

STATE OF OHIO
DEPARTMENT OF COMMERCE

05 APR 27 11:11:30

CASE NO. 05-0039-LOD

IN THE MATTER OF: MISTY S. WALKER

REPORT AND RECOMMENDATION OF THE HEARING OFFICER
William R. Damschroder

I. Findings of Fact

A. Background

This matter came before this Hearing Officer, who is an attorney licensed to practice law in Ohio and duly appointed by the Division of Financial Institutions ("the Division"), Department of Commerce to serve as Hearing Officer. The hearing in this matter was held on September 22, 2005, in accordance with the procedures of Ohio Revised Code ("ORC") Chapter 119.

The hearing was held to consider whether an **Order to Deny the Application for a Loan Officer License** should be issued by the Division to Misty S. Walker, an individual, because Ms. Walker was convicted of a criminal offense that was not disclosed, and that Respondent's action shows that she made substantial misrepresentations on her license application, made false or misleading statements of material fact, and engaged in conduct that constitutes improper, fraudulent, or dishonest dealing, and that Ms. Walker's character and general fitness do not command the confidence of the public and warrant the belief that she would operate his business honestly and fairly, in compliance with the purposes of the Ohio Mortgage Broker Act. The Division appeared and was represented by Assistant Attorney General James Evans. Misty S. Walker ("Respondent") appeared in person and represented herself pro se. Ted Stephens, Vice President of State Wide Home Mortgage appeared as a witness on behalf of Respondent.

B. Jurisdiction and Procedural Matters

1. The Division issued a Notice of Intent to Deny Loan Officer License Application and Notice of Opportunity for Hearing to Respondent on or about April 22, 2005, and served it upon Respondent by certified mail. The letter was signed for by Respondent on April 27, 2005. (State's Exhibits #5)
2. Respondent's signed and submitted a hearing request form, asking that an administrative hearing be held concerning the Division's intention to deny Respondent a license. This request was received by the Division on May 23, 2005. (State's Exhibit #6)

2. By letters of May 25th and 26th, 2005, the Division notified Respondent that the requested hearing was to be held on June 7, 2005. By subsequent letter of August 4, 2005, the Division notified Respondent that the hearing was to be held on September 22, 2005. (State's Exhibits #7, #8, #9)
3. Respondent did attend the hearing and indicated on the record that she was aware of her right to legal counsel and her desire to proceed *pro se*. (Tr. pp. 5)

C. Respondent's Loan Officer Application and Criminal Convictions

1. On or about October 26, 2004, the Division received the loan officer license application of Respondent. (State's Exhibit #1)
2. In completing the application, Respondent indicated by answering "No" on question #5, that she had not ever been convicted of any criminal offense. (State's Exhibit #1)
3. As part of the application process, the Division conducts a criminal background check of each applicant. R.C. 1322.031 (B)
4. In response to the Division's request, Respondent submitted documentation from the Mahoning County Court in Sebring, Ohio, providing the Division with the details concerning convictions for disorderly conduct and telephone harassment, dated March 30, 1999, and a written explanation of the circumstances surrounding these convictions. Respondent also submitted at hearing documentation from the same court proving a conviction for disorderly conduct, dated March 18, 2003. (State's Exhibit #4, Respondent's Exhibit #A)
5. Respondent's written explanation indicated that her 1999 convictions arose from a domestic dispute involving Respondent, her husband, a woman her husband was in a relationship with and Respondent's daughter. Respondent explained at hearing that the 2003 conviction stemmed from her presence during a disturbance outside of a bar in Sebring, Ohio. (State's Exhibit #4, Tr. p. 37)
6. Respondent testified that she answered Question #5 in the negative because she read it carelessly, and thought that the Division was only asking about convictions for the specifically enumerated criminal offenses contained in the question. Since her particular criminal offenses were not listed, she answered the question in the negative, and only realized that the question contained language asking for all criminal offenses when she re-read the application after the division sent her a notice of denial. (Tr. pp. 18-20, 23-24)
7. Under questioning from the Division, Respondent testified to the fact that the application submitted to the Division for consideration, which lead to this

hearing, was not signed under oath and in the presence of a notary public, as required by the terms of the application. Respondent testified that she was familiar with swearing an oath in front of a notary public, and no such oath was sworn prior to signing and submitting her loan officer application. (Tr. pp. 27-33)

II. Conclusions of Law

A. Jurisdictional and Procedural Matters

1. Ohio Revised Code Section 119.07 requires the Division to notify Respondent of her right to request a hearing. The Division's notice to respondent was sent by certified mail, signed for by Respondent, and Respondent returned a request for hearing form to the Division.
2. The Division complied with notification of hearing requirements by sending Respondent a stating the date, time and location of the hearing in this matter
3. Respondent received proper notice of the hearing and therefore, it was appropriate for the hearing to proceed in his absence. *Reed v. State Med. Bd.* (1988) 40 Ohio App. 3d 124, 125-126.
4. The Division has procedurally complied with R.C. Chapter 119, and jurisdiction over this matter is 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 R.C. Chapter 1322.
2. The Franklin County Court of Common Pleas in Chiero v. Bureau of Motor Vehicles, 55 Ohio Misc. 22, 9 Ohio Op. 3d 429, 381 N.E. 2d 219 (1977), in referring to the decision in Goodyear Synthetic Rubber Corp. v. Department of Industrial Relations, 76 Ohio Law Abs. 146, 1222 N.E. 2d 503 (C.P. Franklin Co. 1954), stated that "(i)t is a fundamental concept of administrative law and procedure that the party asserting the affirmative of an issue bears the burden of proof." Thus, the Division bears the burden of proof in this case.
3. The Supreme Court of Ohio, in St. Augustine Church v. Attorney General of Ohio, Charitable Foundations Section, 67 Ohio St. 2d 133, 21 Ohio Op. 3d 84, 423 N.E. 2d 180 (1981) stated that an applicant for a license has the burden to

show it is entitled to a license. Thus, the Respondent must show she is entitled to a license.

4. The Supreme Court of the United States, in Dent v. West Virginia, 129 U.S. 114 (1889), said of state-imposed conditions on practicing a profession:

(t)he power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud...If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

5. R. C. 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 or pleaded guilty to such an offense, the applicant has proven to the superintendent, by a preponderance of 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.

6. The Division's argument in seeking to deny Respondent a loan officer's license rests on R.C. Sections 1322.07, which states in pertinent 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 licensure through 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 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;
7. The Division has proved that Respondent answered question #5 incorrectly by checking the box marked "No", when the criminal background check proved that Respondent had been convicted of a criminal offenses.
 8. Since a conviction has been proved, Respondent bears the burden of showing that, since her conviction, she is honest, truthful, and of good reputation, and that her actions since her conviction demonstrate that she is not likely to commit another criminal offense.
 9. With respect to the answer to Question #5, concerning criminal convictions, it is incumbent upon Respondent to offer some explanation for the obviously incorrect answer provided in her application.
 10. Respondent's explanation for her incorrect answer to Question #5 is plausible, and her testimony is convincing enough to warrant a finding that her answer was unintentional, and could not constitute improper, fraudulent or dishonest dealing. In addition, her life history since her convictions should give the Division comfort that her character and fitness does command the confidence of the general public and warrant the belief that her business activities will be operated in accordance with Ohio law.
 11. Unfortunately for Respondent, none of the above findings matter in this situation. Based upon her own testimony, Respondent failed in submitting an application that meets the requirements for consideration. As she testified, Respondent's signature was not sworn and attested to by a notary public. This procedural defect renders the application invalid, and makes any additional consideration of the specifics of this matter meaningless. Since the Respondent failed the requirement of submitting a valid application, the Division has no alternative but to deny Respondent's request for licensure.

11. The Division has met its burden of proof of showing that Respondent is not entitled to a license.
12. Respondent has failed to present any evidence to meet his burden of proof that she is entitled to a license, due to her failure to submit a valid application for consideration by the Division.

II. **Recommendation**

In careful consideration of the testimony and exhibits at the hearing, it is hereby recommended that Misty S. Walker be found to not have met the prerequisites set forth in Revised Code Section 1322.041, and that the Superintendent of Financial Institutions **deny** Ms. Walker's application for a Loan Officers License.

William R. Damschroder, Esq.
Hearing Officer

Date

4/21/06