

office or prohibit from further participation in any manner in the conduct of an institution's affairs any institution-affiliated party who is charged with a crime. In order for the circumstances to warrant this suspension or prohibition, the statute requires: (1) that the crime involve dishonesty or breach of trust;² (2) that the crime be punishable by imprisonment for a term exceeding one year under State or Federal law; and (3) that the institution-affiliated party's continued service or participation may pose a threat to the interests of the association's depositors or may threaten to impair public confidence in the association.³

Under section 8(g)(3), a party who has received a notice of suspension or prohibition may request an informal hearing before the OTS.⁴ At the hearing, the party has the burden of proving that his continued service or participation does not, or is not likely to, pose a threat to the depositors' interests or threaten to impair public confidence in the association. The OTS's regulations

² Alternatively, the statute authorizes suspension or prohibition of an institution-affiliated party charged with a criminal violation of certain enumerated provisions of titles 18 and 31 of the United States Code. 12 U.S.C.A. § 1818(g)(1)(A)(ii).

³ Section 8(g)(1) also authorizes the OTS, under the same circumstances described in the text, to order an institution-affiliated party who is convicted of such a crime summarily removed from office or prohibited from further participation in the conduct of an institution's affairs, subject to a post-removal/prohibition hearing held at the person's request under 12 U.S.C.A. § 1818(g)(3). 12 U.S.C.A. § 1818(g)(1)(C).

⁴ 12 U.S.C.A. § 1818(g)(3). See 12 C.F.R. § 508.5 (petition for hearing). The OTS has adopted regulations that apply to agency proceedings under section 8(g) of the FDIA. These rules are codified at 12 C.F.R. Part 508 (1994).

require that, if a party fails to appear at a scheduled hearing, either in person or through an attorney, the notice of suspension or prohibition "shall remain in effect" ⁵

On March 17, 1994, a grand jury in the United States District Court for the Northern District of Texas, Dallas Division, indicted the Petitioners on multiple counts of violations of Title 18 of the United States Code, including conspiracy, bank fraud, mail fraud, wire fraud, and making false statements to bank regulators. Criminal No. 3-94 CR-092-R. Each of these criminal offenses involves dishonesty or breach of trust and is punishable by a term of imprisonment exceeding one year under Federal law.

On March 23, 1994, the Acting Regional Director for the Southeast Region of the OTS issued and served the Notice, which provided that each Petitioner was suspended from office and prohibited from further participation, in any manner, in the conduct of the affairs of the Association or any institution or entity as set forth in section 8(e)(7) of the FDIA, 12 U.S.C.A. § 1818(e)(7), on the grounds that continued service or participation by each Petitioner may pose a threat to the interests of the Association's depositors or may threaten to impair public confidence in the Association. The Notice also provided that by virtue of its issuance and the provisions of section 8(j) of the FDIA, 12 U.S.C.A. § 1818(j), each Petitioner was subject to

⁵ 12 C.F.R. § 508.8.

criminal penalties if during the pendency of the Notice either knowingly participates, directly or indirectly, in any manner in the conduct of the Association's affairs, including soliciting, procuring, transferring, attempting to transfer, voting, or attempting to vote any proxy, consent, or authorization with respect to any voting rights in the Association; violating any voting agreement previously approved by the OTS or the Federal Home Loan Bank Board; or voting for a director, or serving or acting as an institution-affiliated party of any institution or entity as set forth in section 8(e)(7) of the FDIA, without the prior written approval of the OTS.

On April 25, 1994, the Petitioners requested a hearing pursuant to section 8(g)(3) of the FDIA and 12 C.F.R. § 508.5.

On May 3, 1994, the Acting Director issued an Order appointing Geraldine R. Gennet, Esq. to serve as Presiding Officer over the section 8(g) hearing. In a telephone conference call, the Petitioners, the Enforcement Office ("Enforcement") of OTS, and the Presiding Officer agreed that the hearing would be held on June 21, 1994; the date and place of the hearing were memorialized in an Order served on May 9, 1994, and reconfirmed in an Order served on June 17, 1994. However, without prior notice, the Petitioners failed to appear at the hearing, either in person or through an attorney. The Petitioners did not subsequently provide the Presiding Officer with any explanation for their failure to appear

at the hearing. Pursuant to the default provision at 12 C.F.R. § 508.8,⁶ on July 27, 1994, the Presiding Officer recommended that the Acting Director continue the suspension and prohibition in effect.

In an August 12, 1994 filing with the OTS,⁷ the Petitioners offered an explanation for their failure to appear by suggesting that in their view, the results of the hearing were "preordained against them." They were therefore precluded from receiving a "fair and reasonable adjudication" and "denied . . . due process and any fair opportunity to be heard."⁸ In support of this argument, they cited to pre-hearing rulings made by the Presiding Officer that denied certain requests made by them.⁹

⁶ Section 508.8 states:

If the subject individual fails to file a petition for a hearing, or fails to appear at a hearing, either in person or by attorney, or fails to submit a written argument where oral argument has been waived pursuant to § 508.7(d) or (f) of this part, the Notice [of suspension or prohibition] shall remain in effect until the information, indictment, or complaint is finally disposed of and the Order [of removal or prohibition] shall remain in effect until terminated by the Office.

⁷ The filing was entitled "Response to Motion for Costs." See Section B, infra, for a discussion of Enforcement's Motion for Costs.

⁸ Response at p. 2.

⁹ See, e.g., the Presiding Officer's Orders dated May 9 and June 17, 1994; Recommended Decision at 5-13.

The Acting Director has carefully considered Petitioners' explanation and reviewed the filings made by the parties, the Presiding Officer's pre-hearing Orders, and the Presiding Officer's Recommended Decision. The pre-hearing Orders and the Recommended Decision contain a thorough and detailed explanation of the circumstances and bases for the Presiding Officer's pre-hearing rulings and Recommended Decision.

The Acting Director rejects the Petitioners' argument that the Orders "preordained" the results against them or denied their rights to due process and a fair hearing, and accordingly justified their failure to appear at the hearing. The Acting Director finds that the Petitioners have not shown good cause for their failure to appear at the hearing, and that the Presiding Officer properly invoked the default provisions of 12 C.F.R. § 508.8 against them.

After reviewing the entire record, including the Recommended Decision and the submissions of the parties, and for the reasons explained herein and in the Recommended Decision, the Acting Director concludes that continuation of the Petitioners' suspension and prohibition is mandatory under the default provision in the applicable regulations.¹⁰ In accordance with 12 C.F.R. §

¹⁰ The Presiding Officer concluded, and the Acting Director agrees, that continuation of the Notice would be warranted even if the default provision were not mandatory. Enforcement has met its burden of demonstrating that the statutory prerequisites for the issuance and continuation of the Notice have been satisfied, and each Petitioner has failed to rebut the statutory presumption that his indictment for a felony involving dishonesty or breach of trust

508.13(b), the Acting Director finds that the Recommended Decision satisfies the requirements of 12 C.F.R. § 509.38. Accordingly, the Acting Director will adopt the Recommended Decision.¹¹

B. Enforcement's Motions for Costs

On June 30, 1994, after the closing of the record, Enforcement filed a motion with the Presiding Officer requesting that the Petitioners be ordered to pay all costs associated with the hearing as a sanction for their intentional failure to disclose that they would not appear at the hearing, thereby causing the OTS to incur

poses a threat to the interests of the Association's depositors or threatens to impair public confidence in the Association. See Recommended Decision at 16-17, n.15.

The Acting Director also notes that the requirement under 12 C.F.R. § 508.11 that the Acting Director consider certain enumerated factors in making a determination, following the hearing and receipt of the presiding officer's recommended decision, whether the Notice should be continued, terminated, or otherwise modified is mooted by virtue of the Petitioners' default.

¹¹ By virtue of today's Order continuing the Suspension and Prohibition, the Petitioners are also subject to the provisions of 12 U.S.C.A. § 1818(e)(7) (a person who, pursuant to an order under section 8(g), has been suspended or prohibited, may not, while such order is in effect, continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of, any insured depository institution or other institution or entity listed in section 8(e)(7)(A), except upon the written consent of the appropriate Federal banking regulator under section 8(e)(7)(B)) and 12 U.S.C.A. § 1818(j) (authorizing criminal penalties for a person subject to an order in effect under section 8(g) who, without the prior written approval of the appropriate Federal banking regulator, knowingly participates, directly or indirectly, in any manner (including by engaging in an activity specifically prohibited in such order or in section 8(e)(6)), in the conduct of the affairs of any insured depository institution or other institution or entity listed in section 8(j)).

substantial unnecessary expense in having OTS personnel travel to the hearing.

Enforcement argued that (1) the presiding officer in a proceeding under section 8(g) has the authority of an administrative law judge ("ALJ") under the OTS's Rules of Practice and Procedure in Adjudicatory Proceedings, 12 C.F.R. Part 509, to order sanctions in appropriate cases, including the imposition of costs on a party;¹² and (2) the presiding officer has the inherent power -- similar to that of courts established pursuant to Article III of the U.S. Constitution -- to impose sanctions on parties, including costs, in order to protect against abuse of the judicial process. The Petitioners did not file a response to this motion.

On July 27, 1994 in the Recommended Decision, the Presiding Officer rejected Enforcement's arguments, concluding that there is no authority under the statutes, regulations or case law cited by Enforcement that would permit a presiding officer to order (or recommend that the Director order) costs as a sanction in addition

¹² 12 C.F.R § 508.7 states that while hearings under Part 508 are not subject to the adjudicative provisions of the Administrative Procedure Act (5 U.S.C. §§ 554-557), the presiding officer is, however, authorized to exercise all of the powers of an ALJ in proceedings under 12 C.F.R. Part 509 that are subject to 5 U.S.C §§ 554-557. In accordance with Part 509, the ALJ possesses all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay, including the power to regulate the course of the hearing and the conduct of the parties and their counsel as well as to do all other things necessary and appropriate to discharge the duties of a presiding officer. 12 C.F.R. § 509.5(a), (b)(5), and (b)(11).

to the sanction of default already explicitly authorized for suspension and prohibition proceedings under 12 C.F.R. § 508.8. In the Recommended Decision, the Presiding Officer recommended that the motion for costs be denied.

Following the Presiding Officer's issuance of the Recommended Decision and certification of the record to the Acting Director, on August 4, 1994, Enforcement filed a submission entitled "Enforcement's Exceptions to Presiding Officer's Recommended Decision, or, in the Alternative, Motion to Acting Director for an Award of Costs." The OTS's procedural rules do not authorize the filing of exceptions in a proceeding under section 8(g) of the FDIA. Therefore, the Acting Director treated Enforcement's submission as a Motion for Costs and afforded the Petitioners the opportunity to respond by August 12, 1994. See OTS Order No. AP 94-38, August 8, 1994. The Petitioners filed a response in opposition to the Motion for Costs on August 12, 1994.

The Acting Director has reviewed the submissions of the parties and concludes as follows. As the Presiding Officer noted in her Recommended Decision, no statute or regulation expressly authorizes the imposition of costs against a party for failure to appear at a hearing under section 8(g) of the FDIA. In the absence of any other cited authority, the Acting Director deems it inappropriate to award costs against the Petitioners in this case and will deny Enforcement's Motion for Costs.

IT IS THEREFORE HEREBY ORDERED that:

1. The Recommended Decision of the Presiding Officer, a copy of which is attached hereto, is hereby adopted.

2. The provisions of this Order apply separately to each Petitioner. Each Petitioner's suspension from office and prohibition from participation in any manner in the conduct of the affairs of the Association, pursuant to the Notice, is hereby continued in effect. The suspension and prohibition of each Petitioner shall continue in effect until the final disposition of the indictment upon which the Notice is based.

3. While this Order is in effect, each Petitioner is subject to the provisions of sections 8(e)(7) and 8(j) of the FDIA, 12 U.S.C.A. §§ 1818(e)(7) and (j).

4. Enforcement's Motion for Costs is denied.

THE OFFICE OF THRIFT SUPERVISION

By: Jonathan L. Fiechter
Jonathan L. Fiechter
Acting Director

Dated: August 26, 1994