

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

_____)	
In the Matter of)	
)	DECISION AND ORDER TO
NIRVA BALAN,)	PROHIBIT FROM FURTHER
Individually and as an institution-)	PARTICIPATION
affiliated party of)	
BLUE HILLS BANK)	FDIC-16-0060e
BOSTON, MASSACHUSETTS)	FDIC-17-0134k
(Insured State Nonmember Bank))	
_____)	

I. INTRODUCTION

This matter is before the Board of Directors (Board) of the Federal Deposit Insurance Corporation (FDIC) following the issuance on April 18, 2018, of a Recommended Decision on Default (Recommended Decision or R.D.) by Administrative Law Judge C. Richard Miserendino (ALJ). The Recommended Decision includes a proposed order that would permanently bar Nirva Balan (Respondent) from the banking industry pursuant to section 8(e) of the Federal Deposit Insurance Act (FDI Act) unless the FDIC consents to her further participation. The Recommended Decision also includes a proposed order assessing a Civil Money Penalty (CMP) of \$175,000. R.D. at 10-11.

This is an uncontested proceeding. The charges are set forth in the FDIC's Notice of Intention to Prohibit from Further Participation, Notice of Assessment of Civil Money Penalty, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing (Notice). The record shows that Enforcement Counsel made reasonable efforts to serve Respondent with the Notice in accordance with the FDIC Rules of Practice and Procedure, 12 C.F.R. 308.11(b) and 308.18(a). It also appears that Respondent had actual notice of the proceeding against her. R.D. at 3-4. Respondent did not, however, file an Answer to the charges in the Notice or respond to Enforcement Counsel's Motion for Entry of an Order of Default (Default Motion). Additionally,

Respondent did not respond to the ALJ's Order to Show Cause to explain why a default judgment should not be entered against her. R.D. at 2-3. After Respondent failed to respond to the Order to Show Cause, the ALJ issued the Recommended Decision concluding that the uncontested facts supported an order of prohibition and the CMP sought. Respondent filed no exceptions to the Recommended Decision. For the reasons discussed below, the Board adopts the Recommended Decision and issues an Order to Prohibit against Respondent.¹

II. PROCEDURAL HISTORY AND BACKGROUND

On September 27, 2017, the FDIC issued the Notice against Respondent pursuant to sections 8(e) and 8(i) of the FDI Act.² Respondent, an institution-affiliated party (IAP) pursuant to section 3(u) of the FDI Act,³ was an employee of Blue Hills Bank, Boston, Massachusetts (Bank) during the period charged in the Notice, most recently serving as a customer service representative. Notice ¶¶1, 3-4.

Respondent's Misconduct

The Notice alleges that from October 2012⁴ through about June 2014, Respondent used her access to the Bank's computer system to make several incremental unauthorized cash and check withdrawals from the accounts of two elderly Bank customers totaling at least \$130,000.

¹ Although the U.S. Supreme Court's recent decision in *Lucia v. SEC*, No. 17-130 (June 21, 2018), invalidated an enforcement decision of the U.S. Securities and Exchange Commission because the ALJ who conducted the hearing was not properly appointed under the Appointments Clause of the U.S. Constitution, we need not address whether *Lucia* applies here. Respondent waived any objection she might have had to the proceeding based on the appointment of the FDIC's ALJ by failing to raise it before the agency. See *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 878-79 (1991) (errors regarding appointment of agency officials are "nonjurisdictional"); see also, e.g., *In re DBC*, 545 F.3d 1373, 1377-81 (Fed. Cir. 2008) (holding that Appointments Clause issue was waived by failing to raise it before the agency).

² 12 U.S.C. §§ 1818(e), 1818(i).

³ *Id.* § 1813(u).

⁴ The Recommended Decision contains a typographical error indicating that Respondent's conduct occurred between October 2013 and June 2014. R.D. at 4. Respondent began making unauthorized withdrawals in October 2012. Notice ¶14-21.

She retained the cash for her own use and deposited the unauthorized checks into her personal checking account at the Metropolitan Credit Union. The Bank agreed to provide restitution to the affected customers. Respondent made a partial confession to her misconduct and paid the Bank partial restitution of \$63,000. Respondent acted willfully in the commission of these felony offenses. Notice ¶¶ 6-8, 14-23, 27-29.

FDIC Enforcement Proceeding

Service of the Notice

The FDIC made several attempts to serve the Respondent by 1) sending the Notice by Certified Mail, Return Receipt Requested, to an address at Alpine Street in Hyde Park, Massachusetts (the Alpine Address); and 2) retaining a process server to personally serve Notice to the Respondent. In October and November of 2017 the process server made nine attempts to serve the Respondent at the Alpine Address and twice affixed the Notice to the door of the residence.

On November 7, 2017, Enforcement Counsel received a telephone call from someone identifying herself as the Respondent. Respondent stated that she no longer lived at the Alpine Address (which she described as a friend's house) and directed Enforcement Counsel to stop sending documents there. Respondent refused to provide an alternate address, but said she would pick up the Notice—presumably at the Alpine Address. Respondent also asked Enforcement Counsel to contact her attorney, Erin Semcken. Enforcement Counsel spoke to Semcken, who represented Respondent in a bankruptcy proceeding, but was not retained in this matter. Semcken told Enforcement Counsel that Respondent listed the Alpine Address as her address in her new client intake form. R.D. at 1-2.

Respondent's Default

The Notice directed Respondent to file an Answer within 20 days from the date of service as required by 12 C.F.R. § 308.19(a). Notice at 9-10. Respondent failed to file an Answer. R.D. at 2.

On February 28, 2018 the FDIC moved for entry of an order of default pursuant to 12 C.F.R. § 308.19(c)(1). Enforcement Counsel served the Default Motion on Respondent at the Alpine Address by UPS Overnight Delivery. R.D. at 2.

On March 16, 2018, the ALJ issued an Order to Show Cause directing that Respondent appear on or before March 20, 2018, and show good cause why a default judgment should not be entered. The Order to Show Cause was served on Respondent at the Alpine Address by 1) UPS Next Day Air Delivery; and 2) retaining a process server to attempt personal service at the Alpine Address. Respondent did not appear or show good cause why a default judgment should not be entered. R.D. at 2-3.

On April 18, 2018, the ALJ granted the FDIC's Default Motion and issued the Recommended Decision, which was served on Respondent at the Alpine Address by 1) UPS Next Day Air Delivery; and 2) retaining a process server to attempt personal service at the Alpine Address. R.D. at 12. Respondent filed no exceptions to the Recommended Decision.

III. DISCUSSION

The Board concurs in and adopts the ALJ's Recommended Decision. Section 308.11 provides that the Notice may be served, among other ways, by Certified Mail and personal service. Here, the FDIC used both methods, including multiple attempts by the process server. In addition, Respondent's telephone call to Enforcement Counsel regarding the proceeding and promise to pick up the Notice indicates that she had actual knowledge of the proceeding against her. R.D. at 1-2. Although there is no conclusive proof that Respondent actually received the

Notice, the totality of the circumstances demonstrates that Enforcement Counsel made reasonable efforts to serve Respondent, that Respondent was aware of the existence of the Notice, and that she had ample opportunity to obtain a copy of the Notice. *Id.* at 3-4.

Accordingly, the Board agrees with the ALJ's conclusion that Respondent was properly served with the Notice.

The Board also agrees with the ALJ's finding that the undisputed facts in the Notice satisfy the three standards necessary to sustain a prohibition order under section 8(e) of the FDI Act—misconduct, effects, and culpability.⁵ Specifically, Respondent engaged in misconduct, including violations of law, unsafe and unsound practices, and breaches of fiduciary duty, by using her position as a customer service representative to make several incremental unauthorized cash and check withdrawals from the accounts of two elderly Bank customers. The effects prong is met because Respondent received an initial direct financial benefit of \$130,000,⁶ consisting of the funds she withdrew from customers' accounts without authorization, which also caused damage or other loss to the Bank. R.D. at 4. Respondent's culpability is evident as her unique teller identification number was attached to every unauthorized withdrawal and she made a partial confession to her misconduct.⁷ R.D. at 4, Notice ¶ 23. Respondent's conduct constituted a purposeful and calculated scheme to defraud two elderly Bank customers and involved multiple instances of deliberate deception and personal dishonesty continuing over the course of nearly two years, thus exhibiting a willful and continuing disregard for the Bank's safety and soundness. R.D. at 4.

⁵12 U.S.C. § 1818(e)(1).

⁶ After her unauthorized withdrawals were detected, Respondent subsequently made partial restitution in the amount of \$63,000, R.D. at 4.

⁷*Id.*

The uncontested allegations establish ample evidence of violations of law and unsafe and unsound banking practices warranting prohibition. *See Matter of Skabardonis*, 2016 WL 8201948, at *5-6 (FDIC May 10, 2016) (bank employee who embezzled funds from customer accounts and stole a customer's identity engaged in dishonest behavior, unsafe and unsound banking practices, and breach of fiduciary duty); *see also Matter of Bauer*, 2012 WL 7152170, at *3 (FDIC Oct. 9, 2012) (bank employee who embezzled funds from bank engaged in dishonest behavior, unsafe and unsound banking practice and breach of fiduciary duty); *Matter of Bennett*, 2004 WL 2185944, at *2 (FDIC Aug. 16, 2004) (prohibiting bank employee who embezzled funds).

Because Respondent failed to file an Answer to the Notice, she waived her right to appear and contest the allegations in the Notice. 12 C.F.R. § 308.19(c)(1); *see also Bauer*, 2012 WL 7152170, at *3; *Matter of Shih*, 2011 WL 2574393, at *4 (FDIC May 10, 2011); *Bennett*, 2004 WL 2185944, at *3. Accordingly, the final prohibition order issued by the Board, which is based upon a failure to answer, "is deemed to be an order issued upon consent." 12 C.F.R. § 308.19(c)(1). Moreover, pursuant to 12 C.F.R. § 308.39(b), Respondent's failure to file exceptions to the Recommended Decision is deemed to be a waiver of any objections to the Recommended Decision. *Bauer*, 2012 WL 7152170 at *3; *Shih*, 2011 WL 2574393 at *4; *Bennett*, 2004 WL 2185944 at *3.

In addition, as the ALJ noted, Respondent's failure to request a hearing with respect to the CMP renders the Order to Pay included in the Notice of Assessment a final and unappealable order under both the FDI Act and FDIC Regulations. 12 U.S.C. § 1818(i)(2); 12 C.F.R. § 308.19(c)(2); *Matter of Majka*, 2007 WL 4698593 at *2 (FDIC Oct. 16, 2007); R.D. at 4. Based on the serious nature of the charges in the Notice, which Respondent has not challenged,

the Board agrees with the ALJ that a CMP is warranted and concludes that the \$175,000 assessment is reasonable.

IV. CONCLUSION

After a thorough review of the record in this proceeding and given Respondent's failure to answer or appear, the Board, for the reasons set forth above, adopts the Recommended Decision, incorporates herein the Findings of Fact and Conclusions of Law set forth in the Notice, and issues the following order implementing its decision.

ORDER TO PROHIBIT

The Board, having considered the entire record of this proceeding, finds that Respondent Nirva Balan, formerly employed by Blue Hills Bank, Boston, Massachusetts (Bank), engaged in violations of law and unsafe and unsound banking practices for which she received personal financial gain and caused a loss to the Bank. The Board further finds that Respondent's actions involved personal dishonesty and willful and continuing disregard for the Bank's safety and soundness. The Board hereby ORDERS and DECREES that:

1. Nirva Balan shall not participate in any manner in any conduct of the affairs of any insured depository institution, agency, or organization enumerated in section 8(e)(7)(A) of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).
2. Nirva Balan shall not solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights in any financial institution, agency, or organization identified in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).
3. Nirva Balan shall not violate any voting agreement previously approved by the appropriate Federal banking agency with respect to any insured depository institution, agency, or organization identified in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

4. Nirva Balan shall not vote for a director, or serve or act as an institution-affiliated party, as that term is defined in section 3(u) of the FDI Act, 12 U.S.C. § 1813(u), of any insured depository institution, agency, or organization identified in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

5. This ORDER shall be effective immediately.

SO ORDERED.

IT IS FURTHER ORDERED that copies of this Decision and Order to Prohibit from Further Participation shall be served on Nirva Balan, FDIC Enforcement Counsel, the ALJ, and the Commissioner of the Massachusetts Division of Banks.

By order of the Board of Directors.

Dated at Washington, D.C. on July 19, 2018.

/s/

Valerie Best
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