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CASE NO. 05-0162-LOD

Issued October 2, 2006

The hearing was held at the request of Respondent Todd L. Dowell, of Pickerington, Ohio (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 criminal offense, 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 Mindy Worly. Respondent appeared and was represented by Sanjay Bhatt, Esq., of Columbus, Ohio.

At the December 1 hearing date, Respondent made a motion for a continuance in order to brief the question whether he should be allowed to withdraw his loan officer application (hereinafter the "Application"). The Division objected on the grounds that this was a second continuance request (the first was to hire counsel) and the request was being made untimely, in that the hearing was set to proceed at that time and the parties and reporter were all present. The motion was granted and a briefing schedule was established to allow each side an opportunity to locate any case law relating to whether an applicant had the right to withdraw his Application. Respondent's brief was, essentially, faxed to the hearing officer within the time limit, and, although the hard copy did not arrive timely, no harm was caused the Division in their response and was therefore accepted into the record. The Division's response was timely filed, both electronic and hard copy, and was accepted into the record. The decision was made at that time that the hearing would proceed and that the recommendation to the Division be that they must make a case-by-case decision on each request to withdraw an application. Respondent is correct that there is no statutory bar prohibiting withdrawal of an application by the applicant, but there is also no mandate to permit such a withdrawal. The test is recommended to be, according to the limited case law available, that the Division must determine whether it is appropriate and in the best interest of the public that the Division serves whether to allow an applicant to withdraw an application once it is filed.

At the hearing, State's Exhibits A through I were admitted into the record. Respondent did not offer documentary evidence, but relied on the Division's exhibits, as discussed in the transcript (hereinafter "Tr."). Respondent appeared as the sole witness.

B. JURISDICTION

Respondent filed a Loan Officer Application with the Division on January 10, 2005. The Division issued the NOH against Respondent on August 25, 2005. Respondent requested a hearing, which was received by the Division on August 31, 2005. On September 13, 2005, the Division scheduled the hearing for September 15, but continued the hearing to November 1, 2005, on its own motion. On October 28, 2005, the hearing was continued to December 1, 2005, at Respondent's request. On December 1, 2005, the hearing commenced, but was limited that day to Respondent's moving for another continuance in order to brief the question whether Respondent could withdraw his Application. The hearing was then ordered to be reconvened on December 21, 2005, at which time 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. (Exhibit A.)
3. On or about January 10, 2005, the Division received from Respondent a Loan Officer Application (hereinafter the "Application"). (Exhibit A.)
4. Respondent signed the Application before a notary on November 12, 2004. The Attestation reads, in part "... The answers are complete and true of my own knowledge." (Exhibit A.)
5. On, or about, January 5, 2000, 5 years prior to the submission of the Application, Respondent was convicted of Assault, a misdemeanor. (Exhibit C.)
6. Respondent's explanation of the 2000 conviction is: The week after Respondent's mother passed away, while he was out of the office arranging the funeral and handling the estate, Respondent received a call from an appraiser which his company worked with frequently. The appraiser stated to Respondent that a Mr. Linn, a loan officer supervised by Respondent, was threatening to quit sending business to the appraiser unless the appraiser increased the value of the home he was appraising. Respondent told Mr. Linn that practice was not acceptable and Mr. Linn became angry. When Respondent returned to the office the next day, Mr. Linn continued his hostile reaction and the two men exchanged some heated words. When Mr. Linn made disparaging remarks about Respondent's recently departed mother, Respondent shoved Mr. Linn, after which Mr. Linn called the police. Respondent notes that he thereafter quit his employment at that firm because Mr. Linn was the owner's nephew and was not disciplined after either the altercation or the conversation with the appraiser. (Exhibit C; Tr. pp. 43-48.)
7. Respondent appeared in Mayor's Court at least twice relating to the assault charge. Respondent initially appeared without counsel and entered a not guilty plea himself. Respondent retained counsel and subsequently changed the plea to No Contest. (Exhibit C.)

8. On the Application, Respondent answered "No" to Question 5 which asked: Have you ... ever been convicted of any criminal offense? ..." (emphasis in original) (Exhibit 1; Tr. p. 19.)
9. Respondent's explanation why he responded "No" to Question 5 was that he was unaware that his plea of No Contest resulted in a criminal conviction. Respondent believed that his criminal record was clean. The police did not place him under arrest and although he paid a fine he was never supplied a copy of any paperwork stating the outcome of the proceedings in Mayor's Court. (Tr. pp. 24-27, 29, 31, 36-39.)
10. Respondent was never incarcerated as a result of the assault conviction. Respondent paid a small fine and court costs. (Exhibit C; Tr. pp. 30-31.)
11. No evidence has been presented that Respondent has had any other criminal convictions.
12. Respondent presented no witnesses, or other evidence, whether Respondent was honest and truthful or a good reputation.
13. Respondent presented no witnesses, or other evidence, to corroborate Respondent's belief that the assault did not lead to a conviction or that he was surprised when it was turned up from the Division's investigation.

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 charged with a violation of sections 1322.041(A)(5) and 1322.07, O.R.C.
3. The Division has not charged Respondent with having a type of criminal conviction that would automatically require the Respondent to prove, by a preponderance of the evidence, that the Respondent'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." Sections 1322.041(A)(3) and (4), O.R.C.

4. 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.
5. 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 incorrect response to Question 5.
6. In eliciting evidence whether Respondent's activities since the offenses prove that the Respondent is honest and truthful, the Division demonstrated that, on or about November 12, 2004, Respondent signed an application under oath and, January 10, 2005, filed that application with a state agency – the Division – to obtain a license to engage in an occupation and that application contained inaccurate information, to wit: the "No" response to Question 5.
7. Filing an inaccurate Application is generally 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 being inattentive to detail when applying for a license for an occupation which is detail oriented.
8. Respondent was not able to negate the allegation that his activities show that he is not honest and truthful. Respondent did not provide sufficient evidence to overcome the Division's evidence, relating to his response to Question 5, questioning his general fitness to command the confidence of the public and the belief that the business will be operated honestly and fairly.
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 Division failed to demonstrate that Respondent's response to Question 5 was a substantial misrepresentation or a false or misleading omission or a fraudulent statement of a material fact required on the license application. The Division, while proving the answer to Question 5 was incorrect, presented no evidence that Respondent committed a deliberately deceptive act. Respondent submitted more persuasive evidence that the act was a mistake and, therefore, not deliberate. The Division has the burden of proof. Since definitions found in statute, case law and Black's Dictionary indicate that "false," "misleading" and "misrepresentation" require an intentional act, the Division has not met its burden.

C. DISCUSSION

The 2000 assault conviction is not sufficient to prohibit Respondent from receiving a loan officer's license. The description of the altercation indicates that Respondent was prohibiting a loan officer from artificially inflating the value of property in order to obtain a loan. This activity should be recognized and rewarded.

However, the Division has sufficiently raised the issue of his character and general fitness and, thus, the burden moves to Respondent to overcome the Division's evidence. Respondent did not present sufficient evidence to meet that burden and demonstrate, thereby that Respondent's general fitness does command the confidence of the public and there is the belief that the business will be operated honestly and fairly. Having had the police called, and having gone to court twice, it is hard to believe that he did not realize that he was being prosecuted criminally. Even though he may have thought that the No Contest plea was not the same as a conviction, he had to have heard the court pronounce the finding and the sentence. Further, and more importantly, it was incumbent on him, in this situation he experienced in Mayor's Court, to determine the correct response to the question on the Application prior to its submission, and he was on notice that it was something he needed to check into after having been through the court system.

III. RECOMMENDATION

Regarding the Motion Respondent made to withdraw the Application, the recommendation to the Division is that they must make a case-by-case decision on each request to withdraw an application, the test being that the Division must determine whether it is appropriate and in the best interest of the public that the Division serves whether to allow an applicant to withdraw an application once it is filed.. In this particular instance, the decision was already made by the Division and there do not appear any reasons for the hearing officer to recommend the Division reconsider its decision.

If the Division determines not to afford this respondent an opportunity to withdraw his Application, the recommendation to the Superintendent of Financial Institutions as a result of the hearing is to **DENY A MORTGAGE LOAN OFFICER'S LICENSE TO TODD L. DOWELL.**

Respectfully submitted,

D. Michael Quinn
Hearing Officer
October 2, 2006
Docket No. 05-DFI-154