UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of

XXXX CREDIT UNION Docket No. BD-04-19

Appeal from determination by the
Supervisory Review Committee

Decision and Order on Appeal
Decision

This matter comes before the National Credit Union Administration Board (Board) under 12 C.F.R. Part 746, Subpart A, as an administrative appeal of XXXX Credit Union (Petitioner) of the determination by the Supervisory Review Committee (SRC) to dismiss, for lack of jurisdiction, the appeal of a decision of the Regional Director for the XXXX Region (Region) to deny its application for secondary capital. Petitioner has also requested an oral hearing on the matter.

Background and SRC Dismissal

XXXX Credit Union is a federally insured, state-chartered (FISCU), low-income designated credit union (LICU) located in XXXX, XXXX. As a FISCU, Petitioner's primary regulator is the XXXX (the SSA).

Initial Determination: On January 11, 2019, Petitioner submitted an application and secondary capital plan (SC Plan)[1] to the NCUA's XXXX Region, pursuant to §701.34(b)(1) of the NCUA's regulations, for authority to accept secondary capital accounts in the amount of XXXX. On February 25, 2019, the Region denied the application.

Reconsideration Determination: On March 18, 2019, pursuant to §746.105, Petitioner made a written request for reconsideration from the Region, citing allegations of error with respect to the Region's initial denial. Upon reconsideration, the Region upheld its initial determination to deny Petitioner's secondary capital request by letter of April 24, 2019.

Appeal to the SRC: On May 17, 2019, Petitioner filed a written appeal to the SRC of the Region's decision on reconsideration. Petitioner also requested an oral hearing on the matter. In its appeal to the SRC, Petitioner argued, among other things, that in the case of a FISCU, §741.204(c) places responsibility to approve or disapprove a FISCU's SC Plan on the SSA with

[1] Petitioner engaged XXXX to prepare its application and SC Plan.

the concurrence of the NCUA. Further, Petitioner noted that, under the XXXX Administrative Code, a LICU "shall have the [power] to the same extent, and subject to the same terms and conditions, as is authorized for federal credit unions," to "accept secondary capital in accordance with 12 CFR 701.34 and 12 CFR 741.204."[2]

Therefore, Petitioner asserted that if "XXXX chartered LICUs have the power to accept secondary capital accounts under the same terms and conditions that federal credit unions have under §701.34, then such LICUs are authorized to accept secondary capital accounts if the LICU is not notified by the [SSA] within 45 days of its receipt of a secondary capital plan that the plan has been approved or disapproved (*See* §701.34(b)(2))." (Emphasis in original).

Region's Rescission: Having received notice from Petitioner of its appeal to the SRC,[3] the Region consulted with the Office of General Counsel (OGC) on the issue of state authority and determined that the Region had erred in providing a determination on Petitioner's SC Plan without a prior approval or disapproval by the SSA. Accordingly, by letter of June 4, 2019, the Region notified Petitioner that its prior decisions were rescinded.

SRC's Notice of Dismissal: Upon review of Petitioner's notice of appeal, the Chairman of the SRC, in consultation with OGC, determined the appeal was not a matter ripe for review by the SRC, and therefore the SRC lacked jurisdiction over the appeal. Thus, by letter of June 5, 2019, the Chairman of the SRC provided Petitioner with a notice of dismissal, finding that as a result of the Region's rescissions, there was no "material supervisory determination" for review by the SRC. Accordingly, pursuant to 12 C.F.R. §746.104(b), the SRC dismissed Petitioner's appeal without prejudice.

Appeal to the NCUA Board: By letter of July 1, 2019 to the Secretary of the NCUA Board, Petitioner provided timely notice of its appeal of the SRC's decision to the NCUA Board. Petitioner also requested an oral hearing on the matter. Petitioner argues the SRC's dismissal without prejudice on the basis of jurisdiction is inconsistent with applicable law and should be reversed.

Discussion and Analysis.

The issue before the Board in this case is whether the SRC's dismissal without prejudice for lack of jurisdiction is supportable. As more fully discussed below, upon review by the Board, the SRC's determination to dismiss Petitioner's appeal without prejudice on ripeness grounds was sound.

In accordance with §746.101(c), the SCR appeal procedures apply to "the appeal of material supervisory determinations made by NCUA staff."[4] The term "material supervisory determination" is defined in §746.103(a) as "a written decision by a program office (unless ineligible for appeal) that may significantly affect the capital, earnings, operating flexibility, or

[2] XXXX
[3] Appeals must be filed with the Secretary of the Board; however, Petitioner emailed a copy of its notice of appeal to the Region's inbox.
[4] 12 C.F.R. §746.101(c).

that may otherwise affect the nature or level of supervisory oversight of an insured credit union."[5]

Further, §746.104(b) states:

> (b) *Dismissal and withdrawal.* Any appeal under this subpart may be dismissed by written notice if it is not timely filed; if the basis for the appeal is not discernable; if an insured credit union asks to withdraw the request in writing; if an insured credit union fails to provide additional information requested pursuant to any authority granted in this subpart; if an insured credit union engages in bad faith; **if the appeal fails to state a material supervisory determination as defined in §746.103 of this subpart**; or for reasons deemed appropriate by the reviewing authority.[6]

Here, there is no material supervisory determination, as defined in §746.103, because the Region rescinded its decisions of February 25, 2019 and April 24, 2019. Thus, there is no "written decision by a program office" and the appeal is not ripe for review by the SRC and should be dismissed.

Under §741.204(c), "[the SSA] must approve or disapprove the [SC Plan] with the concurrence of NCUA."[7] The Region rescinded its decisions because it exceeded its authority in disapproving the SC Plan; indeed, in the case of a FISCU, the NCUA's role in the application is limited to only concurring or not concurring with the SSA's approval or disapproval of the SC Plan. Since the SSA had not yet made a determination on Petitioner's application, there was no SSA decision on which to concur or not concur. As such, the Region was correct in rescinding the February 25th and April 24th decisions as they were made outside the scope of authority. With the written decisions from the Region rescinded, this matter is not ripe for appeal.

Petitioner cites §701.34(b)(2) to support its assertion that an SSA must notify a FISCU as to whether its application for secondary capital is approved or disapproved within 45 days. The implication being that the SSA did, in this case, make a default decision on Petitioner's application. Section 701.34(b)(2) states:

> *Decision on plan.* If a LICU is not notified within 45 days of receipt of a Secondary Capital Plan that the plan is approved or disapproved, the LICU may proceed to accept secondary capital accounts pursuant to the plan.

Petitioner argues "[w]hether [an SSA] is bound by a 45-day time limit or not is a question of state law, which may in some cases adopt the provisions of 12 CFR 701.34(b)(2). While it is true that §741.204(c) requires SSAs to approve or disapprove secondary capital plans with the concurrence of the NCUA, the Rule is silent as to whether the 45-day limit in §701.34(b)(2)

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[5] 12 C.F.R. §746.103(a).
[6] 12 C.F.R. §746.104(b). (Emphasis added).
[7] 12 C.F.R. §741.204(c).

applies. In XXXX if state law is silent on the matter, as in this case, the SSA will defer to the federal code which would make the 45 day time limit apply."

Even if the Board accepts Petitioner's argument that the SSA is bound by the 45-day deadline under §701.34(b)(2),[8] the NCUA is not bound by any regulatory requirement to issue its concurrence on the SSA's determination within any particular timeframe.[9] Thus, even accepting the notion that the SSA has failed to act within the prescribed 45 days, and therefore Petitioner's application is approved by default, the NCUA has still not provided its concurrence on that (default) determination. Accordingly, the appeal is not ripe and should be dismissed for lack of jurisdiction.

Furthermore, while the issue on appeal in this case is purely jurisdictional, even if the Board made a determination on the merits of this case, there would essentially be no practical remedy for Petitioner because the SSA has not yet made a decision on the application. As noted above, in the case of a FISCU's application to accept secondary capital, under §741.204(c), the NCUA's role is solely to concur or not concur with the SSA's approval or disapproval. The SSA has made no determination on the application. Petitioner argues that the 45-day default approval timeline in §701.34(b)(2) applies yet, by its own contention, the SSA is responsible for determining whether the 45-day default approval deadline applies to applications of FISCUs chartered in XXXX. The fact is, the SSA has neither issued a decision on Petitioner's application nor made a determination on whether the federal 45-day default applies under state law. There is simply no SSA decision with which the NCUA can concur in any event. Thus, irrespective of the outcome of this appeal, the Board can offer Petitioner no practical remedy unless or until the SSA takes action.

Moreover, because the Region's determinations have been rescinded the matter is, alternatively, moot. The SRC cannot review a rescinded determination as that determination is no longer in controversy.

Request for Oral Hearing: Under §746.111(a), an insured credit union may request to appear before the Board to make an oral presentation in support of its appeal. Its request must "show good cause for an oral presentation and state reasons why the appeal cannot be presented adequately in writing."[10]

Petitioner contends there is good cause for an oral presentation because the SRC dismissed its appeal without cause. Petitioner further contends that the issues in the appeal impact its due process rights to a hearing.

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[8] According to an August 18, 2018 email from OGC to XXXX counsel, "an SSA is not bound by the 45-day time limit in 12 CFR 701.34(b), applicable to the NCUA rendering a decision on a federal credit union's secondary capital obligation. Likewise, the NCUA's concurrence with an SSA's determination is also not subject to the 45-day time limit."

[9] The state provision states, simply, "[the SSA] must approve or disapprove the [SC Plan] *with the concurrence of NCUA*," with no deadline for the concurrence. 12 C.F.R. §741.204(c) (Emphasis added).

[10] 12 C.F.R. §746.111(a).

The Board disagrees. This case is an appeal of a purely jurisdictional decision made by the SRC. As discussed above, the SRC correctly dismissed Petitioner's appeal for lack of jurisdiction as there is no material supervisory determination to review. Thus, an oral hearing is not warranted in this case.

Conclusion.

There is no material supervisory determination presented in this case, as defined in §746.103, because the Region rescinded its decisions of February 25, 2019 and April 24, 2019 disallowing Petitioner's SC Plan. Thus, the SRC has no jurisdiction to review this matter due to lack of ripeness. Alternatively, the rescissions rendered the issue moot and the matter is no longer in controversy. Further, as this appeal involves a purely a jurisdictional matter, there is no good cause to warrant a hearing in this case.

Order

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

The request for oral hearing is DENIED.

The decision of the Supervisory Review Committee dismissing XXXX Credit Union's appeal without prejudice is AFFIRMED and the appeal of XXXX Credit Union is DENIED.

The Board's decision constitutes a final agency determination, which is reviewable in accordance with the provisions of Chapter 7, Title 5, United States Code. Such action must be filed within 60 days of the date of this final determination.

So **Ordered** this 18th day of July, 2019, by the National Credit Union Administration Board.

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Gerard Poliquin
Secretary of the Board