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[¶8006B] **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 and 89-111e (4-10-90).**

Board stays enforcement and subpoenas for FDIC officials to appear at an ALJ hearing, pending enforcement counsel's appeal of the ALJ's denial of its motion to quash the subpoenas.

[.1] Practice and Procedure—Stay—Enforcement of Subpoena

Where enforcement counsel's request for appeal appears to raise an important policy issue and because the matter will become moot if some form of relief is not granted, stay of enforcement of a subpoena for FDIC executives to appear at an ALJ hearing is appropriate.

[.2] Practice and Procedure—Interlocutory Appeals—Deferral

Where request for interlocutory review of ALJ's refusal to quash a subpoena was filed shortly before the subpoena's return date, fairness requires that respondent be given an opportunity to reply; the Board will not decide whether to grant review until both parties have presented their arguments.

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)**

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FDIC-88-282k

FDIC-89-111e

**DECISION AND ORDER DEFERRING
ENFORCEMENT COUNSEL'S
REQUEST FOR SPECIAL PERMISSION
TO APPEAL
AND STAYING ENFORCEMENT OF
SUBPOENAS**

This matter arises from a request by FDIC Enforcement Counsel for special permission to appeal an interlocutory order issued by the Administrative Law Judge ("ALJ") prior to an administrative hearing. 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. In addition, Enforcement Counsel has filed a separate motion requesting that the Board issue a protective order directing that the testimony not be had or, in the alternative, that enforcement of the subpoenas should be stayed pending the outcome of their motion for permission to appeal.

Consideration of this matter is hampered by the fact that the denial by the ALJ of the Enforcement Counsel's Motion comes but one business day prior to the hearing date for which the subpoenas were issued.¹ Counsel for the Respondent has not yet had an opportunity to respond to either the FDIC's motion seeking permission to appeal or the motion for a protective order/stay.

A. Motion For A Stay.

[.1] The Board may issue a stay if it finds that the moving party has a likelihood of success on the merits and that irreparable harm will result if a stay is not granted.² Because Enforcement Counsel's request for an appeal appears to raise an important policy issue of general applicability to FDIC, and because the matter will become moot if some form of relief is not granted, the Board determines that the best course at this point is to stay the enforcement of the subpoenas pending a resolution of Enforcement

Counsel's request for an appeal.

On the merits, the Board is presented with close legal and factual issues with little guidance from the parties. However, this case appears to be similar to issues raised in a prior FDIC matter, FDIC-85-83k (Decision And Order Granting Special Permission To Appeal Quashing Subpoenas To Testify And Denying Protective Order). As is apparently the case here, Respondent in FDIC-85-83k sought testimony regarding the FDIC's decision to initiate a removal action and the assessment of civil money penalties.

In that case, the Board considered whether the FDIC Board of Review could be compelled to testify regarding its consideration of the statutory factors set forth in section 18(j) of the Federal Deposit Insurance Act, 12 U.S.C. § 1818(j), in setting the amount of a civil money penalty.³ Enforcement Counsel sought to quash the subpoenas on the grounds that such testimony would be protected by the Governmental mental processes and the Governmental deliberative processes privileges. The Board granted the Enforcement Counsel's appeal and quashed the subpoenas.

The Board found that testimony regarding the FDIC's decision to initiate an administrative action has little, if any, relevance to the matters actually before the ALJ. The issues are whether Respondent engaged in activities in violation of the statutes, regulations, or orders set forth in the Notice, and the appropriate amount of a civil money penalty if violations have occurred. Testimony regarding the FDIC's decision to bring an action is of limited relevance once it has commenced: the focus then is upon whether Enforcement Counsel carry their burden of establishing a *prima facie* case in support of the allegations contained in the Notice.

¹ Enforcement Counsel alleges that it was informed of the ruling by a telephone call from the ALJ's secretary on April 6, 1990. No written order appears to have been issued. These motions were filed by Enforcement Counsel on the same day. The Board notes that the subpoenas were issued on March 13, 1990, nearly a month before the scheduled hearing. Enforcement Counsel also states that Mr. Walker was served on March 26, 1990, and that Mr. Stone was served March 29, 1990.

² Section 308.31(c) of the FDIC's Rules and Regulations, 12 C.F.R. § 308.31(c), states that [t]he Board or the administrative law judge may, however, order a stay upon a finding on the record that the party aggrieved by the appealing ruling or order has shown a substantial likelihood of success before the Board

³ At the time of that decision, the Board of Review was an entity within the FDIC that had been delegated the authority to issue Notices of Assessment. In the current proceeding, Associate Director Stone is the person delegated authority to initiate these proceedings and, in fact, authorized the initiation of the removal action under section 8(e). The civil money penalty action was initiated by Mr. Stone's predecessor.

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From the information available to the Board, it is evident that Enforcement Counsel has stated a colorable claim that the requested testimony may be subject to privilege. Additionally, courts have accepted the basic premise that under certain circumstances senior government officials should be protected from having to give testimony absent a showing of special or extraordinary circumstances because it constitutes an undue interference with their official duties.

It is also very clear that irreparable harm to the FDIC will result if the enforcement of the subpoenas is not stayed pending a resolution of this issue. The Board is hesitant to compel two senior FDIC officials on short notice to interrupt their schedules and travel to Oklahoma to testify unless justice so requires.

B. Motion For Special Permission To Appeal.

[.2] At this stage, the Board declines to rule on either the request for permission to seek an interlocutory appeal or the underlying merits of the motion to quash. The Board simply does not have enough information before it to render a fully informed decision, and the requirements of fundamental fairness and due process mandate that Respondent be given an opportunity to file a response.

The Board strongly emphasizes that interlocutory appeals generally are not favored. See FDIC-89-40j. Section 308.31(a) of the FDIC Rules and Regulations, 12 C.F.R. § 308.31(a), states:

General rule. (1) Rulings or orders by an administrative law judge may not be appealed to the Board prior to submission of the record to the Board...unless the Board, in its sole discretion, grants special permission to appeal.

(2) 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.

The Board will grant permission for an appeal only where the criteria set forth in the regulations are met.⁴

In an attempt to direct discussion to what it believes to be the core issues regarding the merits of the request for an interlocutory appeal, the Board notes that the "important, unresolved issue of general application" required under the regulations⁵ appears to be if and under what conditions may senior FDIC officials be compelled to testify at administrative hearings before an ALJ regarding their decision to recommend or authorize the commencement of administrative enforcement actions. While the Board agrees that public policy requires that senior agency officials should be protected from undue interference with their official duties, the Board also recognizes the countervailing right of a Respondent to examine material witnesses and to be allowed to adequately prepare and present their defense.

Consideration of this issue would naturally include discussion of the FDIC's arguments that the witness' testimony would be cumulative or immaterial. The assertion of the "Governmental mental processes" privilege by Enforcement Counsel raises similar issues. In its response, Respondent should state the reasons why they have subpoenaed Mr. Walker and Mr. Stone, the relevance of their testimony, and why it is necessary that they appear at the hearing.

ORDER

After considering the request of Enforcement Counsel, and the materials submitted therewith,

IT IS HEREBY ORDERED, that the request by FDIC Enforcement Counsel to stay the enforcement of the subpoenas requiring the attendance of Kenneth L. Walker and John W. Stone at the April 10, 1990 hearing is *GRANTED* pending the Board's consideration of the request for a special appeal.

IT IS FURTHER ORDERED, that Respondent shall file its Brief in opposition ten days from the date of service of Enforcement Counsel's Motion Seeking Special Per-

⁴ Prior Board decisions have established that such appeals may be granted (1) where issues of first impression are involved; (2) where significant policy considerations are raised; or (3) where there exists a substantial danger of irreparable harm to a party. FDIC-89-144k (March 27, 1990).

⁵ Because no written order setting forth the reasons for the ALJ's ruling has yet been submitted, it is impossible to determine whether the ruling constituted clear error. See 12 C.F.R. § 308.31(b)(ii).

{{7-31-91 p.I-27}}mission To Appeal, pursuant to section 308.31(b) of the FDIC's Rules and Regulations, 12 C.F.R. § 308.31(b).

By direction of the Board of Directors.

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

/s/ Hoyle L. Robinson

Executive Secretary