

UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION BOARD
ALEXANDRIA, VIRGINIA

In the Matter of the Prohibition of
JOHN KEARSE,
LEONE BAUM, and
LAWRENCE BURNS,
Institution-affiliated parties of
CEDC Federal Credit Union,
Hempstead, New York

Docket No. 97-0401-I

Respondents

FINAL DECISION AND ORDER

Final Decision

This case is before the National Credit Union Administration ("NCUA") Board for a final decision, following Administrative Law Judge ("ALJ") Walter J. Alprin's issuance of a recommendation to grant enforcement counsel's motion for summary disposition and a proposed order of prohibition. Following a thorough review of the entire record, the Board affirms and adopts herein the recommended decision, except as amended by this Final Decision and Order.

I. Procedural Background

On April 16, 1997, the NCUA Board issued a notice of intent to prohibit, under 12 U.S.C. §1786(g), against the respondents, John Kears ("Kears"), Leone Baum ("Baum"), and Lawrence Burns ("Burns"), institution-affiliated parties of CEDC Federal Credit Union ("the FCU"), Hempstead, New York. The notice charged that at various times from 1986 through 1995, the respondents committed unsafe and unsound practices, breached their fiduciary duties, caused harm to the FCU and its members, and demonstrated personal dishonesty with respect to the FCU. The case was submitted to the Office of Financial Institution Adjudication and assigned to ALJ Alprin.

On June 27, 1997, after the parties had engaged in discovery but before any hearing had taken place, NCUA's enforcement counsel submitted a motion for summary judgment. On July 18, 1997, the respondents filed a cross-motion to stay the administrative proceeding pending final outcome of criminal investigations. On July 28, 1997, enforcement counsel filed a motion in opposition to the cross-motion to stay.

On August 6, 1997, ALJ Alprin issued a denial of the respondents' cross-motion to stay, a recommendation to grant enforcement counsel's motion for summary disposition, and a proposed order of prohibition (together, "recommended decision"). On August 7, 1997, the ALJ issued a correction of the August 6 recommended decision that corrected several typographical errors and supplied several missing words.

NCUA's Rules and Regulations provide that within 30 days after service of a recommended decision, a party may file with the NCUA Board written exceptions to that decision or to the failure of the ALJ to make

a ruling proposed by a party. 12 C.F.R. §747.39. Neither party filed exceptions to ALJ Alprin's recommended decision within the 30 days. The respondents subsequently requested an extension of time to file exceptions. The NCUA Board granted the request, and respondents filed exceptions by letter dated November 4, 1997. By letter dated November 6, 1997, the NCUA Board informed the parties that the record was complete and that the matter had been submitted for final decision.

II. Discussion

A. Cross-Motion to Stay

In their cross-motion, the respondents argued that the United States Attorney for the Eastern District of New York and the District Attorney of Nassau County had started criminal investigations of them regarding issues overlapping those that were the subject of the administrative proceeding. The respondents contended that any statements they made in the administrative proceeding could be used against them in the criminal investigations and that they had a Fifth Amendment right to decline to testify. They argued that a stay was necessary to protect their right to present a defense in the administrative proceeding. The ALJ denied the motion, and the respondents filed exceptions to that ruling.

It is not clear that this Board has jurisdiction to review the ALJ's ruling. NCUA regulations provide that the ALJ has the authority to "consider and rule upon" motions that do not result in a final determination of the merits of the proceeding. 12 C.F.R. §747.5(b)(7). Dispositive motions must be decided by the NCUA Board. *Id.* NCUA regulations also provide, however, that a party may file exceptions to an ALJ's "recommended decision, findings, conclusions or proposed order, to the admission or exclusion of evidence, or to the failure of the ALJ to make a ruling proposed by a party." 12 C.F.R. §747.39(a) (emphasis added). Although the ruling on the motion to stay was nondispositive, and thus within the ALJ's jurisdiction, respondents have elected to file exceptions to the ALJ's failure to rule in their favor. To ensure that the respondents' due process rights are fully protected, this Board will review the ruling.

The case law establishes that the Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 94, 133 L.Ed.2d 49 (1995). Nevertheless, a court may decide in its discretion to stay civil proceedings when the interests of justice seem to require it. *Id.* The court should consider the extent to which the defendant's Fifth Amendment rights are implicated and then weigh: 1) the interest of the plaintiff in proceeding expeditiously with the litigation; 2) the burden that the proceedings may impose on the defendant; 3) the convenience of the court in the management of its cases; 4) the interest of persons not parties to the civil litigation; and 5) the interest of the public in the pending civil and criminal litigation. *Id.*

The ALJ concluded that the respondents' Fifth Amendment rights were not significantly implicated because the "supposed" criminal matter was only in investigative stages, had not been presented to a grand or petit jury, had not been targeted to any party in the administrative proceeding, and had not been instituted. RD at 3. The respondents do not contend that the ALJ erred in this conclusion. After thoroughly reviewing the record and the case law, we conclude that the ALJ's decision is correct and affirm the denial of the motion to stay.

B. Motion for Summary Judgment

Under NCUA's Rules and Regulations, the ALJ shall recommend a final order granting a motion for summary disposition where the evidence shows that: (1) There is no genuine issue as to any material fact;

and (2) The moving party is entitled to a decision in its favor as a matter of law. 12 C.F.R. §747.29. ALJ Alprin found that both conditions had been met and recommended that the motion be granted.

1. Findings of Fact

In support of his summary judgment motion, enforcement counsel filed a Statement of Material Facts As To Which There is No Genuine Issue. The statement was based on the respondents' answer to the notice, deposition testimony, and documentary evidence.

As noted above, after enforcement counsel filed his motion, the respondents filed a cross-motion to stay. By letter dated July 21, 1997, the ALJ asked the respondents to file an opposition to the summary judgment motion by overnight mail. By letter dated July 22, 1997, the respondents replied that the cross-motion to stay was submitted in opposition to the summary judgment motion. The respondents argued that they were unable to submit a substantive response without forfeiting their Fifth Amendment rights. The respondents asked the ALJ to consider the cross-motion to stay before considering the motion for summary judgment.

On July 24, 1997, the ALJ issued an order to show cause why the summary judgment motion should not be granted. By letter dated July 29, 1997, the respondents finally provided a statement of disputed issues of fact and a memorandum of points and authorities in opposition to the summary judgment motion.

In his recommended decision, the ALJ stated that the respondents' response to the show cause order contained only unsupported denials and no evidence sustaining opposition to the motion. Accordingly, the ALJ's recommended findings of fact substantially mirror those submitted by enforcement counsel and are based on the evidence he submitted.

Briefly, the facts are as follows. The FCU was chartered by NCUA under the Federal Credit Union Act ("the Act") in 1973, was placed into conservatorship on August 30, 1995, and was placed into liquidation on or about April 16, 1997. Economic Opportunity Commission, Inc. ("EOC"), was the sponsor and founding organization of the FCU, Community Action Agency Insurance Group ("CAAIG") was an organization that provided health insurance benefits to employees of EOC and its affiliates, and CEDC, Inc., was a not-for-profit organization that served as the economic development arm of EOC.

Kearse was the chief executive officer ("CEO") of CEDC, Inc., the CEO of EOC, the managing trustee of CAAIG, and a member of the credit committee of the FCU. Baum was the president of the FCU and executive assistant to Kearse at EOC. Burns was the treasurer of the FCU, the Director of Administration at EOC, and the vice president of CEDC, Inc.

NCUA alleged and the ALJ found that respondents committed four acts of wrongdoing. First, Baum knowingly deceived the certified public accountant preparing a financial statement for CAAIG by substantially inflating the amount of CAAIG funds held in FCU accounts. Kearse and Burns were aware that funds had been credited improperly to CAAIG. Second, Baum issued eleven certificates of deposit to CAAIG that she knew were not backed by funds in the FCU. Third, Burns misapplied a member's deposit to the account of CEDC, Inc. Fourth, Baum created a fictitious loan to the National Federation of Community Development Credit Unions, with the funds actually going to EOC.

The ALJ's findings of fact are fully supported by the evidence and, in any event, were not objected to by the respondents. This Board adopts and incorporates those findings of fact, subject to the corrections set forth in Appendix B, which are adopted and incorporated herein.

2. Conclusions of Law

The Act authorizes the NCUA Board to prohibit an institution-affiliated party from participating in the conduct of the affairs of an insured credit union when it determines that the record establishes each of three elements: 1) there must be a specified type of misconduct -- violation of law, unsafe or unsound practice, or breach of fiduciary duty; 2) the misconduct must have a prescribed effect -- financial gain to the party, financial loss or other damage to the credit union, or prejudice to the credit union's members; and 3) the misconduct must involve culpability of a certain degree -- personal dishonesty or unfitness to participate in the conduct of the affairs of an insured credit union. 12 U.S.C. §1786(g).

The ALJ concluded that each of the respondents was an "institution-affiliated party" and that, in engaging in the actions described above, each had, directly or indirectly, alone or with others, engaged in unsafe or unsound practices and breached his or her fiduciary duty to the FCU. He further concluded that this misconduct had the effect of damaging the FCU, which eventually was liquidated, and prejudicing the interests of the members. Finally, the ALJ concluded that respondents actions revealed personal dishonesty and unfitness to participate in the conduct of the affairs of an insured credit union.

The ALJ's conclusions of law are reasonable and, in any event, were not objected to by the respondents. This Board adopts and incorporates those conclusions of law, included in Appendix A to this Final Decision and Order.

3. Conclusion

The ALJ concluded that the material facts required for the issuance of an order of summary judgment had been proven and that enforcement counsel was entitled by law to the relief sought in his motion for summary judgment. The ALJ's findings of fact and conclusions of law are reasonable and supported by the evidence. After thoroughly reviewing the record in this proceeding, and for the reasons set forth above, this Board finds that an Order of Prohibition is warranted against the respondents. Accordingly, this Board affirms the recommended decision of the ALJ and issues the following order implementing its decision.

ORDER

Pursuant to the authority vested in the National Credit Union Administration Board by Section 206(g)(4) of the FCU Act, 12 U.S.C. §1786(g)(4), and in accordance with Part 747 of the NCUA Rules and Regulations, 12 C.F.R. Part 747, it is hereby ordered that Respondents John Kearse, Leone Baum, and Lawrence Burns are prohibited from participating in any manner in the conduct of the affairs of a federally insured credit union. Under Section 206(g)(7) of the FCU Act, 12 U.S.C. §1786(g)(7), respondents may not, while such order is in effect, continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of, any institution defined in that section. In accordance with Section 206(g)(4) of the FCU Act, 12 U.S.C. §1786(g)(4), this order shall become effective thirty days after service upon respondents.

So ordered, this 2nd day of February 1998 by the National Credit Union Administration Board.

Sheila A. Albin
Acting Secretary of the Board