

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

In re: Jason I. Duncan

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Case No. 04-0127-L-001

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DIVISION OF FINANCIAL
INSTITUTIONS
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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 Loan Officer License Application of Jason I. Duncan not be granted. The Division conducted an investigation and found:

- a. In or around 2001, in the Court of Common Pleas of Cuyahoga County, Ohio, Mr. Duncan pleaded guilty to a charge of possession of drugs a felony.
- b. On or around February 18, 2003, Mr. Duncan attested in a sworn statement that the information he provided on a licensing application was truthful, knowing that the information he provided was false.
- c. On or around March 13, 2003, Mr. Duncan provided untruthful information to the Division.

2. As a result, the Division determined:

- a. Mr. Duncan'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 set forth in Revised Code Section 1322.041(A)(5);
- b. Mr. Duncan violated Revised Code Section 1322.07(A), which prohibits a loan officer applicant from "mak[ing] any substantial misrepresentation in any registration or license application";
- c. Mr. Duncan violated Revised Code Section 1322.07(B), which prohibits a loan officer applicant from "[m]ak[ing] false or misleading statements of a material fact, [or] omissions of statements required by state law"; and
- d. Mr. Duncan violated Revised Code Section 1322.07(C), which prohibits a loan officer applicant from "[e]ngag[ing] in conduct that constitutes improper, fraudulent, or dishonest dealings.

3. Mr. Duncan's address for service is 3606 Library Road, Cleveland, Ohio 44109. He is hereinafter referred to as the "Respondent." The Respondent is employed by Custom Home Loans, Inc., 25300 Lorain Road, Suite 4E, North Olmsted, Ohio, 44070.

4. This matter was initiated by the Superintendent of the Division by the issuance on January 22, 2004, of a Notice of Intent to Deny Loan Officer Application & Notice of Opportunity for a Hearing, together with a covering letter (Exhibit 6).

5. The Respondent signed a certified mail receipt for that document. (Exhibit 6).

6. Subsequently, the Division received a Hearing Request Form from the Respondent. (Exhibit 7).

7. On February 17, 2004, the Division wrote to the Respondent acknowledging receipt of the Request for Hearing and scheduling the Hearing for 9:00 a.m. on February 24, 2004. The hearing was simultaneously continued on the Motion of the Division until March 22, 2004, at 1:00 p.m. in Room 1908 of the Vern Riffe Center, 77 S. High Street, Columbus, Ohio. (Exhibit 8).

8. The Hearing was held on March 22, 2004, beginning at 1:00 p.m. in Room 1908 of the Vern Riffe Center. Attending were Anthony D. Siciliano, Assistant Attorney General of Ohio in the Executive Agencies Section, and the Respondent, *pro se*.

9. 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. On February 18, 2003, the Respondent signed a Loan Officer Application (the "Application") under the provisions of the Ohio Mortgage Broker Act, Ohio Revised Code Section 1322. (Exhibit 1).

2. Question 5 of the Application provides:

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?

Yes ☐ No ☐

If yes, furnish details.

3. In response to Question 5, the Respondent answered "No" (*Id.*).

4. As part of the Application, the Respondent signed a National Background Check consent. (Exhibit 1).

5. Following the submission of the Application, the Division received the report of the National Background Check which disclosed a May, 2000 arrest in Cleveland for violation of drug laws and a May 17, 2001, arrest in Cuyahoga County for drug abuse. (Exhibit 2).

6. On April 17, 2003, the Division wrote to the Respondent indicating that the Division was unable to make a decision as to whether to issue a license because of insufficient evidence. (Exhibit 3). That letter recited the 2000 and 2001 arrests and requested that the Respondent provide detailed information of the facts and circumstances of each arrest as well as copies of the journal entries from the applicable courts. (*Id.*).

7. In response to that letter, the Respondent submitted a certified copy of the Journal Entry from the Cuyahoga County Court of Common Pleas indicating that the Respondent was given treatment in lieu of conviction pursuant to Revised Code Section 2951.041, and that the criminal proceedings were stayed for a period of one year. (Exhibit 4).

8. The last page of the records from the Cuyahoga County Court of Common Pleas indicates that on April 4, 2003, on the motion of the Respondent, an expungement of his criminal conviction was granted and that there was no opposition to that motion from the State of Ohio. (Exhibit 4).

9. The Hearing Officer notes for the record that the Respondent filed a License Transfer Application on or about December 8, 2003, is listed in Exhibit 5.

CONCLUSIONS OF LAW

1. Ohio Revised Code Section 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 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.

2. Ohio Revised Code Section 1322.041(A) provides that the Superintendent of the Division shall issue a Loan Officer License if the Superintendent finds that certain conditions are met including:

(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 Section 1322.01 to 1322.12 of the Revised Code.

3. Ohio Revised Code Section 1322.07 provides in relevant part:

No Mortgage broker, registrant, licensee or applicant for a certificate of registration or license under Sections 1322.01 to 1322.12 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 misrepresentations in any registration or license application;
- (B) Make 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[.]

....

4. The Division has the burden to show that the Respondent's character and fitness do not command the confidence of the public and warrant the belief that the business will be operated fairly and in compliance with the purposes of the Ohio Mortgage Broker Act as well as the burden of showing the violations of Section 1322.07(A), (B) and (C).

DISCUSSION

1. The Respondent submitted two exhibits at the Hearing. Respondent's Exhibit A is a Journal Entry from the Cuyahoga County Court of Common Pleas indicating that the Respondent had successfully completed the early intervention program and that the "case is dismissed". That entry was dated October 24, 2002. Also submitted by the Respondent was Respondent's Exhibit 4 which is an Order of Expungement which was dated as of May 2, 2003.

2. At the time of filling out the Application, the Respondent talked to Sarah Dowd, his Probation Officer. (Tr. 15). She reportedly told the Respondent that "this is not a conviction and you will not have anything on your record because you completed the program, and upon completion of the program the case is dismissed." (Tr. 15-16).

3. At the time of the hearing in this matter, the Respondent was thirty years old. At the time of his involvement with the criminal justice system, he was twenty-seven years old.

4. The arrest for drugs involved the Respondent's employment as a waiter. While on break, while working at a restaurant in the Flats in Cleveland, dressed in Tuxedo attire, police searched a co-worker and found cocaine in his pocket. (Tr. 17-18). The police apparently believed that the co-worker and the Respondent were involved in drug activity together. (Tr. 18).

5. The Respondent has a disadvantaged background. (Tr. 19). He initially dropped out of high school but later attended Cuyahoga Community College where he received his G.E.D. (Tr. 19). He has been continuously employed all his life including jobs as a car salesman and currency broker. (*Id.*). He was employed by Total Mortgage almost a year and then went to Custom Home Loans while awaiting the decision on the issuance of this license.

(Tr. 20-21). He is engaged to be married and has two children. (Tr. 21). He works trying to mentor young people. (Tr. 22). The Respondent has never had a customer complaint about his work in the mortgage industry. (Tr. 22-23). Other than this drug episode, the Respondent has had no involvement with the criminal justice system other than tickets for speeding, red lights and a recent arrest for drunken driving. (Tr. 23-24).

6. In focusing on the answer to Question 5, the Respondent stated that he was under the impression from his lawyer, the prosecutor, the probation officer, and the judge, that upon completion of the drug intervention program the case would be dismissed. (Tr. 26).

7. The Application was signed by the Respondent on February 18, 2003. At that time, the criminal drug case against the Defendant had been dismissed. It was dismissed as of October 30, 2002, more than three and one-half months prior to the date of execution of the Application.

8. The entire body of Ohio law must be given effect by the Division, and this Hearing Officer. As of the date of the Application, the Respondent had not been convicted of any criminal offense; the case was dismissed. (Exhibit 4, Respondent's Exhibit A). Ohio Revised Code Section 2951.041 uses specifically the term "dismissed". A dismissal is not a criminal conviction. To hold otherwise would be to obviate the clear language of the General Assembly when it enacted the Treatment in Lieu of Conviction procedure.

9. In this instance, the Division is relying on the portion of Question 5 that asks whether an applicant has "pleaded guilty to any criminal offense". That entry of a plea was, by virtue of the completion of the intervention and the entry of a dismissal, nullified. That is the procedure by which the Treatment in Lieu of Conviction statutory mechanism works. Indeed, in Respondent's Exhibit B is an Order to Seal the Records. The Court specifically found, on February 10, 2004, that the Respondent "was found not guilty in the case or the complaint, indictment or information and the case was dismissed" For legal purposes, the Journal Entry which is in Respondent's Exhibit A is an order of dismissal.

10. The Hearing Officer acknowledges that an Expungement order was entered in this matter but was dated following the submission of the Application.

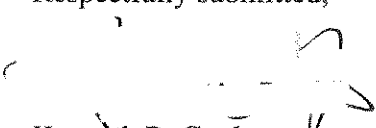
11. Even assuming that the Respondent was convicted of a drug offense, the Hearing Officer, after having an opportunity personally to observe the demeanor of the Respondent and hear the testimony as presented at the hearing in this matter, determines that the Division has not met its burden to show that the Respondent's character and general fitness does 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. The evidence presented by the Respondent, showing his work record, educational development, involvement in the community and involvement with his family are strong evidence in support of the granting of a license here.

12. Finally, the Hearing Officer determines that the Respondent did not violate Ohio Revised Code Section 1322.07(A), (B) or (C) because the statement made in response to Question 5 as a matter of law was an accurate statement. As of the date of the execution of the Application, the criminal offense charge of drug trafficking against the Respondent had been dismissed.

RECOMMENDATION

Based on the above findings of fact, conclusions of law, and discussion set forth herein, it is the recommendation of the Hearing Officer that the Superintendent of the Division grant a Loan Officer License to the Respondent.

Respectfully submitted,


Kenneth R. Cookson ✓
Hearing Officer
May/7, 2004