

{{10-31-00 p.A-3091}}

[¶5259] In the Matter of Michael D. Landry and Alton B. Lewis individually and as institution-affiliated parties of First Guaranty Bank, Hammond, Louisiana, (Insured State Nonmember Bank) FDIC Docket No. 95-65e (7-8-99).

FDIC Board determined that Respondent Landry failed to meet the burden needed to obtain the extraordinary remedy of a stay of the Order of Prohibition because he is not likely to prevail on the merits, he is not likely to suffer irreparable injury and there is danger of harm to other parties and the public interest if he is not prohibited and removed from further participation in financial institutions. Respondent's request for a stay was denied. (*Landry's petition for review was denied by the United States Court of Appeals for the District of Columbia Circuit, 204 F.3d 1125.*)

[.1] Stay—Judicial Proceeding—Appeal, stay pending

Request to U.S. Court of Appeals, and Court's order deferring consideration of motion to Board sufficient to consider stay even though Respondent did not properly file a stay request pursuant to FDIC regulations.

[.2] Stay—Requirements

Respondent must prove the four factors of his likelihood of success on the merits, the possibility of his irreparable harm, and the possibility of harm to others and the public interest before the extraordinary remedy of a stay is warranted.

[.3] Administrative Law Judge—Powers

The ALJ only has power to recommend to the Board, which conducted de novo review of the case, including Respondent's objections to the ALJ's decision.

[.4] Constitutional Law—Appointment of Administrative Law Judge

For purposes of the Appointments Clause of the Constitution, the Office of Thrift Supervision ("OTS"), is the equivalent of an independent federal agency, and equivalent of a "department". If independent federal agencies were not equivalent to a department, they could not appoint inferior officers. The Director of OTS has authority to appoint ALJs.

[.5] Stay—Irreparable Harm—Restricting Employment Opportunities

Orders of Prohibition have the effect of restricting employment, and granting a stay on that basis would defeat the statutory purpose. Respondent does not have a right to be banker and is not prohibited from other means of livelihood.

[.6] Stay—Irreparable Harm—Weighed against Actual Injury Caused

In meeting the irreparable injury factor, Respondent's potential injury must be weighed against the actual injury of over \$550,000 he caused to the bank.

[.7] Stay—Harm to Others and Public Interest

Respondent was removed because his misconduct and culpability were proven and demonstrated he is totally unfit to participate in the affairs of an insured institution. The public interest requires his removal.

**In the Matter of
MICHAEL D. LANDRY AND ALTON
B. LEWIS,
Individually, and as Institution-
Affiliated Parties of
FIRST GUARANTY BANK
HAMMOND, LOUISIANA
(Insured State Nonmember Bank)
ORDER ON MOTION FOR STAY
PENDING REVIEW
FDIC-95-65e**

[.1] This matter is before the Board of Directors ("Board") of the Federal Deposit Insurance Corporation

("FDIC") on the request of Michael D. Landry ("Respondent") for a stay pending review of the Board's Order to Remove and to Prohibit From Further Participation ("Order") dated May 25, 1999, issued pursuant to section 8(e) of the Federal Deposit Insurance Act ("Act"), 12 U.S.C. § 1818(e), removing him from First [{{10-31-00 p.A-3092}}](#) Guaranty Bank, Hammond, Louisiana ("Bank") and prohibiting him from participating in the conduct of the affairs of any insured depository institution. Although Respondent has not filed a proper stay request pursuant to FDIC regulations, 12 C.F.R. Part 308, the Board considers his request to the U.S. Court of Appeals for the D.C. Circuit as a request for stay, in light of the Court's Order of July 2, 1999, deferring consideration of his motion pending agency action. For the reasons set forth below, the Board denies the request.

[.2] The Board's consideration involves the four factors identified in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), and its progeny: (1) likelihood of success on the merits; (2) the possibility of irreparable harm to the moving party; (3) the possibility of harm to other parties; and (4) the public interest. A stay pending appeal is an extraordinary remedy that the Board does not grant routinely, particularly given the Act's admonition that a petition for review does not automatically stay the Board's orders. 12 U.S.C. § 1818(h)(3). In the Board's view, none of the factors favors granting a stay in this matter.

1. *The merits.* Respondent's argument that he will prevail on the merits of his appeal is based on the Appointments Clause of the Constitution, Article I, § 2, cl. 2. He argues that the administrative law judge ("ALJ") who heard the case was an "inferior officer" for purposes of that provision, and, thus, could only be appointed by the head of a "department." In his view, the Office of Thrift Supervision ("OTS"), the entity whose head appointed him, is not a "department" for purposes of the Appointments Clause. Accordingly, he alleges that the whole proceeding is constitutionally invalid.

[.3] The Board believes that Respondent is unlikely to succeed on appeal with this argument. First, because the ALJ only has the power to recommend a course of action to the Board, it is difficult to understand how Respondent has been harmed. The Board, in its Order, conducted an exhaustive *de novo* review of every aspect of the case including the numerous exceptions to the ALJ's decision that Respondent filed. Since the "rule of prejudicial error" applies under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, Respondent is unlikely to prevail on appeal for this reason alone.

[.4] Second, the Board believes that the ALJ's appointment by the Director of the OTS constitutes appointment by the head of a "department" for purposes of the Appointments Clause. The Director of OTS is the head of a bureau within the Department of the Treasury that is, for all practical purposes, an independent agency. 12 U.S.C. § 1462a(b). See *Doolin Security Savings Bank v. OTS*, 139 F.3d 203, 207 (D.C. Cir. 1998) (recognizing the "statutory autonomy" of the OTS). Although the Treasury Department exercises a very general oversight of the OTS, it is forbidden from intervening in matters before the agency and in the agency's regulatory functions. *Id.* at 204. Thus, OTS is the equivalent of an independent federal agency.

As such, the OTS appears to be the equivalent of a "department" for purposes of the Appointments Clause.¹ Respondent's reliance on *Freytag v. CIR*, 501 U.S. 868 (1991), appears erroneous. Although the Supreme Court has never addressed the issue of whether an independent agency of the executive branch could be a "department" for purposes of the Appointments Clause, *Freytag* strongly suggests that such an agency would qualify. *Cf. id.* at 887, n. 4 (Court does not address question of an independent agency's appointment of an inferior officer) *with id.* at 916-19 (Scalia, J., joined by three other justices) (independent agencies are departments for purposes of the Appointments Clause). If this were not so, the agencies could not appoint inferior officers.

Finally, Respondent's reliance, primarily on the case of *Freytag* for the proposition that the ALJ is an "inferior officer", seems misplaced. As just stated, ALJs only have the power to recommend a course of action to the Board, not final authority to issue a binding decision. While they perform tasks that are not all "ministerial," they certainly lack the final decision making authority that caused the Commissioner of Internal Revenue to concede that special trial judges in the Tax Court were "inferior officers" for some purposes. *Id.* at 882.² In addition, the

1 The Court in *Doolin* held that OTS was a "bureau" of a "department" for purposes of the Vacancies Act. *Id.* at 207. It did not address the status of the OTS under the Appointments Clause, and the Board does not believe that *Doolin* is controlling on that issue.

2 *Butz v. Economou*, 438 U.S. 478 (1978), also does not appear to help Respondent. In that case, the Court, for purposes of deciding whether ALJs were entitled to qualified or absolute immunity from suit, concluded that [\(Continued\)](#)

{{10-31-99 p.A-3093}} Board reviews all challenged aspects of an ALJ's recommended decision *de novo*, so ALJs appear to have less discretionary authority than special trial judges. Accordingly, the Board believes that *Freytag* will not warrant reversal of its Order.

Thus, Respondent's arguments on the merits are unlikely to succeed on appeal.

[.5] 2. *Irreparable Injury*. Respondent alleges that he will be irreparably injured because he will lose his livelihood if a stay is denied. Assuming this is true, this type of alleged irreparable injury is inevitable in these cases. Had Congress meant for stays to be granted on the basis of such allegations, it would certainly not have enacted the provision in the statute providing that a petition for review does not automatically stay the Board's enforcement orders. Accordingly, whatever Respondent's alleged irreparable injury through loss of livelihood, the Board believes that Congress did not intend that showing alone to be adequate to justify a stay.

Moreover, Respondent overstates the extent of the potential injury. The Order does not take away his livelihood. He is a well-educated and experienced businessman. He is free to exercise his skills in any other occupation open to him that is not in an insured depository institution. He does not have an absolute right to be a banker.

[.6] In any event, Respondent's potential injury must be weighed against the actual injury he caused to the Bank. As a result of his misconduct and improper activities in attempting to acquire control of the Bank at a time when it was in serious financial difficulty and might have failed, he and his confederates caused the Bank to incur loan losses of \$174,900 and to pay expenses of \$278,000. Order at 29. Thus, his allegation of potential irreparable harm pending appeal rings hollow in light of the harm he caused by his actions.

[.7] 3. *Harm to Other Parties and the Public Interest*. The Board considers these two factors together because they are interrelated. The other parties affected are the Bank and the FDIC. Respondent's removal was based on his breaches of fiduciary duty and dishonest conduct as a banker. He has already harmed the Bank and poses a continuing threat to the Bank, and derivatively, to the FDIC's Bank Insurance Fund.

The public interest is embodied in 12 U.S.C. § 1818(e). A banker can only be removed and prohibited under that provision if the agency proves (1) misconduct, (2) culpability in the form of either dishonestly or willful or continuing disregard for the bank's safety and soundness, and (3) a significant effect on the bank. It is not a simple matter to prove these elements, but once proven, they demonstrate that an individual is totally unfit to hold a position in or participate in the conduct of the affairs of an insured institution. Accordingly, the public interest embodied in section 1818(e) requires removal and prohibition. The Board concluded, after an exhaustive review of the record, that overwhelming evidence supported a finding that all of these elements were present. Accordingly, the public interest required the action taken. Respondent has not presented any reason why his case is so exceptional that the Board should deviate from the public interest as expressed in the statute.

Accordingly, it is hereby ORDERED and DECREED that Respondent's request for a stay pending judicial review is DENIED.

By direction of the Board of Directors.

Dated at Washington, D.C. this 8th day of July, 1999.

2 Continued: agency personnel (such as ALJs) that performed adjudicatory functions were in a position most analogous to judges. Therefore, they were entitled to the same absolute immunity as judges. This determination has no bearing, in the Board's view, on whether such personnel would be considered "inferior officers" for purposes of the Appointments Clause. The question in *Butz* giving rise to the analogy was whether the need to preserve the independent judgment of these adjudicatory officers outweighed the risks of affording the absolute immunity. *Id.* at 514. That question is far different from the one at issue here concerning the extent and nature of the authority of the ALJs.
