

**STATE OF OHIO
DEPARTMENT OF COMMERCE**

RECEIVED
DIVISION OF FINANCIAL
INSTITUTIONS

IN THE MATTER OF:

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**DIVISION OF FINANCIAL
INSTITUTIONS**

MARK A. MORRIS

CASE NO. 05-0187-LOD

**LANDI JACKSON-FORBES
HEARING OFFICER**

REPORT AND RECOMMENDATION

Issued August 2, 2006

I. FINDINGS OF FACT

After having heard the testimony, considered the evidence, observed the demeanor of the witnesses, and weighed their credibility, the Hearing Officer finds the following to be fact:

A. Jurisdiction and Procedural History

This matter came before Landi Jackson-Forbes, an attorney licensed to practice law in Ohio, and duly appointed by the Ohio Division of Financial Institutions (hereinafter the "Division") to serve as Hearing Officer for the above captioned matter in accordance with the Administrative Procedures Act, Chapter 119, Ohio Revised Code (hereinafter "Revised Code").

The hearing was scheduled by the Division at the request of Respondent Mark A. Morris, of Cincinnati, Ohio (hereinafter "Respondent") to consider the Division's Notice of Intent to Deny Loan Officer License Application, Notice of Opportunity for a Hearing (hereinafter "NOH"), that was issued to Respondent on or about December 8, 2005. The Division issued the NOH to Respondent on the bases that Respondent failed to disclose a 1981 criminal conviction on loan officer applications filed in 2003 ("2003 Application") and 2005 ("2005 Application"). The Division alleges that based upon Respondent's nondisclosure of his conviction 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. The Division further alleges that Respondent's failure to disclose his conviction on 2003 Application and the 2005 Application constitute violations of Revised Code §1322.07(A)(B) and (C).

The hearing was held at 1:40 p.m. on January 24, 2006, at 77 South High Street, 19th Floor, Room 1908, Columbus, Ohio. The Division, represented by Assistant Attorney General Martine Jean, appeared at the hearing. Respondent appeared *pro se* and testified at the hearing. At the hearing, State's Exhibits 1 through 3 were admitted into the record without objection and Respondent's Exhibits A through C was admitted into the record as discussed in the transcript (hereinafter "Tr.").

B. Loan Officer License Application

1. The Division is the state agency responsible for the licensing and regulation of Mortgage Loan Officers pursuant to R.C. Chapter 1322. (State Ex. 1 & 2)
2. Respondent is an individual who wishes to conduct business in Ohio as a Mortgage Loan Officer (State Ex. 1 & 2)
3. Respondent applied with the Division on July 5, 2005 by submitting a signed, sworn and attested to Ohio Loan Officer Application ("2005 Application") and fingerprint card. Midwest Financial is listed as the employing Mortgage Broker. (State Ex. 2)
4. Respondent swore to or affirmed that the answers he gave in the 2005 Application are complete and true of his own knowledge. (State Ex. 2)
5. Within the 2005 Application Respondent checked the "no" box to Question 5, 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 DWIs are criminal offenses)"

(State Ex. 2, Tr. at 14)

6. Pursuant to Revised Code §1322.03 (B), the Division conducted a criminal records background check based on Respondent's fingerprints as part of the application process. The criminal records background check revealed a 1981 first degree misdemeanor conviction for theft under \$150.00 in the Village of Evendale Mayor's Court. (Tr. at 27)
7. The Division had previously received a Loan Officer Application for Respondent. On or about March 5, 2003, Ace Mortgage Funding, Inc. ("Ace"), located at 135 Merchant Street, Suite 160, Cincinnati, Ohio, 45246, submitted a Loan Officer Application for Respondent and paid the required fee. (State Ex. 1, Tr. at 45)
8. In February 2003 Respondent applied for a position as a loan officer with Ace. Respondent filled out and signed the 2003 Application and submitted the Application to Ace. Respondent did not submit a fingerprint card with the 2003 Application. (Tr. at 19-21)
9. Respondent checked the "no" box to Question 5 within the 2003 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...?

(State Ex. 1, Tr. at 23)

10. Respondent did not sign the 2003 Application in the presence of the notary as indicated on the 2003 Application. Respondent wrote the County and State of Hamilton, Ohio in the attestation clause section on the 2003 Application as the place where the notarization took place. Respondent's entries were crossed through and replaced with Johnson, Indiana in what appears to be the same handwriting as the notary on the 2003 Application. The notary also notarized the signature of the office manager listed on the Certificate of Employment attached to the 2003 Application. Respondent's testimony that he did not travel to Johnson, Indiana to have the 2003 Application notarized was not rebutted by the Division. (State Ex. 1, Tr. at 20-21, 32-33 & 44-45)
11. Respondent never went to work for Ace. He did not ask Ace Mortgage Funding about the 2003 Application because he believed that the 2003 Application could not be sent to the Division without a fingerprint card. (Tr. at 19-20, 22 & 24)
12. Respondent was not aware that the 2003 Application was submitted to the Division. Respondent did not receive any communications from either Ace Mortgage Funding or the Division regarding the 2003 Application. (State Ex. 1, Tr. at 22-23)
13. The 2003 Application was subsequently withdrawn because Respondent's fingerprints were not submitted to conduct a required criminal background check. The Division introduced two documents as evidence that communications were sent to Ace and the Respondent regarding withdrawal of the 2003 Application but withdrew the documents. (State Ex. 1, Tr. at 19 & 31-32)
14. Respondent contends that the 2003 Application should not be considered as evidence to support denial of his 2005 Application because he did not sign the 2003 Application in front of a notary as required, and because it was submitted without his knowledge. (Tr. At 32)
15. Respondent's conviction arose out of events which occurred when he was 19 years old. He acknowledges that he committed the offense and feels that his behavior was unwise. Respondent has not been convicted of any criminal convictions after 1981. Respondent believes that his convictions does not reflect his character and believes that he is trustworthy. (Tr. at 27-31)
16. Respondent asserts that the conviction happened too long ago to be considered and that there has never been an issue with his conviction with other background checks conducted by employers or in connection with other licenses that for which he has applied. (Tr. at 14 & 18)
17. Respondent testified that his failure to list his conviction on the 2003 and 2005 Applications should be excused because he was confused by the wording of Question 5 and misunderstood the questions. (Tr. at 26, 34-36)
18. Respondent read Question 5 in the 2003 Application to be asking only about whether he had been convicted of a criminal offense in connection with a conviction of a company that he had been an officer of or a more than 5 percent owner, and not asking whether he has criminal convictions in an individual capacity. (Tr. at 26)

19. Respondent read the question in the 2005 Application to exclude all minor misdemeanors, not just minor misdemeanor traffic and parking offenses. (Tr. at 26, 34 & 36)
20. Respondent testified that the wording in the Loan Officer Application revised on 4-25-05 is clearer and surmised that the Division changed the wording of the question regarding an applicant's criminal background because other applicants must have found the question confusing. Respondent read the question from the 4-25-05 revision of the Division's Loan Officer Application into the record but did not put this Application into the record. No testimony or other documents was introduced regarding why the wording of the criminal background question on the 4-25-05 Loan Officer Application was revised. (Tr. at 36-37)
21. Respondent knew that the Division's check of his criminal background record was going to reveal his 1981 conviction. He testified he was not trying to hide his criminal conviction from the Division. (Tr. at 35)
22. Respondent's conviction was expunged from his record on August 28, 2005. (Respondent Ex. C)
23. Two persons that have known Respondent for at least 20 years provided positive statements regarding Respondent's character through signed and notarized letters of recommendation. These persons believe that Respondent is honest and trustworthy and would not intentionally answer an application incorrectly. The letters do not provide specifics on why the persons hold these beliefs regarding Respondent's character. (Respondent Ex. A & B, Tr. at 36)

II. CONCLUSIONS OF LAW

A. Jurisdiction

The Division procedurally complied with Revised Code Chapter 119 in mailing the NOH, in demonstrating delivery of the NOH, and in scheduling the hearing that had been requested by Respondent within the time parameters established in Revised Code §119.07, §119.08 and §119.09. The Division has jurisdiction in this matter.

B. Loan Officer License Application

1. Pursuant to Revised Code §1322.041(A)(5), to issue a license, the Division must make a finding that, *inter alia*, 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 Revised Code §1322.01 to §1322.12.
2. In eliciting evidence that Respondent does not have the character and general fitness to command the confidence of the public and warrant the belief that the business will be operated honestly and fairly in compliance with law, the Division presented the 2003 and 2005 Applications containing inaccurate responses to Question 5 on both Applications. Statements made on a filed application may be

considered in determining an applicant's character and fitness since the application, having been given under oath, is held to be based on truthful statements. *Szep v. Ohio State Board of Pharmacy*, 106 Ohio App.3d 621 (1995)

3. Respondent has raised the question of the validity of the 2003 Application to be used by the Division to demonstrate that his inaccurate response to Question 5 indicates that Respondent does not have the character and general fitness to command the confidence of the public. Respondent's un rebutted testimony showed that he did not sign the 2003 Application under oath in the presence of a notary as required. Revised Code §1322.031(A) provides that "an application for a license as a loan officer shall be in ... under oath..." Further, the Explanation and Instructions that accompany the Ohio Loan Officer Application specify that answers to the application must be verified in front of a notary public. Chapter 1322, nor any rule promulgated there under, is silent regarding the effect of an application not signed under oath and out of a notary's presence. In general, notarization of an application is not an indication that the contents are accurate because the notary is usually not in a position to verify that the content or answers are true. Rather, an applicant signing an application in the notary's presence lends truthfulness to the contents and/or answers and serves as the signer's declaration that they have answered truthfully.

In this instance Respondent admitted that he answered "no" to Question 5. However, since the 2003 Application was not properly notarized, Respondent has not sworn or affirmed that his answers are complete as the attestation provides. As such, the 2003 Application is given no weight to support the Division's allegation that the inaccurate answer to Question 5 in the 2003 Application supports a finding that Respondent lacks the character and general fitness to obtain a loan officer license.

4. The Division demonstrated that Respondent willingly signed the 2005 Application under oath in the presence of a notary and subsequently filed on June 29, 2005 with the Division to obtain a loan officer license. The Division further demonstrated that Respondent signed the 2005 Applications containing an inaccurate response to Question 5. Evidence of filing an inaccurate Application reflects negatively on Respondent's character and general fitness as it relates to whether Respondent will operate as a loan officer honestly and fairly in compliance with law.
5. Respondent provided testamentary and documentary evidence to overcome the Division's evidence questioning his character and general fitness to obtain a loan officer license. Respondent failed to prove by a preponderance of the evidence that his 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 Revised Code §1322.01 to 1322.12.
6. Those who participate in the mortgage industry are obligated to take the time and care to ensure that applications and loan-related documents are truthful and accurate in every respect. This obligation applies to documents relating to a loan as well as for documents relating to loan officer licensure. Respondent had a duty to fully read and understand the questions on the 2005 Application before he answered the questions and swore to the answers. While his excuse that he

misunderstood Question 5 is plausible, his testimony that he could not get any assistance from the Division indicates that he had some question about how he was suppose to answer before he answered in the negative and submitted the 2005 Application for processing. (See Tr. at 43) Respondent did not ask anyone at Midwest Financial for help nor did he heed the instructions in the Application that caution applicants to report any matter if they have any doubts regarding whether it should be reported in the application. Respondent's lack of care in making sure that he understood Question 5 before he answered it demonstrates that he does not have the character and general fitness to command the public's trust.

7. Respondent's testimony that the question of criminal convictions was revised because other applicants were also confused about how to answer the version of the question that he answered does not justify why he answered in the negative. Respondent's testimony amounts to an opinion without reliable, probative or sufficient evidence to demonstrate why the Division revised the question of criminal convictions.
8. Respondent's alternative argument that his conviction occurred too long ago to be considered is also not a reason to ignore that he failed to disclose the conviction. First, Question 5 does not set a time limit beyond which the applicant may omit criminal convictions. Full disclosure was required; it was not given. Second, Respondent's conviction is not factual material on which the Division relies as bases to deny Respondent's application. The Division relied on the fact that the conviction was not disclosed.
9. The letters of recommendation offered to show that Respondent's character is sufficient to obtain a loan officer license are not sufficient to overcome the Division's evidence questioning his character and general fitness. The contents of the letters of recommendation from friends of Respondent were essentially carbon copies of each other. While, notarization of the letter writers' signature lends more weight to the documents and more conviction to the truthfulness of the positive statements regarding Respondent's character than most such evidence, the lack of distinctiveness of the letters' contents calls into question whether the writers independently wrote the letters or were lead in providing their statements. The letters' contents lack of individuality render the writers' positive statements regarding Respondent's character unreliable.
10. The Division has also charged violations of the Ohio Mortgage Broker Action §1322.07(A) (making any substantial misrepresentation in any registration or license application), (B) (making false or misleading statements of material fact or omissions of statement required by law) and (C) (engaging in conduct that constitutes improper, fraudulent, or dishonest dealings) all resulting from Respondent not disclosing all his criminal convictions on his Application and Respondent claiming that the solicitation charge was dropped, when it was not.
11. Intent is required for a conclusion that Revised Code §1322.07(A), (B), and (C) have been violated. *Webb v. State Med. Bd.*, 146 Ohio App. 3d 621, 628 (Ohio Ct. App. 10th Dist., 2001).

12. Respondent's failure to disclose his conviction on the 2005 Application does not automatically demonstrate that he intended to make a substantial misrepresentation on his Application. Respondent's fingerprints were submitted along with his Application which put him on notice that his conviction would be revealed. Respondent provided un rebutted testimony that he knew the conviction would be revealed. Respondent's mistake in excluding the conviction from the Application, although not excusable, is not a substantial misrepresentation in violation of Revised Code §1322.07(A).
13. Respondent excluding his conviction from the 2005 Application was also not a false or misleading statement of material fact or an omission required by state law. Respondent was incorrect in excluding the misdemeanor from the Application, but he did not exclude it to mislead the Division about his criminal past which is evidenced by his testimony that he knew that the criminal records check would disclose his conviction.
14. Pursuant to Revised Code §1322.07(C) a loan officer license applicant is prohibited from engaging in "conduct that constitutes improper, fraudulent, or dishonest dealings." Respondent inaccurately answering Question 5 demonstrates a lack of care particularly since his own testimony indicated that he questioned the wording of Question 5 prior to answering it and swearing to the answer and did not seek any help in answering the question. Respondent's inexcusable lack of care does not amount to engaging in conduct that is improper, fraudulent, or dishonest in violation of Revised Code §1322.07(C).
15. Respondent did not have the requisite intent to violate Revised Code §1322.07(A), (B) or (C).
16. Respondent's actual criminal offense is now in the distant past, but by not fulfilling his duty to understand Question 5 on the 2005 Application before answering and swearing to the answer, Respondent demonstrated that he lacks the present fitness required to be a licensed loan officer. Since the burden was on him to demonstrate that he possesses such fitness, and he has not carried that burden, the license should be denied.

III. RECOMMENDATION

In careful consideration of the record made in this matter, it is recommended that Mark A. Morris be found to have not presented sufficient evidence to prove, by a preponderance of the evidence, that his 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 Ohio Mortgage Broker Act, and that consequently he be denied an Ohio Loan Officer License. It is further recommended that the Division seal its official records and the portions of the record in this case dealing with Respondent's expunged and sealed conviction; including this Report and Recommendation. The Division should only release, disseminate, or make available those records, and information or other data concerning the expunged and sealed conviction in a manner consistent with Revised Code Chapter 2953.

Respectfully submitted,

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Landi Jackson-Forbes
Hearing Officer
August 2, 2006
Docket No. 05-0187-LOD