcement Counsel raises new issues regarding the ALJ's "ruling" on April 11, 1990, as to the scope of testimony to be elicited from Deputy Regional Director Lawrence E. Morgan. Enforcement Counsel's Reply is dated May 4, 1990, nearly a month after the ALJ's "ruling". To the extent that raising this new issue constitutes yet another request for

special permission to appeal, it is untimely, 12 C.F.R. § 308.31(2)(b). The Board also notes that very few interlocutory rulings by an ALJ are the proper subject of an appeal, and that special permission to appeal interlocutory rulings is very much the exception and not the rule. Under the terms of the FDIC's regulation, such requests are reserved for important, unresolved issues of general application or clear prejudicial error below that should be immediately decided by the Board. 12 C.F.R. § 308.31(a). Enforcement Counsel's latest request fails to meet these standards. [{{6-30-92 p.I-20.2}}](#) motion to quash. Because the subpoena for Associate Director Stone is quashed, Respondent's cross-appeal is dismissed as moot.

FACTS

The matter presently before the Board is part of an action pursuant to section 8(e) of the Federal Deposit Insurance Act seeking the removal of Respondent Ronald J. Grubb from the Bank of Hydro located in Hydro, Oklahoma ("Bank"), and the imposition of civil money penalties. Regional Director Walker and Associate Director Stone were subpoenaed by Respondent to appear at an administrative hearing in this case to be conducted on April 10, 1990.

Respondent seeks to elicit testimony from Regional Director Walker and Associate Director Stone regarding the decision to bring these actions against Respondent. Respondent admits that the focus of his inquiry would center upon the deliberations surrounding the decision to bring an action against Mr. Grubb, as well as an allegation that between August of 1988 and May of 1989 the FDIC changed its position regarding the appropriateness of an action against Respondent.

Enforcement Counsel filed a motion with the ALJ seeking to quash the subpoenas on the grounds that the requested testimony was privileged, unnecessary, and that public policy requires that senior FDIC officials should not be compelled to testify at administrative proceedings. Enforcement Counsel also argued that other knowledgeable FDIC officials would be available to testify at the hearing.

On April 6, 1990, Enforcement Counsel were informed by telephone that their motion to quash had been denied by the ALJ, and that Mr. Stone and Mr. Walker were expected to testify on April 10. Enforcement Counsel immediately filed a special request to appeal and motion for a protective order. On April 10, 1990, the Board stayed enforcement of the subpoenas pending a decision on the merits of Enforcement Counsel's request for an appeal and to allow Respondent an opportunity to respond. On April 23, 1990, Respondent filed his Reply and cross-appeal.

DISCUSSION

The underlying issue in this appeal is whether and under what conditions senior FDIC officials involved in the decision to initiate a formal administrative enforcement action may be compelled to testify at administrative hearings before an ALJ regarding that decision. Examination of this issue requires the Board to consider whether such testimony or evidence could ever be relevant or probative of the issues raised in the Notices, whether important agency functions would be disrupted if the subpoenas were upheld, and whether this type of testimony is encumbered by privilege or other considerations. The Board grants Enforcement Counsel's request for special permission to appeal to address these issues.

A. Request For Permission To Appeal.

[.1] Interlocutory appeals, especially those pertaining to routine discovery matters, are generally not favored. Section 308.31(a)(2) the FDIC Rules and Regulations states, in part:

Special permission to appeal a ruling or order will only be granted if (i) the interlocutory appeal involves an important, unresolved issue of general application that should be immediately decided by the Board or (ii) the interlocutory appeal involves clear error below, and the rights of a party are likely to be severely prejudiced if the matter is not immediately decided by the Board.

12 C.F.R. § 308.21(a)(2). However, the issues raised in the requests for permission to appeal meet both criteria.

Compelling the testimony of senior agency officials regarding the decision to recommend or authorize the commencement of administrative enforcement actions is an important issue of general application that must be immediately decided by the Board. This case permits the Board to reaffirm its holding in FDIC-85-83k (Decision and Order Granting Special Permission To Appeal, Quashing Subpoenas To Testify And Denying Protective Order) (copy attached) and to address this issue squarely in the context of a removal action. In addition, because enforcement of these subpoenas would seriously disrupt critical agency activities and functions, Enforcement Counsel's request for special permission to appeal is granted.

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B. The Subpoenaed Testimony Is Neither Relevant Nor Probative Of Any Fact That Is Of Consequence To The Determination Of The Action.

T [2] Notices issued by the FDIC in this and other cases are the functional equivalent of civil complaints in the courts: they set forth the charges against the Respondent and inform him of the relief being sought by the FDIC.² *Id.* at 6–7. They constitute neither conclusive evidence of liability nor the proper amount of the assessment. Once an action has commenced, the issue for the ALJ and the Board to consider is whether Enforcement Counsel carries its burden of establishing a *prima facie* case in support of the alleged violations, and not whether the FDIC correctly decided to bring an enforcement action.

Based upon the issues raised in the Notice Of Assessment of Civil Money Penalties and the Notice of Removal as well as the briefs submitted by Respondent and Enforcement Counsel, it is plain that this testimony is neither relevant nor probative of any issues that are of consequence to the termination of this action. Because this testimony is not relevant, it is not discoverable or admissible.

The Board is guided by the Federal Rules of Civil Procedure and the Federal Rules of Evidence in determining what evidence is relevant to this proceeding. Rule 401 of the Federal Rules of Evidence defines "relevant evidence" as:

...evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed R. Evid. 401. Federal Rule of Civil Procedure 26(b)(1) provides for discovery of any matter "which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party...." While the standard of relevancy in the context of discovery is often liberally construed, it is not so liberal as to allow a party "to roam in shadow zones of relevancy" and to explore matters which are not germane to the proceeding. *See In Re Fontaine*, 402 F. Supp. 1219, 1221 (E.D.N.Y. 1975). The process of complete discovery must be kept within workable bounds of proper and logical bases for determination of the relevancy of that which is sought to be discovered. *Jones v. Metzger Dairies, Inc.*, 334 F.2d 919, 925 (5th Cir.), *cert. denied* 379 U.S. 965 (1964); *Metal Foil Prod. Mfg. Co. v. Reynolds Metals Co.*, 55 F.R.D. 491, 493 (E.D. Va. 1972).

The Board is guided by its previous decision in FDIC-85-83k which raised issues identical to those presented here. In that decision, the Board quashed administrative subpoenas requiring that the FDIC's Board of Review be made available for deposition regarding its decision to issue a Notice of Assessment of Civil Money Penalties.³ The Board granted Enforcement Counsel's request for permission to appeal, and quashed the subpoenas.

The principles illustrated in the Board's decision in FDIC-85-83k apply with equal force here. Absent a strong showing that the decision to issue a Notice was made in bad faith, FDIC staff analysis and recommendations regarding the decision to issue a Notice are not relevant to the proceeding and would properly be subject to claims of privilege.⁴ The relevant issues in this case are (1) whether the Respondent engaged in activities at the Bank that meet the statutory standards for removal and/or the assessment of a civil money penalty, and (2) whether the amount of the proposed penalty is appropriate based on the facts of this case. As a result, the focus of the proceeding should be upon what happened at the Bank, and not upon the FDIC's deliberations in its decision to bring the actions.

Whether FDIC Enforcement Counsel can establish that Respondent's activities at the Bank constitute violations of law or regulation and the effect of any said violations will

² See 12 U.S.C. § 1818(e)(5).

³ The purpose of the depositions at issue in FDIC-85-83k was to determine whether the Board of Review considered the proper statutory and regulatory factors in deciding the amount of civil money penalties to be sought. The Board of Review increased the amount of civil penalties to be sought by over 25 times the figure initially recommended by the FDIC's Regional Office. Respondent alleged that this increase represented an abrupt shift in policy regarding civil penalties, and that it was necessary to depose the Board of Review to establish the administrative records supporting this agency action. FDIC-85-83k at 5–6.

⁴ See *Citizens to Protect Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). [{{5-31-92 p.I-20.4}}](#) be resolved on the basis of the evidence presented on the record. Respondent will have a full and fair opportunity to respond to the FDIC's arguments and evidence, cross-examine its witnesses, and offer rebuttal evidence.

Furthermore, unsupported allegations that the FDIC may not have had "all of the facts" when the action was initiated, or that the FDIC's latest examination prompted different recommendations regarding certain transactions does not establish or even imply that the FDIC's motives were improper. Clearly, testimony regarding the FDIC's deliberations prior to issuing the Notices is not relevant to this proceeding.

C.Enforcement Of The Subpoenas Would Disrupt Critical Agency Activities And Functions.

[.3] Courts may refuse to compel the testimony of senior agency officials because of the serious disruption of agency functioning that such examinations would impose. See *Community Federal Savings & Loan v. Federal Home Loan Bank*, 96 F.R.D. 619, 621 (D.D.C. 1983). Public policy requires that the time and energies of public officials be conserved for the public's business. *Community Federal Savings & Loan*, 96 F.R.D. at 621. See also *Capital Vending Co. v. Baker*, 36 F.R.D. 45, 46 (D.D.C. 1964).

Where the testimony sought of senior agency officials is of little or no relevance to the resolution of the issues before the ALJ, public policy requires that these officials should be protected from undue interference with their official duties. Respondent himself recognizes the importance of the officials he has subpoenaed. Therefore, the Board is unwilling to compel the testimony of senior FDIC officials at an administrative hearing in situations where the Board cannot discern the relevance of the testimony and Respondent has not established that any special or compelling need for this testimony exists.

D.The Testimony Is Encumbered By Privilege.

[.4] This Board has previously recognized the well-established rule that a court may not compel the testimony of senior government officials to probe their mental processes in reaching an official decision.⁵ FDIC-85-83k at 7. The testimony sought by Respondent regarding the FDIC's deliberations prior to issuing the Notices is clearly covered by the mental processes privilege.

Respondent alleges that the FDIC has waived its claim of privilege in this area by producing unredacted copies of internal agency memoranda. No copies or abstracts of these documents were attached to Respondent's pleadings, and Enforcement Counsel failed to adequately address the circumstances surrounding the release of allegedly privileged materials. While the Board is unable to determine the scope and circumstances of any alleged waiver from the pleadings and other information of record, we note that the availability of allegedly privileged documents does not justify an inquiry into mental deliberations of officials who may have received these materials.

However, the Board need not reach the issue of the waiver of privilege. The testimony sought by Respondent is irrelevant, and the FDIC will not routinely compel the testimony of senior officials where their testimony is of limited probative value or relevance to the issues in the proceeding. The subpoenaed testimony would be properly excluded for either of those reasons apart from a claim of privilege.

ORDER

After considering the application of Enforcement Counsel, the decision of the Administrative Law Judge, and the briefs and other materials submitted by the parties,

IT IS HEREBY ORDERED, that the request by FDIC Enforcement Counsel for special permission to appeal is *GRANTED*.

IT IS FURTHER ORDERED, that FDIC Enforcement Counsel's Motion to Quash the subpoenas requiring the testimony of Kenneth L. Walker and John W. Stone is *GRANTED*.

IT IS FURTHER ORDERED, that Respondents request for a special appeal is *DENIED* as moot.

By direction of the Board of Directors.

Dated at Washington, D.C., this 10th day of July, 1990.

⁵ See *United States v. Morgan*, 313 U.S. 409, 422 (1941); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jenna*, 40 F.R.D. 318, 325 (D.D.C. 1966), *aff'd on opinion below*, 384 F.2d 979 (D.D. Cir.), *cert. denied*, 389 U.S. 852 (1967).