UNITED STATES OF AMERICA
BEFORE THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

ON CERTIFICATION OF THE DEPARTMENT OF THE TREASURY—OFFICE OF THE COMPTROLLER OF THE CURRENCY In the Matter of a Notice to Prohibit Further Participation Against CAROLYN D. NELSON Former Assistant Vice President LONE STAR NATIONAL BANK Pharr, Texas	)	DOCKET NO. OCC-AA-99-23

FINAL DECISION

This is an administrative proceeding pursuant to the Federal Deposit Insurance Act ("FDI Act") in which the Office of the Comptroller of the Currency of the United States of America ("OCC") seeks to prohibit the Respondent, Carolyn D. Nelson ("Respondent"), from further participation in the affairs of any financial institution because of her conduct as a vice president of Lone Star National Bank, Pharr, Texas (the "Bank"). Under the FDI Act, the OCC may initiate a prohibition proceeding against a former employee of a national bank, but the Board must make the final determination whether to issue an order of prohibition.

Upon review of the administrative record, the Board issues this Final Decision adopting the Recommended Decision ("RD") of Administrative Law Judge Arthur L. Shipe (the "ALJ"), and orders the issuance of the attached Order of Prohibition.

I. STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

Under the FDI Act and the Board's regulations, the ALJ is responsible for conducting proceedings on a notice of charges. 12 U.S.C. § 1818(e)(4). The ALJ issues a recommended

decision that is referred to the deciding agency together with any exceptions to those recommendations filed by the parties. The Board makes the final findings of fact, conclusions of law, and determination whether to issue an order of prohibition in the case of prohibition orders sought by the OCC. Id.; 12 C.F.R. § 263.40.

The FDI Act sets forth the substantive basis upon which a federal banking agency may issue against a bank official or employee an order of prohibition from further participation in banking. In order to issue such an order, the Board must make each of three findings: 1) that the respondent engaged in identified misconduct, including a violation of law or regulation, an unsafe or unsound practice or a breach of fiduciary duty; 2) that the conduct had a specified effect, including financial loss to the institution or gain to the respondent; and 3) that the respondent's conduct involved either personal dishonesty or a willful or continuing disregard for the safety or soundness of the institution. 12 U.S.C. § 1818(e)(1)(A)-(C).

An enforcement proceeding is initiated by the filing of a notice of charges which is served on the respondent. Under the OCC's and the Board's regulations, the respondent must file an answer within 20 days of service of the notice. 12 C.F.R. §§ 19.19(a) and 263.19(a). Failure to file an answer constitutes a waiver of the respondent's right to contest the allegations in the notice, and a final order may be entered unless good cause is shown for failure to file a timely answer. 12 C.F.R. §§ 19.19(c)(1) and 263.19(c)(1).

B. Procedural History

On November 19, 1999, the OCC issued a Notice initiating an enforcement action that sought, among other things, an order of prohibition due to Respondent's unauthorized withdrawal of customers' funds for her own use. The Notice alleged that over a two-year period,

Respondent had withdrawn over $40,000 in funds from the accounts of three customers, all without the knowledge or approval of the customers, and used the funds for her own benefit.[1]

The record shows that Respondent was served with the Notice by certified mail on November 27, 1999; the Notice was also served on her counsel. Under the OCC's regulations, Respondent was required to file her answer to the Notice by December 14, 1999. When no answer was received, Enforcement Counsel filed and served on Respondent and her counsel a Motion for Entry of an Order of Default on December 21, 1999. The ALJ issued an Order requiring Respondent to show cause why he should not grant the default. This Order was served by certified mail; the record reflects that it was delivered to Respondent's counsel on January 18, 2000, but that the copy sent to Respondent herself was returned to the ALJ marked "unclaimed". Accordingly, the ALJ ordered Enforcement Counsel to serve the show cause order on Respondent personally. Personal service of the Order was made on February 24, 2000, and Respondent had until March 15, 2000, to respond and show good cause for her failure to file an answer in a timely fashion.

When Respondent failed to respond to the Order to show cause, the ALJ issued his Recommended Decision ("RD"). The RD found that Respondent had waived her rights to appear and contest the allegations in the Notice, and recommended that the relief requested in the Notice be imposed.

Following the issuance of the RD, counsel for Respondent contacted the Board by letter,[2] requesting that the default be reconsidered. In his unsworn letter, counsel stated that "[a] proper

[1] The Notice also sought civil money penalties and an order of restitution. On August 8, 2000, on the basis of the ALJ's recommended decision, the OCC issued a decision finding Respondent in default and imposing the requested relief.

request for hearing was sent; however, the hearing did not take place." Counsel also stated that he personally appeared at the courthouse identified in the Notice of Charges, apparently on the day of the hearing as set forth in the Notice, and "was instructed that no such hearing existed." Finally, counsel's letter informed the Board that Respondent intended to plead guilty to criminal charges stemming from the allegations set forth in the Notice, and had made substantial restitution to the Bank.

II. DISCUSSION

The OCC's Rules of Practice and Procedure set forth the consequences of a failure to file an answer to a Notice. Under the Rules, failure to file a timely answer "constitutes a waiver of [a respondent's] right to appear and contest the allegations in the Notice." 12 C.F.R. § 19.19(c). If the ALJ finds that no good cause has been shown for the failure to file, the judge "shall file . . . a recommended decision containing the findings and the relief sought in the notice." Id. An order based on a failure to file a timely answer is deemed to be issued by consent. Id.

In this case, Respondent repeatedly failed to respond to this administrative proceeding. Despite service of the Notice on both her and her counsel, she failed to file an answer within the 20 days provided in the OCC's Rules. Both Respondent and her counsel were served with Enforcement Counsel's Motion for entry of a default but filed no opposition to it. The record reflects that each was served with the ALJ's Order to show cause, giving Respondent another opportunity to explain her failure to answer the Notice , but no such explanation was provided prior to the entry of the RD.

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[2] Counsel initially wrote to the administrative law judge immediately after the issuance of the Recommended Decision. The administrative law judge correctly informed counsel that he no

Even after the issuance of the RD, Respondent failed to explain adequately why she did not file a timely answer. Respondent's counsel asserted that "a request for a hearing was sent," but did not enclose a copy of such a request, and no such request was made part of the record. Counsel also stated in his unsworn letter that he had appeared at the time and place identified in the Notice for the hearing to occur, in January 2000. But by that time Respondent had been in default for over a month and had not filed the required request for a hearing. Moreover, if counsel had been aware of the time and place for the hearing in January 2000, his and his client's failure to file an answer to the Notice if difficult to excuse, and indeed neither Respondent nor her counsel has ever explained it.

In short, Respondent's default permits the Board to consider the allegations in the Notice as uncontested. Those allegations meet all the criteria for entry of an order of prohibition under 12 U.S.C. § 1818(e). Respondent's conduct in withdrawing funds from customers' accounts without authorization and converting those funds to her own use meets the "misconduct" prong of the prohibition statute, 12 U.S.C. § 1818(e)(1)(A), being both a violation of law, an unsafe or unsound practice, and a breach of Respondent's fiduciary duty to her customers. The action had the necessary "effect" of gain to the Respondent under 12 U.S.C. § 1818(e)(1)(B). Finally, the conduct involved the requisite culpability under 12 U.S.C. § 1818(e)(1)(C) in that it involved personal dishonesty. The requirements for an order of prohibition having been met, the Board has determined that such an order will issue.

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longer had jurisdiction over the matter and that any requests with regard to the recommended

CONCLUSION

For these reasons, the Board orders the issuance of the attached Order of Prohibition.

By Order of the Board of Governors, this 29th day of September, 2000.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

(signed)

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Robert deV. Frierson
Associate Secretary of the Board

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decision must be directed to the decisional agencies

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ORDER OF PROHIBITION

WHEREAS, pursuant to section 8(e) of the Federal Deposit Insurance Act, as amended, (the "Act) (12 U.S.C. § 1818(e)), the Board of Governors of the Federal Reserve System ("the Board") is of the opinion, for the reasons set forth in the accompanying Final Decision, that a final Order of Prohibition should issue against CAROLYN D. NELSON ("NELSON");

NOW, THEREFORE, IT IS HEREBY ORDERED, pursuant to section 8(e) of the Federal Deposit Insurance Act, as amended, (12 U.S.C. § 1818(e)), that:

1. In the absence of prior written approval by the Board, and by any other Federal financial institution regulatory agency where necessary pursuant to section 8(e)(7)(B) of the Act (12 U.S.C. § 1818(e)(7)(B)), Nelson is hereby prohibited:

(a) from participating in the conduct of the affairs of any bank holding company, any insured depository institution or any other institution specified in subsection 8(e)(7)(A) of the Act (12 U.S.C. § 1818(e)(7)(A));

(b) from soliciting, procuring, transferring, attempting to transfer, voting or attempting to vote any proxy, consent, or authorization with respect to any voting rights in any institution described in subsection 8(e)(7)(A) of the Act (12 U.S.C. § 1818(e)(7)(A));

(c) from violating any voting agreement previously approved by the appropriate Federal banking agency; or

(d) from voting for a director, or from serving or acting as an institution-affiliated party as defined in section 3(u) of the Act, (12 U.S.C. § 1813(u)), such as an officer, director, or employee.

2. This Order, and each provision hereof, is and shall remain fully effective and enforceable until expressly stayed, modified, terminated or suspended in writing by the Board.

This Order shall become effective at the expiration of thirty days after service is made.

By Order of the Board of Governors, this 29th day of September, 2000.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

(signed)

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Robert deV. Frierson
Associate Secretary of the Board