

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

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IN RE: : CASE NO. 05-0046-LOD
: :
THOMAS TIMPERIO : JANE S. ARATA, HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued September 26, 2005

I. FINDINGS OF FACT

A. Background.

This matter came before Jane S. Arata, an attorney licensed to practice law in Ohio, and 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 August 24, 2005, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent Thomas Timperio ("Respondent" or "Mr. Timperio") to consider the allegations in the Division's Notice of Intent to Deny Loan Officer License and Notice of Opportunity for a Hearing ("NOH").

The Division alleged that Respondent was convicted of grand theft in 1981 and violated R.C. 1322.07(A), (B), and (C) by failing to disclose that conviction on his loan officer license application. Therefore, the Division asserted that Respondent is not eligible for a loan officer license pursuant to the Ohio Mortgage Broker Act, R.C. Chapter 1322, for the following reasons:

1. Respondent violated R.C. 1322.07(A), (B), and (C) by failing to disclose the conviction on his application;
2. Respondent has not proven that he is honest, truthful and of good reputation, and that there is no basis in fact to believe that he would not commit such an offense again as required by R.C. 1322.041(A)(3); and
3. Respondent's character and general fitness do not 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 the Ohio Mortgage Broker Act as required by R.C. 1322.041(A)(5).

James Evans, 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 1 through 8 and Respondent's Exhibits A through M were admitted into the record.

B. Jurisdiction and Procedural Matters.

1. The Division issued the Notice of Opportunity for Hearing ("NOH") to Respondent on May 25, 2005, and served it upon him by certified mail. (State's Exhibit 4; Hearing Transcript at 11-14.) (References to pages of the Hearing Transcript will be abbreviated as "TR at {page(s)}".)
2. The Division received Respondent's request for a hearing within thirty days of the date the NOH was sent to him by certified mail. (State's Exhibit 5.)
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 eventually set for August 24, 2005. A letter was sent to the Respondent notifying him of the date, time, and place for all scheduled hearing dates. (State's Exhibits 5, 6, and 7.)
4. Respondent received the NOH by certified mail and written notice of the date, time and location of the hearing.

C. Respondent's Loan Officer Application.

5. Mr. Timperio is an individual who seeks to conduct business in Ohio as a mortgage loan officer.
6. On November 8, 2004, Respondent signed a Loan Officer Application ("Application") which was then submitted to the Division. The Division received the Application on November 11, 2004. (State's Exhibit 1.)
7. Respondent answered "No" to Question 5 on the 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.

(Application, State's Exhibit 1.)

8. 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." (Application, State's Exhibit 1.)
9. As part of the application process, the Division conducts a criminal background check of each applicant. R.C. 1322.031(B).
10. Sometime after Mr. Timperio filed his Application, he received a letter from the Division requesting information on his 1981 grand theft charges. (State's Exhibit 3.)
11. Respondent responded to the Division's request by sending a letter, dated December 19, 2004, which explained:

One of my co-workers asked me to take some scrap metal to a scrap dealer because I had a truck. He offered to pay me \$50 to do so. I had no idea the scrap was stolen. I picked up the scrap at his house and hauled it to the scrap yard, thinking nothing of it. A few weeks later, the police came to my home, arrested me, and charged me with these offenses. I believed that my involvement was minimal and, therefore, did not obtain the services of an attorney. In court, the judge said that my sentence would be suspended if I completed one year of probation.

(State's Exhibit 3.)

12. Respondent also sent the Division a certified copy of a Cuyahoga County Court of Common Pleas Journal Entry pertaining to the grand theft charge. The entry stated that Mr. Timperio pled guilty to grand theft and received a one year suspended sentence with one year of probation. (State's Exhibit 3.)

D. Respondent's Failure to Disclose Conviction Application.

13. The Respondent did not disclose the 1981 grand theft conviction on his Application. (State's Exhibit 1.)
14. Respondent's December 19, 2004 letter states that he did not understand that charges were entered against him in 1981. He believed that the charges were suspended after he completed the year on probation. (State's Exhibit 3.)
15. Respondent testified that did not think about the grand theft charge when he filled out his Application because he was trying to determine if a concealed weapon charge from 1979 would need to be disclosed. That charge was reduced and he was convicted of illegal transportation of a firearm. He did not disclose that

because he thought the question was only seeking information about felonies. The NOH did not allege that the 1979 conviction or the fact that it was not disclosed on the Application were reasons that Respondent's license should be denied. (State's Exhibit 4; TR at 38-41.)

16. A letter Respondent provided at the hearing indicates that he did not disclose the grand theft charge because he did not remember that it was a felony. (Respondent's Exhibit A; TR at 44.)
17. The Hearing Officer finds that the language in Question 5 on the Application could be confusing. (State's Exhibit 1.)
18. The Respondent, based upon his understanding of events that happened 23 years ago and of Question 5, answered it truthfully. He made a mistake but he did not try to hide the grand theft conviction from the Division or make any statement that he thought or knew was false on the Application. The answer was "complete and true of [his] own knowledge" when he signed the Application. The Respondent did not omit any information that he thought or knew he should disclose from the Application.

E. Respondent's Reputation and Character.

19. Respondent has had no criminal convictions after 1981. (Respondent's Exhibits I-M; TR at 29-30.)
20. During the past 24 years, Respondent has been gainfully employed as an offshore oil technician, a materials manager in the plastics industry, a real estate agent and an appraiser. He was licensed as a real estate agent and a real estate appraiser in Georgia. He stated that he let those licenses lapse because it was difficult to break into the real estate industry. (TR at 25-29, 31-32.)
21. Respondent provided letters from four individuals familiar with his business and personal reputation. Those individuals describe him as being professional, dependable, trustworthy, hardworking, detail oriented, good with people, knowledgeable, and a person with high standards. (Respondent's Exhibits E through H; TR at 26-29.)
22. Respondent identified each of the four letters at the hearing. The authors of the letters were not present at the hearing. Thus, even in this proceeding to which the Rules of Evidence do not strictly apply, Respondent's Exhibits E through H were considered but afforded less weight than they would have been if the respective authors had been available for cross examination.
23. Respondent is active in his community and his church. He testified that he would act with the utmost sincerity and integrity if given a loan officer's license. (TR at 33-34.)

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.

(3) The applicant has not been convicted of or pleaded guilty to any criminal offense described in division (A)(2) of section 1322.031 of the Revised Code, or, if the applicant has been convicted of or pleaded guilty to such an offense, the applicant has proven to the superintendent, by a preponderance of the evidence, that the applicant's activities and employment record since the conviction show that the applicant is honest, truthful, and of good reputation, and there is no basis in fact for believing that the applicant will commit such an offense again.

(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), (3) and (5).

3. Respondent pleaded guilty to grand theft in 1981.
4. 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 he responded to Question 5 on the Application. He misread it and answered truthfully based upon his understanding of past events and the question.

5. 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 he responded to Question 5 on the 2004 Application. He misread it and answered truthfully based upon his understanding of past events and the question.
6. 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. That Section requires a grand theft conviction to be disclosed on an application for a loan officer license. To "omit" one must on some conscious level be aware of information and decide not to include it. The Respondent did not omit any information that he thought or knew he should disclose from his Application. Therefore, the Respondent did not violate Ohio Revised Code Section 1322.07(B) by omitting a statement required by state law from his application.
7. Ohio Revised Code Section 1322.07(C) prohibits a loan officer license applicant from engaging in "improper, fraudulent, or dishonest dealings." Respondent misread a confusing question and answered truthfully based upon his understanding of events that happened 23 years ago and the question. These activities alone do not amount to engaging in "improper, fraudulent, or dishonest dealings" for the purposes of R.C.1322.07(C).
8. There is no basis for establishing any violations of R.C. 1322.07(A), (B), or (C) by the Respondent.
9. 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 1322.041(A)(2).
10. Once the grand theft conviction was proven by the Division, the burden of proof shifted requiring the Respondent to prove, by a preponderance of the evidence, that his "activities and employment record since the conviction show that {he} is honest, truthful, and of good reputation, and there is no basis in fact for believing that {he} will commit such an offense again" in order to obtain a license. R.C. 1322.041(A)(3).

11. Respondent's testimony, the letters he provided from others, and the passage of 23 years since the conviction without any other similar conviction, establish that he is honest, truthful, and of good reputation and that there is no basis in fact for believing that he will commit such an offense again. Over 24 years have passed since the underlying events without incident. That alone indicates that Respondent is not likely to commit any crime in the future.
12. The conviction for grand theft is one of particular interest even though the events involved occurred 24 years ago. The Respondent admitted that he made a mistake while reading and filling in the Application. The confusion and misreading of the question raises concern about his fitness to act as a loan officer. The Respondent's testimony and the character letters submitted establish that Respondent's character is good. They are not, however, not sufficient in light of the grand theft conviction and the nondisclosure to 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 Ohio's Mortgage Broker Act as required by R.C. 1322.041(A)(5).
13. This conclusion is based upon the Hearing Officer's evaluation of evidence relevant to the alleged bases for denial stated in the NOH – the 1981 conviction and the Respondent's failure to disclose it in his response to Question 5. The NOH did not allege that the 1979 illegal transportation of a firearm conviction or the fact that it was not disclosed on the Application were reasons that Respondent's license should be denied. Other reasons for denial brought up for the first time at the hearing were not considered.
14. Ohio Revised Code 119.07 requires a notice of opportunity for hearing to "include the charges or other reasons for the proposed action...." The notice should provide a party with adequate notice of charges or the reasons for a proposed action to enable the party to prepare a response or defense. Geroc v. Ohio Veterinary Medical Bd. (1987), 37 Ohio App.3d 192, 199, 525 N.E.2d 501, 507 citing Keaton v. State (1981), 2 Ohio App.3d 480, 483, 442 N.E.2d 1315, 1318. Thus, Respondent should have received notice of any reasons other than the 1981 conviction and its nondisclosure underlying the proposed denial. This is particularly important when a litigant has chosen to represent himself at a hearing. A litigant making such a decision is entitled to make it with full knowledge of the scope of the hearing.

III. RECOMMENDATION

The Respondent has not established the licensing prerequisites set forth in Ohio Revised Code Section 1322.041(A)(5). Therefore, I respectfully recommend that the Superintendent of the Division of Financial Institutions deny Respondent's loan officer license pursuant to R.C. 1322.041.

Respectfully submitted,

Jane Stempel Arata
Administrative Hearing Officer
September 26, 2005