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**STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS**

REPORT AND RECOMMENDATION OF HEARING OFFICER

IN THE MATTER OF Donald L. Early

**Ohio Department of Commerce, Division of Financial Institutions
Case Number: 04-0407-LOD**

FINDINGS OF FACT

1. On or about October 7, 2003, Donald L. Early ("Respondent" herein) submitted an application (the "Application" herein) to the Ohio Department of Commerce, Division of Financial Institutions (the "Division" herein) for licensing as a loan officer as defined in Chapter 1322 of the Ohio Revised Code. A copy of the Application is attached and incorporated as Exhibits A.
2. On or about April 27, 2004, the Division notified Respondent that it intended to deny the Application, and, by Division Order, provided Respondent with timely notice of opportunity for a hearing in accordance with the Ohio Administrative Procedure Act, Chapter 119, Ohio Revised Code (the "Notice"). A copy of the Notice is attached and incorporated as Exhibit B herein. The Division Order charged that Respondent failed to meet the certain designated requirements for licensing contained in Sections 1322.041 and 1322.10 of the Ohio Revised Code, and cited the circumstances as described in the Notice.
3. In response to the Notice, Respondent requested a hearing and, in response to that request, a hearing was held (the "Hearing" herein) at the Vern Riffe Center for Government and the Arts on July 13, 2004. At the Hearing, the Division was represented by Assistant Attorney General Anthony Siciliano, Esq., and Respondent appeared *pro se*.
4. Respondent did not contest that, for the purposes of the Hearing and this administrative proceeding, the allegations of fact set forth in the Notice were true, through stipulation with respect to admission of the Notice. (Tr. Page 15)
5. As of the date of the Application, Respondent was employed as a loan officer by CFS Mortgage, Ltd., Jericho Mortgage.

CONCLUSIONS OF LAW

1. That the conduct of the Respondent established a statutory rationale for denying the Application of the Respondent based on the provisions of Sections 1322.041 and 1322.10 of the Ohio Revised Code.
2. That the documentation presented by the Division established a sufficient and reasonable basis for the Division to deny Respondent's Application for licensing as a loan officer.
3. That the information and documentation available to the Division prior to the hearing established a statutory rationale under Sections 1322.041 and 1322.10 of the Ohio Revised Code for the denial of Respondent's Application, and the record of the Hearing supports that denial.

DISCUSSION

At the Hearing, Respondent and the Division stipulated to the evidence relating to Respondent's criminal record as described in the Notice. (Tr. Page 15)

Section 1322.041(A)(3) of the Ohio Revised Code states that the Superintendent shall issue a loan officer license if the Superintendent finds that the applicant has not been convicted of, or pleaded guilty to, certain enumerated offenses. If the applicant has in fact been convicted of or pleaded guilty to such offenses, the Superintendent shall issue the loan officer license if the applicant proves 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 truthful, and of good reputation, and there is no basis in fact for believing that the applicant will commit such an offense again.

Respondent's criminal record evidences a conviction in 1984 of Theft, which unfortunately reflects one of the very criminal offenses which the legislature found to be an antithesis to the mortgage broker industry, and specifically enumerated in Ohio Revised Code Section 1322.031(A)(2).

The legislature also recognized, in Ohio Revised Code Section 1322.041(A)(3), that circumstances may arise when that criminal record may not reflect real changes in an individual, which have occurred since the facts that gave rise to the criminal record. As noted previously, Ohio Revised Code Section 1322.041(A)(3) provides that, despite such a criminal record, an applicant may prove to the Superintendent, by a preponderance of the evidence, that the applicant's activities and employment record since the conviction(s) show that the applicant is honest, truthful, and of good reputation, and that there is no basis in fact for believing that the applicant will commit such an offense again.

This statutory ability to, in essence, look past and overcome a criminal history represents a difficult and serious consideration for the Superintendent, who is charged with protecting the public from unscrupulous practitioners in the mortgage broker industry at a time when the industry suffers publicly from a number of "bad players" whose activities have resulted in reputation damage and expanded regulatory oversight for the mortgage industry.

At the Hearing, Respondent and the Division stipulated to the criminal record of Respondent as described in the Notice and Application (Tr. Page 15), and the Respondent presented only his own testimony in support of Respondent's general contention that Respondent is truthful and of good reputation; that there is no basis in fact for believing that Respondent will commit such offenses again; and that Respondent's character and general fitness command the confidence of the public and warrant the belief that the business will be operated honestly and fairly.

Applicable law, as set forth in the referenced provisions of the Ohio Revised Code, clearly requires the Respondent in this instance to prove, by a preponderance of the evidence, that he meets the statutory criteria necessary to overcome the "automatic disqualifier" provisions set forth in Ohio Revised Code section 1322.041(A)(3), and reserves to the Superintendent appropriate discretion in his licensing decision.

Section 1322.041(A)(5) of the Ohio Revised Code states that the Superintendent shall issue a loan officer license if the Superintendent finds that 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 stated provisions of Ohio law.

The Act provides that the Superintendent is charged with regulation and oversight of mortgage brokers and loan officers in the State of Ohio, and part of the Superintendent's consideration in that regard relates to the character and general fitness of the Respondent and the ability of the Respondent to command the confidence of the public as set forth in subsection 1322.041(A)(5) of the Ohio Revised Code. That provision requires that the Superintendent issue a loan officer license if, among things, Respondent's character and general fitness (1) command the confidence of the public and (2) warrant the belief that the business will be operated honestly and fairly in compliance with applicable law. These standards require subjective analysis, and the General Assembly has decided that it is appropriate that the Superintendent undertake a determination, based on industry and regulatory experience, as to whether an applicant's character and fitness enable the applicant to meet the referenced requirements. See *Leon v. Ohio Bd. Of Psychology*, 63 Ohio St. 3d 683, 1992 Ohio 105, 590 N.E. 2d 1223 (1992). See also *Lorain City Bd. Of Edn. v. State Emp. Relations Bd.*, 40 Ohio St. 3d 257, 533 N.E. 2d 264 (1988).

Other than his own testimony, Respondent did not present any other evidence or testimony in support of the statutory factors considered under Ohio Revised Code sections 1322.041(A)(3) and 1322.041(A)(5).

According to Respondent's testimony, Respondent's theft conviction involved misappropriation of insurance premium payments entrusted to Respondent by insurance customers. (Tr. Page 21) The conviction occurred approximately twenty (20) years ago, and in light of the lack of subsequent convictions does not appear to evidence a pattern of criminal behavior which would otherwise give cause for concern that Respondent would commit similar offenses in the future. However, the acts giving rise to Respondent's criminal theft conviction are all the more disconcerting when viewed from the perspective that the acts occurred when Respondent was in a position of professional trust with insurance clients, and handling client funds.

Respondent admitted that he knowingly failed to disclose the criminal conviction in response to question 5 of the Application, testifying generally that he intentionally omitted the disclosure due

to a belief that the conviction occurred sufficiently long ago that it became irrelevant to these proceedings and that the "...statute of limitations had expired" and his "...record was expunged". (Tr. Pages 9, 10, 18, 23, 24)

Other than his own testimony, Respondent did not present any other evidence or testimony to explain why he failed to disclose the conviction in response to the referenced question 5 in the Application.

Respondent's failure to disclose the conviction in the Application unfortunately calls into question Respondent's character and fitness, and there is therefore support for the Division's assertion that Respondent fails to meet the basic statutory criteria contained in Ohio Revised Code section 1322.041(A)(5). Other than his own testimony, Respondent provided no evidence at the Hearing regarding his character and fitness under Ohio Revised Code section 1322.041(A)(5)

It is noted that Respondent's single criminal conviction does not appear to evidence a pattern of ongoing criminal behavior. However, Respondent unfortunately failed to disclose the conviction as required by question 5 in the Application. While Respondent may, in fact, have misunderstood the need to disclose the conviction, the relevant provisions of Ohio law do not provide an excuse by mistake, misunderstanding, or misreading of the question at issue, or require any evidence with respect to intent or knowledge. There is therefore support for the Division's assertion that Respondent violated subsections (A), (B), and (C) of Ohio Revised Code Section 1322.07 in failing to disclose the criminal violations.

In light of the limited evidence provided by Respondent, and the failure to disclose the conviction as required by the Application, Respondent has failed to provide evidence sufficient to overcome the Superintendent's findings under Ohio Revised Code sections 1322.041 and 1322.07.

RECOMMENDATIONS

For the reasons set forth herein, it is hereby recommended that the referenced Application be denied.

Respectfully submitted,

Jeffery E. Smith, Hearing Examiner

Date