

**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) DOCKET NO. OCC-AA-EC-04-70
Against DONALD K. McKINNEY,)
)
Former Vice President,)
American National Bank)
Wichita Falls, Texas)
)**

FINAL DECISION

This is an administrative proceeding pursuant to the Federal Deposit Insurance Act (“the FDI Act”) in which the Office of the Comptroller of the Currency of the United States of America (“OCC”) seeks to prohibit the Respondent, Donald K. McKinney (“Respondent”), from further participation in the affairs of any financial institution based on actions he took both to obtain employment and while employed at American National Bank, Wichita Falls, 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 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. 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 filing and serving on the respondent a notice of intent to prohibit. 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 September 27, 2004, the OCC served upon Respondent a Notice of Intention to Prohibit Further Participation and Notice of Assessment of a Civil Monetary Penalty (“Notice”) that sought, *inter alia*, an order of prohibition against Respondent based on his conduct in obtaining employment and while employed at the Bank. The Notice alleged that Respondent obtained his employment at the Bank through deceitful misrepresentations. Specifically, the Notice charged that Respondent submitted an application and resume in which he lied about his prior criminal record and represented that he had been employed by two companies during a period of time when he was serving a jail sentence.

The Notice further asserted that after obtaining employment at the Bank, Respondent engaged in various other acts of misconduct. He falsified Bank records to make it appear that he was fulfilling an agreement to pay for the lease of two cars that the Bank purchased for his use. He sold a motorcycle the Bank had leased for his use but did not forward the sale proceeds to the Bank, notwithstanding that a balance was owed on the motorcycle. On multiple occasions, Respondent deposited into his own personal account checks made payable to the Bank, individuals other than himself, and two non-profit organizations. He also withdrew for his own use funds from the Bank and from these two non-profit organizations. Finally, Respondent abused the signatory power he had over the account of one of these

non-profit organizations by forging a required second signature for some of the withdrawals he made from that account.

The Bank's total loss from Respondent's misconduct amounted to \$129,046.45. The Respondent's mother made full restitution to the Bank, and accordingly, the Notice only sought an imposition of an order of prohibition and assessment of civil monetary penalties.

The Notice directed Respondent to file an answer within 20 days and warned that failure to do so would constitute a waiver of his right to appear and contest the allegations. The record shows that the Respondent received service of the Notice. Nonetheless, Respondent failed to file an answer within the 20-day period.

On or about November 16, 2004, Enforcement Counsel filed a Motion for Entry of an Order of Default. The motion was served on Respondent in accordance with the OCC's rules, but he did not respond to it. Finally, on or about December 3, 2004, the ALJ issued an Order to Show Cause, which was mailed to the address at which Respondent had received the Notice. The Order for Show Cause was signed for on December 6, 2004 by Respondent's mother. The order provided Respondent twenty days from the receipt of the order to appear and show cause why the ALJ should not grant Enforcement Counsel's default motion. Respondent ignored the Order to Show Cause and has never filed an answer to the Notice.

II. DISCUSSION

The OCC's Rules of Practice and Procedure set forth the requirements of an answer and 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 failed to file an answer despite notice to him of the consequences of such failure, and also failed to respond to the ALJ's Order to Show Cause. Respondent's failure to file an answer constitutes a default.

Respondent's default requires the Board to consider the allegations in the Notice as uncontested. The allegations in the Notice, described above, meet all the criteria for entry of an order of prohibition under 12 U.S.C. § 1818(e). It was a breach of fiduciary duty for Respondent to accept employment by the Bank and continue working for the Bank after lying in his job application and resume and failing to disclose his prior criminal history. Further, it was a violation of law, breach of fiduciary duty, and an unsafe or unsound practice for Respondent to falsify bank records, forge a signature and steal funds from the bank at which he is employed. Respondent's actions caused gain to himself, as well as loss to the bank. Finally, such actions also exhibit personal dishonesty. Accordingly, the requirements for an order of prohibition have been met and the Board hereby issues such an order.

CONCLUSION

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

By Order of the Board of Governors, this 13th day of May 2005.

**BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM**

(signed)

Jennifer J. Johnson
Secretary of the Board

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ORDER OF PROHIBITION

WHEREAS, pursuant to section 8(e) of the Federal Deposit Insurance Act, as amended, (the "FDI 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 DONALD K. McKINNEY ("McKINNEY"), a former employee and institution-affiliated party, as defined in Section 3(u) of the FDI Act (12 U.S.C § 1813(u)), of American National Bank, Wichita Falls, Texas.

NOW, THEREFORE, IT IS HEREBY ORDERED, pursuant to section 8(e) of the FDI Act, 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)), McKinney is hereby prohibited:

(a) from participating in any manner in the conduct of the affairs of any institution or agency specified in section 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A)), including, but not limited to, any insured depository institution, any insured depository institution holding company or any U.S. branch or agency of a foreign banking organization;

(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 FDI Act (12 U.S.C. § 1818(e)(7)(A));

(c) from violating any voting agreement previously approved by any 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 FDI Act (12 U.S.C. § 1813(u)), such as an officer, director, or employee in any institution described in section 8(e)(7)(A) of the FDI Act (12 U.S.C. § 1818(e)(7)(A)).

2. Any violation of this Order shall separately subject McKinney to appropriate civil or criminal penalties or both under section 8 of the FDI Act (12 U.S.C. § 1818).

3. This Order, and each and every 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 13th day of May 2005.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM

(signed)

Jennifer J. Johnson
Secretary of the Board