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CASE NO. 05-0032-LOD

The hearing was held at the request of Respondent Douglas M. Hoover, of Newport, KY (hereinafter the "Respondent") to consider the Division's Notice of Intent to Deny Loan Officer License Application, Notice of Opportunity for a Hearing (hereinafter "NOH"). Said NOH was based upon an allegation that Respondent failed to disclose a past DUI criminal offense in his 2004 Loan Officer Application, and is thereby ineligible to obtain a license as a Mortgage Loan Officer. The Division appeared and was represented by the Ohio Attorney General's Office, Assistant Attorney General Martine Jean. Respondent appeared pro se.

At the hearing, State's Exhibits 1A through 1H, 2A, 3, 4A, 4B and 4C were admitted into the record, as discussed in the transcript (hereinafter "Tr."). Respondent's Exhibit A was admitted into the record. Respondent appeared as the sole witness. Because Respondent's character witness misunderstood his participation and did not remain to present sworn testimony, the record in this case was kept open until 5:00 PM, August 5, 2005, to allow Respondent time to submit a written statement from that same witness (Mills) (Tr. pp. 53-57.) which was received timely and admitted into the record as Respondent's Exhibit B, over the Division's objection. All documents were subject to the weight the hearing officer deemed appropriate to afford the documents.

B. JURISDICTION

Respondent filed a Loan Officer Application with the Division on November 24, 2004. The Division issued the NOH against Respondent on April 5, 2005. Respondent requested a hearing, which was received by the Division on May 3, 2005. On May 4, 2005, the Division scheduled the hearing for May 13, 2005, but continued the hearing to May 26, 2005, on its own motion. On May 20, 2005, Respondent sought a continuance which was granted to July 7, 2005. Due to the case being assigned to a new hearing officer, the hearing was, again, continued, to July 28, 2005, on which date the hearing went forward.

C. PROPOSED ISSUANCE OF ORDER TO DENY LICENSE APPLICATION

1. The Division is the state agency responsible for the licensing and regulation of Mortgage Loan Officers pursuant to O.R.C. Chapter 1322. (Exhibit A.)
2. Respondent is an individual who wishes to conduct business in Ohio as a Mortgage Loan Officer. (Exhibits 2A.)
3. On, or about, November 24, 2004, the Division received from Respondent a Loan Officer Application (hereinafter the "Application"). (Exhibit 2A.)
4. Respondent signed the Application on, or about, November 23, 2004. (Exhibit B.)
5. On, or around, April 7, 1997, Respondent was found guilty, in Kenton District (KY) Court, of Driving Under the Influence. (Exhibit 4B, 4C.)
6. Respondent's explanation of the 1997 DUI conviction was as follows: At the time of the arrest, Respondent was divorcing his

wife of seven years for infidelity. Respondent had driven with a friend to a Cincinnati event and was returning home when he was arrested. The other charges were dropped when the police determined Respondent was not at fault and Respondent pleaded to the DUI. Respondent admits his guilt. (Exhibit 4A; Tr. pp. 30-31.)

7. When Respondent submitted the Application, he responded "No" to Question 5: "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. (DUIs and DWIs are criminal offenses)." (Exhibit 2A.)
8. Respondent's explanation of why he responded "No" to Question 5 was that he was filling out the form in the Dayton offices of his future employer and he was in a hurry to complete the form to drive back down to Kentucky to pick up his baby daughter from the sitter before 5:30 PM. In his hurry, he did not read the end of the question wherein it was stated that "DUIs and DWIs are criminal offenses." (Exhibit 2A; Tr. pp. 24-28, 39-43.)
9. Respondent states that he knew that a background check would be conducted to determine if he had any criminal convictions and that he was not trying to keep the past DUI from being disclosed. (Tr. pp. 43-44.)
10. During the hearing, Respondent presented himself as credible by facial expressions, body language, tonal qualities and emotion.

II. CONCLUSIONS OF LAW

A. JURISDICTIONAL ISSUE

1. The Division procedurally complied with O.R.C. Chapter 119.

B. LICENSE APPLICATION

2. Respondent has been proven to have failed to have disclosed a criminal conviction on the Application.

3. The Division charged that 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.
4. The Division brought into question Respondent's character and general fitness to 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 by bringing forth evidence of Respondent's failure to disclose the 1997 DUI conviction on the Application.
5. Even accepting at face value Respondent's explanation of his response to Question 5, as it relates to the 1997 conviction, it demonstrates a lack of attention to detail. The Application specifically asks for any criminal convictions and includes DUIs. While it may be the case, as Respondent suggested, that a DUI conviction has no relevance to the license for which Respondent is applying, the Division, being charged to determine "general fitness to command the confidence of the public," has determined to examine an applicant's background.
6. Respondent knew that the Application was for the license to allow him to engage in the work he seeks. There was no overriding urgency expressed by Respondent which caused him to fill out the Application that particular day, even though to do so apparently dictated that he hurry to the degree necessary that he make the error of failing to read the entire question. One must wonder how seriously he considered the application process. If Respondent had taken the Application, completed it more carefully, and submitted it a few days later, it is possible that the Division would not have challenged the Application since disclosure of a seven year old DUI would not likely be justification for denial.
7. Filing an inaccurate Application is negatively demonstrative of an applicant's character and general fitness and of whether the business will be operated honestly and fairly in compliance with law, including the lack of attention to detail.
8. Respondent failed to provide sufficient evidence to overcome the Division's argument that Respondent's response to Question 5 demonstrates that 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.

9. The Division also charged violations of the Ohio Mortgage Broker Act sections 1322.07(A) (making any substantial misrepresentation in any registration or license application), (B) (making false or misleading statements of a material fact or omissions of statement required by state law) and (C) (engaging in conduct that constitutes improper, fraudulent, or dishonest dealings) all resulting from Respondent answering Question 5, on the Application, "No."
10. The only evidence in the record going to the question of violations of sections 1322.07(A), (B) and (C) was Exhibit 2A and opposing testamentary evidence by Respondent.
11. The testimony of Respondent that the error on the Application was an unintentional mistake was persuasive and unrefuted by the Division.
12. The argument that section 1322.07, O.R.C., requires only a finding that the act was committed dictates that the statute holds the applicant at fault for any error on the application. This argument does not account for the use of the words false, fraudulent, or misleading in the statute. Those terms have always denoted and connoted deliberative acts. One cannot deliberately mislead without intending to act in such a way as to mislead. Consequently, unless the Division proves, either directly or by inference, that the applicant intended to submit misleading or false information, there can be no finding of such. One cannot unintentionally commit a fraudulent act, by the very definition of the term.
13. The court in Webb v. State Med. Bd., 146 Ohio App. 3d 621, 628 (Ohio Ct. App. 10th Dist., 2001) noted that intent is required for a finding of fraud, misrepresentation, or deception when it observed "The trial court properly concluded that the Ohio medical board committed error when it adopted a conclusion of law that indicated that appellant's intent was irrelevant." See also Powell v. Administrator, 1984 Ohio App. LEXIS 10467 (Ohio Ct. App. 6th District, 1984), wherein the court stated that

A careful examination of the record fails to disclose substantial, credible evidence going to the specific intent to improperly secure unemployment benefits required to be proven under the definitions of false misrepresentation provided by the appellees. Rather, the evidence adduced below suggests that the appellant honestly believed that an individual was not self-employed unless he was receiving remuneration from such self-employment. *** Both of the definitions adopted by the appellees, *supra*, require


"knowledge" of the falsity on the part of the claimant. Once again, appellant's actions subsequent to receiving a profit from his arcade business negate any knowledge on his part that he was in fact self-employed.

14. Intent is required for a finding of any of the three provisions and the burden is on the Division to prove the violation of section 1322.07, O.R.C. The Division has not proven such intent. Consequently, it cannot be found that Respondent has violated sections 1322.07(A), (B) or (C), O.R.C.

III. RECOMMENDATION

Consequently, the recommendation to the Superintendent of Financial Institutions is to **DENY A MORTGAGE LOAN OFFICER'S LICENSE TO DOUGLAS M. HOOVER.**

Respectfully submitted,


D. Michael Quinn
Hearing Officer
December 7, 2005
Docket No. 05-DFI-071