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

IN THE MATTER OF	
TEXAS NATIONAL BANK BAYTOWN, TEXAS	OCC-AA-EC-88, 89
MAYDE CREEK BANK, N.A. KATY, TEXAS	OCC-AA-EC-90, 91
FIRST NATIONAL BANK OF BELLAIRE BELLAIRE, TEXAS	OCC-AA-EC-92, 93

DECISION AND ORDER

I. SUMMARY

This request for interlocutory review arises from cease and desist proceedings brought by the Office of the Comptroller of the Currency (OCC) against three national banks allegedly engaging in unsafe and unsound banking practices, including undue concentrations of credit. The OCC, represented by the Enforcement and Compliance Division ("E&C"), requests interlocutory review of a discovery ruling by Administrative Law Judge Arthur L. Shipe (ALJ) to the extent that it requires OCC to produce personnel records of a National Bank Examiner (NBE). The Comptroller grants the review and reverses that portion of the ALJ's ruling.

II. PROCEDURAL HISTORY

On April 14, 1992, the OCC served a Notice of Charges to each Respondent under the authority of 12 U.S.C. § 1818(b)(1), which commenced cease and desist proceedings against them. On May 27, 1992, the ALJ consolidated the cases. E&C filed a Motion To

Limit Discovery on July 21, 1992. In that Motion, E&C stated that, among other things, Respondents' requests, which included a request for the production of job evaluations or reviews of NBE Phyllis R. Akers, were unreasonable and unduly burdensome, excessive in scope, and duplicative. Further, E&C argued, the requested documents are not materially relevant to the proceedings. The motion was opposed by the Respondents.

On September 11, 1992, the ALJ denied the motion in relevant part, without elaboration, by ordering the production of documents containing the personnel information. E&C filed a Motion For Interlocutory Appeal dated September 24, 1992 to review the ALJ's ruling to the extent that it requires the OCC to produce these documents. The Respondents oppose the request for an interlocutory appeal. On October 14, 1992, the ALJ issued a notice "On Transmittal of Ruling for Interlocutory Review." In the transmittal, the ALJ stated that despite reconsideration of his prior ruling of September 11, his opinion remained unchanged.

III. DISCUSSION

1. Interlocutory Review

The question presented for interlocutory review is whether the OCC can be required to produce personnel records of an NBE in connection with administrative proceedings. For the reasons set forth below, the Comptroller grants the request for interlocutory review.

The Comptroller may exercise interlocutory review if "(1) [t]he ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion; (2) [i]mmediate review of the ruling may materially advance the ultimate termination of the proceeding; (3) [s]ubsequent modification of the ruling at the conclusion of the hearing would be an inadequate remedy; or (4) [s]ubsequent modification of the ruling would cause unusual delay or expense." 12 C.F.R. § 19.28(b)(1992).

E&C asserts that this appeal involves an important question of law and policy and that subsequent modification of the discovery ruling at the conclusion of the proceedings would be an inadequate remedy because the existence of an order for production of the NBE's personnel records could well affect other administrative decisions.

Respondents oppose interlocutory review for several reasons. They contend that because the OCC was responsible for continuance of the hearing from its original date of September 28, 1992, the OCC should have to live with the consequences even if one result may be that the order for production will affect other cases. Respondents suggest that if privacy is a concern, the OCC should move to close the hearings, seal the record, or seek another type of protective order but not prohibit discovery. Respondents argue that discovery of job evaluations should not inhibit bank

examiners unless they have "such bad performance records that they would rather compromise their professional integrity as examiners than to [sic] have their records revealed." They contend that because no harm to the litigants would arise from the production of the requested documents, there would be "nothing to remedy" in the event that the discovery ruling were subsequently modified.

The Comptroller finds that discovery of an NBE's personnel records presents a substantial question of policy and law for the agency, albeit perhaps not critical to the disposition of this particular case. Personnel records are sensitive in virtually any context, and making the personnel records of a bank examiner available may have far-reaching consequences for all examiners. Moreover, subsequent modification of this discovery ruling after the end of the hearing, which is not scheduled to begin until March 1993, will not remove any impact that this ruling might have had on other pending cases or on the examiner whose personnel records are sought in this case. The disclosure of this examiner's personnel records cannot subsequently be reversed.

Accordingly, the Comptroller concludes that the ALJ's ruling meets the standards of 12 C.F.R. § 19.28 and thus warrants interlocutory review.

2. Discovery of Personnel Records

Neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply in an agency proceeding. Further, the Administrative Procedure Act does not expressly provide for discovery. Thus, the extent of discovery due to a party in an agency hearing is primarily determined by the agency. Mister Discount Stockbrokers v. SEC, 768 F.2d 875, 878 (7th Cir. 1985); and McClelland v. Andrus, 606 F.2d 1278, 1285 (D.C. Cir. 1979). Although agency rules on admissibility of evidence are more liberal than those of the Federal Rules of Evidence, they still require that agencies exclude, as a matter of policy, evidence that is irrelevant, immaterial, or unduly repetitive. 5 U.S.C. § 556(d); 12 C.F.R. § 19.36.

Pursuant to the Financial Institutions Reform, Recovery, and Enforcement Recovery Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, § 916 (1989), the federal agencies regulating financial institutions issued uniform regulations governing discovery. 56 Fed. Reg. 38,024 (1991). The OCC's regulations regarding documents provide that privileged information is not discoverable and that:

> Parties may obtain document discovery regarding any matter, not privileged, which has material relevance to the merits of the pending action . . . . The request may not be unreasonable, oppressive, excessive in scope or unduly burdensome.

12 C.F.R. § 19.24(b).

There is a strong public policy against disclosure of personnel files. In Re: The One Bankcorp Securities Litigation, 134 F.R.D. 4, 12 (D. Me. 1991). Disclosure invades employees' privacy and potentially inhibits frank evaluations because firms could fear the use of written evaluations against them or their employees. In Re Sunrise Securities Litigation, 130 F.R.D. 560, 580 (E.D. Pa. 1989)(denying discovery of personnel records). Discovery is nonetheless allowed if (1) the material sought is materially relevant and (2) there is a compelling need because the material is not otherwise available. Id.

E&C contends that the discovery request is unreasonable, oppressive, and unduly burdensome. E&C points out that examiners who face the prospect of having to undergo scrutiny of their professional lives, as reflected in their personnel files, may become very hesitant to pursue recommendations pertaining to administrative actions. E&C is concerned that this may severely affect the ability of the OCC and other agencies to effectively and forcefully carry out their supervisory responsibilities.

The Respondents argue that they seek all personnel records, including job evaluations and reviews, of the examiner responsible for the examinations of the Respondent banks because "there could hardly be anything more materially relevant than her credibility" and information about the examiner's honesty,

competence, and judgment might well be addressed in job evaluations. Respondents' arguments raise several issues on (a) whether the examiner will testify as an expert and, if so, what evidence is needed to qualify her as an expert, (b) what evidence is needed to impeach a witness, and (c) what evidence is materially relevant to allegations of unsafe and unsound banking practices.

a. Qualifying an Expert

The ALJ apparently assumes that NBE Phyllis Akers' personnel file will aid the Respondent banks in cross-examining her. It is unclear whether this assumption reflects a view that she is an expert, rather than lay witness. Like a typical expert witness, she will be called upon to use her expertise as a national bank examiner to enlighten the ALJ about the safety and soundness of certain banking practices. However, NBE Akers is not an "expert witness" as that term is commonly understood. She has not been hired for purposes of this case; rather, she is a permanent OCC employee. Moreover, her testimony in this case will stem from her role as a participant in the examination of Respondent banks, not from being an "expert" in the traditional sense.

To the extent that NBE Akers may properly be characterized as an "expert" at all, her expertise is established as a matter of law. Sunshine State Bank v. Federal Deposit Ins. Corp., 783 F.2d 1580, 1583 (11th Cir. 1986). In Sunshine, the court held that the ALJ

must give deference to the opinions of examiners. Id. at 1584.

Following the logic in Sunshine, to the extent that Ms. Akers is testifying as an expert, personnel records are not needed to establish her as one because the relevant question is whether she is a national bank examiner. Moreover, it is obvious that personnel records would be of no use in determining the actual facts underlying the unsafe and unsound practices. And evidence that is not materially relevant is not discoverable. 12 C.F.R. § 19.24.

b. Impeaching a Witness

Likewise, I conclude that NBE Akers' personnel files are not needed to establish or impeach witness credibility.

Traditionally, the main ways to impeach are through: (1) prior inconsistent statements, (2) bias, (3) character of a witness for truth and veracity, (4) defect in the witness' capacity to observe (e.g., blindness), and (5) contradiction, by testimony of other witnesses, that shows that the material facts are not as the witness under attack asserts. Impeachment by inconsistent statements, bias, capacity defects, and contradiction by other witnesses' testimony is largely accomplished through the use of statements made at depositions and trial.

Nothing bars Respondents from endeavoring to show, via

questioning of NBE Akers and others, and presentation of documents pertaining to Respondents, that the material facts are other than those asserted by the National Bank Examiner. Scrutiny by litigants of bank examiners' personnel files should not be triggered, even indirectly, by the examiner's proper conduct of her function in identifying potentially unsafe and unsound banking practices. If such scrutiny were triggered, bank examiners could suffer an invasion of their personal privacy for faithfully doing their job. In turn, such scrutiny could potentially give rise to incentives for not reporting unsafe and unsound practices and thereby adversely affect supervision of the national banking system.

Moreover, as discussed above, professional bank examiners are entitled to substantial deference. Sunshine, 783 F.2d at 1584. Sunshine does not suggest that different amounts of deference should be accorded to examiners by virtue of the contents of their personnel files. Such a view would usurp the role of the Comptroller in assuring the quality of his examiners and place an insupportable burden on the administrative process and the courts.

c. Material Relevance

OCC regulations mandate that to be discoverable evidence must have material relevance to the merits of the action. 12 C.F.R. § 19.24(b). Relevance has two components: materiality and

probative value. Materiality focuses on the relationship between the proposition for which the evidence is offered and the issues in the case. Probative value examines the tendency of the evidence to support the proposition. 1 J.W. Strong et al. McCormick on Evidence § 185, at 773-74 (4th ed. 1992). The issues in this case revolve around unsafe and unsound banking practices, of which one of the main charges is undue concentrations of credit.

The Comptroller determines that the personnel records of NBE Phyllis Akers are not materially relevant to the merits of the cease and desist proceedings. Any potentially impeaching material would be irrelevant because it would not serve as a defense to the specific allegations giving rise to these cease and desist proceedings. The respondents have not demonstrated that this information is materially relevant to an element of the charges against them or that due process would be denied if they did not obtain this information. See McClelland, 606 F.2d at 1286.

Unlike in McClelland, a case relied upon by Respondents, these proceedings do not involve a personnel action. In McClelland, the court ordered production of at least part of a report that reviewed the management style of plaintiff's supervisor. McClelland, 606 F.2d at 1290. Plaintiff contended that denial of access to the report denied him due process because the report

was relevant to his termination as a government employee. Id. at 1285. In short, unlike in McClelland, Respondents' request for personnel records does not go to the merits of this hearing.

E&C correctly states, and Respondents do not dispute, that Brady v. Maryland, 373 U.S. 83 (1963), does not require production of the personnel files at issue.

IV. ORDER

In conclusion, the Comptroller finds that personnel files of NBE Akers are not sufficiently relevant to warrant their discovery. Accordingly, it is hereby ORDERED that E&C's Motion for Interlocutory Appeal is GRANTED and the ALJ's ruling ordering the production of personnel records related to Phyllis Akers is REVERSED.

So ordered this 26th day of February, 1993.

SUSAN F. KRAUSE
Senior Deputy Comptroller for
Bank Supervision Policy