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DIVISION OF FINANCIAL
INSTITUTIONS

STATE OF OHIO
DEPARTMENT OF COMMERCE 05 MAY 17 PM 12:41
DIVISION OF FINANCIAL INSTITUTIONS

IN THE MATTER OF: : CASE NO. 05-0009-LOD
:
:
Ernest E. Bundy : James J. Lawrence, Hearing Officer

ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
May 11, 2005

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 3:00 p.m. on March 29, 2005, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent Ernest E. Bundy (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 unauthorized use of property in 1987 and he failed to disclose that conviction on his loan officer application filed in January of 2005. 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. The 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 commit such an offense again as required by R.C. 1322.041 (A) (3);
2. The Respondent's conviction for unauthorized use of property and his 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 as required by R.C. 1322.041(A) (5);

3. Respondent violated R.C. 1322.07 (A), (B) and (C) by failing to disclose a criminal conviction on his loan officer application.

Timothy C. Loughry, 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 A through E and Respondent's Exhibits 1 and 2 were admitted into the record.

B. Jurisdiction and Procedural Matters

The Division issued the NOH to Respondent on February 8, 2005 by certified mail, return receipt requested. Respondent's hearing request was received by the Division on February 22, 2005. The Division scheduled the hearing for March 5, 2005 but, on its own motion, continued the hearing to March 29, 2005. The Division sent notice of the hearings by ordinary mail to the same address to which it mailed the NOH. (Exhibit E.)

C. Respondent's Loan Officer Application

1. The Respondent filed a loan officer application on January 4, 2005. (Exhibit A.)
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. (Emphasis in original.)
3. In response to Question 5, the Respondent answered "No." (Exhibit A; TR at 14.)
4. Respondent signed the application on December 29, 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 A.)
5. As part of the application process and pursuant to R.C. 1322.031 (B), the Division conducted a criminal background check which apparently discovered that the Respondent had been charged with passing a bad check, a fourth degree felony, in 1987. (Exhibit B.) By letter dated January 13, 2005, the Division required the Respondent to submit a detailed explanation of the facts and circumstances which gave rise to the charge and a certified copy of the journal entry evidencing the disposition of the case. (Exhibit B.)
6. The Respondent submitted a Certified Journal Report for case number CRA-87-14214-0101 showing that the Respondent had been charged with passing a bad check in violation of R.C. 2913.11, but that upon

recommendation of the prosecutor and for good cause shown, the complaint had been amended to allege unauthorized use of property. On September 29, 1987, the Toledo Municipal Court convicted the Respondent of unauthorized use of property in violation of R.C. 2913.04, a fourth degree misdemeanor. The Court sentenced the Respondent to ten days in jail, but suspended all ten days, and imposed a \$50.00 fine and \$30.00 in costs. (Exhibit B.)

7. At the hearing, the Respondent explained that the conviction occurred when his bank dishonored a check that he wrote in 1984 or 1985 on his business checking account to Montgomery Ward Department Store. He explained that the account contained insufficient funds because he had made a mathematical error and not due to any attempt to avoid paying for the merchandise. At the time that he wrote the check, his father, mother and sister had passed away, he lost his job and his home. (TR at 15.) He took another job driving trucks, but for a substantial period of time did not have a permanent address at which he received mail. (TR at 25.) When he did finally receive notice of the returned check, he promptly reported to the Toledo Municipal Court and paid the amount of the check, the fine and court costs. (TR at 26.)
8. The Respondent testified that he incorrectly responded to Question 5 because he did not remember the conviction. (TR at 19.) He read the question and he knew that he should check the courthouse if he had any doubt, but he did not have any doubt. (TR at 18.) The Respondent testified that he did not intend to deceive the Division and that he knew that the Division would conduct a background check. (TR at 27.)
9. Since the time that he wrote the check, the Respondent completed a thirty-two year career as a truck driver working for PIE and then for Yellow Freight until his retirement. (TR at 15, 17.) He bought a bar in Toledo in the mid 1980s and obtained a liquor license. He sold the bar in 1994 at a good profit. (TR at 16 -17.) From 1984 to the present, the Respondent has not been charged with any offense other than improper mud flaps. (TR at 18.)
10. No witnesses appeared to testify on the Respondent's behalf. However, the Respondent submitted letters from two individuals attesting to his reliability and dependability. The first letter is from his sister, Evelyn Momgaudas. She stated that he is a husband, father, grandfather, son, and brother that anyone would love to have. (Exhibit 1.) The second letter was written by Charlie R. Brown, owner of Brown Publishing/Heflin in Toledo, Ohio. (Exhibit 2.) He stated that the Respondent is a well respected business man and was a member of the Lagrange Business and Profession Association during Mr. Brown's ten year tenure as president. Mr. Brown states:

His integrity and professionalism is beyond question. He is an outstanding business and family man and a concerned community activist. He is a valuable asset to this community. I would highly recommend him to any post or position, without question.

II. CONCLUSIONS OF LAW

A. Jurisdictional and Procedural Matters.

1. The Division procedurally complied with R.C. Chapter 119 and jurisdiction over this matter has been established.
2. The Attorney General objected to the admission of the Respondent's Exhibits 1 and 2 because they are hearsay. The Hearing Officer admitted these letters into the record with the caveat that the weight given the letters would be determined after considering the lack of ability to observe the witnesses as they gave testimony, to judge the credibility of their testimony and to benefit from their responses to cross examination by the Attorney General.

B. Loan Officer Application.

1. R.C. 1322.041 (A) provides that the Superintendent of Financial Institutions (Superintendent) shall issue a loan officer license if the Superintendent finds that the following conditions are met:
 - (1) The application is accompanied by the application fee.
 - (2) The applicant complies with R.C. 1322.01 to 1322.12.
 - (3) The applicant has not been convicted of or pleaded guilty to any criminal offense described in R.C. 1322.031(A)(2), 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.
 - (4) The applicant has not been subject to an adverse judgment for conversion, embezzlement, misappropriation of funds, fraud, misfeasance or malfeasance, or breach of fiduciary duty, or, if the applicant has been subject to such a judgment, the applicant has proven to the superintendent, by a preponderance of the evidence, that the applicant's activities and employment record since the judgment show that the applicant is honest, truthful, and of good reputation, and there is no basis in fact for believing that the applicant will be subject to such a judgment 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 R.C. 1322.01 to 1322.12.

The NOH states the Division intends to deny the Respondent's loan officer application because the Respondent has not met three of these conditions.

2. The NOH states that the Respondent has not shown 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, as required by R.C. 1322.041(A) (3). R.C. 1322.041 (A) (3) requires that if the applicant has been convicted of or pleaded guilty to an offense described in R.C. 1322.031 (A) (2), the applicant must prove 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. R.C. 1322.031 (A) (2) describes the following criminal offenses: any 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. Since the Respondent was convicted in 1987 of unauthorized use of property,¹ the burden is on the Respondent 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.
4. The Respondent has met this burden. The Respondent was continuously employed as a truck driver from the time of the offense until his retirement. Moreover, he owned and operated a bar in Toledo, Ohio until he sold it in 1994. Both of these activities offered opportunities to violate the law. However, the Respondent did not commit any offenses other than violations for improper mud flaps. These activities prove that he is honest, truthful and of good reputation. Moreover, since it has been over twenty years since the Respondent wrote the offending check and he has not committed another offense, there is no basis in fact for believing that he will commit such an offense again.
5. The NOH states 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 as required by R.C. 1322.041(A) (5). The Division bases this finding on the fact that the Respondent was convicted of a criminal offense and the fact that he did not disclose the conviction on his loan officer application. R.C. 1322.031 (A) (2) requires that in an application for a license as a loan officer, an applicant must provide 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.
6. When asked about his criminal record in Question 5 of the application, the Respondent answered "no" even though he had been convicted of an unauthorized use of property offense. The Respondent contends that he answered this question incorrectly because he forgot about his criminal conviction. The Respondent's testimony in this regard was credible and

¹ R.C. 2913.01(K) provides that theft offense includes, among other things, a violation of R.C. 2913.04.

uncontroverted. The Respondent failed to correctly answer Question 5, because after twenty years he had forgotten about the incident. Although the Respondent now understands that his answer to Question 5 was incorrect, at the time that he filled out the application he believed that his answer was "complete and true of [his] own knowledge" as he attested. As such, the incorrect answer does not support a finding 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.

7. The Respondent's criminal conviction also does not support a finding 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 as required by R.C. 1322.041(A) (5). The Respondent's testimony that he wrote the check believing that he had sufficient funds is credible and uncontroverted. Further, it is supported by the local prosecutor's decision to reduce the charge from passing a bad check, an offense which requires a purpose to defraud, to unauthorized use of property an offense which does not include the element of purpose to defraud.
8. The NOH states that the Division intends to deny the Respondent's loan officer application because the Respondent's failure to correctly answer Question 5 of the application violated R.C. 1322.07 (A), (B) and (C). R.C. 1322.041 (A) (3) provides that the Superintendent shall issue a loan officer license if the Superintendent finds the applicant complies with R.C. 1322.01 to 1322.12. R.C. 1322.07 provides:

No mortgage broker, registrant, licensee, or applicant for a certificate of registration or license under sections 1322.01 to 1322.12 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 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.

8. When the Respondent incorrectly answered Question 5 of the loan officer application by failing to disclose the conviction, he made a substantial misrepresentation in a license application in violation of R.C. 1322.07 (A) and he omitted a statement required by state law in violation of R.C.

1322.07 (B). The prohibitions of R.C. 1322.07 (A) and (B) do not require that the misrepresentations or omissions be made knowingly or intentionally. However, for the reasons stated in paragraph 6 above, the record does not support a finding that the Respondent engaged in improper, fraudulent or dishonest dealings with the Superintendent in violation of R.C. 1322.07 (C). By violating R.C. 1322.07 (A) and (B), the Respondent failed to comply with R.C. 1322.01 to 1322.012 as required by R.C. 1322.041 (A) (2).

9. R.C. 1322.10 provides that after notice and opportunity for a hearing conducted in accordance with R.C. Chapter 119, the Superintendent may refuse to issue a loan officer license if he finds either a violation of or failure to comply with any provision of R.C. 1322.01 to 1322.12 or a conviction of or guilty pleas to any criminal offense of involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking or any criminal offense involving money or securities. However, 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 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 act caused by a lapse of memory after a significant passage of time and was not done with any attempt to deceive or mislead the Division. Moreover, the Respondent's has proven by a preponderance of the evidence that his activities and employment since his conviction for unauthorized use of property 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. 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).

Respectfully Submitted,

James J. Bell
Hearing Officer
May 11, 2005