

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

IN THE MATTER OF: : CASE NO. 05-0036-LOD
: :
: :
John E. Duggan II : James J. Lawrence, Hearing Officer

**ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION**
September 14, 2005

I. FINDINGS OF FACT

A. Background

This matter came before James J. Lawrence, an attorney licensed to practice law in the state of Ohio and duly appointed by the Ohio Division of Financial Institutions (Division) to serve as Hearing Officer for this hearing in accordance with Ohio Revised Code (R.C.) Chapter 119, the Administrative Procedure Act. The hearing was held at 10:30 a.m. on June 28, 2005, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent John E. Duggan II (the Respondent) to consider the allegations in the Division's Notice of Intent: Denial of 2004 Renewal Application and Notice of Opportunity for Hearing (NOH).

The Division alleges that Respondent was convicted of bank fraud and income tax evasion in 2004. Therefore, the Division asserts that Respondent is not eligible for a loan officer license renewal pursuant to the Ohio Mortgage Broker Act, R.C. Chapter 1322, for the following reasons:

1. The 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 commit such an offense again as required by R.C. 1322.031(A)(2) and 1322.041 (A) (3);
2. 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) and 1322.041(B)(3).

Timothy C. Loughery, Assistant Attorney General, from the Executive Agencies Section of the Office of the Attorney General, represented the Division

at the hearing. The Respondent appeared at the hearing without counsel. At the hearing, State's Exhibits A through F and Respondent's Exhibits 1 - 3 were admitted into the record.

B. Jurisdiction and Procedural Matters

The Division issued the NOH to Respondent on April 13, 2005 by certified mail, return receipt requested. Respondent's hearing request was received by the Division on May 9, 2005. The Division scheduled the hearing for May 19, 2005 but, on its own motion continued the hearing to June 16, 2005. Notice of the date, time and location of these hearings was sent by ordinary mail addressed to the same address as the NOH. Subsequently, at the Respondent's request, the hearing was continued to June 28, 2005. Notice of the date, time and location of this hearing was sent by ordinary mail addressed to the address shown on the Respondent's hearing request. (Exhibit F.)

C. Respondent's Loan Officer Renewal Application

1. The Division issued a Mortgage Broker Loan Officer License to the Respondent on June 9, 2003. (Exhibit B.)
2. The Respondent filed a 2004 Loan Officer Renewal Application in April of 2004. (Exhibit A.)
3. On August 26, 2004, the Respondent notified the Division that he had pleaded guilty in The United States District Court for the Southern District of Ohio, Western Division, to one count of bank fraud in violation of 18 U.S.C. 1344 and one count of income tax evasion in violation of 26 U.S.C. 7201. (Exhibit C.)
4. By letter dated February 7, 2005, the Division required the Respondent to submit a detailed explanation of the facts and circumstances which gave rise to the convictions and a certified copy of the court's journal entries evidencing his pleas and sentence. (Exhibit D.)
5. The Respondent provided certified copies of the Information and Plea Agreement. (Exhibit D¹.) Subsequently, the Respondent provided a copy of the criminal minutes in Case No. 1:04-CR-89 showing that the Court had accepted his plea. However, since the Respondent was assisting the government in its investigation of other defendants, the Court continued the sentencing.² (Exhibit E.)
6. The Statement of Facts sets forth the facts of the count of bank fraud as follows:

From approximately May, 1998 until approximately February, 2003, defendant John E. Duggan II, while self-employed as the owner of Duggan Financial, Inc., fraudulently diverted money from Miami Savings Bank of

¹ The Information is captioned Statement of Facts. Page 3 of the Statement of Facts is missing from Exhibit B.

² As of the date of the hearing, the sentencing remained continued. (TR at 33, 35.)

Miamitown, Ohio, First National Bank of Germantown, Ohio, and United Bank of Parkersburg, West Virginia.

Duggan had an arrangement with these banks whereby they would provide financing for equipment which would be leased through his company, Duggan Financial, located in Cincinnati, Ohio. Duggan Financial leased equipment to area businesses and made a profit on the rate spread. For example, Duggan Financial borrowed money from the banks at 8 per cent to purchase equipment and leased it to its customers at 10 per cent.

In an attempt to save his failing business, Duggan began to illegally divert money from the banks using the following methods:

- (1) Duggan solicited early payoffs from lessees but did not forward the payoffs to the bank. Duggan continued to make monthly payments on the leases to deceive the banks.
- (2) Duggan had lease agreements that were funded by banks and then cancelled without the banks' knowledge. Duggan kept the funds instead of returning the money to the bank.
- (3) Duggan collected monthly lease payments from lessees but never forwarded them to the banks.
- (4) Duggan submitted the same lease agreement to two separate banks which resulted in the lease being funded twice.

Duggan was eventually confronted by bank officials, and he admitted his fraudulent scheme to divert money from the banks.

7. Although the Respondent pleaded guilty to the count of bank fraud, he disputes substantial portions of the Statement of Facts. The Respondent asserts that he was not confronted by bank officials. Rather, he asserts that he voluntarily disclosed his wrongdoing to the banks and began to make restitution before anyone was aware of his misdeeds. (Exhibit 3; TR at 25.) Before any investigation began, he had already taken steps to address the issues and had put his residence and personal assets into his company so that it could make payments to the banks. (TR at 25, 41.) Moreover, he asserts that in the twenty years that his business was in operation, the banks were generally aware of its practices. (TR at 18.) In those twenty years, only one bank objected and he modified his business' practices to accommodate that bank. (TR at 20.) He emphasized that only one bank ever lost money on a loan. The Respondent testified that he never did anything to defraud a bank. (TR at 34.)
8. The Statement of Facts sets forth the facts of the count of federal income tax evasion as follows:

Duggan and his wife deposited the checks they received from Duggan Financial into their personal bank accounts and used the proceeds to fund their lavish lifestyle. The total amount of the checks deposited greatly exceeded the income Duggan reported as wages from Duggan Financial on his individual tax returns for the years 1999 and 2000. In addition, Duggan paid personal living expenses from the account of Duggan Financial but did not claim them as income on his individual tax returns. For criminal tax purposes, Duggan willfully evaded individual federal income taxes in the amount of \$74,397 for the years 1999 and 2000.

9. Again, although the Respondent pleaded guilty to the count of income tax evasion, he disputes substantial portions of the Statement of Facts. The Respondent testified that the "income" that he did not report on his federal income tax returns was actually return of his capital contributions to the business. As such it was not required to be reported on the returns. (TR at 15.) Moreover, he retains the right to challenge the amount of the underpayment through civil proceedings. (TR at 15.) The Respondent emphatically denies that the funds were used to support a lavish lifestyle. (TR at 41 - 42.)
10. In support of his character and general fitness to be a loan officer, the Respondent asserted that he notified the banks of the situation before any investigation had begun and he used his personal assets to make sure that no bank lost money on a loan whether or not the bank had recourse to Duggan Financial. (TR at 21; Exhibit 2.) He asserts that because of these actions only one bank lost money on a loan and that loss occurred because the bank chose to not to pursue its claim due to its new ownership. (TR at 22; Exhibit 2.) He asserts that he had no intent to defraud the banks and any problems were due to timing differences. (Exhibit 2.)
11. Also in support of his character and fitness to be a loan officer, the Respondent asserted that his business reputation prior to the conviction was such that he has received an outpouring of support from many area business associates. (Exhibit 2.) Moreover, he still gets referrals from banks with which he financed leases. (TR at 43.) He testified that there are many unsolicited letters on his behalf at his attorney's office waiting to be forwarded to the federal judge. (TR at 43.)
12. One witness appeared on the Respondent's behalf. Mary Gleason is Executive Sales Vice President of Sibcy Cline Realtors in Cincinnati, Ohio. She testified that she has known the Respondent for years. In the past two years, since the Respondent has been a loan officer, she has been switching all of her business to him. She has refinanced four of her own properties with the Respondent. She would refer anyone who wanted to get a mortgage to the Respondent because of his honesty and hard work. (TR at 50 - 54.)

II. CONCLUSIONS OF LAW

A. Jurisdictional and Procedural Matters.

1. The Division procedurally complied with R.C. Chapter 119 and jurisdiction over this matter has been established.
2. The Attorney General objected to the admission of the Respondent's Exhibits 1 & 2 because they contain hearsay statements. The Hearing Officer admitted the Exhibits into the record with the caveat that the weight given the statements in the Exhibits would be determined after considering the lack of ability to observe the persons who allegedly made the statements, to judge their credibility and to benefit from their responses to cross examination by the Attorney General.

B. Loan Officer Application.

1. The Division is the state agency responsible for the licensing and regulation of loan officers pursuant to R.C. Chapter 1322.
2. R.C. 1322.041(B) provides that the Superintendent of Financial Institutions (Superintendent) may renew a loan officer license if the Superintendent finds that certain conditions are met, including, among other requirements not relevant here, the applicant meets the conditions set forth in R.C. 1322.041(A)(2) to (5). R.C. 1322.041(A) provides:

* * *

(3) The applicant has not been convicted of or pleaded guilty to any criminal offense described in R.C. 1322.031(A)(2), 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.

The NOH states the Division intends to deny the Respondent's loan officer application because the Respondent has not met these conditions.

3. The NOH states that the Respondent has not shown 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, as required by R.C. 1322.041(A)(3). R.C. 1322.041(A)(3) requires that if the applicant has been convicted of or pleaded guilty to an offense described in R.C. 1322.031(A)(2), the applicant must prove 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. Crimes involving money are one category of the offenses described in R.C. 1322.031(A)(2). Since the Respondent was convicted of crimes involving money in 2004, the burden is on the Respondent to prove by the 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.

4. The Respondent has not met this burden. The Respondent has provided little information about his activities and employment record since his convictions. This burden of proof is very difficult to meet, when, as in this situation, the conviction is very recent. The information submitted with his pre-sentence report addressed his behavior prior to the conviction. Much of Ms. Gleason's testimony also addressed his behavior prior to the conviction. The law requires that his activities and employment since the conviction, not prior to the convictions, prove that he is honest trustworthy and of good reputation. The record in this case contains too little evidence of his activities and employment since August of 2004 to prove by a preponderance of the evidence 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 as required by R.C. 1322.041(A)(3).
5. The NOH asserts that the Respondent's loan officer application should be denied because the 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). The Division bases this finding upon the Respondent's criminal convictions.
6. The Respondent's convictions are evidence that he does not possess the character and general fitness to be loan officer. In support of his character and general fitness, the Respondent testified that he continues to receive the support of the business community and past business associates. However, these individuals did not appear at the hearing to testify on the Respondent's behalf. Although the Respondent alleged that many people sent letters on his behalf, the letters were not submitted as evidence. The only evidence that the Respondent presented to support his character was the testimony of Ms. Gleason. While Ms. Gleason's testimony does support the Respondent's character and general fitness, it was not sufficient by itself to establish that the Respondent has the character and general fitness to be a loan officer. In the absence of any other information supporting the Respondent's character and general fitness, the convictions establish that the 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).

7. As a result of the Respondent's failure to meet the requirements of R.C. 1322.041 (A)(3) and (A)(5), the Superintendent is not required by R.C. 1322.041(B) to renew his loan officer license. Under such circumstances, R.C. 1322.10(A)(1) provides that after notice and opportunity for a hearing conducted in accordance with R.C. Chapter 119, the Superintendent may, among other things, refuse to renew a loan officer license.

III. RECOMMENDATION

The Respondent has not proven 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. The record in this case establishes that the 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 Ohio's Mortgage Broker Act. Therefore, I respectfully recommend that the Superintendent of Financial Institutions deny the Respondent's loan officer renewal application pursuant to R.C. 1322.041 and 1322.10.

Respectfully Submitted,


James J. Lawrence
Hearing Officer
September 14, 2005