

UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of

XXXXXXXXXXXXXX

Docket 03-CRED-001

Creditor Claim

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

Decision and Order on Appeal

Decision

This matter comes before the National Credit Union Administration Board (Board) pursuant to 12 CFR 709.8, as an appeal of the determination by the Liquidating Agent of XXXXXXXXXXXXXXXX Federal Credit Union denying XXXXXXXXXXXXXXXX claim in the amount of \$27,625 for his consulting services as both fundraiser and interim manager.

Background

XXXXXXXXXXXXX Federal Credit Union (the FCU) was placed into conservatorship on November 27, 1997, due to ineffective management and unsafe and unsound operations. The FCU was released from conservatorship on January 13, 2000. XXXXXXXXXXXXXXXX was on the FCU's advisory board during the conservatorship. After release from conservatorship, he served as the chairman of the board of the FCU. XXXXXXXXXXXXXXXX was employed and paid by the FCU in two different capacities after the release from conservatorship. He served as a fundraiser/consultant and he also provided acting manager functions. He was paid \$18,596¹ for these services. The FCU was liquidated on August 27, 2002. XXXXXXXXXXXXXXXX made a claim for additional payment as follows: \$12,550 for his services as fundraiser/consultant and \$15,075 as acting manager. This brings his total claim to \$27,625. NCUA's Asset Management and Assistance Center (AMAC), in its capacity as Liquidating Agent, denied XXXXXXXXXXXXXXXX's claim on February 10, 2003. XXXXXXXXXXXXXXXX appealed the AMAC denial to the NCUA Board on March 17, 2003. The two-part claim is discussed below.

¹ According to FCU documentation, XXXXXXXXXXXXXXXX was paid \$12,000 (twelve \$1,000 payments for consulting services); \$2750 for consulting services as individual development coordinator; and \$3846 for services as part-time manager. These payments total \$18,596.

Consultant Agreement Claim

xxxxxxxxxx submitted a contract (Consulting Agreement) dated March 9, 2000, in support of the consultant portion of his claim. The contract states that xxxxxxxxxxxx will be paid \$1000 a month as an independent contractor “to provide certain skills and abilities to the Credit Union that the Credit Union has need for in the areas of fund raising, market and business development, and other management functions” and “5% of the gross amount of any grants or other form of financial assistance received by the Credit Union written and/or prepared by the Consultant.” According to the contract, unless renewed, it expired on December 31, 2001. The Consulting Agreement is signed by xxxxxxxxxxxx and by xxxxxxxxxxxxxxxxxxxxxx (a board member) on behalf of the FCU.

xxxxxxxxxx claims \$9000 is owed to him based on the Consulting Agreement for the months of April 2001 – December 2001. He also claims that the Credit Union received two grants from the Empire State Development Corporation (ESDC), one for \$49,000 and a second for \$22,000. He claims he is owed 5% of each of the grants under the Consulting Agreement. He submitted letters from ESDC stating the two grants had been approved, payment contingent upon the budget. His total claim under the Consultant Agreement is \$12,550 (\$9000 plus \$3550 – 5% of the two grants).

NCUA’s Office of Credit Union Development (OCUD) approved a technical assistance grant to the FCU on June 15, 2000. It was around this time that FCU board members were asked to provide NCUA with a copy of any written agreement entered into with xxxxxxxxxxxx. None of the board members ever produced a written contract and NCUA staff was unable to locate a copy of the Consulting Agreement with the FCU records after it was placed into liquidation. The OCUD grant states that “the amount approved is \$12,000 to cover the costs of a consultant to perform marketing services for one year.” The grant was to be paid quarterly based on completion of certain goals as noted in the grant. The grant was paid for two quarters (for a total of \$6000) through September 30, 2000. There was no payment for the third and fourth quarters because the goals set forth in the grant were not met.

The FCU’s general ledger and cancelled checks and invoices reflect that xxxxxxxxxxxx was paid \$12,000 (in \$1000 increments) between June 28, 2000 and March 30, 2001 for work as a consultant. His appeal is for nine \$1000 payments from April 2001 – December 2001. FCU records also included an invoice and cancelled check indicating that xxxxxxxxxxxx was paid an additional \$2750 on May 16, 2002, for services he provided as individual development coordinator from May 2001 – December 2001. This period is part of the same period covered by xxxxxxxxxxxx’s claim. Twenty-five hundred dollars appears to be a payment of 5% of a \$50,000 grant received by the FCU. It is not clear what the additional \$250 payment is for because it does not coincide with fees that would be due if xxxxxxxxxxxx was operating under a valid Consulting Agreement, i.e. \$1000 per month.

A review of the FCU's board meeting minutes from January 2000 through April 2000 revealed nothing to indicate the board entered into the Consulting Agreement with xxxxxxxxxx or that xxxxxxxxxx had authority to sign a contract on behalf of the FCU.

AMAC was able to contact (by mail) five out of six former FCU board members regarding xxxxxxxxxx's claim. AMAC obtained affidavits from two of the former FCU board members stating, among other things, that the March 9, 2000, Consulting Agreement xxxxxxxxxx submitted is valid. The affidavits also state that the FCU received the two ESDC grants referred to above. As noted below, ESDC never disbursed these funds to the FCU.

AMAC also contacted xxxxxxxxxxxxxxxx (former Credit Union board member whose signature appears on both agreements² submitted by xxxxxxxxxx) by telephone. Although xxxxxxxxxxxxxxxx stated she signed the Consulting Agreement contract, she did not return the affidavit AMAC sent her confirming the telephone conversation.

As to the two EMSC grants for which xxxxxxxxxx is claiming compensation, according to EMSC, neither of the grants, although approved, was ever disbursed to the FCU. This invalidates the \$3550 (5% of grants) portion of xxxxxxxxxx's claim.

After reviewing all of the documentation regarding xxxxxxxxxx's claim for \$12,550 under a March 9, 2000, Consulting Agreement, we cannot grant his claim. Documentation to support xxxxxxxxxx's claim consists of a copy of a consulting contract submitted by xxxxxxxxxx and two affidavits that are invalid in part. The lack of authority for xxxxxxxxxx to sign the contract, the content of the FCU board meeting minutes found at the FCU, the fact that xxxxxxxxxx was paid \$12,000 plus an additional \$2750 for his consulting services, the absence of a copy of the consulting contract in the FCU's records, as well as the information concerning NCUA's technical assistance grant and the fact that the ESDC grants were never disbursed, all lead us to conclude that the claim is not a valid one.

Acting Manager Claim

The second part of xxxxxxxxxx's claim is for compensation as acting manager from January 19, 2002, to August 23, 2002. xxxxxxxxxx submitted an Engagement Agreement and board meeting minutes, both dated November 20, 2001, as well as invoices of hours worked per month in support of this portion of his claim. Both the Engagement Agreement and the minutes state xxxxxxxxxx's rate of compensation will be \$25/hour. The Engagement Agreement is signed by xxxxxxxxxxxxxxxx on behalf of the FCU. xxxxxxxxxx claims he worked a total of 603 hours from January 2002 – August 2002 and is owed a total of \$15,075 for these services. The two directors' affidavits discussed previously state that the two directors each attended the November 20, 2001, board meeting, approved of the minutes, and agreed to employ xxxxxxxxxx pursuant to the Engagement Agreement that he submitted.

² See Acting Manager Claim below for discussion of second agreement.

Staff did not locate a copy of either the Engagement Agreement or the November 20, 2001, board meeting minutes in the FCU's records. There was a board report for the FCU dated November 2001 found in the FCU's records. There is no mention of a contract to hire xxxxxxxxxx as temporary manager or authority for xxxxxxxxxx to sign a contract on behalf of the FCU in the board report. The only other record of a meeting around the November 20, 2001, date is the minutes of the FCU board meeting with NCUA on November 6, 2001, to discuss the most recent examination. These minutes address the hiring of a new manager generally, but do not address any contract with xxxxxxxxxx.

The authenticity of the minutes dated November 20, 2001, is questionable. Region I staff noted that there are items in the minutes that were not known by either the FCU or NCUA until after November 20, 2001. These include a discussion of ATM mispostings that NCUA did not discover until November 29, 2001, and a discussion of fraudulent activity that was not reported by NCUA to the FCU board until December 13, 2001.

It is also noted that xxxxxxxxxx was paid for part time services as manager from September 2001 – January 2002. According to cancelled checks and invoices obtained after the FCU's liquidation, xxxxxxxxxx was paid for 200 hours of work at \$19.23 an hour (for a total of \$3846) for services rendered from September 2001 – January 19, 2002. However, the Engagement Agreement contract xxxxxxxxxx submitted set the hourly rate at \$25 beginning on November 20, 2001. It is unclear why he was paid a lower rate after the date of the contract. xxxxxxxxxx was paid as a consultant; no taxes were deducted from his pay so that would not explain the amount.

The validity of the 603 hours xxxxxxxxxx claims to have worked in 2002 is also questioned. The FCU board hired a consulting firm in January 2002. This firm was hired to continue basic credit union operations. The consulting firm took over all operating functions except check signing and loan approval in June 2002. It appears unlikely that xxxxxxxxxx worked 85 hours in June, 86 hours in July, and 66 hours in August 2002 as noted in the invoices submitted, given the consulting firm's presence in the FCU in those months.

After reviewing all of the documentation regarding xxxxxxxxxx's claim for \$15,075 under an Engagement Agreement and board meeting minutes, both dated November 20, 2001, we cannot grant his claim. The purported November 20, 2001, Engagement Agreement and board meeting minutes and the two directors' partially invalidated affidavits are the only support for the claim. The absence of copies of the Engagement Agreement and November 21, 2001 board meeting minutes in the FCU's records, the lack of authority for xxxxxxxxxx to sign the contract, the inconsistencies pointed out regarding the board meeting minutes, the inconsistency in the hourly fee in the contract versus the hourly fee paid, and the consulting firm's presence in the FCU lead us to conclude that the claim is not a valid one.

Order

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

The decision of the National Credit Union Administration's Asset Management and Assistance Center (AMAC) denying xxxxxxxxxxxx's claim in the amount of \$27,625 is affirmed and xxxxxxxxxxxx's appeal is denied.

The Board's decision constitutes a final agency determination. Pursuant to 12 CFR 709.8(c)(1)(iv)(B), this final determination is reviewable in accordance with the provisions of Chapter 7, Title 5, United States Code, by the United States Court of Appeals for the District of Columbia or the court of appeals for the Federal judicial circuit where the FCU's principal place of business was located. Such action must be filed within 60 days of the date of this final determination.

So **ORDERED** this 31st day of July, 2003 by the National Credit Union Administration Board.

Becky Baker
Secretary, NCUA Board

August 29, 2003
Dated