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STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

IN RE: : CASE NO. M2006-9992765
: :
ERIN M. THAYER : JANE S. ARATA, HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued January 9, 2007

I. FINDINGS OF FACT

A. Background.

This matter came before Jane S. Arata, an attorney licensed to practice law in Ohio, who was duly appointed by the Ohio Division of Financial Institutions ("Division") to serve as Hearing Officer for this hearing in accordance with the Ohio Administrative Procedure Act, Ohio Revised Code ("R.C.") Chapter 119. The hearing was held October 11, 2006, at 77 South High Street, in Columbus, Ohio. Respondent Erin M. Thayer ("Respondent") requested the hearing to consider the allegations in the Division's Notice of Intent to Deny Loan Officer License Application and Notice of Opportunity for a Hearing ("NOH").

The Division alleges that Respondent violated R.C. 1322.07(A), (B), and (C) because she did not properly complete two loan officer license applications submitted to the Division. For that reason, the Division also alleges that her character and general fitness do not command the confidence of the public and warrant the belief that her business will be operated honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act as required by R.C. 1322.041(A)(5). All citations to the Ohio Mortgage Broker Act in this Report and Recommendation are to the Ohio Mortgage Broker Act effective prior to January 1, 2007, unless otherwise noted.

Todd Nist, an Assistant Attorney General with the Executive Agencies Section of the Ohio Attorney General's Office, represented the Division at the hearing. Respondent appeared *pro se* and testified at the hearing. At the hearing, State's Exhibits A through G and Respondent's Exhibits A through M were admitted into the record.

B. Jurisdiction and Procedural Matters.

1. The Division issued the NOH to Respondent on May 2, 2006, and served it upon her by certified mail. (State's Exhibit A.)
2. The Division received Respondent's request for a hearing within thirty days of the date the NOH was sent to her by certified mail. (State's Exhibit B.)
3. The Division initially scheduled the hearing for a date more than seven and less than fifteen days after the date it received the hearing request. The hearing was continued once and then set for October 11, 2006. The Respondent was notified of the date, time, and place for all scheduled hearing dates. (State's Exhibit B.)
4. Respondent received the NOH by certified mail and notice of the date, time, and location for each hearing scheduled in this matter.

C. Respondent's 2004 Loan Officer Application.

5. Respondent is an Ohio resident who seeks to conduct business in Ohio as a mortgage loan officer. (State's Exhibit C.)
6. On September 14, 2004, Respondent signed a Loan Officer Application ("2004 Application") which was then submitted to the Division. The Division received the 2004 Application on September 27, 2004. (State's Exhibit F; Hearing Transcript ("TR") at 18-19.)
7. Respondent answered "No" to Question 5 on the 2004 Application, which asked:

Have you or has any company for which you have been an officer, or more than 5% owner or director, ever been convicted of any criminal offense? Exclude minor misdemeanor traffic and parking offenses. (DUIs and DWI's are criminal offenses.)

(2004 Application, State's Exhibit F, emphasis and boldface type in original; TR at 17.)

8. Respondent's signature in the Attestation on the 2004 Application is notarized. Directly above that signature, the 2004 Application states: "Being first duly cautioned, I hereby swear or affirm that I have completed the foregoing Loan Officer Application fully and frankly. The answers are complete and true of my own knowledge." (2004 Application, State's Exhibit F.)
9. As part of the application process, the Division conducts a criminal background check of each applicant. R.C. 1322.031(B).

10. The 2004 Application stated that Respondent's employing mortgage broker would be Macloud Financial, Inc., a company located at 90 Village Pointe Drive, Powell, Ohio, 43065. On November 4, 2004, Respondent signed a License Transfer Application changing her employing mortgage broker to HomeLoan USA Corporation a company located at 5100 Tennyson Parkway, Plano, Texas, 75024. The Division received her License Transfer Application on November 8, 2004. On that same day, it appears that the Division sent a letter to Macloud Financial, Inc., stating that the 2004 Application was incomplete because it had not received a criminal background check for the Respondent. The letter further stated that the Division would withdraw the 2004 Application if it did not receive the requested information within 90 days. (State's Exhibits F and G.)
11. There is no evidence in the record establishing that the Respondent received a copy of the letter to her employer requesting additional information or received notice that the Division was planning to withdraw her 2004 Application. Respondent testified that she did not receive a copy of that letter from her then employer and would have responded to it if she had. (State's Exhibit G; TR at 11.)
12. The Division withdrew the 2004 Application when it did not receive additional requested information. Respondent testified that she did not receive the letter notifying her of this. (State's Exhibit G.)
13. Respondent moved to Statewide Home Mortgage by June of 2005. Then she discovered that she would need to file a new application. (State's Exhibit C; TR at 50.)

D. Respondent's 2005 Loan Officer Application.

14. On June 21, 2005, Respondent signed a Loan Officer Application ("2005 Application") which was then submitted to the Division. The Division received the 2005 Application on June 24, 2005. (State's Exhibit C.)
15. Respondent answered "No" to Question 5 on her 2005 Application, which asked:

Have you or has any company for which you have been an officer, or more than 5% owner or director, ever been convicted of or pleaded guilty to any criminal offense including, but not limited to, theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, or any criminal offense involving money or securities?

(2005 Application, State's Exhibit C.)

16. Respondent's signature in the Attestation on the Application is notarized. Directly above that signature, the Application states: "Being first duly cautioned, I hereby swear or affirm that I have completed the foregoing Loan Officer Application fully and frankly. The answers are complete and true of my own knowledge." (2005 Application, State's Exhibit C.)
17. The Respondent agreed to submit to a criminal background check as part of the application process and knew this would be done when she completed her 2005 Application. (2005 Application, State's Exhibit B; TR at 14.)
18. The Respondent has two misdemeanor disorderly conduct convictions both arising from domestic disputes with her estranged husband. The Division requested information about these convictions from her sometime after it received her 2005 Application. She provided a written explanation and certified copies of Perrysburg, Ohio Municipal Court journal entries evidencing the convictions. Respondent was honest and forthright about the underlying events and convictions during the hearing. In both situations, she slapped her then husband after he provoked her. The first incident occurred after he made comments critical of her recently deceased mother. The second incident occurred after he took another woman to an event after uninviting her to the same event. She completed an anger management program and will soon be divorced from her husband. The Division does not allege that the convictions are grounds for denying her a license. (State's Exhibits D and E; Respondent's Exhibits H and I; TR at 20-25, 45-46, 53.)
19. Based upon her understanding of Question 5 on both applications, Respondent answered each truthfully but incorrectly. She made a mistake but she did not try to hide the convictions from the Division or make any statement that she thought or knew was false on either of her applications. Respondent provided detailed information on both convictions to the Division before it made any decision on the 2005 Application.
20. Respondent's confusion in responding to both versions of Question 5 is understandable. Both versions of the question are confusing.
21. Respondent was convicted of misdemeanor disorderly conduct in Ohio in 2000 and 2001 but has not been convicted of or pleaded guilty to any criminal offense involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, or any criminal offense involving money or securities. (State's Exhibits D and E.)

22. The Division's current loan officer license application ("Current Application") only requires an Ohio resident applicant to disclose whether he or she has been "convicted of or pleaded guilty to any criminal offense involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, or any criminal offense involving money or securities," "convicted of or pleaded guilty to any criminal offense in a state other than the state where you currently reside," or "a defendant in a criminal action in the Federal court system." The Current Application does not require an Ohio resident applicant to disclose an Ohio conviction for disorderly conduct. Ohio Loan Officer Application, Revised 1-1-2007, Questions 4, 5, and 6, <http://www.com.state.oh.us/dfi/>. The Hearing Officer takes administrative notice, the equivalent of judicial notice, of the Current Application on the website maintained by the Ohio Division of Financial Institutions and available to the public. (Copy of Relevant Portion of Current Application attached.)

E. Respondent's Reputation and Character.

23. The Respondent has worked in the mortgage loan industry for almost two years gathering information, starting files, and coordinating closings. Prior to that, she worked as a server, in retail, and was a stay at home mom. (TR at 50-53.)
24. Douglas Habegger, Respondent's supervisor during the past year, testified about Respondent's experience in the industry and her character. Mr. Habegger has been a loan officer for ten years and is currently an Ohio licensed loan officer. He has known Respondent through work during the past year. Mr. Habegger spoke favorably of Respondent's work ethic, honesty, and ability to be a loan officer. He testified that she is honest and interacts well with loan customers. (TR at 78-82.)
25. The Hearing Officer finds that Respondent's disorderly conduct convictions do not prove or tend to prove anything pertaining to Respondent's fitness to be a loan officer. Both are misdemeanor convictions and neither is for one of the enumerated financial or drug related crimes listed in R.C. 1322.031(A)(2). Whether they were disclosed in a response to the relevant versions of Question 5 likewise does not prove or tend to prove anything pertaining to Respondent's fitness to be a loan officer.
26. The Hearing Officer finds that Respondent's overall activities and employment record show that she is hardworking, trustworthy, and of good reputation. There is no reason to believe that she will commit any criminal offense again.

27. The Hearing Officer also finds that Respondent's character and general fitness command the confidence of the public and warrant the belief that her business will be operated honestly and fairly in compliance with the purposes of Ohio's Mortgage Broker Act.

II. CONCLUSIONS OF LAW

A. Jurisdiction and Procedural Matters.

The Division procedurally complied with R.C. Chapter 119 and jurisdiction over this matter has been established.

B. Loan Officer License Application.

1. The Division is the state agency responsible for the licensing and regulation of mortgage loan officers pursuant to the Ohio Mortgage Broker Act, R.C. Chapter 1322.
2. Ohio Revised Code Section 1322.041(A) provides that a loan officer license shall be issued if the Superintendent of Financial Institutions finds that certain conditions are met, including:

(2) The applicant complies with sections 1322.01 to 1322.12 of the Revised Code.

(5) The applicant's character and general fitness command the confidence of the public and warrant the belief that the business will be operated honestly and fairly in compliance with the purposes of sections 1322.01 to 1322.12 of the Revised Code.

R.C. 1322.041(A)(2) and (5).

3. In this case, no nexus exists between the disorderly conduct convictions and qualifying for the license sought. The convictions do not prove or tend to prove anything pertaining to Respondent's fitness to be a loan officer. The misdemeanor convictions are not for any of the enumerated financial or drug related crimes listed in R.C. 1322.031(A)(2). The Division does not even contend that the disorderly conduct convictions warrant license denial. Therefore, the Hearing Officer concludes that the two disorderly conduct convictions do not provide any legal basis for denying Respondent's 2005 Application.

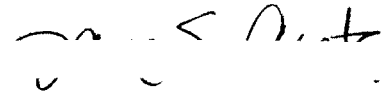
4. This leaves the Division with claims based upon the Respondent's incorrect responses to two questions no longer used by the Division on its loan officer license application. Respondent would not have to disclose either conviction on the Current Application if she applied for a license today. The nondisclosure of convictions no longer required to be disclosed on an application is not a legally sufficient basis for denying a loan officer license. Nondisclosure and incorrect application responses are part of the totality of the circumstances to be considered to when determining whether a person should be licensed as a loan officer. Other factors, including a person's overall work history, character, reputation, trustworthiness, integrity, and ability to be a loan officer, must also be considered.
5. Ohio Revised Code Section 1322.031(A)(2) requires a loan officer license applicant to include in his or her application a statement as to whether he or she has been convicted of or pleaded guilty to any criminal offense involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, or any criminal offense involving money or securities.
6. Both versions of Question 5 at issue request information on "any criminal conviction" and seek disclosure of criminal convictions, like the one at issue, not required to be disclosed on a loan officer license application by 1322.031(A)(2). The Division may consider convictions not enumerated in that section as a part of its determination of an applicant's "character and general fitness." R.C. 1322.041(A)(5). Extending that consideration to look at the nondisclosure of convictions not statutorily required to be disclosed on an application and no longer required to be disclosed by Ohio residents on the Current Application in this licensing process is problematic.
7. The authority to seek information from license applicants does not permit the Division to go on a fishing expedition seeking information about convictions that have no bearing on whether someone will make a competent loan officer. The fact that an Ohio resident applicant applying today would not have to disclose an Ohio disorderly conduct conviction evidences that failing to disclose such a conviction does not bear any significant relationship to being a loan officer.
8. Ohio Revised Code Section 1322.07(A) prohibits a loan officer license applicant from making any substantial misrepresentation in any license application. The Respondent did not make a substantial misrepresentation when she responded to Question 5 on either application. She answered truthfully based upon her understanding of the questions. More importantly, the failure to disclose convictions that the Current Application no longer requires an Ohio resident applicant to disclose is not a substantial misrepresentation for the purposes of this licensing process.

9. Ohio Revised Code Section 1322.07(B) prohibits a loan officer license applicant from making false or misleading statements of a material fact or omissions of statements required by state law. The Respondent did not make a false or misleading statement of a material fact when she responded to Question 5 on either application. She answered truthfully based upon her understanding of the questions. She made a mistake but she did not try to hide the convictions from the Division or make any statement that she thought or knew was false on either application. Furthermore, the failure to disclose convictions that the Current Application no longer requires an Ohio resident applicant to disclose is not material for the purposes of this licensing process.
10. Ohio Revised Code Section 1322.031(A)(2) does not require the convictions at issue in this matter to be disclosed on an application for a loan officer license. Therefore, the Respondent did not violate Ohio Revised Code Section 1322.07(B) by omitting a statement required by state law from her Application.
11. Ohio Revised Code Section 1322.07(C) prohibits a loan officer license applicant from engaging in "improper, fraudulent, or dishonest dealings." Respondent made a mistake but she did not try to hide the convictions from the Division or make any statement that she thought or knew was false on her applications. She did not disclose two misdemeanor Ohio convictions that the Current Application no longer requires an Ohio resident applicant to disclose. This alone does not amount to engaging in "improper, fraudulent, or dishonest dealings" for the purposes of R.C. 1322.07(C).
12. There is no basis for establishing any violations of R.C. 1322.07(A), (B), or (C) by the Respondent.
13. The Division, having failed to establish any violation of R.C. 1322.07(A), (B), or (C), has likewise not established any lack of compliance with R.C. 1322.01 through 1322.12 of the Revised Code. Therefore, the record only supports a conclusion that Respondent complies with R.C. 1322.01 through 1322.12 and meets that condition required for licensure by R.C. 1322.041(A)(2).
14. Based upon a consideration of all of the evidence in the record, the Hearing Officer concludes that the Respondent's character and general fitness command the confidence of the public and warrant the belief that her business will be operated honestly and fairly in compliance with the purposes of Ohio's Mortgage Broker Act as required by R.C. 1322.041(A)(5).

III. RECOMMENDATION

The Respondent meets the licensing prerequisites set forth in Ohio Revised Code Section 1322.041(A)(2) and (5). The alleged failure to meet those requirements was the only basis for the proposed denial. Therefore, I respectfully recommend that the Superintendent of the Division of Financial Institutions issue Respondent a loan officer license pursuant to R.C. 1322.041.

Respectfully submitted,



Jane Stempel Arata
Administrative Hearing Officer
January 9, 2007