"Default Judgment" FIG

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

IN THE MATTER OF CAROLYN D. NELSON FORMER ASSISTANT VICE PRESIDENT LONE STAR NATIONAL BANK PHARR, TEXAS	)))))	AA-EC-99-23

DECISION AND ORDER

This matter is before the Comptroller of the Currency ("Comptroller") on the recommendation of the Administrative Law Judge ("ALJ") for entry of default against Respondent Carolyn D. Nelson ("Respondent"), a former Assistant Vice President of Lone Star National Bank, Pharr, Texas ("Bank"), in civil money penalty and cease and desist proceedings. Upon consideration of the pleadings, the ALJ's Recommended Decision, the materials submitted in response to the Order dated June 2, 2000, and the entire record, the Comptroller concludes that Respondent is in default and assesses a civil money penalty of $50,000. In addition, the Comptroller orders the Respondent to pay restitution in the amount of $33,600; however, Respondent will receive credit for restitution already paid, including restitution paid in compliance with any agreement or court order.

I. FACTUAL SUMMARY AND PROCEDURAL HISTORY

On November 19, 1999, the OCC issued a Notice commencing an enforcement action to impose a civil money penalty, an order of restitution, and an order of prohibition against Respondent.[1] Under the OCC's Rules of Practice and Procedure, a request for hearing and an

[1] The prohibition action has been certified to the Board of Governors of the Federal Reserve System for decision pursuant to 12 U.S.C. § 1818(e)(4).

answer were due on December 14, 1999.[2] When Respondent failed to file an answer or request a hearing, Enforcement Counsel ("E&C") filed a Motion for Default Judgment. Respondent did not respond to the motion or to the ALJ's subsequent order to show cause why she should not be held in default. On April 3, 2000, the ALJ issued a decision recommending that the Comptroller find Respondent in default and impose the relief sought by the Notice.

After the ALJ issued his Recommended Decision and certified the case to the Comptroller and the Board of Governors, counsel for Respondent corresponded with the ALJ on the question of default. The Comptroller then issued the June 2 Order inviting the parties to submit arguments on the default issue. Both Respondent and E&C submitted responses.

II. RESPONSES TO THE JUNE 2 ORDER

A. RESPONDENT

Through counsel, Respondent argues that default is not appropriate. After receiving the Notice, Respondent says she told E&C in a telephone conversation of a criminal proceeding then underway against her. Respondent's counsel asserts that Respondent did not inform counsel of the Notice since counsel had been retained solely for the criminal proceeding. Counsel says that Respondent later informed counsel of the administrative action and her desire to request a hearing. When counsel became aware of the administrative action, he informed E&C of the status of the criminal action and Respondent's intent to contest the OCC's administrative action. Counsel asserts that he appeared at the time and place set in the Notice for the hearing, but no hearing was held.

If a default is found, Respondent argues that E&C should be required to submit information on the appropriate remedy. She says that she has already paid $26,890 in restitution, and payment of the balance may be required at sentencing in the criminal case. In connection

[2] *See* 12 C.F.R. §§ 19.12(b)(1)(ii), 19.12(c)(1), and 19.19(c)(1).

with the civil money penalty, she argues that E&C should be required to prove that the penalty fits the offense, especially when the amount of the penalty exceeds the amount of restitution requested. She also notes that the court may assess a fine against her in the criminal proceeding, and she is likely to serve prison time. In addition, she argues that the imposition of a civil money penalty is unfair in light of her willingness to accept responsibility, pay voluntary restitution, and serve a prison sentence in connection with this matter.

B. ENFORCEMENT COUNSEL

E&C argues that default is appropriate. E&C denies speaking with Respondent concerning the criminal proceedings or any other matter. E&C asserts that separate copies of the Notice were sent to Respondent and her counsel by certified mail return receipt requested, and both persons returned the receipts. After Respondent failed to file a timely answer, E&C filed a motion for default judgment, which Respondent and counsel acknowledged receiving. When Respondent did not respond to the motion, the ALJ issued a Show Cause Order. Respondent's counsel then spoke with E&C by telephone, during which E&C informed counsel of the default. Because the Show Cause Order was not delivered to Respondent personally, the ALJ ordered E&C to make personal service of the Show Cause Order on Respondent. After receiving personal service, Respondent did not file a response to the Show Cause Order.

E&C also argues that the Comptroller does not need further information to justify the proposed remedy. E&C addresses various factors to justify the amount of the civil money penalty, including unjust enrichment and the duration of Respondent's actions. According to E&C, the statutory factors were considered in establishing the assessment set forth in the Notice.

E&C also argues that no further information is necessary to justify the amount of restitution. E&C distinguishes the present case from past restitution cases in which the

Comptroller required additional information.[3] E&C argues that, in those cases, the record was not sufficient to allow the Comptroller to determine the appropriateness of the relief sought. In this case, E&C contends that the Notice sufficiently pleads the facts necessary to justify the amount of restitution.

III. DECISION

A. DEFAULT

The Comptroller finds that Respondent is in default. Failure to file an answer or request a hearing ordinarily constitutes default. Under the civil money penalty statute and implementing regulations, the failure to request a hearing converts the notice of assessment into a "final and unappealable order."[4] Under the statute governing restitution orders, a party that fails to appear at a hearing is deemed to have consented to the issuance of an order.[5] Under the regulations governing OCC administrative hearings, the failure to file a timely answer constitutes a waiver of the right to contest a civil money penalty or a restitution action, unless the respondent can show good cause for the failure.[6] Furthermore, the failure to oppose a motion is deemed a consent to the entry of an order substantially in the form of the order accompanying the motion.[7]

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[3] In re Massimiliano Locci, AA-EC-97-1 (Nov. 13, 1997); In re Paul Lowder, AA-EC-93-73 (Mar. 23, 1994).

[4] 12 U.S.C. § 1818(i)(2)(E)(ii) *and* 12 C.F.R. § 19.19(c)(2).

[5] 12 U.S.C. § 1818(b)(1). *See also* 12 C.F.R. § 19.21.

[6] 12 C.F.R. § 19.19(c)(1).

[7] 12 C.F.R. § 19.23(d)(2).

For more than four months after receiving the Notice on November 27, 1999, Respondent failed to submit any material for the record. Thus, the Comptroller is not persuaded by Respondent's contention that "evidence supports the position that a hearing was requested."[8]

Respondent and her counsel received the Notice, E&C's default motion, a Show Cause Order mailed to counsel, and a Show Cause Order served on Respondent in person by hand delivery. As noted in the ALJ's Recommended Decision, Respondent filed no answer, did not request a hearing, and did not reply to the default motion or the Show Cause Order. Respondent has not directly challenged the ALJ's findings in this regard. Moreover, her concurrent involvement in a criminal proceeding is not good cause for ignoring this administrative proceeding. Respondent was indicted on February 23, 2000 -- more than two months after she defaulted by failing to request a hearing or file an answer. Respondent's assertion that counsel appeared at the time and place set for the hearing in the Notice lacks merit because default had already occurred more than a month earlier when Respondent failed to file an answer or request a hearing.

Amberg v. FDIC[9] and *Oberstar v. FDIC*[10] do not require a contrary conclusion. In both cases, respondents requested a hearing in a timely manner,[11] but filed answers a short time after

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[8] Respondent's Arguments That Default Judgment Is Not Appropriate (June 16, 2000) at § 3.04. Respondent's evidence supposedly supporting this position is that "Ms. Nelson told counsel she responded to the letter" and that "notice was sent to counsel that a hearing was set and required Respondent's attendance." While Respondent does not expressly identify the letter, she presumably refers to the letter described *id.* in § 2.02.

[9] 934 F.2d 681 (5th Cir. 1991).

[10] 987 F.2d 494, 503-05 (8th Cir. 1993).

[11] *Amberg* at 686; *Oberstar* at 503.

the deadline set in the agency rules of practice and procedure.[12] In addition, both courts found that the brief delay in filing an answer constituted little or no prejudice to the agency.[13]

In the present case, Respondent did not file a timely request for hearing. In fact, Respondent only informed the court of her desire for a hearing on April 6, 2000 -- approximately three and one-half months after the request was due and several days after the ALJ had issued his Recommended Decision.[14] Respondent never filed an answer.[15] Respondent's failures clearly prejudiced E&C by requiring it to file and argue a default motion before Respondent filed any document resembling a request for a hearing.

B. REMEDY

The Notice assessed a civil money penalty of $50,000 against Respondent. Under the statute, "the assessment shall constitute a final and unappealable order" when a respondent fails to request a hearing within 20 days of the issuance of the notice of assessment.[16] Thus, the penalty set in the Notice must stand.[17]

Even if the Comptroller has the authority to alter the penalty set in the Notice, he is not inclined to do so here. Respondent intentionally withdrew funds from customer accounts on numerous occasions, thereby showing a lack of good faith. The violations were grave,

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[12] *Amberg* at 682 (three to four days late); *Oberstar* at 503 (22 days late).

[13] *See Amberg* at 686 (answer filed before motion for default filed); *Oberstar* at 504.

[14] *See* 12 C.F.R. § 19.19(a) (request for hearing due within 20 days of service of the notice).

[15] *See id.* (answer due within 20 days of service of the notice).

[16] 12 U.S.C. § 1818(i)(2)(E)(ii). *See also* 12 C.F.R. § 19.19(c).

[17] Respondent argues that the likelihood of criminal sanctions would make a civil money penalty inappropriate. Respondent's Brief at § 4.03. To the extent that Respondent attempts to argue that a penalty would constitute unconstitutional double jeopardy, the Comptroller rejects that argument. Because the penalty is a civil penalty, and not a criminal penalty, the Double Jeopardy Clause of the Constitution does not apply. *Hudson v. United States*, 522 U.S. 93 (1997).

subjecting the Bank to significant reputation risk and potential liability to several depositors. Respondent continued to make the withdrawals for a substantial period of time. Finally, Respondent directly benefited from the withdrawals. Therefore, a substantial civil money penalty is necessary to punish Respondent and to deter other persons within the banking industry from engaging in similar behavior.

With respect to the appropriate amount of restitution, the Notice calls for restitution of $33,600. In the Comptroller's view, the Notice adequately sets out the allegations.[18] Further, the Notice identifies specific accounts from which Respondent withdrew funds,[19] as well as specific amounts withdrawn from the accounts and specific amounts not repaid.[20] The Comptroller is satisfied that restitution in the amount of $33,600 is appropriate.

Respondent argues that she has already paid $26,890 in restitution to the Bank. In addition, Respondent says that she has reached an agreement with the Bank to pay additional restitution, and that she will ask that the agreement be made a part of her sentence in the criminal proceedings. However, Respondent has offered no documentary or other evidence to support these assertions.

To avoid double recovery, Respondent may satisfy the Order by furnishing proof of restitution to the Bank, whether the restitution was made voluntarily, by agreement, or in compliance with court order.

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[18] Notice at ¶¶ 8-15.

[19] The Notice does not identify any specific amounts withdrawn in connection with two of the accounts. *See* Notice at ¶ 12. However, the Notice also does not request any restitution in connection with those accounts. Therefore, this Decision and Order does not include any restitution requirement in connection with the accounts described in ¶ 12.

[20] Notice at ¶¶ 9, 10, 13, 15.

IV. ORDER

(1) This Order is based on the entire record of the proceeding, the Recommended Decision of the Administrative Law Judge, and the responses to the June 2 Order. The Comptroller issues this Order for the reasons described in the Decision, *supra*.

(2) The Comptroller hereby finds that Respondent is in default pursuant to 12 U.S.C. § 1818 and 12 C.F.R. § 19.19.

(3) Pursuant to the Comptroller's authority under 12 U.S.C. § 1818(i), the Comptroller orders Respondent to pay a civil money penalty in the amount of $50,000.

(4) Pursuant to the Comptroller's authority under 12 U.S.C. § 1818(b), the Comptroller orders Respondent to pay restitution in the amount of $33,600.

(5) Respondent shall receive credit under Paragraph 4 of this Order for any restitution that she has already paid to the Bank. Respondent shall also receive credit for any restitution that she pays in compliance with any agreement or court order.

(6) Remittance of the civil money penalty shall be made to the Treasurer of the United States and be delivered to

Hearing Clerk
Office of the Chief Counsel
Office of the Comptroller of the Currency
Washington, DC 20219

(7) Remittance of restitution shall be made to the Bank in a manner acceptable to the Bank.

SO ORDERED this 8th day of August, 2000.

JOHN D. HAWKE, JR.
Comptroller of the Currency