

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of

XXXX FEDERAL CREDIT UNION

Docket No. BD-02-18

Request for Consent from NCUA Board to employ  
XXXX

**Decision and Order**

**Decision**

This matter comes before the National Credit Union Administration Board (Board) as a request by XXXX Federal Credit Union (XXXX) for consent to hire XXXX as Vice President, Lending Programs, notwithstanding XXXX's previous participation in a pretrial diversion program in connection with a crime involving dishonesty or breach of trust.

**Background.** Section 205(d) of the Federal Credit Union Act (FCU Act) specifies that an individual convicted of a crime involving dishonesty or breach of trust, or who has agreed to enter a pretrial diversion or similar program in connection with prosecution for such an offense, may not serve as an employee or director of an insured credit union without first having obtained the written consent of the NCUA Board.<sup>1</sup> XXXX submitted its request to Region II pursuant to this provision in the FCU Act.

**Criminal Charge.** As set forth in the request, XXXX was 21 years old in 1999 when he was charged with (1) an offense against intellectual property by modifying data for the purpose to defraud, and (2) petit theft, in violation of sections 815.04 and 812.014 of the Florida Statutes, respectively.<sup>2</sup> The charge to commit a computer related crime to defraud was, at the time of the offense, a second degree felony punishable by imprisonment not to exceed 15 years and by fines not to exceed \$10,000. The petit theft charge was, at the time of the offense, a second degree misdemeanor punishable by imprisonment not to exceed 60 days and by fines not to exceed \$500.

According to the materials submitted by XXXX, XXXX worked for Circuit City, a consumer electronics retail chain, from June 1996 to January 1999. In January 1999, Circuit City terminated XXXX for violating his computer access keystroke authority by modifying the price and his commission fee for store merchandise, and for stealing several small retail items such as cell phone covers and batteries. XXXX stole approximately \$200 in retail merchandise and benefitted by approximately \$200 in increased sales commissions.

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<sup>1</sup> 12 U.S.C. §1785(d).

<sup>2</sup> See Fla. Stat. §§ 815.04(1) and 815.04(4)(b); Fla. Stat. §§ 812.014(a)(a) and (b), and 812.014(3)(a).

On August 12, 1999, he entered into a pretrial diversion agreement with Escambia County Circuit Court in Pensacola, Florida. XXXX made restitution and completed community service as part of the pretrial diversion program. Accordingly, on June 19, 2000, the Office of the State Attorney for the First Judicial Circuit of Florida announced a *nolle prosequi* in his case.

**IRPS 08-1.** In 2008, the Board issued an Interpretive Ruling and Policy Statement (IRPS) describing the scope of offenses covered under Section 205(d).<sup>3</sup> 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 punishment imposed by the court did not include incarceration;
- 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.<sup>4</sup>

In this case, four of the five criteria outlined above are met. However, the potential punishment XXXX faced included imprisonment for a term not to exceed 15 years and fines not to exceed \$10,000 on the charge to commit a computer related crime to defraud. This exceeds the standard set forth by the IRPS. Thus, even though XXXX's punishment did not include incarceration, and he successfully completed a pre-trial diversion program which resulted in the entry of a *nolle prosequi*, the IRPS refers to the potential range of punishment, not the sentence actually handed down to the defendant. Accordingly, the *de minimis* exception is not available.

**Regional Office Evaluation.** The Regional Director supports this application. As documented in the case file, outlined in greater detail in her memorandum to the General Counsel dated August 17, 2018, the Regional Director notes that the incident occurred approximately nineteen years ago when XXXX was a young man. XXXX stole approximately \$200 in merchandise and benefitted by approximately \$200 in increased sales commissions. He is now 40 years old and has avoided additional incidents with law enforcement since that time.<sup>5</sup> The Region notes there is no known subsequent adverse information impacting XXXX's ability to meet the Vice President of Lending job description or posing a safety and soundness threat to the credit union. The Region also notes that XXXX is generally well-run, with 8.14% net worth ratio, assets of over \$551,000,000, and a CAMEL 2 rating. XXXX was forthcoming with the credit union in disclosing information relating to his prior criminal record. If approved, XXXX will employ XXXX as Vice President of Lending, a position supervised by the Senior Vice President, Chief Operating Officer.<sup>6</sup> XXXX will be in a

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<sup>3</sup> 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).

<sup>4</sup> IRPS 08-1, at 21.

<sup>5</sup> An August 8, 2018 FBI background check found no adverse information.

<sup>6</sup> The Application to Request Consent Pursuant to Section 205(d) indicates in Section D.2 that the position for which XXXX is under consideration reports to the "Chief Operating Officer, SVP." However, the position description that

position to exercise considerable influence and control over the management and affairs of the credit union as a member of the credit union's senior management team. The Region raised general concerns about XXXX management's ability to supervise and control lending and employee activities; however, the Region believes the credit union's current internal controls are adequate to supervise and control XXXX's activities in the Vice President of Lending position. The Region also confirmed the credit union's eligibility of bondability with its bonding company, and the company has indicated it will provide coverage to XXXX if his application is approved.

**Analysis.** The Board notes that several aspects of this case support approval of XXXX's service on behalf of XXXX. Each of these is outlined below.

*Time elapsed.* Approximately 18 years have elapsed since his successful completion of the pretrial diversion program. There was no adverse information on XXXX found in an August 8, 2018 FBI background check. The dollar amount involved was small (\$400), and XXXX admitted to the crime and successfully completed a pretrial diversion program, resulting in a *nolle prosequi*. XXXX is now 40 years old, has no record of any subsequent criminal conduct, and has demonstrated productive living in the considerable time that has elapsed since the indiscretion.

*Evidence of rehabilitation.* Several factors point to XXXX's rehabilitation and good reputation since his participation in a pretrial diversion program:

- Accepted into the University of West Florida's Teacher Certification Program. The program required finger printing, a Florida Department of Law Enforcement (FDLE) background check, and bonding (2000).
- Appointed, bonded, and renewed as a Florida Notary Public (2002 – 2016).
- Licensed and bonded as a Florida Personal Lines 2-20 insurance agent (2004 – 2007).
- Granted a Florida Concealed Weapons Permit requiring finger printing and a FDLE background check (2015).
- Granted a FDIC Section 19 waiver approving employment with a community bank. The waiver required finger printing and an FBI background check (2015).
- Granted a Georgia Conceal Weapons Permit requiring finger printing and a FDLE background check (2018).

*Other relevant factors.* Approval in this case would be consistent with the approach adopted by the Board in other recent cases involving youthful, admitted indiscretion, completion of any mandatory probation and/or community service, followed by years of productive living and avoidance of further criminal conduct.<sup>7</sup> In this case, XXXX was forthcoming and appears to accept responsibility for his prior criminal record. Since the time of the offense, he has been employed by several financial institutions and provided favorable letters of reference concerning his employment

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was submitted with the application indicates that the position reports to "SVP, Member Services & Lending." In either case, the position presumably reports to a senior vice president.

<sup>7</sup> See e.g., BD 04-17 (granting consent to an individual who was 25 at the time of the offense, successfully completed a pretrial diversion program, and had committed no subsequent offenses.); BD 03-17 (granting consent to an individual who was 22 at the time of the offense, successfully completed a pretrial diversion program, and had committed no subsequent offenses.); BD 05-16 (granting consent to an individual who was 18 at the time of the offense and had since had the conviction set aside under state procedures that are analogous to expungement.).

with those institutions. He self-disclosed his criminal background after he became aware of the statutory prohibition and was granted a Section 19 waiver from the FDIC approving employment with a community bank.

**Order**

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

The Board hereby APPROVES the request filed by XXXX Federal Credit Union and grants its consent for XXXX Federal Credit Union to employ XXXX to serve as Vice President, Lending Programs.

So **ORDERED** this 18<sup>th</sup> day of October, 2018, by the National Credit Union Administration Board.

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Gerard Poliquin  
Secretary of the Board