

UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of

XXX

Docket BD 14 -11

Request for Consent by NCUA of service as
a director of XXX Federal Credit Union

Decision and Order

Decision

This matter comes before the National Credit Union Administration Board (Board) pursuant to 12 U.S.C. §1785(d) as a request by XXX for consent of the Board to serve as a director for XXX Federal Credit Union (assuming he receives sufficient votes from the membership at the next annual meeting and election), notwithstanding Mr. XXX's previous conviction of a crime involving dishonesty.

Background

Mr. XXX was convicted of a misdemeanor in 1967, when he was eighteen years old. According to the materials submitted with Mr. XXX's request for consent, he and a friend were in a retail store when the friend took a greeting card from the store rack and, without Mr. XXX's knowledge, inserted it into a folder Mr. XXX was carrying. Mr. XXX was arrested and charged with shoplifting, a crime that, at the time of the offense, carried a potential fine of up to \$1,000 and up to one year in prison. Mr. XXX was convicted, even though his friend admitted his action in court. The judge suspended the sentence, however, and Mr. XXX did not serve any time in prison. Since that time, Mr. XXX has not run afoul of the law.

Applicable Law

Section 205(d) of the Federal Credit Union Act (the Act) provides that no one who has been convicted of a crime involving dishonesty or breach of trust may serve in any capacity as an employee or a director of an insured credit union without first having obtained the consent of the Board. 12 U.S.C. §1785(d).

Analysis

In 2008, the Board issued an Interpretive Ruling and Policy Statement (IRPS) describing the offenses covered, and not covered, under Section 205(d). IRPS 08-1, *Guidance Regarding Prohibitions Imposed by Section 205(d) of the Federal Credit Union Act* (July 24, 2008); 73 Fed. Reg. 48399 (Aug. 19, 2008). The IRPS provides that a Section 205(d) application is not required, and approval is automatically granted, when a covered offense is de minimis. A covered offense is considered de minimis if all of the following requirements are met:

- there is only one conviction or entry into a pretrial diversion program of record for a covered offense;
- punishment for the offense is imprisonment for a term less than one year and/or a fine less than \$1,000, and the court did not incarcerate the offender;
- the conviction date or entry date for a pretrial diversion program precedes the Section 205(d) application by at least five years;
- the offense did not involve an insured depository institution or insured credit union; and
- neither the NCUA Board, under Section 205(d), nor any other federal financial institution regulatory agency, under Section 19 of the Federal Deposit Insurance Act, has previously denied consent for the same conviction or participation in a pretrial diversion program.

IRPS 08-1, at 21 (emphasis added). In this case, all of the foregoing items are present, except for the provisions regarding maximum fine and potential maximum incarceration. The crime occurred over forty years ago, and Mr. XXX has not committed any crimes since then. No incarceration or fine was imposed and the offense did not involve an insured depository institution or insured credit union. Further, we have no indication that any of the federal financial institution regulatory agencies, including NCUA, has previously denied consent to the applicant for this conviction. At the time Mr. XXX was convicted, however, Hawaii law specified that his crime was punishable by imprisonment of up to one year and a fine in an amount up to \$1,000.¹ Thus, even though the court did not incarcerate Mr. XXX, the possible maximum penalty for the crime exceeded the de minimis requirements as set out in IRPS 08-1.

In these cases, the Board applies the IRPS to the law in effect at the time of the incident. The Board recognizes, however, that had this crime occurred after 1972, the Board's consent would have been automatic, based on the de minimis criteria outlined in IRPS 08-1. As such, application of those criteria points toward approval. The crime occurred over 40 years ago, when Mr. XXX was a young man. He asserts that the theft occurred without his knowledge, an assertion that was corroborated in court by his friend. The judge only imposed a suspended sentence. Since the incident, Mr. XXX has maintained a clean record. Though he would serve as a director and be in a

¹ Hawaii changed its criminal code in 1972 to provide for a new category of "petty misdemeanor." Haw. Rev. Stat. Ann. §701-107(4) (2007). Crimes in this new category, including shoplifting involving items valued at less than \$100, are punishable by up to thirty days in jail and a fine of not less than twice the value of the stolen item. Haw. Rev. Stat. Ann. §708-833.5(3) (2007).

position to influence policy and overall direction of the FCU, he would not be in an operational position with direct access to either funds or records. The Board believes that service by Mr. XXX as a director for this FCU is unlikely to constitute a threat to the safety and soundness of the institution or the interests of its members, nor is it likely to undermine public confidence in the FCU. The Board notes, in this respect, that the Region V Director has no objection to Mr. XXX's proposed service.

Waiver. IRPS 08-1 indicates that consent requests are to be submitted by the insured credit union on behalf of the person who will participate in its affairs. On a case-by-case basis, however, the Board may grant a waiver and allow the person to file an application in his or her own right where substantial good cause exists for granting a waiver. IRPS 08-1, at 24. In this case, representatives of current management at the FCU have not advocated or advanced this request on Mr. XXX's behalf and have made no indication of their intent to do so. As he was not a candidate selected by a nominating committee, Mr. XXX has sought to place his name into nomination by gathering sufficient signatures on a petition. Accordingly, unless the Board allows Mr. XXX to pursue this request for consent directly, he would have no way of obtaining the necessary clearance to seek a position on the FCU's board. The Board believes substantial good cause exists to waive the requirement of FCU sponsorship of the request and to consider the request as filed by Mr. XXX in his own right.

Order

For the reasons set forth above, it is ORDERED as follows:

The Board finds sufficient good cause to, and does hereby WAIVE, the requirement that the application for consent must be submitted by an insured credit union on behalf of Mr. XXX.

The Board hereby APPROVES the request filed by Mr. XXX and grants its consent for him to serve as a director for XXX FCU in the event he is elected.

So **ORDERED** this 14th day of December, 2011, by the National Credit Union Administration Board.

Mary F. Rupp
Secretary of the Board