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STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

IN RE: : CASE NO. 04-0262-LOD
: :
JOHN C. NOLL : JANE S. ARATA, HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued September 15, 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 June 1, 2004, at 77 South High Street, Columbus, Ohio. The hearing was requested by Respondent John C. Noll ("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 has past criminal convictions and violated R.C. 1322.07(A), (B) and (C) by failing to disclose those convictions 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 convictions 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 another offense involving theft, money, or securities again as required by R.C. 1322.04 1(A)(3); and
3. Respondent'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 the Ohio Mortgage Broker Act as required by R.C. 1322.041(A)(5).

Martine Jean, an Assistant Attorney General with the Executive Agencies Section of the Ohio Attorney General's Office, represented the Division at the hearing. Mark Rhea, an attorney with the Division, attended the hearing as the Division's representative and testified at the hearing. The Respondent did not appear and was not represented by counsel at the hearing. At the hearing, State's Exhibits 1 through 6, including State's Exhibits 5A through 5F, were admitted into the record.

B. Jurisdiction and Procedural Matters.

1. The Division issued the NOH to Respondent on February 12, 2004, and served it upon him by certified mail. (State's Exhibit 1; Hearing Transcript at 12-13.) (State's Exhibit 1 is comprised of several documents.) (References to pages of the Hearing Transcript will be abbreviated as "TR at {page(s)}".)
2. Respondent's hearing request was received by the Division on March 11, 2004. (State's Exhibit 1; TR at 13.)
3. The Division scheduled the hearing for March 22, 2004, and continued it indefinitely upon its own motion. On March 16, 2004, the Division sent a letter to Respondent notifying him of the date, time, and location of the hearing. The hearing was then set for April 29, 2004. On March 23, 2004, the Division sent a letter to Respondent notifying him of the new date, time, and location of the hearing. Respondent moved to continue the April 29, 2004 hearing and it was continued until June 1, 2004. On April 23, 2004, the Division sent a letter to Respondent, with the Order granting the continuance enclosed, notifying him of the new date, time, and location of the hearing. That letter and the Order were sent to both Respondent and his counsel. (State's Exhibit 1; TR at 13-14.)
4. The hearing was scheduled to start at 1:00 p.m. on June 1, 2004. Shortly after noon on that date, Respondent's counsel faxed a written Notice of Withdrawal of Application to the Division, the Division's counsel, and the Hearing Officer. (The Hearing Officer has marked this document as Exhibit A.) A telephone conference was held with the Division's counsel, Respondent's attorney, a Division attorney, and the Hearing Officer before the hearing. During that call, Respondent's counsel was informed that the Division wanted to proceed with the hearing since it did not accept the withdrawal of the Application. Respondent's counsel reiterated Respondent's position that no jurisdiction existed to do so and clarified that Respondent did not wish to ask for a continuance of the hearing. (TR at 6-7.) A briefing schedule was set for briefs on this issue. Several unopposed continuances were granted to the Division for its brief and the record was ultimately closed on August 20, 2004.
5. The hearing was held on the date and at the location set forth in the Division's April 23, 2004 letter and the enclosed Order. The hearing started twenty minutes after the scheduled time to allow for the telephone conference described above. (State's Exhibit 1; TR at 1, 5.)

6. 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 Criminal Convictions.

7. Respondent is an individual who sought to conduct business in Ohio as a mortgage loan officer. (State's Exhibit 2.)
8. 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).
9. On July 8, 2002, Respondent signed a Loan Officer Application ("Application") which was submitted to the Division. The Division received the Application on August 12, 2002. (State's Exhibit 2.)
10. 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 2.)

11. As part of the application process, the Division conducts a criminal background check of each applicant. R.C. 1322.031(B).
12. Respondent's background check revealed possible criminal convictions during and after 1990. In response to the Division's inquiry, the Respondent submitted certified court records confirming that he has three misdemeanor convictions for theft all stemming from an arrest on April 29, 1990, a conviction for attempted carrying of a concealed weapon in 1998, and a conviction for driving under the influence in 1998. (State's Exhibits 4 and 5A-5F; TR at 16-19.)
13. Respondent did not disclose any of his criminal convictions on his Application. (State's Exhibit 2.) The record contains no evidence indicating why Respondent failed to disclose the convictions on his Application.
14. Respondent's Notice of Withdrawal of Application is a written statement of Respondent's position in this matter. It states, in relevant part, that Respondent "has withdrawn his application for a loan officer license" and "no longer seeks a determination of his entitlement to a loan officer license under Ohio law." (Exhibit A.)

II. CONCLUSIONS OF LAW

A. Jurisdiction and Procedural Matters.

1. Ohio Revised Code Section 119.07 requires the Division to notify Respondent of his right to request a hearing. The Division's NOH properly notified the Respondent that he was entitled to request a hearing and was served upon him by certified mail. The Division has complied with the requirements set forth in R.C. 119.07 for notifying Respondent of his right to request a hearing.
2. Ohio Revised Code Section 119.07 also requires an agency to notify a party of the time, date, and place of the hearing once a date is set.
3. The Division complied with the notification of hearing requirement set forth in R.C. 119.07 by notifying the Respondent and his counsel of the date, time, and place for the hearing in this matter.
4. Once the Respondent filed his written notice withdrawing his Application and indicating that he no longer sought a determination of his entitlement to a loan officer license under Ohio law, a license could not be issued to him. Therefore, the Division has obtained all of the relief sought in its NOH.
5. Initially, the effect of the Respondent's written notice that he was withdrawing his Application on the Division's jurisdiction to hear this matter must be determined. This issue was recently addressed by Hearing Officer Kenneth Cookson in Nancy J. George, dba Ohio Mortgage Company, Division of Financial Institutions Case No. 04-0007-MBD (Report and Recommendation issued August 13, 2004)(Attached.) In that report, Hearing Officer Cookson recommended that the Division permit withdrawal of a mortgage broker license renewal application at any time for the following reasons:

First, there is no statutory or administrative authority, whether direct or implied, for the proposition that withdrawal should be denied. The Hearing Officer notes that the Division has issued no regulations with regard to the withdrawal of an application. By contrast, other agencies, including the Division of Securities, have issued regulations concerning the withdrawal of an application. See, generally Ohio Administrative Code 1301:6-3-151(K)(2). Second, the decision to file an application rests with the applicant and he/she should have a corresponding ability to withdraw the application. Third, until there has been a final decision, after notice and a hearing, there is no decision on the merits of an application. Fourth, it is a waste of scarce administrative resources to conduct a hearing, prepare a report, and commit the Superintendent to review that report when the applicant has expressed a clear and

unequivocal decision to withdraw. Finally, no party is prejudiced by a timely withdrawal.

Id. at 4.

6. The Division asserts that there are public policy reasons for it to retain jurisdiction and hold a hearing to determine that a license should be denied to the Respondent who does not want one. The Division has sought to keep the Respondent from becoming a licensed loan officer in Ohio and the Respondent now concedes that issue. To require someone who filed a license application over two years ago to remain embroiled in litigation over a license he no longer wants is not justified by any of the policy considerations espoused by the Division.
7. The Division's authority under the Mortgage Broker Act is extensive and goes beyond the authority to refuse to issue a license pursuant to R.C. 1322.10(A). The Division has, for example, the ability to issue cease and desist orders, impose fines, and seek injunctive relief. R.C. 1322.10(A)(1), (A)(2), (B), (C), and (D). Thus, it has other remedies available if it believes that the reasons for denying the license are so egregious as to warrant the continued pursuit of the Respondent. R.C. 1322.10(A)(1), (A)(2), (B), (C), and (D). These powers ensure that the Division's concern that issues that are part of the licensing process may evade review have an avenue for redress. Only denial of a license was sought by the Division in this matter. Thus, there is nothing left for the Hearing Officer to decide.
8. Considerations of efficiency and fairness, in addition to the reasons cited by Hearing Officer Cookson Nancy J. George, dba Ohio Mortgage Company, favor allowing the Respondent's written withdrawal of his application to end this matter and divest the Division of jurisdiction. Therefore, it is the recommendation of this Hearing Officer that the Division consider the Application withdrawn and in need of no further action.
9. The conclusions of law and analyses set forth below in Paragraphs 10 through 24 are advisory but are provided to address issues that may need to be resolved if the Division maintains that it has jurisdiction despite the Respondent's written statement indicating that he wants to withdraw his application and no longer seeks a loan officer license from the Division.

B. Loan Officer License Application.

10. 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.

11. Ohio Revised Code Section 1322.031(A)(2) requires a loan officer license applicant to include in his or her application a statement as to whether he or she has been convicted of or pleaded guilty to any criminal offense involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, or any criminal offense involving money or securities.
12. 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).

13. Respondent has three 1990 misdemeanor theft convictions and a 1998 conviction for attempted carrying of a concealed weapon.
14. Ohio Revised Code Section 1322.07(A) prohibits a loan officer license applicant from making any substantial misrepresentation in any license application.
15. 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.


16. Respondent's response to Question 5 of the Application, indicating that he did not have any criminal convictions when in fact he had several, 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).
17. Respondent violated R.C. 1322.07(B) by omitting the statement regarding his theft convictions, criminal offenses required to be disclosed in an application by R.C. 1322.031(A)(2).
18. Ohio Revised Code Section 1322.07(C) prohibits a loan officer license applicant from engaging in "conduct that constitutes improper, fraudulent, or dishonest dealings."
19. 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 several.
20. 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).
21. Once the first theft 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).
22. Instead, the evidence established other criminal convictions and that he failed to disclose his criminal convictions on his Application. The Respondent's unexplained failure to disclose the convictions precludes him from establishing that he is honest, truthful, and of good reputation. He also failed to prove by the preponderance of the evidence that there is no basis in fact for believing that he will commit the criminal offenses of which he was convicted again. Therefore, Respondent has not established the licensing prerequisites set forth in R.C. 1322.041(A)(3).
23. The "business of a loan officer shall be principally transacted at an office of an employing mortgage broker" registered with the Division pursuant to R.C. 1322.02(A). R.C. 1322.031(E)(1). After filing his Application, Respondent informed the Division that he did not want to pursue obtaining a license. This statement establishes that Respondent is not currently employed by or seeking employment with a registered mortgage broker as a licensed loan officer. Therefore, he cannot establish that a license issued to him would be used in compliance with R.C. 1322.031(E)(1).

24. Respondent's unexplained failure to disclose his criminal conviction on his Application 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. Respondent has not established that a license issued to him would be used in compliance with R.C. 1322.031(E)(1). Therefore, Respondent has not established the licensing prerequisites set forth in R.C. 1322.041(A)(5).

III. RECOMMENDATION

Initially, it is the recommendation of this Hearing Officer that the Superintendent of the Division of Financial Institutions consider the Application withdrawn and in need of no further action. If the Superintendent of the Division of Financial Institutions does not consider the Application withdrawn, it is recommended that he refuse to issue a loan officer license to Respondent pursuant to R.C. 1322.041 and 1322.10 because Respondent has not established the licensing prerequisites set forth in Ohio Revised Code Section 1322.041(A)(2), (3) and (5).

Respectfully submitted,


Jane Stempel Arata
Administrative Hearing Officer
September 15, 2004

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS
CONSUMER FINANCE

In re: Nancy J. George,
dba Ohio Mortgage Company

:

Case No. 04-0007-MBD

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

1. The Ohio Department of Commerce, Division of Financial Institutions ("Division"), proposes that the Certificate of Registration issued by the Division to Nancy J. George, dba Ohio Mortgage Company (the "Respondent") be denied for renewal. The Division determined that the Respondent violated Section 1322.052 of the Ohio Revised Code which requires every operations manager to have completed a minimum of six hours of approved continuing education during the prior year. Because of the failure of the Operations Manager to have completed the continuing education requirement in 2002, the Division asserts that the Respondent does not have the requisite character and general fitness to command the confidence of the public and to warrant the belief that the business will be conducted in compliance with the Ohio Mortgage Broker Act.

2. The Respondent's address is 4311 Ridge Road, Brooklyn, Ohio 44144.

3. This matter was initiated by the Superintendent of the Division by the issuance on January 16, 2004, of a Notice of Intent to Deny Mortgage Broker Certificate of Registration & Opportunity for Hearing. (Exhibit 2).

4. On January 26, 2004, the Respondent wrote to the Division requesting a hearing. (Exhibit 3).

5. On February 12, 2004, the Division wrote to the Respondent scheduling a Hearing for Tuesday, March 23, 2004, at 1:00 p.m. in Room 1908 of the Vern Riffe Center, 77 South High Street, Columbus, Ohio, 43215. (Exhibit 4).

6. On March 23, 2004, the Division wrote to Nate N. Malek, Esq., counsel for the Respondent, rescheduling the Hearing for 1:00 p.m. on Wednesday, May 5, 2004. (Exhibit 5).

7. On May 4, 2004, the Division wrote to Attorney Malek rescheduling the Hearing for 1:30 p.m. on Monday, June 28, 2004. (Exhibit 6). On June 28, 2004, Attorney Malek wrote to the Hearing Officer with copies to Assistant Ohio Attorney General Daniel P. Jones indicating that the Respondent's application had been withdrawn. (Exhibit 7).

8. On June 28, 2004, the Division wrote to Attorney Malek rescheduling the Hearing for 11:00 a.m. on Friday, July 2, 2004. (Exhibit 8).

9. The Hearing in this matter took place on Friday, July 2, 2004, beginning at 11:00 a.m. in Room 1918 of the Vern Riffe Center located at 77 S. High Street, Columbus, Ohio. Attending was Daniel P. Jones, Assistant Attorney General of Ohio in the Executive Agencies

Section. Appearing as a witness was Reine Roszak, of the Division. No one attended on behalf of the Respondent.

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

FINDINGS OF FACT

1. The Respondent is an individual doing business as Ohio Mortgage Company that holds an active Ohio Mortgage Broker Certificate of Registration. The Respondent's Mortgage Broker Certificate of Registration was scheduled to expire on April 3, 2003, and the Respondent filed an application to renew its Certificate prior to that date. (Exhibit 2).

2. On July 15, 2003, the Division wrote to the Respondent to indicate that the continuing education requirement for 2002 had not been met. (Exhibit 1).

3. There is no evidence in the Record on which the Hearing Officer can rely to demonstrate that the Respondent has completed the required minimum of six (6) hours of continuing education prior to the expiration of the deadline for calendar year 2002.

CONCLUSIONS OF LAW

1. Ohio Revised Code Section 1322.052 provides:

On or after January 1, 2002 each licensee . . . shall complete at least six hours of continuing education every calendar year. To fulfill this requirement, the six hours of continuing education must be offered in a course of program of study approved by the superintendent of financial institutions.

2. Ohio Revised Code Section 1322.041(B) provides that a loan officer license shall be renewed if the Superintendent of the Division finds that certain conditions are met, including:

. . . (2) On or after January 1, 2003, the loan officer has completed during the immediately preceding calendar year at least six hours of continuing education as required under Section 1322.52 of the Revised Code.

(3) The applicant meets the conditions set forth in Divisions (A)(2) to (5) of this division.

3. Ohio Revised Code Section 1322.041(A)(5) provides:

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.

4. Ohio Revised Code Section 1322.10(A) provides:

(A) After notice and opportunity for a hearing conducted in accordance with Chapter 119 of the Revised Code, the superintendent of financial institutions may do the following:

(1) Suspend, revoke, or refuse to issue or renew a certificate of registration or license if the superintendent finds either of the following:

(a) A violation of or failure to comply with any provision of sections 1322.01 to 1322.12 of the Revised Code or the rules adopted under those sections or any other law applicable to the business conducted under a certificate of registration;

(b) A conviction of or guilty plea to any criminal offense involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, or any criminal offense involving money or securities.

(2) Impose a fine of not more than one thousand dollars, for each day a violation of a law or rule is committed, repeated, or continued. If the registrant or license engages in a pattern of repeated violations of a law or rule, the superintendent may impose a fine of not more than two thousand dollars for each day the violation is committed, repeated, or continued. All fines collected pursuant to this division shall be paid to the treasurer of state to the credit of the consumer finance fund created in section 1321.21 of the Revised Code. In determining the amount of a fine to be imposed pursuant to this division, the superintendent shall consider all of the following:

(a) The seriousness of the violation;

(b) The registrant's or licensee's good faith efforts to prevent the violation;

(c) The registrant's or licensee's history regarding violations and compliance with division orders;

(d) The registrant's or licensee's financial resources;

(e) Any other matters the superintendent considers appropriate in enforcing section 1322.01 to 1322-12 of the Revised Code.

5. Ohio Revised Code Section 1322.10 provides that after notice and an opportunity for a hearing conducted in accordance with Chapter 119 of the Revised Code, the Superintendent of the Division may, among other things, refuse to renew a loan officer license or may impose such other sanctions as the Superintendent deems appropriate.

DISCUSSION

1. The Hearing Officer notes that the record contains a proposed Settlement Agreement that had been proposed at some point prior to the Hearing in this matter. However, the Hearing Officer has not reviewed the proposed Settlement Agreement and does not take it into account in any way in connection with this Report and Recommendation.

2. Initially, the Hearing Officer is presented with the issue of whether the withdrawal of the application by the Respondent defeats the Division's statutory authority to continue with the Hearing and ultimately to consider denial of the application to renew the Respondent's license. There are several foundations for the proposition that the Division should permit the withdrawal of an application at any time. First, there is no statutory or administrative authority, whether direct or implied, for the proposition that withdrawal should be denied. The Hearing Officer notes that the Division has issued no regulations with regard to the withdrawal of applications. By contrast, other agencies, including the Division of Securities, have issued regulations concerning the withdrawal of an application. See, generally Ohio Administrative Code 1301:6-3-151(K)(2). Second, the decision to file an application rests with the applicant and he/she should have a corresponding ability to withdraw the application. Third, until there has been a final decision, after notice and a hearing, there is no decision on the merits of an application. Fourth, it is a waste of scarce administrative resources to conduct a hearing, prepare a report, and commit the Superintendent to review that report when the applicant has expressed a clear and unequivocal decision to withdraw. Finally, no party is prejudiced by a timely withdrawal. The Division's counsel has not asserted that the Division will be adversely affected if the application is withdrawn. It will be the recommendation of this Hearing Officer that, in light of these factors, the Division should consider the application to have been withdrawn and that, therefore, the Division need not act on the renewal application filed by the Respondent.

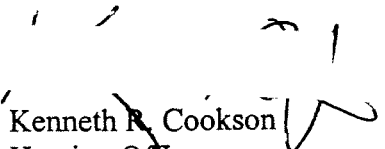
3. Hearing Officer notes that the Respondent did not appear at the hearing and there is, therefore, no factual record supporting the required burden of proof placed on the Respondent.

4. There is in the record sufficient evidence to show that the Respondent did not complete the requisite number of continuing education hours prior to her withdrawal of the Application.

RECOMMENDATION

Based on the findings of fact, conclusions of law, and discussion set forth herein, it is the recommendation of the Hearing Officer first that the Division deem the Respondent's application to have been withdrawn. Second, if the Division elects not to have treated the Application as withdrawn, it is the recommendation that the Division deny the renewal.

Respectfully submitted,


Kenneth R. Cookson
Hearing Officer
August 13, 2004