

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS

2004 JUN 10 AM 9:05

IN RE: : CASE NO. 04-0272-LOD
: :
DAVID M. VASUTA : JANE S. ARATA, HEARING OFFICER

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
Issued June 9, 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 May 6, 2004, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent David M. Vasuta ("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 was convicted of petty theft in 1979 and violated R.C. 1322.07(A), (B) and (C) by failing to disclose that conviction 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 conviction 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 such an offense again as required by R.C. 1322.041(A)(3); and
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).

Martine Jean, an Assistant Attorney General with the Executive Agencies Section of the Ohio Attorney General's Office, represented the Division at the hearing. James Vargo represented Respondent at the hearing. At the hearing, State's Exhibits 1, 1B, 2, 3A, 3B, 3C, 3D, 5, 6 and 7 and Respondent's Exhibits A, B and C were admitted into the record. (Exhibits marked as State's Exhibit 1A and State's Exhibit 4 were not used in this hearing.)

B. Jurisdiction and Procedural Matters.

The Division issued the NOH to Respondent on March 5, 2004. Respondent's hearing request was received by the Division on March 10, 2004. The Division scheduled the hearing for March 22, 2004, and continued it until May 6, 2004. The Respondent received the NOH by certified mail and received written notice of the date, time, and location of hearing.

C. Respondent's Loan Officer Application and Conviction for Petty Theft.

1. Respondent is an individual who seeks to conduct business in Ohio as a mortgage loan officer. (State's Exhibit 1.) (References to pages of the Hearing Transcript will be abbreviated as "TR at {page(s)}".)
2. 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).
3. On November 4, 2003, Respondent signed a Loan Officer Application ("Application") which was then submitted to the Division. (State's Exhibit 1.)
4. 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 **any criminal offense**? Exclude minor misdemeanor traffic and parking offenses. (DUIs and DWI's are criminal offenses.)

(Application, State's Exhibit 1, emphasis and boldface type in original; TR at 14.)

5. Respondent's signature on the Application is notarized. 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." (State's Exhibit 1.)

6. As part of the application process, the Division conducts a criminal background check of each applicant. R.C. 1322.031(B).
7. Respondent's background check revealed a possible conviction for petty theft in 1979. In response to the Division's inquiry, the Respondent submitted certified copies of Rocky River Municipal Court records confirming the conviction. (State's Exhibits 1B, 2, 3A, 3B, 3C, and 3D.)
8. Respondent admitted that he was convicted of petty theft in 1979. Respondent explained the conviction in a letter he sent to the Division prior to the issuance of the NOH as follows:

On September 21, 1979, a friend and myself decided to play a practical joke on a guy that was the butt of practical jokes in the neighborhood. We decided to replace his front license plate on his car with a goof plate. We decided to do it while he was at work at the Great Northern Mall in North Olmstead, Ohio. We found the car in the parking lot and removed the front plate only to see mall security coming down the aisle, so we jumped in my friends' car and drove off. Two police cruisers stopped us before we exited the shopping mall parking lot. They took us to North Olmstead jail while they found the owner. Turns out the joke was on us – it was someone else's car. We were released on \$1000 personal bond until our hearing. We obtained legal counsel and the charges were reduced to petty theft a misdemeanor for which, we pleaded no contest. I made the choice to play a joke, which resulted in an illegal act for which I'm ashamed and accept responsibility. I pleaded guilty, learned a valuable lesson and have been a model citizen since.

(State's Exhibit 3A; TR at 17-20.)

9. Respondent, now 47 years old, has no other criminal convictions. (TR at 30-31.)
- D. Respondent's Failure to Disclose Conviction on Application.**
10. The Respondent did not disclose the 1979 petty theft conviction on his Application. (State's Exhibit 1; TR at 14.)

11. He explained why he did not disclose the conviction as follows:

Part of the agreement was that if we remained free of violations for 2 years our records would be expunged. I assumed this was done and never thought about the incident since I had many background checks throughout the years with never a mention of this. Because I believed it was expunged I never listed it when asked if I was ever charged or convicted of a crime. The clerk of courts advised me that it was not done since we were able to find the journal entry. My intent was never to lie or hide the facts. I truly believed my file was sealed and I had a clean record.

(State's Exhibit 3A.)

12. Respondent testified that the agreement he referred to in his letter was made through the court. The judge told him that the conviction was eligible to be expunged if he did not have any legal problems in the next two years. Respondent discussed the expungement with his counsel before he decided to accept the plea agreement. He paid his attorney for a package of services that included representing him in the criminal proceedings and getting the conviction expunged. He trusted his attorney and believed that the conviction had been expunged twenty-two years ago. He has applied for other jobs with criminal background checks and it has not shown up. Thus, he believed that he had no criminal conviction on his record and could honestly answer Question 5 in the negative. He thought he had nothing to disclose on the Application. (TR at 25-25, 28-30.)
13. The Hearing Officer finds that the Respondent answered Question 5 honestly based upon his understanding of the circumstances surrounding the 1979 conviction. He did not try to hide the conviction from the Division or make any statement that he thought or knew was false on the Application. The Respondent did not omit any information that he thought or knew he should disclose from his Application. Respondent simply believed what his counsel told him - that he (the attorney) would take care of having the conviction expunged.
14. Respondent's trust in a member of the legal profession is commendable and reasonable under the circumstances. Unfortunately, he did not receive what he expected and this is not a negative reflection upon him.

E. Respondent's Reputation and Character.

15. During the past twenty-four years, Respondent has worked as a foreign real estate salesperson, an automotive service manager, and a fitness club manager. He also spent fifteen years investing in real estate, rehabilitating properties and managing his own rental properties. For the past six months, he has been employed by Main Street Financial where he works as a construction consultant and assists with property management. He seeks a license to work as a loan officer with Bridge Mortgage Investments a d.b.a. of Main Street Financial. He has extensive experience working with the public on a daily basis. His work history is solid and there is no indication that he is not trustworthy. (TR at 31-35, 47.)
16. Respondent provided affidavits from two individuals familiar with his reputation in the community and his work. Christine Venesile has known Respondent since 1998. Respondent has provided her with mortgage services, assisted her with investment properties, and performed maintenance work on investment properties and her residence. She stated that Respondent is honest, trustworthy, and can be counted on to complete work on time. (Respondent's Exhibit A.)
17. Harry House has known Respondent since the fall of 2003. Respondent has worked with Mr. House almost on a daily basis since then. Respondent assists Mr. House with the financial aspects of commercial real estate. Mr. House stated that Respondent is honest, trustworthy and knowledgeable about real estate financing, appraisals and repair costs. (Respondent's Exhibit B; TR at 38.)
18. The two affidavits were identified by the Respondent at the hearing. The affiants were not present at the hearing. Thus, even in this proceeding to which the Rules of Evidence do not strictly apply, Respondent's Exhibits A and B were considered but afforded less weight than they would have been if the respective authors had been available for cross examination.
19. Respondent submitted a letter from William James in support of his Application. Mr. James, who holds and has held management positions with the Ohio Association of Mortgage Brokers, submitted the letter to the Division in his individual capacity. Mr. James does not know the Respondent personally and has only had contact with Respondent after the NOH was issued. (Respondent's Exhibit C; TR at 39-40.) While his efforts and letter are appreciated, the statements in his letter were not relied upon by the Hearing Officer in this matter.

II. CONCLUSIONS OF LAW

A. Jurisdiction 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. 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.
2. 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).

3. Respondent was convicted of petty theft in 1979.
4. Ohio Revised Code Section 1322.07(A) prohibits a loan officer license applicant from making any substantial misrepresentation in any license application. The Respondent did not make a substantial misrepresentation when he responded to Question 5 on the Application. He believed that his 1979 petty theft conviction

had been expunged and did not need to be disclosed. He answered Question 5 truthfully based upon his understanding of the 1979 incident. More importantly, the failure to disclose this 1979 conviction for petty theft based upon a license plate prank is not a substantial misrepresentation for the purposes of this licensing process over twenty-four years later.

5. Ohio Revised Code Section 1322.07(B) prohibits a loan officer license applicant from making false or misleading statements of a material fact. The Respondent did not make a false or misleading statement of a material fact when he responded to Question 5 on the Application. He believed that he no longer had a criminal conviction for theft on his record and answered truthfully based upon his understanding of the 1979 incident. The failure to disclose this 1979 petty theft conviction based upon a license plate prank is not a material fact for the purposes of this licensing process over twenty-four years later.
6. Ohio Revised Code Section 1322.07(B) prohibits a loan officer license applicant from omitting statements required by state law. 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. That Section requires a petty theft conviction to be disclosed on an application for a loan officer license. To "omit" one must on some conscious level be aware of information and decide not to include it. The Respondent did not omit any information that he thought or knew he should disclose from his Application. He simply did not know that his criminal conviction for petty theft had not been expunged and answered truthfully based upon his understanding of the events surrounding the 1979 incident. Therefore, the Respondent did not violate R.C. 1322.07(B) by omitting a statement required by state law from his Application.
7. Ohio Revised Code Section 1322.07(C) prohibits a loan officer license applicant from engaging in "improper, fraudulent, or dishonest dealings." Respondent believed that the petty theft conviction had been expunged when it had not. He answered Question 5 truthfully based upon his understanding of the events surrounding the 1979 incident. These activities alone do not amount to engaging in "improper, fraudulent, or dishonest dealings" for the purposes of R.C. 1322.07(C).
8. There is no basis for establishing any violations of R.C. 1322.07(A), (B) or (C) by the Respondent.
9. The Division, having failed to establish any violation of R.C. 1322.07(A), (B), or (C), has likewise not established any lack of compliance with R.C. 1322.01 through 1322.12 of the Revised Code. Therefore, the record only supports a

conclusion that Respondent complies with R.C. 1322.01 through 1322.12 and meets that condition required for licensure by 1322.041(A)(2).

10. Once the 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). Respondent's testimony and the affidavits submitted establish that he is honest, truthful, and of good reputation and that there is no basis in fact for believing that he will commit such an offense again. Twenty-four years have passed without incident. That alone indicates that this was simply a youthful transgression. Respondent has established the licensing prerequisites set forth in R.C. 1322.041(A)(3).
11. An antiquated conviction and the mistaken belief that it had been expunged, do not prove that the Respondent is not fit to work as a loan officer. The evidence submitted establishes that Respondent'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 Ohio's Mortgage Broker Act as required by R.C. 1322.041(A)(5).

III. RECOMMENDATION

The Respondent has established the licensing prerequisites set forth in Ohio Revised Code Section 1322.041(A)(2), (3), and (5). Therefore, I respectfully recommend that the Superintendent of the Division of Financial Institutions issue Respondent a loan officer license pursuant to R.C. 1322.041.

Respectfully submitted,

Jane Stempel Arata
Administrative Hearing Officer
June 9, 2004