

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

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IN RE: : CASE NO. 04-0415-LOD
: (Formerly Case No. 04-0249-LOD)
:
PHILLIP A. SPITTLER : JANE S. ARATA, HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued October 20, 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 July 19, 2004, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent Phillip A. Spittler ("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 drug trafficking in 1996 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).

Anthony Siciliano, an Assistant Attorney General with the Executive Agencies Section of the Ohio Attorney General's Office, represented the Division at the hearing. Paul Hentemann represented Respondent at the hearing. At the hearing, State's Exhibits 1 through 8 and Respondent's Exhibits A through L were admitted into the record.

B. Jurisdiction and Procedural Matters.

The Division issued the NOH to Respondent on January 22, 2004. The Division served the NOH on Respondent by certified mail after the first attempt to do this failed. Respondent's hearing request was received by the Division on April 14, 2004, prior to the May 4, 2004 deadline stated on the hearing request form the Division sent to Respondent. The Division scheduled the hearing for April 27, 2004 and continued it indefinitely on its own motion. The hearing was then set for July 19, 2004. 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 Conviction for Drug Trafficking.

1. Respondent is an individual who seeks to conduct business in Ohio as a mortgage loan officer. (State's Exhibit 1.)
2. 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).
3. On March 18, 2002 and April 15, 2002, Respondent signed a Loan Officer License Application ("Application") which was then submitted to the Division. The Division received the Application on April 24, 2002. (State's Exhibit 1.)
4. 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.)

5. Respondent's March 18, 2002 signature on the Application is notarized. Directly above the applicant signature line Respondent signed on March 18, 2002, 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." (State's Exhibit 1.)
6. As part of the application process, the Division conducts a criminal background check of each applicant. R.C. 1322.031(B).
7. Respondent's background check revealed a possible conviction for drug trafficking in 1996. In response to the Division's inquiry, the Respondent submitted documents confirming the conviction. (State's Exhibits 2, 3, and 4.)
8. Respondent admitted that he was convicted of drug trafficking in 1996. Respondent explained the conviction in a letter he sent to the Division prior to the issuance of the NOH as follows:

On June 11th 1996, I was involved in a 36-car accident on route 90 (east bound) that almost took my life. Due to the facts I was wrongly accused of possession of marijuana. The case was very weak and in order for me to prove my innocence I had to give my attorney, who was not looking out for my best interest, \$9,000 to take it to trial. At the time of the accident I just started my company Great Lakes Technical, Inc. ... and could not afford to pay \$9,000 to prove my innocence. In the end, I was forced to plea Guilty but there were conditions to the plea. 1) That the felony would be expunged from my record two years after probation, as long as there were no further violations. My attorney was supposed to file for the expungement as soon as I was eligible (and he did not).

(State's Exhibit 4.)

9. The Respondent provided more information about the circumstances surrounding the conviction at the hearing. He was in a freeway accident that involved 36 vehicles. Respondent's motorcycle flipped over after hitting a bumper that fell off a box truck. Respondent was injured and taken to the emergency room for treatment. Respondent's wallet and other items in the fishnet on the back of Respondent's bike scattered during the accident. They were picked up by others who put them in a bag they thought was his. The bag contained drugs. Respondent identified his wallet and items at the hospital and was arrested. He testified that the drugs in the bag were not his. (TR at 18-22).
10. Respondent was just starting a business when he was charged with drug trafficking. He decided to plead guilty to the charge. (TR at 23-24).

11. Respondent, now 32 years old, has no other drug related convictions. (TR at 18, 32.)

D. Respondent's Failure to Disclose Conviction on Application.

12. The Respondent did not disclose the 1996 drug trafficking conviction on his Application. (State's Exhibit 1.)
13. He claimed that he did not disclose the conviction because he thought it had been expunged. (TR at 24, 36-37.)
14. Respondent's August 2, 2002 letter to the Division explained that: "As soon as I found out that the felony was not expunged I obtained legal counsel to [proceed] with the filing. In the end an attorney who was not looking out for my best interest represented me. My new attorney Paul Hentemann has filed for this to be expunged from my record on 04/01/02." (State's Exhibit 4.)
15. Mr. Hentemann, Respondent's counsel at the hearing, did not represent Respondent in the criminal matter. Respondent's Application for Expungement was filed on February 25, 2002. Mr. Hentemann signed the certificate of service on that pleading on February 20, 2002. Therefore, Respondent retained Mr. Hentemann to represent him in the expungement proceeding on or prior to February 20, 2002. Thus, by February 20, 2002, Respondent knew his conviction had not been expunged. (State's Exhibit 4.)
16. Respondent knew his conviction was on his record and not yet expunged before he signed his Application on March 18, 2002. (State's Exhibits 1 and 4.)
17. Respondent knew that he had a drug trafficking conviction that should have been disclosed on the Application and his explanations for not doing so were not credible to this Hearing Officer.

E. Respondent's Reputation and Character.

18. Respondent is now 32 years old. After his conviction, he operated a personnel company, and then began to work in the mortgage loan industry. He has over three years of experience as a loan officer. He has handled payroll, purchasing and consumer financial information without incident. Despite his conviction, Respondent testified that he has never engaged in drug trafficking, does not use drugs and does not have a drug problem. (TR at 24-31, 51-54.)

19. Respondent provided letters from his business partner, a title escrow officer, the regional manager of a lending company, and a co-worker, about his work and his character. They think highly of Respondent's character and describe him as professional, committed, organized, and honest. The letters also indicate that he does a good job of explaining the loan process to his customers. (Respondent's Exhibits A, C, D, E and L.) (Respondent's Exhibits D and E are nearly identical letters from the same person.)
20. Respondent provided letters from eight loan customers about their experiences with Respondent. They speak highly of Respondent's character and describe him as professional, knowledgeable, honest, trustworthy, and helpful. The letters also indicate that he does a good job of explaining the loan process to his customers. (Respondent's Exhibits B, F, G, H, I, J, and K.) (Respondent's Exhibits H and I are nearly identical letters from the same couple.)
21. The letters do not indicate whether any of the authors knew about Respondent's criminal background. Respondent identified the letters but none of the authors was available for cross-examination at the hearing. (Respondent's Exhibits A through L.)
22. Especially in a case involving a drug trafficking conviction that is not too far in the past, it is important for the Division to have an opportunity to cross-examine character witnesses and for the Hearing Examiner to be able to observe their demeanor. How well they know the Respondent and whether they know about his criminal conviction go to the weight given to their statements and opinions.
23. While the letters were admitted into the record, they were given less weight than they might have been given if the authors had testified regarding the bases for their opinions as well as been available for cross-examination. Thus, even in this proceeding to which the Rules of Evidence do not strictly apply, the letters were reviewed and given some weight but not the weight they might have been given if their authors had testified at the hearing.

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 was convicted of drug trafficking, an offense specifically referred to in R.C. 1322.031(A)(2) and 1322.041(A)(3).
4. Ohio Revised Code Section 1322.07(A) prohibits a loan officer license applicant from making any substantial misrepresentation in any license application.

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.
6. Respondent's response to Question 5 of the Application indicating that he did not have any criminal convictions when in fact he had a drug trafficking 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).
7. Respondent violated R.C. 1322.07(B) by omitting the statement regarding his drug trafficking conviction required to be in an application by R.C. 1322.031(A)(2).
8. Ohio Revised Code Section 1322.07(C) prohibits a loan officer license applicant from engaging in "conduct that constitutes improper, fraudulent, or dishonest dealings."
9. 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 when in fact he had a drug trafficking conviction.
10. 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 R.C. 1322.041(A)(2).
11. Once the drug trafficking 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).
12. Instead, the evidence established that he failed to disclose the drug trafficking conviction on his Application. Question 5 of the Application explicitly mandates disclosure of drug trafficking convictions without any limitation. The Respondent's failure to disclose the conviction as well as his lack of credibility when explaining this failure, preclude him from establishing that he is honest, truthful, and of good reputation. Therefore, despite favorable character reference letters, Respondent has not established the licensing prerequisites set forth in R.C. 1322.041(A)(3).
13. Respondent's failure to disclose the drug trafficking conviction on his Application shortly after he had filed his pending Application for Expungement, establishes 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 that the Superintendent of the Division of Financial Institutions refuse to issue Respondent a loan officer license pursuant to R.C. 1322.041 and R.C. 1322.10.

Respectfully submitted,

Janě Stempel Arata
Administrative Hearing Officer
October 20, 2004