

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

IN THE MATTER OF)	
)	
EARL FORD McNAUGHTON, Former President,)	
Chief Executive Officer and Chairman of the Board,)	
)	
DAVID SCHIMMELE, Former Chief Financial Officer)	AA-EC-2006-53
and Director, and)	
)	
TED WALTER, Former Loan Officer and Director,)	
)	
First National Bank of Fremont,)	
Fremont, Indiana.)	

DECISION AND ORDER

I. INTRODUCTION

This matter is before the Comptroller of the Currency (“Comptroller” or “the OCC”) upon the Order of Final Assessment of Civil Money Penalties (“Recommended Order” or “RO”) issued by Administrative Law Judge (“ALJ”) Ann Z. Cook on October 18, 2007. The Recommended Order concludes that a final order should be issued by the Comptroller against Respondent David Schimmele, a former Chief Financial Officer and Director of the First National Bank of Fremont, Fremont, Indiana (the “Bank”), with respect to the civil money penalty (“CMP”) assessment concerning him in the Enforcement & Compliance Division’s Notice of Intention to Prohibit Further Participation and Notice of Assessment of Civil Money Penalties (“Notice”), dated August 10, 2007.¹

¹ The OCC issued a single notice of charges assessing a \$250,000 CMP against Respondent McNaughton, a \$50,000 CMP against Respondent Walter, and a \$150,000 CMP against Respondent Schimmele. In addition, the Notice seeks orders of prohibition against each of the respondents.

The Notice issued by OCC enforcement counsel (“E&C counsel”) seeks the assessment of a CMP against Respondent Schimmele in the amount of \$150,000. The Notice also seeks an order prohibiting Respondent Schimmele from further participation in the financial services industry. Upon consideration of the pleadings, the ALJ’s Order of Final Assessment of Civil Money Penalties, and the entire record, the Comptroller concludes that Respondent Schimmele failed to request a hearing regarding the CMP assessment within the twenty-day period required by 12 U.S.C. § 1818(i)(2)(H) and, as a result, the assessment “constitute[s] a final and unappealable order,” 12 U.S.C. § 1818(i)(2)(E)(ii).

II. FACTUAL SUMMARY

The Notice alleges that between January 2000 and October 2004, Respondent Schimmele recklessly participated and engaged in unsafe or unsound practices and/or breached his fiduciary duty to the Bank in conducting the business and affairs of the Bank which caused it to incur more than a minimal financial loss, within the meaning of 12 U.S.C. §§ 1813(u), 1818(i)(2). Notice at 2. The Notice alleged that Respondent Schimmele violated and/or aided and abetted the Bank’s violation of 12 U.S.C. §§ 84, 161, 375a, and 375b, 12 C.F.R. §§ 32 and 215, and 31 C.F.R. § 103.33(a). *Id.* Specifically, the Notice alleged that Respondent Schimmele engaged in a nominee loan scheme designed to funnel funds to Respondent McNaughton. *Id.* at 6. As part of this scheme, Respondents engaged in a series of layering transactions and refinancings of the nominee loans through the Bank and other financial institutions. *Id.* In all, Respondent McNaughton received approximately \$3.2 million in misappropriated funds from the Bank, and the Bank incurred a loss of \$2.1 million. *Id.* at 3.

This scheme was discovered during the OCC's regularly scheduled safety and soundness examination of the Bank that commenced in October 2004. *Id.* at 4. Thereafter, in November 2005, a majority of the Bank's assets and liabilities were acquired and assumed by another institution and the remainder of the Bank's assets and liabilities were then merged into the Bank's parent, American Heritage Banco. *Id.* at 4-5.

III. PROCEDURAL HISTORY

The Notice was served upon Respondent Schimmele by overnight express delivery on August 10, 2007. RO at 1. With respect to the CMP assessment, Respondent Schimmele was required by 12 U.S.C. § 1818(i)(2)(H) to request a hearing within "20 days after issuance of the notice of assessment." There is no dispute that Respondent Schimmele was properly served and that the last day to file a request for a hearing with respect to the CMP assessment was August 31, 2007. The Notice stated in bold letters: **"Failure to request a hearing within this [twenty-day] time period shall cause this assessment to constitute a final and unappealable order for a civil money penalty against Respondent pursuant to 12 U.S.C. § 1818(i)."**

Although Respondent Schimmele filed a timely Answer on August 29, 2007, he has not requested a hearing with respect to the CMP assessment. As a result, E&C counsel, on September 18, 2007, filed a Motion for Entry of a Recommended Final Order Assessing Civil Money Penalties. In that motion, E&C counsel argued that the twenty-day filing period in 12 U.S.C. § 1818(i)(2)(H) is jurisdictional and that 12 U.S.C. § 1818(i)(2)(E)(ii) mandates that a failure to request a hearing within the period provided by section 1818(i)(2)(H) renders the CMP assessment a "final and appealable order." Respondent Schimmele did not respond to E&C's motion.

On October 18, 2007, the ALJ issued a Recommended Order, concluding that, because Respondent Schimmele failed to request a hearing on the CMP assessment within the statutory twenty-day period, the assessment constituted a “final and unappealable order” within the meaning of 12 U.S.C. § 1818(i)(2)(E)(ii):

In my opinion, neither Respondents Walter nor Schimmele have complied with the requirement of filing a hearing request on the civil money penalty assessment within the statutorily-set 20 day period, and neither has cited any authority that permits me discretion to extend that period. This requirement was clearly stated in the Notice of Assessment. The applicable statute and regulation imposing the 20-day requirement were likewise cited in the Notice.

Order at 2.²

IV. DISCUSSION

The failure to request a hearing regarding a CMP assessment within twenty days after the issuance of the notice renders the assessment a “final and unappealable order.” 12 U.S.C. § 1818(i)(2)(E)(ii).³ *See Amberg v. FDIC*, 934 F.2d 681, 684 (5th Cir. 1991) (*citing Kronholm v. FDIC*, 915 F.2d 1171, 1174 (8th Cir. 1990)) (failure to request a hearing within twenty days after issuance of a notice of CMP assessment precludes judicial review). Respondent Schimmele never filed a request for a hearing regarding the notice of assessment of a CMP, but did file a timely Answer to the Notice. Nothing in his Answer, however, could be construed as a request for a hearing on the CMP assessment. His answer contains repeated assertions that he is without information to admit or deny

² The Order concluded by noting that “[t]he civil money penalty assessment pertaining to Respondent McNaughton, as well as the prohibition proceedings pertaining to all three respondents remain to be decided.” *Id.* Respondent Walter also failed to request a hearing within the twenty-day period. He subsequently, however, entered into a settlement agreement with E&C with respect to the CMP assessment.

³ OCC regulations restate what the statute provides: “If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order.” 12 C.F.R. § 19.19(c)(2).

the allegations of the Notice and repeated invocations of his Fifth Amendment right against self incrimination. Paragraph 89 of the Notice specifically asserts that the misconduct alleged in the prior paragraphs warrants the assessment of a CMP. In answer to the allegations of paragraph 89, as he had for virtually every other paragraph in the Notice, Respondent Schimmele simply wrote: "Respondent, David Schimmele, is without sufficient information to admit or deny, so he invokes his Fifth Amendment right against self-incrimination" and then restated the allegations in that paragraph.

V. ORDER

Based on the entire record of the proceeding and the Recommended Order of the ALJ, the Comptroller hereby finds that Respondent Schimmele failed to request a hearing on the assessment of a CMP "within 20 days after the issuance of the notice of assessment" as required by 12 U.S.C. § 1818(i)(2)(H), and that this failure renders the assessment of the CMP a "final and unappealable order," as mandated by 12 U.S.C. § 1818(i)(2)(E)(ii). Accordingly, the Comptroller orders Respondent Schimmele to pay a CMP in the amount \$150,000.

Remittance of this penalty shall be payable to the Treasurer of the United States and be delivered to: Hearing Clerk, Chief Counsel's Office, Office of the Comptroller of the Currency, 250 E Street, S.W., Washington, DC 20219.

SO ORDERED this 6 day of December , 2007,

 /s/ John C. Dugan
John C. Dugan
Comptroller of the Currency