

UNITED STATES OF AMERICA

BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION BOARD

In the Matter of

OLEAN DRESSER CLARK COMMUNITY

FEDERAL CREDIT UNION

Docket No. 97-002

Decision and Order on Appeal

This matter comes before the National Credit Union Administration Board (Board) on appeal from Olean Dresser Clark Community Federal Credit Union (Olean). The Region I Director denied Olean's request to remove an exclusionary clause from its charter and Olean requests the Board reverse that decision.

Background

Olean converted from an occupational to a community charter in 1981. Olean is authorized to serve persons who live or work in the City of Olean, New York, except those persons who are eligible for primary membership in the Cattaraugus County Employees Federal Credit Union or in a credit union which maintains an office located within the City of Olean, New York. Olean has assets of approximately \$73 million. It currently has approximately 14,000 members out of a potential of 20,000 and is a full service credit union.

Cattaraugus County Employees Federal Credit Union (Cattaraugus) is a multiple group credit union serving various municipal employee groups and other select employee groups in Cattaraugus County, New York. Cattaraugus has \$2.9 million in assets and 1178 members out of a potential of 1500. It offers shares, share certificates and consumer loans. Cattaraugus is located approximately 15 miles from Olean in Little Valley, NY.

In May, 1996, Olean wrote to the Region I Director requesting that the portion of the exclusionary clause relating to Cattaraugus be eliminated from its charter. Removal of this portion of the exclusionary clause would permit 325 county employees who work in a facility in Olean, and who currently qualify only for membership in Cattaraugus, to qualify for membership in Olean as well. Cattaraugus objects to removal of the exclusionary clause.

The Region I Director denied Olean's request because: 1) Cattaraugus objected to removal of the exclusionary clause; and 2) the conditions which would allow the Regional Director to grant an overlap were not substantiated by Olean. In addition, Olean did not provide any documentation of the excluded group's interest in joining Olean. Olean requested reconsideration by the Region I Director, but the request was again denied. Olean appealed the Region I Director's denial in March, 1997.

Overlap/Exclusionary Clause Policy

Overlapping Fields of Membership

NCUA's field of membership policy addresses overlaps in general terms.^[1] An overlap is defined as "the situation which results when a group is eligible for membership in more than one credit union." (Chartering Manual, Appendix A, Glossary, p. A-2.) General policy requires that every reasonable effort be made to avoid an overlap. In the event an overlap situation arises, officials of the credit unions involved should attempt to work out the overlap problem themselves. When resolution of an overlap problem is not possible, an overlap may be justified by certain circumstances and may be permitted by the Regional Director. However, there is no requirement that, even if certain circumstances are met, an overlap must be permitted.

Among the circumstances that may justify an overlap are: 1) failure of the original credit union to provide quality service; 2) limited participation by group members in the original credit union; and 3) incidental overlap (the group of persons in question is so small as to have no material effect on the original credit union). Conversely, neither certain specialized services by themselves nor proximity by itself, will justify an overlap. The Chartering Manual offers no guidance on whether or not an overlap may be considered when none of the articulated factors are present. Clearly, a failure to find any of the three factors present should be weighed against a credit union requesting an overlap.

The Chartering Manual does offer some additional guidance to the Regional Director. In reviewing an overlap, the Regional Director will consider:

the nature of the issue, efforts made to resolve the matter, financial effect on the overlapped credit union, the desires of the group(s), the desire of the sponsor organization, ... and the best interest of the affected group and the credit union members involved.

Chartering Manual, p. 1-15. The Manual also states that documentation of the interests of the group, such as a petition signed by a majority of the group's members, will be strongly considered.

Exclusionary Clauses

Use of an exclusionary clause is one method of avoiding an overlap. It is defined as "a limitation, written in a credit union's charter, which precludes the credit union from serving a portion of a group otherwise included in its field of membership. Exclusionary clauses are used to prevent certain overlaps of field of membership between credit unions." (Chartering Manual, Appendix A, Glossary, p. A-2.)

The 1980 Chartering Manual^[2] (one of the predecessors of IRPS 94-1), contained the following guidance in the chapter on community charters: "If a community charter includes "work in" wording, those persons eligible for membership in other credit unions would be excluded only when the impact of the overlap would adversely affect the economic viability of such credit unions." (See p. 5-1 of 1980 Manual.)

When Olean's charter was converted from occupational to community in 1981, the Region inserted the exclusionary clause. According to policy effective at that time,^[3] the exclusionary clause would have been made a part of Olean's field of membership because "the impact of the overlap would adversely affect the economic viability of" Cattaraugus. (See p. 5-1 of 1980 Chartering Manual.)

The preamble to IRPS 94-1 contained a short discussion on exclusionary clauses. It stated that the experience with exclusionary clauses had not been entirely satisfactory and the Board would now limit their use to the few situations where they would be truly warranted and effective. 59 Fed. Reg. 29066, 29072 (6/3/94). The current Chartering Manual recognizes that:

... exclusionary clauses can be ineffective or create obvious inequities -- one spouse may be eligible for membership in a federal credit union while the other may not; one employee may be eligible for federal credit union service while the person working next to him or her may not. For this reason, exclusionary clauses are rarely if ever appropriate for inclusion in a community charter's field of membership as a way to resolve overlap concerns.

Manual at p. 1-17. However, this current policy pertains to adding an exclusionary clause to new and existing charters. *Id.* The elimination of exclusionary clauses already in use is not addressed. The general policy to avoid overlaps, with or without exclusionary clauses, continues to apply.

Application of Policy to Appeal

The question now before the Board is not whether an exclusionary clause is to be included in a charter, but rather should an overlap be permitted by revoking an exclusionary clause. We believe the burden is on the credit union requesting removal of the exclusionary clause to show that its removal (and resultant overlap) is justified.

Olean has not submitted documentation supporting the circumstances that may be used to justify an overlap pursuant to current policy. It has not shown that Cattaraugus has failed to provide quality service; that there has been limited participation by group members in Cattaraugus; or that the overlap is incidental in nature. In addition, Olean has not submitted documentation that county employees located in Olean are interested in service from Olean. Olean only states its belief that the overlap is incidental and that group members are interested in service from Olean. Cattaraugus is a small credit union with just under 1200 members and 1500 potential members. Olean seeks to add a group of 325 potential members to its credit union by deletion of a portion of the exclusionary clause. Staff at Cattaraugus estimates that approximately 1/2 of this group (or ~162) are current Cattaraugus members. This group of members represents approximately 13.5% of Cattaraugus' current membership. The entire group of county workers employed in Olean (325) represents over 21.5% of Cattaraugus' potential membership. We do not believe this to be an incidental overlap.

Olean has not justified creation of a permissible overlap in light of NCUA policy to avoid overlaps. The fact that current policy limits the use of exclusionary clauses as a means to avoid overlaps in community chartered credit unions does not require that the exclusionary clause be eliminated in this situation. Further, even if Olean could show the existence of circumstances that might otherwise justify an overlap, as previously noted, there is no requirement that an overlap must be permitted.

Order

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

The Region I Director's denial of Olean Dresser Clark Community Federal Credit Union's request to remove the exclusionary clause from its field of membership is upheld and the Federal Credit Union's appeal is denied.

So Ordered this 12th day of June, 1997 by the National Credit Union Administration Board.

Becky Baker

Secretary of the Board

^[1] Chartering and Field of Membership Manual (Chartering Manual), pp. 1-14 and 1-15 (IRPS 94-1, as amended by IRPS 96-1, 61 Fed. Reg. 11721, 3/22/96).

^[2] The 1980 Chartering and Organizing Manual for Federal Credit Unions.

^[3] See footnote 2.