

LETTER OPINION
2014-L-03

February 3, 2014

The Honorable Ray Holmberg
Legislative Assembly, District 17
621 High Plains Court
Grand Forks, ND 58201-7717

Dear Senator Holmberg:

Thank you for your letter requesting my opinion on whether North Dakota law gives the North Dakota State Credit Union Board the power to authorize state chartered credit unions which are chartered outside of North Dakota the ability to establish branch offices in North Dakota, as a matter of reciprocity. It is my opinion that, in the absence of a state law to the contrary, the North Dakota State Credit Union Board may properly grant reciprocity to Minnesota state chartered credit unions to establish a branch in North Dakota as long as the branch is located within the credit union's existing field of membership, as an exercise of an implied power necessary to give effect to the express power to authorize the branch locations of North Dakota state chartered credit unions.

ANALYSIS

It is my understanding that your question was prompted by the 2013 application of Citizens Community Credit Union ("Citizens Community"), a North Dakota state chartered credit union, to the North Dakota State Credit Union Board ("Board"), to establish a branch location in East Grand Forks, Minnesota. As part of processing this application, North Dakota Commissioner of Financial Institutions, Robert Entringer, notified the Minnesota Department of Commerce of the application by Citizens Community.¹ Commissioner Entringer indicated that Citizens Community had a geographic field of membership that included a 40 mile radius of Larimore, North Dakota, and the proposed branch location in East Grand Forks was within that field of membership.² Commissioner Entringer also indicated that while this branch location is permitted under North Dakota law, he understood that Minnesota law only permitted a

¹ Letter from Robert Entringer, Comm'r, N.D. Dep't of Fin. Inst., to Carl Schwartz, Minn. Dep't of Commerce (Sept. 25, 2013) (on file with author) (hereinafter "Entringer Letter"). The Minnesota Department of Commerce is the regulatory body for Minnesota State chartered credit unions.

² Entringer Letter.

North Dakota state chartered credit union to do business in Minnesota if a Minnesota state chartered credit union could do business in North Dakota.³ He explained that the Board had, in 2004, authorized reciprocity for Minnesota state chartered credit unions to branch into North Dakota as long as the branch was located within the credit union's existing field of membership.⁴

You are concerned the actions taken by the Board exceeded its scope of authority under North Dakota law by enabling out of state chartered credit unions to establish branch offices in North Dakota. To address this concern, I must consider the nature and attendant circumstances of the actions taken by the Board in 2004 when it authorized the aforementioned reciprocity.

In 2004 the Board considered a branch application of a North Dakota state chartered credit union, United Savings Credit Union ("United Savings").⁵ United Savings is located in Fargo, North Dakota, and in 2004 submitted an application to the Board to establish a branch in Moorhead, Minnesota.⁶ During the consideration of this application the Board was presented with a letter from the Minnesota Department of Commerce asking for confirmation that North Dakota permitted reciprocal interstate credit union branching with Minnesota.⁷ The scope of the requested reciprocity was discussed at Board meetings in May and August of 2004 and included in that discussion was an observation that North Dakota branching law permitted the Board to authorize a North Dakota state chartered credit union to establish a branch in Minnesota as long as the branch is located within the credit union's field of membership.⁸

The Board passed two motions at its August 25, 2004, meeting; the first approved the branch application of United Savings, and the second authorized reciprocity for Minnesota state chartered credit unions to branch into North Dakota as long as the branch was located within the credit union's currently existing field of membership.⁹

³ Id.; Minn. Stat. § 52.03(2).

⁴ Entringer Letter.

⁵ Minutes, State Credit Union Bd., Special Meetings (May 13, 2004, and Aug. 25, 2004).

⁶ Id. United Savings had previously obtained a field of membership that included individuals who reside or are employed in Clay and Ottertail Counties in Minnesota and sought to provide increased service to that portion of its membership by establishing a branch location in Minnesota.

⁷ Letter from Terry Meyer, Chief Exam'r, Minn. Dep't of Commerce to Timothy Karsky, Comm'r, Dep't of Fin. Inst. (Aug. 23, 2004) (on file with recipient agency). It was the understanding of the Board that confirmation of such reciprocity must be submitted to Minnesota before Minnesota would permit United Savings to establish the proposed branch.

⁸ Minutes, State Credit Union Bd., Special Meetings (May 13, 2004, and Aug. 25, 2004).

⁹ Minutes, State Credit Union Bd., Special Meeting (Aug. 25, 2004).

The Board is an agency of the State.¹⁰ An agency has only those powers given to it by the Legislature or necessarily implied therefrom.¹¹ The general rule is that “[w]hen a statute imposes a mandatory duty upon a governmental agency to carry out the express and specifically defined purposes and objectives stated in the law, such statute carries with it by necessary implication the authority to do whatever is reasonably necessary to effectuate the legislative mandate and purpose.”¹² Under North Dakota law, for an incidental or implied power to exist, there should be a direct correlation between the express and incidental or implied power, such that the express power could not be fully exercised without the implied power.¹³

The powers of the Board are set forth in N.D.C.C. chs. 6-01 and 6-06. The enumerated powers do not contain the explicit power to authorize reciprocity for Minnesota state chartered credit unions to branch into North Dakota whether or not the branch is located within the credit union’s currently existing field of membership. Therefore it is appropriate to consider whether the ability to grant reciprocity to Minnesota credit unions under the circumstances described herein was necessarily implied from or otherwise necessary for the Board to carry out its functions in authorizing branch office locations.

North Dakota Administrative Code ch. 13-03-15 sets forth rules promulgated by the Board related to the circumstances and process by which a state chartered credit union may establish a branch office. The statutory authority to promulgate rules is found at N.D.C.C. § 6-01-04. The plain language of the rules does not restrict the location of branches to North Dakota boundaries; rather the branch location is restricted based

¹⁰ N.D.C.C. § 6-01-01. See also, N.D.A.G. 79-188 (discussing the factors used to determine whether a state board may be considered an agency of the state).

¹¹ N.D.A.G. 2000-L-160.

¹² 73 Am. Jur. 2d Statutes § 202 (2013).

¹³ N.D.A.G. 2004-L-08.

upon its proximity to its field of membership.¹⁴ The Board correctly observed in 2004 that the applicable administrative rules did not specifically restrict the Board from approving an interstate branch for United Savings because the branch location would still be within the credit union's field of membership; nor would the rules specifically restrict the Board from approving the present interstate branch application of Citizens Community so long as the branch application is within the credit union's field of membership.¹⁵

Further, under N.D.C.C. § 6-06-06(11) a state chartered credit union has the same powers as a federally chartered credit union, subject to authorization by the Board.¹⁶ Federally chartered credit unions may establish branch locations anywhere within their field of membership.¹⁷ Thus, the Board has the authority through this provision to permit the establishment of an interstate branch office location, under the same or similar circumstances that a federally chartered credit union could have established such a location, to the extent that such an act did not conflict with state law.¹⁸

¹⁴ The Board, throughout N.D.C.C. chs. 6-01 and 6-06, is generally tasked with the responsibility to oversee the governance of credit unions and protect the public and depositors or creditors of those credit unions through the adoption and enforcement of rules or orders. Section 6-06-06, N.D.C.C., generally sets forth the powers of state chartered credit unions. Subsection 9 of this statute authorizes a credit union to invest in a credit union office building to the extent authorized by regulations issued by the Board. N.D.C.C. § 6-06-06(9). The restrictions applicable to the location of a branch office vary dependent upon whether the credit union has a closed or open charter. Under N.D.A.C. §§ 13-03-15-01(2) and 13-03-15-03(1) a "closed charter" credit union restricts its membership to groups having a common bond of occupation or association and the branch location of the same will not be restricted so long as it is reasonably necessary to serve the field of membership. While under N.D.A.C. §§ 13-03-15-01(4) and 13-03-15-03(2) an "open charter" credit union restricts its membership to groups within a well-defined urban or rural district and the branch location must be within the geographical boundaries authorized by the charter.

¹⁵ Minutes, State Credit Union Bd., Special Meeting (Aug. 25, 2004); N.D.A.C. § 13-03-15-03.

¹⁶ N.D.C.C. § 6-06-06(11).

¹⁷ Minutes, State Credit Union Bd., Special Meeting (Aug. 25, 2004), NCUA Handbook p.27 (2006).

¹⁸ N.D.C.C. § 6-06-06(11); see also, N.D.A.G. Letter to Preszler (Jan. 3, 1992). While the Board discussed application of this provision to the question of interstate branching at its meeting on May 13, 2004, the Board believed there was sufficient authority to grant the branch application under the applicable administrative rules without reliance on N.D.C.C. § 6-06-06(11). This however, does not preclude the conclusion that this provision may be utilized under North Dakota law as additional authority to permit interstate branching.

Here, the 2013 branch application that prompted your inquiry involves a state chartered credit union which has a designated field of membership extending into Minnesota around East Grand Forks, and Citizens Community desires to establish a branch office in East Grand Forks to serve those members. Since it is within the Board's jurisdiction to act on a credit union's application to establish a branch within its field of membership but outside of North Dakota, the Board may take such steps as necessary to see that its grant of approval is fully effectuated. If the Board cannot approve reciprocity for Minnesota state chartered credit unions, its authority under statute and rule to grant an out of state branch application of a North Dakota state chartered credit union would be without effect.

A result that favors reciprocity or comity as between states of the United States, absent a state law to the contrary, is consistent both with the general doctrine of reciprocity and prior opinions issued by this office. It has been stated that:

The doctrine of reciprocity is a fair and reasonable principle to govern the conduct of independent nations in affording relief to aliens through their courts, but the people of the United States comprise one nation, banded together, among other reasons, to "establish justice" and "to promote the general welfare"; each State may undoubtedly limit the jurisdiction of its courts and formulate its local policy, but, in the absence of a state policy declared and restricted by statute, statutes of a state, if they create a valid right of action there, should be recognized and enforced elsewhere upon a proper complaint and proof.¹⁹

In N.D.A.G. 2000-L-160 this office concluded that the plain language of N.D.C.C. § 43-23-10 permitted reciprocity for a nonresident real estate broker licensed in other states of the United States but not with any of the provinces of Canada or other foreign countries, because the statute referred only to other states.²⁰ In this manner the statute clearly set forth the intent that reciprocity was restricted to licensees of other states of the United States. Whereas in N.D.A.G. 96-L-60, this office opined that literal adherence to the plain language of another reciprocity statute, N.D.C.C. § 15-40.2-10, relating to reciprocal tuition agreements with border states, would produce an unjust and unreasonable result insofar as it prevented North Dakota students from attending school in South Dakota, and the statute should be construed to permit continuation of the reciprocal agreements.

Finally, you also raised the issue of whether the promulgation of N.D.C.C. ch. 6-08.4 relating to interstate branching requirements for state chartered banks, and the lack of a

¹⁹ 15A CJS Conflict of Laws §19 (2013).

²⁰ N.D.A.G. 2000-L-160

corresponding chapter for state chartered credit unions, was indicative of a policy decision by the legislative assembly to allow interstate branching for banks, but not for credit unions. A review of the legislative history relative to the initial promulgation of N.D.C.C. ch. 6-08.4 indicates that the impetus behind the creation of this chapter and complementary provisions in other sections of the banking code was the passage of the federal Riegle-Neal Act.²¹ Portions of the testimony related to the passage of this chapter indicate that this federal act forced states to make a decision regarding interstate branching and its regulation within state borders, and absent state action, the Riegle-Neal Act would apply.²² In this way the passage of N.D.C.C. ch. 6-08.4 serves as a further example, while admittedly prompted by federal action, of the default to reciprocity in and among the states of the United States, in the absence of state law to the contrary.

For the foregoing reasons, it is my opinion that in the absence of a contrary state law the North Dakota State Credit Union Board may properly grant reciprocity to Minnesota state chartered credit unions to establish a branch in North Dakota as long as the branch is located within the credit union's currently existing field of membership, as an exercise of an implied power necessary to give effect to the express power to authorize the branch locations of North Dakota state chartered credit unions.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.²³

²¹ Hearing on H.B. 1441 Before the House Comm. on Indus., Bus. and Labor, 1995 N.D. Leg. (Testimony of Gary Preszler, Comm'r of Dep't of Banking) and (Testimony of Chairman Berg) discussing Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 [Pub. L. 103-328; 108 Stat. 2338; 12 U.S.C. 1811 et seq.]

²² Id.

²³ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).