

April 30, 1991

Peter M. Forman, Esq.
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Re: Election of Nonmember to Board of Directors (Your March 25, 1991 Letter)

Dear Mr. Forman:

You asked for our opinion regarding a recent board of directors election held by the IBM Hudson Valley Employees Federal Credit Union (the "credit union"). Specifically, you asked how the board should treat the election of an individual later determined not to be a member of the credit union. Although this is not a formal opinion, we believe that the board may either give the seat to the next highest vote getter, or declare the seat in question vacant and appoint someone to fill it.

Section 109 of the Federal Credit Union Act, 12 U.S.C. ~1759, requires that members be within the field of membership, and pay an initial installment on one share in the FCU, and permits the FCU to charge an entrance fee. You state that the individual in question did not comply with the credit union's membership requirements, and is therefore not a member of the credit union.

Based on your letter and your telephone conversations with Staff Attorney Meg Suuberg of this Office, the following facts appear. The credit union had three seats open on its board of directors that were to be filled by a general membership election. An individual applied to the nominating committee, was nominated, and included as a candidate. The nominating committee did not review the individual's membership status prior to nominating her. After the election it was determined that she was not a "member" of the credit union.

There were at least four candidates for the three board slots. The individual in question received the third highest number of votes. You ask whether the board should (1) invalidate the votes she received, thereby making the fourth place vote-getter the winner of the third board seat, or (2) treat her disqualification as creating a vacancy which the board may fill as directed by the credit union's bylaws.

As Ms. Suuberg told you, neither the Act nor NCUA's Rules and Regulations, 12 C.F.R. ~700 et seq. (the "Regulations"), specifically addresses the question you have asked. Therefore we are not in a position to render a formal legal opinion on matter. While it may seem, logically, that the improper election of the individual in question resulted in the actual election of the next highest vote getter, nothing in the Act or Regulations requires that conclusion. We believe the board may either award the seat to the next highest vote getter or declare the seat vacant and fill the vacancy as provided in the bylaws. We see no basis for NCUA to object to either alternative. Of course, should the board desire to declare the seat vacant and appoint the individual in question to fill it, she must take whatever actions are necessary to secure membership in the credit union before the appointment is made. As I am sure you are aware, the fourth place candidate may challenge that course of action.

You may also wish to consult state corporate law on this issue. We leave it to the board to determine which option would best serve the interests of the credit union. Sincerely,

Hattie M. Ulan
Associate General Counsel

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