UNITED STATES OF AMERICA
before the
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

IN THE MATTER OF: MICHAEL COUSIN, a Person Participating in the Conduct of the Affairs of Cross County Federal Savings Bank, Queens, New York	CASE NO. OTS AP 93-38 DATED: May 13, 1993 OTS Order No. AP 94-48 DATED: October 11, 1994

DECISION AND ORDER

TABLE OF CONTENTS

DECISION

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

This case arises from a criminal indictment on multiple counts of bribery and conspiracy brought in 1990 against Michael Cousin ("Respondent"), former chief executive officer and chairman of the board of directors of Cross County Federal Savings Bank, Queens, New York ("Cross County" or the "Association"). As a result of Respondent's arrest, the Office of Thrift Supervision ("OTS") issued an order on August 10, 1990, suspending Respondent from his positions with Cross County. Due to Respondent's incapacity to stand trial, the criminal indictment was later dismissed without prejudice. A condition of the dismissal, negotiated with Respondent, specified that the dismissal did not affect the pending OTS suspension order.

The OTS thereafter instituted this action, seeking an order of permanent removal and prohibition against Respondent based on two counts: (1) for bribing a federal official in 1987 and 1988 and (2) for aiding and abetting a bribe of a federal official in 1988. Respondent used his position with, and the facilities of, Cross County to commit a bribery offense, set up bank customers to engage in illegal activities and induce a member of Cross County's Board of Directors to commit a criminal act. All of these activities could seriously prejudice the interests of the depositors, and all evidence personal dishonesty.

The gravity of Respondent's misconduct was precisely what concerned Congress when it provided that an individual convicted of certain types of criminal offenses should be automatically

prohibited from the banking industry. Here, on the ground of physical incapacity, Respondent was able to avoid trial on the merits in a criminal forum. The allegations have been adjudicated in this administrative proceeding, however. The Acting Director concludes that Respondent's misconduct demonstrating personal dishonesty was established by a preponderance of the evidence. The Acting Director also concludes that such misconduct could seriously prejudice the interests of Cross County's depositors. Accordingly, the sanction of removal and prohibition is appropriately ordered here pursuant to 12 U.S.C. § 1464(d)(4)(A) (1982) and 12 U.S.C. § 1818(e)(Supp. V 1993).

II. BACKGROUND

A. Description of the Charges and Summary of Administrative Proceedings

1. The Prior Suspension Order and Related Proceedings

Respondent was charged on August 8, 1990, with multiple counts of bribery. Cousin v. OTS, 840 F. Supp. 8, 9 (E.D.N.Y. 1993). On August 10, 1990, after the OTS learned of Respondent's arrest, the District Director of the New York District office of the OTS issued and served upon Respondent a Notice of Suspension and Prohibition from Participation in Association Affairs under 12 U.S.C. § 1818(g)(1), suspending Respondent from his positions with Cross County and prohibiting him from further participation in any manner in the conduct of the affairs of Cross County. Id. On September 9, 1990, a grand jury indicted Respondent on eight counts of bribery and conspiracy. Id.

Pursuant to Respondent's request, an administrative hearing on the suspension was conducted on March 1, 1991. The Presiding Officer subsequently issued a Recommended Decision that the Director continue the suspension and prohibition until final disposition of the criminal case. The Director of OTS adopted this recommendation on July 15, 1991. OTS AP 91-42.

On May 25, 1992, the criminal indictment was dismissed at Respondent's motion on the ground that he was not physically capable of standing trial. Cousin, 840 F. Supp. at 9. The OTS requested and obtained language in the dismissal order that the dismissal "does not constitute a final disposition of the indictment for purposes of 12 U.S.C. § 1818(g), [and] is not a dismissal on the merits." Id. at 10. Respondent stated at the time that he had no objection to this provision. Id.

In February 1993, Respondent filed a civil action in federal district court for the Eastern District of New York against the OTS seeking a declaratory judgment that the OTS suspension order had been terminated as a matter of law by the district court's dismissal of the indictment. See Cousin v. Office of Thrift Supervision, Civ. No. 93-0548 (EHN). In dismissing Respondent's suit, the district court concluded that Respondent -- having negotiated the language of the dismissal -- waived his right to have the suspension order terminate when the criminal charges against him were dismissed.[1] Cousin, 840 F. Supp. at 11.

---

[1] That action is presently on appeal before the U.S. Court of Appeals for the Second Circuit. Cousin v. OTS, Dkt. No. 94-6070 (argued September 14, 1994).

Accordingly, the suspension order remains in effect.[2]

2. The Instant Proceeding

On May 13, 1993, Enforcement instituted the instant removal and prohibition proceeding against Respondent. The Notice of Charges alleges three incidents, under two independent counts, giving rise to the enforcement action. These three events also served as the basis for Respondent's arrest and criminal indictment in 1990. Count I charges that on two occasions in 1987 and 1988 Respondent bribed an IRS agent to terminate a grand jury investigation while on bank premises and using bank facilities. Count II charges that Respondent aided and abetted the crime of bribery, by disclosing confidential information concerning the affairs of Cross County customers to an IRS agent in orchestrating a bribe of the agent by Cross County customers.

Respondent answered the charges on June 2, 1993, and asserted six affirmative defenses. Respondent also requested a private hearing. This request was opposed by Enforcement and denied by the Acting Director on August 6, 1993.

On July 18, 1993, Respondent moved to dismiss this proceeding. Enforcement opposed the motion and on August 9, 1993, the ALJ denied the request.

On September 13-15, 1993, a hearing was held in New York

---

[2] The district court also noted that Respondent has recourse under 12 U.S.C. § 1818(g) to apply to the OTS for reinstatement. 840 F. Supp. at 11. By letter dated September 30, 1992, Respondent requested, through counsel, acknowledgement by the OTS that the suspension order terminated by virtue of the dismissal. By letter dated November 25, 1992, the OTS notified Respondent that it considered the suspension order to continue in effect.

City, New York before the ALJ. At the hearing, Enforcement argued that Respondent also committed the additional offense of giving an illegal gratuity to a federal official in 1987. The parties filed post-hearing proposed findings of fact, conclusions of law, memoranda of law, briefs and reply briefs.

The ALJ issued a Recommended Decision and Order on March 31, 1994. Both parties filed exceptions thereto as well as additional memoranda and replies. On June 27, 1994, the parties were notified that the ALJ's Recommended Decision had been submitted to the Acting Director for final decision. On September 26, 1994, the Acting Director extended the deadline for issuing the final decision to October 11, 1994. OTS Order No. AP 94-43.

B. Summary of the ALJ's Recommended Decision

The ALJ determined that Enforcement had not sustained its burden of proof under Count I for several reasons. First, he found that the evidence was insufficient to conclude that Respondent violated any law in 1987. Second, while he determined that Respondent's 1988 activity violated the anti-bribery statute, the ALJ concluded generally that Enforcement did not prove that the actual or potential loss or harm caused by Cousin's activities to the institution was "substantial", or that the interests of the depositors could be seriously prejudiced in light of the existence of federal deposit insurance. The ALJ also concluded that Respondent's acts -- while evidencing personal dishonesty -- were not directed towards the Association.

Nor did the ALJ find that Respondent acted with willful or continuing disregard for the safety or soundness of Cross County. Thus, the ALJ did not recommend removal or prohibition on Count I.

On Count II, however, the ALJ found against Respondent. The ALJ concluded that Respondent's involvement in the Cross County customer's bribe of an IRS agent constituted: a) a violation of law, per 18 U.S.C. § 2 (treating aiders and abettors as principals); b) an unsafe or unsound banking practice; and c) a breach of fiduciary duty to Cross County. The ALJ also determined that the disclosure and misuse of confidential bank information was integrally related to Respondent's position at Cross County, and concluded that the Association suffered or will probably suffer substantial financial loss or other damage. Similarly, he concluded that Respondent's display of personal dishonesty was sufficient to warrant removal and prohibition because Respondent's misconduct related to activities connected with the Association and that Respondent acted with willful and continuing disregard for the safety and soundness of the Association.

C. Exceptions to the Recommended Decision

Respondent has entered exceptions to most of the ALJ's Recommended Decision, reasserting arguments he raised before the ALJ. Respondent raises a number of factual exceptions, but the only significant one is his claim that he did not offer to pay the IRS agent to terminate the IRS investigation in 1988 or aid

and abet the commission of bribery in 1988. Respondent also raises several evidentiary issues, summarized as follows: (1) that he was not permitted to adequately cross-examine witnesses on matters relating to the grand jury, IRS matters or his entrapment defense; (2) that certain discovery requests were improperly denied, including a request for issuance of a subpoena to the IRS; and (3) that OTS's expert testimony should not be accorded any deference. Finally, Respondent asserts a number of legal arguments, essentially denying that the elements for removal and/or prohibition have been met and claiming that Respondent was entrapped and is the victim of government misconduct.

Enforcement excepted to the ALJ's Recommended Decision concerning Count I. First, Enforcement took exception to several factual issues relating to details concerning the bribes. Second, Enforcement excepted to the ALJ's standard for removal and prohibition to the extent that the ALJ interpreted each element to require Respondent's misconduct to be integrally related to the Association. Enforcement also argued that the ALJ, having failed to accord appropriate deference to the OTS's expert testimony, improperly concluded that there was insufficient evidence of actual or potential prejudice to the interests of the depositors.

III. FINDINGS OF FACT

The Acting Director generally accepts the facts relied on by the ALJ in his Recommended Decision. The Acting Director believes, however, that the record reflects additional facts relevant to a determination of this action. These facts are included in the following discussion of the three incidents giving rise to this proceeding.

A. The 1987 Bribe

The events underlying the bribery charge commenced in late 1986 or early 1987, when Kevin McLaughlin ("McLaughlin"), a Special Agent with the Internal Revenue Service ("IRS") Criminal Investigation Division, served a grand jury subpoena on European American Bank ("EAB") for records relating to Respondent. Respondent was contacted by EAB and thereafter initiated a meeting with McLaughlin in February 1987 to review documents at Cross County responsive to the EAB subpoena. When McLaughlin began to question Respondent about the documents, Respondent terminated the meeting on the grounds that he desired legal representation.

Several months later, Respondent called McLaughlin, complained of the cost of retaining an attorney and inquired whether it was necessary to do so. Respondent mentioned that he donated a lot of money to charity, and offered to donate money to McLaughlin's favorite charity. Because McLaughlin believed that Respondent had offered him a bribe, he reported the incident to

the U.S. Attorney's office and his supervisors, who directed him to enter into an undercover operation to accept any bribes offered by Respondent. All of Respondent's conversations with McLaughlin thereafter were monitored by means of a recording device.

On May 27, 1987, at Respondent's request, McLaughlin met with Respondent at Cross County. Respondent told McLaughlin that he did not need an attorney and that he would give McLaughlin half the money that it would have cost to retain an attorney. He also inquired whether McLaughlin "had a tape on" and later stated, "I hope you ain't taping it" and "you're not taping what we did," asking McLaughlin to raise his right hand to swear to it. (OTS Exhibit 1 at 6; 13).

On June 8, 1987, Respondent telephoned McLaughlin to schedule a meeting. McLaughlin asked if they "still got a deal" and Respondent replied, "of course." (OTS Exhibit 2 at 3). The next day, Respondent and McLaughlin met in Respondent's office at Cross County. During the meeting, Respondent inquired how McLaughlin knew his telephones weren't wiretapped. Respondent gave McLaughlin $1,750 in cash in an envelope and a Swiss silver bullion bar. When McLaughlin started to count the money, Respondent cautioned him to put it away.

B. The 1988 Bribe

In 1988, a grand jury subpoena was served on All Queens Tudor Realty ("AQTR"), located in Queens, New York, an entity in which Respondent had a financial interest. Within days after

service of the subpoena, Respondent tried to contact McLaughlin.

On February 10, 1988 McLaughlin and Respondent, meeting at Cross County, discussed the subpoena issued to AQTR. McLaughlin understood that Respondent wanted the agent to "kill" the investigation of AQTR and "make the subpoenas go away" in return for $5,000 from Respondent and another party. (Transcript Vol. I at 96-97; OTS Exhibit 13). McLaughlin understood that Respondent would pay him $5,000 because Respondent used hand signals, indicated that figure and then wrote the amount on a piece of paper. Respondent and McLaughlin agreed to meet the following week to effectuate the payment to McLaughlin and later scheduled that meeting for February 18, 1988, at Cross County.

The meeting on February 18 took place in Respondent's office at Cross County. Respondent gave McLaughlin an envelope with $6,500[3] and repeatedly told McLaughlin he "wanted this stopped" and didn't "want to hear" anymore about the investigation (OTS Exhibit 5 at 9). McLaughlin understood from the discussion that Respondent wanted McLaughlin to "kill the investigation" and that Respondent "didn't want to be bothered with it anymore." (Transcript Vol. I at 101, 103, 105, 106, 108).

C. <u>The Aiding and Abetting of a Bribe in 1988</u>

In March or April 1988, Respondent -- on his own initiative

---

[3] Respondent originally told McLaughlin that Respondent was paying $5,000 and his partner in AQTR the remaining $1,500; however, Respondent later admitted to McLaughlin that it was all Respondent's money.

-- contacted McLaughlin and scheduled a meeting on April 26, 1988. They met at Cross County and proceeded to a restaurant for lunch. During their meeting, Respondent suggested that McLaughlin open an investigation of certain Cross County customers for possible federal tax evasion and Respondent would arrange for the customers to bribe McLaughlin to close the investigation. According to Respondent's plan, Respondent would provide McLaughlin sufficient information on these individuals to enable McLaughlin to commence an investigation of them. Then, Respondent would arrange for the individuals to bribe McLaughlin to "kill" the case. (Transcript Vol. I at 109-10; OTS Exhibit 6). Respondent arranged for Max Fodera ("Fodera"), a friend of Respondent's and a member of the Cross County Board of Directors, to serve as an intermediary in Respondent's scheme. As part of his undercover operation, McLaughlin agreed to Respondent's plan.

At a meeting at Cross County on May 11, 1988 at Respondent's request, Respondent identified the individuals he mentioned on April 26, 1988, as a Mr. and Mrs. Parlante. John and Joan Parlante were borrowers who had obtained a mortgage from Cross County on their personal residences through Respondent. McLaughlin identified the information he would need about the Parlantes to open an investigation. Respondent thereafter provided McLaughlin with the Parlantes' social security numbers and information concerning the location of houses, business, and income as reported on their Cross County mortgage application.

In August 1988, McLaughlin served a grand jury subpoena on

Cross County for the Parlantes' bank records, and McLaughlin and Respondent then discussed how they would proceed with the investigation of the Parlantes. McLaughlin testified that, during a meeting at Cross County, he and Respondent also considered "how to go about it, when to subpoena them, whether I should wait or do it sooner, do it later ... How we should proceed." (Transcript Vol. I at 128). Subsequent to this meeting, Respondent advised McLaughlin that Respondent believed the Parlantes would pay a $25,000 bribe to McLaughlin.

Thereafter, at Respondent's direction, Fodera advised the Parlantes that Cross County had received a subpoena for the Parlantes' bank records. Fodera also told the Parlantes that they "were in a lot of trouble;" that Respondent wanted to talk with them; and that Respondent could "take care of everything." (Transcript Vol. II at 414). Following Fodera's meeting with the Parlantes, Respondent informed McLaughlin that the Parlantes were very concerned about the subpoena and Respondent advised McLaughlin that McLaughlin "will have some winner there." (OTS Exhibit 8 at 3, 8; Transcript Vol. I at 130).

Approximately one week later, Fodera advised the Parlantes that Respondent wanted to talk with John Parlante at Cross County. John Parlante was not inclined to meet with Respondent but Mrs. Parlante agreed to meet with Respondent at Cross County. At that meeting, Respondent advised Mrs. Parlante that Cross County had been served with a subpoena and that the bank would have to give all the information Cross County maintained on the

Parlantes to the IRS agent. Mrs. Parlante told Respondent that he should provide any information the IRS requested in the subpoena.

Respondent advised Mrs. Parlante that he had previous problems with the IRS, that the agent identified on the subpoena for the Parlantes' records was the same agent responsible for Respondent's case, and that Respondent "knew how to deal with this agent." (Transcript Vol. II at 382). Respondent further explained that the IRS agent would take a bribe and that "you have to bribe the agent." Id. Mrs. Parlante initially opposed any bribe plan and Respondent, disturbed with her resistance, told Fodera and Mrs. Parlante that he did not want to deal with her anymore and that he wanted to schedule a meeting with her husband at Cross County.

On September 26, 1988, Respondent and McLaughlin discussed when McLaughlin should serve the subpoenas on the Parlantes at their place of business. Respondent told McLaughlin that Respondent was dispatching Fodera to meet with the Parlantes the next day and that McLaughlin should delay serving the subpoenas until after Fodera met with them. Fodera was instructed to tell the Parlantes that Respondent knew McLaughlin. On the following day, Respondent telephoned McLaughlin and advised him that Fodera had met with the Parlantes and that Mrs. Parlante was concerned, but that her husband was not. McLaughlin and Respondent then agreed on the date and time that McLaughlin would serve the subpoena on the Parlantes.

As advised by Respondent and in furtherance of the plan conceived by Respondent, McLaughlin served a subpoena on the Parlantes at their place of business. John Parlante instructed McLaughlin to leave and to contact the Parlantes' lawyer. Mr. Parlante then decided to meet with Respondent after his wife relayed Respondent's assertions that Respondent knew the agent and that "he could be taken care of." (Transcript Vol. II at 416).

John Parlante later met with Respondent at Cross County. During the meeting Respondent informed Mr. Parlante that Respondent knew McLaughlin from past investigations. Respondent also advised Mr. Parlante that McLaughlin would accept a bribe to terminate the IRS investigation of the Parlantes. Respondent encouraged Mr. Parlante to pay McLaughlin to terminate the investigation and gave Parlante specific instructions on how to effectuate the bribe, including use of a code phrase to signal that McLaughlin and Mr. Parlante could continue their discussions in private.

Respondent and McLaughlin thereafter spoke on the phone to discuss the subpoena involving the Parlantes and the possibility of payments from the Parlantes. Respondent also gave McLaughlin instructions on how to accept the payment from John Parlante, including instructions "to be careful what [he] said with him" and not to leave any evidence of a bribe amount on paper. (Transcript Vol. I at 146-148). On October 20, 1988, McLaughlin met with Mr. and Mrs. Parlante to discuss the IRS subpoenas.

During the meeting, John Parlante, following Respondent's specific instructions, offered to pay McLaughlin $25,000 in cash to terminate the IRS investigation of the Parlantes. At the same meeting, Mr. Parlante paid McLaughlin $20,000 in cash. On October 27, 1988, Mr. Parlante paid McLaughlin an additional $5,000 in cash to terminate the IRS investigation.

Following the October 20, 1988, payment by the Parlantes, McLaughlin spoke by phone with Respondent on several occasions. Respondent was advised by McLaughlin of the payment by the Parlantes and encouraged McLaughlin to ask the Parlantes for more money. He took credit for advising John Parlante how to effectuate the bribe, stating, "I coached him everything that he did to you today." (OTS Exhibit 12 at 14.) Respondent also encouraged McLaughlin to pay Fodera $2,500 in cash for Fodera's role in obtaining the payment from the Parlantes.

On November 2, 1988, McLaughlin telephoned Respondent and agreed to meet Respondent and Fodera. At the meeting, Respondent, Fodera and McLaughlin discussed the Parlante payment, and McLaughlin paid $2,500 to Fodera.

IV. ISSUES

This proceeding raises several issues, including: (1) whether the violation of a criminal statute may serve as the basis for a removal and prohibition order under 12 U.S.C. § 1464(d)(4)(A) and if so, whether the evidence adduced in this action demonstrates a violation of law; (2) to what extent the "violation of law" provision in the removal and prohibition

statute requires misconduct relating to the specific institution; and (3) whether the ALJ properly interpreted the phrase "that the interests of [the] savings account holders could be seriously prejudiced by reason of such violation . . . ," and properly evaluated Enforcement's evidence of potential or actual prejudice based on Respondent's 1990 arrest and indictment.

V. DISCUSSION

A. Statutory Background

The OTS's authority to bring this action against Respondent is founded on provisions existing both prior to the enactment of, as well as those included in, the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), P.L. No. 101-73, 103 Stat. 183 (1989).[4] The current version of the removal and prohibition statute appears in section 8(e) of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1818(e)(Supp. V 1993). The remedies established by FIRREA may be applied to conduct that occurred before the statute was passed, but the substantive standards for judging Respondent's conduct are those found in the law in effect during the time of the conduct complained of, that is, former 12 U.S.C. § 1464(d)(4)(A) (1982). See In re Keating, OTS Order No. AP 91-20 (May 11, 1991) at 17-23; In re O'Keeffe, OTS Order No. AP 90-661 (April 26, 1990) at 13-15.

Before turning to the analysis of the removal and

---

[4] The OTS is the "appropriate Federal banking agency" with regard to Cross County and Cousin. 12 U.S.C. §§ 1813(q), 1818(i)(3).

prohibition charges at issue, the Acting Director notes that the statutory scheme for removal and prohibition involves additional provisions necessary for an understanding of this proceeding. The provisions appear in the enforcement statutes applicable to the agency existing both before and after the enactment of FIRREA.

Under section 8(g)(1)(A) of the FDIA, an institution-affiliated party charged with (1) a crime involving dishonesty or a breach of trust which is punishable by imprisonment for a term exceeding one year under state or federal law, or (2) a criminal violation of certain enumerated provisions of Titles 18 or 31 of the United States Code, may be summarily suspended and/or prohibited by the OTS if the agency determines that such individual's continued service or participation may pose a threat to the interests of the depositors or may threaten to impair public confidence in the association. 12 U.S.C. § 1818(g)(1)(A).[5] Such suspension or prohibition remains in effect until the final disposition of the charge or until terminated by the agency. 12 U.S.C. § 1818(g)(1)(B).

Similarly, if an institution-affiliated party is convicted of a crime involving dishonesty or a breach of trust which is punishable by imprisonment for a term exceeding one year under state or federal law, the OTS, upon a finding that continued service or participation by the individual may pose a threat to

---

[5] The institution-affiliated party may request a hearing after the issuance of the notice of suspension or prohibition. 12 U.S.C. § 1818(g)(3).

the interests of the association's depositors or may threaten to impair public confidence in the association, may issue without prior hearing, an order of removal or prohibition. 12 U.S.C. § 1818(g)(1)(C)(i). In the event of a conviction for a violation of the enumerated provisions of Titles 18 and 31, the agency is required to order summarily the individual's removal or prohibition. 12 U.S.C. § 1818(g)(1)(C)(ii).[6]

The statute also provides that the fact that an individual is found not guilty of the charge, or the charge is otherwise disposed of, does not preclude the OTS from thereafter instituting a proceeding seeking the individual's permanent removal and prohibition under section 8(e) of the FDIA. 12 U.S.C. § 1818(g)(1)(D)(ii).[7]

For conduct that occurred prior to the passage of the FIRREA, the OTS is authorized to issue a removal and prohibition order where an officer or director has, in pertinent part:

> (a) committed any violation of law or regulation; or
>
> (b) engaged or participated in an unsafe or unsound practice in connection with the institution; or
>
> (c) committed or engaged in any act, omission, or practice which constitutes a breach of his fiduciary duty as such officer or director.

Second, as a result of such misconduct, the institution must

---

[6] The statute authorizes a post-order hearing at the request of the individual. 12 U.S.C. § 1818(g)(3).

[7] Substantially similar provisions were in effect pre-FIRREA under 12 U.S.C. § 1464(d)(5).

either:

(a) have suffered or will probably suffer substantial financial loss or other damage; or

(b) the interests of its savings account holders could be seriously prejudiced by reason of the misconduct; or

(c) respondent received financial gain from the misconduct.

Finally, the misconduct must evidence either:

(a) personal dishonesty on the part of respondent; or

(b) a willful or continuing disregard for the safety or soundness of the institution.

12 U.S.C. § 1464(d)(4)(A) (1982)(repealed).[8] The first element

---

[8] The current standard for removal and prohibition is set forth in 12 U.S.C. § 1818(e). In most respects it is similar, although not identical, to the standard contained in § 1464(d)(4)(A).

Section 1818(e)(1) presently provides that the appropriate federal banking agency may serve a notice of removal/prohibition whenever it determines that any (I) institution-affiliated party has, directly or indirectly, (a) violated (1) any law or regulation; (2) any cease-and-desist order which has become final; (3) any condition imposed in writing by the appropriate Federal banking agency in connection with the grant of any application or other request by such depository institution; or (4) any written agreement between such depository institution and such agency; (b) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution; or (c) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty; (II) by reason of such violation, practice or breach, (a) such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage; (b) the interests of the insured depository institution's depositors have been or could be prejudiced; or (c) such party has received financial gain or other benefit; and (III) such violation, practice or breach either involves personal dishonesty on the part of such party or demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution

identifies three independent types of misconduct, the latter two of which contemplate misconduct relating directly to the institution at issue. The second element identifies three alternative effects of the misconduct, including potential serious harm to the association. Finally, the last element identifies two separate aspects of culpability, the latter of which relates to the subject institution. These three categories of requirements may be referred to respectively as "misconduct," "effects" and "culpability." See Oberstar v. FDIC, 987 F.2d 494, 500 (8th Cir. 1993)(construing substantially identical language in 12 U.S.C. § 1818(e)).

B. Count I: Respondent's 1987 and 1988 Bribes of a Federal Official

1. Misconduct

a. The 1987 conduct

i. The bribery charge

With regard to the first element, the underlying misconduct, Enforcement charged that Respondent twice bribed McLaughlin in 1987 and 1988 in violation of 18 U.S.C. § 201(b)(1)(C). Section 201(b)(1)(C) imposes criminal penalties on whoever:

> (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or person selected to be a public official to give anything of value to any other person or entity, with intent --

---

or business institution. 12 U.S.C. § 1818(e)(1).

* * * * * * *

> (C) to induce such public official or such person selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person; ...

18 U.S.C. § 201(b)(1)(C). See United States v. Gallo, 863 F.2d 185, 189 (2d Cir. 1988), cert. denied, 489 U.S. 1083 (1989)(bribery has been committed where something of value is offered or promised with intent to influence any official act). A bribe is distinguishable from an otherwise lawful expenditure to foster goodwill insofar as a bribe is made with "'criminal intent that the benefit be received by the official as a quid pro quo for some official act, pattern of acts, or agreement to act favorably to the donor when necessary.'" United States v. Head, 641 F.2d 174, 180 (4th Cir. 1981), quoting United States v. Arthur, 544 F.2d 730, 735 (4th Cir. 1976).

The element of criminal or "corrupt" intent that must be proved for a bribe is a higher degree of intent than that which is required under the provision that prohibits illegal gratuities. United States v. Hsieh Hui Mei Chen, 754 F.2d 817, 822 (9th Cir.), cert. denied, 471 U.S. 1139 (1985), citing United States v. Strand, 574 F.2d 993, 995 (9th Cir. 1978).[9] A defendant's awareness of the illegality of the transaction is evidence of corrupt intent. Id.

The Acting Director rejects the ALJ's conclusion that the evidence fails to establish that Respondent violated 18 U.S.C. §

---

[9] Section V.B.1.a.ii. infra discusses the lesser included offense of giving an "illegal gratuity."

201(b)(1)(C). While the evidence concerning the 1987 bribe is largely circumstantial, it is nonetheless clear that Respondent paid McLaughlin to terminate the IRS investigation in 1987. The evidence meets each of the four elements of a bribe -- (i) corruptly (ii) giving something of value (iii) to a government official (iv) to induce the official to act or omit to act in violation of his lawful duty. Respondent gave something of value -- $1750 in cash, as well as a bar of silver bullion -- to McLaughlin, a government official.

Additionally, the evidence in the record, and Respondent's failure to rebut such evidence, also demonstrates that Respondent acted with the intent to induce McLaughlin to breach his lawful duty.[10] Respondent's statement to McLaughlin -- an IRS agent with whom he had no previous dealings -- that Respondent did not need an attorney and that he would give McLaughlin half the money that it would have cost for an attorney, and his later

---

[10] The evidence relating to the bribery charge is primarily based on McLaughlin's testimony and transcripts of the taped conversations between McLaughlin and Respondent. The ALJ found McLaughlin to be a credible witness. R.D. at 13 n.7. Given the ALJ's first-hand observations of the witness' demeanor, the Acting Director defers to the ALJ's determination.

Respondent failed to provide any witnesses on his own behalf, including himself. The Acting Director is entitled to draw an adverse inference from Respondent's failure to testify on his own behalf. See Director, Office of Thrift Supervision v. Lopez, 960 F.2d 958, 965 (11th Cir. 1992); N. Simms Organ & Co. v. Securities and Exchange Commission, 293 F.2d 78, 80-81 (2d Cir. 1961), cert. denied, 368 U.S. 968 (1962).

The Acting Director also notes that Respondent's repeated factual cites in his pleadings to the "totality of the evidence" is neither probative nor illuminating and fails to comport with the requirements of specificity set forth in 12 C.F.R. § 509.39(b).

affirmative response to McLaughlin's question whether they "still got a deal," admit of only one interpretation: Respondent wanted McLaughlin not to execute the subpoena, as McLaughlin's duty required him to do. The next day, Respondent gave an envelope full of money to McLaughlin. It was McLaughlin's uncontroverted testimony that he comprehended that Respondent's offer to donate money to McLaughlin's favorite charity (instead of retaining an attorney) was in exchange for abandoning the subpoena. Indeed, Respondent understood that he had offered McLaughlin a bribe, as he later admitted to John Parlante that he had previously bribed McLaughlin and advised John Parlante that "you have to" bribe the agent. (Transcript Vol. II at 417).

Further, Respondent's repeated efforts to conceal his communications with McLaughlin establish that he acted corruptly. Respondent was careful not to express the terms of the bribe more clearly, given his oft-stated concerns that the IRS might be surreptitiously recording his conversations with McLaughlin. Similarly, Respondent cautioned McLaughlin to not count the money in the envelope openly. Respondent's concerns and attempts to avoid surveillance demonstrate that he was aware of the illegal nature of his actions and was acting corruptly.

Respondent provides no creditable, alternative explanation of his behavior and the Acting Director is unable to discern one. The only apparent purpose was to obtain favorable treatment from McLaughlin in the course of the IRS investigation. Based on a preponderance of the evidence, the Acting Director concludes that

Respondent believed he would not need an attorney because he would be able to successfully bribe McLaughlin; that the giving of money to McLaughlin was an effort to terminate the IRS inquiry; that the "deal" Respondent negotiated was the classic quid pro quo contemplated by section 201(b)(1)(C) and that Respondent acted corruptly.

The ALJ's statement that the evidence was insufficient to find a violation of law for the 1987 conduct appears to be based largely upon the weight he gave to the testimony of Ronald Fanelli ("Fanelli"), McLaughlin's supervisor. Fanelli testified that he believed the evidence was "iffy" to support a criminal prosecution based on the bribery statute. Although it is unclear whether the ALJ was relying on Fanelli's legal or factual conclusions, or both, the ALJ's determination is flawed for several reasons.

First, the ALJ should not have relied on Fanelli's legal conclusions because, other than expert testimony, it is inappropriate to take evidence on the legal significance of particular facts. Here, Fanelli was not called to provide expert testimony on whether a criminal prosecution could be sustained against Respondent. Moreover, since Fanelli was discussing the possibility of criminal prosecution, the ALJ wrongfully applied the standard of proof required by a criminal proceeding -- beyond a reasonable doubt -- to a civil administrative action, which only requires a preponderance of the evidence.

Second, as a factual matter, Fanelli's individual opinion

that the evidence was "iffy" to support a criminal bribery prosecution is wholly irrelevant because Respondent was in fact ultimately charged and indicted by a grand jury for bribery on these facts. Furthermore, Fanelli's opinion is not direct evidence of what transpired.

To the extent the ALJ's finding of insufficient evidence of a bribe in 1987 was based on evidence other than Fanelli's testimony, the Recommended Decision does not identify such evidence. Based on the Acting Director's independent review of the evidence, summarized above, he concludes that it was error for the ALJ to determine that no bribe had occurred, and that the evidence is compelling that Respondent bribed McLaughlin in 1987.

ii. The illegal gratuity charge

The evidence also demonstrates that Respondent committed the additional offense of offering a federal official an illegal gratuity in 1987.[11] Section 201(c)(1)(A) imposes criminal penalties on whoever:

---

[11] Although not alleged in the Notice of Charges, at hearing Enforcement offered evidence that Respondent's conduct also violated the section of the statute prohibiting the giving of an illegal gratuity. Under 12 C.F.R. § 509.20(b), the Notice is automatically amended to encompass the proof at hearing. Enforcement's alternative argument that if the misconduct in June 1987 did not constitute a bribe, it did constitute an illegal gratuity, was not challenged at the hearing. Rule 20(b) states "[w]hen issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required." See Recommended Decision at 16 n.12. The ALJ correctly determined that the pleadings are deemed to conform to the proof offered at hearing.

> directly or indirectly gives, offers or promises anything of value to any public official, former public official or person selected to be a public official for or because of any official act performed or to be performed by such public official, former public official or person selected to be such public official.

18 U.S.C. § 201(c)(1)(A). Unlike bribery, the crime does not require corrupt intent. United States v. Strand, 574 F.2d at 995.

The Acting Director concludes that Respondent violated section 201(c)(1)(A) as well. There are essentially three elements of the offense of giving an illegal gratuity: (i) the giving of something of value (ii) to a government official (iii) for or because of an official act. The first two elements are clear. It is undisputed that Respondent gave something of value -- $1750 in cash and the bar of silver bullion -- to McLaughlin, a government official.

All of the record evidence indicates that Respondent did so because of an official act McLaughlin was to perform -- execution of the subpoena. Prior to service of the EAB subpoena, McLaughlin and Respondent were not friends or even acquaintances. The interaction between Respondent and McLaughlin arose solely as a result of the IRS's investigation. After a handful of contacts -- all concerning Respondent's compliance with the investigation -- Respondent suddenly gave McLaughlin a substantial amount of cash. McLaughlin was not entitled to these gifts in the course of his duties as an IRS agent. The elements of an illegal gratuity have thus been proven. Again, based on his independent review of the evidence, the Acting Director concludes that it was

error for the ALJ to determine that no illegal gratuity had been given, and that the evidence demonstrates that Respondent provided McLaughlin with an illegal gratuity.[12]

b. The 1988 Conduct

Respondent again violated the anti-bribery statute in 1988 in his attempts to circumvent the subpoena issued to AQTR. In a meeting at Cross County, Respondent gave McLaughlin an envelope with $6,500[13] and repeatedly told McLaughlin he "wanted this stopped" and "didn't want to hear anymore" about the investigation. McLaughlin understood from the discussion that Respondent wanted McLaughlin to "kill the investigation" and that Respondent "didn't want to be bothered with it anymore." It was McLaughlin's official duty to pursue the investigation and compliance with the subpoena.

Under the standards discussed above -- corruptly giving something of value to a government official to induce a violation of the official's duty -- the evidence demonstrates that Respondent gave McLaughlin $6,500 to terminate the investigation attendant to the AQTR subpoena. As Respondent did so, he took

---

[12] The Acting Director rejects the ALJ's deference to Fanelli's testimony on this element as well, in light of the infirmities discussed above. Furthermore, Fanelli did not opine specifically on whether Respondent's conduct constituted the giving of an illegal gratuity, other than to indicate that in his opinion Respondent's conduct was more in the nature of an illegal gratuity than a bribe.

[13] Respondent originally told McLaughlin that Respondent was paying $5,000 and his partner in AQTR the remaining $1,500; however, Respondent later admitted to McLaughlin that it was all Respondent's money.

steps to communicate the proposed amount of the bribe in a concealed manner, that is, corruptly. From these facts, the Acting Director finds that Respondent violated 18 U.S.C. § 201(b)(1)(C).

The evidence also demonstrates that Respondent thereby committed the additional offense of giving an illegal gratuity to a government official. Respondent gave $6,500 to McLaughlin for the stated purpose of "stopping" the investigation. The Acting Director thus finds that Respondent violated 18 U.S.C. § 201(c)(1)(A) as well.

c. Respondent's Defenses to the Violations of Law

The Acting Director rejects Respondent's argument that the statute is intended to reach violations of banking law only, and that this case raises this as a question of first impression.

It is a well settled principle of statutory construction that the plain language of the statute controls its interpretation. See American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982). This statute provides expressly that removal and/or prohibition may be predicated in part on "any violation of law, rule or regulation . . . ." 12 U.S.C. § 1464(d)(4)(A)(emphasis added).[14] By its plain language, the scope of this provision is not limited to violations of banking-

---

[14] The post-FIRREA version of section 1818(e) contains identical language; accordingly, this reasoning applies to the statute as amended by FIRREA as well.

related laws.[15]

Had Congress intended to so limit the reach of this provision to only certain types of offenses, it could have easily done so. Indeed, Congress had, prior to the enactment of FIRREA, provided for the prohibition of bank officials who had been convicted of crimes involving dishonesty or a breach of trust. See 12 U.S.C. § 1464(d)(12)(B); 12 U.S.C. § 1829 (1982).[16] Congress has since enumerated additional specific types of crimes that would subject an institution-affiliated party to suspension, removal or prohibition. See 12 U.S.C. § 1818(e)(2). It is thus clear that when Congress wanted to limit particular suspension or removal provisions based on certain types of misconduct, it identified such misconduct specifically.

The Acting Director does not sit as a criminal tribunal competent to order criminal sanctions and here, no criminal penalties are sought or imposed. The OTS, however, is statutorily empowered to impose a remedy pursuant to § 1464(d)(4) and § 1818(e), which permit the Acting Director to order removal and/or prohibition based upon any violation of law, whether civil or criminal. Accordingly, the violation of a criminal statute -- albeit evaluated under civil standards for a civil remedy -- may

---

[15] As discussed below, of course, Respondent's violation of law could seriously prejudice the interests of Cross County's depositors and thus satisfies the "effects" test of section 1464(d)(4)(A).

[16] The first statutory provision applied solely to savings and loans; the latter applied to banks. See also 12 U.S.C. § 1464(d)(4)(C)(suspension or removal/prohibition for violations of the Depository Institutions Management Interlocks Act).

serve as the basis for a removal and prohibition order under 12 U.S.C. § 1464(d)(4)(A). See Van Dyke v. Board of Governors of the Federal Reserve System, 876 F.2d 1377 (8th Cir. 1989)(bank president removed under 12 U.S.C. § 1818(e)(1) based on check kiting violation under 18 U.S.C. § 1344).[17]

The Acting Director also rejects Respondent's claim that he was entrapped into committing bribery. A valid entrapment defense contemplates: (1) inducement by law enforcement officers and (2) lack of predisposition by the defendant to commit the crime. See, e.g., Matthews v. United States, 485 U.S. 58, 63 (1988). Respondent has not established either element here.

While the government may use undercover operations to enforce the law, it may not "originate a criminal design, implant in an innocent person's mind the disposition to commit the act, and then induce the commission of the crime so the government may prosecute." See Jacobson v. United States, __ U.S __ , 112 S. Ct. 1535, 118 L.Ed.2d 174, 184 (1992). The record is clear that the idea to bribe McLaughlin originated with Respondent, not with McLaughlin. Here, the chain of events was commenced by the proper issuance of a subpoena. It was Respondent's improper response to that subpoena, i.e., the bribe overture to

---

[17] The Acting Director's findings do not expose Respondent to additional criminal liability. Clearly, the Acting Director's findings herein could not be used against Respondent in a criminal proceeding because of the different standards of proof. See, e.g., United States v. Konovsky, 202 F.2d 721 (9th Cir. 1953).

In any event, the statute of limitations has apparently expired on most if not all of the criminal claims filed against Respondent. Cousin, 840 F. Supp. at 11.

McLaughlin, that caused the IRS to conduct the undercover operation. As part of such operation, McLaughlin agreed to Respondent's plan. McLaughlin did not initially solicit, propose, initiate, broach or suggest that he would be amenable to accepting a bribe. See United States v. Dunn, 779 F.2d 157, 158 (2d Cir. 1985). The record does not reflect that Respondent lacked predisposition, or was induced by McLaughlin, to commit the crime as the entire bribery scheme was caused by his design and overtures.

Finally, Respondent claims that he was the victim of outrageous government conduct. Having considered the submissions of the parties and the ALJ's Recommended Decision on this point, the Acting Director dismisses this claim as baseless.

2. Effects of Respondent's Misconduct on the Association

The ALJ found generally that Enforcement did not prove the "effects" requirement because he concluded the testimony of Michael Simone ("Simone"), an Assistant Director in the OTS Northeast Region, was insufficient to show that the actual or potential harm caused by Respondent's activities to the institution was "substantial."[18] Although it is unclear whether the ALJ was focusing on financial loss or other harm, the record reflects sufficient evidence that by virtue of Respondent's

---

[18] The Acting Director notes that the ALJ did not fail to credit Simone's testimony, nor did he find it outweighed by other witnesses' testimony. Accordingly, in assessing Simone's testimony, the Acting Director believes it is a straightforward matter to compare the testimony and the supporting evidence to the appropriate legal standard.

attempted bribes, the interests of the depositors could be seriously prejudiced.

An interpretation of this provision must commence with the plain language of the statute. See American Tobacco Co., 456 U.S. at 68. This prong of the second element requires that the "interests of [the depositors] could be seriously prejudiced." 12 U.S.C. § 1464(d)(4)(A)(emphasis added).[19] Congress, by including the word "could," clearly intended that the statute reach not only immediate but also potential harm. As the Federal Deposit Insurance Corporation ("FDIC") noted in the context of a proceeding to uphold a suspension order:

> Were it otherwise, the [FDIC] would have to wait until loss or damage to a bank or its depositors had occurred, or confidence had been impaired, and would not be able to act to prevent such loss or damage, or impairment of confidence. Such would be ineffective regulation and was not the intention of Congress.

In re Anonymous, FDIC Docket No. FDIC-84-86g (July 30, 1984), reprinted in FDIC Enforcement Decisions and Orders, Vol. 1 (bound) ¶ 5027 (Prentice Hall). Accord Van Dyke v. Board of Gov. of the Fed. Reserve, 876 F.2d at 1377 (banking agencies are not powerless to respond to official's illegal activity until actual harm to institution occurs). Cf. Saratoga Savings and Loan v. Federal Home Loan Bank Board, 879 F.2d 689, 693 (9th Cir. 1989)(cease-and-desist provision of statute was intended to

---

[19] The corresponding post-FIRREA statute reads: "the interests of the depositors have been or could be prejudiced." 12 U.S.C. § 1818(e)(1)(B).

authorize federal banking agencies to curtail abuses before they harm institution).

The removal and prohibition provision does not identify specifically what constitutes "serious prejudice" to the interests of the depositors. As a matter of statutory interpretation, "serious prejudice" must contemplate something in addition to "substantial financial loss or other damage"[20] or the second element of this provision would be redundant. Such an interpretation is inconsistent with the principle that statutes should be read to give meaning to each independent statutory provision. See, e.g., United States v. Nordic Village, __ U.S.__ 112 S. Ct. 1011, 1015, 117 L.Ed.2d 181 (1992).

The Acting Director notes that the FDIC has indicated that "serious prejudice" to the interests of the depositors may be caused by, inter alia, engaging in conduct that harms the reputation of the institution, causing loss of confidence to depositors, among others. See In re James G. Welk, FDIC Docket No. 91-201e (October 13, 1992), reprinted in FDIC Enforcement Decisions and Orders, Vol. 1, ¶ 5186 (Prentice Hall). The Acting Director similarly concludes that Congress, intending this section to have broad coverage, drafted the phrase to include conduct whose consequences, even if not immediate, could seriously harm the financial institution or its depositors. That is, conduct that injures the reputation of the institution

---

[20] This alternative element of the "effects" test appears in § 1464(d)(4)(A). Section 1818(e) is identical except it omits the word "substantial."

or that otherwise would persuade a depositor that his or her funds were subject to a substantial risk is conduct within the "serious prejudice" standard, even if an immediate dollar effect cannot be quantified.

Enforcement's evidence satisfies this standard in two respects. First, Simone's testimony established that Respondent's conduct harmed the institution's reputation, with the potential for serious risk to the interests of the depositors. OTS officials, such as Simone, possess the requisite expertise and familiarity with the thrift industry to make such predictive judgments. See Franklin Savings Ass'n v. Director, Office of Thrift Supervision, 934 F.2d 1127, 1146 (10th Cir. 1991), cert. denied, __ U.S. __, 112 S. Ct. 1475 (1992).[21]

Here, the misconduct involved bribery, which arose as an illegal response to a legitimate law enforcement inquiry. Simone testified that serious charges like bribery against a bank officer have a significant impact on public confidence in financial institutions, and that depositors have concerns about

---

[21] "Administrative agencies are afforded wide deference in predicting the likelihood of future events." Michigan Pub. Power Agency v. Federal Energy Regulatory Comm'n, 963 F.2d 1574, 1580 (D.C. Cir. 1992). Evidence reflecting the basis for the OTS's predictive judgment concerning the potential for harm to the Association is entitled to weight as a matter particularly within the expertise of the agency.

The Acting Director finds Respondent's citation to United States v. Sette, 334 F.2d 267 (2d Cir. 1964) inapposite, as Sette involved expert testimony by the same agents who conducted the investigation; was rendered prior to the adoption of the Federal Rules of Evidence; and did not involve an adjudicatory proceeding such as this.

leaving money in an institution where questions have been raised regarding that institution's management -- particularly where, as here, Respondent committed the unlawful conduct on the Association's premises. A loss in public confidence could result in a run on the institution and losses to the association and ultimately to the deposit insurance fund. As the FDIC has noted:

> Ordinary bank customers and the general public must be able to view a bank's vice president and director as a trustworthy person without doubt or uncertainty. Where charges of dishonesty and the submission of false statements involving money have been preferred [sic] by a Grand Jury against a bank official there is an obvious potential for doubt and uncertainty. Such may impair public confidence and damage a bank. It is not too much to require that a bank's officers and directors be above suspicion.

In re Anonymous, FDIC Docket No. FDIC-84-86g (July 30, 1984), reprinted in FDIC Enforcement Decisions and Orders, Vol. 1, ¶ 5027 (Prentice Hall). Moreover, as Simone testified, criminal conduct by banking officials damages the public's perception of the integrity of the entire banking system, because customers tend to relate what happens at one institution to all other types of institutions.

Second, Respondent's illegal conduct damages the bank official's credibility with its regulator and interferes with the federal regulatory process, with the consequence that no depositor can be confident that his or her deposits enjoy the safeguards the regulatory system provides. (Transcript Vol. II at 487). The need for honest and accurate communications between a thrift and its regulator is paramount to the proper operation

of the industry. See 12 C.F.R. § 563.180(b); OTS Statement Concerning the Responsibilities of Directors and Officers of Insured Depository Institutions, reprinted in Federal Guide, ¶ 36,485 (November 18, 1992) [hereinafter "Statement of Directors and Officers Responsibilities"]. Effective communication is seriously jeopardized by the efforts of an association's chief executive officer to obstruct a lawful government inquiry. In this case, the evidence is compelling that Respondent intended to do exactly that. In the Acting Director's judgment, Respondent's interference with a lawful IRS investigation could destroy whatever confidence depositors might have that Respondent would communicate with regulators with the requisite candor. Their deposits would be subject to a substantially greater risk than at an institution where the management cooperated with government oversight. This prejudice to the interests of the depositors is underscored where, as here, Respondent was directly running the Association and illegal activities attributed to him could have a significant impact on Cross County.[22] Thus, the interests of Cross County's depositors could be seriously prejudiced by Respondent's wrongful acts.

Accordingly, the Acting Director concludes that the ALJ erred when he found that Enforcement had not met the "effects" test for Count I. Simone's testimony was sufficient to show that the potential effect of Respondent's unlawful conduct could

---

[22] Respondent himself contended that "Cross County is the lengthened shadow of Michael Cousin." Answer at pg. 4

seriously prejudice the depositors' interests. Additionally, it is clear to the Acting Director that an officer and director who undertakes to impede a government investigation erodes the confidence that depositors are entitled to have in the institution, and threatens the kind of honest and accurate communications that regulators require.

The presence or absence of demonstrable significant loss is not dispositive since this element also encompasses potential serious harm. In fact, where the statutory scheme is operating most efficiently, wrongdoers may be removed before they cause losses to the association and the federal insurance fund. Here Respondent was suspended before his misconduct was permitted to cause an immediate financial loss to the Association, on the grounds that the attendant loss of public confidence in the management of Cross County would, if left unremedied, ultimately result in detriment to the institution and to some extent the industry as a whole.

There is some evidence that significant loss would have resulted from Respondent's misconduct. During the period 1989-1992, the Association had generally experienced an increase in assets and deposits. During the period June-December 1990, which includes the time when Respondent was arrested and suspended in August 1990, Cross County experienced a decline in assets in the amount of $900,000 and a decline in deposits in the amount of $350,000. (Transcript Vol. III at 685-686). Respondent presented no evidence to rebut the inference that this sudden

decline was due to the publicity surrounding the charges lodged against Respondent. It was reasonable to expect that had Respondent not been suspended at that point, the deterioration of public confidence in the Association would have been more severe and the withdrawals could have been significant. The fact that the statutory scheme was effective in this instance, i.e., that it prevented substantial financial loss or other damage to the Association by the immediate suspension of Respondent, does not counsel permitting Respondent to continue his association with the institution.

The ALJ erroneously concluded that "serious prejudice" to the interests of depositors could not be demonstrated in light of the existence of federal deposit insurance, which is intended to protect deposits up to a designated amount in the event the institution becomes insolvent. Federal deposit insurance, however, existed in 1966 when Congress amended section 1464 to include removal and/or prohibition authority. Following the ALJ's logic, "serious prejudice" to the interests of the depositors could thus never be proven. Surely the statute should not be interpreted to render the amendment meaningless. See Montana States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249-50 (1985). Accordingly, the Acting Director concludes that the existence of deposit insurance does not eliminate the possibility of "serious prejudice."

The Acting Director rejects the argument that the "effects" test requires more immediate or direct impact upon the

association than establishment of the possibility of serious prejudice to the interests of the institution's depositors. Congress simply did not draft section 1464 to impose such a requirement.

Moreover -- and contrary to Respondent's assertions -- bank officials who have engaged in illegal activities not directed at the association with which they were employed have been relieved of their responsibilities under analogous statutory provisions. See, e.g., In re Anonymous, FDIC Docket No. FDIC-84-86g (July 30, 1984), reprinted in FDIC Enforcement Decisions and Orders, Vol. 1, ¶ 5027 (Prentice Hall)(suspension order based on criminal indictment for personal income tax evasion); Van Dyke, 876 F.2d 1377 (removal and prohibition order based on official's participation in criminal check kiting scheme involving his and another institution).

3. Respondent's Culpability

The Acting Director also concludes that Respondent's illegal conduct involves "personal dishonesty." Personal dishonesty encompasses a broad range of conduct, including "disposition to lie, cheat[,] or defraud; untrustworthiness; lack of integrity; . . . misrepresentation of facts and deliberate deception by pretense and stealth[;]. . . [or] want of fairness and [straightforwardness]." Van Dyke, 876 F.2d at 1379. See also Financial Institutions Supervisory and Insurance Act of 1966: Hearings on S. 3158 and S. 3695 Before the Committee on Banking and Currency, House of Representatives, 89th Cong., 2d Sess. 53

(1966)(statement of Chairman Horne and Kenneth E. Scott, General Counsel of the Federal Home Loan Bank Board)("personal dishonesty" encompasses primarily, but not exclusively, conduct actionable under state and federal criminal statutes).

Bribery of a government official demonstrates, among other things, a lack of integrity. As discussed above, banking officials are placed in a position of trust and responsibility over the finances and affairs of their depositors and customers. Respondent's attempts to illegally thwart a law enforcement investigation demonstrate untrustworthiness and a want of integrity. See Van Dyke, 876 F.2d 1377. The Acting Director concludes that such activity evidences "personal dishonesty" under 12 U.S.C. § 1464(d)(4)(A).

The ALJ concluded that the "personal dishonesty" element must be related to activities concerning the association, and determined that in this case it was not. The ALJ erred in concluding that the statutory requirement of "personal dishonesty" was not met here. His requirement that the misconduct must evidence personal dishonesty towards the association is not founded in the statute. While the latter prong of this element (as well as other aspects of the removal and prohibition statute) contemplates misconduct directed at the association,[23] the former does not. The Acting Director defers to the plain language of § 1464(d)(4)(A) and interprets "personal

---

[23] The alternative prong focuses on a "willful or continuing disregard for the safety or soundness" of the institution. 12 U.S.C. § 1464(d)(4)(A).

dishonesty" as not limited to conduct directed at the association.

C. Count II: Respondent's Aiding and Abetting the Bribery of a Federal Official

The Acting Director affirms the ALJ's conclusions concerning Respondent's liability under Count II. Because, however, the ALJ's analysis regarding the second and third elements of the removal/prohibition analysis imposes standards not required by the statute, the Acting Director does not adopt his analysis.

1. Misconduct

The Acting Director finds that Respondent is culpable on each independent section of the misconduct element.

a. Respondent violated the law

Respondent violated the law by aiding and abetting the Parlante bribe of McLaughlin. Under 18 U.S.C.§ 2(a), "[w]hoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." Liability as an aider and abettor will lie where one has associated himself with a criminal venture, participated in the venture, and sought by his action to make the venture succeed. See United States v. Menesses, 962 F.2d 420, 427 (5th Cir. 1992), citing Nye & Nissen v. United States, 336 U.S. 613 (1949); United States v. Teffera, 985 F.2d 1082, 1086 (D.C. Cir. 1993).

The record demonstrates that John Parlante gave McLaughlin $25,000 in cash to stop the IRS investigation. John Parlante testified that he has pled guilty to a charge of bribery, and

Fodera pled guilty to aiding and abetting the bribery of a public official. The Acting Director concludes that the evidence established that John Parlante committed bribery of McLaughlin. and that Respondent aided and abetted the Parlantes' bribe. It was Respondent who suggested the plan whereby the Parlantes would bribe McLaughlin. Respondent gave McLaughlin confidential information concerning the Parlantes. Respondent arranged for Fodera to serve as an intermediary in the bribery scheme. Respondent plotted with McLaughlin on numerous occasions "how to go about it, when to subpoena them, whether I should wait or do it sooner, do it later ... how we should proceed." (Transcript Vol. 1 at 128). Respondent advised Joan Parlante to offer a bribe to McLaughlin. Respondent instructed John Parlante on how to offer a bribe and instructed McLaughlin on how to accept it. Respondent encouraged McLaughlin to ask the Parlantes for more money and encouraged McLaughlin to pay Fodera $2,500 in cash for Fodera's role in the bribery scheme.

The record reflects that Respondent conceived and developed the bribery scheme. Afterwards, he was an active participant in its execution and worked diligently towards its success. While it is unclear precisely what motivated Respondent to perpetrate his illegal scheme, it is clear that Respondent was not motivated by a patriotic desire to report suspected income tax evasion because it would not have been necessary to commit a crime merely in order to report one. Nor did Respondent notify the Association or the OTS of his suspicions. The record shows that

Respondent's purpose in providing confidential customer information to McLaughlin was to facilitate a bribery scheme. The Acting Director thus finds that substantial evidence demonstrates that Respondent committed a violation of law within the meaning of 12 U.S.C. § 1464(d)(4)(A).

b. Respondent's Defenses to the Violations of Law

For the reasons discussed above, the Acting Director rejects Respondent's argument that the statute does not reach criminal violations of non-banking laws; that this case raises a question of first impression; and that Respondent was entrapped, and was the victim of government misconduct.

c. Respondent Committed an Unsafe or Unsound Banking Practice

Respondent's actions also constitute an unsafe or unsound practice. An unsafe or unsound practice is understood to have:

> a central meaning which can and must be applied to constantly changing factual circumstances. Generally speaking, an "unsafe or unsound practice" embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance fund.

Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before the House Committee on Banking and Currency, 89th Cong., 2d Sess. at 49-50 (1966)(statement of Chairman Horne), cited in First National Bank of Eden v. Dept. of Treasury, 568 F.2d 610, 611 (8th Cir. 1978). See also In the matter of Lopez and Saldise, OTS Order No. AP 94-23 at 29 n.47 (May 17,

1994)(appeal pending); In the matter of Keating, OTS Order No. AP 93-85 at 34-35 (October 22, 1993)(appeal pending).

The evidence in this proceeding establishes that Respondent abused his official position at Cross County to obtain and improperly disclose confidential information from Cross County's files on the Parlantes, exposing the Association to abnormal risk or loss or damage.[24] It is reasonable to expect that bank customers will cease to conduct business with an association that improperly publicizes confidential customer data. As discussed above, withdrawal of deposits may cause a run on the association which could in turn endanger the federal deposit insurance fund. By his misconduct, Respondent put the interests of the depositors and the insurance fund at risk.

Indeed, Congress enacted a statute with the express purpose of protecting the confidentiality of bank customers. See Right To Financial Privacy Act, 12 U.S.C. §§ 3401 et seq. ("RFPA"). The RFPA permits release of personal financial records to the federal government only in accordance with its terms. Generally, the RFPA requires that customer notice be given when a federal agency solicits an individual's records from a financial institution.[25] Respondent disregarded the requirements of RFPA

---

[24] As with the "effects" test, it is significant that Congress did not require proof of actual loss but rather intended the statute to address the risk of, or potential for, loss.

[25] The RFPA further requires such individual to be given the opportunity to oppose the government's request for information. There are a number of enumerated exceptions to these requirements, including disclosure pursuant to a subpoena or court order respecting grand jury proceedings, 12 U.S.C. § 3413(i), or an

in providing the Parlantes' financial information to McLaughlin. Respondent's disclosure does not fall within the exceptions identified in the statute. Respondent did not provide the information to McLaughlin in April 1988 in response to an administrative subpoena, search warrant or judicial subpoena. Nor did Respondent provide the information pursuant to a lawful investigation directed at Cross County. Moreover, the Parlantes neither consented to nor authorized the disclosure of such information. Consequently, the Acting Director accepts the conclusion of the ALJ that the violation of a law designed to protect bank customers is an unsafe or unsound practice.

The evidence on Count II also establishes that it was Respondent, the chief executive officer of the institution, who hatched the complicated bribery scheme and who drew Fodera, a director, and the Parlantes, bank customers, into it. The instigation of an unlawful scheme by the head of an insured institution and his efforts to involve another director and bank customers is exceptionally imprudent. The weaknesses in management that such conduct reveals poses an abundant risk of loss to the institution. For this reason as well, the Acting Director concludes that Respondent committed an unsafe or unsound practice.

Repeated violations of law constitute an unsafe or unsound banking practice. See, e.g., In the Matter of Ronald J. Grubb,

---

administrative subpoena issued by an administrative law judge. 12 U.S.C. § 3413(f).

FDIC Docket Nos. FDIC-88-282k and FDIC-89-11e (August 25, 1992), reprinted in FDIC Enforcement Decisions and Orders, Vol. 1 ¶ 5181 (Prentice Hall). Here, Respondent's misconduct escalated over time in 1987 and 1988, culminating in the Parlantes' bribe. Respondent's misuse of his official position and his disregard for the proper use of bank information also violated prudent standards of operation and were unsafe and unsound. Furthermore, Respondent -- who essentially controlled Cross County -- endangered the institution by placing his personal interests before the interests of the depositors. By his misconduct, Respondent put the interests of the depositors and the insurance fund at risk. The Acting Director thus concludes that Respondent's activities under Count II constituted an unsafe or unsound banking practice.

d. Respondent Breached his Fiduciary Duties to the Association

Officers and directors of an insured depository institution owe fiduciary duties to that association. See, e.g., Bowerman v. Hamner, 250 U.S. 504, 510 (1919); Briggs v. Spaulding, 141 U.S. 132, 146, 152 (1891); Brickner v. Federal Dep. Ins. Corp., 747 F.2d 1198, 1202 (8th Cir. 1984); In re Neil Bush, OTS Order No. AP 91-16 (April 18, 1991). Officers and directors of thrifts must discharge duties owed to depositors, shareholders and creditors of the institutions they serve, and comply with federal and state statutes, rules and regulations. Statement of Directors and Officers Responsibilities at ¶ 36,485.

Respondent's fiduciary duties include the duty of loyalty

and duty of care. Id. The duty of care requires officers and directors to act as prudent and diligent business persons in conducting the affairs of insured institutions. Id. Respondent violated his fiduciary duty of care by ignoring the interests of depositors when he illegally disclosed confidential information to further a bribery scheme, drew a director and customers into his scheme and committed unlawful acts.

The duty of loyalty requires officers and directors to administer the affairs of the institution with candor, personal honesty and integrity. Id. Respondent violated his duty of loyalty because the entire bribery arrangement with McLaughlin was "set up so that [Respondent] would benefit, for whatever reason he thought was necessary, at the expense of the institution, and that expense being the business of the institution going forward." (Transcript Vol. II at 501). Respondent endangered the institution by placing his personal interests in the success of his illegal scheme before the interests of the depositors.

Accordingly, the Acting Director concludes that Respondent committed violations of law, engaged in an unsafe or unsound practice and breached his fiduciary duties to Cross County by orchestrating and participating in a scheme to bribe a government official.

2. Effects of Respondent's Misconduct on the Association

The ALJ also determined that the disclosure and misuse of confidential bank information was integrally related to

Respondent's position at Cross County, and concluded that the Association suffered or will probably suffer substantial financial loss or other damage. The Acting Director does not reach this prong because the alternative prong, contemplating the possibility of "serious prejudice" to the interests of the depositors, has been met here.[26]

The adverse effects upon Cross County resulting from Respondent's misuse of bank records to orchestrate a bribery scheme are even more detrimental than those effects accruing from the conduct charged under Count I. Here, the misconduct involved use of confidential customer information to orchestrate and assist the commission of criminal activity. In addition, Respondent encouraged another member of Cross County's Board of Directors to engage in such activity.

Depositors are entitled to trust the management of depository institutions to spend their time in the office furthering the interests of the association, not committing illegal acts. The Acting Director finds that by virtue of Respondent's misconduct, the interests of Cross County depositors could be seriously prejudiced.

3. Respondent's Culpability

The Acting Director accepts the conclusion of the ALJ that Respondent's aiding and abetting of a bribe involves "personal dishonesty." Here, Respondent believed that he had successfully

---

[26] The ALJ did not make findings or conclusions under the "serious prejudice" standard on Count II.

bribed McLaughlin twice. Emboldened by his apparent success, Respondent concocted the scheme whereby the Parlantes would bribe McLaughlin. Orchestration of a scheme to bribe a government official demonstrates, among other things, a lack of integrity. Moreover, Respondent lied to Cross County customers about the circumstances surrounding the IRS subpoena and counseled Fodera, a Board member, to not only lie to the Parlantes as well, but also to accept part of the bribe. As discussed above, banking officials are placed in a position of trust and responsibility over the finances of their depositors and customers. Respondent has demonstrated untrustworthiness and a want of integrity in abusing his official position and violating the RFPA as part of a larger illegal scheme to engineer a bribe by Cross County customers. See Van Dyke, 876 F.2d 1377. The Acting Director concludes that such activity evidences "personal dishonesty" under 12 U.S.C. § 1464(d)(4)(A).

The ALJ concluded that Respondent's activities demonstrated "personal dishonesty." He construed the statute, however, to require a demonstration of personal dishonesty directed towards the Association. As discussed above, this requirement is not founded in the statute.

The ALJ also found that Respondent demonstrated a willful and continuing disregard for the safety and soundness of Cross County because he ignored the proper affairs of the institution in pursuing his own illegal objectives and, as a result, exposed Cross County to serious risks that could threaten the safety and

soundness of the institution. Based on the record, the Acting Director concludes that Respondent's orchestration of the Parlantes' bribe was intentional and continued over a period of months -- furthering the misconduct that Respondent commenced in 1987. Therefore, the evidence also supports a finding of willful and continuing disregard for the safety and soundness of Cross County. The Acting Director finds that each alternative prong of the culpability element of 12 U.S.C. § 1464(d)(4)(A) has been met for Count II.

D. Respondent's Remaining Exceptions

Respondent has asserted various discovery and evidentiary exceptions, as well as exceptions raised earlier by means of affirmative defenses. Having carefully considered the rulings of the ALJ and the submissions of the parties, the Acting Director rejects these exceptions.

All other exceptions lodged by the parties and not otherwise addressed herein are denied.

E. Respondent's Request for Oral Argument

In Respondent's May 10, 1994 cover letter transmitting his exceptions, he requests oral argument before the Acting Director pursuant to 12 C.F.R. § 509.40(b). Enforcement opposes this request. Under Rule 40(b) of the Rules of Practice and Procedure, the Director has the discretion to order and hear oral argument.

A party seeking oral argument, however, has the burden of demonstrating good cause for such argument and establishing that

arguments cannot be adequately presented in writing. Upon consideration of Respondent's request for oral argument, the Acting Director finds that: (1) the factual and legal arguments are fully set forth in the parties' written submissions; (2) the Acting Director will not be aided in deciding this matter by oral argument; (3) Respondent will not be prejudiced by the lack of oral argument; and (4) Respondent has not shown good cause for oral argument. Therefore, the Acting Director declines to exercise his discretion under Rule 40(b) and denies Respondent's request for oral argument.

VI. CONCLUSION

Based on the record with regard to Count I, the Acting Director finds that Respondent: (i) committed violations of law in bribing an agent of the IRS in 1987 and 1988; (ii) as a result of these violations, the interests of the Association's depositors could be seriously prejudiced; and (iii) such violations evidenced personal dishonesty. Based on the record with regard to Count II, the Acting Director finds that Respondent: (i) committed a violation of law in aiding and abetting an additional bribe of an IRS agent in 1988, breached his fiduciary duty to the Association and committed unsafe or unsound banking practices by disclosing confidential customer information; (ii) as a result of this misconduct, the interests of the Association's depositors could be seriously prejudiced; and (iii) such misconduct evidenced personal dishonesty and willful and continuing disregard for the safety and soundness of

the Association. Accordingly, the Acting Director issues herein a final order removing Respondent from his former positions with Cross County and prohibiting further participation by Respondent in any manner in the conduct of the affairs of any insured depository institution.

ORDER

Upon consideration of the entire record in this matter, including the Recommended Decision of the Administrative Law Judge, the exceptions and replies to exceptions filed by the parties, and for the reasons set forth in the accompanying Decision:

The Acting Director, pursuant to his authority under Section 5(d)(1)(A) of the Home Owners' Loan Act, 12 U.S.C. § 1464(d)(1)(A)(Supp. V 1993), and Section 8(e) of the Federal Deposit Insurance Act, 12 U.S.C. § 1818(e)(Supp. V 1993), and former Section 1464(d)(4) of the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464(d)(4)(1982), finds that Michael Cousin ("Cousin" or "Respondent"), in his former capacity as the Chief Executive Officer and Chairman of the Board of Directors of Cross County Federal Savings Bank, Queens, New York ("Cross County"), a federal savings association, was an institution-affiliated party of Cross County, an officer and director, and person participating in the conduct of the affairs of Cross County who violated laws, engaged in unsafe or unsound practices in connection with Cross County and committed acts and practices which constitute breaches of his fiduciary duty as a director and officer, and as a result of Cousin's violations, unsafe or unsound practices, and breaches of fiduciary duty, the interests of Cross County's depositors could be seriously prejudiced.

These violations, unsafe or unsound practices, and breaches of fiduciary duty involved personal dishonesty on the part of Cousin and demonstrate willful and continuing disregard for the safety and soundness of Cross County. Accordingly, grounds exist to issue an order removing Cousin from office and prohibiting Cousin from any further participation in the conduct of the affairs of Cross County and the other institutions and entities listed in 12 U.S.C. § 1818(e)(7).

Respondent filed, pursuant to 12 C.F.R. § 40(b), a request for oral argument before the Acting Director. Upon consideration of Respondent's request for oral argument, the Acting Director finds that: (1) the factual and legal arguments are fully set forth in the parties' written submissions; (2) the Acting Director will not be aided in deciding this matter by oral argument; (3) Respondent will not be prejudiced by the lack of oral argument; and (4) Respondent has not established good cause for oral argument.

IT IS THEREFORE HEREBY ORDERED:

1. Cousin is removed from office and prohibited from further participation in any manner, in the conduct of the affairs of Cross County pursuant to 12 U.S.C. § 1818(e);

2. While this Order is in effect, Cousin may not continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of, any institution or entity listed in 12 U.S.C. § 1818(e)(7)(A);

3. Conduct prohibited by this Order includes the conduct specified under 12 U.S.C. § 1818(e)(6);

4. This Order is subject to the provisions of 12 U.S.C. § 1818(j);

5. The provisions of this Order are effective upon the expiration of thirty (30) days after the date of service of this Order upon Cousin and shall remain effective and enforceable, except to the extent that, and until such time as, any provisions of this Order shall have been stayed, modified, terminated, or set aside by action of the Acting Director or a reviewing court, or in accordance with 12 U.S.C. § 1818(e)(7)(B). Respondent is hereby notified that he has the right to appeal this Decision and Order within thirty (30) days after service of such Decision and Order under 12 U.S.C. § 1818(h);

6. Respondent's request for oral argument is denied; and

7. The Order Continuing Suspension and Prohibition issued against Cousin, pursuant to 12 U.S.C. § 1818(g), on July 15, 1991 (OTS AP 91-42), will continue until the effective date of this Order, at which time the Order Continuing Suspension and Prohibition shall terminate.

DATED: October 11, 1994

THE OFFICE OF THRIFT SUPERVISION

By: Jonathan L. Fiechter

Jonathan L. Fiechter
Acting Director