UNITED STATES OF AMERICA
OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT

Notice Number 2006-1

In The Matter Of:	)
FRANKLIN D. RAINES	)
J. TIMOTHY HOWARD	)
LEANNE G. SPENCER	)

DECISION OF DIRECTOR JAMES B. LOCKHART III IN RESPONSE TO RESPONDENT HOWARD'S MOTION FOR INTERLOCUTORY REVIEW

The following sets forth my decision and order in response to Respondent J. Timothy Howard's Motion for Interlocutory Review.

BACKGROUND

On December 18, 2006, OFHEO filed a Notice of Charges against Mr. Franklin D. Raines, Mr. J. Timothy Howard, and Ms. Leanne G. Spencer (Respondents) in the above captioned matter alleging violations of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, 12 U.S.C. § 4501 et seq. On February 7, 2007, Administrative Law Judge Moran held a scheduling conference to address, inter alia, the submissions of all three Respondents requesting that the hearing on the merits of this matter be held on February 16, 2007, or alternatively, that the charges be dismissed. The Respondents argued that 12 U.S.C. § 4633 requires that a hearing on the merits of this matter must be held within 60 days of the filing of the Notice of Charges and, if it is not,

that OFHEO has no authority to proceed with the charges.[1] Judge Moran denied the requests of the Respondents. On February 22, 2007, counsel for Respondent Howard filed a Motion for Interlocutory Review of that decision (Howard's Motion) with Judge Moran. OFHEO filed OFHEO's Memorandum in Opposition to Respondent Howard's Motion for Interlocutory Review on March 8, 2007 and Mr. Howard filed a Reply in Support of Motion for Interlocutory Review (Reply) on March 23, 2007. The other Respondents have not joined with Howard's Motion or filed a request for interlocutory review of their own. On March 27, 2007, Judge Moran referred Howard's Motion to me noting that he found Respondent Howard's arguments to be without merit.

DISCUSSION

Regulatory Standard

OFHEO's regulation sets forth the standard when interlocutory review may be appropriate, specifically listing four circumstances under which I may, but am not required to, exercise such review:

> (b) *Scope of review.* The Director may exercise interlocutory review of a ruling of the presiding officer if the Director finds that—(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion; (2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding; (3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or (4) Subsequent modification of the ruling would cause unusual delay or expense.

12 C.F.R. § 1780.30.[2]

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[1] "Any such hearing shall be fixed for a date not earlier than 30 days nor later than 60 days after service of the notice of charges . . . unless an earlier or later date is set by the hearing officer at the request of the party served." 12 U.S.C. § 4633(a)(2).

[2] This regulatory standard regarding interlocutory review echoes that of several other agencies with enforcement powers. See e.g. 12 C.F.R. § 308.28 (Federal Deposit Insurance Corporation), § 509.28 (Office of Thrift Supervision), § 19.28 (Comptroller of Currency) § 263.28 (Federal Reserve Board).

The permissive language of the regulation grants me broad discretion in whether or not to grant interlocutory review. In the Matter of Lawrence B. Seidman and John Bailey, 1992 WL 560995, *1 (1992) (Office of Thrift Supervision case noting broad discretion afforded by same language used in Office of Thrift Supervision regulation and denying interlocutory review). The respondent bears the burden of proving that interlocutory review is appropriate. In the Matter of Doolin, 1994 WL 169620, at *3 (Office of Thrift Supervision).

Mr. Howard's Arguments

For the following reasons, I find that Mr. Howard has not shown that any of the circumstances under which interlocutory review may be granted apply.

Mr. Howard argues that Judge Moran's ruling on the timing of the hearing in this matter involves a controlling question of law. Reply at 1-2. Mr. Howard, however, has not shown that the law in question, 12 U.S.C. § 4633, has ever been interpreted in the way Mr. Howard urges it should be interpreted. Without that showing, he cannot demonstrate that, "substantial grounds exist for a difference of opinion" on that law, as the regulation contemplates. 12 C.F.R. § 1780.30(b)(1).

Mr. Howard also argues that that subsequent modification of the ruling would be an inadequate remedy. Reply at 2. Because neither I nor any court or tribunal has the power to go back in time to grant the initial request of holding the hearing on the merits on February 16, 2007, I assume that Mr. Howard's request for interlocutory review is, in essence, a motion to dismiss the charges. These charges could be dismissed at any time before, during, or after the hearing of this matter. In fact, the legal effect of such a ruling

would be the same regardless of its timing, so it is not true that a subsequent ruling to dismiss the charges would be an inadequate remedy under 12 C.F.R. § 1780.30(b)(3).

Finally, Mr. Howard argues that denying interlocutory review of this issue would result in unusual expense. He cites the millions of dollars in costs and years of time at stake if this matter proceeds. Reply at 2. However, the "unusual expense" contemplated by the regulation at 12 C.F.R. § 1780.30(b)(4), is not referring to ordinary costs of litigation. "Interlocutory review is the exception, rather than the rule, and recognizing costs of litigation as a relevant concern would completely undermine the exceptional nature of the relief." In The Matter of Rick A. Jenson, Scott P. Crabtree, Michael D. Landry, Alton B. Lewis, And Danna A Doucet, FDIC-95-65e 1997 WL 33774615, *3 (April 7, 1997); In The Matter of Randolph W. Lenz And J. Donald Weand, Jr., FDIC-02-174e, FDIC-02-158e, FDIC-02-160c&b, FDIC-02-161c&b, FDIC-02-175k, FDIC-02-176k, 2004 WL 2585214, *4 (September 21, 2004); In the Matter of Citizens Bank of Clovis, FDIC-91-406b,1992 WL 812920, at *2 (May 5, 1992). In order to merit the extraordinary remedy of interlocutory review, the respondent bears the burden of showing that the delay and expenses would be unusual. Mr. Howard has made no such showing.

Furthermore, Mr. Howard has made no showing that he would even bear such expenses himself. If Mr. Howard's former employer, Fannie Mae, is bearing the burden of Mr. Howard's legal expenses, then his argument is even less persuasive.

CONCLUSION

For the aforementioned reasons, I hereby deny Respondent Howard's Motion for Interlocutory Review.

James B. Lockhart III
Director,
Office of Federal Housing Enterprise Oversight

Dated: April 23, 2007