FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of **CORNELIUS CAMPBELL BURGESS,** Individually and as an institution-affiliated party of Herring Bank, Amarillo, Texas (Insured State Nonmember Bank)	Docket Nos.: FDIC-14-0307e FDIC-14-0308k

ORDER REGARDING RESPONDENT'S OBJECTIONS ON REMAND TO PRE-HEARING ACTIONS

On July 19, 2018, the Board of Directors ("Board") of the Federal Deposit Insurance Corporation ("FDIC") issued a Resolution and Order in Pending Cases ("Resolution and Order") reassigning Administrative Law Judge ("ALJ") C. Richard Miserendino to this matter due to the Supreme Court's decision in *Lucia v. SEC*.[1] The Resolution and Order included certain instructions allowing the parties to file an Objection, with supporting law and facts, to any Order issued in this matter by the prior ALJ(s). The newly assigned ALJ was instructed to issue a decision on reconsideration of any prior Order to which an Objection was filed.

On November 30, 2018, C. Campbell Burgess ("Respondent") filed Objections on Remand

[1] *Lucia v. SEC*, 138 S. Ct. 2044 (2018). ALJ Miserendino was designated as the original ALJ in this matter. *See* Notice of Designation and Order Requiring Electronic Filing, issued on November 21, 2014. Subsequently, ALJ Miserendino issued an Order reassigning the case to ALJ McNeil. *See* Order Reassigning Case, issued on July 20, 2016. ALJ McNeil issued a Recommended Decision on January 11, 2017. *See* Findings of Fact, Conclusions of Law, Analysis, and Recommended Decision (Jan. 11, 2017) ("Recommended Decision"). The Board then issued its decision on August 7, 2017, adopting ALJ McNeil's recommendations and ordering that Respondent be subject to an order of prohibition and assessed a civil money penalty. *In the Matter of Cornelius Burgess*, Decision and Order to Remove and Prohibit from Further Participation and Assessment of Civil Money Penalty, Nos. FDIC-14-0307e & FDIC-14-0308k (FDIC Aug. 7, 2017) ("Board Decision"). The Board Decision was stayed by the Fifth Circuit in light of Respondent's Appointments Clause challenge. *Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. 2017); s*ee infra* n.3. Upon remand following *Lucia*, the Board directed that the reassigned ALJ conduct "a new hearing and fresh reconsideration of all prior actions." Resolution and Order at 1.

to Pre-Hearing Actions ("Objections"), in which he asserted four main objections. On January 9, 2019, FDIC Enforcement Counsel filed a Response to Respondent's Objections ("Response"). In the intervening time between the Objections and Response, ALJ Miserendino retired from the agency. Accordingly, no ruling was made on Respondent's Objections.

This matter was reassigned to the undersigned on November 26, 2019. On January 8, 2020, the undersigned issued a Notice of Case Reassignment and Order Requiring Joint Status Report by February 7, 2020. On February 7, 2020, the parties filed a Joint Status Report letter stating that the only pending motion that requires a ruling is Respondent's Objections. In the Joint Status Report, Respondent withdrew as moot his first objection that ALJ Miserendino was barred from presiding over this proceeding under *Lucia*; however, Respondent maintained his other three objections, which are discussed below.

The FDIC's Claims are not Time-Barred

Respondent asserts that the FDIC's claims are time-barred because at the time this matter was initiated, it was brought before an unconstitutionally appointed ALJ, which in turn ostensibly voided the original Notice of Charges. Enforcement Counsel responds that there is no nexus between the FDIC's ability to validly initiate an enforcement action and any challenge to the constitutionality of the appointment of the ALJ subsequently assigned to preside over the proceedings. For the reasons below, the undersigned agrees with Enforcement Counsel.

Respondent's statute of limitations arguments are founded on three premises: first, that the ALJ to whom this matter was originally assigned had not been constitutionally appointed at the time of assignment; second, that "the appropriate remedy for a proceeding tainted with an Appointments Clause violation" would be a voiding and refiling of the Notice of Charges and the institution of an entirely fresh enforcement action before a properly appointed ALJ; and third, that

the FDIC is precluded from commencing a new proceeding against Respondent by operation of the general five-year statute of limitations applicable to the accrual of civil claims brought in enforcement actions by the federal government.[2] Objections at 16-18. Even presuming that Office of Financial Institution Adjudication ("OFIA") ALJs who preside over FDIC enforcement actions are sufficiently similarly situated to the ALJs at issue in *Lucia* as to be subject to the same constraints on the manner of their appointment, a question which has not been determined by the Board and which is not for this tribunal to decide,[3] neither of Respondent's other premises follow from that conclusion under logic or the law.

Contrary to Respondent's contention, there is no relationship between the validity of the Notice of Charges filed against Respondent and the question of whether the ALJ assigned to preside over the subsequent enforcement proceedings was properly appointed. As Enforcement Counsel observes, and as Respondent acknowledges in his now-withdrawn Objection to the constitutionality of the appointment of the prior ALJ assigned to this matter, nothing in the operative statutes requires that an FDIC enforcement action, once initiated, be adjudicated by an ALJ, as opposed to the Board or a member thereof.[4] Such a result upon remand – rehearing by the agency rather than an ALJ – also was contemplated by the *Lucia* Court.[5] Put plainly, the FDIC is entitled to bring an enforcement action even if there is no ALJ available to hear the action at all. It

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[2] *See* 28 U.S.C. § 2462.

[3] The Board's post-*Lucia* Resolution and Order reassigning this and other cases expressly stated that it "should not be interpreted as an opinion that an ALJ's earlier appointment was not made or approved by the Head of a Department" or "as indicating that any of the steps required by this Order are mandated by *Lucia*." Resolution and Order at 2. In an interlocutory decision in this case issued prior to *Lucia*, the Fifth Circuit concluded that FDIC ALJs likely were "inferior Officers" within the meaning of the Appointments Clause, but did not have occasion to rule upon the constitutionality of their prior method of appointment. *Burgess*, 871 F.3d at 301-04; *contra Landry v. FDIC*, 204 F.3d 1125, 1132-34 (D.C. Cir. 2000) (holding that FDIC ALJs are not inferior officers). The question has not been addressed by any court since *Lucia* was decided.

[4] *See* 5 U.S.C. §§ 554(a), 556(b); 12 U.S.C. § 1818(e), (i); Objections at 15 (noting that "the FDIC Board itself" can preside over enforcement proceedings "in the first instance"); Response at 14 (same).

[5] *See Lucia*, 138 S.Ct. at 2055 n.6 (noting that "[t]he SEC may decide to conduct Lucia's rehearing itself").

therefore follows that the presence or absence of a validly appointed ALJ at the commencement of an enforcement action has no bearing on the underlying legitimacy of the action itself.

Moreover, *Lucia* makes it clear that the "appropriate remedy" for an Appointments Clause violation of the kind alleged here is not dismissal of the action and refiling of the Notice of Charges, but simply "a new hearing before a properly appointed official" in the extant action.[6] The remedial analysis in *Lucia* centered on whether the previous ALJ could continue to hear the case upon remand if he were to be constitutionally appointed in the interim; it concluded he could not.[7] At no point did the Court appear to entertain the possibility that the action itself was invalid and should be brought from scratch, or that respondents before an unconstitutionally appointed tribunal are entitled to have the proceedings dismissed in full.[8] Rather, the *Lucia* Court took for granted that the existing case would be remanded and that proceedings would continue, albeit upon assignment to a different ALJ or before the agency itself.[9] So too, here, is it both unnecessary and inappropriate for the FDIC to void the entire action and start again in order to correct whatever Appointments Clause deficiencies may have existed previously; it is enough for the case to be heard anew by an ALJ who has been properly appointed. Given that, the FDIC's claims against Respondent are not time-barred, because they were brought within the applicable limitations period in the first instance and need not be reasserted.

<u>The Horne Standard is the Correct Legal Standard for "Unsafe or Unsound Practices"</u>

Respondent objects to the standard applied in this case by both prior ALJs and by the Board to determine when conduct constitutes "unsafe or unsound practices" under 12 U.S.C. § 1818. In

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[6] *Id.* at 2055 (internal quotation marks and citation omitted).
[7] *See id.* n.5.
[8] *See id.* ("To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.").
[9] *See id.* n.6.

particular, Respondent asserts that ALJ Miserendino, in an April 2016 pre-hearing order, should not have granted Enforcement Counsel's motion to apply the so-called Horne standard, under which imprudent actions that could cause "abnormal risk" of loss or damage to a bank or its shareholders, without more, may be unsafe or unsound for purposes of Section 1818.[10] Rather, Respondent contends that the proper, narrower formulation is set forth in decisions by the Fifth and D.C. Circuits (collectively "the *Gulf Federal* standard"), which ostensibly augmented the Horne standard with a requirement that the conduct also have "a reasonably direct effect on [the institution's] financial soundness" or "threaten the financial integrity of the [institution]" to be considered unsafe or unsound.[11] *See* Objections at 18-20. The undersigned concludes that the *Gulf Federal* standard should not apply and that, in any event, this tribunal is bound by Board precedent when determining the appropriate contours of Section 1818.

The history of the Horne standard and its relevance to enforcement proceedings such as these has been articulated previously, most thoroughly by the Office of the Comptroller of the Currency ("OCC") in its 2014 *Patrick Adams* decision,[12] but a short précis is helpful. The Federal Deposit Insurance Act ("FDI Act") prescribes various sanctions for financial institutions or affiliated parties who engage in "unsafe or unsound practices," but it does not define that phrase.[13] John Horne, Chairman of the Federal Home Loan Bank Board ("FHLBB") during the passage of the 1966 legislation endowing banking agencies with cease-and-desist and removal-and-prohibition authority, submitted a memorandum to Congress that described such practices as encompassing "any action, or lack of action, which is contrary to generally accepted standards of

[10] *See* April 8, 2016 Order Granting in Part and Denying in Part Enforcement Counsel's Pre-Hearing Motions ("Pre-Hearing Order") at 5-6.

[11] *Gulf Federal Sav. & Loan Ass'n of Jefferson Parish v. FHLBB*, 651 F.2d 259, 264, 267 (5th Cir. 1981); *see also Johnson v. OTS*, 81 F.3d 195, 204 (D.C. Cir. 1996).

[12] *In the Matter of Patrick Adams*, Final Decision, No. AA-EC-11-50, 2014 WL 8735096 (OCC Sep. 30, 2014).

[13] *See*, *e.g.*, 12 U.S.C. § 1818(a)(1) (involuntary termination of insurance), (b)(1) (cease and desist), (e)(1) (removal and prohibition), (i)(2) (civil money penalty).

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 funds."[14] This standard has long guided federal banking agencies in bringing enforcement actions and has been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts, including by the Fifth Circuit in *Gulf Federal*.[15]

The FDIC has addressed the distinction between the Horne standard and the *Gulf Federal* standard on several occasions. Each time, the Board has declined to impose a requirement that risky, imprudent conduct must directly affect an institution's financial soundness or stability in order to be considered "unsafe or unsound."[16] Most pertinently, the Board reiterated *in this case* that the Horne standard should be applied without further adornment to the allegations against Respondent, holding that "a practice of habitually using Bank funds for personal expenses," as Respondent is alleged to have done, falls squarely and obviously within that standard, and noting that even *Gulf Federal* recognized "'careless control of expenses' as a quintessential example of an unsafe or unsound practice."[17] The Board cited numerous previous cases in which personal misuse of bank funds was sufficient for a finding that the respondent had engaged in unsafe or unsound banking practices.[18]

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[14] *Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before the House Comm. on Banking and Currency*, 89th Cong., 2d Sess. 49 (1966) (statement of John E. Horne, Chairman of the FHLBB), 122 Cong. Rec. 26,474 (1966).

[15] *Gulf Federal*, 651 F.2d at 264; *see also Patrick Adams*, 2014 WL 8735096, at **14-17 (surveying application of Horne standard by various circuits).

[16] *See*, *e.g.*, *In the Matter of Bank of Louisiana*, Nos. FDIC-12-489b & FDIC-12-479k, 2016 WL 9050999, at *15 (FDIC Nov. 15, 2016) (holding that Fifth Circuit precedent does not "restrict[] agency authority to violations of law that affect a bank's stability"); *In the Matter of Marine Bank & Trust Co.*, No. FDIC-10-825b, 2013 WL 2456822, at *4-5 (FDIC Mar. 19, 2013) (declining to apply *Gulf Federal* standard).

[17] Board Decision at 21-22 (*remanded on other grounds by Burgess v. FDIC*, 871 F.3d 297 (5th Cir. 2017)). The Board further observed that the *Gulf Federal* standard does not apply to breaches of fiduciary duty, which is another charge against Respondent and which constitutes a freestanding basis for the penalties sought by Enforcement Counsel. *See id.* at 18, 20; *see also* 12 U.S.C. § 1818(e)(1) (elements justifying imposition of removal and prohibition order), (i)(2) (elements justifying imposition of civil money penalty).

[18] *See* Board Decision at 22 (citing cases).

Respondent is thus objecting to a statutory interpretation already adopted by the Board, both previously and in this case. In that respect, Respondent's objection is misdirected: while Respondent contends that the "law of the circuit" doctrine requires that the *Gulf Federal* standard be adopted here because it is the prevailing standard in the Fifth Circuit (where this action arises), Respondent has offered no authority to suggest that this tribunal may disregard the express interpretation of the Board in favor of its own alternative definition, and the undersigned declines to do so.[19] If Respondent wishes for the Board to revisit its decision on the matter, it must ask the Board directly at some later stage of these proceedings.

Regardless, even if the undersigned were not bound by Board precedent, there is significant reason to find that the law of the circuit doctrine as articulated by Respondent is not applicable here. This doctrine, as most commonly conceived, holds that "later panels in a particular circuit must follow the decisions of previous panels in the same circuit."[20] Respondent invokes the doctrine in a different sense, to argue that administrative agencies are bound by the precedent of the circuit in which a matter originates.[21] *See* Objections at 18-19. Yet to the extent that such a rule exists, it is modulated by the deference due to an agency in construing ambiguous statutory provisions – so-called "*Chevron* deference," after the Supreme Court's decision in *Chevron U.S.A.,*

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[19] *Cf. Iran Air v. Kugleman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993) ("[O]nce the agency has ruled on a given matter, . . . it is not open to reargument by the administrative law judge.") (internal quotation marks and citation omitted); *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989) (noting that ALJs are "subordinate to the [agency] in matters of policy and interpretation of the law").

[20] Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 Nev. L. J. 787, 797 (Summer 2012); *see also*, *e.g.*, *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1127 (D.C. Cir. 2017) ("[T]he same issue presented in a later case in the same court should lead to the same result. Doubly so when the parties are the same.") (internal quotation marks, emphases, and citation omitted).

[21] In support of this position, Respondent cites two cases, *Hoffman v. FDIC*, 912 F.2d 1172 (9th Cir. 1990), and *Llapa-Singh v. Mukasey*, 520 F.3d 897 (8th Cir. 2008). Objections at 19. As the OCC notes in its *Patrick Adams* decision, however, "[n]either case stands for the proposition that either the ALJ or the agency must tailor its reasoning at the adjudication stage to the law of the courts in which a petition for review might be filed." *Patrick Adams*, 2014 WL 8735096, at *19. Rather, these cases "stand in relevant part for the proposition that circuit courts of appeals are not bound by the decisions of other courts of appeals." *Id.* (citing *Hoffman*, 912 F.2d at 1175, and *Llapa-Singh*, 520 F.3d at 901).

Inc. v. Natural Resources Defense Council ("*Chevron*").[22] In *National Cable & Telecommunications Association v. Brand X Internet Services* ("*Brand X*"), the Supreme Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[23] Like virtually all of the circuits, the Fifth Circuit extends *Chevron* deference to banking supervisory agencies interpreting provisions of the FDI Act.[24] *Gulf Federal*, moreover, does not purport to be interpreting the unambiguous terms of the statute in propounding its construction of "unsafe or unsound practices,"[25] and later Fifth Circuit precedent makes it clear that "Congress has not spoken clearly to what constitutes an unsafe or unsound practice, *leaving development of the phrase to the regulatory agencies*."[26] Thus, under *Brand X*, the Board is not obliged to adopt the Fifth Circuit's definition of that phrase when construing the scope of 12 U.S.C. § 1818, the law of the circuit notwithstanding.

Indeed, *Gulf Federal* arguably does not describe the prevailing standard for "unsafe or unsound practices" even in the Fifth Circuit. The OCC observed in *Patrick Adams* that "a key component of *Gulf Federal*'s reasoning was rejected by the Supreme Court a year after it was decided,"[27] and subsequent Fifth Circuit decisions have been inconsistent in their use of the *Gulf Federal* standard.[28] Further, the case relied on by Respondent to show the continued primacy of

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[22] 467 U.S. 837 (1984).
[23] 545 U.S. 967, 982 (2005).
[24] *See Akin v. OTS*, 950 F.2d 1180, 1185 (5th Cir. 1992); *Bullion v. FDIC*, 881 F.2d 1368, 1374 (5th Cir. 1989); *see also Patrick Adams*, 2014 WL 8735096, at **11, 25-30 (discussing *Brand X* and judicial deference to agency interpretations of FDI Act).
[25] *See Gulf Federal*, 651 F.2d at 263-65 (using legislative history and public policy to construe statutory terms).
[26] *MCorp Fin., Inc. v. Bd. of Governors*, 900 F.2d 852, 862 (5th Cir. 1990) (emphasis added).
[27] *Patrick Adams*, 2014 WL 8735096, at *12; *see also id.* at **17-19 (discussing *Fidelity Sav. & Loan Ass'n. v. De La Cuesta*, 458 U.S. 141 (1982), which rejected *Gulf Federal*'s limitation on FHLBB authority).
[28] *See id.* at *19.

the *Gulf Federal* standard in the Fifth Circuit not only applied *Chevron* deference to the agency's interpretation of the statute but quoted the Horne standard, without *Gulf Federal*'s gloss, as the "authoritative definition of an unsafe or unsound practice."[29] It is therefore not clear that following Fifth Circuit precedent would even yield the result Respondent seeks in this case.[30]

Consistent with the Board's direction to fully reconsider objected-to actions of the prior ALJ, the undersigned notes that there are other reasons for this tribunal and the Board not to adopt the *Gulf Federal* standard as well. First, to the extent that *Gulf Federal* stands for the proposition that conduct must have a direct effect on a bank's financial soundness or integrity to be considered unsafe or unsound, it "conflicts with the fundamental structure of the FDI Act by introducing an effects element, textually reserved as a predicate for more severe remedies, into the definition of an element of misconduct."[31]

To illustrate this point, the OCC in *Patrick Adams* offers the example of the agencies' removal and prohibition authority in 12 U.S.C. § 1818(e), under which an agency must prove the separate elements of misconduct, culpability, and effect. The misconduct element may be satisfied by a showing of unsafe or unsound practices, a breach of fiduciary duty, or a violation of law, regulation, or agency order.[32] The effect element may be satisfied, in turn, by showing either that the institution at issue thereby "has suffered or probably will suffer financial loss or other damage," that the institution's depositors' interests "have been or could be prejudiced," or that the charged party "has received financial gain or other benefit."[33] All of these effects present a significantly

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[29] *MCorp Fin.*, 900 F.2d at 862-63 (quoting *Gulf Federal*, 651 F.2d at 264).
[30] Along those lines, it is relevant moreover that both ALJ McNeil, in his January 11, 2017 Recommended Decision following reassignment from ALJ Miserendino, and the Board concluded that Respondent had engaged in unsafe and unsound practices even under the more restrictive standard set forth in *Gulf Federal*. *See* Recommended Decision at 150-51; Board Decision at 21-22.
[31] *Patrick Adams*, 2014 WL 8735096, at *16.
[32] 12 U.S.C. § 1818(e)(1)(A).
[33] *Id.* § 1818(e)(1)(B).

lower bar than the *Gulf Federal* standard urged by Respondent. If the "unsafe or unsound practices" prong of the misconduct element were construed to require conduct that actually threatens an institution's financial soundness or integrity, as Respondent claims and as *Gulf Federal* apparently holds, then "a higher degree of effect would need to be shown in the misconduct tier than in the effects tier," which renders the effect element largely vestigial in cases where unsafe or unsound practices are charged and creates a stark asymmetry between the necessary showing for unsafe or unsound practices and for the other two prongs of the misconduct element.[34] Similar disparities would exist in the required elements for, among other things, the imposition of a cease-and-desist order or a Second Tier civil money penalty.[35]

Likewise, the one provision of the FDI Act that describes specific conduct constituting "unsafe or unsound practices" also is arguably inconsistent with the *Gulf Federal* standard. In Section 1818(b)(8), the statute provides that "[i]f an insured depository institution receives, in its most recent report of examination, a less-than-satisfactory rating for asset quality, management, earnings, or liquidity, the appropriate Federal banking agency may (if the deficiency is not corrected) deem the institution to be engaging in an unsafe or unsound practice."[36] Insofar as *Gulf Federal* confines actionable "unsafe or unsound" conduct under Section 1818 to practices that directly threaten an institution's continued financial viability, consecutive less-than-satisfactory ratings for management or earnings would seem not to qualify. Yet by the terms of the statute, they are enough to authorize an agency to impose sanctions.

Finally, the federal banking system is well-served by uniformity and predictability in applying the statutory predicates for enforcement actions. The Horne standard presently stands as

[34] *Patrick Adams*, 2014 WL 8735096, at *16.
[35] *See id.*; *see also* 12 U.S.C. § 1818(c)(1), (i)(2)(B)(ii).
[36] *Id.* § 1818(b)(8).

the benchmark for delineating the scope of "unsafe or unsound practices" under the FDI Act, both for the supervisory agencies charged with the Act's enforcement and in virtually every circuit.[37] To deviate from that standard selectively when enforcement actions arise in certain jurisdictions would create a disharmony between and within agencies that would be at odds with the FDIC's mission. The District of Columbia Circuit has expressed concerns regarding the prospect of a supervised party receiving conflicting guidance from regulators where multiple supervisory agencies administer the same statute,[38] as with the FDI Act, but in fact "the three banking agencies have adopted materially identical formulations of 'unsafe or unsound practice,'" much more so than the various courts.[39] As a result, "[f]or an institution that operates nationally or regionally, as do many national banks and federal thrifts, there is . . . far more prospect of conflicting guidance from the courts of appeals than from the supervisory agencies."[40] Were the FDIC to change its interpretation of Section 1818 when bringing enforcement actions depending on the circuit in which the home office of the institution in question was located, it would generate not only uncertainty on the part of supervised parties but the inter-agency conflict that the agencies have so far striven to avoid. For this reason, and all of the reasons above, the undersigned finds that Respondent's objection to the governing standard at issue is meritless. Accordingly, ALJ Miserendino's April 8, 2016 order that the *Gulf Federal* standard will not be applied in this case is hereby adopted.[41]

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[37] *See Patrick Adams*, 2014 WL 8735096, at **20-24 (finding that only the Third, Fifth, and D.C. Circuits have based decisions on *Gulf Federal*'s restrictive gloss, and even there inconsistently).

[38] *See DeNaples v. OCC*, 706 F.3d 481, 488 (D.C. Cir. 2013) (warning of "a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all") (internal quotation marks and citation omitted).

[39] *Patrick Adams*, 2014 WL 8735096, at *26.

[40] *Id.*

[41] *See* Pre-Hearing Order at 5-6.

ALJ Miserendino's Order on the Motion to Strike Bias Evidence Was Not in Error

Respondent asserts that an error was made in not denying the FDIC's pre-hearing "Motion to Strike Respondent's Affirmative Defense of Bias, Prejudicial and Unprofessional Conduct, and Unfair Treatment or, in the Alternative, Motion in Limine to Exclude Respondent's Non-Relevant Exhibits, Witnesses, and Related Testimony" ("Bias Motion") in full, because it resulted in relevant and probative information being excluded by ALJ McNeil. Objections at 20-23. ALJ Miserendino issued a ruling on the Bias Motion on April 8, 2016, holding that because evidence of witness bias could bear on credibility, he was denying the motion "to the extent it seeks to strike Respondent's allegations of bias completely" and would instead treat those allegations "as denials of the FDIC's allegations." Pre-Hearing Order at 4. ALJ Miserendino went on to state that "[t]o the extent the Bias Motion seeks the exclusion of specific evidence and witnesses, the undersigned will defer ruling until the hearing, at which time I will be better able to determine whether the evidence meets the standards for admissibility." *Id.*

The matter was then reassigned to ALJ McNeil, who conducted the hearing and determined that the proposed evidence proffered on the issue of bias was not sufficiently probative as to render the evidence material and relevant. Recommended Decision at 151-53. Respondent raised the issue again in his exceptions to the Recommended Decision, arguing that he should have been allowed to present evidence of examiner bias. Addressing this argument, the Board concluded that "the objective evidence of Respondent's expenses, his own admissions, and the testimony of Bank employees and consultants hired by the Bank" were more than sufficient to support a finding of Respondent's misconduct irrespective of any claimed bias on the part of FDIC examiners. Board Decision at 30-31. Respondent now contends that ALJ Miserendino's decision not to deny the Bias Motion in its entirety led ALJ McNeil to refuse to "consider any evidence of FDIC bias as part of

his analysis of the case," which in turn left Respondent unable "to investigate or develop adequately any testimony on the issue." Objections at 21.

It is not the remit of this tribunal to revisit the question of whether evidence of bias was properly excluded during the hearing. Insofar as Respondent's objection rests upon a reappraisal of the relevance, materiality, or otherwise probative nature of testimony and evidence excluded at the hearing by ALJ McNeil, then, the undersigned declines to make that inquiry. Nor will the undersigned conclude that alleged evidence of bias is admissible as a blanket matter or that ALJ Miserendino should have ruled as such. At bottom, ALJ Miserendino's Pre-Hearing Order did not exclude any evidence of bias or conclude that it was inadmissible. Rather, ALJ Miserendino determined that a full assessment of the admissibility of the proffered bias evidence was better undertaken on a case-by-case basis within the context of the hearing itself, and the undersigned will not gainsay that decision.

As noted in the Board's July 19, 2018 Resolution and Order, this matter requires a new hearing – either as a paper hearing or as a new oral hearing – before a new ALJ who will issue a new recommended decision.[42] If the issue of bias is raised during the new hearing process, the undersigned will address the issue at the relevant time. Accordingly, Respondent's objection to the Pre-Hearing Order is hereby rejected.

SO ORDERED.

Date: March 2, 2020.

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Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication

[42] *See* Resolution and Order at 1, 3.