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

In re: Zachary Dziak

:

Case No. 04-0373-LOD

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 Zachary Dziak not be granted. The Division conducted an investigation and found:

- a. In or around 2000, in the Oberlin Municipal Court, Lorain County, Ohio, Mr. Dziak was convicted of assault, a misdemeanor of the first degree;
- b. On or around December 11, 2003, Mr. Dziak attested in a sworn statement that information he provided about his criminal background on his loan officer license application was complete and truthful, when it was not.
- c. On or around December 17, 2003, in an attempt to obtain his loan officer license, Mr. Dziak provided untruthful information about his criminal background to the Division.

2. As a result, the Division determined:

- a. Mr. Dziak's actions, as listed in sub-paragraph 1.a above, show 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 as provided in Revised Code Section 1322.041(A)(5);
- b. Mr. Dziak's actions, as listed in sub-paragraph 1.b above show 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 as set forth in Revised Code Section 1322.041(A)(5);
- c. Mr. Dziak's actions, as listed in sub-paragraph 1.c above, show 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 as set forth in Revised Code Section 1322.041(A)(5);
- d. Mr. Dziak's actions, as listed in sub-paragraph 1.b above, violated Revised Code 1322.07(A) which prohibits a loan officer applicant from "mak[ing]

any substantial misrepresentation in any registration or license application[.]”.

- e. Mr. Dziak’s actions, as listed in sub-paragraph 1.c above, violated Revised Code 1322.07(A) which prohibits a loan officer applicant from “mak[ing] any substantial misrepresentation in any registration or license application[.]”.
- f. Mr. Dziak’s actions, as listed in sub-paragraph 1.b above, violated Revised Code 1322.07(B) which prohibits a loan officer applicant from “mak[ing] false or misleading statements of a material fact, [or] omissions of statement required by state law[.]”
- g. Mr. Dziak’s actions, as listed in sub-paragraph 1.c above, violated Revised Code 1322.07(B) which prohibits a loan officer applicant from “mak[ing] false or misleading statements of a material fact, [or] omissions of statement required by state law[.]”
- h. Mr. Dziak’s actions, as listed in sub-paragraph 1.b above, violated Revised Code 1322.07(C) which prohibits a loan officer applicant from “[e]ngage[ing] in conduct that constitutes improper, fraudulent, or dishonest dealings.”
- i. Mr. Dziak’s actions, as listed in sub-paragraph 1.c above, violated Revised Code 1322.07(C) which prohibits a loan officer applicant from “[e]ngage[ing] in conduct that constitutes improper, fraudulent, or dishonest dealings.”

3. Mr. Dziak’s address for service is 424 Berry Ridge Drive, Amherst, Ohio 44001. He is hereinafter referred to as the “Respondent.” The Respondent was, at the time of the submission of the Loan Officer License Application, employed by United Mortgage Group, Inc., 7271 Engle Road, Suite 200, Middleburg Heights, Ohio, 44130. (Exhibit 4B).

4. This matter was initiated by the Superintendent of the Division by the issuance on May 14, 2004, of a Notice of Intent to Deny Loan Officer License Application & Notice of Opportunity for a Hearing. (Exhibit 4B).

5. The Respondent signed a certified mail receipt for that document. (Exhibit 4C).

6. Thereafter, the Division received a Hearing Request Form from the Respondent (Exhibit 5).

7. On June 16, 2004, the Division wrote to the Respondent scheduling a hearing in this matter for Friday, July 16, 2004, at 1:00 p.m. in Room 1924 of the Vern Riffe Center, 77 South High Street, Columbus, Ohio, 43215. (Exhibit 6).

8. The Hearing took place beginning at 1:10 p.m. on Friday, July 16, 2004, in Room 1928 of the Vern Riffe Center, 77 South High Street, Columbus, Ohio. Attending were Martine

Jean, Assistant Attorney General of Ohio in the Executive Agencies Section and the Respondent. Appearing as witnesses were Gary King and Carla King.

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 December 11, 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 **any criminal offense?** Exclude minor traffic and parking offenses. (DUIs and DWI's are criminal offenses.)

Yes ☐ No ☐

If yes, submit a detailed explanation of the facts and circumstances which gave rise to each charge and a certified copy of the journal entry evidencing the disposition of each charge.

3. In response to Question 5, the Respondent answered "No".

4. On January 29, 2004, the Division wrote to the Respondent seeking a detailed explanation of the facts and circumstances as well as a certified copy of the judgment entry for a charge of assault filed against the Respondent in 2000. (Exhibit 2).

5. In response to that letter, the Respondent submitted a written explanation as follows:

This is in reference to the misdemeanor received by Zachary L. Dziak.

This took place on 07/02/2000.

As you can see in the journal remarks after the judge listened to the(sic) me, the court had to find me guilty because of my plea of no contest. But because of the extenuating circumstances, the judge suspended the 180 days sentence and cut the fine in half. He placed me on good behavior for 2 years. This has been my only run-in with the law.

The plaintiff had previously physically assaulted my female friend, and when the plaintiff walked into the restaurant where we were seated, she became extremely fearful for her physical well-being. The plaintiff and I went into the restroom and words were exchanged. Our tempers got the

best of us and an altercation took place. I let it go, but the plaintiff pressed charges against me. I now know that it was a stupid thing to do, however I was immature at the time and felt that I was protecting my friend so that he would not hurt her again. I now realize (4 years later) that this could have been handled in a different fashion. I guess with age comes maturity.

I did not put this on my application, because I was told that I only had to disclose felonies and my charge was a misdemeanor. If I had known that this should have been listed, I would have done so. I was not trying to hide anything. (Exhibit 3A).

6. The Respondent also submitted a copy of the Oberlin Municipal Court Traffic/Criminal Docket indicating that on August 16, 2000, the Respondent entered a plea of no contest to a misdemeanor assault charge. (Exhibit 3B).

7. Thereafter, on May 14, 2004, the Division wrote to the Respondent indicating that the Division intended to deny the Application unless a timely request for a Hearing was filed. (Exhibit 4A).

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 honestly and fairly 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. At the outset of the hearing, the Respondent indicated that he wished to withdraw the application. *See* Transcript 8-9.

2. The Hearing Officer is therefore 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. There are several foundations for the proposition that the Division should permit the withdrawal of the Application at any time. First, there is no statutory or administrative authority, whether direct or implied, for the proposition that the 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 applications. *See, generally* Ohio Administrative Code 1301:6-3-151(K)(2). Second, the decision to file an application rests with an applicant and he/she should have a corresponding ability to withdraw an 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 an 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 Application.

3. Assuming that the Division wishes to proceed to the merits of this matter, the Hearing Officer continues with his Report and Recommendation. The Respondent, at the time of the hearing in this matter, was a 24 year old man. The Respondent was twenty years old at the time of the criminal arrest. (Tr. 37). He is employed at May Credit in Customer Service. (Tr. 14-15). He has worked there a little over 90 days. (Tr. 15). Prior to that he worked at United Mortgage Group for a few months. (Tr. 15). The Respondent is also considering starting a business with his father. (Tr. 16). The Respondent, prior to answering Question 5 of the

Application, asked a few people about that question. (Tr. 20). Those people apparently indicated that a misdemeanor conviction would not disqualify the Respondent. (Tr. 20). The people that the Respondent asked included other loan officers as well as his father. (Tr. 20). The Respondent was focused on the phrase "exclude minor misdemeanor traffic and parking offenses". (Tr. 21). He did not understand the meaning of that phrase. (Tr. 21).

4. The Respondent has provided a written explanation of the facts surrounding his conviction. (Exhibit 3A). An altercation took place in a restaurant bathroom. A fight broke out and ultimately the Respondent was charged with assault. (Tr. 23). The Respondent was arrested that evening. (Tr. 25). The Respondent entered a plea and was sentenced to probation and a fine. (Tr. 25-26). The fine has been paid.

5. The Respondent, by his own testimony, has many friends and attends church every Sunday. (Tr. 28-29). He believes that people trust him because he would not be a "good liar". (Tr. 29). The Respondent is adamant that he is leaving the mortgage industry and does not want a black mark on his record. (Tr. 32). The Respondent has had no trouble getting credit and no allegations of improper conduct were ever made against the Respondent when he worked in the mortgage industry. (Tr. 34).

6. Testifying in support of the Respondent was Gary King, the Respondent's dad. (Tr. 37). Mr. King is a realtor and teaches classes in real estate. (Tr. 38). Mr. King was called by the Respondent and interpreted Question 5 as asking about "any problem with the law basically, other than a misdemeanor". (Tr. 38). Mr. King believes that the Respondent has a good reputation in the community. He is truthful and that he has had no problems with the Respondent. (Tr. 39). Mr. King believes that he is responsible for misdirecting the Respondent to mis-answer Question 5. (Tr. 40). Mr. King teaches real estate at Ohio Business College and for three years worked for Fleet Mortgage or Fleet Bank at a loan officer. (Tr. 42).

7. Also testifying in support of the Respondent was Carla King, the Respondent's mother. (Tr. 46). Mrs. King also holds a real estate salesperson's license. (Tr. 47). She was a school teacher for thirty-three years. (Tr. 47-48). She believes that the reputation of the Respondent in the community is as a good person and that he is well liked and dependable. (Tr. 48).

8. The Respondent stands convicted of a single misdemeanor offense of assault which occurred approximately four years prior to the hearing in this matter. The conviction is wholly without allegations of fraud, financial misdealings, or anything related to the financial services industry. In addition, whether through misunderstanding or otherwise, the Respondent mistakenly answered Question 5 of the Application. The Hearing Officer has had the opportunity to observe the Respondent as well as the witnesses in this matter. Based on their testimony the Hearing Officer concludes that the Respondent was sincere when he indicated that he did not understand Question 5 correctly.

9. In order to sustain its burden to prove violations of Section 1322.07(A), (B) and (C), the Division must show that there has been a false or fraudulent misrepresentation or omission or conduct that constitutes improper, fraudulent or dishonest dealings. The Hearing Officer concludes that there is no creditable evidence in the record to suggest that the

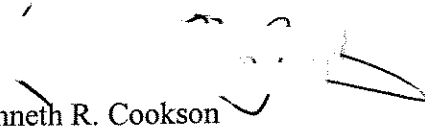
Respondent knowingly or intentionally misrepresented his answer to Question 5. The Hearing Officer is convinced that the Respondent did not understand Question 5. He may have answered Question 5 incorrectly but he was not attempting to deceive the Division. The Division has not met its burden with regard to violations of Section 1322.07(A), (B) and (C).

10. Nevertheless, the Respondent stands convicted of a first-degree misdemeanor. The record does not show that that conviction has been expunged and therefore the Hearing Officer concludes that it exists on the Respondent's criminal record. Moreover, that conviction should have been reported to the Division. The failure to provide that information, while more likely than not unintentional, was a reflection of the Respondent's general fitness. Question 5 calls for the same level of disclosure in its answer that all other aspects of the mortgage loan business require. Accordingly, the Hearing Officer concludes that the Division has met its burden to establish 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 Section 1322.01 to 1322.12 of the Revised Code.

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 deems the Respondent's application to have been withdrawn. Second, in the alternative, if the Division elects not to treat the Application as having been withdrawn, it is the recommendation of the Hearing Officer that the Division deny the Application.

Respectfully submitted,


Kenneth R. Cookson
Hearing Officer
August 19, 2004