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[¶8012] In the Matter of The Citizens Bank of Clovis, Clovis, New Mexico, Docket No. FDIC-91-406b (3-2-92).

Board denies Bank's request for a private hearing because Bank did not present evidence to overcome the presumption in favor of public proceedings.

[.1] Practice and Procedure—Private Hearings—Authority to Grant

Because the statute permits the Board to allow private hearings but does not specify a procedure for making that decision, the Board may fashion procedures which it deems best to effectuate the purpose of the statute.

[.2] Practice and Procedure—Private Hearings—Standard

The test prescribed by statute is whether the "public interest" requires a private hearing; safety and soundness of banks and the insurance fund are the primary public interest concerns of the FDIC.

[.3] Practice and Procedure—Private Hearings—Burden on Respondent

The party requesting a private hearing must demonstrate in a concrete fashion how it differs from other institutions facing cease and desist actions and how a public hearing is likely to cause a run on the Bank's deposits.

[.4] Practice and Procedure—Private Hearings—Borrowers' Privacy

The ALJ can fashion procedures to protect the Report of Examination and the identities of borrowers from disclosure during a public hearing, so a private hearing is not necessary to protect those privacy interests.

**In the Matter of
THE CITIZENS BANK OF CLOVIS
CLOVIS, NEW MEXICO
(Insured State Nonmember Bank)
DECISION AND ORDER ON
REQUEST FOR PRIVATE HEARING
FDIC-91-406b**

BACKGROUND

On December 19, 1991, the Regional Director (Supervision) of the Federal Deposit Insurance Corporation's ("FDIC") Dallas Regional Office initiated this proceeding by issuing a Notice of Charges and of Hearing ("Notice") alleging that The Citizens Bank of Clovis, Clovis, New Mexico ("Bank" or "Respondent"), has engaged and/or is

[{{5-31-92 p.I-47}}](#)engaging in unsafe and unsound practices and violations of law, rules, or regulations. The Notice requested issuance of an appropriate order under section 8(b)(1) of the Federal Deposit Insurance Act (the "FDI Act"), 12 U.S.C. § 1818(b)(1). On January 2, 1992, Administrative Law Judge Walter J. Alprin (the "ALJ") was designated to hear the case. The Respondent filed a variety of pleadings on January 7, 1992, including a Request for Private Hearing. That request stated three reasons for keeping the hearing private: (1) potential adverse effect on the Bank by causing a run; (2) probable disclosure of the contents of a Report of Examination; and (3) identification of borrowers whose loans have been criticized with the effect of embarrassing those borrowers and impeding collection of debts.

The ALJ, in a letter dated January 13, 1992, transmitted the Request for Private Hearing to the FDIC Office of the Executive Secretary. As set forth in the letter, the ALJ believed that Rule 33(a), 12 C.F.R. § 308.33(a), requiring the filing of such requests with the Executive Secretary, divested him of jurisdiction to rule on the request. Enforcement Counsel has not filed a response to date.

DISCUSSION

This case presents the Board of Directors ("Board") of the FDIC with two issues. One is jurisdictional: whether the ALJ should initially act on the request and issue a recommended decision on the request for

private hearing. The other involves whether the Respondent has presented a sufficient basis to warrant a private hearing.

A. The Board Should Make the Decision on the Request.

The Board finds that it should act on requests for private hearing. In the Board's view, although the statute governing this matter does not compel the conclusion that the initial decision be made by either the Board or the ALJ, the better view, as expressed in the applicable regulation is that the Board should make the decision. Accordingly, the Board concludes that it will decide whether or not to grant the request.

The statutory provision governing requests for private hearings states that "[a]ll hearings on the record with respect to any notice of charges issued by any Federal banking agency shall be open to the public unless the agency, in its discretion, determines that holding an open hearing would be contrary to the public interest." 12 U.S.C. § 1818(u) (2). The FDIC's version of Rule 33(a) of the Uniform Rules of Procedure promulgated by the banking regulatory agencies, which implements that provision, 12 C.F.R. § 308.33(a), states that within a prescribed time period, a "respondent may file with the Executive Secretary a request for a private hearing, and any party may file a pleading in reply to such a request."

[.1] The Board interprets the language of section 8(u)(2), 12 U.S.C. § 1818(u)(2), as permitting the agency to decide the question of private hearings, but not specifying the procedures for that decision.¹

Accordingly, the Board may fashion those procedures in the manner which it deems best to effectuate the purpose of section 8(u)(2) in particular as well as the broader purposes of section 8 and the FDI Act. Rule 33(a), 12 C.F.R. § 308.33(a), by requiring the filing of the request with the Executive Secretary, implements the Board's view that it is appropriate for the Board rather than the ALJ to address these requests.²

Accordingly, the Board has jurisdiction to decide whether or not to grant the request for a private hearing.

B. The Bank is not Entitled to a Private Hearing.

As set forth above, the statute requires that hearings be public unless the agency determines that the public interest mandates a private hearing. 12 U.S.C. § 1818(u)(2). The Bank contends that a private hearing is required because: (1) a possibility that adverse publicity will cause a run on the bank; (2) the likelihood of disclosure of the contents of a Report of Examination; and (3) identification of borrowers whose loans have been criticized with concomitant embarrassment and increased difficulty of collecting the debt. In the Board's view, these contentions, which are essentially presented in conclusory form with no concrete support, are

¹ There is no legislative history concerning this provision.

² The Comptroller of the Currency has recently taken the same position concerning Rule 33(a) in *In the Matter of Mark D. Dunlap*, AA-EC-91-175, Slip op. at 3, n. 1 (Nov. 13, 1991). The regulatory preamble issued in connection with the notice of proposed rulemaking for this regulation confirms that the request is to be filed with the "Agency Head" for the appropriate banking agency. 56 Fed. Reg. 27790, 27814 (June 17, 1991).
[5-31-92 p.I-48] insufficient to overcome the presumption in favor of public proceedings which the statute embodies.

[.2] The test prescribed by the statute is whether the "public interest" requires a private hearing. The statute was passed in November 1990, and there is no legislative history explaining the particular considerations Congress expected the "public interest" test to embrace. Nevertheless, earlier legislative history sheds some light on the issue by making clear the change in the presumption— from private to public proceedings—and using safety and soundness considerations as the test for a companion provision.

Prior to the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 101 Stat. 183, section 8(h)(1) of the FDI Act provided that all hearings were to be private unless the FDIC determined that a public hearing was necessary to protect the public interest. 12 U.S.C. § 1818(h)(1) (1988). The final orders issued by the agencies were also private although available in redacted form.

FIRREA changed the statutory presumption in favor of private hearings and orders by enacting a new

section 8(u)(2). That provision and its legislative history, which are exhaustively discussed in *In the Matter of Mansfield Bank*, FDIC-90-44b, 2 P-H FDIC Enforcement Dec. and Ord. ¶5165 at A-1669-1701 (March 12, 1991) and *In the Matter of Bank of Salem, Salem, Ark.*, FDIC-89-229b, 2 P-H FDIC Enforcement Dec. and Ord. ¶5164 at A-1661-1663 (Feb. 28, 1991), required publication of the final orders unless "exceptional circumstances" necessitated a delay in publication to protect the safety and soundness of the institution. In 1991, section 8 was revised, with, *inter alia*, recodification of section 8(u)(2) without change as section 8(u)(5) and addition of a new section 8(u)(2) to require that hearings be public except if doing so would be contrary to the public interest.

[.3] Thus, the evolution of the statute suggests increasing emphasis on the public nature of all aspects of section 1818 proceedings with any private proceedings being the exception to be justified by the party desiring privacy. Moreover, although the language of section 8(u)(2) specifies the "public interest" test rather than the "safety and soundness of the institution" test contained in section 8(u)(5), common sense suggests that concern for the safety and soundness of an institution should be the primary consideration in determining whether to mandate private proceedings in a particular case. The primary duty of the FDIC is to protect the insurance fund, and, therefore, the "public interest" test should reflect this emphasis by concentrating on safety and soundness concerns.

Judged by these considerations, the Bank's submission fails to convince the Board that the request should be granted. A bank needs to demonstrate in a concrete fashion how the effects of this proceeding differ so significantly from those involving other banks as to warrant special treatment. While the Bank has argued that adverse publicity may cause a run, that is pure speculation. Furthermore, that argument could be raised concerning any section 8 proceeding. The Bank has failed to present any evidence from which the Board could conclude that there is a reasonable likelihood of such an event.

The Bank has also stated that disclosure of a Report of Examination is probable during the proceeding. As the Bank recognizes, these Reports are protected from disclosure by 12 C.F.R. Part 309. The Board expects that the parties and the ALJ will take all necessary steps to avoid any disclosure of such Reports. See 12 U.S.C. § 1818(u)(6) (filing of documents under seal). However, a key rationale for avoiding disclosure of Reports of Examination is the possibility that a run on the bank may occur; thus, that possible disclosure does not create a justification for the request independent from the one previously discussed. In any event, such potential disclosure could be alleged to support a request for private hearing in almost any section 8 proceeding and, therefore, does not, by itself, present a basis for differentiating this case from others.

[.4] Finally, the Bank contends that a private hearing is necessary to prevent disclosure of the identities of borrowers whose loans have been criticized, with concomitant embarrassment of those borrowers and increased collection difficulties. Although embarrassment to borrowers is unrelated to safety and soundness concerns, the agency must consider the issue because of its privacy implications. However, the Board is mindful that Congress has opted for public proceedings and, therefore, has concluded that normally borrower privacy interests must give way to the public interest in public proceedings.

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This is not to say that those privacy interests do not deserve protection. This goal is best accomplished by fashioning procedures which protect the identity of borrowers such as sealing reports of examination and other documents (or redacting them). To the extent that the parties view this problem as serious,³

they and the ALJ may fashion procedures which will avoid identifying borrowers during testimony.

In addition, the Board notes that while increased collection difficulties do relate to safety and soundness of the institution, the Bank's request fails to explain how identification of borrowers would create such difficulties or to provide any factual support for the allegation. Accordingly, the Board must reject identification of borrowers with criticized loans as a basis for requiring a private hearing.

In sum, the Bank has failed to overcome the presumption that the hearing in this case should be public. Accordingly, the Request for Private Hearing is denied.

ORDER

For the reasons set forth above, it is hereby ORDERED that the Bank's Request for Private Hearing is DENIED.

By direction of the Board of Directors.

Dated at Washington, D.C., this 2nd day of March, 1992.

³ Adverse publicity is more likely to be a problem for borrowers whose loans contain indicia of

misfeasance. The Board is primarily concerned with the protection of innocent borrowers, and their privacy interests are likely to be served by the sealing (or redacting) of documents.

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