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[¶5242A] **In the Matter of Rick A. Jenson, Scott P. Crabtree, Michael D. Landry, Alton B. Lewis, and Danna A Doucet, First Guaranty Bank, Hammond, Louisiana**, Docket No. 95-65e (4-7-97).

FDIC denied Respondent Michael D. Landry's Request for Interlocutory Review of the Order on Respondent Landry's Motion for Document Production. FDIC found Landry failed to meet the four criteria necessary to grant interlocutory review of a ruling of an administrative law judge.

[.1] Interlocutory Review—Standards—Failure to meet any criteria

Review of a ruling of an administrative law judge may be granted if the Board of Directors of the FDIC finds four criteria were met.

[.2] Discovery—In camera review

Respondent failed to show in camera inspection of documents was required.

[.3] Disclosures—Privilege

Order did not present controlling question of law or policy as to which substantial grounds exists for a difference of opinion.

**In the Matter of
RICK A. JENSON,
SCOTT P. CRABTREE,
MICHAEL D. LANDRY,
ALTON B. LEWIS,
AND
DANNA A DOUCET,
individually, and as institution-affiliated parties of
FIRST GUARANTY BANK
HAMMOND, LOUISIANA
(Insured State Nonmember Bank)
Decision and Order on Request for Interlocutory Review**

FDIC-95-65e

This matter involves the Request of Respondent Michael D. Landry ("Respondent") for Interlocutory Review of the "Order on Respondent Landry's Motion for Document Production" ("Order"). The Order denied Respondent's Motion to Compel Production ("Motion to Compel") except for further production of additional exculpatory "Brady" material to the extent that it exists. The request arose during the proceedings of a removal and prohibition action under section 8(e) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. §1818(e).

BACKGROUND

On April 30, 1996, the Federal Deposit Insurance Corporation ("FDIC") initiated this action by the issuance of a "Notice of Intention to Remove from Office and to Prohibit from Further Participation" ("Notice"), which was served on Rick A. Jenson, Scott P. Crabtree, Alton B. Lewis, Danna Doucet, and Respondent, individually, and as institution-affiliated parties of First Guaranty Bank, Hammond, Louisiana ("Bank"). The Notice alleged that Respondent(s) had engaged in certain unsafe or unsound practices, violations of law and regulations, and/or breaches of fiduciary duty that have evidenced the personal dishonesty and/or willful or continuing disregard for the safety and soundness of the Bank and their unfitness to serve as officer(s) or director(s) of any insured depository institution. The Notice further alleged that this conduct has resulted in or will result in financial loss or damage to the Bank, has prejudiced the interests of the Bank's depositors, and/or has resulted in financial gain to the Respondents. On June 21, 1996, Respondent filed an Answer, including affirmative defenses.

During the pre-hearing discovery, counsel for Respondent made Requests for Production of Documents. In

October 1996, Enforcement counsel forwarded Respondent more than 20,000 pages of responsive documents. Enforcement Counsel also provided Respondent with a "Federal Deposit Insurance Corporation Privilege Log" ("Privilege Log"), asserting that 97 documents were subject to privilege(s). For each document listed, the Privilege Log identified the type of document withheld, the privilege(s) asserted, a brief description of the contents of the document, the identity of the person to whom the document was addressed, the author of the document, and the date of the document.

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On October 18, 1996, Respondent filed a Motion to Compel the production of the 97 documents listed on the Privilege Log. Respondent's Motion to Compel asserted that (1) Enforcement Counsel withheld documents that constituted "Brady" ¹ material; (2) by instituting the enforcement proceeding Petitioner had waived all governmental privileges; (3) the deliberative process privilege, the law enforcement privilege and the inter-agency or intra-agency privileges do not apply to the documents withheld; and (4) the privilege log is inadequate.

Enforcement Counsel timely filed a "Response to Respondent Landry's Motion to Compel" ("Response"). This Response included the declaration under penalty of perjury of Cottrell L. Webster ("Declarant"), Regional Director (Memphis) of the FDIC, Division of Supervision, Memphis, Tennessee, the jurisdictional Region in which this depository institution is located. Declarant, "after personal consideration," formally claimed on behalf of the FDIC, the deliberative process privilege.

The Administrative Law Judge ("ALJ") adjudicated the issues raised in Respondent's Motion to Compel, issuing his Order on December 6, 1996. It is from this Order that Respondent seeks interlocutory review.

INTERLOCUTORY REVIEW

[.1] Section 308.28(b) of the FDIC Rules of Practice and Procedure, 12 C.F.R. §308.28(b), states that interlocutory review of a ruling of an administrative law judge may be granted if the Board of Directors ("Board") of the FDIC finds that:

- (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 would cause unusual delay or expense.

None of the four criteria enumerated in section 308.28(b) are present in this case and, therefore, the FDIC finds no basis for disagreement with the ALJ's Order.

[.2] The ALJ in his Order addresses in detail the due process requirements of *Brady, supra*, and subsequent cases. While the holding in *Brady* is limited to criminal matters, the ALJ correctly concluded that in civil and enforcement matters fundamental fairness requires the production of all exculpatory, factual material. See *Winthrow v. Larkin*, 421 U.S. 35 (1975); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (1985); *McClelland v. Andrus*, 606 F.2d 1278 (D.C. Cir. 1979). Enforcement Counsel asserts that all such information has been disclosed to Respondent, and that none of the documents at issue in this Motion to Compel contain exculpatory, factual material. Respondent has made no showing of bad faith with regard to Enforcement Counsel's assertion. Respondent does not contest the ALJ's decision requiring the production of exculpatory, factual material. Rather, Respondent appears to challenge the fact that the ALJ's Order permits the FDIC to determine whether additional exculpatory exists and does not require *in camera* inspection of the withheld documents. However, the FDIC finds that the ALJ correctly states that without more, Respondent's mere "suspicions" are insufficient grounds to require *in camera* inspection of the documents. Respondent's complaint about the procedure and/or the method established for compliance with the Order does not satisfy any of the four criteria set out in 12 C.F.R. §308.28(b).

[.3] Respondent also raises the issues of whether Petitioner waived all privileges by the initiation of this case, whether Petitioner properly invoked the deliberative process privilege, whether Petitioner can assert the law enforcement privilege and the inter-agency and intra-agency privileges, and whether Petitioner's privilege log is adequate. As to these issues, the Order does not present any controlling question of law or policy as to which

substantial grounds exist for a difference of opinion.

In cases such as this one, involving the denial of a motion to compel, the scope of the asserted privilege(s) does not involve "controlling questions of law or policy" within the meaning of section 308.28(b). The Board has addressed the issue of what is a

¹ *Brady v. Maryland*, 373 U.S. 83, 87 (1963), held that in criminal prosecutions, "[s]uppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

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controlling question of law or policy in cases involving similar discovery matters on several previous occasions. *FDIC-85-83k*, 1 FDIC Enf. Dec. ¶8001, I-1 (1985); *In the Matter of Ronald J. Grubb*, FDIC-88-282k, FDIC-89-111e, 1 FDIC Enf. Dec. ¶8006A, I-20 (1990). The FDIC finds nothing in the record to distinguish these previous rulings.

In his Order, the ALJ found, and the FDIC agrees, that Respondent's submission presents no evidence overcoming the assertion of privilege made by Mr. Webster.² Moreover, the disclosure of information between parties sharing a common legal interest—such as the shared enforcement authority and obligations of the FDIC and the State Department of Banking—does not waive privileged communications. *In re Grand Jury Subpoenas*, 89-3 and 89-4, 904 F.2d 244, 249 (4th Cir. 1990).

Additionally, the FDIC is unconvinced that review will materially advance the ultimate conclusion of the proceeding. The FDIC concludes that Respondent will have adequate recourse through exceptions at the conclusion of the proceeding on the merits and the Board will have a complete record before it in considering Respondent's disagreements with the procedural rulings of the ALJ. Respondent's allegations of unusual delay and expense are not the types of 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 the Matter of the Citizens Bank of Clovis*, FDIC-91-406b, 1 FDIC Enf. Dec. ¶ 8016, I-58 (1992). Accordingly, Respondent's Request for Interlocutory Review is denied.

ORDER

For the foregoing reasons, it is hereby ORDERED that the Request for Interlocutory Review is DENIED.

Pursuant to delegated authority, upon the advice and recommendation of the Deputy General counsel for Litigation.

Dated at Washington, D.C., this 7th day of April, 1997.

² For purposes of an FDIC administrative proceeding, the FDIC agrees with the ALJ that the Regional Director is an appropriate official to assert claims of deliberative process privilege.