

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

IN THE MATTER OF)	
)	
EDWARD TOWE, FORMER PRESIDENT)	
AND DIRECTOR,)	
)	
AND)	OCC-AA-EC-93-42
)	OCC-AA-EC-93-43
THOMAS E. TOWE, FORMER)	
DIRECTOR AND CHAIRMAN OF THE)	
BOARD OF DIRECTORS,)	
)	
FIRST NATIONAL BANK & TRUST)	
WIBAUX, MONTANA.)	

DECISION AND ORDER

I. SUMMARY

This request for interlocutory review arises from administrative proceedings which are pending before Administrative Law Judge Arthur L. Shipe. The Office of the Comptroller of the Currency ("OCC"), represented by the Enforcement and Compliance Division ("E&C"), requests interlocutory review of a discovery ruling by the ALJ permitting Respondents, Edward Towe and Thomas Towe, to take the deposition of Fred D. Finke who is the Deputy Comptroller of the Special Supervision Division at the OCC. Upon careful consideration of the applicable administrative regulation and the arguments presented, the Comptroller grants the review and overturns the ALJ's ruling.¹

¹ The Comptroller notes that E&C's instant motion was not timely filed pursuant to 12 C.F.R. § 19.28. Section 19.28 provides that requests for interlocutory appeals be filed within ten days of the ALJ's ruling. However, the Comptroller on his own motion pursuant to 12 C.F.R. § 19.13 grants E&C leave to file

II. PROCEDURAL HISTORY

The ongoing administrative proceedings concern a Notice of Intention to Prohibit Further Participation ("Prohibition Notice") and a Notice of Assessment of Civil Money Penalties ("Penalties Notice"). These enforcement actions arise out of Respondents' activities while directors and officers of the First National Bank & Trust, Wibaux, Montana ("the Bank"). In a separate administrative action, the OCC appointed a conservator for the Bank. The Bank's shareholders have challenged the Comptroller's conservatorship decision in the United States District Court for the District of Montana. The District Court has granted summary judgment in favor of the OCC, upholding the Comptroller's decision. First National Bank & Trust v. OCC, Cause No. CV 91-121-BLG-JDS (D.Mo. August 9, 1993). The shareholders are seeking reconsideration of the federal court ruling.

The current enforcement actions are summarized in turn. In the Prohibition Notice at issue in these proceedings, the Comptroller seeks to prohibit Respondents from further participation, in any manner, in the conduct of the affairs of any insured banking institution. As basis for the Prohibition Notice the Comptroller charges the Respondents with violations of law and regulations regarding certain activities while they were directors and

its motion out of time because the deposition at issue here has not been conducted and because the respondents did not object to the timeliness of E&C's motion. Respondents' Brief at 4.

officers of the Bank. Further, the Comptroller determined that the Respondents engaged and participated in unsafe and unsound practices, and have committed and engaged in acts, omissions, and practices which constitute a breach of their fiduciary duties as Directors of the Bank.

In the Penalties Notice the Comptroller assesses civil money penalties against the Respondents for violations of law and regulation, and for violations of a cease and desist orders against the Bank.

Both enforcement actions are separate and distinct from the OCC's conservatorship action. However, Respondents' activities and involvement in certain activities and transactions which gave rise to the Comptroller's decision to appoint a conservator for the Bank also give rise to the current enforcement actions. For this reason, the parties have incorporated into these enforcement actions the administrative record, including Finke's Declaration dated June 24, 1992, which provided the basis for the conservatorship decision. Deputy Comptroller Finke summarized in his Declaration the Bank's noncompliance with Cease and Desist Orders and outlined various unsafe and unsound activities in which the Bank was engaged. Finke's Declaration shows that the conclusions he reached were based upon information provided "by OCC staff in the performance of their duties and contained in the official records of the OCC." (Finke Decl. ¶ 2)

On August 3, 1993, in the present administrative proceedings, Respondents filed a Motion for Partial Summary Judgment ("Respondents' Motion"), which is pending. Respondents' Motion states that there are ten issues raised by the Prohibition Notice and Penalties Notice to which no issues of material fact exist. Respondents' Motion at 4-5. E&C has filed its opposition to Respondents' Motion. On October 15, 1993, Respondents filed an application to take Finke's deposition. Respondents' application to depose Finke was based on the inclusion of Finke's Declaration in the record. Respondents' Brief at 3. E&C opposed the application, arguing that Finke did not have direct knowledge of the facts upon which the Notices were issued. On December 16, 1993, the ALJ ordered E&C to make Finke available for deposition on the ground that as evidenced by the Declaration Finke possesses direct knowledge of the facts in these matters even though he obtained the facts from OCC staff.

III. DISCUSSION

1. Interlocutory Review

The question presented for interlocutory review is whether the OCC may be required to produce a senior Agency official merely because he acquired knowledge of certain facts from his or her staff members. Both parties request interlocutory review and state that it is appropriate here pursuant to 12 C.F.R. § 19.28(b)(3) (1993) because subsequent modification of the ruling at the conclusion of the administrative hearings would be

an inadequate remedy. The Comptroller agrees. Further, the Comptroller finds that the issue of whether a senior Agency official should be subject to a discovery deposition presents a substantial question of policy and law for the OCC. Accordingly, the Comptroller grants the request for interlocutory review.

2. **Whether Deputy Comptroller Finke should be made subject to a discovery deposition on the ground that he purportedly possesses direct knowledge of information he received from members of his staff.**

The Federal Rules of Civil Procedure do not apply in an agency proceeding. Further, the Administrative Procedure Act, 5 U.S.C. § 701 et seq., does not expressly provide for discovery. Thus, the extent of discovery due to a party in an agency proceeding is primarily determined by the agency. Mister Discount Stockbrokers, Inc. v. SEC, 768 F.2d 875, 878 (7th Cir. 1985); and McClelland v. Andrus, 606 F.2d 1278, 1285 (D.C. Cir. 1979).

Accordingly, OCC's regulation regarding deposition discovery is 12 C.F.R. § 19.170, which provides in pertinent part:

(a) General rule. In any proceeding instituted under or subject to the provisions of subpart A of this part, a party may take the deposition of an expert, or a person, including another party, who has direct knowledge of matters that are non-privileged, relevant, and material to the proceeding, and where there is need for the deposition.

(emphasis added).

Respondents acknowledge that pursuant to OCC's preamble to Section 19.170, discovery depositions of senior Agency officials

are prohibited unless they have direct knowledge or firsthand knowledge of the facts of the case. Respondents' Brief at 9; 56 Fed.Reg. 27797 (1991). The preamble follows the general principle of law that cabinet officials and other top government executives are not required to submit to depositions. Church of Scientology v. I.R.S., 138 F.R.D. 9, 12 (D.Mass. 1990). The reason for this policy is to allow such officials freedom to conduct their duties without constant interference of the discovery process and to protect the integrity of the administrative process. Id.; Community Fed. Sav. & Loan Bank Bd., 96 F.R.D. 619, 621 (D.D.C. 1983). However, the courts recognize an exception when a senior level official has relevant firsthand personal knowledge of the matters material to the decision which are neither part of the administrative record nor available from some other source. Community Fed. Sav. & Loan Bank, at 621.

Respondents seek to depose the Deputy Comptroller on grounds that he submitted a signed Declaration in the Decision to appoint a conservator for the Bank and that the Prohibition and Penalties Notices are based upon the same factual allegations of wrongdoing. Respondents' Brief at 2. Further, Respondents argue that Deputy Comptroller Finke is a "lay witness who has direct knowledge of the matters relevant to this case." Respondents' Brief at 5. However, a reading of Finke's Declaration shows that he relied upon information which he gained from OCC staff and

OCC's official records. (Finke Decl. ¶ 2) Therefore, the Declaration does not reveal that Finke has firsthand personal knowledge of the information from which his conclusions are drawn.

Moreover, Respondents make no factual showing that the information they seek is otherwise unavailable or that the Deputy Comptroller possesses unique personal knowledge concerning the matters which are the subject of these enforcement actions. Nor have the Respondents shown that the information they hope to get from Finke is not available through interrogatories or through the depositions of the examiners whom Finke supervised.

Respondents present only one example of the type of information they seek to obtain from the Deputy Comptroller. They explain that regarding payments by the Bank to Respondent Edward Towe, Finke stated in the Declaration "[t]hese transactions were, I believe, designed to circumvent IRS levies against Edward Towe's salary." (Finke Decl. ¶15, at 4.) Respondents' Brief at 8. Respondents fail to explain, however, how this conclusion rests on Finke's direct or firsthand personal knowledge or how the underlying information is otherwise unavailable. Moreover, Respondents' desire to depose Finke on this allegation is curious because it is on this very allegation, among others, that the Respondents have moved for summary judgment, alleging that as a matter of law and the undisputed facts these transactions do not

violate any laws or regulations. Respondents' Motion at 5. Indeed, Respondents decision to move for summary judgment suggests their full understanding of this and other transactions upon which they would like to question Finke, thus, further weakening their position that they are entitled to depose Finke.

Furthermore, even if Respondents had shown that Finke somehow possesses direct or firsthand personal knowledge, Respondents fail to show as required pursuant to § 19.170 that there is a need for Finke's deposition. For example, Respondents do not argue that the administrative record is inadequate. This too undermines Respondents' arguments seeking to depose Finke.²

Where, as here, the administrative record is ample, and the Respondents have presented no information from which the Comptroller could conclude that Finke possesses direct or firsthand knowledge regarding any matters which are material in this action, or that information concerning such matters is not available from other sources, there is no basis to permit an exception to the general rule prohibiting deposition discovery of senior Agency officials. The Comptroller finds that allowing Respondents the opportunity to depose Finke violates the policy

² Also, Respondents ambiguously contend that "[d]etrimental action was taken based on Mr. Finke's declaration." If Respondents mean that Finke decided to initiate the current enforcement actions, then they are mistaken. To the contrary, these enforcement actions are based on acts and transactions which are discussed at length in the administrative record.

to conserve the time and energies of public officials for the public's business and runs the risk of violating the policy to protect the integrity of the administrative process. Upon the record presently before the Comptroller, Respondents have failed to justify the depositions they seek in these enforcement actions.

IV. CONCLUSION

For the foregoing reasons, it is hereby ORDERED, that E&C's Motion for Interlocutory Review and to Reverse the Order Permitting the Deposition of Fred D. Finke is granted, and the Order permitting his deposition is vacated.³

So ordered this 23d day of February, 1994.

EUGENE A. LUDWIG
Comptroller of the Currency

³ The parties agree that a stipulation should be entered regarding E&C's decision not to call Finke as an expert witness. Accordingly, they should prepare and execute such a stipulation.