

LS/HMU:jrm

MEMORANDUM

FROM: Department of Legal Services

TO: [ ]

SUBJ: [ ]

DATE: June 24, 1985

REF: (a) P.E. Rauer Memo 2/JAR:jr, dated March 1, 1985, same subject  
(b) RD, Region II (Capital) Memo EI/ALC:lmd, dated March 13, 1985 same subject

ENCL: (1) Letter to Richard A. Zeller, GC/RPK/AJK:nmw, dated 8/6/79; subj: removal of director

1. This is in response to reference (b) concerning the ability of an FCU board of directors to remove a director who is currently delinquent on two loans (described in reference (a)).
2. The FCU Act and the Standard FCU bylaws authorize the removal of an FCU director (excluded from the list below is the authority granted to the NCUA Board pursuant to Section 206 of the Act) as follows:
  - (a) Section 115 of the FCU Act grants the supervisory committee the power to suspend a director by unanimous vote. The suspension must be acted upon by the members at a meeting not less than seven nor more than fourteen days after such suspension.
  - (b) Article X, Section 5 of the Bylaws implements Section 115 of the Act.
  - (c) Article X, Section 6 and Article XIX, Section 3 of the Bylaws authorize a special meeting of the members called for the purpose of removing a director upon the affirmative vote of a majority of the members present at the meeting.
  - (d) Article VII, Section 7 of the bylaws authorizes the board of directors to remove a director (declare his/her position vacant) if the director fails to attend three consecutive meetings or otherwise fails to perform any of the duties devolving upon him/her as a director.

3. In the matter before us, the issue involves the removal of a director by an FCU's board of directors in reliance on the authority contained in Article VII, Section 7 (as described above in paragraph 2 (d)). The authority of a board of directors to remove one of its own has been narrowly construed by the courts. Generally, the courts have held that a director can be removed only by those that have placed him/her in that position, i.e., stockholder or in the case of FCU's, the members. At least one court has held that a bylaw provision empowering a board of directors, in addition to the stockholders, to remove a director, was invalid (See 19 CJS Corporations §738).

4. In light of the above, it is our opinion that the power granted to an FCU's board by Article VII, Section 7, should be interpreted narrowly by NCUA. With respect to what constitutes a failure to perform "any of the duties devolving upon him as a director." we have previously stated that loan delinquency is not sufficient reason for the board to remove a director. (See enclosure (1).) It is our opinion that delinquency in loan payments is a personal failure not related to "any of the duties devolving upon him/her as a director." Removal for this type of failure should be left to the body that elected the director (the membership). As noted in paragraph 2(a) above, the supervisory committee may suspend a director, but such suspension must be acted upon by the membership. An expansion of our present interpretation of Article VII, Section 7 to include a personal failure such as loan delinquency may be too broad resulting in a successful legal challenge to the authority provided to an FCU's board by this bylaw provision.

6. This opinion is advisory only and is based on the limited facts set out in references (a) and (b). The subject Credit Union may wish to consult outside counsel who is familiar with both Federal and state common law, the FCU Act, and

FCU Bylaws.

7. If you have further questions, please contact Hattie Ulan of this Office.

STEVEN R. BISKER  
Assistant General Counsel

Enclosure

cc: All RD's  
Dept. of S & E CC/RPY/AJK:nnw

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3700  
8/6/79

Richard A. Zeller, Esq.  
Kiley, Feldmann, Whalen, Devine, Zeller and Patane, P.C.  
Oneida Savings Bank Building  
Oneida, NY 13421

Dear: Zeller

This responds to your letter of May 31, 1979, concerning the general scope of Article VII, Section 7 of the Federal Credit Union Bylaws and its application to three situations occurring at [ ] AFB Federal Credit Union.

Article VII, Section 7 of the Bylaws allows the board of directors to declare a position on the board or credit committee vacant when the occupant of that position fails ". . . to attend regular meetings of the board or credit committee, respectively, for three consecutive months, or otherwise fails to perform any of the duties devolving upon him as a director or credit committee member. . . ." This is the single avenue of removal available to board and it is quite limited when compared to the more broad and numerous avenues for such removal available to the membership in Article X, Sections 5 and 6 of the Bylaws, and Article XIX, Section 3 of the Bylaws.

The limited removal powers that are vested in a credit union board are in accord with the general rule of corporate law that any removal powers of a board of directors be exceptional and limited. This is so because the ultimate power and responsibility in the corporate structure for selection and removal of officials lies with the voting stockholder, in this case, the credit union membership. See, 19 C.J.S. Corporations 1738 (1974). Any construction of Article VII, Section 7 that allowed the board to accomplish removals except under the most extreme situations would tend to diminish the voice of the membership. Hence, Article VII, Section 7 must be construed quite narrowly.

Applying such a construction to Article VII, Section 7, removal for failure to attend meetings for three consecutive months is clear on its face. The clause ". . . or otherwise fails to perform any of the duties devolving upon him as a director or credit committee member," poses more questions. In order for the board to use its Article VII, Section 7 removal powers it must have evidence not that the director or credit committee member is simply not performing well but that he has, in fact, failed to perform his duties at all, that is, nonfeasance. This does not mean that a failure to perform perfunctory duties like ordering new carpeting for the board room, for instance, could result in removal. Failure to perform a substantive duty, such as failure to invest credit union funds, must be shown in order to invoke the board's removal powers. While the facts of a given case are important, the thrust of the bylaw involves an abandonment of duty and not generalized unhappiness with performance.

Applying the above interpretation to the examples you present, Article VII, Section 7 could not be employed by the board to remove a credit committee member delinquent in his loan payments or a director who has overdrawn his share draft account. these are personal failures which bear no relationship whatsoever to "any of the duties devolving upon him as a director or credit committee member." To allow the board to remove a director because he is "just not performing his duties appropriately" also falls short of the standard necessary to invoke Article VII, Section 7. The

types of activity that you have described might form a basis for removal initiated by the membership, but to allow the board to accomplish such removals might tend to subject individual board or credit committee members to political squabbles resulting in removals for simple differences in style, philosophy, or methods.

It therefore appears that general corporate law, which places the ultimate removal decisions in the general membership, dictates that Article VII, Section 7 be construed narrowly. Hence, the situation you describe at [ ] AFB Federal Credit Union does not warrant the use of Article VII, Section 7. I hope that this response adequately answers all of your questions.

Sincerely,

JOHN L. OSTBY  
General Counsel

By: JAMES J. ENGEL  
Assistant General Counsel

cc: Regional Director  
Region I (Boston)