

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of

XXX FEDERAL CREDIT UNION

Docket BD 03 -13

Request for Consent from NCUA to hire XXX

**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 Federal Credit Union (XXX) for consent to hire Mr. XXX as a member service representative, notwithstanding Mr. XXX's previous agreement to participate in a pre-trial diversion program in connection with a crime involving dishonesty.

**Background**

Mr. XXX was hired by XXX in April 2012 as a member service representative. A background check performed by XXX revealed that Mr. XXX was arrested in January 2012 and charged with petit larceny, falsification of business records, and criminal possession of stolen property. Following his arrest, Mr. XXX admitted to stealing gift cards from his previous employer, a Target department store. The prosecutor determined to place Mr. XXX, who was twenty-one at the time, into a pre-trial diversion program, during which time his case was "adjourned in contemplation of dismissal" under applicable New York law. He was directed to make restitution to the store from which he stole the cards and complete fifty hours of community service. Mr. XXX represented that he completed these requirements and he stated that the case against him has been dismissed.

Mr. XXX made no reference in his employment application materials to the arrest or the disposition of his case. Upon learning of these circumstances, XXX placed Mr. XXX on unpaid administrative leave and submitted its request for consent to hire him to NCUA's Region I Office.

**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, or who has agreed to participate in a pre-trial diversion program in connection with such a crime, 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. In this case, four of the five criteria outlined above are met. However, Mr. XXX's actions occurred slightly more than a year ago. The de minimis exception is, therefore, not available.

The Regional Director does not support this application. Explaining his views, the Regional Director indicated that it would be "not appropriate" for XXX to employ Mr. XXX based on current information.

After receiving the initial application from XXX, the Regional Director invited (but did not require) the credit union to provide any additional information it might have in support of the request. XXX did not respond to that invitation. After conferring with representatives of the Office of General Counsel, the Regional Director went back to XXX with a more specific request for additional information to support the application, some of which was to be provided by Mr. XXX. In its response, XXX indicated that Mr. XXX was unwilling to provide the requested information. Furthermore, according to XXX, Mr. XXX stated that he was no longer interested in pursuing the request for approval from NCUA. Although XXX made two requests of him via email to document those sentiments in writing, Mr. XXX never did.

On January 2, 2013, NCUA's Special Counsel to the General Counsel wrote to Mr. XXX and explained that the NCUA Board was considering a request from XXX for consent in the event it

determined to re-hire him. That letter advised Mr. XXX that the Board was interested in knowing specifically whether or not he had an interest in the position with XXX. The letter directed him to respond in writing within two weeks. The letter noted that failure on his part to provide any response would be viewed by the Board as an indication that he was not interested in the position. Mr. XXX never responded to that letter.

In reviewing the circumstances in this case and applying the principles noted in IRPS 08-1, the Regional Director focused on the following points. First, the Regional Director noted that Mr. XXX has not provided confirmation that his case has, in fact, been dismissed.<sup>1</sup> Second, given the short amount of time that has elapsed since the offense was committed, the Regional Director noted that there is insufficient basis to evaluate whether or not Mr. XXX has truly been rehabilitated. In this connection, the Regional Director also noted that Mr. XXX's failure to disclose the arrest and pre-trial diversion participation on his job application goes to the question of rehabilitation. Finally, while noting that Mr. XXX is bondable and would not be employed in a position in which he would have significant opportunity to threaten the safety and soundness of XXX, the Regional Director noted that he would be in a position in which encounters with members would be occurring. As such, the Regional Director believed an encounter with someone familiar with Mr. XXX's record and experience with the criminal justice system could tend to undermine public confidence in XXX.

The Board considers the following factors present in this case to be significant. The relatively short time that has elapsed since Mr. XXX entered into the pre-trial diversion program renders any judgment relative to his rehabilitation premature. His verbal statements that he is no longer interested in a position with XXX, together with his failure to provide any written expression of such interest when specifically directed in writing to do so, are strong indicators that, in fact, he is not interested in pursuit of the request. The Board notes that the record is sealed upon a participant's successful completion of the pre-trial diversion program and so discounts as insignificant the impact on public confidence in XXX that might result from Mr. XXX's association with the credit union.

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<sup>1</sup> NCUA personnel have independently confirmed that the case has been dismissed.

## **Order**

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

The Board hereby REJECTS the request filed by XXX Federal Credit Union and denies its consent for XXX to hire Mr. XXX as an employee.

So **ORDERED** this 14<sup>th</sup> day of March, 2013, by the National Credit Union Administration Board.

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Mary F. Rupp  
Secretary of the Board