

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

2004 NOV 22 AM 8: 12

IN THE MATTER OF: : CASE NO. 04-0399-LOD
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:
Myles M. Moore : James J. Lawrence, Hearing Officer

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
November 19, 2004

I. FINDINGS OF FACT

A. Background

This matter came before James J. Lawrence, an attorney licensed to practice law in the state of Ohio and duly appointed by the Ohio Division of Financial Institutions (Division) to serve as Hearing Officer for this hearing in accordance with Ohio Revised Code (R.C.) Chapter 119, the Administrative Procedure Act. The hearing was held at 1:00 p.m. on October 26, 2004, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent Myles M. Moore (Respondent) to consider the allegations in the Division's Notice of Intent to Deny Loan Officer License Application and Notice of Opportunity for Hearing (NOH).

The Division alleges that Respondent was convicted of passing a bad check in 1983 and he failed to disclose that conviction on his loan officer application filed in June of 2004. Therefore, the Division asserts 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 a criminal conviction on his loan officer application filed in June of 2004;
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);

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).

Emily A. Smith, Assistant Attorney General, from the Executive Agencies Section of the Office of the Attorney General, represented the Division at the hearing. The Respondent appeared without counsel. At the hearing, State's Exhibits 1 through 6 and Respondent's Exhibits A through C were admitted into the record.

B. Jurisdiction and Procedural Matters

The Division issued the NOH to Respondent under date of August 24, 2004 and mail the NOH to the Respondent by certified mail, return receipt requested. (Exhibit 3.) The Division received the Respondent's hearing request on September 1, 2004. (Exhibit 4.) The Division scheduled the hearing for September 10, 2004 and, on its own motion, continued it to September 27, 2004. The hearing was continued at the Respondent's request to October 26, 2004. The Division sent notices of the hearings by ordinary mail to the same address to which it mailed the NOH. (Exhibits 5 & 6.)

C. Respondent's Loan Officer Application

1. The Respondent filed a loan officer application on June 16, 2004. (Exhibit 1.)
2. Question 5 of that application asked the following 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.
3. In response to Question 5, the Respondent answered "No." (Exhibit 1; TR at 18.)
4. Respondent signed the application on June 11, 2004 before a notary public. Directly above the applicant signature line, 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." (Exhibit 1.)

5. As part of the application process and pursuant to R.C. 1322.031 (B), the Division conducted a criminal background check which apparently revealed that the Respondent had been convicted of passing a bad check. In response to the Division's request, the Respondent submitted an explanation of the facts and circumstances which gave rise to the charge and a certified copy of the journal entry evidencing the disposition and sentence. (Exhibits 2 & A.)
6. The Journal Entry from the Cuyahoga Falls Municipal Court states that the Court convicted the Respondent of one count of passing a bad check in violation of R.C. 2913.11 on February 3, 1983, fined him \$150.00 plus costs and sentenced him to five days in jail with \$100.00 of the fine and all days in jail suspended. (Exhibit 2.)
7. The Respondent explained that he had not intended to write a check with insufficient funds. In December of 1980, he was separated from his spouse. He wrote the check from their joint account in the amount of \$15.52 on December 23, 1980 to a retail vender. Unknown to him, his spouse had closed the account. (TR at 18, 23.) He was unaware that the check did not clear until the Court notified him of the pending charge over two years later. He immediately appeared in court and, in a matter of ten minutes, he pled guilty, paid a fine and costs and left. (TR at 19, 24 - 25.)

D. Respondent's Failure to Disclose Conviction

1. The Respondent did not disclose the conviction for passing a bad check on his loan officer application. (Exhibit 1; TR at 18.)
2. The Respondent stated that he did not disclose the conviction because at the time that he completed the application, twenty-four years after the offense and twenty-one years after the conviction, he had forgotten about the incident. He stated that he did not intend to mislead the Division when he filled out the loan officer application. (TR at 37.)

E. Respondent's Reputation and Character.

1. The Respondent testified that he has been in the loan business since 1980. He has closed hundreds of loans. (TR at 27 - 28.) He has been honest and truthful with lenders and customers. (TR at 28 - 29.) To his knowledge, none of the loans that he has been involved with have defaulted, been charged off, or gone into foreclosure. (TR at 29 - 30.) He belongs to the

Bankers Association and Home Builders Association. He has an Ohio license to sell insurance which is inactive. He is active in his church and golf association. (TR at 31 -32.) The Respondent feels that he has operated in his career for the past 30 years with honest and integrity and has never done anything misleading. (TR at 33 - 34.)

2. Russell Iona, Branch Manager for Colony Mortgage, has known the Respondent for twenty years. Mr. Russell Iona testified that the Respondent is trustworthy. Mr. Iona recommended to the owner of Colony Mortgage that he appoint the Respondent the manager of its affiliate, Alternative Mortgage Services, Inc., because the Respondent is reputable and honest. (TR at 42 - 44.)
3. James Iona, a licensed real estate agent and broker and owner of JM Realty, has known the Respondent since 1982. Mr. James Iona testified that the Respondent's reputation in the community is that of a professional and reliable loan officer. If he were dishonest, Mr. Iona said that he would not send clients to him. However, he has referred 70 to 80 clients to the Respondent. (TR at 57 - 58.)
4. The Respondent also submitted letters from two other individuals including the Marketing Director of Alternative Mortgage Services, Inc. and the owner of a title company. Both attested to the Respondent's reputation for honesty. (Exhibits B & E.)

II. CONCLUSIONS OF LAW

A. Jurisdictional 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. R.C. 1322.031 (A) (2) requires that in an application for a license as a loan officer, an applicant must submit a statement as to whether the applicant 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.

3. R.C. 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 or 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.

4. R.C. 1322.07 provides:

No mortgage broker, registrant, licensee, or applicant for a certificate of registration or license under sections 1322.01 to 1322.07 of the Revised Code shall do any of the following:

(A) Obtain a certificate of registration or license through any false or fraudulent representation of a material fact or any omission of a material fact required by state law, or make any substantial misrepresentation in any registration or license application.

(B) Make any false or misleading statements of a material fact, omissions of statements required by state law, or false promises

regarding a material fact, through advertising or other means, or engage in a continued course of misrepresentations.

(C) Engage in conduct that constitutes improper, fraudulent, or dishonest dealings.

* * *

5. R.C. 1322.10 provides that after notice and opportunity for a hearing conducted in accordance with R.C. Chapter 119, the Superintendent may, among other things, refuse to issue a loan officer license if he finds a violation of or failure to comply with any provision of R.C. 1322.01 to 1322.12.

DISCUSSION

1. The Respondent was convicted in the Cuyahoga Falls Municipal Court of passing a bad check, a misdemeanor of the first degree.
2. R.C. 1322.041 provides, among other things, that since Respondent was convicted of passing a bad check, the Respondent must 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.
3. Since the conviction in 1983, the Respondent has worked over twenty years in the mortgage loan industry. By all accounts his reputation is good and he is honest and truthful. The Respondent's offense involved writing a check that was submitted to the bank after his spouse had closed the account. As such, it is an offense that is not likely to be repeated and has, in fact, not been repeated in the nearly twenty-four years since the Respondent wrote the check. The Respondent has shown by the 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.
4. The Division alleges that his conviction shows that the 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. However, the Respondent explained that the charge and conviction occurred because he did not know that his spouse had closed their joint account. The conviction arose out of an act of negligence and not out of an act of avarice.

or deception. This single incident, while it may have violated the Ohio Revised Code, does not, by itself, establish that the Respondent's character and general fitness do not command the confidence of the public. Nor does it, by itself, warrant the belief that he will not conduct himself as a loan officer honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act.

5. The Division alleges that the Respondent's failure to disclose the conviction on his loan officer application shows 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 the Ohio Mortgage Broker Act. However, the Respondent explained that he had forgotten about the conviction because of the intervening twenty plus years. As such, his failure to disclose the conviction in his response to question 5 may show that he did not pay enough attention to the application and did not give his responses adequate thought. It is doubtful that at the time that he completed the application, the Respondent believed that the \$50.00 fine for having a \$15.52 check returned for insufficient funds twenty-four years earlier would cause the Division to not give him a loan officer license. The facts show that the Respondent's failure to correctly answer question 5 on the application was not done with any intent to deceive the Division. Thus, the Respondent's incorrect answer to question 5 does not, by itself, establish that the Respondent's character and general fitness do not command the confidence of the public. Nor does it, by itself, warrant the belief that he will not conduct himself as a loan officer honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act.
6. When Respondent failed to disclose his conviction for passing a bad check on his loan officer application, he did violate R. C. 1322.07(A), in that he omitted a material fact required by state law from a license application.¹
7. Pursuant to R.C. 1322.10(A)(1) when an applicant for a loan officer license fails to comply with any provision of R.C. 1322.01 to 1322.12, the Superintendent may refuse to issue the loan officer license or impose a fine. The statute's use of the permissive word "may" means that the Superintendent is not required to take either action and may decide to take no formal disciplinary action. In deciding which action to take, the Superintendent should consider the facts and circumstances of the particular


¹ The Division alleges that the failure to disclose the conviction also violated R.C. 1322.07(B) and R.C. 1322.07(C). However, having found that the failure to disclose violated R.C. 1322.07(A), any further finding that the failure to disclose violated additional provisions of R.C. 1322.07 would make no difference to the outcome of this application for a loan officer license.

case and take the action that best serves the purposes of the Ohio Mortgage Broker Act. In this case, the facts show that the Respondent's violation of R.C. 1322.07 was an unintentional omission caused by the passage of time and the failure of memory and was not done with any attempt to deceive or mislead the Division. The purposes of the Ohio Mortgage Broker Act will be best served by issuing a loan officer license to the Respondent.

III. RECOMMENDATION

Based upon the particular facts and circumstances of this case, I respectfully recommend that the Superintendent of Financial Institutions issue a loan officer license to the Respondent pursuant to R.C. 1322.041(A) and R.C. 1322.10(A)(1)(a).

Respectfully Submitted,


James J. Lawrence
Hearing Officer
November 19, 2004