

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

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DIVISION OF FINANCIAL
INSTITUTIONS

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IN RE: : CASE NO. 04-0230-LOD
: :
PATRICK J. SPILKER : JANE S. ARATA, HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued June 16, 2004

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 on May 26, 2004, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent Patrick J. Spilker ("Respondent") 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 theft 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. Diane Wagenbrenner, an attorney with the Division, attended the hearing as the Division's representative and testified at the hearing. The Respondent did not appear and was not represented by counsel at the hearing. At the hearing, State's Exhibits 1 through 14 were admitted into the record.

B. Jurisdiction and Procedural Matters.

1. The Division issued the NOH to Respondent on January 23, 2004, and served it upon him by certified mail. (State's Exhibit 9; Hearing Transcript at 14-16.) (References to pages of the Hearing Transcript will be abbreviated as "TR at {page(s)}".)
2. Respondent's hearing request was received by the Division on February 19, 2004. (State's Exhibit 10; TR at 15.)
3. The Division scheduled the hearing for March 4, 2004, and continued it indefinitely. On March 30, 2004, the Division sent a letter to Respondent notifying him of the date, time, and location of the hearing. (State's Exhibits 11 and 12; TR at 15.) That letter was sent by regular mail to the Respondent at the most recent address he had provided to the Division and where he received the NOH by certified mail. It was not returned to the Division as undeliverable. (State's Exhibits 7, 9, 10, 11 and 12; TR at 16-17.)
4. The Respondent did not contact anyone at the Division or the Hearing Officer to indicate that he could not be present at the hearing or request a continuance. (TR at 4, 7.)
5. The hearing was held on the date and at the location set forth in the Division's March 30, 2004 letter. The hearing started 22 minutes after the time set forth in that letter to make sure that the Respondent was not running late. (State's Exhibit 12; TR at 1, 4.)
6. The Respondent received the NOH by certified mail and received written notice of the date, time, and location of the hearing.

C. Respondent's Loan Officer Application and Criminal Conviction.

7. Respondent is an individual who wants to conduct business in Ohio as a mortgage loan officer. (State's Exhibit 1.)
8. On May 2, 2002, amendments to Ohio's Mortgage Broker Act became effective that required mortgage loan officers to be licensed by the Division. R.C. 1322.02(B).

9. On March 3, 2003, Respondent signed a Loan Officer Application ("Application") which was submitted to the Division. The Division received the Application on April 17, 2003. (State's Exhibit 1.)

10. 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 **any criminal offense**? Exclude minor misdemeanor traffic and parking offenses.

(Application, State's Exhibit 1, emphasis and boldface type in original; TR at 12-13.)

11. As part of the application process, the Division conducts a criminal background check of each applicant. R.C. 1322.031(B).

12. Respondent's background check revealed a possible conviction for theft in 1999. In response to the Division's inquiry, the Respondent submitted a certified journal entry from the Cuyahoga Falls Municipal Court confirming the conviction. (State's Exhibits 4, 5 and 6; TR at 12-13.)

13. Respondent did not disclose his theft conviction on his Application. (State's Exhibit 1.) The record contains no evidence from the Respondent explaining why he failed to disclose the theft conviction on his Application.

14. Respondent sent a letter to the Division explaining the conviction as follows:

On the night of November 22, 1999 I was charged with theft because I had been drinking way too much and did a childish thing. The reason I was drinking so much was because my Grandmother had passed away the day before and I was not taking it to well. It's the first and last time I ever drank to try and solve my problems. That night I had some friends drive me up to the Giant Eagle grocery store so I could get some food, and for some reason I decided I was going to walk out with a 12 pack of beer. Don't ask me why I just did not pay for it being that I was 21 at the time. The only thing that I can say is that it was a stupid mistake and it has been haunting me ever since. After I told the judge this story she ordered me to attend a drug and alcohol evaluation. The findings of this evaluation were that I did not in fact have a drinking problem and that what I did was just a case of me not knowing how to deal with personal problems at the time. Since then I have not gotten into any kind of trouble and I hope that this does not affect my career as a loan officer in any way.

II. CONCLUSIONS OF LAW

A. Jurisdiction and Procedural Matters.

1. Ohio Revised Code Section 119.07 requires the Division to notify Respondent of his right to request a hearing. The Division's NOH properly notified the Respondent that he was entitled to request a hearing and was served upon him by certified mail. The Division has complied with the requirements set forth in R.C. 119.07 for notifying Respondent of his right to request a hearing.
2. Ohio Revised Code Section 119.07 also requires an agency to notify a party of the time, date, and place of the hearing once a date is set. The Division's March 30, 2004 letter including this information was sent to the Respondent by regular mail at the most recent address he had provided to the Division and at which he received certified mail service of the NOH. The person who sent the March 30, 2004 hearing notice letter testified that it was sent to the Respondent and not returned to the Division as undeliverable.
3. Ohio Revised Code Section 119.07 does not require the notice of the actual hearing to be sent by certified mail. The use of regular mail, which is used for the service of many legal papers and court notices, was appropriate in this case. McCoy v. Bureau of Unemployment Compensation (1947), 81 Ohio App. 158, 161, 77 N.E.2d 76, 78.
4. The Division complied with the notification of hearing requirement set forth in R.C. 119.07 by notifying the Respondent of the date, time, and place for the hearing in this matter.
5. The Respondent received proper notice of the hearing and therefore, it was appropriate for the hearing to proceed in his absence. Reed v. State Med. Bd. (1988), 40 Ohio App.3d 124,125-26, 532 N.E.2d 189, 191.
6. The Division procedurally complied with R.C. Chapter 119 and jurisdiction over this matter has been established.

B. Loan Officer License Application.

7. 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.
8. 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.

9. 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).


10. Respondent was convicted of theft in 1999.
11. Ohio Revised Code Section 1322.07(A) prohibits a loan officer license applicant from making any substantial misrepresentation in any license application.
12. 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.
13. Respondent's response to Question 5 of the Application, indicating that he did not have any criminal convictions when in fact he had a recent theft conviction, was a substantial misrepresentation in his application that violated R.C. 1322.07(A). This response was also a false statement of a material fact in violation of R.C. 1322.07(B).

14. Respondent violated R.C. 1322.07(B) by omitting the statement regarding his theft conviction, a criminal offense required to be in an application by R.C. 1322.031(A)(2).
15. Ohio Revised Code Section 1322.07(C) prohibits a loan officer license applicant from engaging in "conduct that constitutes improper, fraudulent, or dishonest dealings."
16. Respondent has engaged in improper and dishonest dealings in violation of R.C. 1322.07(C) by falsely indicating that he did not have any criminal convictions on his loan officer license application.
17. Respondent's violations of R.C. 1322.07(A), (B), and (C) preclude him from being in compliance with R.C. 1322.01 through 1322.12 of the Revised Code, a condition required for licensure by 1322.041(A)(2).
18. Once the theft conviction was proven by the Division, the Respondent had the burden 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).
19. Instead, the evidence established that he failed to disclose a recent criminal conviction on his Application. The Respondent's unexplained failure to disclose the conviction precludes him from establishing that he is honest, truthful, and of good reputation. He also failed to prove by a preponderance of the evidence that there is no basis in fact to believe that he will commit the criminal offense of which he was convicted again. Therefore, Respondent has not established the licensing prerequisites set forth in R.C. 1322.041(A)(3).
20. Respondent's criminal conviction and his failure to disclose it on his Application, establish that his 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 Ohio's Mortgage Broker Act. Therefore, Respondent has not established the licensing prerequisites set forth in R.C. 1322.041(A)(5).

III. RECOMMENDATION

The Respondent has not established the licensing prerequisites set forth in Ohio Revised Code Section 1322.041(A)(2), (3) and (5). Therefore, I respectfully recommend to the Superintendent of the Division of Financial Institutions that Respondent's loan officer license application be denied pursuant to R.C. 1322.041.

Respectfully submitted,


Jane Stempel Arata
Administrative Hearing Officer
June 16, 2004