UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of

XXXXXXXXXX Docket No. BD 12-11

Creditor Claim
Western Corporate Federal Credit Union

Decision and Order on Appeal

Decision

This matter comes before the National Credit Union Administration Board ("the Board") as an appeal to modify the determination by the Agent for the Liquidating Agent of Western Corporate Federal Credit Union ("WesCorp") to award XXXXXX ("XXXXX") a recorded claim in the amount of $34,841.82, and to deny his claim for interest. Of that amount, $30,542.05 consists of Deferred Incentive Plan benefits and $4,299.77 consists of a California Labor Code penalty.

A. Background

The Board placed WesCorp into conservatorship on March 20, 2009, and appointed itself Conservator. XXXXX served as WesCorp's XXXXXX from 2003 until the Conservator terminated him effective July 1, 2009, as part of a "reduction in force" affecting several employees.

While employed by WesCorp, XXXXX participated in a Deferred Incentive Plan ("Plan"), under which he accrued "deferred wages" equal to 7.5 percent of each year's annual salary, plus earnings on the accumulated balance thereof (together, "the Plan Benefits"). The Plan gave XXXXX a vested, non-forfeitable right to the accrued Plan Benefits only when and if he remained employed by WesCorp continuously for a 36-month "vesting period" beginning January 1, 2007, and ending on December 31, 2009. XXXX was terminated after 30 months of employment—six months short of the 36-month vesting period.

On July 7, 2009, XXXXX brought a claim for Plan Benefits accrued through June 30, 2009 ("Plan Claim"), under the Plan's claims procedure. The Agent for the Conservator acting as Plan Administrator denied the Plan Claim on July 29, 2009, because XXXXX had not met the Plan's 36-month vesting period. On October 21, 2009, after reviewing the ruling at XXXXX's request, the successor Agent upheld the denial of the Plan Claim on the same grounds. The decision stated that it was "the Administrator's final determination as to the merits of this claim." XXXXX took no further action to challenge the denial of his Plan Claim.

The Board placed WesCorp into liquidation on October 1, 2010, and appointed itself Liquidating Agent. On December 14, 2010, after receiving notice of the opportunity to file a creditor claim against the WesCorp liquidation estate, XXXXX filed a new claim in the adjusted amount of $57,303.37 ("the Liquidation Claim"). The Liquidation Claim sought the accrued Plan Benefits, a penalty under the California Labor Code ("Labor Code") for failure to pay back wages, and interest on the unpaid benefits and the penalty.

On November 15, 2011, the Asset Management and Assistance Center as Agent for the Liquidating Agent ("AMAC") awarded XXXXX a "recorded claim" (*i.e.,* a liquidation certificate) in the amount of $34,841.82, consisting of $30,542.05 in Plan Benefits and a Labor Code penalty of $4,299.77. The claim for interest on the unpaid penalty was denied.

B. Appeal and Analysis

On December 9, 2011, XXXXX appealed the decision on his Liquidation Claim to the NCUA Board. The two issues XXXXX raised on appeal are addressed below.

1. California Labor Code Penalty.

The Labor Code provides that, in the event an employer "willfully fails to pay . . . any wages of an employee who is discharged . . . , the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid . . . , but the wages shall not continue for more than 30 days." Cal. Lab. Code §203(a). Accordingly, AMAC awarded XXXXX a Labor Code penalty of $4,299.77, reflecting the "deferred wages" portion of his accrued Plan Benefits prorated for the Labor Code maximum of 30 days.[1]

XXXXX argues on appeal that the Labor Code penalty should include "not just the portion of wage not paid" (*i.e.,* the deferred wage portion of his Plan Benefits), but also an additional $18,627.07 to reflect compensation items he apparently contends are "wages" within the Labor Code even if they *were* paid or were not owed: (1) 30 days' prorated annual salary; (2) 30 days' prorated employer co-pays on employee benefits; (3) 30 days' prorated deferred wages under the Plan; (4) the expired balance of his Flexible Spending Account; and (5) 24 months' interest on the preceding items.

The purpose of Labor Code §203(a) is to penalize an employer for the earned wages it "failed to pay" the employee upon discharge. *See* Pineda v. Bank of America, 241 P.3d 870 (Cal. 2010). It is completely contrary to this purpose to include within a Labor Code penalty earned wages an employer *did* timely pay the employee upon discharge. Yet that is precisely what XXXXX seeks to do here. We decline to enlarge the Labor Code

[1] In practice, the maximum penalty is converted from 30 *workdays* to 45 *calendar* days to account for weekends and holidays: $34,875.90 in deferred wages x 45/365.

penalty to reflect compensation that was timely paid or was never owed in the first place.

Because WesCorp paid XXXXX his final paycheck on the day he was discharged, he is not entitled to a penalty of 30 days' prorated annual salary. Because WesCorp paid the employer co-pays on XXXXX's employee benefits through the day he was terminated, he is not entitled to a penalty of 30 days' prorated employer co-pays. Because AMAC already awarded XXXXX a penalty consisting of 30 days' prorated deferred Plan wages, he is not due the same penalty again, in effect doubling the penalty. Because XXXXX's Flexible Spending Account survived his termination, and he was free to exhaust the balance until it expired the following year, XXXXX is not due a penalty on something WesCorp never withheld. Since there is no basis for including any of the above items in the Labor Code penalty, XXXXX is not entitled to interest on them.

2. Liquidation Payout Priority.

The recorded claim AMAC awarded to XXXXX represents a general unsecured debt of the WesCorp liquidation estate. As such, XXXXX's claim falls within the 5th tier of the liquidation payout priority, ahead of uninsured share claims that fall in the 6th tier. 12 C.F.R. 709.5(b)(5)–(6) (2010).

On appeal, XXXXX contends that NCUA's decision to establish the Temporary Corporate Credit Union Share Guaranty Program ("Share Guaranty") does not include "the power to circumvent the liquidation payout priority of [WesCorp] and pass losses through to unsecured and secured creditors, which should have been taken by member shares above the insured limit." The implication is that the Share Guaranty improperly caused uninsured share claims to be paid ahead of creditor claims such as XXXXX's. We find no merit to this argument, either with respect to the implementation of the Share Guaranty or its impact on the post-liquidation purchase and assumption of WesCorp's assets and liabilities.

In 2009, the Board took the extraordinary step of establishing the Share Guaranty, promising to guarantee the member deposits of all corporate credit unions ("CCUs") above the share insurance limit in the event of liquidation.[2] The principal purpose of the Share Guaranty was to bolster confidence in the CCU system in order to protect CCUs, whether operating in conservatorship or independently, from a "run" on their member deposits. A "run" on deposits almost certainly would have driven WesCorp and other CCUs to insolvency and closure prematurely, ensuring that neither they nor their member deposits would have survived to an orderly liquidation.

Although the eventual liquidation of WesCorp triggered the Share Guaranty obligation, it did not result in guaranty payments to holders of WesCorp shares in excess of the

[2] The authority for the Share Guaranty resides in Title II of the Federal Credit Union Act, 12 U.S.C. 1788(a)(1) ("special assistance" lending authority to avoid liquidation), 1783(a) (assistance in connection with a threatened liquidation), 1789(a)(7) (incidental powers) and 1786(i)(2) (expending funds and performing functions necessary to carry out provisions of the Act).

insurance limit. It did result in giving value to those shares in liquidation, however. For that reason, they were among the member deposits assumed by Western Bridge Federal Credit Union ("WesBridge") in its purchase and assumption ("P&A") of WesCorp's liabilities and much of its assets. The deficit between the value of the assets purchased and the liabilities assumed in the P&A, which included the value of the uninsured shares, was offset by a debt to WesBridge guaranteed by the Temporary Corporate Credit Union Stabilization Fund.

XXXXX's argument that the Share Guaranty "circumvented" the liquidation payout priority, implying that it caused uninsured shares to be paid ahead of unsecured creditor claims, rests on a faulty assumption—that funding a P&A deficit that includes the value of uninsured shares is an insurance payout. On the contrary, the Federal Credit Union Act recognizes funding such a deficit as assistance to facilitate a P&A, not as an insurance payout, 12 U.S.C. 1788(a)(2),[3] and that is how NCUA characterizes the assistance provided to fund such a deficit in the P&A of a liquidated natural person credit union. The distinction between an insurance payout in liquidation and assistance to facilitate a P&A is that shares that would be characterized in liquidation as "uninsured," once assumed in a P&A, are no longer part of a liquidation estate and thus are not subject to the payout priority that applies only in liquidation. Instead, the once "uninsured" shares now held by the assuming credit union are simply member deposits irrespective of the insurance limit.

Order

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

The Board AFFIRMS the decision of AMAC awarding XXXXX a recorded claim in the amount of $34,841.82—representing $30,542.05 in Plan Benefits and a Labor Code penalty of $4,299.77—and denying his claim for interest.

The Board's decision constitutes a final agency determination reviewable pursuant to 12 C.F.R. 709.8(c)(1)(iv)(B).

So **ORDERED** this 15th day of March 2012 by the National Credit Union Administration Board.

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Mary Rupp
Secretary of the Board

[3] To "facilitate the sale of the assets of an open or closed insured credit union to and assumption of its liability by another person, the Board may, upon such terms and conditions as it may determine, make loans secured whole or in part by assets of an open or closed insured credit union, which loans may be in subordination to the rights of members and creditors of such credit union, or the Board may . . . guarantee any person against loss by reason of his assuming the liabilities and purchasing the assets of an open or closed insured credit union." 12 U.S.C. 1788(b)(2).