

UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of

ARIZONA CENTRAL CREDIT UNION

Docket BD 05 -16

Request for Consent from NCUA Board to reinstate
XXXX

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 Arizona Central Credit Union (Arizona Central) for consent to reinstate XXXX as a mortgage closing assistant, notwithstanding XXXX's previous conviction of a crime involving dishonesty.

Background

XXXX was 18 years old and still in high school in February of 2009. He was caught in an attempt to steal clothing priced at \$14 from a local department store. He was arrested and agreed to plead no contest to the charge of shoplifting, a class one misdemeanor in Arizona, based on the value of the goods involved.¹ Under Arizona law, a class one misdemeanor is punishable by jail time of up to six months and a fine of up to \$2,500.² XXXX paid a fine and fees totaling \$346 but was not required to spend any time incarcerated. He has since had the conviction set aside under Arizona procedures that are analogous to expungement.³

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.⁴

¹ Ariz. Rev. Stat. §13-1805

² Ariz. Rev. Stat. §§13-707, 802

³ Ariz. Rev. Stat. §13-907

⁴ 12 U.S.C. §1785(d).

Analysis

In 2008, the Board issued an Interpretive Ruling and Policy Statement (IRPS) describing the scope of offenses covered under Section 205(d).⁵ 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.

IRPS 08-1, at 21. In this case, four of the five criteria outlined above are met. However, the potential punishment XXXX faced included a fine that could have exceeded the threshold set out in the IRPS. Thus, even though the fine actually levied on XXXX was significantly less than that figure, the *de minimis* exception is not available.

The Regional Director supports this application. Explaining her views, the Regional Director noted that XXXX's crime occurred almost eight years ago, when XXXX was still in his teens. He has avoided additional clashes with law enforcement since that time, and has, in fact, successfully served as an employee of Arizona Central for approximately two years.⁶ XXXX's age at the time of the incident, as well as the fact that his position with Arizona Central does not afford him any significant managerial or policy-making influence, are additional considerations that the Region believes provide support for the request. The Region has also noted that the state supervisor has posed no objection to the proposed employment for XXXX.

XXXX had been employed by Arizona Central for approximately two years before the credit union became aware of his criminal background. According to the application materials, his performance has been excellent, warranting a promotion, up from a branch office support role to his current position as a mortgage closing assistant. He is characterized in the application materials as a "reliable, dedicated, and engaged employee," and is recognized for his support for a local charity through a payroll deduction as well as his participation in community service through the credit union. He did not disclose his conviction during the initial interview and application process, which was not improper because XXXX had legitimately had his conviction

⁵ 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)

⁶ His conviction did not show up on the initial background check, apparently because the court records contained an error in the spelling of XXXX's last name.

“set aside” in accordance with applicable Arizona procedures following his conviction.⁷ Although the application materials do not provide details, evidently XXXX was undergoing a difficult time in his personal life at the time of the arrest.

As noted above, the only reason that this case does not qualify for application of the *de minimis* automatic approval option as described in IRPS 08-1 is the potential size of the fine that could have been imposed under Arizona’s criminal code. Since the value of the goods that XXXX was convicted of stealing was less than \$1,000, his crime is characterized as a class one misdemeanor. As such, the conviction could have carried with it a fine of up to \$2,500. The judge in his case determined to assess a fine and fees that aggregated less than \$350.

XXXX’s crime was at the very low end of the scale for what qualifies as a class one misdemeanor in Arizona. That state has determined not to make narrower classifications based on lower dollar amounts, such as at levels of \$100 or \$500. Had he lived in a different state, he may have faced a potential fine that would have been capped at well below the *de minimis* threshold. The law in Massachusetts, for example, provides for a fine of only \$250 for a first offense, with no potential incarceration, where the value of the goods in question is less than \$100.⁸ While XXXX must take the law in his home state as he finds it, the Board notes that some degree of consistency across the several states should be an objective in how the policy is applied, given that the matter involves a federal oversight function based on federal law.

Drawing on the analysis the Board has applied in administering this policy in recent previous cases, the following are some of the primary considerations in this case. Although he would still be considered a young man, XXXX was a teenager when he was arrested. He has avoided subsequent encounters with law enforcement in the almost eight years since the incident occurred. He cooperated with the authorities and did not contest the verdict, which tends to show his acknowledgement of the error in his way. The relatively small value of the goods being taken, while certainly not an excuse for theft, is nevertheless a factor that warrants consideration. The judge in his case elected to assess a fine at the low end of the permissible scale, which is another indication of the relatively benign circumstances in the case.

In terms of the reputation of Arizona Central, XXXX’s position is clerical in nature, supporting the mortgage loan program administration, and he is unlikely to have influence over policy. As a member of the support staff, he will be under relatively close supervision by management. Moreover, he has pursued and obtained an order setting aside his conviction, which means it is more or less hidden from public knowledge. Members and others dealing with him at the credit union will most likely not be aware of his background, so there will not be any negative reflection on Arizona Central. Indeed, in its application Arizona Central speaks highly of his contribution to the overall success of their operation and clearly supports his retention as an employee. Both the Regional Director and the state supervisor have no objection to the request. Although XXXX has not yet achieved the age that some previous applicants had achieved at the

⁷ See Ariz. Rev. Stat. §13-907. As counsel for Arizona Central has acknowledged, the Arizona set-aside provisions are not the equivalent of an expungement within the meaning of IRPS 08-1, since the conviction may still be revealed under certain circumstances. See, e.g., *McCully v. Schwenn*, 220 F. App’x 475 (9th Cir. 2007) (“§13-907 . . . does not expunge or remove the fact of conviction in Arizona.”).

⁸ Mass. Gen. Laws Ann. ch. 266, §30A (West 2008)

time of their requests, approval in this case is consistent with the posture the Board has taken in other §205(d) cases.

Order

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

The Board hereby APPROVES the request filed by Arizona Central Credit Union and grants its consent for Arizona Central to reinstate XXXX as a mortgage closing assistant.

So **ORDERED** this 20th day of December, 2016, by the National Credit Union Administration Board.

Gerard Poliquin
Secretary of the Board