

{{10-31-00 p.A-3173}}

[¶5263] **In the Matter of Gerald P Brickner, individually and as an institutional-affiliated party of Bank of Hoven, Hoven, South Dakota (Insured State Nonmember Bank)**, FDIC Docket No. 00-078ej; FDIC Docket No. 83-152e (8-2-00)

The FDIC approved Respondent's request to serve as an employee of an FDIC insured institution for the sole purpose of handling the bank's credit life insurance business but did not otherwise modify a 1984 Order of Removal From Office and Prohibition from Further Participation.

[.1] Prohibition, Removal or Suspension—Modification

On the record as a whole the Respondent demonstrated his fitness to participate in affairs of the Bank, and that his participation would not pose a risk to the Bank's safety and soundness and would not erode public confidence in the Bank. Based on those findings the FDIC consented to allow Respondent employee status on a limited basis.

[.2] Prohibition, Removal or Suspension—Modification

Consent granted to Respondent to serve as employee is limited solely to participation in the Bank's credit life insurance business and does not otherwise modify the order or grant consent to engage in other activity.

**In the Matter of
GERALD P. BRICKNER,
individually and as an institution-affiliated party of
BANK OF HOVEN
HOVEN, SOUTH DAKOTA
(Insured State Nonmember Bank)
DECISION AND ORDER APPROVING APPLICATION TO MODIFY ORDER OF REMOVAL FROM
OFFICE AND PROHIBITION FROM FURTHER PARTICIPATION**

FDIC-00-078ej

FDIC-83-152e

**STATEMENT OF THE CASE
Introduction**

On March 10, 2000, Gerald P. Brickner ("Respondent"), through a letter ("Applica-
{{10-31-00 p.A-3174}} tion") addressed to the Regional Director of the Kansas City Regional Office of the Federal Deposit Insurance Corporation, made application to the Federal Deposit Insurance Corporation ("FDIC") for written consent to become an employee of the Bank of Hoven, Hoven, South Dakota ("Bank"), an institution regulated by the FDIC. This application arises under section 8(e)(7)(B) of the Federal Deposit Insurance Act ("Act"), 12 U.S.C. §1818(e)(7)(B), and section 8(j) of the Act, 12 U.S.C. §1818(j).

Background

Respondent served as a director and assistant cashier of the Bank from 1975 through 1982. On July 5, 1983, the FDIC issued a Notice of Intention to Remove from Office and to Prohibit From Further Participation (the "Notice") pursuant to section 8(e) of the Act, 12 U.S.C. §1818(e), against Respondent. The Notice alleged that Respondent had breached his fiduciary duties by failing to disclose to the entire board of directors of the Bank and Federal banking regulators the existence of unauthorized extensions of credit to a particular borrower and failing to prevent the continued extensions of credit to the borrower.

A formal administrative hearing was held before an administrative law judge from November 15 to November 23, 1983. On March 22, 1984, the administrative law judge issued a decision in which he

recommended finding that Respondent had breached his fiduciary duty to the Bank by failing to disclose the unauthorized extensions of credit to the Bank's board of directors as well as to the Federal banking regulators and recommended the removal of Respondent as a director of the Bank.

After reviewing the recommended decision of the administrative law judge, the Board of Directors of the FDIC ("Board") on July 9, 1984, issued an Order of Removal from Office and Prohibition from Further Participation ("Section 8(e) Order") pursuant to section 8(e) of the Act, 12 U.S.C. §1818(e). The Board found that Respondent's failure to report the illegal and unauthorized extensions of credit to the board of directors or to the regulators and his failure to take effective action to prevent another officer in the Bank from continuing to make illegal extensions of credit to a Bank customer constituted a breach of his fiduciary duties as a director and officer. The Section 8(e) Order prohibited Respondent from participating in any manner in the conduct of the affairs of the Bank or any other FDIC insured institution without the prior written consent of the FDIC and the appropriate Federal banking regulator pursuant to 12 U.S.C. §1818(j) (amended by the Financial Institutions Reform Recovery and Enforcement Act of 1989 at 12 U.S.C. §§ 1818(e)(7)(B) and 1818(j)). Respondent appealed the Board decision, but the United States Court of Appeals for the Eighth Circuit affirmed the Board decision in 1984, finding that Brickner's conduct constituted continuing disregard for the safety or soundness of the Bank. *Brickner v. Federal Deposit Insurance Corporation*, 747 F.2d 1198 (8th Cir. 1984).

Prior Applications

Respondent has filed several previous requests to obtain approval to reenter banking. On June 19, 1985 and March 21, 1986, Respondent filed his initial two requests. These requests were both denied. Respondent filed on September 30, 1986, his third request to obtain written approval from the FDIC to serve as an employee of the Bank. The Board denied his request on January 20, 1987, on the grounds that the extensive involvement of Respondent's family in the affairs of the Bank for a long period of time, combined with the proposed position which Respondent would occupy, would place Respondent in the position of having an opportunity of exercising substantial influence and control over the affairs of the Bank. See *Docket No. FDIC-83-153e*, FDIC ENFORCEMENT DECISIONS AND ORDERS Par. 5117, A-1303 (1988).

On February 19, 1987, Respondent filed a request for reconsideration of the January 20, 1987, denial. The Board issued a denial of Respondent's request on August 9, 1988, on the grounds that Respondent's participation in the conduct of the affairs of the Bank would not be in the best interests of the Bank or its depositors in light of the financial condition of the Bank and the proposed position which Respondent would occupy. *Docket No. FDIC-83-153e*, FDIC ENFORCEMENT DECISIONS AND ORDERS Par. 5117, A-1303 (1988).

On December 27, 1995, Respondent made application to the FDIC for written consent to a modification or termination of the Section 8(e) Order. By his application, Respondent sought to become a director of the Bank.

[{{12-31-00 p.A-3175}}](#) The FDIC determined that there were sufficient grounds to approve Respondent's request to serve as a director of the Bank pursuant to section 8(e)(7)(B) of the Act, 12 U.S.C. §1818(e)(7)(B). First, Respondent and his family had sold most of their interest in the Bank and their existing holdings of twelve percent of the total outstanding shares of stock were subject to a voting agreement and must be voted with other individuals who own a greater percentage of the shares of stock in the Bank. Further, the financial condition of the Bank was satisfactory and Respondent had stated that he did not intend to become involved in the daily operations of the institution. Finally, Respondent acknowledged his wrongdoing and expressed remorse for all the problems he caused at the Bank. The conduct for which Respondent was removed occurred more than fourteen years earlier and in those intervening years, Respondent had served in positions of trust in the community as well as run his own insurance agency.

The Present Application

By letter dated March 10, 2000, Respondent made application to the FDIC for written consent to establish an employee relationship with the Bank, pursuant to which his job responsibilities would be confined to the conduct of the Bank's credit life insurance business. For 27 years, Respondent was the principal owner and operator of the P.J. Hackl Insurance Agency, Hoven, South Dakota, which acted as agent for the insurance companies that underwrite the Bank's credit life insurance program. On March 1, 2000, Respondent sold his insurance business and terminated his agency relationship with insurance companies except for those companies underwriting the Bank's credit life insurance business. Respondent had maintained errors-and-omissions insurance coverage through his insurance agency.

However, that coverage was terminated because Respondent is no longer actively soliciting insurance business. Reportedly, Respondent would qualify for coverage under the Bank's errors-and-omissions insurance policy, if he became an employee of the Bank.

FINDINGS OF FACT

In his application for consent of the FDIC to become an employee of the Bank, Respondent asserts that his proposed employment would be limited solely to the handling of the Bank's credit life insurance business and would not involve any other aspects of the Bank's operations. The Bank's credit life insurance program has not been criticized by examiners and will not change as a result of Respondent's request. By becoming an employee of the Bank, Respondent would receive periodic compensation payments in lieu of an insurance agent's commission for his services. Additionally, the FDIC has no evidence that Respondent has had an unfavorable impact on the Bank since becoming a director subsequent to obtaining the FDIC's consent in 1997.

DECISION AND ORDER

Section 8(e)(7)(B) of the Act states in pertinent part:

(7) INDUSTRYWIDE PROHIBITION.—

(B) EXCEPTION IF AGENCY PROVIDES WRITTEN CONSENT.—If, on or after the date an order is issued under this subsection which removes or suspends from office any institution-affiliated party or prohibits such party from participating in the conduct of the affairs of an insured depository institution, such party receives the written consent of—

(i) the agency that issued such order; and

(ii) the appropriate Federal financial institutions regulatory agency of the institution described in any clause of subparagraph (A) with respect to which such party proposes to become an institution-affiliated party, subparagraph (A) shall, to the extent of such consent, cease to apply to such party with respect to the institution described in each written consent.

12 U.S.C. §1818(e)(7)(B).

[.1] To obtain the FDIC's consent, Respondent must demonstrate: (1) his Xfitness to participate directly or indirectly in the conduct of the affairs of an insured depository institution; (2) that his participation would not pose a risk to the institution's safety and soundness; and (3) that his participation would not erode public confidence in the institution. See *In the Matter of Charles E. Floyd*, FDIC ENFORCEMENT DECISIONS AND ORDERS, Par. 5177, A-1976 (1992); *In the Matter of Frederick M. Pfeiffer*, FDIC ENFORCEMENT DECISIONS AND ORDERS, Par. 5163A, A-1656 (1991); *Docket {{12-31-00 p.A-3176}}* No. FDIC-83-153e, FDIC ENFORCEMENT DECISIONS AND ORDERS Par. 5117, A-1303 (1988).

Upon review of the record as a whole, the FDIC finds that Respondent has presented sufficient evidence to be granted consent to become an institution-affiliated party pursuant to section 8(e)(7)(B) of the Act, 12 U.S.C. §1818(e)(7)(B), for the sole purpose of handling the Bank's credit life insurance business. Based upon the foregoing, the FDIC sees no reason to object to Respondent's request to serve as an employee of the Bank in a limited capacity.

Respondent is reminded, however, that banking depends upon the commitment to the highest standards of fiduciary duty long required by law for bankers. See *Briggs v. Spaulding*, 141 U.S. 132 (1891); *Docket No. 85-291k*, FDIC ENFORCEMENT DECISIONS AND ORDERS, PAR. 5072, A-964, A-975 (1986); *Docket No. 85-356e*, FDIC ENFORCEMENT DECISIONS AND ORDERS, Par. 5112, A-1228, A-1235 (1988); *In the Matter of Donohoo*, FDIC-92-249c & b, 92-250e, 1 FDIC Enforcement Decisions and Orders ¶ 5225 at A-2670 [Recommended Decision adopted in pertinent part] (1994), *aff'd in part sub. nom.*, *Lindquist & Vennum v. FDIC*, 103 F.3d 1409 (8th Cir.), *cert. denied*, 522 U.S. 821 (1997); *In the Matter of Landry*, FDIC-95-65e, 1 FDIC Decisions and Orders, ¶ 5256 at A-3017, *aff'd* at 204 F.3d 1125 (D.C. Cir. 2000); see also FDIC Policy "Statement Concerning the Responsibilities of Bank Directors and Officers," 2 FDIC Law, Regulations, Related Acts at 5369; and American Bankers Association, *Focus on the Bank Director*, 97-125 (1984); Schlichting, Rice & Cooper, *Banking Law*, 6.04 (1984).

[.2] Accordingly, the request dated March 10, 2000, is hereby approved for Respondent to serve as an employee of the Bank of Hoven, Hoven, South Dakota, in the manner hereafter described. The consent so granted for Respondent to serve as an employee of the Bank is limited solely to participation in the conduct of the Bank's credit life insurance business and does not constitute consent to engage in any other conduct not specifically authorized by this order which may violate the Section 8(e) Order or section 8(e)(7)(A) of the Act, 12 U.S.C. §1818(e)(7)(A).

Pursuant to delegated authority.

Dated at Washington, D.C., this 2nd day of August 2000.