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FROM: Assistant General Counsel
Hattie M. Ulan

SUBJECT: Legal Opinion on Vacating Appointment to Board of Directors; Federal Credit Union Bylaws, Article VII, Sections 3 and 7 (Your January 23, 1989, Memorandum)

DATE: March 17, 1989

You have asked that we review the facts surrounding the removal of a director who was appointed by the Board and the resignation of another director at the []. You have raised several questions regarding the legality of the removal and resignation. It is our view that these questions involve a factual dispute that will have to be resolved either by the FCU or in a state court. Since the FCU bylaw on removal and appointment of directors does not implement provisions of the FCU Act or NCUA's Rules and Regulations, we can only provide you with general advice. A court would look to state corporate law to interpret the bylaws at issue. The FCU should be encouraged to solve these issues with the assistance of their attorney or a third party arbitrator.

BACKGROUND

The FCU's Board of Directors received complaints from FCU employees concerning the treatment of FCU personnel by the FCU's manager, []. The Board was split on a proposal to remove the manager. As a compromise, the Board agreed to retain [] but to take all "personnel functions" from him and assign those functions to the assistant manager. The FCU's President was given the responsibility of informing [] of this decision.

[] requested clarification of the term "personnel functions." The President prepared a letter clarifying the term and presented it to []. [] showed the letter to another director, a [], who told [] to ignore the letter. The President informed [] that he did not have the authority to direct [] to ignore the letter.

At the next Board meeting, the Board voted to remove []. [] was appointed member of the board. The minutes for the board meeting at which [] was removed state that no reason need be given for [] since he was an appointed director. (See Tab 10b of attachments to your incoming memorandum.) The FCU's legal counsel informed the FCU that, if the bylaws do not address a specific issue, corporate law can be looked to, and that under corporate law an appointed official can be removed in the same manner in which they were appointed. The minutes do, however, go on to discuss certain incidents in which [] conduct was deemed improper, including [] statement to [] to ignore the President's letter.

[] another FCU director, resigned from the Board due to the controversy over []. He was later appointed to the Board. [] then requested that your Office provide the FCU with an opinion on whether [] had been properly removed. [] did not indicate in his inquiry to your Office that [] was an appointed director. He also asked whether he should be viewed as an appointed or an elected director. Your Office determined that [] had been improperly removed, but that you did not have sufficient information to make a determination as to [] status. (See Tabs 8 and 10 of attachments to your incoming memorandum.)

The FCU has determined that your office was not provided with complete and accurate information, and, therefore, that your opinion should not be followed. They have submitted the matter to you for reconsideration. They have also asked their attorney, [], to review the matter.

ANALYSIS

You have raised four issues regarding the removal of [] and the resignation and reappointment of []. The issues raised and our responses follow:

1. The legality of vacating an appointment two months after it is made, due to the incidents reported in the enclosure.

Article VII of the FCU Bylaws governs the appointment and removal of FCU directors. Section 3 provides:

Any vacancy on the board, credit committee, or supervisory committee shall be filled by vote of a majority of the directors then holding office. Directors and credit committee members so appointed shall hold office only until the next annual meeting, at which any unexpired terms shall be filled by vote of the members, and until the qualification of their successors

Section 7 provides:

If a director or a credit committee member fails to attend regular meetings of the board or credit committee, respectively, for 3 consecutive months, or otherwise fails to perform any of the duties devolving upon him/her as a director or a credit committee member, his/her office may be declared vacant by the board and the vacancy filled as herein provided. The board may remove any executive officer from office for failure to perform the duties thereof, after giving the officer reasonable notice and opportunity to be heard.

Some of the Board members are taking the position that, since [] was an appointed member of the Board rather than an elected member, Article VII is not relevant. It is our view that Article VII applies to both appointed and elected directors. We recognize that state law does enter into this issue. However, the bylaw on its face applies to all directors. We see no basis for determining that it does not apply to appointed directors.

If it is determined that Article VII Section 7 is the proper vehicle for removal, the next issue is whether [] conduct constitutes a failure to perform the duties of his office within the meaning of the bylaw. It seems-that an argument could be made that instructing [] to ignore the President's letter could be construed as a failure to carry out his duties, i.e., to implement a Board decision. However, this is a factual dispute that should be resolved by the FCU and not by NCUA. If the Board is unable to resolve the dispute, an affected party could bring an action in state court. The court, in deciding the matter, would look to state law since an interpretation of the FCU Act or NCUA's Rules and Regulations is not involved.

2. The legality of the subsequent appointment to the Board of Directors of the official who had previously resigned.

Article VII, Section 3 governs the appointment of directors. We see no problem with an FCU appointing [] to the Board after his resignation.

3. Which of the individuals should be considered the legal Board member.

It is our understanding that [] was reappointed to the position he vacated, and that [] position is still vacant. [] status as a director does not appear to be in question. His question is whether he is an elected or an appointed director. (See our response to number 4. below.) A determination pursuant to the guidelines discussed in response 1 above must be made to determine if [] was properly removed and is therefore no longer a Board member.

4. If the resigned member who has now been appointed is considered the legal Board member, is he considered an elected or an appointed Board member? Must he stand for election at the next annual meeting?

We believe that your December 14, 1988, letter to [] (Tab 10 to your incoming) adequately addresses the resignation issue. As you pointed out, this is a factual issue the Board should attempt to resolve. If the issue is ultimately litigated, a determination would be made under state law.

The FCU wants NCUA to arbitrate its problems with its Board of Directors. The FCU is apparently anticipating a joint decision from NCUA and Jerry Hyland on this matter. We did contact [] to discuss the matter generally with him. However, we do not believe that this is the type of action in which NCUA should be involved. We suggest that you advise the FCU to resolve the matter with the assistance of their legal counsel or another third party arbitrator.