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[¶8016] In the Matter of The Citizens Bank of Clovis, Clovis, New Mexico, Docket No. FDIC-91-406b (5-5-92).

Board denies request for interlocutory review of denial of a motion to dismiss. Bank's motion was based on assertion that, prior to the initiation of Section 8(b) proceedings, it was entitled to review by a senior FDIC official outside the supervisory process of the examination giving rise to the proceeding. Board found Bank met none of the criteria for interlocutory review.

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

Failing to show that there is a controlling question of law or policy at issue, or that immediate review may advance ultimate termination of the proceeding, or that subsequent modification of the ruling at the conclusion of the proceeding would be an unsatisfactory remedy or would cause unusual delay or expense, Bank is not entitled to interlocutory review of ALJ's denial of a motion to dismiss.

**In the Matter of
THE CITIZENS BANK OF CLOVIS
CLOVIS, NEW MEXICO
(Insured State Nonmember Bank)
DECISION AND ORDER ON
REQUEST FOR INTERLOCUTORY
REVIEW
FDIC-91-406b
[{{9-30-92 p.I-59}}](#)**

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"), had engaged and/or was 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 Motion to Dismiss and to Abate ("Motion").¹

The basis of that Motion was the Bank's allegation that prior to the institution of proceedings under section 8 of the FDI Act, 12 U.S.C. § 1818, the Bank was entitled to a review of the examination giving rise to this proceeding by a senior official of the FDIC outside of the supervisory process.

On February 11, 1992, the ALJ denied the Motion. After reviewing the facts, he concluded:

Respondent was provided the full rights of internal appeal to which it was entitled. While the entire FDIC is involved in bank supervision, an Assistant Regional Director [who reviewed the examination] is a senior official and not involved with the day-to-day bank examination. The bank examination covered a good bit more than violations resulting from disputed real estate evaluations, and there are other violations upon which this proceeding is brought. The actions of the FDIC did not violate any regulations then in force. Finally, Respondent will have full opportunity to dispute the real estate valuations of which it sought review during the course of the [section 8 proceeding].

ALJ Order Denying Motions to Dismiss and to Abate (Feb. 11, 1992) ("Order"), at 2. On February 18, 1992, the Bank filed a Request with the ALJ for Interlocutory Review of the ALJ's February 11 Order ("Request"). FDIC Enforcement Counsel filed a Response to the Request with the ALJ on March 3, 1992.

DISCUSSION

[.1] Requests for Interlocutory Review are governed by Rule 28 of the Uniform Rules of Practice and procedure, 12 C.F.R. § 308.28. The Board of Directors ("Board") of the FDIC concludes, upon a review of

the record and the reasons proffered by the Bank in its Request, that the Bank has failed to satisfy any of the criteria for interlocutory review pursuant to that Rule. Accordingly, the Board denies the Request.

Rule 28 provides that the Board may grant interlocutory review of an ALJ ruling if:

- (1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;
- (2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;
- (3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or
- (4) Subsequent modification of the ruling at the conclusion of the proceeding would cause unusual delay or expense.

12 C.F.R. § 303.28(b). The Bank contends that its Request meets all four criteria. The Board disagrees.

The Order does not present any controlling question of law as to which substantial grounds exist for a difference of opinion. As the ALJ found, the FDIC gave the Bank all of the rights to which it was entitled under internal procedures, and the FDIC did not violate any regulation. The Bank has not, in its Request, suggested that either finding is incorrect or that the FDIC violated a statutory provision. At best, the Bank is arguing that the FDIC violated internal directives, but has not shown that some exception to the well-settled law that such directives have "no legal force, and [do not] bind the [agency]," *Scheiker v. Hansen*, 450 U.S. 785, 789 (1981), applies to this case.

The Board is also unconvinced that review will materially advance the ultimate termination of the proceeding. The Bank argues that review by a senior official may, in essence, moot out the proceeding, but, as

¹ In a Decision and Order on Request for Private Hearing dated March 2, 1992, the Board of Directors of the FDIC denied the Bank's Request for Private Hearing filed on that same date.

[{{9-30-92 p.I-60}}](#) the ALJ pointed out, the proceeding involves a number of issues which the Bank would not raise in the request for internal review of the examination. Moreover, since the FDIC's internal directive makes discretionary any review beyond that which has already occurred involving Division of Supervision regional officials, there is no certainty that such review, if requested, will be granted. Accordingly, granting the Request for Interlocutory Review is unlikely to have any effect on the ultimate termination of the proceeding.

Finally, the Board does not agree with the Bank's contention that subsequent modification of the Order will be an inadequate remedy or cause unusual delay or expense. The Bank's argument appears to be that if the Order is ultimately modified, it will have spent money litigating the case which it cannot recoup. However, as the ALJ found, there is a limited amount of overlap concerning the issues which form the basis of this proceeding and the issues which the Bank seeks to raise in requesting that the agency review the examination. In any event, costs of litigation are not the type of expense or irreparable injury which the procedures under Rule 28 are designed to avoid. Interlocutory review is the exception, rather than the rule, and recognizing costs of litigation as a relevant concern would completely undermine the exceptional nature of the relief.

In sum, the Bank's Request for Interlocutory Review fails to satisfy the criteria contained in Rule 28. Accordingly, the Request is hereby denied.

ORDER

For the reasons set forth above, it is hereby ORDERED that Respondent's Request for Interlocutory Review is DENIED.

By direction of the Board of Directors.

Done at Washington, D.C., this 5th day of May, 1992.

/s/ Hoyle L. Robinson
Executive Secretary