

STATE OF OHIO
DEPARTMENT OF COMMERCE
Division of Financial Institutions
Consumer Finance

In the matter of:)	Case No. 03-LO-D-09-10
)	
THOMAS EDWARD MULLANEY)	<u>DIVISION ORDER</u>
6227 Swanbrook Lane)	Denial of loan officer license application
Cincinnati, Ohio 45233)	&
)	Notice of Appellate Rights

Respondent, Thomas Edward Mullaney, submitted a loan officer license application to the Division of Financial Institutions ("Division") on February 24, 2003. On April 30, 2003, the Division notified Mullaney that it intended to deny his loan officer license application because: (1) he had twice been convicted of driving under the influence—in 1985 and 1991; (2) he had been convicted of assault in 1982; (3) he violated R.C. § 1322.07(A) by failing to disclose his criminal convictions on his loan officer license application; (3) he violated R.C. § 1322.07(B) by making a false statement of a material fact or by omitting a statement required on the licensing application; and (4) because his character and general fitness did not command the confidence of the public and warrant the belief that his business will be operated honestly and fairly in compliance with the purposes of R.C. §§ 1322.01 to 1322.12—the Ohio Mortgage Broker Act.

Mullaney requested a hearing and an administrative hearing was held on July 8, 2003. A Report and Recommendation was filed with the Division on August 11, 2003, recommending that the Division approve Mullaney's application and grant him a loan officer license. No objections were filed.

In accordance with R.C. §119.09, the Division has considered the Report and Recommendation, applicable laws, the transcript of testimony and the exhibits. As a result, the Division modifies and/or disapproves the findings and/or conclusions listed below. Any finding and/or conclusion not specifically addressed below is approved, adopted, and incorporated herein. (The Hearing Examiner's Report and Recommendation is attached hereto as Exhibit A.)

- The Division modifies paragraph 2 on page 2 of the Report and Recommendation (hereinafter referred to as "R&R") to expand the hearing examiner's description of Exhibit 2, which is a copy of the first page of the loan officer application, titled "**EXPLANATION AND INSTRUCTIONS**". (Bold in original.) This cover page to the loan officer license application states:

Before completing this Mortgage Loan Officer License Application, you should read and be familiar with the Ohio Mortgage Broker Act, codified in R.C. Chapter 1322, and the rules relating to the Act, which are contained in Ohio Administrative Code Chapter 1301:8-7. You should pay specific attention to R.C. 1322.031 and 1322.041. These statutes explain the criteria and procedures for determining your qualifications for obtaining an Ohio Mortgage Loan Officer License. Before the Superintendent will issue a Mortgage Loan Officer License to an applicant, the Superintendent must be convinced that the applicant's character and general fitness will command the confidence of the public and warrant the belief that the Loan Officer will operate honestly and fairly in compliance with the purposes of the Act [See R.C. 1322.041(A)(5)].

You must answer each question on this application fully and truthfully. Any omission, untruthful answer or incomplete answer may result in your being denied the privilege of obtaining a Mortgage Loan Officer License and acting as a loan officer in the State of Ohio, or in subsequent legal action. Questions 2 through 6 must be fully answered regardless of dismissals or similar terminations, and must include all actions or legal proceedings occurring in any court in any jurisdiction. This includes any matter dismissed favorably to you, filed by you or in which you were involved in any manner other than as a witness.

If you have any doubts about whether any matter should be reported on this application, report it. If you are not sure of the dates, times, places, or other information requested, you should consult the court, government agency, or other entity involved to obtain the correct and full information.

If the space provided for any answer is inadequate, complete your answer on a separate sheet, specifying the question to which it relates, and attach this sheet to the application. Sign each additional sheet you provide. **The answers to your application must be verified in front of a notary public. *****

(Bold in original.)

- The Division disapproves paragraph 3 on page 3 of the R&R, which reads:

The Respondent was convicted of assault in 1982 in Hamilton County, and Ohio and of Driving Under the Influence in 1991 and 1985 in Florida. The burden of proof shifted to the Respondent to show by a preponderance of the evidence that his character and fitness command the confidence of the public and

warrant the belief that the business will be operated honestly and fairly in compliance w/ the purpose of the Ohio Mortgage Brokers Act.

Mullaney was not convicted of a crime that shifted the burden of proof—a crime listed under R.C. § 1322.031(A)(2). See, also, R.C. § 1322.041(A)(3). It was the Division's burden to prove, by a preponderance of the evidence, that Mullaney's character and general fitness do not command the confidence of the public and warrant the belief that his business will be operated honestly and fairly in compliance with the purposes of R.C. §§ 1322.01 to 1322.12. Accordingly, paragraph 3 on page 3 is hereby modified to reflect the accurate burden of proof.

- The Division modifies paragraph 4 on page 4 of the R&R, which states:

The Respondent submitted the *Application* of Suzette Lovell. Ms. Lovell supervises the Respondent at Excel Financial Services, Inc. In her affidavit, she indicated that the Respondent disclosed his two convictions for Driving Under the Influence and one conviction of Assault to Excel Financial Services, Inc. (Exhibit A).

(Emphasis added.) Paragraph 4 is modified to: (1) reflect that Mullaney submitted the affidavit of Suzette Lovell, not an application; and (2) to clarify that Lovell attested Mullaney had disclosed his convictions to Excel during the application process for employment with the company, not the application for a loan officer license.

- The Division disapproves paragraph 8 on page 4 of the R&R. Mullaney violated R.C. § 1322.07(A) and (B) by failing to disclose his convictions on his licensing application. Question number 5 on the loan officer license application asked whether Mullaney had “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?” Mullaney answered “NO,” and then attested that he had “completed the *** [a]pplication fully and frankly[,]” and that his “answers [were] complete and true[.]”

R.C. § 1322.07(A) forbids any license applicant from “[o]btain[ing] a *** license through any false or fraudulent representation of a material fact or any omission of a material fact required by state law, or [from] mak[ing] any substantial misrepresentation in any *** license application[.]” R.C. § 1322.07(B) prohibits a license applicant from “[m]aking false or misleading statements of a material fact, [or] omission of statements required by state law[.]”

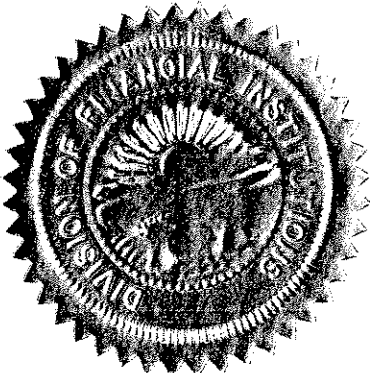
The hearing officer found that Mullaney had not disclosed his conviction on his licensing application. (See R&R paragraph 4, page 2; R&R paragraph 5, page 3; and R&R paragraph 7, page 4.) Accordingly, the evidence demonstrates that Mullaney violated R.C. §§ 1322.07(A) and (B).

- The Division disapproves the recommendation of the hearing officer to approve Mullaney’s application and to grant him a loan officer license. Mullaney’s failure to disclose his convictions on his licensing application shows recent evidence of dishonesty, and proves that Mullaney violated R.C. §§ 1322.07(A) and (B)—all evidence that Mullaney does not possess the character and general fitness to command the confidence of the public and warrant the belief that his business will be operated honestly and fairly in compliance with the purposes of R.C. §§ 1322.01 to 1322.12—the Ohio Mortgage Broker Act.

Mullaney’s loan officer license application is hereby denied.

NOTICE OF APPELLATE RIGHTS

Respondent is hereby notified that pursuant to R.C. 119.12, this order may be appealed by filing a notice of appeal with the Ohio Division of Financial Institutions setting forth the order appealed from and the grounds for the appeal. A copy of such notice of appeal must, pursuant to R.C. 119.12, must also be filed with the court of common pleas of the county in which the place of business of the Respondent is located, or the county in which the Respondent is a resident. A notice of appeal must be filed within fifteen (15) days after the date of mailing of this order.



Signed and sealed this 15th day of April, 2004.

ROBERT M. GRIESER

Deputy Superintendent for Consumer Finance
Division of Financial Institutions
Ohio Department of Commerce

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In re: Thomas Edward Mullaney : Case No. 03-LO-D-09-10

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS OF
THE HEARING OFFICER

The Ohio Department of Commerce, Division of Financial Institutions ("Division") proposes that the Loan Officer License Application of Thomas Edward Mullaney not be granted because Mr. Mullaney failed to disclose in his Application a 1982 conviction for misdemeanor assault, a 1991 Florida conviction for driving under the influence and a 1985 Florida conviction for driving under the influence. Given the failure to disclose, the Division believes that Mr. Mullaney's character and general fitness do not command the confidence of the public to warrant the belief that the business will be operated honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act, as set forth in Section 1322.041(A)(5).

Mr. Mullaney's address for service is 6227 Swanbrook Lane, Cincinnati, Ohio 45233. He is hereinafter referred to as the "Respondent". The Respondent is employed by Excel Financial Services, Inc. (Exhibit 1A).

This matter was initiated by the Superintendent of the Division by the issuance on April 30, 2003 of a Notice of Intent to Deny Loan Officer License & Notice of Opportunity for a Hearing together with a covering letter. (Exhibit 1A).

On May 23, 2003, the Respondent wrote to the Division requesting a hearing. (Exhibit 1B).

On June 4, 2003, the Division wrote to the Respondent acknowledging receipt of the request for a hearing, scheduling a hearing for May 28, 2003 and simultaneously continuing that hearing. (Exhibit 1C). The hearing was rescheduled for July 8, 2003 at 2:00 p.m. in Room 1924 of the Vern Riffe Center, 77 South High Street, Columbus, Ohio. (Exhibit 1C).

The hearing was held beginning at 2:00 p.m. on July 8, 2003 and was attended by John Izzo, Assistant Attorney General of the Executive Agencies Section of the Attorney General's Office of Ohio; Hector A. Polanco, on behalf of the Respondent; and the Respondent.

The hearing was conducted pursuant to Section 119 of the Ohio Revised Code. The Division is deemed to have jurisdiction to conduct the proceedings.

Exhibit A

FINDINGS OF FACT

1. On February 22, 2003, the Respondent signed a Loan Officer Application (the "Application") under the provisions of the Ohio Mortgage Broker Act, Ohio Revised Code Section 1322. (Exhibit 3).

2. Accompanying the Application was a document entitled "Explanation and Instructions" which provided, *inter alia*, that each question be answered fully and truthfully. (Exhibit 2).

3. Question 5 of the Application provides:

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?

4. In response to Question 5, the Respondent answered "No".

5. On March 10, 2003, the Division wrote to the Respondent to report that it was not able to make a decision on the Application because the background check disclosed a March 11, 1982 arrest and that the Respondent was listed as a "multi-state offender". (Exhibit 4). The Respondent was required to submit to the Division a "Multi-State Offenders" questionnaire together with details about the Ohio matter. (*Id.*)

6. On April 8, 2003, the Division received from the Respondent the completed "Multi-State Offenders" questionnaire. Attached to it were documents from the relevant Courts. Together, these documents show that, (i) in 1982, the Respondent was charged in the Hamilton County Municipal Court with assault, disorderly conduct, resisting arrest and drug abuse and convicted of only assault; (ii) that the Respondent was charged in 1984 in the Hamilton County Municipal Court with criminal trespass (which allegation is not part of the Division's basis for denying a license (Tr. 41-42); (iii) that the Respondent was convicted in 1991 of Driving Under the Influence in Pinellas County, Florida; and (iv) the Respondent was convicted in 1985 of Driving Under the Influence in Pinellas County, Florida.

7. The 1982 conviction stemmed from a barroom brawl in which the Respondent, while not an instigator, was a participant. (Exhibit 5). The 1984 charge, which again is not part of the Division's basis for denying the Application, is for entering the field of play at a Cincinnati Reds game to get a baseball. (*Id.*)

CONCLUSIONS OF LAW

1. Ohio Revised Code Section 1322.041 provides that the Superintendent of the Division shall issue a Loan Officer License if the Superintendent finds that certain conditions are met including:

- (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.

2. Ohio Revised Code Section 1322.07(A) and (B) provide:

No mortgage broker, registrant, licensee, or applicant for a certificate of registration or license under Sections 1322.01 to 1322.07 of the Revised Code shall do any of the following:

- (A) Obtain a certificate of registration or license through any false or fraudulent representation of a material fact or any omission of a material fact required by state law, or make any substantial misrepresentation in any registration or license application;
- (B) Make any false or misleading statements of a material fact, omissions or statements required by state law, or false promises regarding a material fact, through advertising or other means, or engage in a continued course of misrepresentations;

...

3. The Respondent was convicted of assault in 1982 in Hamilton County, Ohio and of Driving Under the Influence in 1991 and 1985 in Florida. The burden of proof shifted to the Respondent to show by a preponderance of the evidence that his character and fitness command the confidence of the public and warrant the belief that the business will be operated honestly and fairly in compliance with the purpose of the Ohio Mortgage Brokers Act.

5. The Respondent answered Question 5 of the Application incorrectly.

DISCUSSION

1. There is adequate evidence in the record to substantiate the Respondent's criminal convictions. (Exhibit 5, Tr. 38-42).

2. The Respondent has worked at Excel Financial Services, Inc. since February 10, 2003. (Tr. 14). His job is a loan originator. (Id). Prior to joining Excel Financial Services, Inc., he worked at Fifth Third Bank for a year-and-a-half as a loan originator. (Tr. 15).

3. The Respondent claims that he did not answer Question 5 of the Application correctly because he just "flat out misread the question". (Tr. 18). He did not read the question thoroughly. (Tr. 18-19).

4. The Respondent submitted the Application of Suzette Lovell. Ms. Lovell supervises the Respondent at Excel Financial Services, Inc. In her affidavit, she indicated that the Respondent disclosed his two convictions for Driving Under the Influence and one conviction for Assault to Excel Financial Services, Inc. (Exhibit A).

5. There is no evidence in the record to suggest that customers or others have complained about the Respondent's job performance. (Tr. 15, Exhibit A).

6. The Respondent is now 43 years of age. (See Exhibit 5). The conviction for Assault occurred more than 20 years ago and the convictions for Driving Under the Influence occurred, respectively, 12 and 18 years ago. (See Exhibit 5). There is no evidence in the record showing any involvement in the criminal process on the part of the Respondent since 1991, 12 years ago.

7. However, the Respondent's failure to answer Question 5 of the Application accurately is troubling. Criminal convictions are material facts. The failure to disclose a criminal conviction is a violation of Ohio Revised Code Section 1322.07(A). An omission of a criminal conviction is the making of a false or misleading statement of a material fact and a violation of Ohio Revised Code Section 1322.07(B). The Division has a right to expect each Applicant will answer Question 5, as well as all other questions, fully, truthfully and accurately. Every Applicant should be certain that he or she understands each question and answers it truthfully.

8. In this isolated case, however, the Hearing Officer has the opportunity to observe the Respondent in the course of the hearing. The Hearing Officer is convinced that the length of time between the convictions and the Application, the misdemeanor status of the convictions, the Respondent's clean record since his last conviction more than a dozen years ago, the Respondent's education and training and, the Respondent's maturity show that the Respondent's character and general fitness command the confidence of the public to warrant the belief that the business will be operated honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act.

RECOMMENDATION

Based on the above-findings of fact, conclusions of law and discussion thereof, it is the recommendation of the Hearing Officer that the Superintendent of the Division grant a Loan Officer License to the Respondent.

Respectfully submitted,

Kenneth R. Cookson
Hearing Officer
August 7, 2003

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