



NATIONAL CREDIT UNION ADMINISTRATION

WASHINGTON, D.C. 20456

June 17, 1991

Daniel P. Stake, Esq.
Asst. Vice President/Corporate Attorney
Tinker Credit Union
P.O. Box 46750
Tinker Air Force Base, OK 73145

Re: Interpretation of Memorandum of Agreement
Language (Your Letter of April 17, 1991)

Dear Mr. Stake:

You requested a legal opinion regarding the interpretation of a term, "new management contract," in a Memorandum of Agreement entered into between Tinker Credit Union ("TCU"), the National Credit Union Administration ("NCUA") and the Bank Commissioner, State Banking Department for the State of Oklahoma (the "Commissioner"), dated March 6 and 10, 1987 (the "MOA"). Specifically, you ask whether an Employment Agreement between TCU and yourself, undated (the "Contract"), violates paragraph 8 of the MOA, which reads: "8. **Personnel Contracts:** The credit union shall not enter into any new management contract unless authorized by the Commissioner and NCUA." It is not possible to make this legal determination from the material on hand and this issue has been forwarded to the Region for investigation and determination. Secondly, you request that NCUA advise you of any substantive concerns regarding the Contract. We have no legal concerns, although the Region will review the Contract for any safety and soundness concerns.

BACKGROUND

The MOA was the result of a September 1986 joint examination/insurance review of TCU and its' credit union service organizations ("CUSOs") by the NCUA and the Commissioner. As the MOA states, "[t]he examination disclosed severe financial

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problems in one of the CUSO's, Tinker Investment and Mortgage Corporation ("Timcorp"). These problems were primarily the result of 'unsafe and unsound' practices of the officers of Timcorp which threaten the capital of [TCU].'" MOA, Preamble. It was agreed by all parties to the MOA that it would remain in effect until terminated by the mutual consent of all parties. Id. As of this date the MOA has not been terminated.

In your letter of April 17, 1991, you state that the board of directors of TCU ("TCU Board") adopted a resolution instructing the President of TCU to make an offer of employment to you subject to the terms of the Contract. Unexecuted drafts of a resolution and the Contract were supplied by you with your letter. You also mentioned that outside counsel to TCU had advised that the Contract would not violate paragraph 8 of the MOA "because the position has no management responsibilities."

You are hired as TCU General Counsel, supervised by the TCU Board, from March 21, 1991 until March 30, 1993. Contract, §§3 and 6. Every two years after the initial term, the contract automatically renews. Contract, §4. Compensation is equal to the average of salaries paid to the Chief Credit Officer, Chief Administrative Officer, Chief Financial Officer and Chief Operations Officer of TCU. Contract, §5. Duties performed must be in accordance with the Rules of Professional Conduct for Attorneys practicing in Oklahoma, and all other laws, rules and regulations governing the legal profession imposed by governmental authorities or professional associations of which you are a member. Contract, §9. Termination may occur for cause or without cause. Contract, §§7 and 8. The duties and responsibilities of your position are as follows:

Generally: To provide legal advice and counsel to the Board of Directors and Management as to the total affairs of the Credit Union and its subsidiaries (the "Corporation"); to represent or provide for the representation of the Corporation in State and Federal Courts and agencies; and to act as the Ethics Officer for the Corporation.

Specifically:

1. Advise the Corporation on regulatory matters; contracts; personnel policy and procedures; product

- development; and government relations.
2. Retain and oversee the activities of outside counsel.
 3. Monitor and report to appropriate personnel material changes in laws and regulations affecting the operations of the Corporation.
 4. Review: contracts; loan documentation; minutes of Board meetings; advertising copy; and other documents submitted for review by Management.
 5. Perform all other activities incidental and necessary to the performance of specified duties to the extent necessary to satisfy the Rules of Professional Conduct for attorneys practicing law in the State of Oklahoma. Contract, Exhibit "A".

With these facts, you requested authorization for TCU to enter into the Contract from the Commissioner. The Commissioner did not grant your request, finding that "the activities delineated by the [Contract] itself constitute 'management' by the common, legally understood meaning of the term. Realizing the [Contract] must have been carefully drafted to avoid the appearance of management activities, and yet, smacks strongly of such activities, I can only conclude that the [Contract] is indeed for 'management' and thus, I will not grant the authorization requested." Letter from Wayne Osborn, Commissioner, to Sheila K. Jones, Chair, TCU, dated April 23, 1991.

ANALYSIS

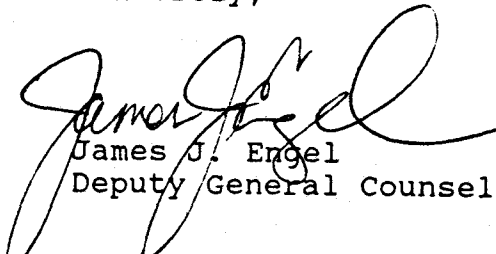
The term "new management contract" is not defined in the MOA. Therefore, the intent of the parties must be ascertained from the language used in the contract and the ordinary meaning of the words used. 17A Am.Jur.2d Contracts §352 (1991) and 17A C.J.S. Contracts §296 (1963). Paragraph 8 of the MOA, reads: "8. **Personnel Contracts:** The credit union shall not enter into any new management contract unless authorized by the Commissioner and NCUA."

The term "new management contract" is not defined in American Jurisprudence, Second Edition, Corpus Juris Secundum or Words and Phrases. "Management" is defined as "having the general management, conduct or direction of something; the act or art of managing; the act of managing by direction or regulation; the manner of treating, directing, carrying on or using for a

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purpose;" 55 C.J.S. Management (1948). "Manager" is defined as "an ambiguous term...manager has been variously defined as a director; a conductor; a person appointed or elected to manage the affairs of another; one charged with management, direction or control of an affair, undertaking or business; one who has the conduct or direction of anything; the person who manages." 55 C.J.S. Manager (1948). The factors determinative of management and managers are fact dependent. The Contract terms include no duties or responsibilities indicative of management. However, it is possible that in actuality the Contract duties are narrower than those performed by you as TCU General Counsel. Therefore, as this is a question of fact and not of law, we cannot state whether the Contract is a "new management contract" or not. We have referred this matter to Lyle E. Mettler, Director, Supervision, NCUA Region V for investigation and determination. While we find no legal objections to the draft Contract, it is possible that the Region may have safety and soundness concerns. For information regarding any nonlegal substantive concerns we suggest you contact Mr. Mettler.

Sincerely,



James J. Engel
Deputy General Counsel

cc: Lyle E. Mettler
Director, Supervision
Region V

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