

STATE OF OHIO  
DEPARTMENT OF COMMERCE  
DIVISION OF FINANCIAL INSTITUTIONS

2004 DEC 13 AM 9:25

IN THE MATTER OF: : CASE NO. 04-0392-LOD  
:  
:  
Jonathan W. Troutt : James J. Lawrence, Hearing Officer

---

---

ADMINISTRATIVE HEARING OFFICER'S  
REPORT AND RECOMMENDATION  
December 9, 2004

---

---

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 October 26, 2004, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent Jonathan W. Troutt (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 the offense of reckless driving in 2003 and that he failed to disclose this conviction on his loan officer application filed on May 21, 2004. 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. 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);

2. Respondent violated R.C. 1322.07 (A), (B) and (C) by failing to disclose criminal convictions on his loan officer application filed in May of 2004.

Emily A. Smith and Tim Loughry, Assistant Attorneys General, from the Executive Agencies Section of the Office of the Attorney General, represented the Division at the hearing. The Respondent appeared with Counsel David W. Pryor, Gallagher, Gams, Pryor, Tallan & Littrell, LLP of Columbus, Ohio. At the hearing, State's Exhibits 1 through 6 and Respondent's Exhibits A – G were admitted into the record.

#### **B. Jurisdiction and Procedural Matters**

The Division issued the NOH to Respondent on August 25, 2004 by certified mail return receipt requested. (Exhibit 3.) The Division received the Respondent's hearing request on August 31, 2004. (Exhibit 4.) The Division scheduled the hearing for September 10, 2004 and, on its own motion, continued it to September 27, 2004. The Division sent notice of these hearings by ordinary mail to the same address to which it mailed the NOH. (Exhibit 5.) The hearing was continued at the Respondent's request to October 26, 2004. The Division sent notice of this hearing by ordinary mail to the address of the Respondent's attorney. (Exhibit 6.)

#### **C. Respondent's Loan Officer Application**

1. Upon being hired by Coldstream Financial Services, Inc. (Coldstream), the Respondent filed a loan officer application on May 21, 2004. (Exhibit 1.)
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 1.)
4. Respondent signed the application on May 13, 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 1.)

5. As part of the application process, the Division conducted a criminal background check. R.C. 1322.031 (B). In response to an inquiry from the Division, the Respondent submitted a certified copy of a General Sessions Disposition from the Court of General Sessions of Davidson County, Tennessee in Case No. SC455550 that shows that in October of 2003 the Court convicted the Respondent of the offense of reckless driving, a B misdemeanor. (Exhibit 2a.)
6. The Respondent explained that in April of 2003, as he drove home from a concert, he was stopped at a sobriety checkpoint. He was charged with driving while intoxicated. He pled guilty to a reduced charge of reckless driving. The court fined him \$350.00 and ordered him to attend an alcohol safety course. (Exhibit 2b; TR at 23 - 25.)

**D. Respondent's Failure to Disclose Conviction**

1. The Respondent did not disclose the conviction on his loan officer application. (Exhibit 1.)
2. The Respondent stated that he did not disclose the conviction because the conviction was for a traffic offense, which he believed was a "minor misdemeanor." (TR at 29.) At the time that he filled out the application he was unsure how to answer Question 5 and asked the Kaylyn Rodriguez, Coldstream's office manager and human resource manager.<sup>1</sup> She listened to his story and advised him that "No" was the correct answer. The Respondent states that he was confident that he had completed his loan officer application honestly and correctly. (TR at 48.) Further, he proceeded with the procedures for submitting to a background check by National Background Check, Inc. (Exhibit 1.)

**E. Respondent's Reputation and Character.**

1. Scott Thompson, a co-owner of Coldstream, testified on the Respondent's behalf. Mr. Thompson testified that he hired the Respondent after he graduated from Miami University. Mr. Thompson testified that the Respondent has exhibited earnestness, attentiveness and a willingness to learn above and beyond the average of the twenty-two people that Coldstream hired in 2004. Mr. Thompson believes that the Respondent is trustworthy and will earn the public's trust as a loan officer. Mr. Thompson stated, "He's the one that I [would] probably trust with my own checkbook."

---

<sup>1</sup> In an affidavit submitted at the hearing, Ms. Rodriguez stated that she has worked at Coldstream for one and one half years and has assisted or advised dozens of loan officer candidates on the completion and submission of their loan officer applications. (Exhibit C.)

2. The Respondent submitted four affidavits and a letter from individuals other than Mr. Thompson who each attested to the Respondent's good character and general fitness. (Exhibits A, C, D, E & G.)

## **II. CONCLUSIONS OF LAW**

### **A. Jurisdictional 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. R.C. 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 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.
2. R.C. 1322.031 (A) (4) requires that in an application for a license as a loan officer an applicant must provide any further information that the Superintendent of the Division of Financial Institutions requires. Pursuant to this provision, in Question 5 of the application the Superintendent asks for information about convictions for any criminal offense.
3. R.C. 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 or the Revised Code.

\* \* \*

(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.

4. R.C. 1322.07 provides, in part, that no applicant for a loan officer license 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.

\* \* \*

5. R.C. 1322.10 provides that after notice and opportunity for a hearing conducted in accordance with R.C. Chapter 119, the Superintendent may, among other things, refuse to issue a loan officer license if he finds a violation of or failure to comply with any provision of R.C. 1322.01 to 1322.12.
6. The Ohio Revised Code contains five classifications of misdemeanors: first degree misdemeanor, second degree misdemeanor, third degree misdemeanor, fourth degree misdemeanor and minor misdemeanor. R.C. 2901.02 (A). Offenses in the Revised Code are either classified or unclassified. An offense classified as a minor misdemeanor has as its only penalty a fine of not more than one hundred dollars.<sup>2</sup> R.C. 2929.28. Any offense not specifically classified is a minor misdemeanor if the only penalty that may be imposed is a fine not exceeding one hundred dollars. R.C. 2901.02 (G). For example, R.C. 4511.20 classifies reckless operation of a motor vehicle as a minor misdemeanor and pursuant to R.C. 2929.28 the fine may not exceed one hundred dollars.

## DISCUSSION

---

<sup>2</sup> Effective for offenses committed on or after January 1, 2004, the maximum fine for a minor misdemeanor offense was raised to one hundred and fifty dollars. Since the Respondent's offense occurred prior to January 1, 2004, this Report and Recommendation will consistently state the maximum penalty for a minor misdemeanor as one hundred dollars.

1. The Respondent was convicted in the Court of General Sessions of Davidson County, Tennessee of the offense of reckless driving and did not disclose that conviction on his loan officer application.
2. The Division alleges that this conviction shows 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. However, the record is devoid of any support for the inference that the single conviction for reckless driving means that the public has lost confidence in the Respondent or that there is any reason to believe that the Respondent will not operate honestly and fairly and comply with the Ohio Mortgage Broker Act. Based upon the mere fact of the conviction alone, the Division has not established that the Respondent's character and general fitness do not command the confidence of the public. Nor does the conviction, by itself, warrant the belief that he will not conduct himself as a loan officer honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act.
3. The Division alleges that the Respondent's failure to disclose the conviction on his loan officer license 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. However, the Respondent has a strong argument that he was not required to list the conviction on his application. The application by its own instructions told the Respondent not to exclude "minor misdemeanor traffic offenses." Reckless operation of a motor vehicle in Ohio is classified as a minor misdemeanor. Had the Respondent been convicted of reckless operation of a motor vehicle in Ohio he would not have been required to disclose it on his loan officer license.
4. The Division has not defined what it means by "minor misdemeanor traffic offenses" in Question 5. The Division most likely intended that applicants exclude convictions for traffic offenses that are, or would have been, classified as a minor misdemeanor under the Ohio Revised Code. In other words, applicants are to exclude offenses that have as their only penalty a fine of not more than one hundred dollars. Since the General Sessions Court fined the Respondent more than one hundred dollars, the offense does not meet the definition minor misdemeanor in Ohio and the Respondent should have disclosed it on his loan officer application.

5. Finding that the Respondent should have disclosed the conviction on his loan officer application, the Division must show by a preponderance of the evidence that the Respondent's failure to disclose the conviction 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. In light of the ambiguity in the meaning of "minor misdemeanor traffic offenses" and the fact that the Respondent sought the counsel of an employee experienced with loan officer license applications before he answered the question, the Division cannot sustain its burden of proof. The record supports the Respondent's assertion that he believed that he honestly and correctly completed his application. It is doubtful that at the time that he completed the application, the Respondent believed that the conviction would cause the Division to not give him a loan officer license. Moreover, the Respondent knew that the Division planned to conduct a criminal background check as part of the application process. He had to know that simply answering "No" to Question 5 would not prevent the Division from discovering his criminal history. The facts in this record show that the Respondent's failure to correctly answer Question 5 on the application was not done with any intent to deceive the Division. Thus, the Respondent's incorrect answer to Question 5 does not, by itself, establish that the Respondent's character and general fitness do not command the confidence of the public. Nor does it, by itself, warrant the belief that he will not conduct himself as a loan officer honestly and fairly in compliance with the purposes of the Ohio Mortgage Broker Act.
6. The Division alleges that when the Respondent failed to disclose his conviction on his loan officer application, he violated R. C. 1322.07(A), in that he made a substantial misrepresentation in his license application; he violated R.C. 1322.07(B) in that he made a false or misleading statement of a material fact or omitted a statement required by state law; he violated R.C. 1322.07(C) in that he engaged in improper, fraudulent or dishonest dealings. Assuming that the instructions to Question 5 required the Respondent to disclose his conviction, when the Respondent failed to disclose his conviction, he violated R.C. 1322.07 (A) and (B) in that he did, albeit unintentionally, misrepresent his criminal record and omit a material fact or statement required by state law. However, the record does not support the Division's allegation that he engaged in improper, fraudulent or dishonest dealings.
7. Pursuant to R.C. 1322.10(A)(1) when an applicant for a loan officer license fails to comply with any provision of R.C. 1322.01 to 1322.12, the Superintendent may refuse to issue the loan officer license or impose a fine.

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 in the record show that the Respondent's violation of R.C. 1322.07 was an unintentional omission caused by the ambiguity of the application of the instructions to Question 5 to his unique situation. In light of this ambiguity and considering the Respondent's exemplary record, 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)(1)(a).

Respectfully Submitted,

*[Handwritten signature]*

James J. Lawrence

Hearing Officer

December 9, 2004